

# PUBLICATION

---

## Spotlight on Mississippi: Recent Court Decisions Potentially Level the Playing Field in Tax Cases

June 18, 2012

Since 1987, taxpayers have faced uncertainty as to the scope of judicial review available for state tax assessments made by the Mississippi Department of Revenue (Department). Statutes establishing a taxpayer's right to judicial review have typically referred to such cases being tried anew or *de novo*. These statutes all imply a robust proceeding that starts at the beginning and allows either party an equal opportunity to convince the judge as to the underlying facts and the proper application of the law. However, that fresh review has been in question for many years, although recent decisions offer hope that it may yet be confirmed.

### The Problem

Trial courts, and more importantly, appellate courts reviewing lower court decisions, have more recently tended to allow only a minimal court review of tax assessments made by the Department. The idea that tax assessments are entitled to special deference when reviewed by a trial court originated with a Mississippi Supreme Court case in 1987, which is discussed in more detail below. The deferential standard requires that assessments be upheld unless the assessment is so wrong as to be "arbitrary and capricious." This is a much higher burden for taxpayers than merely convincing the judge on the basis of the facts and the law that the assessment is not correct.

The fundamental practical problem arising from the line of cases espousing limited review of tax assessments is that those cases uniformly impose a concept unique to appeals (the standard of review) in a proceeding that is not an appeal at all (that is, the trial court's review of the Department's assessment). These proceedings instead are designed and intended to be a trial. Needless to say, the result of applying a concept relevant only to appeals to a trial substantially tilts the playing field in favor of upholding assessments and produces a number of anomalous situations.

As an example, the law in Mississippi has long been that ambiguities in tax statutes are interpreted strictly in favor of the taxpayer. This venerable principle, however, is in and of itself fundamentally inconsistent with the level of deference required by an arbitrary and capricious standard of review.

As another example, a trial court hearing a tax case may carefully and reasonably weigh the evidence presented and determine that, in preponderance, the evidence supports a ruling for the taxpayer. Under Mississippi statutes, both historical and current, the decision should then be for the taxpayer. Again, however, such a result would be fundamentally inconsistent with the application of the arbitrary and capricious appellate standard of review. That standard requires a decision for the Department if *any* substantial evidence at all can be produced to support the assessment.

### Historical Context

As noted above, the concept of an arbitrary and capricious standard of review for tax cases originated as a result of a decision in 1987. In *Mississippi State Tax Commission v. Dyer Investment Co., Inc.*, the Mississippi Supreme Court held that arbitrary and capricious review was required by the holding in an earlier 1969 case. The case cited as requiring deferential review, ironically, expressly recognized the taxpayer's right to full

*de novo* review. That earlier case was *Tenneco, Inc. v. Barr*, and the *Tenneco* Court did not apply or endorse an arbitrary and capricious standard. In fact, the Court's decision in *Tenneco* only commented that the assessment was not "arbitrary, capricious or unreasonable." That unfortunate choice of words, however, apparently led the Court in *Dyer* to conclude, for the first time, that tax assessments could only be reviewed in the limited fashion allowed by the arbitrary and capricious standard.

The trend started by the *Dyer* decision was taken to a new level in 2005 when the Department initiated and supported legislation to consolidate and unify procedural rules for seeking judicial review of different types of tax assessments. Prior to that legislation, sections dealing with judicial review were sprinkled throughout the Mississippi Code. Deadlines and other procedural issues were not uniform. The 2005 legislation provided a great benefit to taxpayers in many respects. In addition to simplifying the procedural rules with respect to tax cases, the 2005 statute specifically confirmed that such cases were to be tried *de novo*. Unfortunately, the 2005 law also included a phrase referencing deference to the Department's decisions (but not specifically mentioning an arbitrary and capricious level of deference). This phrase introduced the concept of deferential review into statutory law for the first time. Previously, the idea was limited to the *Dyer* line of cases discussed above.

### The Equifax Decision

The Mississippi Court of Appeals (Court of Appeals Court) just recently issued a decision in *Equifax, Inc. and Equifax Credit Information Services, Inc. v. Mississippi Department of Revenue* that potentially settles the long-standing question about the scope of review of tax cases in lower court. If the Appeals Court decision stands, the *Equifax* case will significantly level the playing field for tax cases. The factual details of the *Equifax* case are interesting and complex but not necessary to understand the Appeals Court's holding on the scope of review. For these purposes, the central point is that the Appeals Court clearly recognized the right of taxpayers to a *de novo* trial to review the Department's tax assessments. In fact, the Court expressly reversed the lower court for applying the arbitrary and capricious standard in reaching its decision.

The Mississippi Supreme Court, coincidentally, published an opinion in March 2012 that contained comments entirely consistent with and supportive of the holding in the *Equifax* case. The Supreme Court case was *W.C. Fore v. Mississippi Department of Revenue*. In *W.C. Fore*, the issue of scope of review was not directly before the Supreme Court, but the Supreme Court's general comments in deciding the case clearly rejected an arbitrary and capricious standard of review and were otherwise entirely consistent with the decision of the Appeals Court in *Equifax*.

### More Developments to Follow

While these two recent decisions clearly represent the potential to settle once and for all any dispute over the scope of review of tax assessments, the conflict is not yet resolved. The Department has filed motions for rehearing in both cases requesting each Court to change its opinion and endorse an arbitrary and capricious standard of review. Furthermore, with respect to the *Equifax* decision, the losing party will have the option to petition the Mississippi Supreme Court for a writ of certiorari to allow consideration of the case by the higher Court, which would prolong the process.

The Department's argument in support of its motions for rehearing is familiar, the gist being that the trial court should try the case *de novo*, **but only to the extent** that a hearing be conducted and a record made. After that, however, the Department's current view is that the trial court is not permitted to weigh the evidence or make its own decisions as to the facts and application of the law. Instead, the trial court must uphold the assessment in all cases except where it determines that the assessment is so unsupportable as to be arbitrary

or capricious. The Department's view on scope of review is clearly antithetical to the definition of *de novo* set out in the *Equifax* decision.

**Breaking News:** As this Alert was being finalized, the Mississippi Supreme Court denied the Department's motion for rehearing in *W.C. Fore*. Look for a detailed alert on the holding shortly.