

No. 13-

IN THE
Supreme Court of the United States

EQUIFAX, INC. and EQUIFAX CREDIT
INFORMATION SERVICES, INC.,

Petitioners,

v.

MISSISSIPPI DEPARTMENT OF REVENUE F/K/A
MISSISSIPPI STATE TAX COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSISSIPPI

PETITION FOR A WRIT OF CERTIORARI

MARY T. BENTON
Counsel of Record
CLARK R. CALHOUN
ALSTON & BIRD LLP
1201 W. Peachtree St., Suite 4200
Atlanta, GA 30309
(404) 881-7000
mary.benton@alston.com

Attorneys for Petitioners



QUESTION PRESENTED

The question presented is whether a state violates the Due Process Clause's guarantee of an opportunity to receive a "fair opportunity to challenge the accuracy and legal validity" of an assessment for taxes and penalties, when the taxpayer must present its administrative appeals to employees of the state's revenue department without learning the complete basis for the assessment or having the opportunity to present witnesses or to cross-examine the state's representatives, and the subsequent judicial appeal is not *de novo* but one in which the judge can only reverse the assessment or abate the penalties under a highly deferential standard of review.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner Equifax, Inc. states that it is a publicly-traded corporation incorporated under the laws of Georgia. Equifax has no parent corporation, and no publicly-traded company owns ten percent or more of its stock.

Petitioner Equifax Credit Information Services, Inc. (“ECIS”) is a wholly-owned subsidiary of Equifax, Inc.

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OPINIONS BELOW

The final opinion of the Supreme Court of Mississippi that gives rise to this Petition is reported as *Equifax, Inc. and Equifax Credit Information Services, Inc. v. Mississippi Department of Revenue*, 125 So. 3d 36 (Miss. 2013). App. A. That opinion, dated Nov. 21, 2013, was a substituted opinion that was issued in connection with a denial of the Petitioners' Motion for Rehearing. App. A at 1a. The Petitioners' Motion for Rehearing was filed in response to the Supreme Court of Mississippi's original opinion, dated June 20, 2013. App. H. The Supreme Court of Mississippi was reviewing an appeal from a May 1, 2012 opinion of the Court of Appeals of Mississippi in the case of *Equifax, Inc. and Equifax Credit Information Services, Inc. v. Mississippi Department of Revenue f/k/a Mississippi State Tax Commission*, No. 2010-CA-01857-COA. See App. B (unpublished).

The appeal before the Court of Appeals of Mississippi was an appeal from a November 4, 2010 decision of the Chancery Court of the First Judicial District of Hinds County, Mississippi in the case of *Equifax, Inc. and Equifax Credit Information Services, Inc. v. Mississippi State Tax Commission*, No. G-2009-884 T/1. See App. C (unpublished).

That Chancery Court case was the consolidation of the administrative appeals brought by Equifax, Inc. and ECIS. The administrative orders that were at issue in the consolidated appeal to the Chancery Court were two Orders of the Mississippi State Tax Commission. See Apps. D-E. Finally, the administrative orders that were at issue before the Mississippi State Tax Commission were

Orders of the Board of Review dated October 8, 2008. *See* Apps. F-G.

STATEMENT OF JURISDICTION

The Supreme Court of Mississippi rendered its original opinion in this matter on June 20, 2013 (App. H), and Equifax filed a timely motion for rehearing. The Supreme Court of Mississippi issued a substituted opinion denying the motion for rehearing on Nov. 21, 2013. App. A.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a), which empowers this Court to review the judgments of “the highest court of a State in which a decision could be had . . . where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution.”

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The federal constitutional provision at issue in this petition is the Due Process Clause of the Fourteenth Amendment. U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law.”).

The state statutory provision at issue in this petition is Miss. Code Ann. § 27-77-7(4) (2005). *See* App. J at 99a.

STATEMENT OF THE CASE

This petition concerns the unconstitutional standard of review applicable to appeals from tax assessments and

other adverse decisions of the Mississippi Department of Revenue (the “MDOR”). Under the Supreme Court of Mississippi’s erroneous interpretation of Miss. Code § 27-77-7(4), Equifax never received its “day in court” because the highly deferential standard of review that the Supreme Court of Mississippi required the state’s chancery courts to apply virtually insures that the MDOR’s assessments will be upheld, making the “trials” promised to Mississippi taxpayers a charade en route to an affirmation of the MDOR’s actions.

I. The Assessment

This case stems from the MDOR’s assessment of corporate income and franchise taxes against Equifax for the audit period of Jan. 1, 2000 through Dec. 31, 2003 (the “Audit Period”).¹ Equifax is a Georgia corporation headquartered in Atlanta, and it is one of the three largest consumer credit reporting agencies in the United States. During the Audit Period, Equifax was registered to do business, and was doing business, in Mississippi. For the three years of the Audit Period, Equifax had approximately 800 customers (mostly businesses) located in Mississippi. App. C at 41a. Those Mississippi customers generated \$22,679,340 in revenue for Equifax during those years. *Id.* All of the service activities which generated those revenues were performed within Georgia.

Equifax filed income tax returns with the MDOR for each year of the Audit Period and apportioned its

1. When the assessment against Equifax was issued, Mississippi’s state revenue department was called the “Mississippi State Tax Commission.” It changed its name to the MDOR effective July, 1, 2010.

multistate income to Mississippi using the MDOR's prescribed apportionment method for service providers set forth in subsections 402.09(3)(d) and 402.09(3)(f)(iii) of Miss. Admin. Code 35.III.8.06 ("Rule 806"). *See* App. K at 125a-128a. Those subsections of Rule 806 require service providers to apportion their income based on the place where they perform their "income-producing activities." Because Equifax's employees performed all of Equifax's income-producing activities at its Georgia headquarters, in accordance with Rule 806, Equifax did not apportion any income to Mississippi during the Audit Period. App. C at 42a.²

2. Subsection 402.09(3)(d) of Rule 806 specifies that a taxpayer should apportion receipts from "sales other than sales of tangible personal property" to Mississippi "to the extent of such gross receipts which represent services or activities actually performed within this state." *See* App. K at 125a. Subsection 402.09(3)(f)(iii) of Rule 806 adds that "gross receipts for the performance of services attributable to this state shall be measured by a ratio of the time spent in performing such services in this state [over] the total time spent in performing services everywhere." *Id.* at 128a.

An apportionment formula reflects a state's policy choices. With respect to service providers, a state generally must choose whether to apportion service receipts based on the location where the services are performed (a "place-of-performance" or "cost-of-performance" rule) or where the benefits of the service are received (a "market-sourcing" rule). When a state chooses a place-of-performance rule, it has generally chosen to tax the receipts earned by service providers located within the state but will not tax the receipts earned by service providers located outside the state for services performed outside the state. *See generally* Giles Sutton *et al.*, "The Increasingly Complex Apportionment Rules for Service-Based Businesses: Basic Issues," *JOURNAL OF MULTISTATE TAXATION*, 2007 WL 3201540, Oct. 2007, at 28-31.

Beginning in 2006, the MDOR performed an audit of Equifax. At the conclusion of the audit—although it had not received any information regarding how or whether Equifax performed any of its services within Mississippi—the MDOR determined that the place-of-performance apportionment method prescribed in Rule 806 did not fairly reflect the extent of Equifax’s business activity in the state. Accordingly, under subsection 402.10 of Rule 806 (App. K at 129a), the MDOR determined that a “market-based” sourcing method was the appropriate method for apportioning Equifax’s income to Mississippi during the Audit Period. *See* App. C at 43a. The “alternative apportionment formula” chosen and imposed by the MDOR was based on the gross receipts from Equifax’s Mississippi customers. *Id.* However, in invoking alternative apportionment, the MDOR—in contrast to the way that alternative apportionment has historically been applied—did not identify any factors that distinguished Equifax from other nonresident service providers, all of which are subject to the standard place-of-performance apportionment method set forth in Rule 806.³

Because (1) service providers often perform their services where they are located, and (2) many services can be provided without physical delivery, the expected outcome of Mississippi’s “place-of-performance” apportionment rule for service providers is that out-of-state service providers will source little to no income to Mississippi.

3. Many states have authorized their departments of revenue to utilize alternative apportionment and have—like Mississippi—modeled their alternative apportionment provisions on the language provided in the 1957 Uniform Division of Income for Tax Purposes Act (“UDITPA”). But alternative apportionment was never intended to provide *carte blanche* authority to a state revenue department to impose an alternative apportionment

In addition to its assessment of taxes, the MDOR also imposed penalties against Equifax, finding that Equifax had acted with “willful neglect,” notwithstanding the parties’ stipulation that Equifax had filed its taxes in accordance with the prescribed apportionment formula. *See* App. A at 19a (citing Miss. Code § 27-13-25(3) (2005)).

Pursuant to Miss. Code §§ 27-77-5 and 27-77-7 (Apps. I-J), Equifax appealed from those assessments.

II. Equifax’s Administrative Appeals

Equifax’s administrative appeals were limited to two informal proceedings before representatives of the MDOR. The first appeal was before the “Board of Review,” an administrative review board comprised of

formula whenever it does not like the result of the standard apportionment formula as applied to a particular taxpayer; rather, alternative apportionment was always intended to be applied only in unusual circumstances. William J. Pierce, “*The Uniform Division of Income for State Tax Purposes Act*,” 35 TAXES 747, 781 (1957) (stating that alternative apportionment provisions are intended to apply only to “unusual fact situations (which ordinarily will be unique and nonrecurring”). State appellate courts have long reiterated those limitations on the use of alternative apportionment. *See, e.g., American Tel. & Tel. Co. v. Huddleston*, 880 S.W.2d 682, 691-692 (Tenn. 1994) (“The variance provision applies only in *unusual and limited circumstances* and is to be interpreted narrowly in order to carry out the purpose of uniform apportionment under the act.”) (emphasis added); *Deseret Pharm. Co. v. State Tax Comm’n*, 579 P.2d 1322, 1326 (Utah 1978) (“The use of any method other than [standard] apportionment should be *exceptional . . .*”) (emphasis added); *Donald M. Drake Co. v. Dep’t of Revenue*, 500 P.2d 1041, 1044 (Or. 1972) (“We agree with the conclusion of the Tax Court that the use of any method other than apportionment should be exceptional”).

senior employees of the MDOR, which held an “informal” proceeding of which “no official transcript [was] made . . .” Miss. Code § 27-77-5(3) (App. I). During that proceeding, Equifax was not entitled to perform discovery, present any witnesses, or cross-examine the MDOR’s representatives. Miss. Admin. Code 35.I.1.01, sub. 107.02(11) (App. L). The Board of Review upheld the assessments and penalties imposed against Equifax and issued short orders that did not explain the reasoning for its decisions. *See* Apps. F, G.

Equifax’s other administrative appeal was before the “Mississippi State Tax Commission” (the “Commission”), an administrative review board comprised of the MDOR’s Commissioner and the MDOR’s two associate commissioners. Like the Board of Review, the Commission also held an “informal” proceeding of which “no official transcript [was] made.” Miss. Code § 27-77-5(4) (App. I). During that proceeding, Equifax was not entitled to perform discovery, present any witnesses, or cross-examine the MDOR’s representatives. Miss. Admin. Code 35.I.1.01, sub. 107.02(12) (App. L). The Commission upheld the assessments and penalties imposed against Equifax and issued short orders that did not explain the reasoning for its decisions. *See* Apps. D, E.

III. Appeal to Chancery Court

Pursuant to Miss. Code § 27-77-7(1) (App. J), Equifax appealed the decisions of the Commission and consolidated them in a single action before the Chancery Court. Mississippi law clearly provided for a “full evidentiary hearing” before the chancery court, and based on the plain language of that statute, state regulations, and relevant case law, Equifax expected a full *de novo* trial on the merits. Miss. Code § 27-77-5(6) (App. I) (“Any appeal to chancery court from an order of the [C]ommission . . . shall include a

full evidentiary hearing on the issues presented.”); Miss. Admin. Code 35.I.1.01, sub. 107.02(12)(f) (App. L) (“In Commission hearings involving tax determinations, the hearing will not be transcribed since any judicial review of the Commission decision will involve a full evidentiary judicial hearing.”); *Miss. State Tax Comm’n v. Murphy Oil USA, Inc.*, 933 So. 2d 285, 288 (Miss. 2006) (holding that the chancery court in a tax appeal should hold a “full evidentiary hearing, complete with a full record.”). In keeping with Equifax’s expectations, the chancery court held a two-day trial in which it heard testimony from witnesses for Equifax and the MDOR and permitted both sides to cross-examine the opposition’s witnesses. The Chancery Court also supervised discovery between the parties, received documents into the record, and created a full transcript of the trial. *See* App. C at 40a (chancellor’s summary of the trial proceedings).

However—notwithstanding the full trial heard by the chancellor and the development of the trial record—in its decision the chancery court held that, under Miss. Code § 27-77-7(4), the decision it could render was substantially limited by a deferential standard of review. That statute provided in relevant part:

At trial of any action brought under this section, the chancery court shall give deference to the decision and interpretation of law and regulations by the commission as it does with the decisions and interpretation of any administrative agency, but it shall try the case de novo and conduct a full evidentiary judicial hearing on the issues raised.

App. J at 99a.

Based on its interpretation of that statute, the Chancery Court upheld the MDOR's tax assessments, finding that the statute prohibited the court from "substituting its 'judgment for the agency's unless the latter's interpretation is arbitrary or unreasonable.'" App. C at 48a. Thus, the chancery court upheld the assessments despite its finding that a taxpayer such as Equifax "should be allowed to rely upon apportionment methods specifically authorized by the [MDOR's] own regulations," and despite its additional finding "that there are other methods that are preferable to the apportionment method utilized by [the MDOR]." *Id.* at 47a.

The court stated that it reached this holding because, although the MDOR's assessment against Equifax was "concerning," it was not "arbitrary or unreasonable," as required under the deferential standard of review it applied. *Id.* at 48a; *see also id.* at 44a (noting that chancery court review is limited by "the arbitrary and capricious standard"). Finally—despite its explicit disagreement with the appropriateness of penalties in this matter—the Chancery Court also upheld the MDOR's imposition of penalties against Equifax, noting that under the deferential standard of review, "[t]his Court cannot abate penalties *based solely on its disagreement with [the MDOR's] finding as to whether Equifax acted reasonably and without willful neglect.*" *Id.* at 50a (emphasis added).

Thus, the Due Process Clause question sought to be reviewed by this Petition first arose as a result of the November 4, 2010 decision of the chancery court.

IV. Appeal to Court of Appeals of Mississippi

Equifax filed an appeal from the Chancery Court's decision, arguing that the court's interpretation of the standard of review was incorrect and unconstitutional, citing the plain language of the statute and contending that the chancery court's interpretation of Miss. Code § 27-77-7(4) did not "afford due process through a meaningful review of the issues." Brief of Appellants, Filed March 22, 2011, at 23-24; *see also id.* at 24:

("[A]n appeal from the Tax Commission to the Chancery Court is the first and only opportunity for a taxpayer to receive meaningful due process. . . . This [*de novo* standard] is the standard of review that was endorsed by this Court in *Tenneco* and *Murphy Oil*, and the holding reached in those cases is necessary in order to provide due process to aggrieved taxpayers.").

Equifax had raised the federal due process issue with respect to the imposition of penalties even earlier in the proceedings, in response to the MDOR's implication in its motion for summary judgment (before the chancery court) that the imposition of penalties was statutorily required. Petitioners' Memorandum in Opposition to Defendant's Motion for Summary Judgment, Filed March 29, 2010, at 29 ("Any penalty left solely to the discretion of the Commission violates the federal and Mississippi constitutions. *Broadhead v. Monaghan*, 117 So. 2d 881 (Miss. 1960).").

While the matter was pending before the Court of Appeals, the Supreme Court of Mississippi issued a decision in *W.C. Fore v. Miss. Dep't of Revenue*, 90 So. 3d 572, 578 (Miss. 2012), in which it recognized Section 27-77-7(4)'s requirement of a *de novo* hearing and concluded that "[t]his section clearly requires the chancellor to be the trier of fact on appeal." Shortly thereafter, the Court of Appeals reversed the chancery court's decision in this matter, holding that the chancellor erred because it "*did not conduct a de novo review of the matter.*" App. B at 35a (emphasis added).

Because the Court of Appeals decided the appeal in Equifax's favor on statutory grounds, it held that all other issues—including Equifax's due process arguments—were rendered moot. *Id.* at 38a.

V. Appeal to Supreme Court of Mississippi – Original Decision

The MDOR appealed to the Supreme Court of Mississippi, which granted certiorari and reversed the decision of the Court of Appeals, holding that a *de novo* standard of review did not apply under Section 27-77-7(4), and ruling that the deferential standard of review precluded the chancery court from reviewing the "merits" of the MDOR's assessments. App. H at 83a. Instead, the chancery court was limited to reviewing the "legality" of the MDOR's assessments (*i.e.*, whether the assessments were "supported by substantial evidence," were not "arbitrary and capricious," were "within the [MDOR's] power to make," and "did not violate the taxpayer's statutory or constitutional rights"). *Id.* at 83a-84a.

That court explained its holding by stating that, despite the plain language of the statute, a *de novo* standard of review could not have been intended by Miss. Code § 27-77-7(4), because the appeal to chancery court was “the first hearing conducted by a judicial tribunal.” *Id.* at 84a. Attempting to interpret the meaning of “*de novo*” in the statute in a manner supporting its conclusion, the Court surmised that “no trial anew can occur” in the absence of a prior proceeding; it therefore determined that “the [statute’s] instruction to ‘try the case de novo’ is misdirected.” *Id.* The Court went on to affirm the “legality” of those assessments and held that Equifax’s constitutional rights had not been violated. *Id.* at 85a-86a. It also affirmed the MDOR’s imposition of penalties, stating, “The chancellor was correct that he could not reverse the [MDOR’s] decision to impose penalties solely because he would have found differently” *Id.* at 91a.

VI. Appeal to Supreme Court of Mississippi – Motion for Rehearing

Equifax then reasserted its due process argument in a motion for rehearing. Motion for Rehearing, Filed July 22, 2013, at 21-23 (“If the chancery court is not directed to perform a *de novo*, on-the-merits review of the Commission’s assessment in this case, then Equifax will not have received any meaningful review of the assessment issued against it at any level of its appeal, in violation of its due process rights under the federal and state constitutions.”). The Supreme Court of Mississippi denied the motion for rehearing and reissued a nearly identical opinion in which it reaffirmed the assessment of taxes and imposition of penalties and again rejected Equifax’s constitutional claims. App. A at 13a-14a, 19a-20a.

REASONS FOR GRANTING THE PETITION

I. The Court Should Accept This Petition Because the Unjust Standard of Review Applied in the Case Affects Every Mississippi Taxpayer and Has the Potential to Infect Other States' Administrative Appeals.

Equifax urges this Court to grant certiorari to the Supreme Court of Mississippi because that court's interpretation of Miss. Code Ann. § 27-77-7(4) (2005)—the statute that governs the standard of review in appeals from MDOR tax assessments—has flagrantly denied Mississippi taxpayers their “day in court,” in clear violation of the Due Process Clause's guarantee that taxpayers shall have a “fair opportunity to challenge the accuracy and legal validity” of assessments for taxes and penalties.

It seems implausible that a state of the United States would have devised such a patently unconstitutional process, yet that is precisely the state of affairs today in Mississippi, where the Supreme Court of Mississippi has held that tax appeals are governed by a highly deferential standard of review that resulted in the chancery court's affirmance of the MDOR's actions in this case—even when the court was highly skeptical of the correctness of the assessment of taxes, and even when it concluded that the imposition of penalties was wrong. Under the precedents of this Court—including the extremely analogous reasoning of this Court's 1993 decision in *Concrete Pipe*⁴—the deferential standard of

4. *Concrete Pipe and Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.*, 508 U.S. 602 (1993).

review applied by Mississippi's courts preserves neither the appearance nor the reality of procedural due process. Rather, the application of a highly deferential standard of review in chancery court appeals turns the "trials" held by those courts into meaningless charades in which the affirmance of the assessments is virtually a foregone conclusion, even though the chancery court is the first (and *only*) reviewing body in the Mississippi tax appeals scheme to allow discovery or to conduct an evidentiary hearing. Accordingly, the Court should grant this Petition to clarify that Mississippi has violated Equifax's right to due process by assessing taxes and penalties and then *never* providing a constitutionally-sufficient *de novo* review (*i.e.*, a *de novo* review featuring the fundamental processes of a fair hearing, such as discovery, the right to present witnesses, and the right to cross-examine the government representatives who issued the assessment) before an adjudicator who is independent of the MDOR.

This matter is particularly appropriate for certiorari because Equifax was not only denied its right to procedural due process, but it was also subjected to an extremely unjust tax assessment and then amazingly penalized for following the MDOR regulation. The MDOR's assessment of taxes and penalties against Equifax is part of an alarming trend by the MDOR toward an egregious and unwarranted extension of its "alternative apportionment" authority—an extension of authority that puts Mississippi in the minority among state revenue departments, most of which have invoked alternative apportionment only in the "unusual" circumstances for which that authority was intended.⁵

5. See Multistate Tax Commission, Allocation and Apportionment Regulations, § IV.18(a), *available at* <http://www>.

Here, the MDOR assessed taxes and penalties against Equifax based on the MDOR’s determination that the standard “place-of-performance” apportionment formula applicable to service providers did not sufficiently capture Equifax’s in-state activity. Despite agreeing that Equifax accurately reported its income under the standard formula that applied to it, the MDOR assessed taxes and imposed penalties based on an unwritten “alternative apportionment formula.” Equifax disagreed with the assessment of tax, and it vehemently disagreed with the imposition of penalties; therefore, pursuant to Miss. Code §§ 27-77-5 and 27-77-7, Equifax appealed from those assessments. Yet nearly six years after the MDOR issued its assessments—notwithstanding two administrative appeals, a chancery court trial, and appeals to the Court of Appeals and the Supreme Court of Mississippi—Equifax has *still* not received a constitutionally-sufficient review of the merits of the MDOR’s assessment by a neutral adjudicator who is independent of the MDOR and who is authorized to evaluate the evidence under a *de novo* standard of review.

mtc.gov/Uniformity.aspx?id=496 (alternative apportionment applies “only in limited and specific cases where the apportionment and allocation provisions contained in Article IV produce incongruous results.”); Multistate Tax Commission, Report of the Hearing Officer, MTC Art. IV Proposed Amendments, at 35 (Oct. 25, 2013), *available at* www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Pomp%20final%20final3.pdf (“[A]lternative apportionment is tolerable when unique, non-recurring, or special circumstances are involved.”); *see also* Peter L. Faber, “Defending an Equitable Apportionment Case,” *State Tax Notes*, at 161 (Jan. 20, 2014) (criticizing various aspects of the *Equifax* decision for representing a “minority view”).

Thus, Equifax asks the Court to hear this Petition and rule that Equifax was constitutionally entitled to a *de novo* hearing by the chancery court in this case. This Petition, however, is about much more than Equifax's right to due process, for it also involves the due process rights of every taxpayer in Mississippi who disagrees with a decision of the MDOR. Furthermore, due to states' increasingly aggressive attempts to seek revenue through new—often unpublished and untested—interpretations of their tax laws, those reasons for disagreement have only been increasing in recent years.⁶ In many cases, those attempts have come at the expense of nonresident taxpayers like Equifax, who are vulnerable to being home-cooked under an inadequate appeals process and who often have less ability to influence legislation, given their limited presence within the state. The Court should therefore take this Petition because it speaks to precisely the form of government over-reaching that the federal Due Process Clause is designed to protect.

Moreover, this Petition is not limited to the due process rights of Mississippi *taxpayers*, for the MDOR's "success" in defending this constitutionally insufficient tax appeals scheme could lead to the extension of the deferential standard of review into other administrative contexts, and it could even be adopted into the laws of other states that see an opportunity to more easily defend and affirm their administrative decisions and to reduce their appeal costs. Therefore, granting this Petition would

6. See, e.g., Cara Griffith, "Because I Said So: Uncertainties With Apportionment," *State Tax Notes*, at 595 (May 20, 2013) ("Unfortunately, state taxing officials are using the 'because I said so' argument more and more.").

not only provide a reminder to states that the federal Due Process Clause provides a fundamental level of procedural protection to state taxpayers, but it would also dissuade states from modeling their appeals systems after the Mississippi paradigm in an attempt to streamline their administrative processes.

Finally, while this Court has been unequivocal in declaring that due process requires a “neutral adjudicator,” it has been far less explicit in its discussions of the standard of review under which such an adjudicator must review state administrative actions. Therefore, in addition to hearing this Petition in order to remedy the Supreme Court of Mississippi’s denial of the due process rights of Equifax and all other Mississippi taxpayers, the Court should hear this Petition to resolve the question of what standard of review is appropriate for the neutral adjudicator who is tasked with reviewing a state’s assessment of taxes and penalties or similar state administrative decisions.⁷

7. This case presents a potentially rare opportunity for the Court to address this standard-of-review issue, for it is uncommon that a litigant who is denied due process on account of an unconstitutionally-deferential standard of review also receives an explicit indication that the adjudicator would have ruled differently *but for* the deferential standard, such that the litigant is properly motivated to undertake the filing of a petition to this Court.

