



MISSISSIPPI SUPREME COURT IN *EQUIFAX*: MARK IT TO "MARKET" BUT THAT'S NOT HALF THE STORY – STANDARD OF REVIEW IS THE REAL ISSUE!

Equifax, Inc. and Equifax Credit Information Services, Inc. v. Mississippi Department of Revenue f/k/a Mississippi State Tax Commission

Yesterday, the Mississippi Supreme Court handed down its opinion in the widely-watched case [*Equifax, Inc. and Equifax Credit Information Services, Inc. v. Mississippi Department of Revenue f/k/a Mississippi State Tax Commission*](#). The Court, in reversing the Court of Appeals decision from 2012 and reinstating the chancery court's decision, placed the burden of proof on the taxpayer in upholding the Mississippi Department of Revenue's (the "Department") use of an alternative apportionment formula.¹ The Court also upheld the substantial penalties the Department had imposed due to the taxpayer's complete adherence to the state's sales factor sourcing regulations. The Mississippi Court of Appeals previously [held](#) that the Department, when invoking a market sourcing sales factor method under the state's alternative apportionment authority, bore the burden of proof in establishing that the standard cost-of-performance formula did not fairly reflect Equifax's business in Mississippi and that its alternative method was reasonable.

The Big Issue is Standard of Review – Taxpayers Beware!

Although the market sourcing and burden of proof issues in *Equifax* have been the center of national attention recently, the more sweeping issue in the case from a local standpoint is the Court's application of a limited standard of review the chancery court is to apply in appeals of Department decisions. Historically, Mississippi taxpayers have been afforded a trial *de novo* at the chancery court on all issues contained within a tax appeal, including the merits of the assessment or refund denial. The Mississippi Supreme Court has wrestled with this issue for years, but seemed to resolve the issue in its 2006 opinion in [*Mississippi State Tax Commission v. Murphy Oil USA, Inc.*](#), 933 So. 2d 285 (Miss. 2006). In that decision, the Court recognized and upheld the *de novo* standard and its longstanding place in Mississippi tax appeals:

The chancery court reviewed this matter in a full evidentiary hearing, complete with a full record. In *Tenneco, Inc. v. Barr*, 224 So. 2d 208, 211 (Miss. 1969), this Court held that '[i]t is manifest, from the express provisions of [Mississippi Code 1942 Annotated] § 9220-31, that the Legislature has made it the public policy of this state to provide a full evidentiary judicial hearing in cases of the character now under consideration.'

Also in 2009, in large part to settle the standard of review issue once and for all, the Mississippi Legislature revised the tax appeals statutes and in Miss. Code Ann. § 27-77-7(4) provided the following instructions regarding these appeals:

¹ The Court distinguished cases from other jurisdictions cited by the Court of Appeals such as *Microsoft Corp. v. Franchise Tax Board*, 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) on the basis that those states had adopted UDITPA, which Mississippi has not.



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 of Revenue] 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 party bringing 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. ***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); *see also* S.B. 2712 (Miss. 2009).²

In its detailed dissection of this statute, the Equifax Court never acknowledged or cited the final sentence of subsection (4) instructing the chancery court to "***decide all questions presented, including those as to legality and the amount of tax or refund due***" and that "***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.***" This sentence is perhaps the clearest manifestation of the legislature's intent to codify the taxpayer's right to a full *de novo* trial on the substantive issues underlying an assessment or denial.

In a little-noticed 2010 case, however, the Court began to retreat from this *de novo* standard. In [*Buffington v. Mississippi State Tax Commission*](#), 43 So. 3d 450 (Miss. 2010), the Court recited, almost as an aside, the standard of review ordinarily applicable to non-tax appeals from administrative agencies. Citing none of its prior tax cases upholding and applying the *de novo* standard in the tax context, the Court noted that typically the chancery 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 to make; or (4) violated the complaining party's statutory or constitutional right." The Supreme Court in *Equifax* agreed with the chancellor that the more limited "arbitrary and capricious" standard of review cited in *Buffington* governed the case and concluded the taxpayer had not met its burden of proof on any of the issues raised in the appeal.

What Now?

At least for the time being, the more limited trial court standard of review now appears to be the law of the land in Mississippi. From a practical standpoint, only time will bear out the full implications of this decision. We expect the Court will revisit the issue in the future, in light of its history of struggling with the issue and the legislature's desire to implement true *de novo* hearings.

² The Court reviewed Miss. Code Ann. § 27-77-7(4), which was renumbered in 2009 as Miss. Code Ann. § 27-77-7(5), but remains substantively the same.



For now, however, taxpayers need to be aware of the following important issues if they are contemplating any tax appeals in Mississippi:

- For all intents and purposes, the Board of Review and/or Board of Tax Appeals hearings may be your only opportunity to put on your case in chief and submit your substantive evidence. And you likely will have less than an hour to do so, without a court reporter and in an informal setting.
- The scope of discovery at the trial court could change fundamentally from what taxpayers have been accustomed to, with new issues arising as to the relevancy of requests going to the merits of the case if the court's scope of review is limited to weighing what was presented factually at the administrative hearing level.
- Taxpayers have no formal discovery rights at the administrative level and often do not get a clear explanation for audit adjustments and theories until trial court discovery.
- The chancery court now is limited to reviewing the "record" created at the administrative level (now the independent Board of Tax Appeals), but technically no formal "record" in the ordinary sense is made at that level. Orders and minutes from these hearings rarely contain the detail and analysis one would expect from a trial court record proceeding.
- The Court's position appears to be that evidence presented at the trial court level is *presumed* to have been before the administrative agency when it made its decision, an idea the Court tacitly appears to have endorsed. In other words, issue the decision now, find the facts to substantiate it later.
- You probably will not be able to put your auditors under oath at the administrative hearings, which will make subsequent impeachment difficult if they attempt to offer different facts or legal theories once discovery begins at the trial court level.
- Constitutional challenges to an assessment may be especially problematic under the new standard because the agencies do not consider themselves vested with authority to entertain them. Since the trial court will be the first time the taxpayer has an opportunity to put on that case, it is unclear how the limited standard of review will be applied.
- This decision will have immediate impact on every appeal of an assessment or refund denial pending at any level in Mississippi. For cases pending at an administrative level, new steps must be undertaken to preserve your ability to meet the burden of proof and standard of review once you get to court. If you are in court, this case likely changes how you must plead a case and the relief requested.

—[John F. Fletcher](#)



Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

William M. Backstrom, Jr.

Jones Walker LLP
201 St. Charles Avenue
New Orleans, LA 70170-5100
504.582.8228 *tel*
504.589.8228 *fax*
bbackstrom@joneswalker.com

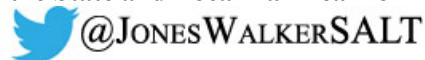
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