IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

No. 2010-CA-01857

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

APPELLANTS,

v.

MISSISSIPPI STATE TAX COMMISSION,

APPELLEE.

Appeal from the Chancery Court for the First Judicial District of Hinds County, Mississippi;
Consolidated Civil Action No. G2009-884-T-11

BRIEF OF *AMICUS CURIAE* MULTISTATE TAX COMMISSION

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Mississippi Rule of Appellate Procedure 28(a)(1), undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court may evaluate possible disqualification or recusal:

1. Mississippi State Tax Commission (now Mississippi Department of Revenue), Appellee; Equifax, Inc. and Equifax Credit Information Services, Inc., Appellants;
2. Brunini, Grantham, Grower & Hewes, PLLC (Louis G. Fuller, Katie L. Wallace); Alston & Bird LLP (Timothy 1. Peaden, Mary T. Benton), Counsel for Appellants Equifax, Inc. and Equifax Credit Information Services, Inc.;
3. Mississippi State Tax Commission Legal Department (Gary W. Stringer), Counsel for Appellee Mississippi State Tax Commission;
4. Honorable J. Dewayne Thomas, Hinds County Chancery Judge; Institute for Professionals in Taxation, *Amicus Curiae*; and
5. Butler, Snow, O'Mara, Stevens & Cannada, PLLC (J. Paul Varner, J. Stevenson Ray, Donna Brown Jacobs), Counsel for Institute for Professionals in Taxation.

6. Multistate Tax Commission, *Amicus Curiae*;

7. Hubbard, Mitchell, Williams & Strain, PLLC (Richard Mitchell); Bruce J. Fort, Counsel for the Multistate Tax Commission.

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Bruce J. Fort, One of the Attorneys for *Amicus Curiae* Multistate Tax Commission

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I. INTERESTS OF *AMICUS CURIAE*

Amicus curiae Multistate Tax Commission ("MTC") submits this brief in support of the Appellee, Mississippi State Tax Commission ("the Commission") in order to address a single contention of the Appellants, Equifax, Inc., and Equifax Credit Information Services, Inc. ("the Taxpayers"), and *Amicus Curiae* Institute for Professionals in Taxation. The Taxpayers and their *amicus* argue that the Commission lacked the authority to invoke the "equitable apportionment" provisions of Miss. Admin. Code 35.III.806 § 402-10 to more fairly apportion the Taxpayers' income, because the adjudication of the Taxpayers' liability was in essence the adoption of a "rule" under the Mississippi Administrative Procedures Act, Miss. Code Ann. § 25-43-1.101, *et seq*. without prior administrative notice and hearing. Brief-in-Chief, pp. 32-35; Brief of *Amicus Curiae* Institute for Professionals in Taxation, ("IPT Brief") pp. 1-13. The contentions of the Taxpayers and their *amicus* find no support in the relevant law and are contrary to basic principles of tax administration and adjudication.

The MTC's interest in this case arises from its role as the administrative agency for the Multistate Tax Compact ("Compact"), which became effective in 1967. *See* RIA, *All States Tax Guide* ¶ 701 *et seq*., (2005). Twenty states are full members of the Compact, and another 27 states, including Mississippi, are associate or sovereignty members of the MTC.[1] Article IV of the Compact incorporates almost verbatim the Uniform Division of

[1] This brief is filed by the Commission, not on behalf of any particular member state other than Mississippi. Compact Members are: Alabama, Alaska, Arkansas, California, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Michigan, Minnesota, Missouri, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah and Washington. Sovereignty Members: Georgia, Kentucky, Louisiana, New Jersey, West Virginia and Wyoming. Associate Members: Arizona, Connecticut, Florida, Illinois, Iowa, Indiana, Maine, Maryland, Massachusetts, Mississippi,

Income for Tax Purposes Act ("UDITPA"), a model act promulgated in 1957 and widely followed by the States. UDITPA establishes a methodology, called formulary apportionment, for determining how much of a multistate taxpayer's profits are generated in each taxing jurisdiction by measuring the percentage of the taxpayer's property, payroll and sales ("factors") which are located in or otherwise "sourced" to the jurisdiction. Significantly, UDITPA also provides for the use of alternative formulas ("equitable apportionment") in circumstances where the "standard" formula does not fairly represent a taxpayer's business activity in the taxing state. Compact, Art. IV, Section 18. Although Mississippi's standard formula varies from UDITPA, it has incorporated UDITPA's "Section 18" equitable apportionment language verbatim in Miss. Admin. Code 35.III.806 § 402-10 ("Regulation 402-10"). Mississippi is not unique in this regard. Virtually all states utilizing formulary apportionment systems have some equitable apportionment provisions which closely mirror the language of Article IV, Section 18. 1 Healy & Schadewald, *2006 Multistate Tax Guide*, I-492-506 (CCH 2006).