II. The Court Should Accept This Petition To Clarify That a “Fair Opportunity” to Challenge Assessments of Taxes and Penalties Requires a *De Novo* Review Before a Neutral Adjudicator.

A. The Due Process Clause Guarantees Taxpayers a “Fair Opportunity” to Challenge Assessments of Taxes and Penalties.

Within the context of taxation, the Due Process Clause provides that a taxpayer must be given a fair and meaningful opportunity to challenge the *accuracy* and *legal validity* of a tax assessment. *See, e.g., McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco of Fla.*, 496 U.S. 18, 38 (1990) (“To satisfy the requirements of the Due Process Clause . . . the State must provide taxpayers *with, not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a ‘clear and certain remedy,’ . . . to ensure that the opportunity to contest the tax is a meaningful one.*”) (emphasis added and citation omitted); *see also In re Murchison*, 349 U.S. 133, 136 (1955) (“A fair trial in a fair tribunal is a basic requirement of due process.”). Yet under Mississippi’s tax appeals scheme, Equifax has never actually received any such meaningful opportunity, for the deferential standard of review precluded the chancery court from considering whether Equifax was entitled to relief based on the evidence presented at trial.

B. To Satisfy Due Process, a Final Adjudication Must Include Some Fundamental Elements, Such as the Right to Learn the Basis for the Assessment and to Cross-Examine the State's Representatives.

While the specific elements that are required for a constitutionally-sufficient hearing are flexible, *see, e.g., Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545 (1985), this Court has frequently suggested that, prior to a final adjudication in a case involving the government's deprivation of an interest, due process mandates the provision of certain fundamental elements.

For example, in *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972), this Court listed the "minimum requirements of due process," holding in the context of a final decision on parole revocation that the state must provide, *inter alia*: (a) written notice of the alleged violation; (b) disclosure of the state's evidence; (c) the opportunity to present witnesses and documents in evidence; (d) the right to cross-examine the state's witnesses; (e) a neutral hearing body; and (f) a written explanation of the hearing body as to the evidence relied on and reasons for the hearing body's decision. Other decisions of this Court have similarly emphasized the virtual necessity of other specific safeguards. *See, e.g., In re Murchison*, 349 U.S. at 139 ("The right of a defendant to examine and cross-examine witnesses is too essential to a fair trial to have that right jeopardized."); *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) ("In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."); *id.* at 270 ("Certain principles have remained relatively

immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual . . . the evidence used to prove the Government's case must be disclosed . . . in all types of cases where administrative actions were under scrutiny.”).

This Petition does not ask the Court to consider *all* of the elements that are necessary to constitute a “fair opportunity” to challenge assessments of taxes and penalties, because the informal proceedings conducted by Mississippi's administrative bodies (the Board of Review and the Commission) did not come close to satisfying constitutional minimums.⁸ The hearing before the chancery court, on the other hand, surely satisfied *most* of the requirements of due process (*e.g.*, the chancery court supervised discovery between the parties, and it provided Equifax the right to examine witnesses and to cross-examine the MDOR's witnesses). Nevertheless, as explained in the next section, the deferential standard of review applied in that judicial appeal prevented the chancery court from providing a *fully* constitutionally-sufficient appeal.

8. See discussion of those informal proceedings *supra*.

C. A “Fair Opportunity” to Challenge Assessments of Taxes and Penalties Requires a *De Novo* Review Before a Neutral Adjudicator.

1. A neutral adjudicator is essential to due process, but the only neutral adjudicator in Mississippi’s tax appeals system is the Chancery Court.

This Court has “jealously guarded” the requirement of neutrality in appeals from adverse government actions, emphasizing that a neutral adjudicator “safeguards the two central concerns of procedural due process[:] the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision-making process.” *Marshall v. Jerrico*, 446 U.S. 238, 242 (1980). Thus, in *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57, 61-62 (1972), this Court held that the village mayor could not fairly adjudicate traffic citations when the funds raised by such tickets were crucial to the city’s budget, writing that the individuals appealing the tickets were “entitled to a neutral and detached judge in the first instance.” That same year, this Court evaluated whether a state’s procedures for revoking parole satisfied due process and held that one of the “minimum requirements” of due process is a “neutral and detached” body to provide a hearing “prior to the final decision on revocation . . .” *Morrissey v. Brewer*, 408 U.S. at 489.

More recently, the Court spoke to the importance of this “neutral adjudicator” requirement, explaining that “one is entitled as a matter of due process of law to an adjudicator who is not in a situation which would offer a

possible temptation to the average man as a judge which might lead him not to hold the balance nice, clear, and true.” *Concrete Pipe and Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.*, 508 U.S. 602, 617-18 (1993) (citation and punctuation omitted). Thus, the Court again held that an administrative appeals scheme must provide at least one level with a “neutral adjudicator” to satisfy due process. *See id.* at 618 (“Where an initial determination is made by a party acting in an enforcement capacity, due process may be satisfied by providing for a neutral adjudicator to ‘conduct a *de novo* review of all factual and legal issues.’”) (citing *Marshall v. Jerrico, Inc.*, 446 U.S. at 245).

The Mississippi tax appeals scheme afforded to Equifax provided two levels of administrative review and then a judicial appeal to the Chancery Court. Neither the Board of Review nor the Commission comes close to satisfying the requirement of a “neutral and detached” adjudicator, for both review boards were staffed by employees of the MDOR (*i.e.*, the agency that had issued the assessments of taxes and penalties from which Equifax was appealing). *See, e.g., Jerrico*, 446 U.S. at 242 (emphasizing the need for “both the appearance and the reality of fairness”); *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (“Not only is a biased decision maker constitutionally unacceptable but our system of law has always endeavored to prevent even the probability of unfairness.”) (citing *In re Murchison*, 349 U.S. at 136).

The lack of any appearance or reality of “neutrality” is most glaring at the proceeding before the Commission, which shared a name with the revenue department at the time (both were called the “Mississippi State Tax

Commission”) and which was staffed by the MDOR’s Commissioner and its Associate Commissioners. *See* Apps. D-E (written decisions of the Commission). That failure of neutrality is *especially* true in an appeal from the Commission’s use of alternative apportionment, which by regulation is a decision that must be made by the Commissioner himself. App. K at 129a (Rule 806, sub. 402.10); *see Withrow v. Larkin*, 421 U.S. at 58 n.25 (“[W]hen review of an initial decision is mandated, the decision maker must be other than the one who made the decision under review.”); *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) (holding that an administrator who was involved in a decision to terminate welfare benefits “should not . . . have participated in making the [subsequent] determination under review”).

2. The neutral adjudicator must have the authority to review the evidence and decision under a *de novo* standard of review.

This Court has emphasized the importance of a *de novo* standard of review in administrative appeals on several occasions, but it has not explicitly held that a *de novo* review is required. For example, in *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980), the Court examined an employer’s appeal of a civil penalty imposed by the Department of Labor under a federal statute. In upholding the constitutionality of that statute, it twice cited the importance of the availability of “a *de novo* hearing before an administrative law judge.” *See id.* at 245, 247.

Similarly, in *Goss v. Lopez*, 419 U.S. 565 (1975), the Court examined the circumstances under which students

were entitled to review of their suspensions from school. After a discussion of its due process precedents and the flexibility required by school administrators, the Court nevertheless concluded that the Due Process Clause entitles students to certain “rudimentary precautions against unfair or mistaken findings of misconduct.” *Id.* at 581. It then added that the subsequent judicial review available under Ohio law was not constitutionally sufficient, in part because “the proceeding is not *de novo*.” *Id.* at 581 n.10; *see also Withrow v. Larkin*, 421 U.S. at 58 (“Clearly, if the initial view of the facts based on the evidence derived from nonadversarial processes as a practical and legal matter foreclosed fair and effective consideration at a subsequent adversary hearing leading to ultimate decision, a substantial due process question would be raised.”); *Phillips v. Comm’r of Internal Revenue*, 283 U.S. 589, 598 (1931) (noting, over a due process objection, that the taxpayer’s rights were protected in part because of the availability of a *de novo* hearing before the Board of Tax Appeals).

This Court’s decision in *Concrete Pipe and Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.*, 508 U.S. 602 (1993)—a case with startling parallels to the instant case—provides the Court’s clearest statements that a neutral adjudicator *must* perform a *de novo* review, but it does not discuss the scope of that holding. In that case, a federal statute (the Multiemployer Pension Plan Amendments Act, or “MPPAA”) provided that the members of a pension plan could be assessed for unfunded liabilities upon withdrawing from the plan, and it provided for an appeal to an arbitrator to resolve any objections to such assessments. *Id.* at 610-611. Crucially, with respect to such appeals, the MPPAA stated that

determinations of the plan were “presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.” *Id.* at 611.

The first issue in that case was whether the plan member who had received the assessment had received a hearing before the requisite “neutral adjudicator.” *Id.* at 617-620. This Court concluded that while the plan sponsors’ “statutory role and fiduciary obligation [] would suffice to bar [them] from serving as adjudicators,” *id.* at 618, the MPPAA’s provision of an appeal to an arbitrator had satisfied the neutral adjudicator requirement. *Id.* at 620.

Nevertheless, just because the MPPAA had provided for a neutral arbitrator did not mean that it satisfied due process; rather, the Court explored the “strangeness” of the statute’s combination of a burden of proof (the “preponderance of the evidence” standard) and a standard of review (“unreasonable or clearly erroneous”) and concluded that the statute was “incoherent.” *Id.* at 623-25. The Court then went on to discuss the constitutionality of the MPPAA’s standard-of-review provision, writing:

The proper response to this incomprehensibility is obviously important in deciding this case. If [the statute] permitted an employer to rebut the plan sponsor’s factual conclusions by a preponderance, merely placing a burden of persuasion on the employer, *and permitting adjudication of the facts by the arbitrator without affording deference to the plan sponsor’s determinations*, the provision would be constitutionally unremarkable.

...

On the other hand, if the employer were required to show the trustees' findings to be either "unreasonable or clearly erroneous," *there would be a substantial question of procedural fairness under the Due Process Clause*. In essence, the arbitrator . . . would be required to accept the plan sponsor's findings, even if they were probably incorrect, absent a showing at least sufficient to instill a definite or firm conviction that a mistake had been made. In light of our assumption of possible bias, the employer would seem to be deprived thereby of the impartial adjudication in the first instance to which it is entitled under the Due Process Clause.

Concrete Pipe, 508 U.S. at 625-26 (emphasis added; citation omitted).

Because the deferential standard of review imposed by the MPPAA created a "substantial question of procedural fairness under the Due Process Clause," this Court noted that it must construe the statute to preserve its constitutionality. *See id.* at 628-29. It therefore held that the statute must be construed so as to afford "independent consideration" of all factual issues by the neutral arbitrator; in so doing, the Court insured that the federal administrative scheme at issue provided for a *de novo* review of the pension plan's assessment against its member. *Id.* at 630. Thus, in *Concrete Pipe*, this Court extended its constitutional requirement of a "neutral adjudicator" to hold that the appellant from an adverse

action would be deprived of due process *if the adjudicator were limited by a deferential standard of review*. Without an explanation of the *scope* of that holding, however, it is not clear whether such a safeguard applies with equal force to a state administrative scheme, meaning that states like Mississippi will continue to test the boundaries of what the Due Process Clause requires.

The U.S. Supreme Court's decision in *Reich v. Collins*, 513 U.S. 106 (1994), demonstrates yet another measure by which Mississippi has violated Equifax's Due Process rights in these proceedings. In that case, this Court held that a state had "unfairly, in midcourse" done a "bait and switch" on the taxpayer. *Id.* at 111. Here, Equifax was initially presented with two informal, off-the-record administrative appeals, both of which were governed by provisions that explicitly promised a "full evidentiary judicial hearing" at the chancery court. However, years after those administrative appeals, the Supreme Court of Mississippi re-examined its prior interpretation of the standard of review applicable to tax appeals and held that an "arbitrary and capricious" standard of review applies. Thus, through its interpretation of Miss. Code § 27-77-7(4), Mississippi has run afoul of *Reich* because the "full evidentiary hearing" promised to Equifax at the beginning of the appeals process was subsequently eliminated, thereby precluding the chancery court's authority to consider the merits of Equifax's appeal.

3. The Supreme Court of Mississippi’s interpretation of Miss. Code § 27-77-7(4) violates due process because it does not provide for a *de novo* standard of review.

In conflict with this Court’s proclamations regarding the importance of a *de novo* review, the Supreme Court of Mississippi held that in a tax appeal, the chancery court’s authority to review the evidence presented at trial is limited by a deferential standard of review under which the chancellor may only reverse the MDOR’s assessment of taxes if “the decision was arbitrary and capricious, beyond the Commission’s power, and/or violated Equifax’s statutory or constitutional right.” App. A at 13a. In fact, the Supreme Court of Mississippi specifically held that the Court of Appeals had erred by applying a *de novo* standard explicitly set forth in the statute. *Id.*

In so holding, the Mississippi court failed to recognize the constitutional importance of the *de novo* standard of review—as emphasized by this Court in *Concrete Pipe* and *Marshall v. Jerrico*, and going back as far as its 1931 decision in *Phillips*—and prioritized instead Miss. Code § 27-77-7(4)’s call for “deference” to the decisions of the MDOR. The parallels between the Mississippi statute at issue here and the federal statute at issue in *Concrete Pipe* are striking, as both statutes contain an “incoherent” mixture of a standard of review and a burden of proof. The Mississippi statute, however, doubled down on its incoherence by referring not only to a burden of proof, but also to two contrasting standards of review (“deference” and “*de novo*”) within the same sentence.

Concrete Pipe drew the Mississippi court a map for resolving the statute’s incoherence, as it held that the deferential standard of review should be construed so as to allow the arbitrator to perform a *de novo* review and provide the impartial adjudication guaranteed by due process. *Concrete Pipe*, 508 U.S. at 626, 628-29. Yet the Supreme Court of Mississippi, despite being presented with the due process implications of applying a deferential standard of review, resolved the statute’s incoherence in exactly the opposite way, prioritizing the statute’s requirement of “deference” to the MDOR’s decisions and holding that the “instruction to ‘try the case *de novo*’ is [therefore] misdirected.” App. A at 12a.

In light of this Court’s discussion of the constitutional importance of a party having the merits of its case heard by a “neutral adjudicator,” the Supreme Court of Mississippi’s interpretation of Miss. Code § 27-77-7(4) was completely—and unconstitutionally—backwards. Rather than attempting to preserve Equifax’s due process rights by focusing on the statute’s explicit reference to a *de novo* trial, the Supreme Court of Mississippi instead favored the statute’s mandate of “deference” to the decisions of the “commission.” See App. A at 10a (“First, the chancery court ‘shall give deference to the decision and interpretation of law and regulations by the commission’”). Thus, by holding that a deferential standard of review applies to appeals from assessments of the MDOR, the Supreme Court of Mississippi put Mississippi’s tax appeals scheme in conflict with this Court’s holding in *Concrete Pipe* and its years of emphasis on the availability of a fair hearing before a neutral adjudicator.

The state court's error stemmed in part from this Court's lack of guidance in explaining the scope of *Concrete Pipe's* holding, and whether it applies to a state administrative appeal process, like the Mississippi tax appeals scheme at issue here. Failure to grant this Petition will allow Mississippi's conflict with the reasoning of *Concrete Pipe* to stand, and it will allow the MDOR to continue issuing assessments of taxes and penalties with impunity, confident in the knowledge that Miss. Code § 27-77-7(4)'s deferential standard of review will protect its assessments from reversal—even when the Chancery Court disagrees. The outcome of this case presents a powerful example of the unfairness that such a deferential standard of review can yield, for here the Chancery Court expressed explicit disagreement with the MDOR's assessments of additional taxes, yet held that it was powerless to grant relief under the deferential standard of review mandated by the statute, even though the decision receiving deference was the assessment of MDOR representatives that was based on a very limited understanding of Equifax's business and which had *never* been evaluated under a *de novo* standard of review by a neutral adjudicator who had reviewed the evidence in the case.

D. The Chancery Court's Inability to Reverse Penalties with Which It Disagrees Is the Most Egregious Consequence of Mississippi's Unfair Tax Appeals System.

While Mississippi's deferential standard of review unfairly limits the chancery court's authority to reverse the MDOR's assessments of taxes, the unfairness of Mississippi's scheme is even more vividly demonstrated

with regard to the MDOR's imposition of *penalties* in this matter for Equifax's "willful neglect" in failing to comply with the state's tax laws. At the Chancery Court, Equifax and the MDOR stipulated that Equifax had apportioned its income to Mississippi using the "place-of-performance" apportionment formula applicable to Equifax, a service provider based in Atlanta. *See* App. C at 42a. Thus, Equifax had complied with Mississippi law.

In reviewing the facts presented at trial, the chancellor "agree[d] with Equifax that a corporation should be allowed to rely upon apportionment methods specifically authorized by the [MDOR's] own regulations." *Id.* at 47a. Nevertheless, despite that finding, and despite the fact that the MDOR's assessment and imposition of penalties were based on the application of an *unwritten, unpublished* alternative apportionment formula, the chancery court affirmed the MDOR's imposition of penalties, writing that under the deferential standard of review, it could not "abate penalties based *solely upon its disagreement with [the MDOR's] finding as to whether Equifax acted reasonably and without willful neglect.*" *Id.* at 50a (emphasis added).

Therefore, under current Mississippi law, the MDOR's assessments and imposition of penalties will not be reversed on appeal *even when the chancery court disagrees with them*, unless the taxpayer overcomes the deferential standard of review. That result is contrary to years of this Court's decisions emphasizing the importance of a neutral adjudicator performing a *de novo* review, and this Court must seize this opportunity to restore Mississippi taxpayers' due process rights and to remind other states that Mississippi's example is not to be

followed. *See, e.g., Marshall v. Jerrico, Inc.*, 446 U.S. 238, 245-47 (1980) (emphasizing importance of “*de novo* review of all factual and legal issues” in appeal from imposition of penalty); *F.C.C. v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) (reciting Due Process principle that “fair notice” of a rule is required before a penalty or other punishment can be assessed and upheld); *Delhaize America, Inc. v. Lay*, 731 S.E.2d 486, 500 (N.C. App. Ct. 2012) (upholding imposition of penalty against taxpayer after finding that taxpayer had notice of state’s position).

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Honorable Court grant this Petition.

Respectfully submitted,

MARY T. BENTON

Counsel of Record

CLARK R. CALHOUN

ALSTON & BIRD LLP

1201 W. Peachtree St., Suite 4200

Atlanta, GA 30309

(404) 881-7000

mary.benton@alston.com

Attorneys for Petitioners

APPENDIX

1a

**APPENDIX A — OPINION OF THE SUPREME
COURT OF MISSISSIPPI AND DENIAL OF
REHEARING, DATED NOVEMBER 21, 2013**

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2010-CT-01857-SCT

EQUIFAX, INC. AND EQUIFAX CREDIT
INFORMATION SERVICES, INC.

v.

MISSISSIPPI DEPARTMENT OF REVENUE
f/k/a MISSISSIPPI STATE TAX COMMISSION

ON WRIT OF CERTIORARI

MOTION FOR REHEARING FILED: 07/22/2013;
DENIED AND MODIFIED AT ¶8 AND ¶11 - 11/21/2013

MANDATE ISSUED:

EN BANC.

**RANDOLPH, PRESIDING JUSTICE, FOR THE
COURT:**

¶1. Before the Court on certiorari review is an income-tax assessment by the Mississippi State Tax Commission¹

1. Since the events underlying this appeal occurred, the “Mississippi State Tax Commission” has been renamed the “Mississippi Department of Revenue.” Miss. Code Ann. § 27-3-4

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(“the Commission”) against Equifax, Inc., and Equifax Credit Information Services, Inc. (collectively “Equifax”). Using the standard apportionment method prescribed by Commission regulation, Equifax computed its Mississippi taxable income as zero. The Commission then audited Equifax and determined that the standard apportionment method did not fairly reflect Equifax’s business in Mississippi. The Commission employed an alternative apportionment method, under which Equifax’s income from services provided to customers located in Mississippi was apportioned to Mississippi, and it issued assessments against Equifax.

¶2. After Equifax exhausted its administrative remedies, it petitioned the Hinds County Chancery Court for relief, and it affirmed the Commission’s decision. The Court of Appeals reversed the judgment of the chancery court on standard-of-review and burden-of-proof grounds and found all remaining issues moot. *Equifax, Inc. v. Miss. Dep’t of Revenue*, So. 3d , 2012 Miss. App. LEXIS 241, 2012 WL 1506006 (Miss. Ct. App. May 1, 2012). On writ of certiorari, we hold that the Hinds County Chancery Court did not commit reversible error; that the use of an alternative apportionment method for Equifax was not a promulgation of a rule in violation of the Mississippi Administrative Procedures Act; and that the Commission did not abuse its discretion by imposing penalties against Equifax, as provided for in Mississippi Code Section 27-13-25(3). Accordingly, we reverse the judgment of the Court

(Rev. 2010). In the interest of consistency, this opinion uses the term “Commission.”

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of Appeals and reinstate and affirm the judgment of the Hinds County Chancery Court.

FACTS AND PROCEDURAL HISTORY

¶3. The Court of Appeals set forth the following facts and procedural history:

¶2. The taxpayers are Equifax, Inc. and Equifax Credit Information Services, Inc. (“ECIS”) (collectively referred to as “Equifax”). Equifax, Inc. is a Georgia corporation in the business of consumer credit reporting. It sells credit information and other services to consumers and businesses across the country. Equifax, Inc. was registered to do business and was in fact doing business in Mississippi. Equifax, Inc. is the parent company of ECIS. The services provided by Equifax, Inc. and ECIS include: credit reporting, information services, direct mail marketing, risk management, and mortgage loan processing and approval. The primary services provided are credit reports, credit scores, and fraud alerts.

¶3. The [Commission] audited Equifax for payment of state income taxes for the period of January 1, 2000, through December 31, 2003 (the “audit period”). During the audit period, Equifax had approximately 800 customers located in Mississippi. The revenue generated from these Mississippi customers was \$5,275,406 in 2000, \$6,579,281 in 2001, \$5,646,283 in 2002, and \$5,178,370 in 2003. Based on these figures, the total gross receipts for the sale of Equifax’s

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services provided to Mississippi customers during the audit period totaled \$22,679,340.

¶4. Equifax did not have a corporate office in Mississippi but employed three Mississippi residents. Equifax's Mississippi customers requested and received services from Equifax at their Mississippi locations. These transactions primarily occurred electronically and took approximately three seconds from the time the customer requested the credit report or score to the time they received the information.

¶5. Equifax timely filed Mississippi state income tax returns for each year in the audit period. However, Equifax reported no taxable income in the State for each of these years and paid no income tax for each year. In computing taxable income, Equifax relied on the [Commission's] regulations and the standard-apportionment method for service companies. As a result, Equifax determined that it had no income subject to tax in Mississippi.

¶6. At the conclusion of the audit, on February 28, 2008, the [Commission] issued assessments against Equifax. The [Commission] determined that the apportionment method used by Equifax did not fairly reflect the extent of Equifax's business in Mississippi. The [Commission] determined Equifax should have used an alternative-apportionment method, a market-based sourcing method, during the audit period.

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¶7. Equifax disagreed with the assessments and appealed the assessments to the Mississippi Tax Commission Board of Review (the “Board”). The Board upheld the assessments in a reduced amount. Equifax then appealed to the three-member Tax Commission, which upheld the Board’s reduced assessments.

¶8. On May 29, 2009, Equifax paid the assessments, under protest, including interest and penalties. Equifax, Inc.’s assessments totaled \$467,836; and ECIS’s assessments totaled \$271,201.

¶9. On June 1, 2009, pursuant to Mississippi Code Annotated section 27-77-7 (Rev. 2008), Equifax appealed the assessment to the Hinds County Chancery Court. [The chancellor] held an evidentiary hearing on all issues presented. The chancellor then entered an order and final judgment, dated October 26, 2010, affirming the [Commission’s] assessments.

Equifax, 2012 Miss. App. LEXIS 241, 2012 WL 1506006, ** 1-2. In its Complaint and Petition, Equifax sought judicial review of the decision of the Tax Commission. Equifax averred that the Commission’s use of the alternative apportionment method was not authorized by Mississippi law and violated Equifax’s rights under the United States Constitution. Equifax and the Commission filed a stipulation of agreed-upon facts.² At trial, Equifax

2. No claim was made that the Commission’s decision was unsupported by the agreed-upon facts. Rather, Equifax claimed

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was burdened to prove its entitlement to relief - that the Commission's decision was reversible - by a preponderance of the evidence. The chancellor concluded that Equifax had failed to meet its burden to prove that the Commission's use of an alternative apportionment method violated the Mississippi Administrative Procedures Act, that its imposition of penalties against Equifax was arbitrary and capricious, or that Equifax's rights under the United States Constitution had been violated. The court further found that it could not substitute its "judgment for the agency's unless the latter's interpretation is arbitrary or unreasonable." It further found, in the limited record presented, including the agreed-upon facts, that the Commission orders were premised on substantial evidence.

