



Mississippi Taxpayers Seeing Green! Mississippi Supreme Court Invalidates Restrictive Regulation on Pollution Control Equipment Sales Tax Exemption

Yesterday, August 7, 2014, the Mississippi Supreme Court invalidated a sales and use tax regulation where the Mississippi Department of Revenue (the "MDOR") attempted to impose more restrictive requirements than the terms of the underlying statute on the exemption for pollution control equipment. This ruling could directly affect virtually all Mississippi manufacturers and custom processors subject to federal or state pollution control requirements. It also serves as another reminder that *all* taxpayers should closely scrutinize restrictions and conditions contained in the MDOR's exemption and incentives regulations and policies to ensure those rules do not impose limitations inconsistent with the underlying tax statutes.¹

In [Mississippi Department of Revenue v. Mississippi Power Company](#), No. 2013-CA-01234-SCT (Miss. Aug. 7, 2014), the Court reviewed Miss. Code Ann. § 27-65-101(1)(w), which provides manufacturers and custom processors an exemption for pollution control equipment "*used or acquired*" to prevent, control, monitor or reduce pollution as required by federal or state law or regulation. Yet, in its transparent attempt to limit the scope of the exemption to prevent what it feared would be "an exemption free for all," the MDOR adopted Miss. Reg. 35.IV.7.03(302) to restrict the exemption to equipment "*used exclusively and directly*" for those purposes.

Specifically at issue were four low-nitrous-oxide ("NOx") burners that the taxpayer purchased and installed at its facilities in order to comply with new federal regulations requiring a reduction in emissions. As such, the taxpayer claimed the pollution control equipment tax exemption for the federally-mandated equipment. On audit, the MDOR asserted that although the low-NOx burners had a pollution control effect, the burners were necessary to the taxpayer's day-to-day business operations and the final marketable product. Because those assets purportedly served this dual production-and-pollution purpose, the MDOR concluded they were not used "exclusively and directly" for pollution control purposes and fell outside the scope of the more restrictive regulation. Based on this finding, the MDOR assessed the taxpayer additional use tax.

In striking down the regulation, however, the Court concluded that the MDOR's substitution of the phrase "used exclusively and directly" in the place of the statutory language "used or acquired" was an improper redefinition and restriction of the requirement imposed by the Legislature. Accordingly, the MDOR could not enact via regulation greater

¹ See our previous Client Alert, [Casino Hits the Mississippi Jackpot!](#), discussing the Mississippi Supreme Court's rejection of the MDOR's improper restriction of a taxpayer's application of gaming tax credits in a combined income tax return context.

restrictions than the statute. Noting that "the MDOR rewrote the exemption provision to provide what it believes the Legislature should have written and adopted to reflect what the MDOR calls a 'good tax policy,'" the Court invalidated the regulation as having exceeded the MDOR's authority. "Whether the statute creates a potential tax loophole is the concern of the Legislature, not this Court." "The function of the Court is not to decide what a statute should provide, but to determine what it does provide."

With the removal of the MDOR's restrictive "exclusively and directly" requirement, manufacturers and custom processors in Mississippi should review recent purchases of pollution control equipment which were acquired to comply with federal or state laws to determine if this exemption might now apply to those purchases, even if they serve a dual purpose. Beyond the immediate pollution control context, however, all taxpayers should closely scrutinize the MDOR's exemptions and incentives regulations and policies to ensure that the MDOR has not improperly restricted those benefits approved by the Legislature.

— [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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