The Compact was created as a result of threatened federal legislation that would have imposed significant limitations on state taxation of interstate commerce. *See, e.g.*, H.R. Rep. No. 89-952, Pt. VI, at 1143 (1965). The purposes of the Compact, and the charge given to the MTC as the Compact's administrative agency are: (1) facilitation of proper determination of state and local tax liability of multistate taxpayers, including equitable apportionment of tax bases and settlement of apportionment disputes; (2) promotion of uniformity or compatibility in significant components of tax systems; (3)

Nebraska, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Wisconsin and Wyoming.

facilitation of taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration; and (4) avoiding duplicative taxation. *See* Compact, Art. I.[2]

The contentions advanced by the Taxpayers and its *amicus* in this case, if accepted by the Court, would result in a rule which would be at odds with the Compact's purposes of ensuring "the proper determination of state…tax liability" and "promotion of uniformity or compatibility in significant components of tax systems."

During the course of auditing the Taxpayers, the Commission determined that the standard apportionment formula failed to accurately reflect either of the Taxpayers' "business activity" in the State, and assessed liability based on an alternative formula as it was authorized to do under Regulation 402-10. The adjudicatory procedures set out in the tax code and followed in this action have provided the Taxpayers with adequate notice of the proposed action and a full and complete opportunity to argue the merits of the case before an impartial tribunal. The purposes of the Administrative Procedures Act—ensuring notice of agency action and an opportunity to be heard—have already been met.

The Chancery Court correctly held in its decision below that prior "rule-making" was unnecessary before applying an appropriate apportionment formula under Regulation 402-10, because the Regulation already granted that authority—and indeed responsibility—to the Commission.

Super-imposing the requirement of an additional set of administrative procedures in (some) instances where equitable apportionment rules are applied to a particular taxpayer would significantly interfere with "the proper determination of state tax liability."

[2] The validity of the Compact was upheld in *United States Steel Corp.* v. *Multistate Tax Commission*, 434 U.S. 452 (1978).

In some instances where application of the standard formula to particular taxpayers would produce manifestly improper and distorted results, the state (and its taxpayers) would be compelled to abide by those results if no prior "rule-making" has been conducted.

In addition, Mississippi's adoption of a rule imposing state APA "rule-making" procedures in some equitable apportionment cases would lead to a lack of uniformity in tax administration, since there would be little guidance to the courts for distinguishing between permissible "orders" and impermissible "rule-making." The MTC has a strong interest in ensuring that the States' equitable apportionment provisions are applied in a uniform and consistent manner, and believes that the most efficacious means of maintaining that uniformity is to apply those provisions according to their terms.

II. SUMMARY OF ARGUMENT

Mississippi's equitable apportionment regulation should be applied according to its terms. Engrafting additional requirements on application of the regulation would needlessly hinder the ability of states to administer formulary apportionment systems and would deprive taxpayers as well as taxing authorities of an important remedy to prevent improper apportionment of income.

III. ARGUMENT

SUPERIMPOSING STATE "APA" RULE-MAKING REQUIREMENTS ON INCOME APPORTIONMENT DETERMINATIONS WOULD INTERFERE WITH TAX ADMINISTRATION WITHOUT PROVIDING ADDITIONAL PROTECTIONS TO TAXPAYERS

1. The Ability of Taxing Authorities to Develop Alternative Apportionment Formulas to Prevent Distortions of Income Sourcing is Critical to the Proper Functioning of a Formulary Apportionment System.