¶4. Equifax appealed the decision of the Hinds County Chancery Court to the Court of Appeals. The Court of Appeals found that: (1) a *de novo* standard applies to judicial review of Commission decisions; and, (2) as the party invoking alternate apportionment, the Commission has the burden to prove that the standard apportionment method is not a fair representation of the taxpayer's activity in the state and that its chosen alternative method is reasonable. *Equifax*, 2012 Miss. App. LEXIS 241, 2012 WL 1506006, at **4-5. The Court of Appeals recognized that the arbitrary-and-capricious standard normally applies to agency decisions, but opined that "[t]his is not the normal case. The Legislature has established a

that the Commission improperly applied regulations and laws in an impermissible manner.

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different standard that . . . applies here.” 2012 Miss. App. LEXIS 241, [WL] at *2. The Court of Appeals examined Mississippi Code Section 27-77-7(4) and found that “[t]his case seems to create a conflict as to exactly what a trial de novo means in an appeal from a [Commission] decision.” 2012 Miss. App. LEXIS 241, [WL] at *4. Quoting the general understanding that “[a] de novo review ‘means that the case shall be tried the same as if it had not been tried before, and the court conducting such a trial may substitute its own findings and judgment for those of the inferior tribunal from which the appeal is taken[,]’” the Court of Appeals concluded that “the chancery court’s review of the [Commission’s] decision should have been conducted just as if the chancery court were sitting as the [Commission].” *Id.* (citing *California Co. v. State Oil & Gas Bd.*, 200 Miss. 824, 838-39, 27 So. 2d 542, 544 (1946) (citation omitted)). Concluding that the chancellor had erred both by applying an incorrect standard of review and by imposing the burden of proof on the wrong party, the Court of Appeals reversed the chancellor’s decision and remanded the case to the Hinds County Chancery Court. 2012 Miss. App. LEXIS 241, [WL] at *7. As it reversed and remanded on these two issues, the Court of Appeals found all other issues raised on appeal moot. *Id.*

ISSUES

¶5. This Court granted certiorari to address the following issues:

1. Whether the chancellor committed reversible error by applying an arbitrary-and-capricious

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standard when reviewing a decision of the Mississippi State Tax Commission under Section 27-77-7(4).

2. Whether the chancellor committed reversible error by requiring Equifax to carry its burden of proof of establishing that the Commission's decision was reversible.

¶6. Declining to reverse the chancellor's judgment on the grounds of standard of review or burden of proof, we also address the following additional issues raised by Equifax:

3. Whether the chancellor manifestly erred by concluding that the Commission's use of an alternative apportionment method for Equifax's income was not a promulgation of a new rule in violation of the Mississippi Administrative Procedures Act.

4. Whether the chancellor manifestly erred by declining to abate penalties imposed by the Commission under Section 27-13-25(3).

DISCUSSION

¶7. The proper standard of review and burden of proof for an appeal to chancery court of a judgment of the Commission are questions of law dictated by Mississippi statute. Miss. Code Ann. § 27-77-7(4) (2005) (amended 2009). This Court reviews questions of law *de novo*.

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Hankins v. Md. Cas. Co./Zurich Am. Ins. Co., 101 So. 3d 645, 652 (Miss. 2012) (citation omitted).

¶8. All agree that the applicable standard of review and burden of proof in chancery court for judicial review of a Commission decision are found in Mississippi Code Section 27-77-7(4), but much disagreement arises over the practical application of that language. The relevant portion of Section 27-77-7(4) reads as follows:

the chancery court shall give deference to the decision and interpretation of law and regulations by the commission as it does with the decisions and interpretation of any administrative agency, but it shall try the case de novo and conduct a full evidentiary judicial hearing on the issues raised. Based on the evidence presented at the hearing, the chancery court shall determine whether the taxpayer has proven, by a preponderance of the evidence or a higher standard if required by the issues raised, that he is entitled to any or all of the relief he has requested.

Miss. Code Ann. §27-77-7(4) (2005) (amended 2009) (emphasis added). We hold that, under this language, the chancery court must hold a judicial hearing to determine whether the taxpayer challenging the Commission decision can prove entitlement to any or all of the relief requested by a preponderance of the evidence.³ In this

3. Or a higher standard, if required by the issues raised. Miss. Code Ann. § 27-77-7(4) (2005).

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case, the evidence to be considered by the chancellor was the record from the Commission, including the agreed-upon facts. As in other appeals of administrative-agency decisions, to be entitled to reversal of the agency decision, a petitioner must raise and prove one or more of the following: the agency's decision was unsupported by substantial evidence, the agency's decision was arbitrary and capricious, the agency's decision was beyond the power of the administrative agency to make, and/or the agency's decision violated the complaining party's statutory or constitutional right. ***Buffington v. Miss. State Tax Comm'n***, 43 So. 3d 450, 453-54 (Miss. 2010). The court does not adjudicate the merits (or lack thereof) of the agency's decision, but rather is limited to examining the legality of the decision. To resolve any confusion surrounding Section 27-77-7(4), we address the pertinent provisions.

¶19. First, the chancery court “shall give deference to the decision and interpretation of law and regulations by the commission as it does with the decisions and interpretation of any administrative agency.” Miss. Code Ann. §27-77-7(4) (2005). Courts accord great deference to decisions of administrative agencies; a judgment of an administrative agency is binding unless a party proves otherwise. See ***CLC of Biloxi, LLC v. Miss. Dep't of Health***, 91 So. 3d 633, 635 (Miss. 2012) (“A rebuttable presumption exists in favor of the [agency's] decision, and the burden lies with the challenging party to prove the contrary.”) (citation omitted). Accordingly, a court will reverse the decision of an administrative agency only if the presumption is overcome, as addressed in ***Buffington***, *supra*. The statute clearly mandates deference for Commission decisions,

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as for decisions of any administrative agency. These specific bases for reversal apply in appeals of Commission decisions just as they do in appeals of other administrative agencies' decisions.

¶10. Equifax's complaint in chancery court sought judicial review of the *merits* of the Commission's decision, a determination which clearly was outside of the chancery court's authority. Equifax also averred that: (1) the Commission's use of alternative apportionment was not authorized by Mississippi law, because the Commission failed to prove, under its own regulations, that standard allocation did not fairly represent Equifax's business activity in Mississippi and that the alternative method was reasonable; and (2) the Commission's decision violated Equifax's rights under the Due Process and Commerce Clauses of the federal Constitution. The chancellor properly limited his analysis to determining whether Equifax had proven that it was entitled to reversal of the Commission's decision for any of the prescribed legal bases for reversing an agency decision provided by this Court in *Buffington*.

¶11. Section 27-77-7(4) next provides that the chancery court "shall try the case *de novo* and conduct a full evidentiary judicial hearing *on the issues raised*." We emphasize that the subject of the evidentiary hearing is *the issues raised* on appeal in chancery court - whether the decision was made in violation of the tenets announced in *Buffington* - *not* the merits of the underlying decision by the Commission. The chancery court had before it the orders of the Commission and the Board of Review,

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including agreed findings of fact. Under Section 27-77-7(4), Equifax had the opportunity to present evidence contesting the legality of the Commission's and the Board of Review's decisions.

¶12. Perhaps the confusion surrounding Section 27-77-7(4) stems from the statute's instruction to the chancery court to "try the case de novo." Black's Law Dictionary defines "de novo" as "anew." *Black's Law Dictionary* 500 (9th ed. 2009). "Anew" means "[a] second time as a new trial or action, over again, afresh, once more." I *The Oxford English Dictionary* 457 (2d ed. 1989). "A trial de novo, within the common acceptance of that term . . . means that the case shall be tried the same *as if it had not been tried before*, and the court conducting such a trial may substitute its own findings and judgment for those of the inferior tribunal from which the appeal is taken." *California Co. v. State Oil and Gas Bd.*, 200 Miss. 824, 838-39, 27 So. 2d 542, 544 (1946) (emphasis added). The hearing in chancery court is the first hearing conducted by a judicial tribunal to test the legality of the decision. The proceedings before the Commission are informal, nonjudicial proceedings that are neither conducted under oath nor preserved in the record for appeal. The chancery-court proceedings mark the first time a taxpayer may judicially challenge the legality of the Commission's final decision. In the absence of a prior proceeding, no trial anew can occur. Thus, the instruction to "try the case de novo" is misdirected. Section 27-77-7(4) provides a judicial forum to try anew (or for the first time) the legal issues raised by the taxpayer in chancery court. Its limited purpose is only to examine whether the Commission's

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decision was supported by substantial evidence, was not arbitrary and capricious, was within the Commission's power to make, and did not violate the taxpayer's statutory or constitutional rights.

¶13. Finally, Section 27-77-7(4) establishes the burden of proof and upon whom the burden rests. "Based on the evidence presented at the hearing, the chancery court shall determine whether *the taxpayer* has proven, by a preponderance of the evidence or a higher standard if required by the issues raised, *that he is entitled to any or all of the relief* he has requested." Miss. Code Ann. §27-77-7(4) (2005) (emphasis added). This sentence stands for the simple proposition that, in a taxpayer's action in chancery court appealing a final judgment of the Commission, as in all other judicial proceedings, the party petitioning the court for relief bears the burden of proving its claims by a preponderance of the evidence or a higher standard, if required by the issues raised.⁴

¶14. In this case, under Section 27-77-7(4), the chancery court conducted a hearing to determine whether Equifax (the taxpayer) was able to prove, by the appropriate burden, that the decision was arbitrary and capricious, beyond the Commission's power, and/or violated Equifax's statutory or constitutional right. At the hearing in chancery court,

4. For example, a taxpayer claiming that a Commission decision was the result of fraud must carry the higher burden of proving his claim by clear and convincing evidence. See *O.W.O. Investments, Inc. v. Stone Inv. Co.*, 32 So. 3d 439, 446 (Miss. 2010) ("these elements [of fraud] must be proven by clear and convincing evidence" (citation omitted)).

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the parties were given the opportunity to present such evidence and legal authority as they deemed appropriate to the limited issues being tried, *i.e.*, the legality of the decision. In this case, the chancery court determined that Equifax had failed to prove that the agency's decision violated one or more of the *Buffington* tenets.

¶15. The chancellor in the case *sub judice* did just that, finding that his “review of the Order of the [Commission] must be only to determine whether or not the order ‘(1) was supported by substantial evidence, (2) was arbitrary or capricious, (3) was beyond the power of the administrative agency to make, or (4) violated some statutory or constitutional right of the complaining party’” and that “Equifax clearly bears the burden of proving, by a preponderance of the evidence, that the decision of the [Commission] is reversible” Thus, the chancery court applied the proper standard of review and burden of proof.

¶16. It follows that the Court of Appeals erred by reversing the chancellor's judgment on standard-of-review and burden-of-proof grounds. For the reasons discussed above, the Court of Appeals erroneously construed Section 27-77-7(4) as imposing a *de-novo standard of review*, such that “the chancery court's review of the [Commission's] decision should have been conducted just as if the chancery court were sitting as the [Commission].”⁵ *Equifax*, 2012

5. In *W.C. Fore v. Mississippi Department of Revenue*, 90 So. 3d 572 (Miss. 2012), this Court held that Section 27-77-7(4) “clearly requires the chancellor to be the trier of fact on appeal.” *Fore*, 90 So. 3d at 578. We now clarify that the chancellor is

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Miss. App. LEXIS 241, 2012 WL 1506006, at *4. The Court of Appeals further erred by holding that the Commission - rather than the taxpayer-petitioner, Equifax - had the burden of proof, based on cases from other jurisdictions interpreting the Uniform Division of Income for Tax Purposes Act (“UDITPA”).⁶ *Equifax*, 2012 Miss. App.

the trier of facts related to the taxpayer’s claim(s) on appeal, *i.e.*, whether the Commission’s decision was unsupported by substantial evidence, arbitrary and capricious, beyond the power of the Commission, or in violation of a statutory or constitutional right of the taxpayer.

6. Commission regulations include the following UDITPA language:

402.10 Other Provisions. If the allocation and apportionment provisions of this Regulation do not fairly represent the extent of the taxpayer’s business activity in this state, the taxpayer may petition for, or **the Commissioner may require**, in respect to all or any part of the taxpayer’s business activity, **if reasonable**:

1. Separate accounting;
2. The exclusion of any one of the factors;
3. The inclusion of one or more additional factors which will fairly represent the taxpayer’s business activity in this state; or
4. **The employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer’s income.**

Miss. Admin. Code 35-III-8.06 (2011) (emphasis added). The Court of Appeals is correct that courts in jurisdictions where

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LEXIS 241, 2012 WL 1506006, at *6. Section 27-77-7(4) clearly places the burden on the taxpayer challenging a decision of the Commission to prove its entitlement to relief, just as petitioners in other judicial proceedings bear the burden of proving their claims. We will not impose a burden on the Commission, in contradiction of the Legislature's explicit placement of the burden on the taxpayer, on the basis that courts in states whose legislatures have adopted the UDITPA as law have done so. We conclude that the Court of Appeals erred by reversing the chancellor's judgment requiring Equifax to carry the burden of proving that the Commission's decision was unsupported by substantial evidence, arbitrary and capricious, beyond the power of the Commission, or in violation of a statutory or constitutional right of Equifax.

¶17. Reversing the chancellor's judgment on standard-

the UDITPA has been adopted statutorily have interpreted this language as requiring the party invoking alternative apportionment to prove that the standard apportionment method does not fairly represent the taxpayer's business in the state and that the chosen alternative is reasonable. *Equifax*, 2012 Miss. App. LEXIS 241, 2012 WL 1506006, at **5-6 (citing *Microsoft Corp. v. Franchise Tax Board*, 39 Cal. 4th 750, 47 Cal. Rptr. 3d 216, 139 P.3d 1169, 1178 (Cal. 2006); *Am. Tel. & Tel. Co. v. Huddleston*, 880 S. W. 2d 682, 691 (Tenn. Ct. App. 1994); and *Deseret Pharm. Co. v. State Tax Comm'n*, 579 P.2d 1322, 1326 (Utah 1978)). However, those decisions do not inform our decision, for the Mississippi Legislature has not adopted the UDITPA as law; in Mississippi, this UDITPA language appears in an administrative regulation adopted by the Commission, and the Mississippi Legislature has specifically provided that the taxpayer bears the burden of proof in appeals of Commission decisions.

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of-review and burden-of-proof grounds, the Court of Appeals found the remaining issues raised by Equifax moot. As we hold that the chancellor properly interpreted the applicable standard of review and burden of proof under Section 27-77-7(4), we do not reverse on those grounds. Accordingly, we examine Equifax’s remaining claims of error.

¶18. Equifax argues that the chancellor erred by finding that the use of an alternative apportionment method was not a promulgation of a new rule in violation of the Mississippi Administrative Procedures Act and that the imposition of penalties under Mississippi Code Section 27-13-25(3) was not arbitrary and capricious. These are factual determinations, and “[w]e review the chancellor’s factual determinations applying a manifest-error standard.” *W.C. Fore v. Miss. Dep’t of Revenue*, 90 So. 3d 572, 578 (Miss. 2012) (citation omitted). “This Court will not disturb the findings of a chancellor when supported by substantial evidence unless the chancellor abused his discretion, was manifestly wrong, clearly erroneous or an erroneous legal standard was applied.” *Long Meadow Homeowners’ Ass’n, Inc. v. Harland*, 89 So. 3d 573, 577 (Miss. 2012) (citation omitted).

¶19. We hold that the chancellor did not manifestly err by finding that the Commission’s requirement of an alternative apportionment method for Equifax’s income did not amount to a rule, unduly promulgated in violation of the Mississippi Administrative Procedures Act.⁷

7. Under the Mississippi Administrative Procedures Act, an agency must observe certain procedures prior to promulgating a

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Equifax argues that the Commission promulgated a new rule for all service companies when it required Equifax to use an alternative apportionment method, because the Commission did “not rely upon a single fact unique to Equifax’s situation in support of invoking alternative apportionment[,]” but premised its requirement of alternative apportionment “solely on the fact that Equifax is a service company and makes sales to customers located in Mississippi.” We disagree. Equifax presented no evidence that the Commission promulgated a new standard apportionment method for all service companies. Rather, the Commission required Equifax to use an alternative apportionment method under an existing rule, which provides that, “[i]f the [standard] allocation and apportionment provisions do not fairly represent the extent of the taxpayer’s business activity in this state, . . . the Commissioner may require . . . [t]he employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer’s income.” Miss. Admin. Code 35-III-8.06-402.10. This language clearly provides for the Commission to require alternative apportionment where the standard allocation of income does not fairly represent a taxpayer’s activity in the state - such as Equifax’s allocation of zero income to Mississippi, despite having employees in the state and receiving \$22,679,340 for services provided to customers in Mississippi during the audit period. The Commission’s judgment requiring

new rule, including considering and composing a written report on the economic impact and benefits of the rule, filing notice with the Secretary of State at least twenty-five days before adopting the rule, and, if requested by a political subdivision, agency, or at least ten persons, holding an oral hearing. Miss. Code Ann. §§ 25-43-3.101 to 25-43-3.114 (Rev. 2010).

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Equifax to use an alternative apportionment method did not bind other service companies to the alternative apportionment method imposed on Equifax or alter the standard apportionment method prescribed by Commission regulation. We agree with the chancellor's conclusion that the Commission "utilized an existing alternative method as prescribed under an existing rule. Therefore, no new promulgation of a rule occurred."

¶20. We likewise hold that the chancellor did not commit manifest error by concluding that Equifax had failed to prove that the Commission's imposition of penalties pursuant to Mississippi Code Section 27-13-25(3) (2005) (amended 2009) warranted reversal. Section 27-13-25 provided additional penalties to be imposed "[i]n case of failure to pay any additional taxes as assessed under this section, *unless it is shown that the failure is due to reasonable cause and not due to willful neglect . . .*" Miss. Code Ann. § 27-13-25(3) (emphasis added). Equifax argues that the chancellor is vested with authority to reverse the imposition of penalties because it disagreed with the Commission's decision - reiterating its argument that the chancery court is to apply a *de novo* standard of review to appeals of Commission decisions. We disagree. The chancellor properly found as follows:

this Court cannot find that the imposition of penalties is unsupported by substantial evidence, arbitrary or capricious, beyond the power of the [Commission], or violative of some statutory or constitutional right of Equifax. This Court cannot abate penalties based solely

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upon its disagreement with the [Commission's] finding as to whether Equifax acted reasonably and without willful neglect.

The chancellor was correct that he could not reverse the Commission's decision to impose penalties solely because he would have found differently than the Commission; rather, he could reverse only if Equifax proved that the imposition of penalties was unsupported by substantial evidence presented to the Commission, arbitrary and capricious, beyond the power of the Commission, or in violation of Equifax's statutory or constitutional rights - which the chancellor found Equifax had failed to do. As the chancellor pointed out in his order, it was clear that "the lack of any taxable income attributable to the State of Mississippi is not a fair assessment of Equifax's income earned within the state." We find that the chancellor did not commit manifest error by concluding that Equifax failed to prove that it was entitled to reversal of the Commission's imposition of penalties. Accordingly, we conclude that the chancellor did not err by affirming the Commission's decision, based on the evidence presented at the evidentiary hearing.

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CONCLUSION

¶21. For the reasons discussed above, we reverse the judgment of the Court of Appeals and reinstate and affirm the judgment of the Hinds County Chancery Court affirming the Mississippi State Tax Commission's use of an alternative apportionment method and assessment of income taxes and penalties against Equifax.

¶22. THE JUDGMENT OF THE COURT OF APPEALS IS REVERSED. THE JUDGMENT OF THE HINDS COUNTY CHANCERY COURT IS REINSTATED AND AFFIRMED.

WALLER, C.J., DICKINSON, P.J., KITCHENS, PIERCE, KING AND COLEMAN, JJ., CONCUR. LAMAR, J., CONCURS IN PART AND IN RESULT WITHOUT SEPARATE WRITTEN OPINION. CHANDLER, J., NOT PARTICIPATING.

**APPENDIX B — OPINION OF THE COURT OF
APPEALS OF THE STATE OF MISSISSIPPI,
DATED MAY 1, 2012**

IN THE COURT OF APPEALS
OF THE STATE OF MISSISSIPPI

NO. 2010-CA-01857-COA

EQUIFAX, INC. AND EQUIFAX CREDIT
INFORMATION SERVICES, INC.

APPELLANT,

v.

MISSISSIPPI DEPARTMENT OF REVENUE
F/K/A MISSISSIPPI STATE TAX COMMISSION

APPELLEE.

**BEFORE GRIFFIS, P.J., BARNES AND ISHEE,
JJ.**

GRIFFIS, P.J., FOR THE COURT:

¶1. This is the appeal of an assessment of Mississippi state income taxes. The Mississippi Department of Revenue (“Department”) conducted an audit of state income taxes and determined that additional taxes were owed. The taxpayers disputed the assessment and appealed the Department’s assessment to the chancery court. The Hinds County Chancery Court affirmed the assessment. The taxpayers now appeal the chancellor’s judgment

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and argue that: (1) the chancellor applied the incorrect standard of review; (2) the chancellor improperly placed the burden of proof on the taxpayers for alternative apportionment; (3) the Department's use of special apportionment violated the Mississippi Administrative Procedure Act; and (4) the assessed penalties were erroneous because the chancellor found the taxpayers acted reasonably and without willful neglect. Finding reversible error, we reverse and remand the judgment of the chancery court for further proceedings consistent with this opinion.

PROCEDURAL AND FACTUAL HISTORY

¶2. The taxpayers are Equifax, Inc. and Equifax Credit Information Services, Inc. ("ECIS") (collectively referred to as "Equifax"). Equifax, Inc. is a Georgia corporation in the business of consumer credit reporting. It sells credit information and other services to consumers and businesses across the country. Equifax, Inc. was registered to do business and was in fact doing business in Mississippi. Equifax, Inc. is the parent company of ECIS. The services provided by Equifax, Inc and ECIS include: credit reporting, information services, direct mail marketing, risk management, and mortgage loan processing and approval. The primary services provided are credit reports, credit scores, and fraud alerts.

¶3. The Department audited Equifax for payment of state income taxes for the period of January 1, 2000, through December 31, 2003 (the "audit period"). During the audit period, Equifax had approximately 800 customers

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located in Mississippi. The revenue generated from these Mississippi customers was \$5,275,406 in 2000, \$6,579,281 in 2001, \$5,646,283 in 2002, and \$5,178,370 in 2003. Based on these figures, the total gross receipts for the sale of Equifax's services provided to Mississippi customers during the audit period totaled \$22,679,340.

¶4. Equifax did not have a corporate office in Mississippi but employed three Mississippi residents. Equifax's Mississippi customers requested and received services from Equifax at their Mississippi locations. These transactions primarily occurred electronically and took approximately three seconds from the time the customer requested the credit report or score to the time they received the information.

¶5. Equifax timely filed Mississippi state income tax returns for each year in the audit period. However, Equifax reported no taxable income in the State for each of these years and paid no income tax for each year. In computing taxable income, Equifax relied on the Department's regulations and the standard-apportionment method for service companies. As a result, Equifax determined that it had no income subject to tax in Mississippi.¹

¶6. At the conclusion of the audit, on February 28, 2008, the Department issued assessments against Equifax.

1. In years prior to the audit period, Equifax used a different apportionment method. The method used in the earlier years resulted in the payment of Mississippi state income taxes.

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The Department determined that the apportionment method used by Equifax did not fairly reflect the extent of Equifax's business in Mississippi. The Department determined Equifax should have used an alternative-apportionment method, a market-based sourcing method, during the audit period.

¶7. Equifax disagreed with the assessments and appealed the assessments to the Mississippi Tax Commission Board of Review (the "Board").² The Board upheld the assessments in a reduced amount. Equifax then appealed to the three-member Tax Commission, which upheld the Board's reduced assessments.

¶8. On May 29, 2009, Equifax paid the assessments, under protest, including interest and penalties. Equifax, Inc.'s assessments totaled \$467,836; and ECIS's assessments totaled \$271,201.

¶9. On June 1, 2009, pursuant to Mississippi Code Annotated section 27-77-7 (Rev. 2008), Equifax appealed the assessment to the Hinds County Chancery Court. He held an evidentiary hearing on all issues presented. The chancellor then entered an order and final judgment, dated October 26, 2010, affirming the Department's assessments. From this judgment, Equifax appeals.

2. Since the time of the audit, the Mississippi State Tax Commission has changed its name to the Mississippi Department of Revenue.

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ANALYSIS

1. Whether the chancellor applied the incorrect standard of review.

¶10. An appellate court's review should always begin with the standard of review. The correct standard of review here proves conclusive.

¶11. Typically, the standard of review in the appeal from an administrative agency decision is "limited by the arbitrary and capricious standard." *Buelow v. Glidewell*, 757 So. 2d 216, 219 (¶9) (Miss. 2000) (citing *Miss. State Tax Comm'n v. Mask*, 667 So. 2d 1313, 1315 (Miss. 1995); *Miss. State Tax Comm'n v. Dyer Inv. Co.*, 507 So. 2d 1287, 1289 (Miss. 1987)). This means that the reviewing court may "reverse the decision of an administrative agency **only if** the decision (1) was unsupported by substantial evidence; (2) was arbitrary and capricious; (3) was beyond the power of the administrative agency . . . ; or (4) violated the complaining party's statutory or constitutional right . . ." *Buffington v. Miss. State Tax Comm'n*, 43 So. 3d 450, 453-54 (¶12) (Miss. 2010) (footnote omitted and emphasis added). The chancellor cited his standard of review in his order.

