

No. _____

In The
Supreme Court of the United States

—◆—

WAYNE COUNTY SCHOOL DISTRICT,

Petitioner,

v.

J. ED MORGAN, in His Official Capacity
As the Commissioner of Revenue of the
Mississippi Department of Revenue,

Respondent.

—◆—

**On Petition For A Writ Of Certiorari
To The Supreme Court
Of The State Of Mississippi**

—◆—

PETITION FOR A WRIT OF CERTIORARI

—◆—

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QUESTION PRESENTED

Whether a State statute interpreted by the State's highest court as vesting in the State's tax administrative agency the arbitrary and unrestricted discretion to determine how much, if any, monetary interest is owed to a taxpayer on a tax overpayment is unconstitutional because it is in violation of (i) the Takings Clause of the Fifth Amendment made applicable to the States by the Fourteenth Amendment, (ii) the Due Process Clause of the Fourteenth Amendment, and/or (iii) the Equal Protection Clause of the Fourteenth Amendment.

PARTIES TO THE PROCEEDING

All parties are listed in the caption.

RULE 29.6 STATEMENT

The petitioner is not a nongovernmental corporation nor does the petitioner have a parent corporation or shares held by a publicly traded company.

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Petitioner Wayne County School District (“WCSD”) respectfully petitions for a writ of certiorari to review the subject opinion of the Mississippi Supreme Court.



OPINIONS BELOW

On March 16, 2017, the Supreme Court of Mississippi issued its decision and opinion affirming a final judgment of the Wayne County Chancery Court. *Wayne Cnty. Sch. Dist. v. Morgan*, 224 So.3d 539 (Miss. 2017). A copy of the opinion is attached as Appendix A. WCSD timely filed a Motion for Rehearing on April 21, 2017. A copy of the Motion for Rehearing with a Citation of Supplemental Authority under MRAP 28(k) is attached as Appendix F. The Court *en banc* denied the Motion for Rehearing on August 17, 2017, with one justice voting to grant the Motion. The Court’s decision denying the Motion for Rehearing is attached as Appendix D.



JURISDICTION

Petitioner seeks review of the decision and opinion of the Mississippi Supreme Court entered on August 17, 2017. This petition has been timely filed within 90 days of the Court’s decision denying WCSD’s Motion for Rehearing. Sup. Ct. R. 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 and

Article III, Section 2 of the United States Constitution.



**STATUTORY AND
CONSTITUTIONAL PROVISIONS INVOLVED**

Miss. Code Ann. § 27-65-53, 3rd par.

If any overpayment of tax as reflected in an application or amended return, or both, filed by the taxpayer, and verified by the commissioner or otherwise determined to be due by the commissioner or commission, is not refunded or credited to a taxpayer's account within ninety (90) days after the application or amended return is filed or the date the commission or commissioner determines a refund is due, whichever is later, interest at the rate of one percent (1%) per month shall be allowed on such overpayment computed for the period after expiration of the ninety-day period provided herein to the date of payment.

Miss. Code Ann. § 27-7-315(2)¹

If any overpayment of tax as reflected on a return or amended return filed, and verified by the commissioner or determined to be due by the commissioner or

¹ The case actually involves the application of just Miss. Code Ann. § 27-65-53, 3rd par. which governs interest on overpayments of severance and sales taxes. Section 27-7-315(2) covers interest on overpayments of **income** tax; however, it is almost identical to § 27-65-53, 3rd par. and is also administered by MDOR and thus is potentially impacted by the Court's opinion.

commission when no overpayment is shown on a return or amended return, is not refunded within ninety (90) days after the prescribed due date of the return, the date the return is filed, or the date the commissioner or commission determines a refund as being due when no overpayment is shown on a return or amended return, whichever is later, interest at the rate of one percent (1%) per month shall be allowed on the overpayment computed for the period after expiration of the ninety-day period provided in this subsection to the date of payment.