It is axiomatic that under the Constitution's Due Process Clause (U.S. Const., Amend. XIV) and Commerce Clause (U.S. Const., Art. I, § 3, cl.8), the States cannot tax income

earned beyond their borders. *Allied-Signal, Inc. v. Director, Div. of Taxation,* 504 U.S. 768, 778 (1992). But determining where income arises in the context of a multistate business is a difficult proposition, a process likened by the Supreme Court to "slicing a shadow." *Container Corporation of America, Inc. v. Franchise Tax Board,* 463 U.S. 159, 163 (1983). Instead of using "arms-length" accounting methods to determine how much income arose in a particular jurisdiction, the States universally employ systems of formulary apportionment, by which the income attributable to each taxing jurisdiction is roughly approximated by reference to easily ascertainable and objective "factors", such as the amount of in-state sales. *See generally*, W. Hellerstein, *State Taxation,* Para. 8.05, pp. 8-46 to-49 (Warren Gorham & Lamont, 3rd. Ed. 1998).

In 1957, in an effort to bring more uniformity to state income tax systems, the National Council of Commissioners on Uniform State Laws ("NCCUSL") promulgated the Uniform Division of Income for Tax Purposes Act ("UDITPA"), *compiled in*, 7A *Uniform Laws Annotated,* pp. 147-198 (West Pub. 2005). UDITPA set forth a single formula for apportioning the income of all taxpayers.[3] But the original drafters of the uniform law recognized that no single formula could be expected to appropriately reflect the income-producing activities of every one of the different taxpayers to which it would apply, and accordingly drafted "Section 18" of UDITPA, which provides that:

> If the allocation and apportionment provisions of this Article 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

[3] UDITPA's formula uses an average of three equally-weighted factors: in-state payroll, property and sales versus property, payroll and sales everywhere.

> method to effectuate an equitable allocation and apportionment of the taxpayer's income.

While the latitude afforded to the States in devising and applying general apportionment rules under the Constitution is considerable, *Moorman Manufacturing Company v. Bair*, 437 U.S. 267 (1978), as a constitutional matter, no formulary apportionment system could function without a mechanism to prevent gross distortions of income that may result from application of the general apportionment rule to particular taxpayers. *See, e.g., Hans Rees' Sons, Inc. v. North Carolina, ex rel. Maxwell,* 283 U.S. 123, 134 (1951)("evidence may always be received which tends to show that a state has applied a method, which, albeit fair on its face, operates so as to reach profits which are in no just sense attributable to transactions within its jurisdiction").

In *Moorman,* the Court noted with approval that the state allowed the taxpayer "an opportunity to demonstrate that the [general] formula produced an arbitrary result in its case." 437 U.S. at 275. UDITPA's Section 18 (and Regulation 402-10) acts as a "safety valve" to prevent distortions of tax liability where circumstances warrant. Engrafting a "prior rule-making" requirement onto the statutory system would cut off that safety valve while adding no substantive protections for taxpayers. Regulation 402-10 is the mechanism by which the Commission can receive and evaluate evidence in order to prevent unfair and possibly unconstitutional distortions of income apportionment. Imposing APA preconditions on the use of alternative apportionment formulas in adjudications would interfere with the operation of the "safety valve."

2. Regulation 402-10, Like its UDITPA Counter-Part, Includes Just Two Criteria for it Application; Additional Criteria Should Not be Read into the Regulation.

Nothing in the language of Regulation 402-10 and UDITPA's "Section 18" suggests that its application should be limited to those instances where the tax administrator has issued prior regulations under state APA requirements. Section 18 specifies only two criteria for its application: (1) it must be shown that application of the standard apportionment formula would not "fairly represent" the extent of the taxpayer's business activities in the state and (2) it must be shown that the alternative methodology for measuring the taxpayer's activities would be "reasonable." Imposing an additional requirement, that of prior rule-making, would be reading language into the statute that simply isn't there. *Cf., Union Pacific Corporation v. Idaho Tax Commission*, 83 P.3d 116, 122 (Id. 2004)("To engraft a gross distortion requirement onto the application of an alternative apportionment would be to add to [the statute], which we are wont to do. When the meaning of a statute is clear, the statute is to be read literally, neither adding nor taking away anything by judicial construction.").

