# APPENDIX

# APPENDIX

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**APPENDIX A**

**IN THE SUPREME COURT OF MISSISSIPPI**

**NO. 2017-CA-01295-SCT**

**[Filed November 29, 2018]**

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| MICHAEL KANSLER AND VICKIE KANSLER | ) |
| | ) |
| v. | ) |
| | ) |
| MISSISSIPPI DEPARTMENT OF REVENUE | ) |

DATE OF JUDGMENT: 08/31/2017

TRIAL JUDGE: HON. J. DEWAYNE THOMAS

TRIAL COURT ATTORNEYS:
ALEXIS L. FARMER
JON FRANCIS CARMER, JR.
JOHN FLOYD FLETCHER

COURT FROM WHICH APPEALED:
HINDS COUNTY CHANCERY COURT

ATTORNEYS FOR APPELLANTS:
JOHN FLOYD FLETCHER
ADAM STONE
KAYTIE MICHELLE PICKETT

ATTORNEYS FOR APPELLEE:
JON FRANCIS CARMER, JR.
BRIDGETTE TRENETTE THOMAS

NATURE OF THE CASE: CIVIL - OTHER

DISPOSITION: AFFIRMED - 11/29/2018

MOTION FOR REHEARING FILED:

MANDATE ISSUED:

**BEFORE WALLER, C.J., MAXWELL AND ISHEE, JJ.**

**ISHEE, JUSTICE, FOR THE COURT:**

¶1. Michael and Vickie Kansler moved to Mississippi from New York for Michael's job and, over the following years, exercised stock options stemming from that employment. The Kanslers took the position that the stock options' income was taxable only in Mississippi, which reduced their tax burden significantly. New York saw things differently and found a substantial portion of the income taxable by it. This liability to another state would have entitled the Kanslers to a credit on their Mississippi taxes worth more than $250,000—but by the time the New York audit was finished, our statute of limitations barred the Kanslers from amending their Mississippi returns. They now argue our statute of limitations unconstitutionally discriminates against interstate commerce.

¶2. Mississippi's treatment of the statute of limitations for amending tax returns is unremarkable

and appears to be shared with many other states.[1] The Kanslers' dormant Commerce Clause argument, on the other hand, is novel. And it depends on an unprecedented and erroneous attempt to apply the "internal consistency test," intended to evaluate the apportionment of taxes, to the collateral effects of a statute of limitations. We hold that the challenge is instead governed by the discrimination/***Pike***[2] balancing test employed by the United States Supreme Court in ***Bendix Autolite Corp. v. Midwesco Enterprises Inc.***, 486 U.S. 888, 108 S. Ct. 2218, 100 L. Ed. 2d 896 (1988), the only United States Supreme Court case to scrutinize a statute of limitations under the dormant Commerce Clause. While ***Bendix*** and its ilk offer little guidance—Justice Scalia famously compared the ***Pike***

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[1] The Kanslers point out in their brief that at least two states have statutes permitting amendment on the taxpayer's initiative in response to a sister state's audit—Massachusetts and Oregon. The statutes of our neighboring states appear to be consistent with ours and lack any obvious exception for refunds sought as a result of sister-state audits. *See* Ala. Code § 40-2A-7(c)(2)(a) (2018) (petition for refund must be filed "within . . . three years from the date that the return was filed, or . . . two years from the date of payment of the tax"); Ark. Code Ann. § 26-18-306(i)(1)(a) (2018) (tax refund claim "shall be filed by the taxpayer within three (3) years from the time the return was filed or two (2) years from the time the tax was paid, whichever of the periods expires later"); La. Stat. Ann. § 47:1623(A) (2015) (taxpayer must seek refund either three years from December 31 the tax became due or within a year the tax was paid); Tenn. Code Ann. § 67-1-1802(a)(1)(A) (2011) (tax refund claim must be filed within "three (3) years from December 31 of the year in which the payment was made").

[2] ***Pike v. Bruce Church Inc.***, 397 U.S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970).

balancing test to trying to decide "whether a particular line is longer than a particular rock is heavy"[3]—the Kanslers' challenge fails because our statute of limitations is facially nondiscriminatory and has only an incidental effect on interstate commerce, one that is justified by the practical difficulties of tax administration and the State's interest in finality. The Kanslers bear the burden of proving otherwise, so any uncertainty must be resolved against their challenge. We affirm the Mississippi Department of Revenue's decision to refuse the refund request.

## FACTS AND PROCEDURAL HISTORY

¶3. This case comes up on summary judgment. The facts are not disputed, and the following facts are drawn from the facts stipulated in the chancery court.

¶4. Michael Kansler worked for Entergy in New York, and he received stock options as part of his compensation. The Kanslers lived in New York until they were relocated to Mississippi in May 2007. During 2008 and 2009, Michael was still employed by Entergy in Mississippi. The Kanslers timely filed their Mississippi tax returns for the 2008 and 2009 tax years and paid taxes on their worldwide income, as required by Mississippi law. Some of that income derived from Michael's stock options. The stock options had been granted over several years before the Kanslers moved to Mississippi. The options vested over multiple years, including after the Kanslers moved to Mississippi.

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[3] *See* ***Bendix***, 486 U.S. at 897 (Scalia, J., concurring).

¶5. In 2012, New York began an audit of the Kanslers' taxes related to the exercise of stock options in 2008, 2009, and 2010. On December 29, 2014, New York completed the audit and assessed the Kanslers additional tax and interest. The Kanslers paid the assessment on December 31, 2014. In January 2015, the Kanslers filed amended Mississippi tax returns and requested a refund of $257,140 based on the credit allowed for income taxes paid to other states.[4] The Mississippi Department of Revenue denied the refund request because it was outside of the three-year limitations period.[5] The Kanslers appealed to the Department's Board of Review and then to the Mississippi Board of Tax Appeals, both of which affirmed the Department's decision. The Kanslers challenged the constitutionality of the limitations period in both appeals, but each body affirmed the Department's decision based on the text of the statute without considering its constitutionality. The Kanslers then appealed to the Chancery Court of the First Judicial District of Hinds County, arguing that the limitations period under Section 27-7-313 violates the Commerce, Due Process, and Equal Protection Clauses of the United States Constitution, and that the Department's actions were arbitrary, capricious, and beyond its statutory authority. Both parties filed motions for summary judgment. The chancellor granted the Department's motion and denied the Kanslers' motion, finding that the refund limitations

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[4] Miss. Code Ann. § 27-7-77 (Rev. 2017).

[5] Miss. Code Ann. § 27-7-313 (Rev. 2017).

period does not violate the United States Constitution. The Kanslers appeal from that judgment.

## STANDARD OF REVIEW

¶6. This Court reviews a chancellor's grant or denial of summary judgment de novo. ***Miss. Dep't of Revenue v. AT & T Corp.***, 202 So. 3d 1207, 1213 (Miss. 2016). Summary judgment is only appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." M.R.C.P. 56(c).

¶7. We also apply a de novo standard of review when deciding the constitutionality of a state statute. ***Commonwealth Brands, Inc. v. Morgan***, 110 So. 3d 752, 758 (Miss. 2013) (citing ***Johnson v. Sysco Food Servs.***, 86 So. 3d 242, 243 (Miss. 2012)). Statutes "come before us clothed with a heavy presumption of constitutional validity." ***Ex rel. T.L.C.***, 566 So. 2d 691, 696 (Miss. 1990), *overruled on other grounds by* ***In re J.T.***, 188 So. 3d 1192 (Miss. 2016)). "The party challenging the constitutionality of a statute is burdened with carrying his case beyond all reasonable doubt before this Court has authority to hold the statute, in whole or in part, of no force or effect." ***Id.*** (citations omitted).

¶8. Also potentially relevant is Mississippi Code Section 27-77-7(5) (Rev. 2017), which provides in relevant part,

> At trial of any action brought under this section, the chancery court shall give no deference to the

> decision of the Board of Tax Appeals, the Board of Review or the Department of Revenue, but shall give deference to the department's interpretation and application of the statutes as reflected in duly enacted regulations and other officially adopted publications. The chancery court shall try the case de novo and conduct a full evidentiary judicial hearing on all factual and legal issues raised by the taxpayer which address the substantive or procedural propriety of the actions of the Department of Revenue being appealed.

But this provision has not been not cited by the Department of Revenue in its brief, nor has the Department cited any "duly enacted regulations" or "other officially adopted publications" relevant to our analysis.