¶12. Normally, the Department, as an administrative agency, is entitled to the above standard of review. This is not the normal case. The Legislature has established a different standard that is applies here.

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¶13. In Title 27, Chapter 77 of the Mississippi Code Annotated, titled “Appellate Review for Taxpayers Aggrieved by Certain Actions of the Department of Revenue,” the Legislature determined that a different appellate standard of review should be used when considering Department findings. Both the Department and Equifax agree that section 27-77-7 governs this appeal.

¶14. Section 27-77-7(4), as of the date of this appeal,³ provided:

The chancery court in which a petition under subsection (1) of this section is properly filed shall have jurisdiction to hear and determine the cause or issues joined as in other cases. In any petition in which the taxpayer is seeking a refund or credit for an alleged overpayment of tax or for taxes paid under protest under subsection (3) of this section, the taxpayer shall prove by a preponderance of the evidence that he alone bore the burden of the tax sought to be refunded or credited and did not directly or indirectly collect the tax from anyone else. *At trial of any action brought under this section, the chancery*

3. We note that Section 27-77-7 was amended effective July 1, 2010. The amendment changed subsection (4) and restated it as subsection (5). The amendment also made several non-substantive changes to the statute’s language. The amendment does not affect the outcome of this appeal, but does create some confusion for this opinion.

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court shall give deference to the decision and interpretation of law and regulations by the [Department] as it does with the decisions and interpretation of any administrative agency, but it shall try the case de novo and conduct a full evidentiary judicial hearing on the issues raised. Based on the evidence presented at trial, the chancery court shall determine whether the party bringing the appeal has proven by a preponderance of the evidence or a higher standard if required by the issues raised, that he is entitled to any or all of the relief he has requested. The chancery court shall decide all questions presented, including those as to legality and the amount of tax or refund due, and if it finds that the tax assessment or denial of refund claim in issue is incorrect or invalid, in whole or in part, it shall determine the amount of tax or refund due, including interest and, if applicable, penalty to date, and enter such order or judgment as it deems proper. . . .

(Emphasis added).

¶15. We begin with the standard of review cited in the chancellor's order. The chancellor first cited the arbitrary-and-capricious standard as the appropriate standard of review. Then, the chancellor began his discussion with a block quote of section 27-77-7. However, the chancellor then held:

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Equifax clearly bears the burden of proving, by a preponderance of the evidence, that the decision of the [Department] is reversible under the limited circumstances set forth above. “A rebuttable presumption exists in favor of the administrative agency’s decision and findings, and the challenging party has the burden of providing otherwise.” *Cummings. v. Miss. Dep’t of Employment Sec.*, 980 So. 2d 340, 344 (Miss. Ct. App. 2008). This court cannot find that Equifax has met this burden.

¶16. As set forth above, the correct standard of review is found in section 27-77-7(4). The chancellor’s citation to *Cummings*, an appeal of a Mississippi Employment Security Commission, provides no authority or guidance here. In fact, *Cummings* directly contradicts the express language of section 27-77-7(4). Section 27-77-7(4) neither sanctions nor allows the chancellor to give a “rebuttable presumption . . . in favor of” the Department’s finding. The chancellor’s application of the standard of review was error.

¶17. This appeal presents an interesting contrast of positions. Both parties cite the same sentence of section 27-77-7(4) as the operative language:

At trial of any action brought under this section, the chancery court shall give deference to the decision and interpretation of law and regulations by the [Department] as it does

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with the decisions and interpretation of any administrative agency, but it shall try the case de novo and conduct a full evidentiary judicial hearing on the issues raised.

In its brief, the Department highlights the first portion of this sentence, and Equifax highlights the second portion of the sentence. Before the chancellor, the Department was successful because the chancellor clearly gave “deference” to the Department’s decision. Equifax claims that it was reversible error for the chancellor to give the Department deference; instead, the chancellor was required to “try the case de novo.”

¶18. This Court and the parties agree that section 27-77-7(4) required the chancellor conduct a trial de novo. This case seems to create a conflict as to exactly what a trial de novo means in an appeal from a Department decision.

¶19. In *Mississippi State Tax Commission v. ANR Pipeline Co.*, 806 So. 2d 1081, 1084 (¶14) (Miss. 2001), the supreme court held that a similar statute “should be applied literally to require circuit courts to try ad valorem tax cases anew[.]” A de novo review “means that the case shall be tried the same as if it had not been tried before, and the court conducting such a trial may substitute its own findings and judgment for those of the inferior tribunal from which the appeal is taken.” *Cal. Co. v. State Oil & Gas Bd.*, 200 Miss. 824, 838-39, 27 So. 2d 542, 544 (1946) (citing *Knox v. L.N. Dantzler Lumber Co.*, 148 Miss. 834, 854-55, 114 So. 873, 876 (1927)). Thus, the chancery court’s review of the Department’s decision should have

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been conducted just as if the chancery court were sitting as the Department.

¶20. We move to the question of what the Legislature intended when it included the instruction for the chancellor to give “deference to the decision and interpretation of law and regulations by the Department of Revenue as it does with the decisions and interpretation of any administrative agency[.]” Miss. Code Ann. § 27-77-7(4). The general definition of the word “deference” would mean that the chancellor should submit to or respect the Department’s interpretation of its regulations.

¶21. Here, deference to the Department’s decision would interfere with the chancery court’s ability to try the case anew. If the chancery court were to try this case as if it were the Department, the Department would have the burden to prove that its assessment method was correct.

¶22. Equifax computed its taxable income based on the Department’s *standard* formula for service companies. *See* Miss. Admin. Code 35-III-8.06:402.09. The Department made the assessment based on its determination that an alternative apportionment formula should be used. *See* Miss. Admin. Code 35-III-8.06:402.10. Regulation 402.10 states:

Other Provisions. If the allocation and apportionment provisions of this Regulation do not fairly represent the extent of the taxpayer’s business activity in this state, the taxpayer may petition for, or the Commissioner may require,

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in respect to all or any part of the taxpayer's business activity, if reasonable:

1. Separate accounting;
2. The exclusion of any one of the factors;
3. The inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this state; or
4. The employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

Mississippi has not adopted the Uniform Division of Income for Tax Purposes Act ("UDITPA"). However, Regulation 402.10 is modeled after UDITPA section 18.⁴

4. Section 18 provides:

If the allocation and apportionment provisions of this Act do not fairly represent the extent of the taxpayer's business activity in this state, the taxpayer may petition for or the [tax administrator] may require, in respect to all or any part of the taxpayer's business activity, if reasonable: (a) separate accounting; (b) the exclusion of any one or more of the factors; (c) the inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this state; or (d) the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

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Because this provision of our regulations is modeled after UDITPA, we look to other jurisdictions regarding the burden of proof when alternative apportionment is used.

¶23. In *Microsoft Corp. v. Franchise Tax Board*, 139 P.3d 1169, 1178 (Cal. 2006), the California Supreme Court analyzed the implications of alternative apportionment under UDITPA. The Tax Board argued that the amount of tax paid to California did not fairly represent the amount of business in the state. *Id.* The court held “[a]s the party invoking [the UDITPA alternative-apportionment provision], *the Board has the burden of proving by clear and convincing evidence that (1) the approximation provided by the standard formula is not a fair representation; and (2) its proposed alternative is reasonable.*” *Id.* (emphasis added).

¶24. Other jurisdictions have come to a similar conclusion. The Tennessee Court of Appeals held “[t]he standard statutory apportionment formula is presumed to be correct, and *the party seeking to employ an alternate method has the burden of showing that the statutory method is inappropriate.*” *Am. Tel. & Tel. Co. v. Huddleston*, 880 S.W.2d 682, 691 (Tenn. Ct. App. 1994) (emphasis added). The Utah Supreme Court held “[a] pportionment under the [UDITPA] is the prescribed method. *The use of any method other than apportionment should be exceptional, and the party who seeks to invoke the applicability of the relief provisions has the burden of proof.*” *Deseret Pharm. Co. v. State Tax Comm’n*, 579 P.2d 1322, 1326 (Utah 1978) (emphasis added).

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¶25. Here, the matter tried before the chancellor had to be tried just as if it were first tried before the Department. The problem is that the chancellor in effect switched the burden of proof by giving the Department “deference” or the benefit of a “rebuttable presumption.” This case must be decided based on whether the Department met its burden of proof that the alternate-apportionment method was appropriate rather than the standard-apportionment method set forth in its regulations. For the Department to prevail, the Department must first meet this burden of proof.

¶26. The chancellor’s order questions the Department’s ability to meet its burden of proof. Regardless, the order indicates that the chancellor’s decision was based on his incorrect application of the standard of review. The chancellor’s order held:

This Court further agrees with Equifax that there are other methods preferable to the apportionment method utilized by the MSTC. However, when interpreting the rules, regulations[,] and statutes under which the Commission operates this Court cannot substitute its “judgment for the agency’s unless the latter’s interpretation is arbitrary and unreasonable.” *Owens Corning v. [Miss. Ins. Guar. Ass’n]*, 947 So. 2d 944, 945-46 (Miss. 2007) (citing *Elec. Data Sys. Corp. v. Miss. Div. of Medicaid*, 853 So. 2d 1192, 1202 (Miss. 2003)). Although th[is] Court finds the application of equitable apportionment and the market-based

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sourcing method to be somewhat concerning, it cannot be said to rise to the level of arbitrary or unreasonable.

¶27. Equifax as the taxpayer apparently relied on the prescribed income tax formula for service companies. After receiving no tax payments, the Department concluded that the income tax reported by Equifax did not fairly represent the amount of business Equifax did in Mississippi. The Department sought to use the alternative-apportionment formula provided in Regulation 402.10. Thus, before the Board of Review and on appeal to the chancery court, the Department had the burden of proof to prove: (1) the standard formula does not fairly represent the activities of Equifax within the State; and (2) the alternative formula to be used is reasonable.

¶28. We find that the chancellor committed reversible error, under Section 27-77-7(4), when he gave the Department the benefit of a rebuttable presumption and when he applied an arbitrary-and-capricious standard. Having applied this standard, the chancellor did not conduct a de novo review of the matter. Section 27-77-7(4) expressly requires that:

The chancery court shall decide all questions presented, including those as to legality and the amount of tax or refund due, and if it finds that the tax assessment or denial of refund claim in issue is incorrect or invalid, in whole or in part, it shall determine the amount

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of tax or refund due, including interest and, if applicable, penalty to date, and enter such order or judgment as it deems proper.

¶29. Because the Department sought to use an alternative-apportionment method and the Department bore the burden of proof that such alternative apportionment was the proper method to assess Equifax's income tax obligation, and because the case is to be tried de novo or "anew," the Department retains the burden of proof before the chancellor. The chancellor must decide whether the Department met its burden of proof, and the Department must prove anew that the alternate-apportionment method was indeed correct method.

¶30. The Legislature has created an appellate safeguard to the Department's assessment of taxes and required that the chancellor "shall decide all questions presented . . . and enter such order or judgment as it deems proper." Miss. Code Ann. § 27-77-7. Thus, we conclude that the chancellor was incorrect as a matter of law to give deference to the Department's decision and apply an arbitrary and capricious standard.

¶31. Here, the chancellor failed to decide all questions presented. He recognized that the Department may not have met its burden of proof when he held "[t]his Court further agrees with Equifax that there are other methods preferable to the apportionment method utilized by the MSTC." Accordingly, we reverse the chancellor's judgment and remand for further proceedings consistent with this opinion.

*Appendix B***2. Whether the use of special apportionment violates the Mississippi Administrative Procedures Act.**

¶32. To expedite the review of this case, we also consider another issue presented by Equifax.

¶33. Equifax argues that the Department implemented a new rule to determine the amount of taxes it owed without following the procedure for an agency adopting an amendment to a specific rule. Specifically, Equifax argues the Department failed to consider the economic impact of the proposed rule. Mississippi Code Annotated section 25-43-3.105(1) (Rev. 2010) states:

Prior to giving the notice required in [Mississippi Code Annotated s]ection 25-43-3.103 [(Rev. 2010)], each agency proposing the adoption of a rule or significant amendment of an existing rule imposing a duty, responsibility or requirement on any person shall consider the economic impact the rule will have on the citizens of our state and the benefits the rule will cause to accrue to those citizens. For purposes of this section, a “significant amendment” means any amendment to a rule for which the total aggregate cost to all persons required to comply with that rule exceeds One Hundred Thousand Dollars (\$100,000.00).

¶34. Here, the Department did not create a new tax policy, but rather relied on a regulation that was previously in

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place. Regulation 402.10 is currently in the tax regulations relied on by taxpayers and the Department. In the regulation, a taxpayer or the Commissioner may seek to use alternative apportionment. *See* Miss. Admin. Code 35-III-8.06:402.10. The Department did not implement a new rule, but rather relied on regulations in place. Further, the Department did not issue a rule for all service companies, but rather relied on a previously existing regulation for use in Equifax's situation. Applying a regulation on an ad hoc basis does not conflict with the Mississippi Administrative Procedure Act.

¶35. Accordingly, we find this issue has no merit.

¶36. All other issues presented in this appeal are rendered moot by the reversal and remand of this action.

¶37. THE JUDGMENT OF THE CHANCERY COURT OF HINDS COUNTY IS REVERSED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLEE.

LEE, C.J., BARNES, ISHEE, ROBERTS, CARLTON, MAXWELL, RUSSELL AND FAIR, JJ., CONCUR. IRVING, P.J., DISSENTS WITHOUT SEPARATE WRITTEN OPINION.

**APPENDIX C — AMENDED ORDER OF THE
CHANCERY COURT OF THE FIRST JUDICIAL
DISTRICT OF HINDS COUNTY, MISSISSIPPI,
FILED NOVEMBER 4, 2010**

IN THE CHANCERY COURT OF THE FIRST
JUDICIAL DISTRICT OF HINDS COUNTY,
MISSISSIPPI

NO. G-2009-884 T/1

EQUIFAX, INC. and EQUIFAX CREDIT
INFORMATION SERVICES, INC.,

Petitioners,

vs.

MISSISSIPPI STATE TAX COMMISSION,

Defendant.

AMENDED ORDER OF THE COURT

THIS ORDER IS AMENDED SOLELY TO
INCLUDE PAGES MISTAKENLY OMITTED IN THE
COURT'S PREVIOUS ORDER.

BEFORE THIS COURT is an appeal by Petitioners,
Equifax, Inc. and Equifax Credit Information Services,
Inc. (hereinafter "Equifax") of the Final Order of
the Mississippi State Tax Commission (hereinafter
"Commission") dated May 5, 2009, assessing certain

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income tax and penalties. Equifax paid the assessed liabilities under protest on or about May 29, 2009 and timely filed their appeal in accordance with Miss. Code Ann. § 27-7-7 on or about June 1, 2009. The Commission subsequently filed a Motion for Summary Judgment which this Court denied on April 20, 2010. This Court held hearing on the matter on May 3 and 4, 2010, allowing both parties to submit both oral and written argument. Both Petitioners and Defendant subsequently filed proposed findings of fact and conclusions of law for this Court's consideration. Full briefing of this matter was completed in July 2010. The Court has carefully considered all argument, as well as all case and statutory law, and makes the following findings.

FACTS

Equifax, Inc. and Equifax Credit Information Services ("ECIS") (together referred to herein as "Equifax") were audited by the Mississippi State Tax Commission ("MSTC" or the "Commission") for income tax purposes for the period of January 1, 2000 through December 31, 2003 (the "Audit Period"). At the conclusion of the audit, the MSTC issued assessments against Equifax on February 28, 2008. Equifax appealed the Assessments to the MSTC Board of Review which held a hearing on the appeals and issued Orders on October 8, 2008, upholding and affirming the Assessments in a reduced amount. Equifax then appealed to the three-member Tax Commission, which after holding a hearing in the matter, issued Orders on May 5, 2009, upholding and affirming the income tax Assessments as reduced by the Board of

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Review. Equifax paid the assessed liabilities under protest on May 29, 2009, and filed the Appeals currently before this Court on June 1, 2009. On June 29, 2009, the parties filed a Joint Motion for Consolidation and this Court entered its Order consolidating these cases on July 2, 2009.

Equifax is one of the three largest consumer credit reporting agencies in the United States and is engaged in the sale of credit information and other services to consumers and businesses across the country. Equifax is a Georgia corporation that, at all times relevant, was registered to do business, and was in fact doing business, in Mississippi. During the Audit Period, Equifax provided services, including, but not limited to, credit reporting, information services, direct mail marketing services, risk management services, and mortgage loan processing and approval services. The primary services provided by Equifax are credit reports, credit scores, and fraud alerts. During the Audit Period, Equifax had approximately 800 customers located in Mississippi. The revenue generated for Equifax by these Mississippi customers was \$5,275,406 in 2000, \$6,579,281 in 2001, \$5,646,283 in 2002, and \$5,178,370 in 2003. Based on these figures, the total gross receipts attributable to the sales of services provided to customers located in Mississippi during the Audit Period was \$22,679,340.

Although Equifax did not have a corporate office in Mississippi during the Audit Period, Equifax did have employees and property in Mississippi during each year included in the Audit Period. Specifically, Equifax had three employees who lived in Mississippi. One employee

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was an account manager for several Mississippi accounts, and multiple other accounts outside of Mississippi. One employee was a customer service representative for Mississippi customers. The third employee was a credit marketing services representative who did not have customers in Mississippi. Equifax also employed two individuals who lived in Louisiana and had a few customers within Mississippi. Equifax's customers located in Mississippi both requested and received services from Equifax at their Mississippi locations. These transactions primarily occur electronically and take approximately three seconds on average from the time the customer requests the credit report or score to the time that they receive the information.

Equifax filed income tax returns with the State of Mississippi for each year included in the Audit Period and reported \$0 of taxable income in Mississippi for each of these years. Equifax paid \$0 of income tax to the State of Mississippi for each year included in the Audit Period. Equifax relied on Miss. Admin. Code 35.III.8.06.402.06 and 35.III.8.06.402.09 when reporting income to Mississippi for the years included in the Audit Period. Miss. Admin. Code 35.III.8.06.402.06 provides that service companies shall apportion their income to Mississippi using a single sales factor apportionment formula as defined in paragraph 3 of Miss. Admin. Code 35.III.8.06.402.09. The result of Equifax utilizing the apportionment method prescribed in Miss. Admin. Code 35.III.8.06.402.09 results in \$0 of taxable income being subject to tax in Mississippi. In the years prior to those included in the Audit Period, Equifax had previously

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reported income and paid income tax to the State of Mississippi based upon a method whereby income from services provided to customers located in Mississippi was sourced to Mississippi. This previous method never resulted in Equifax having \$0 of taxable income being subject to tax in Mississippi. Since 2005, Equifax has utilized another methodology in reporting their income in the State of Mississippi using a single sales factor where payroll is used as a proxy for sale.

After the relevant audit, the MSTC determined that Equifax's utilization of the apportionment method prescribed in Miss. Admin. Code 35.III.8.06.402.09 did not fairly reflect the extent of Equifax's business activity in the State of Mississippi. Miss. Admin. Code 35.III.8.06.402.10 provides that if the apportionment provisions of the regulation do not fairly represent the extent of the taxpayer's business activity in Mississippi, then a taxpayer may petition for or the Commissioner may require, if reasonable, the employment of any other method to effectuate an equitable apportionment of the taxpayer's income. Therefore, the MSTC determined that a market-based sourcing method was the appropriate methodology for the apportionment of Equifax's income to the State of Mississippi during the years included in the Audit Period. The market-based sourcing method utilized by the MSTC was termed a service fee revenue factor and was determined based upon the gross receipts attributable to the services being provided by Equifax to its customers located in Mississippi.

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The final amount of the Assessment imposed against Equifax, Inc. is \$467,836, including interest and penalties. The final amount of Assessment imposed against ECIS is \$271,201, including interest and penalties.

STANDARD AND SCOPE OF REVIEW

Mississippi law regarding administrative agency appeals is well settled. Courts are to give great deference to an administrative agency's construction of its own rules and regulations and the statutes under which it operates. *Mississippi State Tax Comm'n v. Mask*, 667 So. 2d 1313, 1314 (Miss. 1995); *Melody Manor Convalescent Ctr. v. Mississippi State Dept. of Health*, 546 So. 2d 972, 973 (Miss. 1989); *General Motors Corp. v. Mississippi State Tax Comm'n*, 510 So. 2d 498, 502 (Miss. 1987). "When reviewing orders of a state agency, the trial court and [the Mississippi Supreme Court] are limited by the arbitrary and capricious standard." *Mississippi State Tax Comm'n v. Mask*, 667 So. 2d 1313, 1314 (Miss. 1995) (citing *Mississippi State Tax Comm'n v. Inv. Co., Inc.*, 507 So. 2d 1287, 1289 (Miss. 1987)). This Court's review of the Order of the Mississippi State Tax Commission must be only to determine whether or not the order "(1) was supported by substantial evidence, (2) was arbitrary or capricious, (3) was beyond the power of the administrative agency to make, or (4) violated some statutory or constitutional right of the complaining party. This rule has been thoroughly settled in this state." *Mississippi State Tax Comm'n v. Vicksburg Terminal, Inc.*, 592 So. 2d 959, 961 (Miss. 1991) (quoting *Mississippi State Tax Comm'n v. Mississippi-Alabama State Fair*, 222 So. 2d 664, 665 (Miss. 1969)).

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DISCUSSION

Equifax seeks a refund of taxes paid under protest in accordance with the provisions of Miss. Code Ann. § 27-77-7. Said statute provides in pertinent part as follows:

... The chancery court in which a petition under subsection (1) of this section is properly filed shall have jurisdiction to hear and determine said cause or issues joined as in other cases. In any petition in which the taxpayer is seeking a refund or credit for an alleged overpayment of tax or for taxes paid under protest under subsection (3) of this section, the taxpayer shall prove by a preponderance of the evidence that he alone bore the burden for the tax sought to be refunded or credited and did not directly or indirectly collect the tax from anyone else. At trial of any action brought under this section, the chancery court shall give deference to the decision and interpretation of law and regulations by the commission as it does with the decisions and interpretation of any administrative agency, but it shall try the case de novo and conduct a full evidentiary judicial hearing on the issues raised. Based on the evidence presented at the hearing, the chancery court shall determine whether the taxpayer has proven, by a preponderance of the evidence or a higher standard if required by the issues raised, that he is entitled to any or all of the relief he has requested.

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In this matter, Equifax clearly bears the burden of proving, by a preponderance of the evidence, that the decision of the MSTC is reversible under the limited circumstances set forth above. “A rebuttable presumption exists in favor of the administrative agency’s decision and findings, and the challenging party has the burden of proving otherwise.” *Cummings v. Miss. Dep’t of Employment Sec.*, 980 So. 2d 340, 344 (Miss. Ct. App. 2009). This Court cannot find that Equifax has met this burden.

Prior to the Audit Period, Equifax utilized a methodology which resulted in positive taxable income to the State of Mississippi on a yearly basis. However, during the Audit Period, Equifax utilized a methodology which resulted in \$0 taxable income to the State of Mississippi. During this same Audit Period, Equifax received \$22,679,340 in gross receipts attributable to sales of services provided to customers located in Mississippi. Equifax argues that it utilized a methodology specifically allowed in the Mississippi tax regulations. However, it is disingenuous to allege that Equifax could reasonably believe that \$0 of taxable income was a fair representation of Equifax’s business activity in Mississippi that yielded over \$22,000,000 in gross receipts. Miss. Admin. Code 3S.III.8.06.402.10 provides for alternative methods of income tax apportionment if either the taxpayer or the Commissioner determines that the allocation and apportionment provisions of the relevant regulations do not fairly represent the extent of the taxpayer’s business activity in the state. MSTC interpreted this regulation to allow for a market-based sourcing method to be utilized to determine the apportionment of Equifax’s income to the

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State of Mississippi for the years included in the Audit Period This Court is mindful that the MSTC should be granted great deference in interpreting its own statutes and regulations. *See Mississippi State Tax Comm'n v. Mask*, 667 So. 2d 1313, 1314 (Miss. 1995). *See also In re Dean*, 972 So. 2d 590, 594 (Miss. 2008) (finding that great deference is afforded to an agency's interpretation of statutes and rules that govern its operation). In fact, our Mississippi Supreme Court has specifically stated that unless an agency's interpretation is manifestly contrary to the law, that interpretation should be given controlling weight *Manufab, Inc. v. Mississippi State Tax Comm'n*, 808 So. 2d 947, 950 (Miss. 2002) (*citing Miss. Dept of Env'tl. Quality v. Weems*, 653 So. 2d 266, 273 (Miss. 1995)).

This Court agrees with Equifax that a corporation should be allowed to rely upon apportionment methods specifically authorized by the MSTC's own regulations. However, the MSTC regulations also specify that the Commissioner may utilize alternative methods to fairly represent a corporation's business activity in the State. Further, this Court does note that Equifax utilized a different method for multiple tax years prior to unilaterally adopting the standard apportionment method. Finally, this Court notes that it would be unreasonable to allow Equifax to receive \$22,000,000 in gross receipts from business within Mississippi without incurring any income tax.