The official comments to UDITPA published in 1966 by NCCUSL expressed the drafters' understanding of how Section 18 would be applied in relation to the remainder of UDITPA:

> Section 18 is intended as a broad authority, within the principle of apportioning business income fairly among the state which have contact with the income, to the tax administrator to vary the apportionment formula and to vary the system of allocation where the provisions of the Act do not fairly represent the extent of the taxpayer's business activity in the state. [4]

[4] TR, Trial Ex. 7 at 15, also available at: http://www.law.upenn.edu/bll/archieves/ulc/finact99/1920_69/udiftp57.htm.

Under the Taxpayers' theory, if an adjudication of a taxpayer's liability shows that the general rule does not fairly reflect a particular taxpayer's in-state business activity, the State would nonetheless be bound to apply that general rule to that taxpayer if the alternative formula was deemed to be broadly applicable to other taxpayers. Some taxpayers could enjoy a "free bite at the apple," avoiding fair apportionment until such time as state tax agencies became sufficiently knowledgeable about their business methods to complete formal regulatory processes. Other taxpayers whose income is over-apportioned to a state under the standard formula, however, would have no practical remedy. But even a special apportionment regulation applicable to a particular subset of taxpayers is unlikely to fairly reflect the activity of every one of the taxpayers in that subset. *See, e.g., Montana Dept. of Revenue v. United Parcel Service, Inc.*, 830 P.2d 1259 (Mont. 1992)(state was required to modify a special apportionment formula for trucking companies adopted by regulation where the taxpayer demonstrated that the formula resulted in an overstatement of its income attributable to the state). The states still need a mechanism for evaluating distortion on a case by case basis, unimpeded by extraneous administrative rule-making considerations.[5]

3. The State's Administrative Procedures Act Does Not Override Substantive State Tax Laws.

[5] The NCCUSL official comments to Section 18 also suggest that the drafters assumed that administration of the section would be conducted through application of state tax procedures, not general governmental administrative standards:

> It is anticipated that this Act will be made part of the income tax acts of the several states. For that reason, this section does not spell out the procedure to be followed in the event of a disagreement between the taxpayer and the tax administrator. **The *income tax acts* of each state presumably outline the procedure to be followed.**

(Emphasis supplied.) TR, Trial Ex. 7 at 15.

Mississippi's Administrative Procedure Act, Mississippi Code Ann. § 25-43-1.101, *et seq*. ("the APA"), makes a distinction between an "order", which is an agency action "of particular applicability that determines the legal rights, duties and privileges and …other legal interests of one or more specific persons", and "rules", which are defined as "an agency regulation or other statement of general applicability that implements, interprets or prescribes: law or policy, or the organization, procedure or practice requirements of an agency." Miss. Code Ann., § 25-43-1.102(f),(i). The statute's "rule-making" requirements include issuing a notice to the Secretary of State and providing an oral hearing and public comment period after the hearing. Although the Commission's "order" only determined the legal rights of the Taxpayers, they argue the Commission was required to proceed under its regulation-making authority since the sales-sourcing decision could apply to other service providers as well.

The APA makes clear that it was not intended to supersede or amend the provisions of any other law or to confer substantive rights. Miss. Code Ann. § 25-43-1.103 provides in part:

> (2) This chapter creates only procedural rights and imposes only procedural duties.
> (3) Specific statutory provisions which govern agency proceedings and which are in conflict with any of the provisions of this chapter shall continue to be applied to all proceedings of any agency to the extent of such conflict only.
> (4) The provisions of this chapter shall not be construed to amend, repeal or supersede the provisions of any other law; and to the extent the provisions of any other law conflict or are inconsistent with the provisions of this chapter, the provisions of such other law shall govern and control.

It is difficult to understand how engrafting a new set of criteria on the use of Regulation 402-10, based on an adjudication's potential application to other taxpayers, would not "amend, repeal or supersede" the Regulation's two stated requirements.

In support of their argument that prior rule-making was required notwithstanding § 25-43-1.103, the Taxpayers rely on a single apportionment case from 27 years ago, *Metromedia, Inc. v. Director*, 487 A.2d 742 (N.J. 1984). In that case, the New Jersey Supreme Court conceded that the tax commission had broad discretion under New Jersey law to decide whether to apply a special apportionment formula on an *ad hoc* basis or to first proceed to create a broadly, uniformly applicable special regulation, 487 A.2d at 752. Nonetheless, a narrow 4-3 majority of the court held that the tax commission had exceeded its discretion in that case, over-ruling the intermediate appellate court.

