



## State & Local Tax Advisory ■

**APRIL 24, 2014**

### Several Organizations Support Equifax's Petition for Certiorari to the United States Supreme Court<sup>1</sup>

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Several tax and business organizations filed amicus curiae briefs with the United States Supreme Court in support of the Petition for a Writ of Certiorari to the Supreme Court of Mississippi in the case of *Equifax, Inc., et. al. v. Mississippi Department of Revenue*. Joining Equifax in its attempt to overturn the Mississippi Supreme Court's decision were the Institute for Professionals in Taxation (IPT), the Council on State Taxation (COST) (joined in its brief by the Mississippi Economic Council and Mississippi Manufacturers Association) and the Georgia Chamber of Commerce.

The Question Presented by Equifax to the United State Supreme Court is:

Whether a state violates the Fourteenth Amendment's Due Process Clause's guarantee of an opportunity to receive a "fair opportunity to challenge the accuracy and legal validity of an assessment for taxes and penalties, when the taxpayer must present its administrative appeals to employees of the state's revenue department without ever being informed of the complete basis for the assessment or having the opportunity to present witnesses or to cross-examine the state's representatives, and the subsequent judicial appeal is not de novo but one in which the judge can only reverse the assessment or abate the penalties under a highly deferential standard of review."

Each of the three amicus briefs bolsters Equifax's primary argument that utilizing an "arbitrary and capricious" standard of review, which deprived Equifax of a full de novo hearing on the merits before a neutral adjudicator, violates the Due Process Clause. The amici also joined Equifax in expressing concern and even outrage over applying the highly deferential standard of review to the imposition of penalties in a situation where Equifax followed the governing law in filing its return. The amici's outrage over this particular application is well-placed, as it precluded the judge from abating penalties even after finding that the taxpayer acted reasonably.

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<sup>1</sup> Alston & Bird serves as counsel to Equifax.

Each of the amicus briefs also emphasized specific aspects of the underlying decision that help provide the impetus for the U.S. Supreme Court to grant cert in the case. Under the Mississippi Supreme Court's decision, the trial court judge is forced to uphold an assessment against the taxpayer even if he finds that the assessment is not correct, provided that the Department's position was not arbitrary and capricious. The Georgia Chamber attacked this paradigm by drawing upon the federal tax appeal procedures. The Georgia Chamber made the novel argument that the Mississippi hearing under this regime is wrongly focused on the actions of the Mississippi Department of Revenue (i.e., whether the MDOR acted arbitrarily and capriciously) when it should instead be focused on whether the underlying tax assessment itself was incorrect or invalid. As an example of this quandary, suppose a taxpayer provided services for \$5,000, but then received an erroneous 1099 reporting \$10,000 of income. Based upon that documentation, it would certainly not be arbitrary and capricious for the Department to issue an assessment related to the difference. However, the taxpayer did not actually receive an additional \$5,000, and so the taxpayer should have the opportunity to prove that the 1099 was incorrect and that no additional tax is due. However, in Mississippi, the taxpayer is not entitled to prove that the 1099 is incorrect and can only prevail if he shows that the Department acted arbitrarily and capriciously—an impossible task. Such a highly deferential standard under these circumstances violates due process.

In its brief, COST highlighted the particular inequity that results from the application of the arbitrary and capricious standard to the review of an assessment that was based upon the Department's discretionary utilization of an alternative apportionment formula. COST noted that this was particularly inequitable in light of the fact that alternative apportionment in Mississippi has only been applied to nonresident service providers. COST's brief cited other fairness issues with Mississippi's existing system for tax appeals, noting that the burden remains on the taxpayer to disprove the use of alternative apportionment and adding that there is never an opportunity to establish a record and receive a review on the merits of the assessment before an independent adjudicator.

And in IPT's amicus brief, the Institute argues that the Mississippi Supreme Court's decision, which labeled the legislature's use of the term *de novo* within the appeal statute "misdirected," violated the Separation of Powers Clause because it precluded the judiciary from exercising its responsibility to check the powers of the executive branch (i.e., the Department). IPT also urged the U.S. Supreme Court to take action by stressing that there could be a serious "domino effect" if Mississippi's decision is allowed to stand, noting that (i) many states have similar appeals statutes and have yet to address the due process concerns and that (ii) within the state tax arena, there are numerous examples of states copying the aggressive positions of other states regardless of whether those positions are of questionable constitutionality. Thus, a strong directive from the U.S. Supreme Court is necessary in order to correct the problem in Mississippi, as well as to prevent such unconstitutional positions from spreading to other states.

The amicus briefs provide meaningful support to Equifax in its Petition for a Writ of Certiorari, highlighting the importance of this case for not only Equifax, but also other taxpayers in Mississippi and across the country. The Mississippi Department of Revenue will file its response brief by May 23, 2014, after which the case will be set for a conference date in order to determine whether the U.S. Supreme Court will grant the taxpayer's petition and hear this appeal.

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