This Court further agrees with Equifax that there are other methods that are preferable to the apportionment method utilized by MSTC. However, when interpreting

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the rules, regulations and statutes under which the Commission operates, this Court cannot substitute its “judgment for the agency’s unless the latter’s interpretation is arbitrary or unreasonable.” *Owens Corning v. Mississippi Insurance Guaranty Association*, 947 So. 2d 944, 945-46 (Miss. 2007)(citing *Elec. Data Sys. Corp. v. Miss. Div. of Medicaid*, 853 So. 2d 1192, 1202 (Miss. 2003)). Although the Court finds the application of equitable apportionment and the market-based sourcing method to be somewhat concerning, it cannot be said to rise to the level of arbitrary or unreasonable.

Our Mississippi Supreme Court has not had opportunity to address the issue of equitable apportionment. However, the Tennessee Court of Appeals recently considered a similar variance assessment utilizing a market/circulation based method of sourcing revenues similar to the method utilized by the MSTC herein. In *Bellsouth Advertising & Publishing Corp. v. Chumley*, 308 S.W. 3d 350 (Tenn. App. 2009), the Court determined that the cost of performance method did not fairly represent the taxpayer’s business in the State of Tennessee and that the issuance of the variance assessment was appropriate. This Court finds wisdom in that decision. Obviously, a determination of \$0 taxable income within the State of Mississippi is not a fair and accurate representation of the \$22,000,000 business that Equifax conducted in Mississippi. Our Mississippi Supreme Court has found that the “purpose of the state income tax law, insofar as a foreign corporation is concerned, is to tax its income, which is earned in the state.” *McWilliams Dredging Co v. McKeigney*, 227 Miss. 730, 746, 86 So. 2d 672, 677 (Miss. 1956) (citing *Mississippi*

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Cottonseed Products Co. v. Stone, 184 Miss. 409, 184 So. 428. Clearly, the lack of any taxable income attributable to the State of Mississippi is not a fair assessment of Equifax's income earned within the state.

This Court has also considered the constitutional challenges raised on behalf of Equifax. However, Equifax has provided this Court with no authority for the proposition that the methodology utilized by MSTC is violative of the United States Constitution. To the contrary, this Court notes that other states currently utilize the same method set forth by MSTC. In fact, Equifax filed returns in four other states during the Audit Period which utilized the same market-based sourcing. Therefore, this Court cannot find that Equifax's constitutional rights have been violated. Similarly, this Court declines to find that the determination by MSTC to rely on equitable apportionment amounts to a new promulgation of a rule contrary to the Mississippi Administrative Procedures Act. MSTC determined that the use of the method contained in Miss. Admin. Code 35.III.8.06.402.09 did not fairly represent the extent of Equifax's business activity in Mississippi and therefore utilized an alternative method pursuant to Miss. Admin. Code 35.III.8.06.402.10. Accordingly, MSTC utilized an existing alternative method as prescribed under an existing rule. Therefore, no new promulgation of a rule occurred. Finally, this Court declines to abate the imposition of penalties. The assessment of penalties is determined by the MSTC in accordance with statute. Similar to the findings set forth above concerning the primary matter, this Court cannot find that the imposition of penalties is unsupported by

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substantial evidence, arbitrary or capricious, beyond the power of the MSTC or violative of some statutory or constitutional right of Equifax. This Court cannot abate penalties based solely upon its disagreement with MSTC's finding as to whether Equifax acted reasonably and without willful neglect. MSTC determined that penalties were proper in this instance. This Court cannot substitute its own judgment as Equifax has not demonstrated that the determination of MSTC was either unreasonable or arbitrary. Therefore, this Court cannot abate the penalties as requested by Petitioner.

CONCLUSION

This Court has reviewed all relevant pleadings in this action, as well as all relevant statutes and regulations. It is not the role of this Court to substitute its own judgment for that of the Commission. Instead this Court is limited in its review to determining whether the Commission's order (1) was supported by substantial evidence, (2) was arbitrary or capricious, (3) was beyond the power of the administrative agency to make, or (4) violated some statutory or constitutional right of the Plaintiffs. This Court cannot find that the Commission acted capriciously, unreasonably, or arbitrarily; nor has it abused its discretion or violated a vested constitutional right of the Plaintiffs. It is clear to this Court that the Commission premised its Orders upon substantial evidence as well as its specialized knowledge and expertise in these matters. Therefore, this Court hereby affirms the Orders of the Mississippi State Tax Commission affirming the assessment against the Petitioners in this action.

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SO ORDERED, ADJUDGED, AND DECREED
THIS the 4th day of November, 2010.

/s/
CHANCELLOR J. DEWAYNE THOMAS

**APPENDIX D — TRANSCRIPT OF ORDER,
STATE TAX COMMISSION, JACKSON,
MISSISSIPPI, DATED MAY 5, 2009**

TRANSCRIPT OF ORDER, STATE TAX
COMMISSION, JACKSON, MISSISSIPPI

STATE OF MISSISSIPPI
COUNTY OF HINDS
OFFICE STATE TAX COMMISSION MAY 5, 2009

BE IT REMEMBERED THAT on the date stated above
the State Tax Commission of said state adopted an order
in words and figures as follows, to-wit:

IN THE MATTER OF AN ASSESSMENT OF
INCOME TAX AGAINST EQUIFAX, INC., ATLANTA,
GEORGIA, IN THE AMOUNT OF \$304,143.00, FOR
THE PERIODS OF JANUARY 1, 2000 THROUGH
DECEMBER 31, 2003

ACCOUNT NUMBER 58-0401110

ORDER

This day this cause came on for decision and
determination and it appearing to the State Tax
Commission of the State of Mississippi (the “Tax
Commission”) that on February 18, 2009, a hearing
was held before Commissioners Morgan, Wilkinson and
Martin on the protest and appeal from an assessment
of income tax in the amount of \$304,143.00 against
Equifax, Inc., Atlanta, Georgia, account number 58-

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0401110, (“Equifax” or “Taxpayer”) for the periods of January 1, 2000 through December 31, 2003. Equifax was represented by the Honorable Louis G. Fuller, Attorney at Law, the Honorable Ethan Miller, Attorney at Law, and the Honorable Timothy J. Peaden, Attorney at Law. The State Tax Commission was represented by the Honorable Stephanie R. Jones, Attorney at Law. Also present were Alice G. Gorman, Deputy Commissioner, Melinda Lott, Director, Foreign Audit Bureau, Samuel T. Polk, III, Commission Secretary, Wyn Roebuck, Equifax, Inc., Terry T. Smith, Office Director, Office of Revenue, Office of Audit and Compliance, Gary W. Stringer, Chief Attorney, Shelton N. Vance, Office Director, Office of Audit and Compliance and Gerald L. Yates, Chairman of the Board of Review. At the conclusion of the hearing the matter was taken under advisement for decision and determination at a later time. The Tax Commission is now of the opinion and finds, as follows:

1. Equifax is a Georgia corporation that is registered to do business and is in good standing in the State of Mississippi. Its principal offices are situated in Atlanta, Georgia.
2. The assessment was the result of an income and franchise tax audit conducted by Kerryn Deverteuil whose post of duty is the Tax Commission’s Foreign Audit Office. Mr. Deveteuil examined the Taxpayer’s income and franchise tax returns and apportionment worksheets to make sure that Mississippi income was reported and appropriate taxes paid. Mr Deverteuil made the following findings:

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The taxpayer is a service company and provides those services to its clients via computer data systems or electronically. The company has clients and a market base in every state in the United States. Services provided its clients often begin with the client submitting information to the company for an analysis that will assist in a “decision making process.” The transaction is consummated principally using computers and carried out without the physical presence of individuals. A fee is then, however, charged to the client for the information provided to that client.

The taxpayer is able to identify, track and summarize fees charged to various clients and/or states. It is our position that: Because certain “Service Fee Revenue” can be sourced to Mississippi and that Mississippi was one of the markets that generated a portion of the taxpayer’s revenue, the taxpayer’s income is taxable in the state and that income should be apportioned to the state using a “Service Fee Revenue Factor.” It’s also our position that Regulation 806 III 10 serves as a basis for our apportionment method and that the

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“Trans Union Court Case” mirrors and sets a precedent for our posture in this instance.

3. At the conclusion of the audit, an assessment was made against the Taxpayer in the amount of \$304,143.00 being the sum of additional tax due in the amount of \$229,383.00, penalty in the amount of \$25,374.00 and interest in the amount of \$49,386.00.
4. Equifax appealed the assessment to the Board of Review where a hearing was held on the matter on August 19, 2008. The taxpayer argued that it provided services, that the services were all provided in Georgia and that since Equifax provided services and did not engage in the sale of tangible personal property that it did not have any Mississippi sales and did not have any Mississippi apportionable income. There were two other issues before the Board of Review. One involved the add-back of royalty expenses and the other related to the disallowance of a partnership capital loss. The Board of Review allowed the royalty expenses and removed the partnership income. The Board did not agree with the Taxpayer’s argument regarding the apportionment formula. On October 8, 2008, the Board of Review issued order number 8975 by which it reduced the assessment to \$278,282.00 and upheld and affirmed the assessment as reduced.

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5. Feeling aggrieved by the decision of the Board of Review, the Taxpayer appealed to the full Commission. The matter came on for a hearing before Commissioners Morgan, Wilkinson and Martin on February 18, 2009. The Taxpayer argued that Miss. Admin. Code § 35.III.8.06.402.06 requires that business income of service companies shall be apportioned to Mississippi on the basis of a single sales-factor apportionment formula and that the single sales factor apportionment formula is determined by dividing (1) the gross receipts attributable to Mississippi and derived by the taxpayer from transactions and activity in the regular course of business by (2) the total gross receipts derived by the taxpayer from transactions and activity in the regular course of trade or business citing Miss. Admin. Code § 35.III.8.06.402.09(3)(g) and (h). The Taxpayer further argued that its difference with the Tax Commission is based on the manner in which the determination of gross receipts attributable to Mississippi was made. The Taxpayer asserted that gross receipts from the sale of services should be attributable to Mississippi only to the extent of such gross receipts which represent services or activities actually performed in the state, citing Miss. Admin. Code § 35.III.8.06.402.9(3)(d).
6. The staff argued that “the taxpayer’s business activity in Mississippi is not fairly reflected as reported. The service related income attributable

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to Mississippi should be sourced to Mississippi to effectuate an equitable apportionment of the taxpayer's income. Pursuant to 35.III.8.06.402.10, the auditor appropriately utilized a service fee revenue factor to arrive at an equitable apportionment of the taxpayer's income." Miss. Admin. Code § 35.III.8.06.402.10 provides as follows:

If the allocation and apportionment provisions of this Regulation do not fairly represent the extent of the taxpayer's business activity in this state, the taxpayer may petition for, or the Commissioner may require, in respect to any part of the taxpayer's business activity, if reasonable:

1. Separate accounting;
2. The exclusion of any one of the factors;
3. The inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this state; or
4. The employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

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7. The decision of the Board of Review to reduce the assessment of income tax and to affirm it as reduced was correct and should be affirmed.
8. The Commission notes that Review Board Order No. 8975 also upheld and affirmed an assessment of franchise tax in the amount of \$59,575.00. The Taxpayer did not appeal the assessment of franchise tax and the same has been paid in full.

IT IS, THEREFORE, HEREBY ORDERED AND ADJUDGED by the Tax Commission that the assessment of income tax in the amount of \$304,143.00 against Equifax, Inc., Atlanta, Georgia, account number 58-0401110, for the periods of January 1, 2000 through December 31, 2003, reduced by the Board of Review to \$278,282.00, is hereby upheld and affirmed as reduced.

IT IS FURTHER ORDERED AND ADJUDGED by the Tax Commission that Equifax, Inc., shall within thirty (30) days from the date of this order pay to the Tax Commission \$467,836.00, being the amount of the aforementioned assessment including interest to date, or file a petition in Chancery Court appealing this order pursuant to Miss. Code Ann. § 27-77-7. Even if a petition is filed, Miss. Code Ann. § 27-77-7(3) requires that the petition be accompanied by a surety bond in double the amount in controversy or that the Taxpayer pays the assessment as affirmed herein under protest prior to the filing of such petition. This order and the findings contained herein shall become final if the Taxpayer does not file within thirty (30) days from the date of this order

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a petition in Chancery Court in accordance with Miss. Code Ann. § 27-77-7. If the Taxpayer fails to pay the full amount of the assessment affirmed herein within thirty (30) days from the date of this order, interest at the rate of 1% per month will accrue from the date of this order on any unpaid balance.

SECRETARY'S CERTIFICATE

As Secretary of the State Tax Commission of the State of Mississippi, I do hereby certify that the above and foregoing is a true and correct copy of an order adopted by the said Commission on the date therein stated as the same appears of record in Order Book 12 at page 407 - 410, an official record in said office and in my official care and custody.

Witness my signature this, the 5th day of May, 2009.

/s/
SECRETARY, STATE TAX COMMISSION

**APPENDIX E — TRANSCRIPT OF ORDER,
STATE TAX COMMISSION, JACKSON,
MISSISSIPPI, DATED MAY 5, 2009**

TRANSCRIPT OF ORDER, STATE TAX
COMMISSION, JACKSON, MISSISSIPPI

STATE OF MISSISSIPPI
COUNTY OF HINDS

OFFICE STATE TAX COMMISSION MAY 5. 2009

BE IT REMEMBERED THAT on the date stated above
the State Tax Commission of said state adopted an order
in words and figures as follows, to-wit:

IN THE MATTER OF AN ASSESSMENT OF INCOME
TAX AGAINST EQUIFAX CREDIT INFORMATION
SERVICES, INC., ATLANTA, GEORGIA, IN THE
AMOUNT OF \$205,325.00, FOR THE PERIODS OF
JANUARY 1, 2000 THROUGH MAY 31, 2001, ACCOUNT
NUMBER 58-0209400

ORDER

This day this cause came on for decision and
determination and it appearing to the State Tax
Commission of the State of Mississippi (the “Tax
Commission”) that on February 18, 2009, a hearing was
held before Commissioners Morgan, Wilkinson and Martin
on the protest and appeal from an assessment of income
tax in the amount of \$205,325.00 against Equifax Credit
Information Services, Inc., Atlanta, Georgia, account

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number 58-0209400, (“Equifax Credit Information Services” or “Taxpayer”) for the periods of January 1, 2000 through May 31, 2001. Equifax Credit Information Services was represented by the Honorable Louis G. Fuller, Attorney at Law, the Honorable Ethan Miller, Attorney at Law, and the Honorable Timothy J. Peaden, Attorney at Law. The State Tax Commission was represented by the Honorable Stephanie R. Jones, Attorney at Law. Also present were Alice G. Gorman, Deputy Commissioner, Melinda Lott, Director, Foreign Audit Bureau, Samuel T. Polk, III, Commission Secretary, Wyn Roebuck, Equifax, Inc., Terry T. Smith, Office Director, Office of Revenue, Office of Audit and Compliance, Gary W. Stringer, Chief Attorney, Shelton N. Vance, Office Director, Office of Audit and Compliance and Gerald L. Yates, Chairman of the Board of Review. At the conclusion of the hearing the matter was taken under advisement for decision and determination at a later time. The Tax Commission is now of the opinion and finds, as follows:

1. Equifax Credit Information Services is a Georgia corporation doing business in the State of Mississippi. Its principal offices are situated in Atlanta, Georgia.
2. The assessment was the result of an income and franchise tax audit conducted by Kerry Deverteuil whose post of duty is the Tax Commission’s Foreign Audit Office. Mr. Deveteuil examined the Taxpayer’s income and franchise tax returns and apportionment worksheets to make sure that Mississippi income was reported and appropriate taxes paid. Mr. Deverteuil made the following findings:

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The taxpayer is a service company and provides those services to its clients via computer data systems or electronically. The company has clients and a market base in every state in the United States. Services provided its clients often begin with the client submitting information to the company for an analysis that will assist in a “decision making process.” The transaction is consummated principally using computers and carried out without the physical presence of individuals. A fee is then, however, charged to the client for the information provided to that client.

The taxpayer is able to identify, track and summarize fees charged to various clients and/or states. It is our position that: Because certain “Service Fee Revenue” can be sourced to Mississippi and that Mississippi was one of the markets that generated a portion of the taxpayer’s revenue, the taxpayer’s income is taxable in the state and that income should be apportioned to the state using a “Service Fee Revenue Factor.” It’s also our position that Regulation 806 III 10 serves as a basis for our apportionment method and that the

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“Trans Union Court Case” mirrors and sets a precedent for our posture in this instance.

3. At the conclusion of the audit, an assessment was made against the Taxpayer in the amount of \$205,325.00 being the sum of additional tax due in the amount of \$124,177.00, penalty in the amount of \$27,256.00 and interest in the amount of \$53,892.00.
4. Taxpayer appealed the assessment to the Board of Review where a hearing was held on the matter on August 19, 2008. Taxpayer argued that it provided services, that the services were all provided in Georgia and that since Taxpayer provided services and did not engage in the sale of tangible personal property that it did not have any Mississippi sales and did not have any Mississippi apportionable income. The Board did not agree with the Taxpayer’s argument regarding the apportionment formula. On October 8, 2008, the Board of Review issued order number 8976 by which it upheld and affirmed the assessment.
5. Feeling aggrieved by the decision of the Board of Review, the Taxpayer appealed to the full Commission. The matter came on for a hearing before Commissioners Morgan, Wilkinson and Martin on February 18, 2009. The Taxpayer argued that Miss. Admin. Code § 35.III.8.06.402.06 requires that business income of service companies shall be apportioned to Mississippi on the basis

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of a single sales-factor apportionment formula and that the single sales factor apportionment formula is determined by dividing (1) the gross receipts attributable to Mississippi and derived by the taxpayer from transactions and activity in the regular course of business by (2) the total gross receipts derived by the taxpayer from transactions and activity in the regular course of trade or business citing Miss. Admin. Code § 35.III.8.06.402.09(3)(g) and (h). The Taxpayer further argued that its difference with the Tax Commission is based on the manner in which the determination of gross receipts attributable to Mississippi was made. The Taxpayer asserted that gross receipts from the sale of services should be attributable to Mississippi only to the extent of such gross receipts which represent services or activities actually performed in the state, citing Miss. Admin. Code § 35.III.8.06.402.9(3)(d).

6. The staff argued that “the taxpayer’s business activity in Mississippi is not fairly reflected as reported. The service related income attributable to Mississippi should be sourced to Mississippi to effectuate an equitable apportionment of the taxpayer’s income. Pursuant to 35.III.8.06.402.10, the auditor appropriately utilized a service fee revenue factor to arrive at an equitable apportionment of the taxpayer’s income.” Miss. Admin. Code § 35.III.8.06.402.10 provides as follows:

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If the allocation and apportionment provisions of this Regulation do not fairly represent the extent of the taxpayer's business activity in this state, the taxpayer may petition for, or the Commissioner may require, in respect to any part of the taxpayer's business activity, if reasonable:

1. Separate accounting;
 2. The exclusion of any one of the factors;
 3. The inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this state; or
 4. The employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.
7. The decision of the Board of Review to affirm the assessment of income tax was correct and should be affirmed.
8. The Commission notes that Review Board Order No. 8976 also upheld and affirmed an assessment of franchise tax in the amount of \$42,819.00. The

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Taxpayer did not appeal the assessment of franchise tax and the same has been paid in full.

IT IS, THEREFORE, HEREBY ORDERED AND ADJUDGED by the Tax Commission that the assessment of income tax in the amount of \$205,325.00 against Equifax Credit Information Services, Inc., Atlanta, Georgia, account number 58- 0209400, for the periods of January 1, 2000 through May 31, 2001, is hereby upheld and affirmed.

IT IS FURTHER ORDERED AND ADJUDGED by the Tax Commission that Equifax Credit Information Services, Inc., shall within thirty (30) days from the date of this order pay to the Tax Commission \$271,201.00, being the amount of the aforementioned assessment including interest to date, or file a petition in Chancery Court appealing this order pursuant to Miss. Code Ann. § 27-77-7. Even if a petition is filed, Miss. Code Ann. § 27-77-7(3) requires that the petition be accompanied by a surety bond in double the amount in controversy or that the Taxpayer pays the assessment as affirmed herein under protest prior to the filing of such petition. This order and the findings contained herein shall become final if the Taxpayer does not file within thirty (30) days from the date of this order a petition in Chancery Court in accordance with Miss. Code Ann. § 27-77-7. If the Taxpayer fails to pay the full amount of the assessment affirmed herein within thirty (30) days from the date of this order, interest at the rate of 1% per month will accrue from the date of this order on any unpaid balance.

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SECRETARY'S CERTIFICATE

As Secretary of the State Tax Commission of the State of Mississippi, I do hereby certify that the above and foregoing is a true and correct copy of an order adopted by the said Commission on the date therein stated as the same appears of record in Order Book 12 at page 411-413, an official record in said office and in my official care and custody.

Witness my signature this, the 5th day of May, 2009.

/s/
SECRETARY, STATE TAX
COMMISSION

**APPENDIX F —ORDER OF THE BOARD OF
REVIEW, JACKSON, MISSISSIPPI, DATED
OCTOBER 8, 2008**

Review Board Order No. 8975

**ORDER OF THE BOARD OF REVIEW
STATE TAX COMMISSION,
JACKSON, MISSISSIPPI**

Date October 8, 2008

Equifax Inc.	58-0401110
Name of Taxpayer	Account No.
Atlanta, Georgia	1/01/00 thru 12/31/03
Address	Period of Assessment
Income Tax	\$304,143.00
Franchise Tax	\$59,575.00
Kind of Tax	Tax Assessed

The Review Board, after having been duly petitioned in writing as provided by statute, has today heard and carefully considered all the evidence presented by the taxpayer, as recorded in detail in the Minutes of the Review Board, and finds as follows:

That the Commissioner's Assessment of Income Tax in the amount of \$304,143.00 to Equifax Inc., account number 58-0401110, is reduced to \$278,282.00 and upheld and affirmed as reduced. The Commissioner's Assessment

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of Franchise Tax in the amount of \$59,575.00 to Equifax Inc., account number 58-0401110, is upheld and affirmed.

It is ordered that within thirty (30) days from the date of this order, the above named taxpayer shall pay to the Mississippi State Tax Commission the amount of \$337,857.00 the taxes, penalties and/or interest upheld and affirmed herein. The taxpayer must either send payment of the above amount to Review Board, P. O. Box 22828, Jackson, MS 39225-2828 or, if the taxpayer wishes to contest this Order, file an appeal to the Mississippi State Tax Commission with the Commission Secretary, P. O. Box 22805, Jackson, MS 39225-2805, within thirty (30) days from the date of this Order. For further information as to appeals to the three (3) member Mississippi State Tax Commission, see Miss. Code Ann. § 27-77-5 and Title 35, Part I, Chapter 01, Section 107, Subsection 107.01-107.02 of the Mississippi Administrative Code.

By Order of the Review Board

/s/ _____

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**APPENDIX G — ORDER OF THE BOARD OF
REVIEW, JACKSON, MISSISSIPPI, DATED
OCTOBER 8, 2008**

Review Board Order No. 8976

**ORDER OF THE BOARD OF REVIEW STATE
TAX COMMISSION, JACKSON, MISSISSIPPI**

Date October 8, 2008

Equifax Credit Information Service Inc. Name of Taxpayer	58-0209400 Account No.
Atlanta, Georgia Address	1/01/00 thru 5/31/01 Period of Assessment
Income Tax Franchise Tax Kind of Tax	\$205,325.00 \$42,819.00 Tax Assessed

The Review Board, after having been duly petitioned in writing as provided by statute, has today heard and carefully considered all the evidence presented by the taxpayer, as recorded in detail in the Minutes of the Review Board, and finds as follows:

That the Commissioner's Assessments of Income Tax and Franchise Tax in the amounts of \$205,325.00 and \$42,819.00, to Equifax Credit Information Service Inc., account number 58-0209400, are upheld and affirmed.

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It is ordered that within thirty (30) days from the date of this order, the above named taxpayer shall pay to the Mississippi State Tax Commission the amount of \$248,144.00 for the taxes, penalties and/or interest upheld and affirmed herein. The taxpayer must either send payment of the above amount to Review Board, P.O. Box 22828, Jackson, MS 39225-2828 or, if the taxpayer wishes to contest this Order, file an appeal to the Mississippi State Tax Commission with the Commission Secretary, P.O. Box 22805, Jackson, MS 39225-2805, within thirty (30) days from the date of this Order. For further information as to appeals to the three (3) member Mississippi State Tax Commission, see Miss. Code Ann. § 27-77-5 and Title 35, Part I, Chapter 01, Section 107, Subsection 107.01-107.02 of the Mississippi Administrative Code.

By Order of the Review Board

/s/ _____
Chairman

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**APPENDIX H — OPINION OF THE SUPREME
COURT OF MISSISSIPPI, DATED JUNE 20, 2013**

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2010-CT-01857-SCT

EQUIFAX, INC. AND EQUIFAX CREDIT
INFORMATION SERVICES, INC.

v.