Metromedia is easily distinguished from the present case because of its unique factual background. More significantly, however, the case has not been followed outside of its narrow context of apportioning the income of television broadcasters based on viewer market-shares. Metromedia was a New York-based broadcaster which did not solicit advertising in New Jersey; in fact, Metromedia had no business activities in New Jersey at all, although its signals reached viewers in the state. The state employed a "cost of performance" rule for sourcing sales from services that assigned all receipts to the one state with the greatest "costs of performance" for performing the service, in marketed contrast to Mississippi's broader "service activities" rule. A tax study group had recommended that New Jersey change its sales sourcing rules for broadcasters, but the legislature had failed to act on that recommendation. *Id*. at 753. The court found that "the agency determination did not itself arise from the development of an evidential record that characterizes adjudication." *Id*. at 754. And, the tax director for New Jersey testified that the new "audience factor" sourcing rule was *intended* to have future application to all broadcasters. *Id*. at 753.

In stark contrast to the unusual circumstances of that case, in this appeal there is no pre-existing legislative or administrative policy directed to sourcing income from credit-reporting agencies or other service providers. And there was an extensive evidentiary record developed in this case supporting the Commission's particularized decision that it must use the an alternative formula in order to fairly reflect the Taxpayers' activities in Mississippi, including: (1) the presence of sales representatives in the state, (2) the use of in-state information data sources including credits and courts, and (3) the similarity of the product being sold to more traditional tangible products, the sales of which are sourced to Mississippi when delivered or shipped to the state. T.R. at 154-158, 173-4; 186. Mississippi's standard apportionment formula reflects none of this--or any--activity of the Taxpayers' in the state.

Most importantly, the adjudication in this case is not applicable to other taxpayers, unlike the circumstances in *Metromedia.*[6] In fact, the only "evidence" cited by the Taxpayers or its *amicus* of the Commission's intent to establish a "rule" applicable to all service providers consists of excerpts from an auditor's deposition to the effect that the Commission had utilized Regulation 402-10 in four other audits of service providers over a

[6] Although not cited in the briefs by the Taxpayers or their *amicus,* the *Metromedia* case has been followed—or even cited--exactly once in all of the scores of reported "equitable apportionment" decisions rendered since 1984. *See CBS Broadcasting, Inc. v. Comptroller of the Treasury*, 575 A.2d 324 (Md. 1990). But the same Maryland court later distinguished that holding in a decision that bears a much stronger resemblance to the circumstances in the instant appeal. *Comptroller v. Syl, Inc*., 825 A.2d 399 (Md. 2003). In that case, the court held that where there had not been reliance on a prior administrative policy applicable to the taxpayer, the Comptroller was empowered to adopt a new sourcing rule through adjudication, without prior rule-making. 825 A.2d at 417-8.

five year period. IPT Brief, p. 6, *citing*, Tr. Ex. 26 at 66-67.[7] But simply using its authority to remedy distortion on a case-by-case basis in four individual cases does not suggest that the Commission has adopted a "rule" applicable to the service industry as a whole. In *Leichter v. Barber*, 501 N.Y.S.2d 925, 926, 120 A.D 776 (N. Y. 2nd. App. Div. 1986), the court defined a "rule" requiring prior rule-making procedures as: "only a fixed general principle intended to be applied without regard to other facts and circumstances." The record in this case is clear that the Commission has not adopted a "fixed general principle" intended to be applicable in all circumstances. *See, e.g.*, TR. 152-154; 158-9; 173-4; 193-4. The Commission simply used Regulation 402-10 as it was intended to be used, and applied a reasonable alternative formula upon a finding of distortion in individual cases. The invitation to this court (IPT Brief, p.6) to second-guess the intentions of the Commission, in the absence of any evidence of improper application of its equitable apportionment authority, highlights the problem with superimposing APA standards on a comprehensive system for adjudicating taxpayer liability.

4. Administrative Agencies Have Traditionally Been Afforded Wide Discretion to Implement Laws Through Rule-Making or Adjudication; The Case for Agency Discretion in Applying Equitable Apportionment Formulas is Especially Compelling.