## DISCUSSION

### I. Dormant Commerce Clause

¶9. The Kanslers argue Mississippi's three-year statute of limitations for amending a taxpayer's return impermissibly burdens interstate commerce because it does not give taxpayers enough time to amend a Mississippi tax return after an audit by another state, which can take far longer than three years. They contend that this violates the negative or dormant aspect of the Commerce Clause of the United States Constitution because in-state taxpayers do not suffer the same difficulty.

### A. The Dormant Commerce Clause

¶10. The Constitution gives Congress the authority to regulate interstate commerce. U.S. Const. art. I, § 8, cl. 3. But "[a]lthough the Clause is framed as a positive grant of power to Congress, [the United States Supreme Court has] consistently held [it] to contain a further, negative command, known as the dormant Commerce Clause." ***Maryland v. Wynne***, 135 S. Ct. 1787, 1794, 191 L. Ed. 2d 813 (2015). The dormant aspect of the Commerce Clause "prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." ***Fulton Corp. v. Faulkner***, 516 U.S. 325, 330, 116 S. Ct. 848, 133 L. Ed. 2d 796 (1996). Absent congressional approval, a state may not discriminate against or impose excessive burdens upon interstate commerce. ***Wynne***, 135 S. Ct. at 1794. "In the absence of conflicting federal legislation the States retain authority under their general police powers to regulate matters of 'legitimate local concern,' even though interstate commerce may be affected." ***Lewis v. BT Inv. Managers, Inc.***, 447 U.S. 27, 36, 100 S. Ct. 2009, 64 L. Ed. 2d 702 (1980).

¶11. State laws that discriminate against interstate commerce "face a virtually per se rule of invalidity." ***Granholm v. Heald***, 544 U.S. 460, 476, 125 S. Ct. 1885, 161 L. Ed. 2d 796 (2005). But when a state law "regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits"; this

is the ***Pike*** balancing test. ***Pike v. Bruce Church, Inc.***, 397 U.S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970). "[T]hese two principles guide the courts in adjudicating cases challenging state laws under the Commerce Clause," but they are, as the Supreme Court recently put it, "subject to exceptions and variations." ***South Dakota v. Wayfair, Inc.***, 138 S. Ct. 2080, 2091, 201 L. Ed. 2d 403 (2018). Others have been less charitable, saying the dormant Commere Clause jurisprudence remains a "quagmire" that offers "little in the way of precise guides to the States in the exercise of their indispensable power of taxation." ***DIRECTV v. Utah State Tax Comm'n***, 364 P.3d 1036, 1049 (Utah 2015) (quoting ***Nw. States Portland Cement Co. v. Minnesota***, 358 U.S. 450, 458, 79 S. Ct. 357, 3 L. Ed. 2d 421 (1959)).

### B. The Mississippi Statutes at Issue

¶12. Mississippi taxes the worldwide income of its residents. *See* Miss. Code Ann. § 27-7-5 (Rev. 2017). To avoid double taxation, Mississippi offers a credit for income taxes paid to other states. *See* Miss. Code Ann. § 27-7-77 (Rev. 2017). This credit, however, is limited to how much Mississippi would have taxed the income. Miss. Code Ann. § 27-7-77(2)(c) (Rev. 2017). Since New York has a higher income tax rate, the Mississippi credit would have been less than the tax assessed by New York. Or, put another way, claiming the income as earned in Mississippi would have reduced the Kanslers' total tax burden—if New York had gone along with it.

¶13. While the facts are not fully developed in the record, the Kanslers appear to have contested their New York tax liability; they assert that their final New

York liability was "substantially less" than that state originally sought. The tax returns at issue were for tax years 2008 and 2009. The New York audit was completed in late 2014. The Kanslers tried to amend their Mississippi tax returns in January 2015, but by then the statute of limitations had run.

¶14. Mississippi Code Section 27-7-313 (Rev. 2017) provides,

> No refund shall be granted under this article or under the provisions of Article 1 of this chapter unless a claim for the refund is made within three (3) years from the date the return is due, or within three (3) years from the final day of an extension period previously granted by the commissioner pursuant to the provisions of Section 27-7-50; however, the restrictions imposed by this section do not apply to those refund requests or claims made in compliance with Section 27-7-49.

Mississippi Code Section 27-7-49 (Supp. 2008) further provided, in relevant part and at the relevant time,[6]

> (1) Returns shall be examined by the commissioner or his duly authorized agents within three (3) years from the due date or the date the return was filed, whichever is later, and

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[6] Section 27-7-49 was amended in 2013 to limit the time for a Mississippi audit to one year after the original three-year examination period. *See* 2013 Miss. Laws ch. 470 (H.B. 892), § 1, eff. Jan. 1 2013. It does not appear that this affects the issues at hand.

no determination of a tax overpayment or deficiency shall be made by the commissioner, and no suit shall be filed with respect to income within the period covered by such return, after the expiration of said three-year period, except as hereinafter provided.

(2) When an examination of a return made under this article has been commenced, and the taxpayer notified thereof . . . within the three-year examination period provided in subsection (1) of this section, the determination of the correct tax liability may be made by the commissioner after the expiration of said three-year examination period, provided that said determination shall be made with reasonable promptness and diligence.

(3) Where the reported taxable income of a taxpayer has been increased or decreased by the Internal Revenue Service, the three-year examination period provided in subsection (1) of this section shall not be applicable, insofar as the Mississippi income tax liability is affected by the specific changes made by said Internal Revenue Service. However, no additional assessment or no refund shall be made under the provisions of this article after three (3) years from the date the Internal Revenue Service disposes of the tax liability in question.

(4) The three-year examination period provided in subsection (1) of this section shall not be applicable in the case of a false or fraudulent return with intent to evade tax.

> (5) A taxpayer may apply to the commissioner for revision of any return filed under this article at any time within three (3) years from the due date, or if an extension of time to file was granted, three (3) years from the date the return was filed. If the return is not filed by the time authorized by the extension, then the three (3) years begin to run from the final day of the extension period.

¶15. In summary, the taxpayer has three years from the due date of her return to apply for a revision. *See* Miss. Code Ann. § 27-7-49(5) (Supp. 2008). The other four subsections appear to extend the limitations period only for a revision at the behest of the Department of Revenue, but the Kanslers assert (and the Department does not appear to disagree) that the Department will give the taxpayer the benefit of previously unclaimed credits or reductions in tax liability if they are found during the course of its audit.

### C. *Complete Auto* and The Kanslers' Argument

¶16. Before determining whether Mississippi's refund limitations period burdens interstate commerce, we must decide how to characterize what has happened to the Kanslers. The Kanslers urge us to judge the Mississippi statute of limitations under one of those "exceptions and variations" alluded to by the Supreme Court in ***Wayfair***, the ***Complete Auto*** test. *See* ***Wayfair***, 138 S. Ct. at 2091. Under the ***Complete Auto*** test, to avoid violating the dormant Commerce Clause, "a tax must: (1) be imposed on an activity with a substantial nexus with the taxing state; (2) be fairly

apportioned, based on the activity within the taxing state; (3) not discriminate against interstate commerce; and (4) be fairly related to services provided by the taxing state." ***Commonwealth Brands, Inc. v. Morgan***, 110 So. 3d 752, 758 (Miss. 2013) (citing ***Complete Auto Transit Inc. v. Brady***, 430 U.S. 274, 97 S. Ct. 1076, 51 L. Ed. 2d 326 (1977)).

¶17. But the ***Complete Auto*** test is specifically intended for evaluating the constitutionality of taxes, not state regulations in general. *See* ***Complete Auto***, 430 U.S. at 274 (addressing "the perennial problem of the validity of a state tax . . . ."). In ***Mississippi Department of Revenue v. AT &T Corp.***, 202 So. 3d 1207, 1216 (2016), this Court agreed that "[t]he United States Supreme Court has applied ***Complete Auto*** to invalidate a wide range of state tax credits, deductions and exemptions," but we are not aware of any decisions applying the test to a statute of limitations, even when it is related to taxes. Nor do the Kanslers offer any such authority.

¶18. In ***Direct Marketing Association v. Brohl***, 814 F.3d 1129 (10th Cir. 2016), the United States Court of Appeals for the Tenth Circuit rejected a challenge to a Colorado law that imposed notice and reporting requirements on out-of-state retailers. The reporting requirements were intended to facilitate Colorado's collection of use taxes from its own residents who were avoiding sales taxes by buying goods online from retailers without a physical presence in the state. *See* ***id.*** at 1133. The challenge to the law was based on ***Quill Corp. v. North Dakota***, 504 U.S. 298, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992), *overruled by*

***Wayfair***, 138 S. Ct. at 2099. ***Quill*** had held that prior decisions prohibiting states from compelling out-of-state retailers to collect sales taxes were still good law under the ***Complete Auto*** test. *See* ***Quill***, 504 U.S. at 311. The Tenth Circuit ultimately concluded that the "***Complete Auto*** [test] does not apply . . . because this case involves a reporting requirement and not a tax." ***Brohl***, 814 F.3d at 1133.