MISSISSIPPI DEPARTMENT OF REVENUE
f/k/a MISSISSIPPI STATE TAX COMMISSION

ON WRIT OF CERTIORARI

DATED OF JUDGMENT: 11/04/2010

TRIAL JUDGE: HON. J. DEWAYNE THOMAS

COURT FROM WHICH
APPEALED: HINDS COUNTY
CHANCERY COURT

ATTORNEYS FOR
APPELLANTS: LOUIS G. FULLER
KATIE LOFTON WALLACE
TIMOTHY J. PEADEN
MARY T. BENTON

ATTORNEYS FOR
APPELLEE: GARY WOOD STRINGER
JAMES L. POWELL

NATURE OF THE CASE: CIVIL - STATE BOARDS
AND AGENCIES

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DISPOSITION: THE JUDGEMENT OF
THE COURT OF APPEALS
IS REVERSED. THE
JUDGMENT OF THE HINDS
COUNTY CHANCERY COURT
IS REINSTATED AND
AFFIRMED - 6/20/2013

MOTION FOR REHEARING FILED:

MANDATE ISSUED:

EN BANC.

**RANDOLPH, PRESIDING JUSTICE, FOR THE
COURT:**

¶1. Before the Court on certiorari review is an income-tax assessment by the Mississippi State Tax Commission¹ (“the Commission”) against Equifax, Inc., and Equifax Credit Information Services, Inc. (collectively “Equifax”). Using the standard apportionment method prescribed by Commission regulation, Equifax computed its Mississippi taxable income as zero. The Commission then audited Equifax and determined that the standard apportionment method did not fairly reflect Equifax’s business in Mississippi. The Commission employed an alternative

1. Since the events underlying this appeal occurred, the “Mississippi State Tax Commission” has been renamed the “Mississippi Department of Revenue.” Miss. Code Ann. § 27-3-4 (Rev. 2010). In the interest of consistency, this opinion uses the term “Commission.”

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apportionment method, under which Equifax's income from services provided to customers located in Mississippi was apportioned to Mississippi, and it issued assessments against Equifax.

¶12. After Equifax exhausted its administrative remedies, it petitioned the Hinds County Chancery Court for relief, and it affirmed the Commission's decision. The Court of Appeals reversed the judgment of the chancery court on standard-of-review and burden-of-proof grounds and found all remaining issues moot. *Equifax, Inc. v. Miss. Dep't of Revenue*, So. 3d , 2012 Miss. App. LEXIS 241, 2012 WL 1506006 (Miss. Ct. App. May 1, 2012). On writ of certiorari, we hold that the Hinds County Chancery Court did not commit reversible error; that the use of an alternative apportionment method for Equifax was not a promulgation of a rule in violation of the Mississippi Administrative Procedures Act; and that the Commission did not abuse its discretion by imposing penalties against Equifax, as provided for in Mississippi Code Section 27-13-25(3). Accordingly, we reverse the judgment of the Court of Appeals and reinstate and affirm the judgment of the Hinds County Chancery Court.

FACTS AND PROCEDURAL HISTORY

¶13. The Court of Appeals set forth the following facts and procedural history:

¶2. The taxpayers are Equifax, Inc. and Equifax Credit Information Services, Inc. ("ECIS") (collectively referred to as "Equifax").

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Equifax, Inc. is a Georgia corporation in the business of consumer credit reporting. It sells credit information and other services to consumers and businesses across the country. Equifax, Inc. was registered to do business and was in fact doing business in Mississippi. Equifax, Inc. is the parent company of ECIS. The services provided by Equifax, Inc. and ECIS include: credit reporting, information services, direct mail marketing, risk management, and mortgage loan processing and approval. The primary services provided are credit reports, credit scores, and fraud alerts.

¶3. The [Commission] audited Equifax for payment of state income taxes for the period of January 1, 2000, through December 31, 2003 (the “audit period”). During the audit period, Equifax had approximately 800 customers located in Mississippi. The revenue generated from these Mississippi customers was \$5,275,406 in 2000, \$6,579,281 in 2001, \$5,646,283 in 2002, and \$5,178,370 in 2003. Based on these figures, the total gross receipts for the sale of Equifax’s services provided to Mississippi customers during the audit period totaled \$22,679,340.

¶4. Equifax did not have a corporate office in Mississippi but employed three Mississippi residents. Equifax’s Mississippi customers requested and received services from Equifax at

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their Mississippi locations. These transactions primarily occurred electronically and took approximately three seconds from the time the customer requested the credit report or score to the time they received the information.

¶15. Equifax timely filed Mississippi state income tax returns for each year in the audit period. However, Equifax reported no taxable income in the State for each of these years and paid no income tax for each year. In computing taxable income, Equifax relied on the [Commission’s] regulations and the standard-apportionment method for service companies. As a result, Equifax determined that it had no income subject to tax in Mississippi.

¶16. At the conclusion of the audit, on February 28, 2008, the [Commission] issued assessments against Equifax. The [Commission] determined that the apportionment method used by Equifax did not fairly reflect the extent of Equifax’s business in Mississippi. The [Commission] determined Equifax should have used an alternative-apportionment method, a market-based sourcing method, during the audit period.

¶17. Equifax disagreed with the assessments and appealed the assessments to the Mississippi Tax Commission Board of Review (the “Board”). The Board upheld the assessments in a reduced amount. Equifax then appealed to the three-

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member Tax Commission, which upheld the Board's reduced assessments.

¶8. On May 29, 2009, Equifax paid the assessments, under protest, including interest and penalties. Equifax, Inc.'s assessments totaled \$467,836; and ECIS's assessments totaled \$271,201.

¶9. On June 1, 2009, pursuant to Mississippi Code Annotated section 27-77-7 (Rev. 2008), Equifax appealed the assessment to the Hinds County Chancery Court. [The chancellor] held an evidentiary hearing on all issues presented. The chancellor then entered an order and final judgment, dated October 26, 2010, affirming the [Commission's] assessments.

Equifax, 2012 Miss. App. LEXIS 241, 2012 WL 1506006, ** 1-2. In its Complaint and Petition, Equifax sought judicial review of the decision of the Tax Commission. Equifax averred that the Commission's use of the alternative apportionment method was not authorized by Mississippi law and violated Equifax's rights under the United States Constitution. Equifax and the Commission filed a stipulation of agreed-upon facts.² At trial, Equifax was burdened to prove its entitlement to relief - that the Commission's decision was reversible - by a preponderance

2. No claim was made that the Commission's decision was unsupported by the agreed-upon facts. Rather, Equifax claimed that the Commission improperly applied regulations and laws in an impermissible manner.

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of the evidence. The chancellor concluded that Equifax had failed to meet its burden to prove that the Commission's use of an alternative apportionment method violated the Mississippi Administrative Procedures Act, that its imposition of penalties against Equifax was arbitrary and capricious, or that Equifax's rights under the United States Constitution had been violated. The court further found that it could not substitute its "judgment for the agency's unless the latter's interpretation is arbitrary or unreasonable." It further found, in the limited record presented, including the agreed-upon facts, that the Commission orders were premised on substantial evidence.

¶4. Equifax appealed the decision of the Hinds County Chancery Court to the Court of Appeals. The Court of Appeals found that: (1) a *de novo* standard applies to judicial review of Commission decisions; and, (2) as the party invoking alternate apportionment, the Commission has the burden to prove that the standard apportionment method is not a fair representation of the taxpayer's activity in the state and that its chosen alternative method is reasonable. *Equifax*, 2012 Miss. App. LEXIS 241, 2012 WL 1506006, at **4-5. The Court of Appeals recognized that the arbitrary-and-capricious standard normally applies to agency decisions, but opined that "[t]his is not the normal case. The Legislature has established a different standard that . . . applies here." 2012 Miss. App. LEXIS 241, [WL] at *2. The Court of Appeals examined Mississippi Code Section 27-77-7(4) and found that "[t]his case seems to create a conflict as to exactly what a trial *de novo* means in an appeal from a [Commission] decision."

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2012 Miss. App. LEXIS 241, [WL] at *4. Quoting the general understanding that “[a] de novo review ‘means that the case shall be tried the same as if it had not been tried before, and the court conducting such a trial may substitute its own findings and judgment for those of the inferior tribunal from which the appeal is taken[,]’” the Court of Appeals concluded that “the chancery court’s review of the [Commission’s] decision should have been conducted just as if the chancery court were sitting as the [Commission].” *Id.* (citing *California Co. v. State Oil & Gas Bd.*, 200 Miss. 824, 838-39, 27 So. 2d 542, 544 (1946) (citation omitted)). Concluding that the chancellor had erred both by applying an incorrect standard of review and by imposing the burden of proof on the wrong party, the Court of Appeals reversed the chancellor’s decision and remanded the case to the Hinds County Chancery Court. 2012 Miss. App. LEXIS 241, [WL] at *7. As it reversed and remanded on these two issues, the Court of Appeals found all other issues raised on appeal moot. *Id.*

ISSUES

¶5. This Court granted certiorari to address the following issues:

1. Whether the chancellor committed reversible error by applying an arbitrary-and-capricious standard when reviewing a decision of the Mississippi State Tax Commission under Section 27-77-7(4).

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2. Whether the chancellor committed reversible error by requiring Equifax to carry its burden of proof of establishing that the Commission's decision was reversible.

¶6. Declining to reverse the chancellor's judgment on the grounds of standard of review or burden of proof, we also address the following additional issues raised by Equifax:

3. Whether the chancellor manifestly erred by concluding that the Commission's use of an alternative apportionment method for Equifax's income was not a promulgation of a new rule in violation of the Mississippi Administrative Procedures Act.

4. Whether the chancellor manifestly erred by declining to abate penalties imposed by the Commission under Section 27-13-25(3).

DISCUSSION

¶7. The proper standard of review and burden of proof for an appeal to chancery court of a judgment of the Commission are questions of law dictated by Mississippi statute. Miss. Code Ann. § 27-77-7(4) (2005) (amended 2009). This Court reviews questions of law *de novo*. ***Hankins v. Md. Cas. Co./Zurich Am. Ins. Co.***, 101 So. 3d 645, 652 (Miss. 2012) (citation omitted).

¶8. All agree that the applicable standard of review and burden of proof in chancery court for judicial review

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of a Commission decision are found in Mississippi Code Section 27-77-7(4), but much disagreement arises over the practical application of that language. The relevant portion of Section 27-77-7(4) reads as follows:

the chancery court shall give deference to the decision and interpretation of law and regulations by the commission as it does with the decisions and interpretation of any administrative agency, but it shall try the case de novo and conduct a full evidentiary judicial hearing on the issues raised. Based on the evidence presented at the hearing, the chancery court shall determine whether the taxpayer has proven, by a preponderance of the evidence or a higher standard if required by the issues raised, that he is entitled to any or all of the relief he has requested.

Miss. Code Ann. §27-77-7(4) (2005) (amended 2009) (emphasis added). We hold that, under this language, the chancery court must hold a judicial hearing to determine whether the taxpayer challenging the Commission decision can prove entitlement to any or all of the relief requested by a preponderance of the evidence.³ In this case, the evidence to be considered by the chancellor was the record from the Commission, including the agreed-upon facts. As in other appeals of administrative-agency decisions, to be entitled to reversal of the agency decision,

3. Or a higher standard, if required by the issues raised. Miss. Code Ann. § 27-77-7(4) (2005).

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a petitioner must raise and prove one or more of the following: the agency's decision was unsupported by substantial evidence, the agency's decision was arbitrary and capricious, the agency's decision was beyond the power of the administrative agency to make, and/or the agency's decision violated the complaining party's statutory or constitutional right. ***Buffington v. Miss. State Tax Comm'n***, 43 So. 3d 450, 453-54 (Miss. 2010). The court does not adjudicate the merits (or lack thereof) of the agency's decision, but rather is limited to examining the legality of the decision. To resolve any confusion surrounding Section 27-77-7(4), we address the pertinent provisions.

¶19. First, the chancery court "shall give deference to the decision and interpretation of law and regulations by the commission as it does with the decisions and interpretation of any administrative agency." Miss. Code Ann. §27-77-7(4) (2005). Courts accord great deference to decisions of administrative agencies; a judgment of an administrative agency is binding unless a party proves otherwise. *See CLC of Biloxi, LLC v. Miss. Dep't of Health*, 91 So. 3d 633, 635 (Miss. 2012) ("A rebuttable presumption exists in favor of the [agency's] decision, and the burden lies with the challenging party to prove the contrary.") (citation omitted). Accordingly, a court will reverse the decision of an administrative agency only if the presumption is overcome, as addressed in ***Buffington, supra***. The statute clearly mandates deference for Commission decisions, as for decisions of any administrative agency. These specific bases for reversal apply in appeals of Commission decisions just as they do in appeals of other administrative agencies' decisions.

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¶10. Equifax’s complaint in chancery court sought judicial review of the *merits* of the Commission’s decision, a determination which clearly was outside of the chancery court’s authority. Equifax also averred that: (1) the Commission’s use of alternative apportionment was not authorized by Mississippi law, because the Commission failed to prove, under its own regulations, that standard allocation did not fairly represent Equifax’s business activity in Mississippi and that the alternative method was reasonable; and (2) the Commission’s decision violated Equifax’s rights under the Due Process and Commerce Clauses of the federal Constitution. The chancellor properly limited his analysis to determining whether Equifax had proven that it was entitled to reversal of the Commission’s decision for any of the prescribed legal bases for reversing an agency decision provided by this Court in ***Buffington***.

¶11. Section 27-77-7(4) next provides that the chancery court “shall try the case *de novo* and conduct a full evidentiary judicial hearing *on the issues raised*.” We emphasize that the subject of the evidentiary hearing is *the issues raised* on appeal in chancery court - whether the decision was made in violation of the tenets announced in ***Buffington*** - *not* the merits of the underlying decision by the Commission. The chancery court had before it the orders of the Commission and the Board of Review, including agreed findings of fact. Under Section 27-77-7(4), Equifax had the opportunity to present evidence contesting the legality of the Commission’s and the Board of Review’s decisions.

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¶12. Perhaps the confusion surrounding Section 27-77-7(4) stems from the statute's instruction to the chancery court to "try the case de novo." Black's Law Dictionary defines "de novo" as "anew." *Black's Law Dictionary* 500 (9th ed. 2009). "Anew" means "[a] second time as a new trial or action, over again, afresh, once more." I *The Oxford English Dictionary* 457 (2d ed. 1989). "A trial de novo, within the common acceptance of that term . . . means that the case shall be tried the same *as if it had not been tried before*, and the court conducting such a trial may substitute its own findings and judgment for those of the inferior tribunal from which the appeal is taken." *California Co. v. State Oil and Gas Bd.*, 200 Miss. 824, 838-39, 27 So. 2d 542, 544 (1946) (emphasis added). The hearing in chancery court is the first hearing conducted by a judicial tribunal to test the legality of the decision. The proceedings before the Commission are informal, nonjudicial proceedings that are neither conducted under oath nor preserved in the record for appeal. The chancery-court proceedings mark the first time a taxpayer may judicially challenge the legality of the Commission's final decision. In the absence of a prior proceeding, no trial anew can occur. Thus, the instruction to "try the case de novo" is misdirected. Section 27-77-7(4) provides a judicial forum to try anew (or for the first time) the legal issues raised by the taxpayer in chancery court. Its limited purpose is only to examine whether the Commission's decision was supported by substantial evidence, was not arbitrary and capricious, was within the Commission's power to make, and did not violate the taxpayer's statutory or constitutional rights.

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¶13. Finally, Section 27-77-7(4) establishes the burden of proof and upon whom the burden rests. “Based on the evidence presented at the hearing, the chancery court shall determine whether *the taxpayer* has proven, by a preponderance of the evidence or a higher standard if required by the issues raised, *that he is entitled to any or all of the relief* he has requested.” Miss. Code Ann. §27-77-7(4) (2005) (emphasis added). This sentence stands for the simple proposition that, in a taxpayer’s action in chancery court appealing a final judgment of the Commission, as in all other judicial proceedings, the party petitioning the court for relief bears the burden of proving its claims by a preponderance of the evidence or a higher standard, if required by the issues raised.⁴

¶14. In this case, under Section 27-77-7(4), the chancery court conducted a hearing to determine whether Equifax (the taxpayer) was able to prove, by the appropriate burden, that the decision was arbitrary and capricious, beyond the Commission’s power, and/or violated Equifax’s statutory or constitutional right. At the hearing in chancery court, the parties were given the opportunity to present such evidence and legal authority as they deemed appropriate to the limited issues being tried, *i.e.*, the legality of the decision. In this case, the chancery court determined that Equifax had failed to prove that the agency’s decision violated one or more of the *Buffington* tenets.

4. For example, a taxpayer claiming that a Commission decision was the result of fraud must carry the higher burden of proving his claim by clear and convincing evidence. *See O.W.O. Investments, Inc. v. Stone Inv. Co.*, 32 So. 3d 439, 446 (Miss. 2010) (“these elements [of fraud] must be proven by clear and convincing evidence” (citation omitted)).

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¶15. The chancellor in the case *sub judice* did just that, finding that his “review of the Order of the [Commission] must be only to determine whether or not the order ‘(1) was supported by substantial evidence, (2) was arbitrary or capricious, (3) was beyond the power of the administrative agency to make, or (4) violated some statutory or constitutional right of the complaining party’” and that “Equifax clearly bears the burden of proving, by a preponderance of the evidence, that the decision of the [Commission] is reversible” Thus, the chancery court applied the proper standard of review and burden of proof.

¶16. It follows that the Court of Appeals erred by reversing the chancellor’s judgment on standard-of-review and burden-of-proof grounds. For the reasons discussed above, the Court of Appeals erroneously construed Section 27-77-7(4) as imposing a *de-novo standard of review*, such that “the chancery court’s review of the [Commission’s] decision should have been conducted just as if the chancery court were sitting as the [Commission].”⁵ *Equifax*, 2012 Miss. App. LEXIS 241, 2012 WL 1506006, at *4. The Court of Appeals further erred by holding that the Commission

5. In *W.C. Fore v. Mississippi Department of Revenue*, 90 So. 3d 572 (Miss. 2012), this Court held that Section 27-77-7(4) “clearly requires the chancellor to be the trier of fact on appeal.” *Fore*, 90 So. 3d at 578. We now clarify that the chancellor is the trier of facts related to the taxpayer’s claim(s) on appeal, *i.e.*, whether the Commission’s decision was unsupported by substantial evidence, arbitrary and capricious, beyond the power of the Commission, or in violation of a statutory or constitutional right of the taxpayer.

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- rather than the taxpayer-petitioner, Equifax - had the burden of proof, based on cases from other jurisdictions interpreting the Uniform Division of Income for Tax Purposes Act (“UDITPA”).⁶ *Equifax*, 2012 Miss. App.

6. Commission regulations include the following UDITPA language:

402.10 Other Provisions. If the allocation and apportionment provisions of this Regulation do not fairly represent the extent of the taxpayer’s business activity in this state, the taxpayer may petition for, or **the Commissioner may require**, in respect to all or any part of the taxpayer’s business activity, **if reasonable**:

1. Separate accounting;
2. The exclusion of any one of the factors;
3. The inclusion of one or more additional factors which will fairly represent the taxpayer’s business activity in this state; or
4. **The employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer’s income.**

Miss. Admin. Code 35-III-8.06 (2011) (emphasis added). The Court of Appeals is correct that courts in jurisdictions where the UDITPA has been adopted statutorily have interpreted this language as requiring the party invoking alternative apportionment to prove that the standard apportionment method does not fairly represent the taxpayer’s business in the state and that the chosen alternative is reasonable. *Equifax*, 2012 Miss. App. LEXIS 241, 2012 WL 1506006, at **5-6 (citing *Microsoft Corp. v. Franchise Tax Board*, 39 Cal. 4th 750, 47 Cal. Rptr. 3d 216, 139 P.3d 1169, 1178 (Cal. 2006); *Am. Tel. & Tel. Co. v. Huddleston*, 880 S. W. 2d 682, 691 (Tenn. Ct. App. 1994); and *Deseret Pharm. Co. v. State Tax Comm’n*, 579 P. 2d 1322, 1326 (Utah 1978)). However,

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LEXIS 241, 2012 WL 1506006, at *6. Section 27-77-7(4) clearly places the burden on the taxpayer challenging a decision of the Commission to prove its entitlement to relief, just as petitioners in other judicial proceedings bear the burden of proving their claims. We will not impose a burden on the Commission, in contradiction of the Legislature's explicit placement of the burden on the taxpayer, on the basis that courts in states whose legislatures have adopted the UDITPA as law have done so. We conclude that the Court of Appeals erred by reversing the chancellor's judgment requiring Equifax to carry the burden of proving that the Commission's decision was unsupported by substantial evidence, arbitrary and capricious, beyond the power of the Commission, or in violation of a statutory or constitutional right of Equifax.

¶17. Reversing the chancellor's judgment on standard-of-review and burden-of-proof grounds, the Court of Appeals found the remaining issues raised by Equifax moot. As we hold that the chancellor properly interpreted the applicable standard of review and burden of proof under Section 27-77-7(4), we do not reverse on those grounds. Accordingly, we examine Equifax's remaining claims of error.

¶18. Equifax argues that the chancellor erred by finding

those decisions do not inform our decision, for the Mississippi Legislature has not adopted the UDITPA as law; in Mississippi, this UDITPA language appears in an administrative regulation adopted by the Commission, and the Mississippi Legislature has specifically provided that the taxpayer bears the burden of proof in appeals of Commission decisions.

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that the use of an alternative apportionment method was not a promulgation of a new rule in violation of the Mississippi Administrative Procedures Act and that the imposition of penalties under Mississippi Code Section 27-13-25(3) was not arbitrary and capricious. These are factual determinations, and “[w]e review the chancellor’s factual determinations applying a manifest-error standard.” *W.C. Fore v. Miss. Dep’t of Revenue*, 90 So. 3d 572, 578 (Miss. 2012) (citation omitted). “This Court will not disturb the findings of a chancellor when supported by substantial evidence unless the chancellor abused his discretion, was manifestly wrong, clearly erroneous or an erroneous legal standard was applied.” *Long Meadow Homeowners’ Ass’n, Inc. v. Harland*, 89 So. 3d 573, 577 (Miss. 2012) (citation omitted).

¶19. We hold that the chancellor did not manifestly err by finding that the Commission’s requirement of an alternative apportionment method for Equifax’s income did not amount to a rule, unduly promulgated in violation of the Mississippi Administrative Procedures Act.⁷ Equifax argues that the Commission promulgated a new rule for all service companies when it required Equifax to use an alternative apportionment method, because

7. Under the Mississippi Administrative Procedures Act, an agency must observe certain procedures prior to promulgating a new rule, including considering and composing a written report on the economic impact and benefits of the rule, filing notice with the Secretary of State at least twenty-five days before adopting the rule, and, if requested by a political subdivision, agency, or at least ten persons, holding an oral hearing. Miss. Code Ann. §§ 25-43-3.101 to 25-43-3.114 (Rev. 2010).

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the Commission did “not rely upon a single fact unique to Equifax’s situation in support of invoking alternative apportionment[,]” but premised its requirement of alternative apportionment “solely on the fact that Equifax is a service company and makes sales to customers located in Mississippi.” We disagree. Equifax presented no evidence that the Commission promulgated a new standard apportionment method for all service companies. Rather, the Commission required Equifax to use an alternative apportionment method under an existing rule, which provides that, “[i]f the [standard] allocation and apportionment provisions do not fairly represent the extent of the taxpayer’s business activity in this state, . . . the Commissioner may require . . . [t]he employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer’s income.” Miss. Admin. Code 35-III-8.06-402.10. This language clearly provides for the Commission to require alternative apportionment where the standard allocation of income does not fairly represent a taxpayer’s activity in the state - such as Equifax’s allocation of zero income to Mississippi, despite having employees in the state and receiving \$22,679,340 for services provided to customers in Mississippi during the audit period. The Commission’s judgment requiring Equifax to use an alternative apportionment method did not bind other service companies to the alternative apportionment method imposed on Equifax or alter the standard apportionment method prescribed by Commission regulation. We agree with the chancellor’s conclusion that the Commission “utilized an existing alternative method as prescribed under an existing rule. Therefore, no new promulgation of a rule occurred.”

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¶20. We likewise hold that the chancellor did not commit manifest error by concluding that Equifax had failed to prove that the Commission’s imposition of penalties pursuant to Mississippi Code Section 27-13-25(3) (2005) (amended 2009) warranted reversal. Section 27-13-25 provided additional penalties to be imposed “[i]n case of failure to pay any additional taxes as assessed under this section, *unless it is shown that the failure is due to reasonable cause and not due to willful neglect . . .*” Miss. Code Ann. § 27-13-25(3) (emphasis added). Equifax argues that the chancellor is vested with authority to reverse the imposition of penalties because it disagreed with the Commission’s decision - reiterating its argument that the chancery court is to apply a *de novo* standard of review to appeals of Commission decisions. We disagree. The chancellor properly found as follows:

this Court cannot find that the imposition of penalties is unsupported by substantial evidence, arbitrary or capricious, beyond the power of the [Commission], or violative of some statutory or constitutional right of Equifax. This Court cannot abate penalties based solely upon its disagreement with the [Commission’s] finding as to whether Equifax acted reasonably and without willful neglect.