As administrative law scholars have long noted, and as noted in *Metromedia*, *supra* at 751-2, the dividing line between rule-making and adjudication may not always be clear, but the point is rarely litigated since both federal and state agencies are traditionally afforded wide discretion in choosing how to implement the statutes they are charged with

[7] The auditor later explained that numerous factors were looked at in applying Regulation 402-10 in the audits of those taxpayers; taxpayer confidentiality laws, however, precluded discussion of the details of those case. TR. Ex. 26 at 65, 82.

enforcing. *See, e.g.*, 1 Davis & Pierce, *Administrative Law Treatise*, pp. 266-269 (West, 3rd. Ed. 1983); 3 Mezines, Stein & Gruff, *Administrative Law* § 14.01, at 14–8 (Mathew-Bender, 1985).

The seminal case on this point is *SEC v. Chenery Corporation*, 322 U.S. 194 (1947), in which the Court held that the Securities and Exchange Commission properly adopted a "rule" during the course of adjudication which prohibited a corporation's directors from trading in their company's stock during a reorganization. The Court held that the decision of using either method of exemplifying the law was a matter left primarily within the agency's discretion. The Court noted:

> Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular unforeseeable situations. In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity.
> In other word, problems may arise in a case which the administrative agency could not reasonably foresee, problem which must be resolved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule.
>
> 322 U.S. at 203-4.

The Supreme Court reiterated its position in the specific context of whether the federal APA required prior rule-making in a subsequent case, *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974), holding that the agency had broad discretion to proceed by adjudication or formal rule-making when making policy, because "[t]hose most immediately affected, the [parties] in the particular case, are accorded a full opportunity to be heard before the Board makes its determination." 416 U.S. at 295. The Court also noted

that there had been no fundamental shift in policies or strong reliance interested in a previously established policy. *Id.*

Although A*micus Curiae* cites a smattering of state cases in which miscellaneous adjudications announcing "rules" have been successfully challenged on APA grounds, IPT Brief, pp. 8-10, the great majority of state cases have held otherwise. For instance, in *Kopsombut-Myint Buddhist Center v. State Bd. of Equalization,* 728 S.W.2d. 327 (Tenn. App. 1986), the Tennessee Court of Appeals rejected the contention that prior rule-making was required, summarizing the law as follows:

> The State Board of Equalization has the authority…to promulgate rules and manuals to aid in the appraisal, classification, and assessment of property. While the Board could, if it wished to do so, define the term "religious institution" by promulgating a rule, it is not required to do so as a condition to exercising its responsibility…to determine appeals concerning the exemption of property from taxation. The choice between using a rule-making proceeding and an adjudicatory proceeding is, in the first instance, within the agency's discretion. [citations omitted]
>
> While an agency's decision to use an adjudicatory rather than a rule-making proceeding can be reviewed for abuse of discretion [citation omitted], these decisions are rarely reversed. When they are, the adjudicatory proceedings involve changes in well-established agency policy upon which there has been significant reliance.
>
> 728 S.W. 2d at 332.

Of course, in this appeal the Commission has not in fact adopted a "rule" intended for broad application absent a finding of distortion on a case by case basis. Rather, the Commission is simply following the rule that already exists --- the rule that requires the Commission to apply an alternative formula where the general formula is not appropriate.

In this important respect, the adjudication was consistent with, and in no way constituted a change, in "well-established agency policy upon which there has been substantial reliance." *Id.* Regulation 402-10 has been in effect for decades, T.R. 176, and

provides taxpayers with adequate notice that the Commission can and will adjust the standard apportionment where necessary to fairly reflect a taxpayer's in-state business activities. The Taxpayers were allowed a full and fair opportunity to contest the fairness of the apportionment formula proposed by the Commission and presented expert testimony as to other criteria which might be considered. The "wide discretion" available to administrative agencies generally to enforce laws through adjudication or rule-making should be especially applicable in the context of this apportionment dispute. Where the tax law specifically empowers an agency to adopt alternative methods of apportionment where necessary to prevent distortion, it is disingenuous to assert a "reliance interest" in a formula which produces distortive results.

CONCLUSION

For the reasons set forth above, *Amicus Curiae* Multistate Tax Commission prays that the Mississippi Supreme Court enter an order upholding the decision of the Chancery Court in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this brief was served on the following counsel of record and interested parties this 16th. day of June 2011 by placing a copy of the same in the U.S. mails to the addresses listed below:

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