U.S. Const. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. XIV, Sec. 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall

abridge the privileges or immunities of citizens of the United States; **nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.**

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PRELIMINARY STATEMENT

The United States Constitution prohibits a State from taking private property for public use without just compensation (“Takings Clause”) and from depriving a person of property without due process of law (“Due Process Clause”). The Constitution also prohibits a State from denying any person equal protection of laws (“Equal Protection Clause”). In this case, the Mississippi Supreme Court interpreted and applied a statute enacted by the Mississippi Legislature as giving the Mississippi Department of Revenue (“MDOR”) the arbitrary and unrestricted discretion to determine how much, if any, monetary interest is owed to a taxpayer on a tax overpayment. MDOR utilized the discretion in refusing to pay WCSD over \$800,000.00 of interest on a refund of \$2,345,560.00 of severance taxes that WCSD had previously paid to MDOR in error.

The subject statute as interpreted by the Mississippi Supreme Court would appear to violate the Takings Clause and/or the Due Process Clause of the Fifth and Fourteenth Amendments of the United States Constitution by granting to an administrative agency unfettered discretion to deprive or take monetary

interest on a taxpayer's overpayment of tax without the capability of any real judicial review of the agency's action. The interpretation would also allow for unequal treatment of similarly situated taxpayers in violation of the Fourteenth Amendment's Equal Protection Clause.

The Court's interpretation of the subject statute is particularly troublesome in that it ignores and directly conflicts with decisions of the United States Supreme Court expressly holding that monetary interest is "private property" protected by the Fifth Amendment. The Mississippi Supreme Court's interpretation of the State statute governing interest on tax overpayments is unprecedented and conflicts with every authority from other legislative bodies (including Congress) and other courts that have addressed interest on tax overpayments. The Court's interpretation of the statute also conflicts with a long standing rule of statutory construction followed by this Court and lower courts that federal constitutional issues should be avoided if reasonably possible when a court interprets a statute.

The Mississippi Supreme Court's decision, if allowed to stand, detrimentally affects all taxpayers in Mississippi (and perhaps other jurisdictions) by vesting in a State tax administrative agency the absolute power to make arbitrary and unrestricted decisions concerning how much interest, if any, is owed to a taxpayer on a tax overpayment.



STATEMENT OF THE CASE

(1) Administrative Claims for Refund of Severance Tax: On October 7, 2008, WCSD applied to MDOR for a refund of an overpayment of severance taxes for the periods October 2006-June 2008. WCSD's application for refund was filed pursuant to Miss. Code Ann. § 27-65-42 (1972) which provided at that time as follows:

A taxpayer may apply to the Commissioner for revision of the tax assessed against him, or paid by him, at any time within thirty-six (36) months from the date of the assessment or from the date the return was filed.

MDOR formally denied WCSD's refund application promptly after it was filed, and continued to deny the claim through most of 2013. WCSD supplemented the initial refund claim to include severance taxes paid for periods after the periods covered by the initial application. The supplemental applications were filed on June 7, 2011, for the periods July 2008-March 2010, and on April 10, 2013, for the periods April 2011-April 2013. MDOR also denied the later applications.

MDOR did not agree to pay refunds to WCSD until 2013, and then only after the Mississippi Supreme Court issued its opinion and subsequent mandate in *Jones County Sch. Dist. v. Miss. Dep't of Revenue*, 111 So.3d 588 (Miss. 2013). The Supreme Court's opinion in the *Jones County School District* case was issued on March 7, 2013. The Court in that opinion affirmatively

rejected MDOR's legal positions for denying the application for refund of severance taxes that had been filed by Jones County School District in 2006. The Supreme Court determined that a school district that had paid severance taxes on mineral interest owned by the district had done so in error and was entitled to a refund.²

Although WCSD was not a party in the Jones County School District case, WCSD's application for refund filed with MDOR in 2008 was essentially identical to Jones County School District's application for refund filed two years earlier. WCSD relied on the same grounds for its refund application as Jones County School District did, and MDOR administratively denied WCSD's refund application on the same legal positions asserted in its response to Jones County School District's application, which positions were ultimately rejected by the Mississippi Supreme Court in the Jones County School District opinion.

