



### Casino Hits the Mississippi Jackpot!

#### [Mississippi Department of Revenue v. Isle of Capri, Inc., et. al.](#) [No. 2012-CA-01419-SCT \(Miss. Feb. 13, 2014\)](#)

In an exceedingly rare taxpayer victory, the Mississippi Supreme Court on Thursday unanimously ruled that the Department of Revenue improperly limited a taxpayer's use of gaming license credits to offset the combined filing group's Mississippi corporate income tax liability. The Court also rejected the Department's attempt to dismiss the taxpayer's appeal based on a hyper-technical challenge of its appeal bond.

This decision may present refund opportunities for many taxpayers who have limited the use of a wide range of tax credits on combined returns based on the Department's guidance and instructions. It also provides a cautionary tale of the Department's tendency to scrutinize appeal bonds to identify procedural foot-faults to dismiss taxpayer appeals, and reinforces the importance of proposals currently before the Mississippi Legislature to repeal Mississippi's existing pay-to-play requirements.

#### Many Income Tax Credits May Be Available to Offset Combined Group's Liability

Isle of Capri, Inc. and 18 of its affiliates filed Mississippi combined income tax returns for tax years 2004 through 2007, as permitted by Miss. Code Section 27-7-37. Mississippi's combined return is commonly referred to as a "nexus post-apportioned" return, in that each entity computes its own separate-company apportionable income and applies its own separate-company apportionment formula, and then the members combine their individual apportioned incomes and losses to arrive at the group's Mississippi combined taxable income. Tax is computed on the group's combined income, and then credits and estimated payments are applied to reduce that total in computing the group's ultimate liability, for which each member is jointly and severally liable.

Four members of the Isle of Capri filing group held gaming licenses which generated income tax credits, and the company applied those credits against the entire group's combined tax liability. The Department rejected this application of the credits, arguing that the credits were limited to offsetting the taxes attributable to the individual company holding the gaming license, and assessed the companies over \$4,000,000 in taxes, interest and penalties (in addition to rejecting refund claims related to amended returns filed for some years on the credit issue). It was undisputed that the Department's position was consistent with its long-standing policies and practices.

The Supreme Court found controlling its previous ruling in *General Motors Corp. v. Mississippi State Tax Commission*, 510 So. 2d 498 (Miss. 1987), a virtually identical legal and factual situation to Isle of Capri. In *General Motors*, the Court examined the mechanics of the combined return and determined that the Department's policy of limiting credits to the

separate-company liability of a combined group member was improper. *Id.* The Court also rejected the Department's attempt to distinguish *General Motors* via a purported semantic distinction between a "licensee" holding the credit-generating gaming license and the "taxpayer" filing the return and owing the tax. Thus, the Court concluded the gaming license credit was available to offset entire group's income tax liability.

This case may present refund opportunities for many taxpayers who have been limiting this or other types of credits in a similar manner. Mississippi offers a wide range of income tax credits, each with different criteria and limitations, and the Department limits a number of them to the income generated by the specific entity or, in some instances, the business location whose operations gave rise to the incentive. Taxpayers should closely examine the specific language of the statutes authorizing their credits to determine whether the Department's limitations are valid in light of the *Isle of Capri* ruling.

#### Court Rejects Department's Challenge to Appeal Bond Technicality

Rather than pay the disputed tax under protest, *Isle of Capri* opted to post an appeal bond equal to half the amount in controversy when it filed its chancery court appeal, pursuant to Miss. Code Section 27-77-7(3). The taxpayer met the three specific requirements set forth in this statute in that it timely filed its appeal bond, the bond was in the correct amount, and the issuing surety was authorized to do business in the state.

The Department, however, brought a hyper-technical challenge to the validity of the bond. Specifically, because the text of the bond referenced the "money judgment against said Plaintiff entered by the Board of Tax Appeals," the Department argued the bond was deficient because "the Board of Tax Appeals does not enter money judgments, but orders and therefore the bond posted does not guarantee payment of anything." In support of its position, the Department cited a string of recent Mississippi Supreme Court decisions involving Mississippi's appeal bond requirements in which payment under protest (rather than posting a bond), late payment and financial inability to post security were held fatal to those taxpayers' appeal rights. See *Miss. Dep't of Rev. v. AT&T Corp.*, 101 So. 3d 1139 (Miss. 2012); *Khurana v. Miss. Dep't of Rev.*, 85 So. 3d 851 (Miss. 2012); *5K Farms v. Miss. Dep't of Rev.*, 94 So. 3d 221 (Miss. 2012). Fortunately, the Court rejected this parsing of the bond's terms and held the bond to be valid and enforceable.

Perhaps the most troubling aspect of this case is how the Department attempted to invent a technical foot-fault to dismiss an appeal even though the taxpayer had satisfied every requirement of the statute. The appeal bond is intended to protect the State and ensure collection of disputed taxes. The Department, however, seems to view the requirement as a vehicle by which it can avoid judicial scrutiny of the merits of its assessments based on specious technicalities. Fortunately, the Court in this case refused to continue the trend of its recent bond-related decisions to permit that result.

#### Pending Legislation Could Eliminate These Specious Procedural Challenges Altogether

This case also illustrates the importance of two procedural tax reform bills currently pending before the Mississippi Legislature which would, among other things, rescind Mississippi's pay-to-play requirements altogether. [House Bill 799](#) and its companion [Senate Bill 2487](#), if enacted, would remove all requirements that taxpayers pay under protest or post security in order to obtain an independent judicial review of the agency's actions. See our prior coverage [here](#). Absent this legislation, nothing guarantees the Court will view with similar skepticism the Department's next specious challenge to a taxpayer's appeal bond or payment under protest.

— [John F. Fletcher](#) and [Justin B. Stone](#)

*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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