¶19. Similarly, in ***Xcaliber International Ltd., LLC v. Ieyoub***, 377 F. Supp. 2d 567, 569-70 (E.D. L.A. 2005), *vacated on other grounds sub nom*. ***Xcaliber International Ltd., LLC v. Foti***, 442 F.3d 233 (5th Cir. 2006), the United States District Court for the Eastern District of Louisiana considered a statute requiring tobacco companies not participating in the 1998 settlement to put a small amount of money in escrow for each of their cigarettes sold in Louisiana. The manufacturers alleged this violated the dormant Commerce Clause under the ***Complete Auto*** test, but the district court disagreed:

> Plaintiffs argue that their Commerce Clause claim should be judged by the standards announced in cases such as ***Quill Corp. v. North Dakota***, 504 U.S. 298, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992) and ***Complete Auto Transit v. Brady***, 430 U.S. 274, 97 S. Ct. 1076, 51 L. Ed. 2d 326 (1977). These cases, however, involved the "limits" the Commerce Clause placed "on the taxing powers of the States." ***Quill***, 504 U.S. at 305, 112 S. Ct. 1904. The amended escrow statute does not impose a tax on tobacco manufacturers, rather an escrow

> payment which may be accessed by the state only if it obtains a judgment against or enters into settlement with the manufacturer. Because the amended escrow statute is not a tax or other "revenue-raising measure designed to line the State's coffers," the test utilized by the ***Quill*/*Complete Auto Transit*** line of cases does not apply. ***Star Scientific, Inc. v. Carter***, 2001 WL 1112673, at *9 (S.D. Ind. Aug. 20, 2001); *see also* ***American Target Advertising, Inc. v. Giani***, 199 F.3d 1241, 1254-55 (10th Cir.) (holding that because ***Quill*** and related cases "concern the levy of taxes upon out-of-state entities," they govern only the analysis of tax burdens) (emphasis in original), *cert. denied*, 531 U.S. 811, 121 S. Ct. 34, 148 L. Ed. 2d 14 (2000); ***Ferndale Lab., Inc. v. Cavendish***, 79 F.3d 488, 494 (6th Cir.1996) (holding that because "virtually every precedent relied upon by the Court in deciding ***Quill*** was concerned with attempts by states to tax interstate commerce," ***Quill*** applies only if a state attempts to tax interstate transactions).

***Xcaliber***, 377 F. Supp. 2d at 578.

¶20. This Court has applied the ***Complete Auto*** test in six reported decisions, each time addressing a tax. *See* ***Miss. Dep't of Revenue v. AT & T Corp.***, 202 So. 3d 1207, 1216-18 (Miss. 2016) (tax exemption for certain dividends); ***Morgan***, 110 So. 3d at 758 (tax on cigarettes sold by tobacco companies not participating in settlement); ***Miss. State. Tax Comm'n v. Murphy Oil USA***, 933 So. 2d 285, 293 (Miss. 2006) (franchise

tax); ***Thomas Truck Lease Inc. v. Lee County***, 768 So. 2d 870, 876 (Miss. 1999) (ad valorem tax); ***Weeks Dredging & Contracting, Inc. v. Miss. State Tax Comm'n***, 521 So.2d 884, 889 (Miss. 1988) (Alabama sales tax); ***Marx v. Truck Renting and Leasing Ass'n, Inc.***, 520 So. 2d 1333, 1341 (Miss. 1987) (sales tax), *overruled on other grounds by* ***Morgan***, 110 So. 3d at 761-62.

¶21. Ultimately, it makes little difference whether we formally employ the ***Complete Auto*** test. Two of its prongs are not invoked in this case, one is essentially the traditional discrimination/***Pike*** balancing test, and the last—apportionment—is erroneously applied by the Kanslers. As noted above, under ***Complete Auto***, "a tax must: (1) be imposed on an activity with a substantial nexus with the taxing state; (2) be fairly apportioned, based on the activity within the taxing state; (3) not discriminate against interstate commerce; and (4) be fairly related to services provided by the taxing state." ***Morgan***, 110 So. 3d 752, 758 (Miss. 2013).

¶22. The Kanslers do not contest that our statute passes under prongs one (substantial nexus) and four (fairly related to services provided by the taxing state). Notably these two prongs left unchallenged have actually been applied to analyze collateral burdens similar to those alleged in today's case. In ***South Dakota v. Wayfair Inc.***, 138 S. Ct. 2080, 2091, 201 L. Ed. 2d 403 (2018), and ***Quill Corp. v. North Dakota***, 504 U.S. 298, 313, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992) (overruled by ***Wayfair***), the United States Supreme Court considered whether requiring *collection*

of sales taxes by mail-order retailers placed an undue burden on interstate commerce. The Supreme Court weighed whether a physical presence in the taxing state was needed to justify the burden on the retailers of complying with that state's tax schemes, or whether mail-order retailers would be unduly burdened by having to comply with fifty states worth of sales tax schemes. *See* ***Wayfair***, 138 S. Ct. at 2093. A major concern was compliance costs, which must include some cost associated with inevitable errors in administering the tax. *See* ***id.*** Presumably out-of-state retailers would commit more errors—errors that cost them money—than in-state retailers. This is essentially what the Kanslers complain, that our statute of limitations exposes people who engage in interstate commerce to a greater risk of suffering for tax mistakes. But instead of holding that any degree of de facto discrimination against interstate commerce invalidated the tax (like the Kanslers ask us to do), the United States Supreme Court employed a balancing test. It observed first that "interstate commerce may be required to pay its fair share of state taxes." ***Wayfair***, 138 S. Ct. at 2091 (quoting ***D.H. Holmes Co. v. McNamara***, 486 U.S. 24, 31, 108 S. Ct. 1619, 100 L. Ed. 2d 21 (1988)). The relevant question was whether the challenged law created an *undue* burden on interstate commerce. *See* ***Wayfair***, 138 S. Ct. at 2091 (emphasis added). This is similar to, if not essentially the same as, the ***Pike*** balancing test. *See* ***id.***; *see also* ***Pike v. Bruce Church Inc.***, 397 U.S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970).

¶23. The second ***Complete Auto*** prong is apportionment, which requires considering the internal

consistency of the statute, although the internal consistency test has also sometimes been said to apply to the final ***Complete Auto*** prong, discrimination, as well.[7]

¶24. As this Court recently explained in ***AT & T***,

> "Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear." [***Okla. Tax Comm'n v. Jefferson Lines***, 514 U.S. 175, 185, 115 S. Ct. 1331, 131 L. Ed. 2d 261 (1995)]. The test "simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with intrastate commerce." ***Id.*** "A failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes from the interstate transaction, since allowing such tax in one State would place interstate commerce at the mercy of those

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[7] *See* ***Armco Inc. v. Hardesty***, 467 U.S. 638, 644, 104 S. Ct. 2620, 81 L. Ed. 2d 540 (1984). External consistency is also potentially an issue under the apportionment prong, but it is not contested by the Kanslers. "External consistency looks . . . to the economic justification for the State's claim upon the value taxed, to discover whether a State's tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State." ***AT & T***, 202 So. 3d at 1219 (quoting ***Okla. Tax Comm'n v. Jefferson Lines***, 514 U.S. 175, 185, 115 S. Ct. 1331, 131 L. Ed. 2d 261 (1995)).

> remaining States that might impose an identical tax." ***Id.***

***AT & T***, 202 So. 3d at 1219. The internal consistency test

> allows courts to distinguish between (1) tax schemes that inherently discriminate against interstate commerce without regard to the tax policies of other States, and (2) tax schemes that create disparate incentives to engage in interstate commerce (and sometimes result in double taxation) only as a result of the interaction of two different but nondiscriminatory and internally consistent schemes.

***Id.*** (quoting ***Maryland v. Wynne***, 135 S. Ct. 1787, 1802, 191 L. Ed. 2d 813 (2015)).

¶25. The Kanslers contend that our statute fails the internal consistency test because taxpayers with income from other states will suffer more from our statute of limitations than taxpayers whose income is derived solely from Mississippi. The Kanslers apparently prefer the internal consistency test because, unlike the other ***Complete Auto*** prongs or the traditional discrimination/balancing test, it makes no allowance for balancing the state's interest against the impact on interstate commerce.