WCSD's refund applications were pending in the administrative process with MDOR while MDOR's denial of Jones County School District's refund claim was before the Jones County Chancery Court and then on appeal by MDOR to the Mississippi Supreme Court after the Chancery Court had ruled that MDOR's denial of the refund claim was erroneous. As stated, MDOR did not grant WCSD's refund application until 2013,

² A copy of the Jones County School District opinion is included at Appendix G for background on the severance tax law in Mississippi and the basis for the Court's holding that school districts are not subject to the tax.

five years after WCSD's initial claim for refund was filed, and then only after the Supreme Court issued its opinion and mandate in the *Jones County School District* case. After the issuance of the Supreme Court's mandate, MDOR relented and made refund payments to WCSD in five installments of \$469,112.00 each in January, February, March, April and May of 2014. The total of these payments equaled the verified tax amount of \$2,345,560 for the periods October 2006-April 2013 that WCSD had previously paid to MDOR in error.

(2) Claim for Interest: MDOR initially refused to pay any interest on WCSD's overpayment of tax that MDOR refunded. After WCSD pursued the issue of interest with MDOR in early 2014, MDOR paid just \$26,927.02 of interest to WCSD in June of 2014 and took the position at that time that it did not owe any more interest to WCSD on the \$2,345,560 of taxes that WCSD had erroneously paid to MDOR for the periods October 2006-April 2013.

(3) Chancery Court Action on Interest Claim: After MDOR refused to pay interest, WCSD filed a Complaint for Declaratory Judgment on April 9, 2014, requesting that the Wayne County Chancery Court declare that WCSD was entitled to interest on its severance tax overpayments at the rate of one percent (1%) per month beginning ninety (90) days after WCSD filed each subject application for refund to the date of payment of the refund pursuant to Miss. Code Ann. § 27-65-53, 3rd par. (1972). On July 22, 2015, the Chancery Court held a hearing on WCSD's interest claim. During

the hearing, MDOR's counsel asserted for the first time the argument that WCSD was entitled to more interest than just \$26,972.02 but that interest on WCSD's overpayment did not start running until 90 days after the Supreme Court issued its opinion in the Jones County School District case in March of 2013, not years earlier when WCSD filed its claims for refund.³

The Chancellor agreed with MDOR's position asserted at the hearing and so ruled in the Chancery Court's Final Judgment entered on August 4, 2015. The Chancery Court ordered MDOR to pay WCSD interest in the amount of \$182,953.75 for the period beginning 90 days after the opinion in the Jones County School District case was issued on March 7, 2014, with credit for the \$26,927.02 of interest previously paid. MDOR immediately paid WCSD the \$182,953.25 of interest ordered by the Court. WCSD filed a Notice of Appeal to the Mississippi Supreme Court. MDOR did not appeal.

(4) Mississippi Supreme Court Appeal: WCSD's position on appeal was that the Chancery Court's ruling was in error because the language of the subject

³ As stated, MDOR initially denied that any interest was owed on WCSD's overpayment of \$2,345,560; later MDOR paid \$26,927.02 of interest and said that no more interest was owed; and then at the July 22nd hearing for the first time MDOR's counsel asserted that more interest was owed but not beginning until 90 days after the Supreme Court opinion in the Jones County School District case. MDOR has not published any regulations or rules on how it handles overpayment interest, nor did it ever present any internal written guidance on how it actually made the decision on overpayment interest in this case.

statute did not allow for deferring the start date for interest on a tax overpayment to the date that a court determined that indeed there was an overpayment to be refunded after MDOR had denied the taxpayer's claim for refund. WCSD advocated that the statute should be read to start the running of interest on the tax overpayment 90 days after the taxpayer put MDOR on notice that it had overpaid severance tax and that it was due a refund by WCSD filing its application for refund with MDOR. The interpretation of the statute set forth by WCSD was overwhelmingly supported by federal and state authority concerning tax overpayment interest and by various rules of statutory construction. The Chancery Court's ruling that interest on the tax overpayment should not start until a **court** determines whether the taxpayer had indeed made an overpayment after MDOR denied the refund claim, was not supported by the plain language of the statute.