The chancellor was correct that he could not reverse the Commission’s decision to impose penalties solely because he would have found differently than the Commission; rather, he could reverse only if Equifax proved that the imposition of penalties was unsupported by substantial evidence presented to the Commission, arbitrary and

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capricious, beyond the power of the Commission, or in violation of Equifax's statutory or constitutional rights - which the chancellor found Equifax had failed to do. As the chancellor pointed out in his order, it was clear that "the lack of any taxable income attributable to the State of Mississippi is not a fair assessment of Equifax's income earned within the state." We find that the chancellor did not commit manifest error by concluding that Equifax failed to prove that it was entitled to reversal of the Commission's imposition of penalties. Accordingly, we conclude that the chancellor did not err by affirming the Commission's decision, based on the evidence presented at the evidentiary hearing.

CONCLUSION

¶21. For the reasons discussed above, we reverse the judgment of the Court of Appeals and reinstate and affirm the judgment of the Hinds County Chancery Court affirming the Mississippi State Tax Commission's use of an alternative apportionment method and assessment of income taxes and penalties against Equifax.

¶22. THE JUDGMENT OF THE COURT OF APPEALS IS REVERSED. THE JUDGMENT OF THE HINDS COUNTY CHANCERY COURT IS REINSTATED AND AFFIRMED.

WALLER, C.J., DICKINSON, P.J., KITCHENS, PIERCE, KING AND COLEMAN, JJ., CONCUR. LAMAR, J., CONCURS IN PART AND IN RESULT WITHOUT SEPARATE WRITTEN OPINION. CHANDLER, J., NOT PARTICIPATING.

APPENDIX I — MISS. CODE ANN. § 27-77-5 (2005)

(1) Any taxpayer aggrieved by an assessment of tax by the agency, by the agency's denial of a refund claim, or by the denial of a waiver of tag penalty, and who wishes to contest the action of the agency shall, within thirty (30) days from the date of the action, file an appeal in writing with the board of review requesting a hearing and correction of the contested action specifying in detail the relief requested and any other information that might be required by regulation.

(2) Upon receipt of a timely written appeal from a tax assessment, refund claim denial or denial of waiver of a tag penalty, a hearing shall be scheduled before the board of review unless it is determined that the relief requested in the written appeal should be granted without a hearing. A notice of the hearing shall be mailed to the taxpayer advising the taxpayer of the date, time and location of the hearing. The taxpayer or his designated representative shall attend the hearing unless a request is made to, and granted by, the board of review to allow the taxpayer to submit his position in writing or by electronic transmission in lieu of attendance. Failure of the taxpayer or his designated representative to attend a hearing or to submit his position in writing or by electronic transmission by the date specified by the board of review or by the hearing date, if no date was specified, shall constitute a withdrawal of the appeal.

(3) At a hearing before the board of review on a tax assessment, denial of refund claim, or denial of waiver of a tag penalty, the board of review shall try the issues presented, according to law and the facts and within

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the guidelines established by regulation. The hearing before the board of review shall be informal and no official transcript will be made of the hearing. At the earliest practical date after the hearing, the members of the board of review that heard the appeal shall make a determination on the matter presented and notify the taxpayer of its findings by mailing a copy of its order to the taxpayer. If the order involves the appeal of a denial of a waiver of tag penalty, a copy of the order shall also be mailed to the tax collector that imposed the penalty. If in the order the board of review orders the taxpayer to pay a tax assessment, the taxpayer shall, within thirty (30) days from the date of the order, pay the amount ordered to be paid or appeal the order of the board of review to the commission. After the thirty-day period, if the tax determined by the board of review to be due is not paid and an appeal from the order of the board of review is not made to the commission, the agency shall proceed to collect the tax assessment as determined by the board of review.

(4) Any taxpayer aggrieved by an order of the board of review affirming a tax assessment, the denial of a refund claim, or the denial of a waiver of tag penalty, and who wishes to contest the order shall, within thirty (30) days from the date of the order of the board of review being contested, file an appeal to the commission. The appeal shall be in writing and shall request a hearing and reversal or modification of the order of the board of review, specify in detail the relief requested and contain any other information that might be required by regulation, and be filed with the commission secretary. Failure to timely file a written appeal with the commission secretary

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within the thirty-day period shall make the order of the board of review final and not subject to further review by the commission or a court, other than as to the issue of whether a written appeal from the order of the board of review was timely filed with the commission secretary.

(5) Upon receipt of a written appeal from an order of the board of review affirming a tax assessment, refund claim denial or denial of waiver of a tag penalty, the commission secretary shall schedule a hearing before the commission on the appeal. A notice of this hearing shall be mailed to the taxpayer advising the taxpayer of the date, time and location of hearing. The taxpayer or his designated representative shall attend the hearing unless a request is made to and granted by the commission to allow the taxpayer to submit his position in writing or by electronic transmission in lieu of attendance. Failure of the taxpayer or his designated representative to attend a hearing or to submit his position in writing or by electronic transmission by the date specified by the commission or by the hearing date, if no date was specified, shall constitute a withdrawal of the appeal.

(6) At any hearing before the commission on an appeal of an order of the board of review affirming a tax assessment, refund claim denial or denial of waiver of a tag penalty, two (2) members of the commission shall constitute a quorum. At the hearing, the commission shall try the issues presented, according to the law and the facts and pursuant to any guidelines established by regulation. The rules of evidence shall be relaxed at the hearing. Any appeal to chancery court from an order of the commission

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resulting from this type of hearing shall include a full evidentiary judicial hearing on the issues presented. No official transcript shall be made of this hearing before the commission. After reaching a decision on the issues presented, the commission shall enter its order setting forth its findings and decision on the appeal. A copy of the order of the commission shall be mailed to the taxpayer. If the order involves an appeal of a denial of a waiver of tag penalty, a copy of the order shall also be mailed to the tax collector that imposed the penalty.

(7) If in its order the commission orders a taxpayer to pay a tax assessment, the taxpayer shall, within thirty (30) days from the date of the order, pay the amount ordered to be paid or properly appeal said order of the commission to chancery court as provided in Section 4 of this act. After the thirty-day period, if the tax determined by the commission to be due is not paid and an appeal from the commission order has not been properly filed, the agency shall proceed to collect the tax assessment as affirmed by the commission. If in its order the commission determines that the taxpayer has overpaid his taxes, the agency shall refund or credit to the taxpayer, as provided by law, the amount of overpayment as determined and set out in the order.

(8) At any time after the filing of an appeal to the board of review or from the board of review to the commission under this section, an appeal can be withdrawn. Such a withdrawal of an appeal may be made voluntarily by the taxpayer or may occur involuntarily as a result the taxpayer failing to appear at a scheduled hearing, failing

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to make a written submission or electronic transmission in lieu of attendance at a hearing by the date specified or by the hearing date, if no date was specified, or by any other act or failure that the board of review or the commission determines represents a failure on the part of the taxpayer to prosecute his appeal. Any voluntary withdrawal shall be in writing or by electronic transmission and sent by the taxpayer or his designated representative to the chairman of the board of review, if the appeal being withdrawn is to the board of review, or to the commission secretary, if the appeal being withdrawn is to the commission. If the withdrawal of appeal is involuntary, the administrative appeal body from whom the appeal is being withdrawn shall note on its minutes the involuntary withdrawal of the appeal and the basis for the withdrawal. Once an appeal is withdrawn, whether voluntary or involuntary, the action from which the appeal was taken, whether a tax assessment, a denial of refund claim, a denial of waiver of tax penalty, or an order of the board of review, shall become final and not subject to further review by the board of review, the commission or a court. The agency shall then proceed in accordance with law based on such final action.

(9) Nothing in this section shall bar a taxpayer from timely applying to the commissioner as otherwise provided by law for a tax refund or for a revision in tax.

APPENDIX J — MISS. CODE ANN. § 27-77-7 (2005)

(1) The findings and order of the commission entered under Section 27-77-5 shall be final unless the taxpayer shall, within thirty (30) days from the date of the order, file a petition in the chancery court appealing the order and pay the tax or post the bond as required in this chapter. The petition shall be filed against the State Tax Commission and shall contain a concise statement of the facts as contended by the taxpayer, identify the order from which the appeal is being taken and set out the type of relief sought. If in the action, the taxpayer is seeking a refund or credit for an alleged overpayment of tax or for taxes paid in protest under subsection (3) of this section, the taxpayer shall allege in the petition that he alone bore the burden of the tax sought to be refunded or credited and did not directly or indirectly collect the tax from anyone else.

(2) A petition under subsection (1) of this section shall be filed in the chancery court of the county or judicial district in which the taxpayer has a place of business or in the Chancery Court of the First Judicial District of Hinds County, Mississippi; however, a resident taxpayer may file the petition in the chancery court of the county or judicial district in which he is a resident.

(3) A petition filed under subsection (1) of this section that appeals an order of the commission affirming a tax assessment, shall be accompanied by a surety bond approved by the clerk of the court in a sum double the amount in controversy, conditioned to pay the judgment of the court. The clerk shall not approve a bond unless the bond is issued by a surety company qualified to write

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surety bonds in this state. As an alternative to the posting of bond, a taxpayer appealing an order of the commission affirming a tax assessment may, prior to the filing of the petition, pay to the agency, under protest, the amount ordered by the commission to be paid and seek a refund of such taxes, plus interest thereon.

(4) Upon the filing of the petition under subsection (1) of this section, the clerk of the court shall issue a summons to the State Tax Commission requiring the commission to answer or otherwise respond to the petition within thirty (30) days of service. The summons shall be served on the State Tax Commission by personal service on the commissioner as the chief executive officer of the State Tax Commission. The chancery court in which a petition under subsection (1) of this section is properly filed shall have jurisdiction to hear and determine said cause or issues joined as in other cases. In any petition in which the taxpayer is seeking a refund or credit for an alleged overpayment of tax or for taxes paid under protest under subsection (3) of this section, the taxpayer shall prove by a preponderance of the evidence that he alone bore the burden of the tax sought to be refunded or credited and did not directly or indirectly collect the tax from anyone else. At trial of any action brought under this section, the chancery court shall give deference to the decision and interpretation of law and regulations by the commission as it does with the decisions and interpretation of any administrative agency, but it shall try the case de novo and conduct a full evidentiary judicial hearing on the issues raised. Based on the evidence presented at the hearing, the chancery court shall determine whether the

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taxpayer has proven, by a preponderance of the evidence or a higher standard if required by the issues raised, that he is entitled to any or all of the relief he has requested. The chancery court shall decide all questions presented, including those as to legality and the amount of tax or refund due, and if it finds that the tax assessment or denial of refund claim in issue is incorrect or invalid, in whole or in part, it shall determine the amount of tax or refund due, including interest and, if applicable, penalty to date, and enter such order or judgment as it deems proper. Interest and penalty included in this determination shall be computed by the court based on the methods for computing penalty and interest as specified by law for the type of tax in issue. Either the State Tax Commission or the taxpayer, or both, shall have the right to appeal from the order of the chancery court to the Supreme Court as in other cases. If an appeal is taken from the order of the chancery court, the bond provided for in subsection (3) of this section shall continue to remain in place until a final decision is rendered in the case.

**APPENDIX K — MISS. ADMIN. CODE 35.III.8.06,
SUBSECTION 402**

402 Computation of Basis of Filing.

402.01 Business Income of Producers of Mineral or
Natural Resource Products.

1. Taxpayers engaged in the trade or business of producing oil, gas, other liquid hydrocarbons, sulphur, coal, sand, gravel and other mineral or natural resource products, except timber, shall determine Mississippi net business income from such activity on a direct or separate accounting basis. The Mississippi gross business income from the production of mineral or natural resources shall include:
 - a. Sales of natural or mineral resources produced in Mississippi and sold in this state;
 - b. The market value, at the time of transfer, of all natural or mineral resources produced in this state and transferred by the taxpayer to another state for sale, refining, processing or manufacturing, provided that if the natural or mineral resources are sold by means of an “arms-length” transaction prior to refining, processing or manufacturing, the market value prescribed herein shall not exceed the selling price; and;
 - c. The market value, at the time of transfer, of all natural or mineral resources produced by the

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taxpayer in Mississippi and transferred to a refinery, processing plant, or manufacturing facility of the taxpayer in Mississippi.

2. A natural resource product shall be deemed to be sold in Mississippi if it is located in this state at the time title thereto passes to the purchaser. In the absence of specific proof of value of natural resources at the time of transfer from the state, the value of natural resources at the time of production shall be determined in accordance with the methods prescribed for the determination of “gross income from the property” for purposes of percentage depletion for federal income tax purposes.

402.02 Business Income of Contractors

1. The net business income of taxpayers engaged in the business of contracting shall be accounted for and assigned directly to this state for each contract performed within this state. Taxpayers engaged in the business of contracting both within and without the state shall determine such job cost which cannot be specifically allocated to the Mississippi contract by multiplying such non-allocable business-related expenses in the ratio that Mississippi direct job costs bears to total direct job costs.
2. Where a contract is performed partly within and partly without the state, the net business

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income assignable directly to Mississippi shall be determined by first deducting from the total contract receipts those job costs directly allocable to said contract and then deducting a pro-rata part of expenses which cannot be directly allocable to any contract, said pro-rata part to be determined by using the ratio between the contract direct job costs and the direct job costs of total contracts. The net business income from the contract, thus determined, shall then be apportioned to Mississippi in the ratio that receipts from said contract allocable to Mississippi for sales tax purposes bears to the total receipts from said contract. In the event that no allocation has been or can be made of the Mississippi gross receipts from said contract for Mississippi sales tax purposes, and the Mississippi gross receipts from said contract cannot otherwise be determined, then the apportionment of the net business income from the contract to Mississippi shall be made by such reasonable method as is acceptable to the Commissioner.

3. In the case of a prime contractor, who enters into a contract with a subcontractor for the performance of all or part of a contract within the State of Mississippi, both prime contractor and subcontractor are required to report any and all income from such contracts.
4. The net business income derived by a contractor from gains or losses from sales of capital assets,

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interest, dividends, rents and royalties shall be apportioned to Mississippi by multiplying such net business income by a receipts factor, the numerator of which is the total receipts located, assignable, allocated, or otherwise having a situs in this state during the tax year, and the denominator of which is the total receipts of the taxpayer everywhere during the tax year. In the case of sales of capital assets (buildings, land, depreciable machinery and equipment, stocks, bonds, etc.) receipts, for purposes of the receipts factor, shall include only the net gain or loss resulting from such sales of capital assets.

402.03 Business Income of Airlines. If an airline has any activity other than simply passing over this state, then it is “doing business” in this state and is required to file a return. The net business income of an airline company which has not been directly assigned, allocated or excluded as otherwise provided by this Regulation shall be apportioned to this state as provided in this section.

1. PASSENGER TRAFFIC INCOME. Business income from passenger traffic shall be apportioned to this state in the ratio that Mississippi revenue passenger miles bears to the total revenue passenger miles. The numerator of the ratio shall be computed by multiplying the number of revenue-producing passengers carried on flights landing or taking off within this state by the number of miles flown over the state

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by such flights. The denominator shall be determined by multiplying the total number of revenue-producing passengers carried by the total number of miles flown by flights carrying revenue-producing passengers.

2. **CARGO TRAFFIC INCOME.** Business income from cargo traffic and other classes of traffic shall be apportioned to this state in the ratio that Mississippi revenue ton miles, or other units of cargo transported, multiplied by Mississippi miles flown bears to the total of such elements of the factor. The numerator of each of such ratios shall be computed by multiplying the number of revenue-producing tons, or other units of cargo carried on flights landing or taking off within this state by the number of miles flown over this state by such flights. The denominator of each of such ratios shall be determined by multiplying the total number of revenue-producing tons, or other units of cargo carried, by total number of miles flown by flights carrying such revenue-producing cargo.
3. **ALTERNATIVES BASIS.** Business income of an airline company, or business income from any class of traffic of an airline company, may, as an alternative to the requirements of the paragraphs above, be apportioned to this state in the ratio that Mississippi flight miles bears to total flight miles during the tax year. The numerator of such alternative ratio shall be computed by

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multiplying the number of miles flown over this state by such flights. The denominator shall be determined by multiplying the total number of revenue-producing flights by the total number of miles flown by such flights.

4. In all of the apportionment formulas above, mileage from states here the taxpayer is not “doing business” will not be included in the apportionment formula.

402.04 Business Income of Motor Carriers. If a motor carrier picks up, delivers, services equipment, or has any activity other than simply passing through this state, then it is “doing business” in this state and is required to file a return. The net business income of motor carriers which has not been directly assigned, allocated or excluded as provided by this Regulation shall be apportioned to this state as provided in this section.

1. PASSENGER TRANSPORTATION. Business income from the transportation of passengers shall be apportioned to this state in the ratio that Mississippi revenue passenger miles bears to the total revenue passenger miles of the taxpayer during the tax period.
2. FREIGHT TRANSPORTATION. Business income from the transportation of freight or cargo shall be apportioned to this state in the ratio that Mississippi revenue ton miles to the

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total revenue ton miles of the taxpayer during the tax period.

3. PASSENGER-FREIGHT TRANSPORTATION. Business income of taxpayers engaged in the transportation of both passengers and freight shall first make a breakdown of the business income between passenger traffic and freight traffic by using the several ratios between gross revenue from each class of traffic and the total gross operating revenues. Business income from each class or traffic shall then be apportioned to this state in accordance with the two paragraphs above.
4. ALTERNATIVE BASIS. Business income of a motor carrier, or business income from any class of traffic of a motor carrier, may as an alternative to the requirements of the paragraph above, be apportioned to this state (A) in the ratio that Mississippi vehicle miles bears to total vehicle miles of the taxpayer during the tax period, or (B) in the ratio that gross receipts from trips beginning, ending, or passing through Mississippi bears to the total gross receipts.
5. In all of the apportionment formulas above, mileage from states where the taxpayer is not “doing business” will not be included in the apportionment formula.

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402.05 Business Income of Certain Utilities. The net business income of taxpayers operating a railroad, express service, telephone or telegraph business, or other form of public service, other than public service companies specifically provided for elsewhere in this Regulation, which has not been directed to this state as provided by this Section.

1. FORMULA. Business income of public utilities shall be apportioned to this state in the ratio that gross operating revenues within Mississippi during the tax year bears to total gross operating revenues everywhere by the taxpayer during the tax year.
2. GROSS OPERATING REVENUE WITHIN MISSISSIPPI. The term “**gross operating revenue within Mississippi**” means an equal mileage portion of revenue such as ton miles, passenger miles, message miles, and the like as received for interstate business from activity in this state whether such business originates, ends, or passes through Mississippi to this result, there shall be added the Mississippi portions of all intrastate revenue.
3. ALTERNATIVE. In cases where the amounts of gross operating revenues within this state cannot be accurately and adequately determined, the Commissioner may prescribe a method for otherwise apportioning business income in Mississippi. Only methods provided in this

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regulation may be used without the prior approval of the Commissioner.

402.06 Business Income of Retailers, Wholesalers, Service Companies and Lessors. The net business income of retailers, wholesalers, lessors and other service companies, merchants, traders, vendors, or dealers buying, selling or renting, other than those specifically provided for elsewhere in this Regulation, which has not been allocated, directly assigned, or excluded as otherwise provided, shall be apportioned to Mississippi by multiplying such net business income by a single sales-factor apportionment formula as defined in subsection 402.09 paragraph 3 of this Regulation.

402.07 Business Income of Pipelines. The net business income of a pipeline company which has not been allocated, directly assigned, or excluded as otherwise provided in this Regulation shall be apportioned to Mississippi by multiplying such net business income by a fraction, the numerator of which is the property factor plus the payroll factor, as defined in subsection 402.09, paragraphs 1 and 2 of this Regulation, plus the traffic miles factor, and the denominator where is three (3).

1. **TRAFFIC MILES FACTOR.** The term “**traffic miles**” means the movement or transportation of one barrel of oil, one gallon of gasoline, or one thousand cubic feet of natural or casinghead gas for a distance of one mile. In cases where

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MCF mileage units cannot be determined, then capacity mileage of the pipeline in Mississippi to total capacity mileage everywhere shall be used. Capacity mileage shall be determined by squaring one-half ($\frac{1}{2}$) of the diameter of each size of pipe and multiplying by the mileage of that size of pipe with a total computation for each in Mississippi as compared to the total of such computations everywhere.

2. PIPELINE COMPANY DEFINED. A pipeline company means any taxpayer engaged in the trade or business of moving, conveying or transporting through a system or conduit of pipes any crude oil, natural gas, refined petroleum products, minerals or any other mineral products to a point of delivery either in, out or through Mississippi, and irrespective of whether such products of goods belong to the taxpayer or to others. The term includes transmission lines and connecting field and storage lines.

402.08 Business Income of Manufacturers

1. MANUFACTURERSSELLINGPRINCIPALLY AT WHOLESALE. The net business income of a taxpayer, engaged in the trade or business of manufacturing and selling principally at wholesale, which has not been allocated, directly assigned, or excluded as otherwise provided in this Regulation shall be apportioned to Mississippi by multiplying such net business

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income by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, as defined subsection 402.09, paragraphs 1 and 2, and (c) of this Regulation, and the denominator of which is three (3).

2. MANUFACTURERSSELLINGPRINCIPALLY AT RETAIL. The net business income of a taxpayer, engaged in the trade or business of manufacturing and selling principally at retail, which has not been allocated, directly assigned, or excluded as otherwise provided in this Regulation shall be apportioned to Mississippi by multiplying such net business income by a fraction, the numerator of which is the average of the sum of property and payroll factors plus the sales factor, as defined in subsection 402.09, paragraphs 1 and 2 of this Regulation, and the denominator of which is two (2).

402.09 Apportionment Factors

1. Property Factor Defined.
 - a. Except as otherwise provided, the property factor of the apportionment formula for each trade or business of the taxpayer shall include all real and tangible personal property owned or rented by the taxpayer and used during the tax period in the regular course of such trade or business. The term “**real and tangible personal property**” includes

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land, buildings, machinery, stock of goods, equipment, and other real and tangible personal property, but does not include such properties owned or rented and used for general and administrative functions, transportation equipment (automobiles, trucks, and trailers, aircraft and other mobile equipment), coin or currency, or properties used in the production of non-business or exempt income. The includable property in the property factor shall include the average net book value of property owned, plus the value of rented property computed as provided in the “valuation of rental property” portion of this section of the Regulation.

- b. **PROPERTY USED IN THE PRODUCTION OF BUSINESS INCOME.** Property shall be included in the property factor if it is actually used or is available for or capable of being used during the tax period in the regular course of the trade or business of the taxpayer unless expressly excluded. Property held as reserves or standby facilities or property held as a reserve source of materials shall be included in the factor. Property or equipment under construction during the tax period (except inventoriable goods in process) shall be excluded from the factor until such property is actually used in the regular course of the trade or business of

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the taxpayer. If the property is partially used in the regular course of the trade or business while under construction, the value of the property to the extent used shall be included in the property factor. Property used in the regular course of the trade or business of the taxpayer shall remain in the property factor until its permanent withdrawal is established by an identifiable event such as conversion to the production of non-business income, its sale or its abandonment.

- c. **NUMERATOR.** The numerator of the property factor shall include rented by the taxpayer and used in this state during the tax period in the regular course of the trade or business of the taxpayer. Property in transit between locations of the taxpayer to which it belongs shall be considered to be at the destination for purposes of the property factor. Property in transit between a buyer and seller which is included by a taxpayer in the denominator of his property factor in accordance with his regular accounting practices shall be included in the numerator according to the state of destination. The value of transportation equipment such as automobiles, trucks and trailers, aircraft, etc. shall be excluded completely from the property factor.
- d. **DENOMINATOR.** The denominator of the property factor is the total of such property

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described in the above three paragraphs wherever located during the tax year.

- e. VALUATION OF OWNED PROPERTY.
 - i. Property owned by the taxpayer shall be valued at net book value. As a general rule “**net book value**” is deemed to be the original cost of the property less the depreciation as reflected on the books of the taxpayer and includes the net book value of subsequent capital additions or improvements to the includable property as well as adjustment or partial disposition thereof, by reason of sale, exchange, abandonment, etc.
 - ii. Inventory of stock of goods shall be included in the factor in accordance with the valuation method acceptable for federal income tax purposes and used by the taxpayer for book purposes.
 - iii. Property acquired by gift or inheritance shall be included in the factor as its net book value as reflected on the books of the taxpayer.
- f. VALUATION OF RENTED PROPERTY. Property rented by the taxpayer is valued at eight times the net annual rental rate. The net annual rental rate for any item of

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rented property is the annual rental rate paid by the taxpayer for such property, less the aggregate annual subrental rates paid by subtenants of the taxpayer.

- g. **SUBRENTALS.** Subrents are not deducted when subrents constitute business income because the property which produces the subrents is used in the regular course of a trade or business of the taxpayer when it is producing such income.
- h. **ANNUAL RENTALS. “Annual rental rate”** is the amount paid as rental for property for a 12-month period. Where property is rented for less than a 12-month period, the rent paid for the actual period of rental shall constitute the “annual rental rate” for the tax period. Where a taxpayer has rented property for a term of 12 or more months and the current tax period covers a period of less than twelve months, the rent paid for the short tax period shall be annualized. If the rental term is for less than 12 months, the rent shall not be annualized beyond its term. Rent shall not be annualized because of the uncertain duration when the rental term is on a month to month basis. Annual rent is the actual sum of money or other consideration payable, directly or indirectly, by the taxpayer or for its benefit for the used of the property. Leasehold improvements

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shall, for the purposes of the property factor, be treated as property owned by the taxpayer regardless of whether the taxpayer is entitled to remove the improvements or the improvements revert to the lessor upon expiration of the lease. Hence, the net book value of leasehold improvements shall be excluded in the factor.