¶26. The problem with this argument is that the internal consistency test employs a hard-line rule rather than a balancing test because of the limited question it is supposed to address—whether double taxation results from the intrinsic unfairness of a

state's tax structure (generally disallowed) or the interaction with other states' tax structures (allowed). The reviewing court is supposed to "look[] to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage." ***Jefferson Lines***, 514 U.S. at 185. The test is theoretical; it "asks nothing about the degree of economic reality reflected by the tax." ***Id.***

¶27. The Kanslers have cited no instance where a Court found a tax scheme failed the internal consistency test because of practical or collateral issues like a statute of limitations, nor are we aware of any. As noted above and below, compliance difficulties have been addressed under other ***Complete Auto*** prongs. If the internal consistency test were to be applied as the Kanslers argue, no tax on interstate commerce—which is necessarily more complicated than purely intrastate taxes and thus inevitably subject to more errors and associated costs—could survive the test.

**D. The Discrimination/Balancing Test**

¶28. The remaining ***Complete Auto*** prong is that the tax does not discriminate against interstate commerce. The United States Supreme Court has also articulated this question as the preliminary step in a traditional, non-***Complete Auto***-specific dormant Commerce Clause analysis. *See* ***Bendix Autolite Corp. v. Midwesco Enterprises Inc.***, 486 U.S. 888, 891, 108 S. Ct. 2218, 100 L. Ed. 2d 896 (1988). In ***Bendix***, the Supreme Court addressed a challenge to an Ohio statute that tolled the limitations period when a defendant was out of state. *See* ***id.*** at 899. For foreign

corporations, the effect of this statute was to require the defendant to "appoint an agent for service of process, which operates as consent to the general jurisdiction of the Ohio courts." ***Id.*** The Supreme Court held that it "may" have found the statute facially discriminatory against interstate commerce, but it would proceed to the ***Pike*** balancing test "to demonstrate that its legitimate sphere of regulation is not much advanced by the statute while interstate commerce is subject to substantial restraints." ***Id.*** at 891. The Court observed that "statute of limitations defenses are not a fundamental right," but they are "an integral part of the legal system," and a state "may not withdraw such defenses on conditions repugnant to the Commerce Clause." ***Id.*** at 893 (citations omitted). "The State may not condition the exercise of the defense on the waiver or relinquishment of rights that the foreign corporation would otherwise retain." ***Id.*** The state could not justify the rule because the defendant in that case was subject to service of process under Ohio's long-arm statute, and, thus, the tolling provision failed under the ***Pike*** balancing test. *See* ***id.*** at 894. ***Bendix*** is not on all fours with today's case because the challenged statute there categorically affected out-of-state businesses, but it is instructive as to applying the discrimination/balancing test approach to a challenge to a statute of limitations.

¶29. If we apply the discrimination/balancing test, the first step is to ask whether the law at issue discriminates against interstate commerce; such laws "face a virtually per se rule of invalidity." ***Granholm v. Heald***, 544 U.S. 460, 476, 125 S. Ct. 1885, 161 L. Ed. 2d 796 (2005). Discriminatory in this context is usually

equated to "economic protectionism" favoring in-state interests. *See* ***Bacchus Imports, Ltd. v. Dias***, 468 U.S. 263, 270, 104 S. Ct. 3049, 82 L. Ed. 2d 200 (1984). If the state law does not discriminate against interstate commerce, if it instead "regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." ***Pike v. Bruce Church Inc.***, 397 U.S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970).

¶30. Crucially, the Kanslers bear the burden of proof to show both that the statute discriminates against interstate commerce and, if it does not, to show that the burden imposed on commerce is clearly excessive in relation to the putative local benefits. *See* ***Hughes v. Oklahoma***, 441 U.S. 322, 336, 99 S. Ct. 1727, 1736, 60 L. Ed. 2d 250 (1979) (challengers bear burden of proving discrimination against interstate commerce); ***Nat'l Ass'n of Optometrists & Opticians LensCrafters, Inc. v. Brown***, 567 F.3d 521, 528 (9th Cir. 2009) (challengers bear burden of proving clearly excessive burden on interstate commerce).

¶31. Our statute of limitations for tax returns is not discriminatory on its face. The statute and its various tolling provisions make no distinction between in-state and out-of-state taxpayers or between interstate and intrastate commerce. *See* Miss. Code Ann. § 27-7-49 (Supp. 2008); Miss. Code Ann. § 27-7-313 (Rev. 2017).

¶32. The statute of limitations might also be found to be discriminatory if it had a discriminatory /

protectionist purpose or effect. *See* ***Bacchus Imports***, 468 U.S. at 270. As to a discriminatory or protectionist purpose (this would usually be of the legislature in passing the law), the Kanslers have produced no evidence on that point, and since they bear the burden of proof, the analysis ends there. For a discriminatory or protectionist effect, the Kanslers rely on the internal consistency test, which, as we have already explained above, they misapply.

¶33. Since our statute of limitations is not obviously discriminatory against interstate commerce, we turn to the ***Pike*** balancing test; we ask whether the statute "regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental." ***Pike***, 397 U.S. at 142. If so, "it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." ***Id.*** This is the test Justice Scalia compared to trying to decide "whether a particular line is longer than a particular rock is heavy." *See* ***Bendix***, 486 U.S. at 897 (Scalia, J., concurring).

¶34. As discussed above, our statute of limitations does not discriminate against interstate commerce on its face. The Kanslers' assertion that it burdens interstate commerce, to an extent, has some merit. We acknowledge that it may be difficult for a taxpayer to determine how to apportion his income when it is arguably earned in multiple states. But it is inevitable that it will be more difficult to comply with taxes on interstate commerce. And it has not been developed in the record how severe or pervasive this particular issue

is, nor is there any real evidence in the record regarding the countervailing interests of finality and ease of administration that are advanced by the Department of Revenue. Thus, this issue comes down to the burden of proof, which is on the Kanslers. *See* ***Brown***, 567 F.3d at 528. They have failed to show that our statute of limitations' burden on interstate commerce is "clearly excessive in relation to the putative local benefits." *See* ***Pike***, 397 U.S. at 142.

¶35. It is also worth noting ***Nissan Motor Corp. v. Commissioner of Revenue***, 552 N.E.2d 84, 88-89 (Mass. 1990), the only case of which we are aware that addressed a constitutional challenge similar to the one made here. The Massachusetts Supreme Court denied the challenge, holding,

> If the corporate excise tax formula . . . is constitutionally valid under the commerce clause, as Nissan does not dispute, then the mere fact that an error may occur in the Commonwealth's computation of it, and that the taxpayer then has the time set out in [the statute] to seek an abatement does not render the scheme unconstitutional. The purpose of the commerce clause is to protect interstate commerce from discrimination or regulation by the States or from action, such as a tax, which imposes a direct and immediate burden on such commerce. ***Commissioner of Corps. & Taxation v. Ford Motor Co.***, [33 N.E.2d 318 (Mass. 1941)]. Both the . . . tax itself and the abatement remedy apply to domestic and foreign corporations engaged in interstate commerce

alike. Nissan's assertion that local businesses do not face the "risk" interstate businesses do, of paying tax twice to two different States by the Commonwealth's erroneous application of [the tax], ignores the fact that a taxpayer like Nissan is charged with knowledge of the tax laws wherever it does business, *see* ***Atkins v. Parker***, 472 U.S. 115, 130, 105 S. Ct. 2520, 2530, 86 L. Ed. 2d 81 (1985); ***Wilkinson v. New England Tel. & Tel. Co.***, 327 Mass. 132, 97 N.E.2d 413 (1951), and has several years, under [the statute of limitations] to seek the remedy of abatement if a tax is incorrectly assessed. Local businesses, too, are in peril of erroneous tax assessment, and are limited to the [same] deadlines, which Nissan has not challenged as unreasonable.

The fact that Nissan stands today in the unfortunate position of having paid tax on the same income twice to two different States is not the fault of either Massachusetts or New York. Engaging in "interstate commerce" is no talisman freeing Nissan from meeting reasonable deadlines set by the Legislature for bringing a complaint against assessment of a corporate excise tax in Massachusetts. ***George S. Carrington Co. v. State Tax Comm'n***, [377 N.E.2d 950 (Mass. 1978)]. The commerce clause does not grant immunity to foreign corporations from such State taxation that does not directly oppress interstate commerce. ***Commissioner of Corps. & Taxation v. Ford Motor Co.***, *supra* 308 Mass. at 570, 33 N.E.2d 318.