In affirming the Chancery Court judgment, the Supreme Court did not rule that the statute actually said that interest should be deferred until a final court decision on MDOR's denial of the refund claim as held by the Chancery Court; instead, the Supreme Court held that the plain and unambiguous language of the statute gives MDOR discretion without any restrictions to determine when interest on a tax overpayment starts:

This statute neither contains language restricting the nature of the Commissioner's determination regarding the

refund nor does it exclude any determinations based on court rulings. To inject such restrictions would require a departure from the plain-language approach required when a statute, such as this one, is unambiguous.

Since the plain language of the statute requires MDOR to pay interest only if it fails to issue a complete refund within ninety days after the later of either (1) the date the application is submitted, or (2) **the date the Commissioner determines a refund is due**, MDOR owes interest in this matter beginning ninety days after this Court issued the *Jones County School District* opinion. Because the chancellor's ruling was proper based on the plain language of Section 27-65-53, it is not necessary to address WCSD's remaining issues raised regarding calculation of interest or additional interest.

¹ We recognize that the date this Court rules and the date the Commission acts may not always coincide. Based upon the facts presented in today's case, the two dates were the same. [Footnote from the decision.]

Wayne Cnty. Sch. Dist. v. Morgan, 224 So.3d at 539 (Miss. 2013) (emphasis added).

In other words, MDOR could have decided that the appropriate date for starting interest was the date of the *Jones County School District* opinion or MDOR could have decided that some other date for starting

interest was appropriate, in MDOR's "unrestricted" discretion.

In response to the Court's decision and opinion, WCSD filed a Motion for Rehearing (Appendix F). WCSD contended with its Motion that the Supreme Court's interpretation of the statute (not the Chancery Court's judgment) would render the statute unconstitutional insofar as the Supreme Court's interpretation of the statute vested in the State's tax administrative agency the arbitrary and unrestricted discretion to determine how much, if any, interest was owed on a tax overpayment. The Court *en banc* denied the Motion for Rehearing on August 17, 2017, with one Justice voting to grant the Motion. Petitioner now seeks a writ of certiorari from this Court on the constitutional issues presented by the Mississippi Supreme Court's opinion.



REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT REVIEW OF THE MISSISSIPPI SUPREME COURT OPINION TO DETERMINE WHETHER THE SUBJECT STATUTE AS INTERPRETED AND APPLIED BY THE STATE SUPREME COURT VIOLATES THE TAKINGS CLAUSE AND/OR DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT AND FOURTEENTH AMENDMENT AND/OR ALLOWS FOR UNEQUAL TREATMENT OF SIMILARLY SITUATED TAXPAYERS IN VIOLATION OF THE FOURTEENTH AMENDMENT'S EQUAL PROTECTION CLAUSE.

A. State Supreme Court's Interpretation of Statute Allows a Taking of Private Property Without Compensation.

This Court has held that monetary interest is “private property” for purposes of the Fifth Amendment’s Takings Clause made applicable to the States by the Fourteenth Amendment. *Phillip v. Wash. Legal Fund*, 524 U.S. 156 (1998); *Webb’s Fabulous Pharm. v. Beckwith*, 449 U.S. 155 (1980); *Seaboard A.L.R. Co. v. United States*, 261 U.S. 299 (1923). *See also Gen. Mills, Inc. v. Minn.*, 226 N.W. 2d 296 (Minn. 1975) (analysis of economic and fairness principles that undergird the requirement that interest should be paid on a tax overpayment). While this Court has not previously addressed whether denial of interest on a tax overpayment can constitute a “taking” of “private property” proscribed by the Fifth Amendment, this would appear to be a logical extension of this Court’s holdings in the

above cases that should be addressed by the Court in the present case.