- i. AVERAGING PROPERTY. As a general rule the average value of property owned by the taxpayer shall be determined by averaging the values at the beginning and ending of the tax period. However, the Commissioner may require or allow averaging by monthly values, or other periodic values, if such method of averaging is required to property reflect the average values of the taxpayer's property for the tax period. Averaging by monthly values, or other periodic values, will generally be applied if substantial fluctuations in the values of the property exist during the tax period or where property is acquired after the beginning of the tax period or disposed of before the end of the tax period. Averaging with respect to rented property is achieved automatically by the method of determining the net annual rental rate of such property.
2. Payroll Factor Defined. Except as otherwise provided, the payroll factor of the apportionment

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formula for each trade or business of the taxpayer shall include the total amount paid by the taxpayer in the regular course of its trade or business for compensation during the tax period. There shall be excluded from the payroll factor amounts paid as compensation for general and administrative functions and amounts paid for the production of non-business or exempt income.

- a. PAID. The total amount **“paid”** to employees is determined upon the basis of the taxpayer’s accounting method. If the taxpayer has adopted the accrual method of accounting, all compensation properly accrued shall be deemed to have been paid. Notwithstanding the taxpayer’s method of accounting, at the election of the taxpayer, compensation paid to employees may be included in the payroll factor by use of the cash method if the taxpayer is required to report such compensation under such method for unemployment compensation purposes.
- b. COMPENSATION. The term **“compensation”** means wages, salaries, commissions and other form of remuneration paid to employees for personal services. Amounts considered paid directly include the value of board, rent, housing, lodging, and other benefits, or services furnished to employees by the taxpayer in return for personal services, provided that such

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amounts constitute income to the recipient under the Federal Internal Revenue Code. Payments made to an independent contractor or any other person for personal services rendered for the taxpayer may, with the approval or requirement of the Commission, be classified as compensation.

- c. EMPLOYEES. Except as otherwise provided, the term “**employee**” means any officer of a corporation, or any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an employee. Generally, a person will be considered to be an employee if he is included by the taxpayer as an employee for purposes of the payroll taxes imposed by the Federal Insurance Contributions Act.
- d. NUMERATOR. The numerator of the payroll factor is the total amount paid in this state during the tax period by the taxpayer for compensation.
- e. DENOMINATOR. The denominator of the payroll factor is the total compensation paid everywhere during the tax period.
- f. Compensation paid in this state. Compensation is paid in this state if any one of the following tests, applied consecutively,

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are met:

- i. The employee's service is performed entirely within this state.
 - ii. The employee's service is performed both within and without the state, but the service performed without the state is incidental to the employee's service within the state. The word "**incidental**" means any service which is temporary or transitory in nature, or which is rendered in connection with an isolated transaction.
- g. If the employee's services are performed both within and without this state, the employee's compensation will be attributed to this state:
- i. If the employee's base of operations is in the state; or
 - ii. If there is no base of operations in any instance in which some part of the service is performed, but the place from which the service is directed or controlled is in this state; or
 - iii. If the base of operations or the place from which the service is directed or controlled is not in any state in which

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some part of the service is performed but the employee's residence is in this state.

- h. The term “**base of operations**” is the place of more or less permanent nature from which the employee starts his work and to which customarily returns in order to receive instructions from the taxpayer or communications from his customers or other persons or to replenish stock or other materials, repair equipment, or perform any other functions necessary to the exercise of this trade or profession at some other point or points. The term “place from which the service is directed or controlled” refers to the place from which the power to direct or control is exercised by the taxpayer.

3. Sales Factor Defined.

- a. For the purpose of the sales factor of the apportionment formula for each trade or business of the taxpayer, the term “**sales**” means all gross receipts derived by the taxpayer from transactions and activity in the regular course of such trade or business during the tax period which have not been directly assigned, allocated or excluded as provided in this Regulation. The following are rules for determining “sales” in various situations:

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- i. In the case of a taxpayer engaged in manufacturing and selling or purchasing and reselling goods or products, “**sales**” includes all gross receipts from the sales of such goods or products held by the taxpayer primarily for sale to customers in the ordinary course of its trade or business. Gross receipts for this purpose means gross sales, less returns and allowances, and includes interest income, service charges, carrying charges, or time-priced differential charges incidental to such sales. Federal and state excise taxes (including sales taxes) shall be included as part of such receipts if such taxes are passed on to the buyer or included as part of the selling price of the product.
- ii. In the case of cost plus fixed fee sales or service contracts, “**sales**” include the entire reimbursed cost, plus the fee.
- iii. In the case of a taxpayer engaged in providing services, “**sales**” includes the gross receipts from the performances of such services including fees, commissions, and similar items.
- iv. In the case of a taxpayer engaged in renting real and tangible property

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“sales” includes the gross receipts from the rental, lease, or licensing the use of the property.

- v. In the case of a taxpayer engaged in the sale, assignment, or licensing of intangible personal property such as patents and copyrights, **“sales”** include the gross receipts therefrom.
 - vi. In the case of business income derived from interest and dividends, such receipts constitute **“sales”**.
 - vii. In the case of business income derived from the sale of capital assets (sale of equipment used in business, sales of stocks, bonds, etc.), such receipts constitute **“sales”** but only to the extent of the gain realized from such sales.
- b. **SALES OF TANGIBLE PERSONAL PROPERTY ARE IN THIS STATE.** Gross receipts from sales of tangible personal property (except sale to the United States Government) are in this state:
- i. If the property is delivered or shipped to a purchase, within this state regardless of the f. o. b. point or other conditions of sale, or

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- ii. If the property is shipped from an office, store, warehouse, factory, or other place of storage in this state and the taxpayer is not taxable in the state of the purchaser.
- iii. Property shall be deemed to be delivered or shipped to a purchaser within this state if the recipient is located in this state, even though the property is ordered from outside this state.
- iv. Property is delivered or shipped to a purchaser within the state if the shipment terminates in this state, even though the property is subsequently transferred by the purchaser to another state.
- v. The term “purchaser within this state” shall include the ultimate recipient of the property if the taxpayer in this state, at the designation of purchases, delivers to or has the property shipped to the ultimate recipient within this state.
- vi. When the property being shipped by a seller from the state of origin to a consignee in another state is diverted while enroute to a purchaser in this state, the sales are in this state.

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- vii. If the taxpayer is not taxable in the state of the purchaser, the sale is attributed to this state if the property is shipped from an office, store, warehouse, factory, or other place of storage in this state.
- viii. If a taxpayer, whose salesman operates from an office located in this state, makes a sale to a purchaser in another state in which the taxpayer is not taxable, and the property shipped directly by a third party to the purchaser, the following rules apply:
 - If the taxpayer is taxable in the state from which the third party ships the property, then the sale is in such state.
 - If the taxpayer is not taxable in the state from which the property is shipped, then the sale is in this state.
- c. SALES OF TANGIBLE PERSONAL PROPERTY TO THE UNITED STATES GOVERNMENT ARE IN THIS STATE. Gross receipts from the sales of tangible personal property to the United States Government are in this state if the property is shipped from an office, store, warehouse,

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factory, or other place of storage in this state. For purposes of this Regulation, only sales for which the United States Government makes direct payment to the seller pursuant to the terms of a contract constitute sales to the United States Government. Thus, as a general rule, sales by a subcontractor to the prime contractor (the prime contractor being party to the contract with the United States Government) do not constitute sales to the United States Government.

- d. SALES OTHER THAN SALES OF TANGIBLE PERSONAL PROPERTY ARE IN THIS STATE. SECTION 27-7-23(c)(3) provides for the inclusion in the numerator of the sales factor, gross receipts from transactions other than sales of tangible personal property (including transactions with the United States Government). Under this section gross receipts are attributed to this state if the income-producing activity is performed wholly within this state. Gross receipts, with respect to a particular item of income, derived from income-producing activity performed within and without this state shall be attributed to this state to the extent of such gross receipts which represent services or activities actually performed within this state.

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- e. **INCOME-PRODUCING ACTIVITY DEFINED.** The term “**income-producing activity**” applies to each separate item of income and means the transactions and activity directly engaged in by the taxpayer in the regular course of its trade or business for the ultimate purpose of obtaining gains or profits. Accordingly, the income-producing activity includes but is not limited to the following:
- i. The rendering of personal services by employees or the utilization of tangible and intangible property by the taxpayer in performing a service.
 - ii. The performance, execution or subletting of a construction contract by the taxpayer to whom a construction contract has been awarded.
 - iii. The sale, rental, leasing, or licensing or other use of real property.
 - iv. The rental, leasing, licensing or other use of tangible personal property.
 - v. The sale, licensing or otherwise of intangible personal property.
- f. **SPECIFIC APPLICATIONS.** The following are special rules for determining when

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receipts from income-producing activities described below are in this state:

- i. Gross receipts from the sale, lease, rental or licensing of real property are in this state if the real property is located in this state.
- ii. Gross receipts from the rental, lease or licensing of tangible personal property are in this state if the property is located in this state. The rental, lease, licensing or other use of tangible personal property in this state is a separate income-producing activity from the rental, lease, licensing or other use of the same property while located in another state; consequently, if property is within and without this state during the rental, lease or licensing period, gross receipts attributable to this state shall be measured by a ratio of the time the property was physically present or was used in this state bears to the total time or use of the property everywhere during such period.
- iii. Gross receipts for the performance of personal services are attributable to this state to the extent such services are performed in this state. Usually where services are performed partly

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within and partly without this state, the services performed in each state will constitute a separate income-producing activity; in such case the gross receipts for the performance of services attributable to this state shall be measured by a ratio of the time spent in performing such services in this state bears to the total time spent in performing services everywhere. Time spent in performing services includes the amount of time expended in the performance of a contract or other obligation which produced such gross receipts. Personal service not directly connected with the performance of the contract or other obligation, as for example, time expended in negotiating the contract, is excluded from the computation.

- iv. In the case of a construction contract performed partly within and partly without this state, gross receipts attributable to this state shall be the amount of the construction contract allocable to Mississippi for Mississippi sales tax purposes.
- g. **NUMERATOR.** The numerator of the sales factor shall include the gross receipts attributable to this state and derived by the

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taxpayer from transactions and activity in the regular course of its trade or business. All interest income, service charges, carrying charges, or time-price differential charges incidental to such gross receipts shall be included regardless of the place where the accounting records are maintained or the location of the contract or other evidence of indebtedness.

- h. DENOMINATOR. The denominator of the sales factor shall include the total gross receipts derived by the taxpayer from transactions and activity in the regular course of its trade or business, except receipts directly assigned, allocated or excluded by the provision of this Regulation.
- i. UNIFORMITY. It is the purpose and intent of this Regulation to include in both the numerator and denominator of the factors described in the above sections only those properties, payrolls and sales which are comparable.

402.10 Other Provisions. If the allocation and apportionment provisions of this Regulation do not fairly represent the extent of the taxpayer's business activity in this state, the taxpayer may petition for, or the Commissioner may require, in respect to all or any part of the taxpayer's business activity, if reasonable:

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1. Separate accounting;
2. The exclusion of any one of the factors;
3. The inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this state; or
4. The employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

**APPENDIX L — MISS. ADMIN. CODE 35.I.1.01,
SUBSECTION 107 (2005)**

107 Hearings and Appeals Effective July 1, 2005, a new statutory uniform administrative and judicial appeal procedure from certain acts of the Agency was established. The administrative appeal process described in this section is based on this new statutory uniform administrative and judicial appeal procedure and is applicable to all administrative and judicial appeals brought under this new statutory procedure. This new statutory procedure is not however applicable to any assessment, refund claim, request for waiver of tag penalty or the suspension, revocation, surrender, seizure or denial of a permit, tag or title or the administrative appeal or judicial appeal thereof where the initial date of said assessment, refund claim, tag penalty, suspension, revocation, denial, surrender or seizure is before July 1, 2005. Anyone seeking an administrative appeal or a judicial review of an action of the Agency where the initial date of the action is prior to July 1, 2005 is directed to consult the applicable administrative appeal and judicial review statutes in effect at the time of the action to determine the proper procedures to be followed and not the provisions of this section.

107.01 Administrative Appeal This section describes the administrative appeal process applied when a person is aggrieved by certain actions of the Agency. Typically, that action is an assessment of tax when the taxpayer does not agree tax is due; however, the action may also include a denial of refund, assessment of penalties or interest, and other similar items. The intent of the administrative appeal process is to secure a just resolution or decision.

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107.02 Administrative Appeal Process With the exception of an appeal of a tag penalty, this section does not describe the administrative appeal process relating to actions of the Commission and/or the Agency regarding ad valorem taxes and homestead exemption. An administrative appeal from these actions shall be as prescribed by statute. This section also does not describe the administrative appeal process of actions taken by the Commission and/or the Agency under the Local Option Alcoholic Beverage Control Law and/or under the Mississippi Native Wine Act of 1976. The administrative appeal process for such ABC actions is already described in the ABC Regulations of the Commission.

1. Informal Review

a. The person may seek an informal review of any assessment or other action believed incorrectly issued or any refund improperly denied.

b. In the case when an auditor or examiner determines additional tax is due, the person should first attempt to resolve any questions with the auditor or examiner. If unable to reach an agreement of the audit results with the auditor, a conference with the auditor's supervisor or the supervisor's designee may be arranged. This conference should provide opportunity to both parties to gain a thorough understanding of the basis of the assessment and to make sure that the facts of the case are correct and complete.

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c. An informal review may be granted for any situation, but is not required before seeking administrative appeal. The person may continue to attempt to resolve an issue informally with Agency staff once the formal appeal process has begun but the informal review does not toll the time limit to appeal to the Review Board.

2. Representation

A person may represent himself or may choose to have a representative at any point throughout the appeal process. Hearings before the Review Board, a hearing officer, or the Commission are considered confidential and are not open to the public; however, the appellant may permit another person(s) to attend the hearing and to participate as deemed appropriate or necessary.

3. Interest continues to accrue on unpaid balances.

Filing an appeal does not stop interest charges from accruing on any unpaid tax liability. In some situations, penalties may also continue to accrue.

4. Written requests for Administrative Appeal

a. The taxpayer or person appealing must request a hearing in writing. The written request for appeal should include a statement of the relief being sought and the amount of tax, fees, interest and/or penalty, or the action in dispute. The

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request should also include the tax identification or tax account number, type of tax and tax periods involved, and the reason the taxpayer or person appealing disagrees with the assessment or action.

b. The request must include the person's mailing address and the name and address of his designated representative, if any. It is the responsibility of the person appealing to provide and maintain an official mailing address on file with the Review Board and/or Commission Secretary. Any change of address during the appeal process must be made in writing and addressed to the body in which the appeal is pending. This address change is for the appeal process only and does not include any address change to tax account information maintained by the Agency.

c. The timeline for appeals are explained further in this section. A request for appeal not received within the time periods provided below will be dismissed.

5. Notice of hearing.

a. A person or the authorized representative will be notified of the hearing by mail at the last known address. The last known address will be the mailing address provided in the written request of appeal.

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b. The hearing notice will contain the time, place, and date of the hearing. Notice to the person's or taxpayer's authorized representation constitutes notice to the person or taxpayer.

6. Continuance of hearing

a. A request for a continuance of the hearing will be routinely granted if the request is received within ten (10) days after the notice of the hearing is mailed. If the request for continuance is received beyond ten (10) days, then the determination to continue the hearing will be decided by the Chairman of the Review Board or the Commissioner.

b. The Tax Commission will not be responsible for delay in the delivery or mail.

7. Confidential hearings

All hearings are closed to the public due to the confidential nature of the subject matter. However, through written authorization, the person appealing may waive the right to a closed hearing.

8. Items not subject to appeal.

Items, in general, not subject to administrative appeal include but are not limited to:

a. Certain bond amounts,

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- b. Penalty rate increases,
 - c. Declaratory Opinions,
 - d. Letter rulings,
 - e. Oral or written advice,
 - f. Issuance of levy or garnishments,
 - g. Issuance of liens, warrants or jeopardy warrants, and
 - h. Diversions or distributions of tax revenue.
- 9. Request for removal of voting member of appeal board**
- a. Any person may request that a member of the voting panel of the Review Board be replaced or a member of the Commission not participate in a hearing if it appears that person's impartiality might be questioned by a reasonable person knowing all the circumstances, or for other grounds.
 - b. A written or verbal request for removal of a voting member from the decision process stating the reason the member's partiality is questioned must be made by the taxpayer or person appealing before the commencement of a Review Board hearing.

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A written request for removal of a member of the Commission from the decision process must be made by the taxpayer or person appealing no more than two (2) weeks after receiving notice of a hearing before the Commission.

10. Timeline for filing appeals

a. Assessment of tax, denial of refund, or denial of a waiver of tag penalty:

- i.** The taxpayer, if aggrieved by an assessment of tax, penalty, interest, a denial of a refund, or by a denial of a waiver of tag penalty, may apply for a hearing before the Review Board. The taxpayer must submit a request in writing to the chairman of the Review Board within thirty (30) days of the date of the action.
- ii.** If the Review Board determines that an assessment of tax, penalty or interest is due, the taxpayer must pay the assessment or appeal to the Commission within thirty (30) days from the date of the order of the Review Board. The taxpayer must submit the request for appeal in writing to the Commission Secretary.

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- iii.** If the Commission determines that the assessment of tax, penalty, or interest is due, the taxpayer must either pay the tax due or appeal the action to the appropriate chancery court within thirty (30) days of the date of the order of the Commission.

- b.** Suspension, surrender, seizure or revocation of a permit, tag, or title:

 - i.** If the Agency determines that action against a permit, tag, or title is necessary, the permittee, tag holder, or title interest holder will be notified by mail of the agency's intention to revoke, suspend, or order the surrender or seizure of the permit, tag, or title. The notice will advise the permittee, tag holder, or title interest holder of the time and location for a hearing on the matter that is at a minimum of thirty (30) days from the date of the notice. The hearing will be conducted by the Review Board or by a hearing officer designated by the Commissioner.

 - ii.** If the permittee, tag holder or title interest holder is aggrieved by the

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determination of the Review Board or hearing officer, the aggrieved party may appeal in writing to the Commission within thirty (30) days of the date of the order. The matter will become final after thirty (30) days if not appealed.

- iii. The hearing before the Commission shall be taken down by a court reporter. The order of the Commission shall become final unless the permittee, tag holder, or title interest holder appeals within thirty (30) days from the date of the order in the appropriate chancery court seeking a review of the order.
- c. Denial of an application for a permit, tag, or title.
- i. If the Agency determines that an application for a permit, tag, or title should be denied, the applicant will be notified either by mail or in person of the Agency's intention to deny the permit, tag, or title. If the denial involves an application for a title, the notice will also be mailed to the designated agent who submitted the title application and any other alleged title interest

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holders shown on the application. If the applicant or any title interest holder appearing on the application is aggrieved by the denial of application, the aggrieved party shall file a written appeal with the Review Board within thirty (30) days of the notice. The matter will become final after thirty (30) days if not appealed.

- ii.** If the applicant or the title interest holder remains aggrieved by the determination of the Review Board, the aggrieved party may appeal in writing to the Commission within thirty (30) days of the date of the order. The matter will become final after thirty (30) days if not appealed.
- iii.** The hearing before the Commission shall be taken down by a court reporter. The order of the Commission shall become final unless the applicant of the permit, tag, or title, or the title interest holder files within thirty (30) days from the date of the order in the chancery court seeking a review of the order.

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11. Review Board hearing

a. With exception of matters administered by the Office of Alcoholic Beverage Control and Commission actions related to Ad Valorem Tax, a taxpayer or person in disagreement with an assessment, refund, or other appealable action of the Agency may request a hearing before the Review Board. Three members of the Review Board shall constitute a quorum and may hear any matter before the Review Board; however, an appeal of the intent to revoke, suspend, or order for seizure or surrender of a permit, tag, or title may be heard by a panel of the Review Board or by a hearing officer.

b. Upon timely receipt of a written request from the person appealing or an authorized representative, the Review Board shall promptly schedule a hearing for consideration of the appeal. At the hearing, the Review Board shall decide the issues presented according to applicable law and the facts.

c. A decision in favor of the person appealing may be made without a hearing when the facts are not in dispute, the issues are clearly identified, or the law has been applied to similar situations in previous decisions.

d. There will be no official transcript or recording made of a Review Board hearing. The official

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record of the hearing will be the minutes and orders of the Review Board which are confidential for all tax matters. Review Board hearings shall be informal and the rules of evidence will be relaxed.

e. The person requesting the hearing or the person's authorized representative will be asked to discuss the facts supporting the claim to provide explanation of how the law supports that claim. Representatives of the Agency may also be asked to discuss the facts in support of the action or cause.

f. The Review Board may request the person appealing the matter or Agency staff to provide additional information and/or documents during the course of its review. Time limits for submission of the additional information or documents will be established by the chair of the Review Board. If the person from whom information or documents are requested fails to respond to the request in the time provided, the Review Board may decide the appeal without the supplemental documents or information.

g. An Order will be issued after the Review Board has fully considered the information provided at the hearing, any post-hearing information, and the laws specific to the case. The chair of the Review Board will prepare the order and mail it to the person or authorized representative. Notice

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to the authorized representative constitutes notice to the person appealing.

h. The Review Board may elect to uphold the assessment, to amend the assessment, to issue a revised assessment, to issue a refund or credit, to remand the issue to the originating division for further work, or any other action it deems appropriate. If the person remains aggrieved with the decision of the Review Board, the action may be appealed to the Tax Commission.

12. Commission hearing

a. Any authorized appeal must be timely made to the Commission in writing. The Commission shall consider the appeal request and notify the person appealing or his authorized representative of the time and place fixed for the hearing. Any two members of the Commission constitute a quorum and may hear all appeals.

b. The person or the authorized representative will be asked to discuss the facts and documents in support of the claim and to explain how the law supports that claim. Commission hearings shall be informal and the rules of evidence will be relaxed.

c. The Commission may request the person appealing the matter or Agency staff to provide additional information and/or documents during the course of its review. Time limits for submission

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of the additional information or documents will be established by the chair of the Commission. If the person from whom information or documents are requested fails to respond to the request in the time provided, the Commission may decide the appeal without the supplemental documents or information.

d. The Commission may elect to uphold the assessment or action, to amend the assessment, to issue a revised assessment, to issue a refund or credit, to remand the issue to the Review Board or originating division for further work, or any other action it deems appropriate. The Commission may also request the person appealing, Agency staff, or both to submit proposed findings of fact, conclusions of law, orders, and/or briefs.

e. After the Commission has fully considered the information provided at the hearing, any post-hearing information, and the laws specific to the case, it shall issue its order conveying its decision in regard to the appeal which order is considered confidential for all tax matters excluding ad valorem tax. The Commission Secretary will mail the order to the person appealing or the designated representative. Notice to the person's authorized representative constitutes notice to the person appealing.

f. In Commission hearings involving tax determinations, the hearing will not be

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transcribed since any judicial review of the Commission decision will involve a full evidentiary judicial hearing. However, these hearings will be tape-recorded.

g. The Commission hearings regarding beer, tobacco, or sales tax permits, and tag or title matters will be recorded by a court reporter. Hearings before the Commission regarding Alcoholic Beverage Control (ABC) matters shall be held as provided in ABC Regulations.

13. Withdrawal of an appeal

a. An appeal before a hearing officer, Review Board, or Commission may be withdrawn by the taxpayer or person filing the appeal at any time. The withdrawal may be made voluntarily by the person or may occur involuntarily under the following conditions.

b. An involuntary withdrawal of an appeal may occur as result of the person failing to appear at a scheduled hearing, failing to timely provide a written appeal in lieu of attendance at a hearing, or by any other act or failure that the body hearing the appeal determines represents a failure on the part of the person to defend his appeal. An involuntary appeal will be documented in the minutes providing the basis of the withdrawal.

c. A voluntary withdrawal of appeal must be received in writing and sent by the person or

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authorized representative to the chairman of the Review Board if the appeal is before the Board, or to the Commission Secretary if the appeal is before the Commission.

d. Following a withdrawal of an appeal, the action shall become final and not subject to further review by the Review Board, Commission or a court. The agency shall then proceed with any action in accordance with the law.

14. Judicial review

a. Any person aggrieved by the final Order of the Commission may seek a judicial review of that decision as provided by law. The petition shall be filed against the State Tax Commission and must include a concise statement of facts as contended by the person appealing, identify the order from which the appeal is being taken, and set out the type of relief sought.

b. The petition for a review of an assessment of tax must include a bond double the amount in controversy conditioned to pay the judgment of the court. The bond must be issued by a surety company qualified to write surety bonds in Mississippi. Alternatively, the taxpayer may pay the assessment, under protest, prior to filing the petition and seek a refund of such assessment.

c. In a petition involving a revocation, suspension, seizure, order to surrender, or denial of a permit,

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tag, or title, the petition shall contain certification that the petitioner has paid to the Commission Secretary the estimated cost of preparation of the entire record of the Commission on the matter for which a review is sought.

d. The person or the State Tax Commission may appeal an order of the chancery court to the state Supreme Court.