***Nissan Motor Corp.***, 552 N.E.2d at 88-89. The Massachusetts court further noted the value of statutes of limitation for taxes,

> It should be noted that in the tax context, statutory time limits have special significance. A tax system without a final point at which accounts are declared settled—under which both taxpayer and government stand forever on guard, receipts and other facts proving valuation and conduct of business, forever at the ready—"would be all but intolerable, at least Congress has regarded it as ill-advised," the United States Supreme Court has observed. ***Rothensies v. Electric Storage Battery Co.***, 329 U.S. 296, 301, 67 S. Ct. 271, 273, 91 L. Ed. 296 (1946). "[A] statute of limitation is an almost indispensable element of fairness as well as of practical administration of an income tax policy." ***Id.***

***Nissan Motor Corp.***, 552 N.E.2d at 89. The court concluded by noting that "it is not the task of the courts to 'adjust' the time limits of tax statutes where their application would appear unjust or inequitable" because "[s]tatutes of limitation are by definition arbitrary and their operation does not discriminate between the just and the unjust claim." ***Id.*** at 89-90 (citations omitted).

¶36. Finally, we echo the Utah Supreme Court's caution against novel Commerce Clause arguments. That court explained,

Many decades ago the Supreme Court described its dormant Commerce Clause caselaw as a "quagmire." ***Nw. States Portland Cement Co. v. Minnesota***, 358 U.S. 450, 458, 79 S. Ct. 357, 3 L. Ed. 2d 421 (1959). Not much has changed in the interim, except perhaps to add more "room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation." ***Id.*** at 457, 79 S. Ct. 357. Yet we must of course decide the cases that come before us, mindful of our role as a lower court to follow controlling precedent from the U.S. Supreme Court.

In so doing, we are reluctant to extend dormant Commerce Clause precedent in new directions not yet endorsed by that court. The high court's precedents in this area seem rooted more in "case-by-case analysis" than in any clear, overarching theory. *See* ***W. Lynn Creamery, Inc. v. Healy***, 512 U.S. 186, 201, 114 S. Ct. 2205, 129 L. Ed. 2d 157 (1994). In a field like this one, it is more difficult than usual for a lower court to anticipate expansions of the law into new territory, as any decision to do so seems more like common-law decision-making than constitutional interpretation. The principle of dormant commerce, after all, is not rooted in a clause, but in a negative implication of one; so there is a dearth of any textual or historical foundation for a court to look to.

> Our hesitance to extend the law of dormant commerce is reinforced by a practical problem: The extension advocated [here] would open a can of worms.

***DIRECTV v. Utah State Tax Comm'n***, 364 P.3d 1036, 1049 (Utah 2015).

### E. Conclusion

¶37. In summary, we reject the Kanslers' novel attempt to apply the internal consistency test to a statute of limitations. Instead, we analyze the challenge under the traditional discrimination/***Pike*** balancing test, and we find that the discrimination alleged by the Kanslers is "incidental" to Mississippi's otherwise nondiscriminatory statute of limitations. It therefore must "be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." ***Pike***, 397 U.S. at 142. We cannot say that is the case based on the record before us.

## II. Due Process

¶38. Finally, the Kanslers contend the three-year limitations period for filing amended returns violates their due process rights. This second issue receives only cursory treatment in their brief; all told, it cites a single case and occupies less than a single full page of argument. The Kanslers cite ***Marx v. Broom***, 632 So. 2d 1315, 1320 (Miss. 1994), where this Court held that a statute which "stripp[ed] . . . federal retirees of the right to file for a refund [for an illegally collected tax] . . . without providing them any means of protecting

those rights . . . violated [their] Fourteenth Amendment right to due process."

¶39. ***Marx*** is inapposite, first, because the tax here was not illegally collected by the State; it was voluntarily paid by the Kanslers. Nor does the statute of limitations here categorically deny the Kanslers' eligibility for the tax credit; they could have asked for it in their original tax return, and after that they had three years to amend their returns. It may not have been as long as the Kanslers would have liked, but the statute of limitations did not violate their right to due process under ***Marx***.

¶40. It is presumed that the trial court's judgment is correct, and the Kanslers, as the appellants, are required to show otherwise. *See* ***Barrhead v. State***, 57 So. 3d 1223, 1231 (Miss. 2011). This Court is under no obligation to consider this issue beyond the arguments presented, and we decline to do so.

## CONCLUSION

¶41. We affirm the chancery court's grant of summary judgment to the Mississippi Department of Revenue.

¶42. **AFFIRMED.**

**WALLER, C.J., RANDOLPH AND KITCHENS, P.JJ., KING, COLEMAN, MAXWELL, BEAM AND CHAMBERLIN, JJ., CONCUR.**

## APPENDIX B

**IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI**

**CAUSE NO. G-2016-1175 T/1**

**[Filed August 31, 2017]**

| | |
|---|---|
| MICHAEL AND VICKIE KANSLER PLAINTIFFS | ) |
| VS. | ) |
| MISSISSIPPI DEPARTMENT OF REVENUE RESPONDENT | ) |

### FINAL ORDER GRANTING SUMMARY JUDGMENT

BEFORE THIS COURT is Respondent's Motion for Summary Judgment seeking dismissal of Plaintiff's Appeal Petition, as well as Plaintiffs' Cross-Motion for Summary Judgment seeking a full refund of Mississippi income taxes for the 2008 and 2009 tax years. The Court has held hearing on the matter and has considered all relevant case and statutory law, as well as all written and oral arguments. After diligent

consideration, the Court makes the following findings of fact and conclusions of law.

**Facts**

Both parties agree that there are no genuine issues of material fact. Instead, the parties fully agree to the recitation of facts. Therefore, the only questions that remain are purely those of law.

In 2007, the Plaintiffs moved to Mississippi from New York pursuant to a relocation through Mr. Kansler's employment with Entergy. During the years of 2008 and 2009, Mr. Kansler continued his employment with Entergy, routinely traveling to New York as part of his job requirements. As such, Mr. Kansler was engaged in interstate commerce in 2008 and 2009 due to the multistate nature of his ongoing employment. During 2008 and 2009, Plaintiffs were residents of and were domiciled in the State of Mississippi. As such, Plaintiffs timely filed resident individual income tax returns for this period. Per these returns, Plaintiffs reported and paid Mississippi income tax on their worldwide income for 2008 and 2009, specifically including certain stock options exercised by Mr. Kansler.

In 2012, the New York taxing authorities initiated an audit related to Mr. Kansler's exercise of these stock options in the years 2008, 2009 and 2010. Mr. Kansler's employer had granted the stock options over multiple years prior to the move to Mississippi in 2007; the options vested over multi-year periods, including after Plaintiffs' move to Mississippi. New York considered a portion of the stock option income to be taxable, even

though the options were exercised after Mr. Kansler had left the state. On December 29, 2014, New York concluded its audit and assessed the Plaintiffs a tax liability of $390,895 in additional taxes and $184,099 in interest, for a total of $547,994. Plaintiffs paid the New York tax liability on December 31, 2014.

In January 2015, Plaintiffs filed amended Mississippi income tax returns for the 2008 and 2009 tax periods, claiming credit for the New York tax paid. Pursuant to Mississippi Code Annotated §27-7-77, Plaintiffs requested a refund of $257,140 in overpaid Mississippi income taxes resulting from the application of the credit for the New York tax paid. The MOOR denied the refund claim as untimely under Mississippi Code Annotated §27-7-313, which states that such claims must be brought within three (3) years after the due date of the income tax return or within three (3) years of the due date of an extension to file. Plaintiffs timely appealed the denial of the refund claim to the MOOR Board of Review. The Board of Review conducted an administrative hearing on September 29, 2015. On October 20, 2015, the Board of Review issued its Order affirming the denial of the refund claim. Plaintiffs thereafter timely appealed the Order to the Mississippi Board of Tax Appeals. The Board of Tax Appeals conducted an administrative hearing on June 15, 2016. On June 21, 2016, the Board of Tax Appeals issued its Order affirming the denial of the refund claim. Feeling aggrieved, Plaintiffs timely filed the instant appeal before this Court.