B. State Supreme Court's Interpretation of Statute Allows a Deprivation of Property Without Due Process.

Even if MDOR's action under the subject statute does not constitute a prohibited "taking," it most certainly is a "deprivation" of property without adequate due process. The Mississippi Supreme Court opinion gives the State tax administrative agency arbitrary and unrestricted discretion to determine how much, if any, interest is owed to a taxpayer on a tax overpayment. The statute nor the opinion provides any standards or rules governing MDOR's determination. MDOR has not issued any regulations or rules setting out how it goes about exercising this discretion. MDOR's determination with respect to overpayment interest would not be capable of any real judicial review since there would be no criteria or standard for the court to follow in judging MDOR's actions.

In this case, MDOR exercised its "discretion" to deprive or take over \$800,000.00 of interest that would otherwise be owed to WCSD.⁴ If allowed to stand, this would clearly be in violation of the Due Process Clause proscription against a State depriving any person of property without due process of law. *See Sweezy v. New Hampshire*, 354 U.S. 234 (1957) (State legislature's

⁴ WCSD provided certified calculations of interest from a Certified Public Accountant that are in the appeal record.

delegation of power in statute was so broad and uncertain that it was impossible to determine whether the rules and regulations were followed which “cause[d] a deprivation of constitutional rights . . . and a denial of due process of law.”); *see also Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602 (1993) (Supreme Court found the subject statute “incoherent” with respect to the degree of certainty required to overturn administrator’s determination, and concerning how much deference should be given to the administrator in light of assumed bias, all of which raised “a substantial due process question.” To avoid the constitutional issues, the Supreme Court chose an alternative reasonable construction of the statutes.); *Spencer Enters. v. United States*, 345 F.3d 683 (9th Cir. 2003) (only in “rare instances” limited to decisions **not** to take action, as opposed to taking some kind of action, is an agency granted “unfettered discretion” to make a decision); *Cantanzoro v. Weiden*, 140 F.3d 91 (2d Cir. 1998) (“[A]n arbitrary decision depriving the residents of their homes . . . would be constitutionally oppressive, sufficient to violate the plaintiff’s substantive due process rights.”).⁵

⁵ Although unusual, courts have held that the “combination of investigative and adjudication functions” in an administrative agency like MDOR may by itself “constitute a due process violation [when] the risk of unfairness is intolerably high.” *See Withrow v. Larkin*, 421 U.S. 35, 56 (1974). The MDOR attorney that represented MDOR at the above-referenced July 22nd hearing was the same attorney that litigated the Jones County School District case for MDOR. As previously pointed out, MDOR’s position on overpayment interest owed to WCSD changed multiple times during the course of the underlying proceedings. It is clear

C. State’s Extraction of Tax is a Deprivation of Property Requiring a Meaningful Opportunity to Obtain a Refund of an Erroneously Paid Tax with Interest.

The United States Supreme Court in *McKesson Corp. v. Div. of Alcoholic Bevs. & Tobacco*, 496 U.S. 18 (1989), ruled that action by a State tax authority that deprives a taxpayer of a “meaningful opportunity” to obtain a tax refund would be a violation of the Due Process Clause:

“[I]f a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax’s legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide *meaningful backward-looking relief* to rectify any unconstitutional deprivation.”

...

“To say that [the state] could collect . . . unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property of these [taxpayers] arbitrarily and without due process of law . . . in

from the record that the attorney that litigated the Jones County School District case and this case was involved in coming up with the multiple positions on interest. MDOR does not even have regulations or any written guidelines on how MDOR makes decisions on overpayment interest. This smacks of an administrative agency acting as both the “prosecutor” and “judge,” which certainly raises the “risk of unfairness.” *Id.*

contravention of the Fourteenth Amendment.”

...

These cases demonstrate the traditional legal analysis appropriate for determining [the state’s] constitutional duty to provide relief to petitioner . . . for its payment of an unlawful tax. ***Because an extraction of a tax constitutes a deprivation of property, the State must provide procedural safeguards against unlawful extractions in order to satisfy the commands of the Due Process Clause.***

Florida has availed itself of the approach designed so that the taxpayer tenders tax payments before any objection entertained and resolved. No meaningful opportunity to withhold payment and obtain a predeprivation determination of tax assessment’s validity, rather, Florida requires taxpayers to raise objections to the tax in a postdeprivation refund action. ***“To satisfy the requirements of the Due Process Clause, therefore, in th[e] refund action the State must provide taxpayers with, not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a clear and certain remedy,”*** [citation omitted] ***for any erroneous or unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one.***

Id. at pp. 31, 32 & 35.

