



**MISSISSIPPI SUPREME COURT:
THIS CHEESEBURGER MIGHT CAUSE HEARTBURN
*MOBILITY MEDICAL, INC. AND MOBILITY MEDICAL OF NORTH
MISSISSIPPI, LLC V. MISSISSIPPI DEP'T OF REVENUE***

Using the analogy of a \$4.00 cheeseburger, the Mississippi Supreme Court has ruled that Mississippi retailers generally are not required to add sales tax to the purchase price of taxable goods sold in the state or to collect those taxes from their customers. The Court made this seemingly unprecedented ruling in order to uphold a sales tax assessment on sales of medical equipment paid directly by insurance carriers participating in the Federal Employees Health Benefits Plan ("FEHBP"), notwithstanding a federal law that purports to prohibit the assessment of any state taxes "directly or indirectly, on a carrier or an underwriting or plan administration subcontractor of an approved health benefits plan . . . with respect to any payment made from the [Employee Health Benefits] Fund." *Mobility Medical, Inc. and Mobility Medical of North Mississippi, LLC v Mississippi Dep't of Revenue*, No. 2011-CA-01780-SCT, June 6, 2013.

Congress enacted these federal restrictions specifically to prevent states from taxing purchases that effectively were paid with federal health care funds via the FEHBP system. Although the federal government is not the direct purchaser of the medical equipment at issue, it established the fund and deposits money into it to reimburse participating insurers when they directly pay medical providers for eligible costs based on enrollee's claims. Enrollees are typically civilian employees and retirees of the federal government, which supplies approximately two-thirds of the money in the fund. The taxpayer contended that because Mississippi law required it to add the sales tax to the price of the equipment sold to its customers, that tax would be paid by the insurance company via the enrollee claims process and, ultimately, would be borne by the federal fund via the reimbursement to the insurance company.

Although the federal preemption issue is important and could be an attractive issue for U.S. Supreme Court review, the more troubling aspect of the opinion is the Court's unprecedented construction of Mississippi sales tax law. By characterizing the retailer as the true taxpayer, rather than just being the party responsible for collecting the tax from the consumer and remitting it to the state, the Court was able to conclude that the tax was not indirectly imposed on the insurance carriers. Repeatedly throughout the opinion the Court stated that the Mississippi sales tax is not really a pass-through tax imposed on the consumer, specifically that "it is the vendor—not the customer—who is required by Mississippi law to pay the sales tax."

Miss. Code Ann. § 27-65-31, however, would appear to directly undermine the Court's entire analysis. This statute unambiguously requires that retailers add the sales tax to the purchase price and collect it from the customer, and states that it is "unlawful" for them "to fail or refuse" to do so. It specifies that violation of that requirement is a misdemeanor punishable by a fine of no less than \$50 nor more than \$100, presumably upon each occurrence. While the retailer may be liable for collecting and remitting the tax, there is no doubt the tax is imposed on and is economically borne by the person paying for the taxable goods.

It is unclear whether the Court considered Section 27-65-31 or any other particular Mississippi tax statute in reaching its conclusion. Neither the majority nor dissenting opinions cited any Mississippi statutes, regulations, administrative



guidance, court cases, or other precedent in support of these conclusions. The opinion's construction of the nature of the sales tax appears to be completely devoid of any precedent.¹

The pass-through character of the sales tax is pervasive throughout the entire sales tax system, not only in Mississippi, but nationwide. It serves as the underlying rationale for the universal principle that any sales taxes collected by retailers are considered "trust fund" monies held on behalf of the state, reflecting the concept that the retailer is merely the collection agent for the state and never held title to or should have use of those funds. This is why a "responsible person" can be held personally liable for sales tax trust fund violations. It is why all states allow retailers to retain a small portion of the sales taxes they collect as compensation for having served as the state's collection agent. It is the reason all states levying a sales tax also levy a corresponding use tax *directly on the consumer* upon the importation of goods purchased out-of-state, and is at the core of the national debate over whether states can compel remote sellers to collect and remit those taxes directly. It also is the basis for the requirement that anyone claiming a refund of sales taxes first must certify that they alone bore the economic burden of the tax and did not pass it through to the consumer or any other person. After all, if the retailer merely collected the tax from the customer or third-party payor in its capacity as the agent of the state, it would be improper for the retailer to claim and receive a refund of those taxes without returning the funds to the person who actually bore the economic burden of those taxes.

It is open to debate whether or not the Court's ultimate conclusion is technically or constitutionally correct regarding the existence of a conflict with federal law in light of the complexity and specifics of the federal reimbursement process. It also is no stretch to imagine the U.S. Supreme Court could take a particular interest in the federal preemption issue should the taxpayer pursue further appeals.

It would appear, however, that in its efforts to avoid the federal conflict issue the Court may have unwittingly undermined the foundational principles of the entire Mississippi sales and use tax system.

— [John F. Fletcher](#)

¹ The Court's failure to cite any statutes or prior cases will mean that the decision probably will not appear in any Code annotations or turn up in any electronic searches for cases construing those particular sales tax statutes. Taxpayers should take care not to overlook the broad ramifications this decision could have on future conflicts and Mississippi sales and use tax policy discussions.



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:

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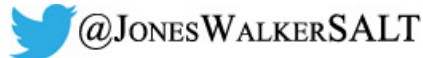
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