The parties do not dispute that the denial of the refund claim is based solely upon the failure to make

such claim within the three (3) years provided in §27-7-313. Likewise, the parties do not dispute that Plaintiffs were unable to file the refund claim within the statutory period due solely to the fact that the New York income tax audit was not concluded within that three (3) year period. The sole issue in dispute is whether the statute of limitations contained in Miss. Code Ann. §27-7-313, without a tolling or re-opening provision to account for tax determinations made by sister-states outside the regular statute of limitations, is unconstitutional.

**Standard of Review**

In addressing the constitutionality of a statute, the Court must apply a *de novo* standard of review. *Mississippi Dep't of Revenue v. AT & T Corp.,* 202 So. 3d 1207, 1213 (Miss. 2016). There is a strong presumption that statutes properly enacted by the Mississippi Legislature are constitutional. A party assailing the constitutionality of statutes must overcome the strong presumption that the Legislature acted within its constitutional authority. *5K Farms, Inc. v. Mississippi Dep't of Revenue,* 94 So. 3d 221, 226 (Miss. 2012). "This deference to legislative enactments is particularly strong involving constitutional challenges to taxation statutes." *5K Farms, Inc. v. Mississippi Dep't of Revenue,* 94 So. 3d 221, 227 (Miss. 2012) (*citing City of Belmont v. Miss. State Tax Comm'n,* 860 So.2d 289, 306 (Miss.2003). While the Court is mindful of the great deference given to agencies in this state, it is nevertheless bound by the rulings of the United States Supreme Court in regard to the constitutionality of even state statutes. Further,

our Mississippi Supreme Court has explicitly adopted the four-prong test set out by the United States Supreme Court which a state tax must satisfy in order to survive a Commerce Clause challenge. In order for a tax to comport with the Commerce Clause: (1) the tax must be imposed on an activity with a substantial nexus with the taxing state; (2) the tax must be fairly apportioned, based on the activity within the taxing state; (3) the tax must not discriminate against interstate commerce; and (4) the tax must be fairly related to the services provided by the taxing state. *Mississippi Dep't of Revenue v. AT & T Corp.,* 202 So. 3d 1207, 1216 (Miss. 2016) (*quoting Commonwealth Brands, Inc. v. Morgan,* 110 So.3d 752, 758 (Miss. 2013)). *See also Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 279 (1977). Therefore, this Court must determine whether Miss. Code Ann. §27-7-313 passes the four-prong test to determine constitutionality.

**Analysis**

Mississippi Code Annotated §27-7-313 provides, in pertinent part:

> No refund shall be granted under this article or under the provisions of Article 1 of this chapter unless a claim for the refund is made within three (3) years from the date the return is due, or within three (3) years from the final day of an extension period previously granted by the commissioner pursuant to the provisions of Section 27-7-50; however, the restrictions imposed by this section do not apply to those refund requests or claims made in compliance with Section 27-7-49.

Neither party contends that the statutory scheme in §27-7-313 fails to comport with the first and fourth prongs of the *Complete Auto Transit* test. Instead, Plaintiffs assert that the refund limitation contained in this section violate the second and third prongs, discriminating against interstate commerce and failing to constitute a fairly apportioned tax scheme. Specifically, Plaintiffs assert that the limitation fails the internal consistency test and creates a clear and certain risk of double taxation.

"Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear." *Oklahoma Tax Comm'n v. Jefferson Lines,* 514 U.S. 175, 185, 115 S.Ct. 1331, 1331 (1995). The test "simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with intrastate commerce." *Mississippi Dep't of Revenue v. AT & T Corp.,* 202 So. 3d 1207, 1219 (Miss. 2016) (*quoting Oklahoma Tax Comm'n v. Jefferson Lines,* 514 U.S. 175, 185, 115 S.Ct. 1331, 1331 (1995)). There is no failure of such consistency in this case; for if every state were to impose a statute of limitations identical to that contained in §27-7-313, interstate commerce would bear no additional burden than that of intrastate commerce.

Similarly, this Court cannot find that the unfortunate result of the Kanslers being taxed twice on the same income is due to any unfairness in the

Mississippi tax scheme. "[A] statute of limitation is an almost indispensable element of fairness as well as of practical administration of an income tax policy." *Rothensies v. Electric Storage Battery* Co., 329 U.S. 296, 301, 67 S.Ct. 271, 273, 91 L.Ed. 296 (1946). "It is not the task of the courts to 'adjust' the time limits of tax statutes where their application would appear unjust or inequitable." *Nissan Motor Corp. in U.S.A. v. Comm'r of Revenue,* 407 Mass. 153, 162, 552 N.E.2d 84, 89 (1990). The double taxation experienced by the Kanslers herein is the unfortunate "result of the interaction of two different but nondiscriminatory and internally consistent schemes." *Comptroller of Treasury of Maryland v. Wynne,* 135 S.Ct. 1787, 1802 (2015). While this Court is sympathetic to the unfortunate position in which the Kanslers find themselves, the statute at issue is not unconstitutional on its face or in its application.

**Conclusion**

Based upon the foregoing, this Court must find that MOOR properly denied the Kansler's income tax refund claims for the 2008 and 2009 tax periods. The same were made outside the three (3) year statute of limitations set forth under Miss. Code Ann. §27-7-313. Accordingly, this Court hereby grants MDOR's Motion for Summary Judgment and dismisses the Kansler's Appeal Petition with prejudice.

SO ORDERED, ADJUDGED, AND DECREED THIS the 31st day of August, 2017.

/s/
CHANCELLOR J. DEWAYNE THOMAS

## APPENDIX C

TRANSCRIPT OF ORDER, BOARD OF TAX APPEALS, JACKSON, MISSISSIPPI

STATE OF MISSISSIPPI
COUNTY OF HINDS JUNE 21, 2016

BE IT REMEMBERED THAT on the date stated above the Board of Tax Appeals of the State of Mississippi adopted an order in words and figures as follows, to-wit:

IN THE MATTER OF THE DENIAL
OF AN INDIVIDUAL INCOME TAX REFUND
AGAINST MICHAEL AND VICKIE KANSLER
RALEIGH, NORTH CAROLINA
FOR THE PERIOD OF JANUARY 1, 2008
THROUGH DECEMBER 31, 2009
IN THE AMOUNT OF $257,140.00
ACCOUNT NUMBER 1084-5254
DOCKET NUMBER 2015-0130

ORDER

This day this cause came on for decision and determination and it appearing to the Board of Tax Appeals of the State of Mississippi (hereinafter the "Board of Tax Appeals" or the "Board") that on June 15, 2016 a hearing was held on the protest and appeal in the matter of the denial of an individual income tax refund to Michael and Vickie Kansler, Raleigh, North Carolina, account number 1084-5254 (hereinafter the

"taxpayers" or the "Kanslers") in the amount of $257,140.00 for the periods of January 1, 2008 through December 31, 2009. The taxpayers were represented by the Honorable John F. Fletcher, Attorney at Law. The Mississippi Department of Revenue (hereinafter the "Department" or the "Department of Revenue") was represented by the Honorable Laura H. Carter, Attorney at Law. Also present were: Jon F. "Jack" Carmer, Jr., Attorney, Department of Revenue, Ashley May, Chief Counsel, Department of Revenue, Nicole Riley, Income Manager, Department of Revenue, John Robinson, newly confirmed Associate Member of the Board of Tax Appeals, and Samuel T. "Sam" Polk, III, Executive Director, Board of Tax Appeals. At the conclusion of the hearing, the matter was taken under advisement for decision and determination at a later date. The Board of Tax Appeals is now of the opinion and finds, as follows:

1. The Board of Tax Appeals has jurisdiction over this matter pursuant to Miss. Code Ann. § 27-4-3(1)(b).

2. The Kanslers were New York residents prior to moving to Mississippi in May 2007. Mr. Kansler was an Entergy employee in its White Plains, New York, office until the company reassigned and relocated him to its Jackson, Mississippi office. In 2008 and 2009, the Kanslers filed Mississippi resident individual income tax returns and reported and paid Mississippi taxes upon their worldwide income. In 2012, New York initiated an audit of the Kanslers related to Mr. Kansler's exercise of stock options in

2008, 2009 and 2010. Those stock options had been granted by his employer, Entergy, during the time they were New York residents, and New York considered that to be taxable non-resident income even if exercised after he had severed his residency with the state. Simultaneously with the New York payment, the Kanslers filed amended 2008 and 2009 Mississippi resident individual income tax returns to claim credit for the New York tax payments as authorized by Miss. Code Ann. § 27-7-77. These returns were filed in early January 2015, immediately after the Kanslers paid the New York assessment.