Although this Court has not previously addressed whether interest must be paid on a tax refund to ensure that the refund procedure is “meaningful” so as to pass constitutional muster, Judge Learned Hand in an earlier opinion while a federal district court judge expressed the opinion that interest on a tax refund is essential for the tax refund remedy to be complete:

[I]t seems to me plain that it is not an adequate remedy, after taking away a man’s money as a condition of allowing him to contest his tax, merely to hand it back, when, no matter how long after, he establishes that he ought never to have been required to pay at all. Whatever may have been our archaic notions about interest, in modern financial communities a dollar to-day is worth more than a dollar next year, and to ignore the interval as immaterial is to contradict well-settled beliefs about value. **The present use of my money is itself a thing of value, and, if I get no compensation for its loss, my remedy does not altogether right my wrong.**

Procter & Gamble Dist. Co. v. Sherman, 2 F.2d 165, 166 (S.D.N.Y. 1924) (emphasis added).

D. State Supreme Court’s Interpretation of Statute Allows Unequal Treatment of Similarly Situated Taxpayers.

Given the unrestricted nature of MDOR’s discretion under the Mississippi Supreme Court’s interpretation of the statute, MDOR’s decisions on overpayment

interest are likely to vary among similarly situated taxpayers. This would present a violation of the Equal Protection Clause. *See Allegheny Pittsburgh Coal Co. v. County Com.*, 488 U.S. 336 (1989).

E. Mississippi Supreme Court's Opinion is Contrary to All Authority on Overpayment Interest.

Various State courts have addressed the imposition of interest on tax overpayments where there was no statute requiring the payment of overpayment interest by the taxing authority. Those courts have imposed interest on tax overpayments (even without a statute) after giving consideration to concepts concerning compensating a taxpayer for the time value and use of money and principles of fairness. These concepts and principals are clearly present with the interest provisions found in the Internal Revenue Code. Congress has provided symmetry between the imposition of interest owed to the government on an underpayment of tax and interest owed to the taxpayer on an overpayment of tax. The Internal Revenue Code as a general rule imposes interest on an overpayment of tax for the **entire period** that the government had the taxpayer's money, just like underpayment interest is imposed against the taxpayer for the **entire period** the taxpayer had the government's money. I.R.C. § 6601(a); I.R.C. § 6611(a)-(b).⁶

⁶ "The underlying objective is to determine in a given situation whose money it is and for how long the other party had the use of it." Rev. Proc. 60-17, 1960-2 C.B. 942. In limited situations,

The courts and State legislatures have generally departed from Congress' approach to overpayment interest by deferring the starting date for interest to the date that the taxpayer put the taxing authority on notice that a refund may be due by filing a claim for

however, Congress has reduced the time period for interest on overpayments, but only up to 45 days. I.R.C. § 6611(e)(2) & (3). If the taxpayer files a claim for refund of a tax overpayment after the taxpayer has filed its original return, and the IRS pays the refund within 45 days after the claim is filed, no interest is allowed on the overpayment "from the date the claim is filed until the day the refund is made." I.R.C. § 6611(e)(2). The interest period is reduced for no more than 45 days; the government still owes interest for the entire period that it had the taxpayer's money less a period of time of no more than 45 days. This provision is clearly intended to give the IRS a reasonable amount of time to pay the refund without **additional** interest once the IRS has notice that the taxpayer may be due a refund. Similarly, if an adjustment initiated by the Internal Revenue Service results in a refund of an overpayment (in contrast to the taxpayer initiating the adjustment by filing a claim for refund), interest on the resulting overpayment is computed by subtracting 45 days from the number of days interest would otherwise be allowed with respect to such overpayment. I.R.C. § 6611(e)(3). In other words, the IRS gets a 45-day interest free period to pay a refund if it initiated the refund, just like it does when the taxpayer puts the IRS on notice that a refund may be due; but in both cases there would still be interest for the rest of the period that the government had the taxpayer's money. **Significantly, there is nothing in the Internal Revenue Code that defers the time period for starting interest on an overpayment to the date a court determines that the refund is owed should the IRS decide to deny a taxpayer's refund claim, thereby forcing the taxpayer to challenge the denial in court. In that situation, the federal government still owes interest on the overpayment for the *entire period* the government had the taxpayer's money if the taxpayer is successful in its court challenge of the IRS's denial of the refund claim.**