3. Because the Kanslers filed the amended returns more than three years after filing the original returns, the Department denied the refund claims as having been untimely filed. The refund denial does not specify the statutory authority for the denial, but the denial was presumably made pursuant to Miss. Code Ann. § 27-7-313, which provides in part that "no refund shall be granted...unless a claim for the same is made within three (3) years from the date the return is due... "

4. Aggrieved by the Department's denial of their refund request, the Kanslers appealed to the Board of Review before which the matter came on for a hearing on Tuesday, September 29, 2015. The Kanslers argued that the statute of limitations, in this instance, is unconstitutional because it violates the commerce clause of the

United States Constitution and requested that the Kanslers be allowed to take the additional credits.

5. The Review Board found that Section 27-7-313 "explicitly prevents the Department of Revenue from issuing a refund unless the claim is made within three (3) years from the due date of the return." *See,* Minutes of the Called Meeting of the Board of Review Held Tuesday, September 29, 2015.

6. Aggrieved by the Review Board's decision, the Kanslers appealed to the Board of Tax Appeals before which the matter came on for a hearing before Janet H. Mann, Chairman, Sara M. Fox, Associate Member, and Will Green Poindexter, Associate Member, on June 15, 2016. The Kanslers again argued that the Department's actions were in violation of the commerce clause of the United States Constitution.

7. We find that Miss. Code Ann. § 27-7-313 explicitly prevents the Department of Revenue from issuing a refund unless a claim is made within three (3) years from the due date of the return. We decline to rule on the constitutionality of the statute or to carve out a constitutional exception that allows this taxpayer to reopen the statute of limitations for purposes of claiming this refund.

8. The decision of the Board of Review should be affirmed.

IT IS, THEREFORE, HEREBY ORDERED AND ADJUDGED by the Board of Tax Appeals that the decision of the Board of Review to uphold and affirm the Commissioner's denial of an individual income tax refund to Michael and Vicki Kansler, in the amount of $257,140.00, for the periods of January 1, 2008 through December 31, 2009, is hereby upheld and affirmed.

IT IS HEREBY FURTHER ORDERED AND ADJUDGED by the Board of Tax Appeals that the findings contained herein and this order shall be final unless the taxpayers or the Department of Revenue shall within sixty (60) days from the date of this order file a petition in Chancery Court requesting a hearing pursuant to Miss. Code Ann. § 27-77-7.

IT IS HEREBY FURTHER ORDERED AND ADJUDGED by the Board of Tax Appeals that, as required by Rule 4.23.D. of the Rules of the Mississippi Board of Tax Appeals, "[a]ny party appealing from an order of the Board to Court shall mail to the Executive Director a copy of his written appeal to Court..." to put the Board on notice of the appeal and to insure that all records are maintained.

SO ORDERED this the 21st day of June, 2016.

---

CERTIFICATE

As Executive Director of the Board of Tax Appeals of the State of Mississippi, I do hereby certify that the above and foregoing is a true and correct copy of an order adopted by the Board of Tax Appeals on the date therein stated as the same appears of record in Exempt Order Book BTA 2 at pages 797 through 800, an official

record in said office and in my official care and custody, and that I have this day mailed copies to Mr. Fletcher and the Department of Revenue.

Witness my signature, this the 21st day of June, 2016.

[SEAL] /s/Samuel T. Polk III
SAMUEL T. POLK, III
EXECUTIVE DIRECTOR

## APPENDIX D

**Review Board Order No.** 11887

**ORDER OF THE BOARD OF REVIEW DEPARTMENT OF REVENUE, JACKSON, MISSISSIPPI**

**Date** October 20, 2015

| | |
|---|---|
| Michael and Vickie Kansler | 1084-5254 |
| **Name of Taxpayer** | **Account No.** |
| Raleigh, NC | 1/01/2008 - 12/31/2009 |
| **Address** | **Period of Assessment** |
| Individual Income Tax | $257,140.00 |
| **Type of Tax** | **Refund Denied** |

**The Review Board, after having been duly petitioned in writing as provided by statute, has today heard and carefully considered all the evidence presented by the taxpayer, as recorded in detail in the Minutes of the Review Board, and finds as follows:**

That the Commissioner's denial of an Individual Income Tax refund in the amount of $257,140.00 against Michael and Vickie Kansler, account number 1084-5254, is upheld and affirmed.

It is ordered that within sixty (60) days from the mailing date of this order, the above named taxpayer

shall pay to the Mississippi Department of Revenue the amount of $257,140.00 or the taxes, penalties and/or interest upheld and affirmed herein. The taxpayer must either send payment of the above amount to Review Board, P.O. Box 22828, Jackson, MS 39225-2828 or, if the taxpayer wishes to contest this Order, file an appeal to the Mississippi Board of Tax Appeals with the Executive Director, 2679 Crane Ridge Drive, Suite A, Jackson, MS 39216-4997, within sixty (60) days from the mailing date of this Order. For further information as to appeals to the three (3) member Mississippi Board of Tax Appeals, see Miss. Code Ann. § 27-77-5 and Title 35, Part I, Chapter 01, Section 107, Subsection 107.01-107.02 of the Mississippi Administrative Code.

**By Order of the Review Board**

/s/

**Chairman**

**MINUTES OF THE CALLED MEETING OF THE BOARD OF REVIEW HELD TUESDAY, SEPTEMBER 29, 2015.**

**IN THE MATTER OF THE DENIAL OF AN INDIVIDUAL INCOME TAX REFUND AGAINST MICHAEL AND VICKIE KANSLER, RALEIGH, NORTH CAROLINA, ACCOUNT NUMBER 1084-5254, FOR THE PERIOD BEGINNING JANUARY 1, 2008, AND ENDING DECEMBER 31, 2009, IN THE AMOUNT OF $257,140.00.**

John Fletcher, taxpayer representative, Nicole Riley, DOR, Lauren Windmiller, DOR, Jan Craig, DOR, and Nathan Smith, DOR met with the Board to discuss the assessment.

The taxpayer was recently audited by the State of New York for tax years including 2008 and 2009. The State of New York assessed the taxpayer for income generated when stock options were issued to the taxpayer while a New York resident. The New York audit was completed on December 31, 2014, so the taxpayer immediately attempted to file amended returns for the 2008 and 2009 tax years requesting a refund for the tax paid on the income representing the stock options. The Department of Revenue denied the refund based on the three year statute of limitations per Miss. Code Ann. 27-7-313.

The taxpayer representative argued that the statute of limitations, in this instance, is unconstitutional because it violates the commerce clause of the United States Constitution and requests that they be allowed to take the additional credits for nonresident income

taxes paid to other states. The taxpayer representative offered documentation explaining the recent opinion in Maryland v. Wynne, No. 13-485, 575 U.S.__ (May 18, 2015) as evidence of the claim. The Board reviewed the documentation provided.

It is the opinion of the Board that Miss. Code Ann. Section 27-7-313 explicitly prevents the Department of Revenue from issuing a refund unless a claim is made within three (3) years from the due date of the return.

The Board upheld and affirmed the income tax refund denial.

/s/Sam Portera
Sam Portera, Presiding

/s/Kathy Waterbury
Kathy Waterbury

/s/Tamekia Edwards
Temekia Edwards

## APPENDIX E

**Supreme Court of Mississippi**
**Court of Appeals of the State of Mississippi**
*Office of the Clerk*

D. Jeremy Whitmire
Post Office Box 249
Jackson, Mississippi
39205-0249
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Facsimile: (601) 359-2407

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Jackson, Mississippi
39201-1082
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sctclerk@courts.ms.gov

February 28, 2019

This is to advise you that the Mississippi Supreme Court rendered the following decision on the 28th day of February, 2019.

Supreme Court Case # 2017-CA-01295-SCT
Trial Court Case # 25CH1:16-cv-001175

Michael Kansler and Vickie Kansler v. Mississippi Department of Revenue

The Motion for Rehearing filed by Appellants is denied. Griffis, J., not participating.

* NOTICE TO CHANCERY/CIRCUIT/
COUNTY COURT CLERKS *

If an original of any exhibit other than photos was sent to the Supreme Court Clerk and should now be

returned to you, please advise this office in writing immediately.

**Please note: Pursuant to MRAP 45(c), amended effective July, 1, 2010, copies of opinions will not be mailed. Any opinion rendered may be found by visiting the Court's website at: https://courts.ms.gov, and selecting the appropriate date the opinion was rendered under the category "Decisions**."

## APPENDIX F

### 2012 Miss. Code Ann. § 27-7-49

***MISSISSIPPI CODE of 1972 ANNOTATED > TITLE 27. TAXATION AND FINANCE > CHAPTER 7. INCOME TAX AND WITHHOLDING > ARTICLE 1. INCOME TAX***

**§ 27-7-49. Examination of returns**

**(1)** Returns shall be examined by the commissioner or his duly authorized agents within three (3) years from the due date or the date the return was filed, whichever is later, and no determination of a tax overpayment or deficiency shall be made by the commissioner, and no suit shall be filed with respect to income within the period covered by such return, after the expiration of said three-year period, except as hereinafter provided and as provided in Section 27-7-307.

**(2)** When an examination of a return made under this article has been commenced, and the taxpayer notified thereof, either by certified mail or personal delivery by an agent of the commissioner, within the three-year examination period provided in subsection (1) of this section, the determination of the correct tax liability may be made by the commissioner after the expiration of said three-year examination period, provided that said determination shall be made with reasonable promptness and diligence.

**(3)** Where the reported taxable income of a taxpayer has been increased or decreased by the Internal Revenue Service, the three-year examination period provided in subsection (1) of this section shall not be applicable, insofar as the Mississippi income tax liability is affected by the specific changes made by said Internal Revenue Service. However, no additional assessment or no refund shall be made under the provisions of this article after three (3) years from the date the Internal Revenue Service disposes of the tax liability in question.

**(4)** The three-year examination period provided in subsection (1) of this section shall not be applicable in the case of a false or fraudulent return with intent to evade tax.

**(5)** A taxpayer may apply to the commissioner for revision of any return filed under this article at any time within three (3) years from the due date, or if an extension of time to file was granted, three (3) years from the date the return was filed. If the return is not filed by the time authorized by the extension, then the three (3) years begin to run from the final day of the extension period.

**(6)** Where the reportable taxable income of a taxpayer has been decreased by the carryback of a net casualty loss deduction under Section 27-7-20 or the carryback of a net operating loss deduction under Section 27-7-17, the three-year examination period provided under subsection (1) of this section shall not be applicable insofar as the Mississippi income tax liability is affected by the carryback of the net casualty loss

deduction or the carryback of the net operating loss deduction.

**History**

**SOURCES:**

Codes, 1942, § 9220-25; Laws, 1934, ch. 120; Laws, 1952, ch. 402, § 24; Laws, 1958, ch. 554, § 7; Laws, 1966, ch. 632, § 1; Laws, 1971, ch. 512, § 1; Laws, 1986, ch. 393, § 5; *Laws, 1993, ch. 563, § 3*; *Laws, 2007, ch. 466, § 2*; *Laws, 2010, ch. 386, § 2*, eff from and after July 1, 2010.

**2012 Miss. Code Ann. § 27-7-313**

***MISSISSIPPI CODE of 1972 ANNOTATED > TITLE 27. TAXATION AND FINANCE > CHAPTER 7. INCOME TAX AND WITHHOLDING > ARTICLE 3. WITHHOLDING OF TAX***

**§ 27-7-313. Refund to taxpayer**

In the case of any overpayment of any tax, interest or penalty levied or provided for in Article 1 of this chapter, or in this article, whether by reason of excessive withholding, error on the part of the taxpayer, erroneous assessment of tax, or otherwise, the excess shall be refunded to the taxpayer.

When, upon examination of any return made under this article, or under the provisions of Article 1 of this chapter, it appears that an amount of income tax has been paid in excess of the amount properly due, then the amount of the excess shall be credited against any income tax then due from the taxpayer under any other

return required by this article, or Article 1 of this chapter. Refunds or credits may be withheld or applied against any other tax determined finally to be due if the taxpayer has failed to pay any tax finally due as required by the provisions of the laws administered by the commission. Any excess after such application shall be certified to the State Auditor of Public Accounts by the commissioner. The said Auditor is hereby authorized to make such investigation and audit of the claim as he finds necessary. If he finds that the commissioner is correct in his determination, the Auditor may issue his warrant to the State Treasurer in favor of the taxpayer for the amount of tax erroneously paid into the State Treasury. No refund shall be granted under this article or under the provisions of Article 1 of this chapter unless a claim for same is made within three (3) years from the date the return is due, or within three (3) years from the final day of an extension period previously granted by the commissioner pursuant to the provisions of Section 27-7-50; however, the restrictions imposed by this section do not apply to those refund requests or claims made in compliance with subsections (2) and (3) of Section 27-7-49.

The State Treasurer shall withhold from all income taxes collected each month an amount necessary to make refunds expected to be approved by the State Auditor during the following month. This amount shall be placed in a special fund, separate and apart from the General Fund of the state, and used for the purpose of making refunds under the Income Tax Laws of the state. All refunds made under this article shall be

made as quickly as possible upon receipt of the proper proof, as required by the State Auditor.

In order to obtain a refund, such employee shall attach to his return a copy of the withholding statement required to be furnished him by his employer as provided in Section 27-7-311. The making of any refund shall not be conclusive of the tax due by any individual, but shall be made subject to the future audit of his return and the determination of his liability. Bond requirements of Section 7-7-57 shall not apply to warrants for refund of income tax.

Nothing in this section shall be construed as authorizing a refund of taxes for claims made pursuant to the United States Supreme Court decision of *Davis v. Michigan Department of Treasury*, 109 S. Ct. 1500 (1989). These taxes were not incorrectly and/or erroneously collected as contemplated by this chapter.

In the event a court of final jurisdiction determines the above provision to be void for any reason, it is hereby declared the intent of the Legislature that affected taxpayers shall be allowed a credit against future income tax liability as opposed to a tax refund.

**History**

**SOURCES:**

Codes, 1942, § 9220-68; Laws, 1968, ch. 580, § 8; Laws, 1971, ch. 512, § 8; Laws, 1975, ch. 449, § 1; Laws, 1982, ch. 489, § 5; Laws, 1986, ch. 393, § 6; Laws, 1988, ch. 391, § 9; Laws, 1989, ch. 485, § 7; Laws, 1990, ch. 523, § 7, eff from and after January 1, 1990.

**2015 CMSR 35-003-001**

***CODE OF MISSISSIPPI RULES > AGENCY 35. DEPARTMENT OF REVENUE > SUB-AGENCY 003. INCOME AND FRANCHISE TAX > CHAPTER 001. SUBPART 1: DEFINITIONS AND MISCELLANEOUS***

* * *

**Chapter 12** Credit for Income Tax Paid to another State.

**100** Residents of Mississippi are required by law to include in gross income for Mississippi income tax purposes, total income regardless of whether earned or realized from sources within or without the state. Individual resident taxpayers of Mississippi who earn income in other states, and who are required to pay income tax to the other state or states on that income, are allowed a credit against the Mississippi income tax due for the same year for which the tax is paid to the other state. Non-residents are not allowed this credit when completing the Non-Resident Mississippi Income Tax Return.

**101** The tax credit is confined to income taxes paid by a resident individual to another state, territory of the United States or District of Columbia paid for the same tax year. No tax credit is authorized for income tax paid by a resident individual to any subdivision of another state, such as a city or county or to a foreign country.

**102** A copy of the actual return filed with the other state must be attached to the Mississippi individual

income tax return. In lieu of a copy of the other state's return, documentation of the amount of tax paid to another state on the taxpayer's behalf by another entity, such as federal schedule K-1, may be attached to the return. This will only be accepted in instances where the other state's return is not required to be filed by the taxpayer. Copies of withholding statements indicating the amounts withheld by the other state are not sufficient to establish the credit to Mississippi.

**103** The law provides and imposes three limitations in establishing the amount of tax credit that may be claimed. The tax credit is confined to the least amount of the three limitations. They are:

1. The credit may not exceed the amount of income tax due Mississippi after applying all other credits:

2. The credit may not exceed the amount of income tax actually paid the other state. (Any income tax credits allowed by another state will not be treated as taxes actually paid.)

3. The credit may not exceed an amount computed by applying the highest applicable Mississippi rates to the net taxable income reported to the other state.

**104** The tax credit is confined to the least amount of the three limitations. The Credit for Tax Paid to Other States form may be used to compute the appropriate tax credit. If this form is used in the calculation of the credit, it must be attached to the Mississippi individual income tax return in addition to the required documentation to substantiate the credit.

If the required documentation is not attached, the credit may be disallowed.

105 (Reserved)

106 (Reserved)

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**EFFECTIVE DATE:**

June 30, 2006 [compilation, Secretary of State Document #13413]

**AMENDED:**

November 17, 2011 Secretary of State Document #18132 [compilation]