refund, as opposed to starting interest from the earlier date that the taxpayer actually paid the tax as under the Internal Revenue Code for federal taxes.

A good example of the typical approach to overpayment interest is a 1975 Minnesota Supreme Court opinion. *Gen. Mills, Inc. v. Minn.*, 226 N.W.2d 296 (Minn. 1975). The Minnesota Court addressed the question of whether interest should be paid on a refund of personal property taxes even though a state statute imposing overpayment interest did not exist. The court noted that “fairness and equity” require the imposition of interest on tax overpayments if the state requires interest on tax underpayments:

If a taxpayer has not paid his disputed personal property tax, any judgment against him “shall include any penalties or interest which have then accrued thereon for failure to pay the same tax.”⁷ If, on the other hand, the petitioning taxpayer has paid his tax and has sued for a refund, the statute is silent as to the question of interest. If an assessment or levy is adjudged to have been illegal, and a refund is thereby made, we believe that interests of fairness and equity require that the petitioners receive interest on that refund.

We do not perceive the silence of the legislature on the question of interest to be a deliberate legislative choice, for there appears

⁷ Miss. Code Ann. § 27-65-39 (1972) during the relevant period imposed interest on severance tax underpayments at 1% per month for the entire period of time the tax was owed.

no reason for granting interest with respect to some tax refunds but not to others.

Id. at 298 (internal citations omitted). The Minnesota Supreme Court then quoted the above-referenced federal district court opinion written by Judge Learned Hand as follows:

[I]t seems to me plain that it is not an adequate remedy, after taking away a man's money as a condition of allowing him to contest his tax, merely to hand it back, when, no matter how long after, he establishes that he ought never to have been required to pay at all. Whatever may have been our archaic notions about interest, in modern financial communities a dollar to-day is worth more than a dollar next year, and to ignore the interval as immaterial is to contradict well-settled beliefs about value. The present use of my money is itself a thing of value, and, if I get no compensation for its loss, my remedy does not altogether right my wrong.

Id. (quoting *Procter & Gamble Dist. Co. v. Sherman*, 2 F.2d 165, 166 (S.D.N.Y. 1924)).

The Minnesota Supreme Court had no problem following Judge Learned Hand's lead in concluding that interest was owed on a tax overpayment even without a statute:

We also recognize that the granting of interest would comport with modern financial practice. Governmental units are extremely aware of the necessity of promptly investing

public funds. The payment of a tax obligation therefore generates interest which may properly serve as a source of funds for the payment of interest on its refund.

Id.

Having determined that the taxing authority should pay interest on a tax overpayment, the Minnesota court next addressed the period during which interest would accrue:

As between ordinary persons, interest on money runs from the time the money becomes due and payable until the payment is made. Where money has been paid and received under a mistake of fact, and no fraud or misconduct can be imputed to the party receiving it, money does not become due and payable, and is not considered in default, until a demand for payment has been made.

Accordingly, we hold that interest should not begin to accrue on a tax refund until the protesting taxpayer has made a demand on the taxing unit of government. Within the statutory scheme provided for refunds, then, interest should not start to accumulate until the protesting taxpayer has filed a petition for a personal property tax refund. A petitioning taxpayer may minimize his loss of interest by filing his petition promptly, and the county will therefore not be charged with any delays thus created by the taxpayer.

We hold, therefore, that interest must be paid on a refund of personal property taxes illegally collected, at the statutory rate of 6 percent from the date a petition for refund is filed until the date of actual refund.

Id. at 299-300 (internal citations omitted) (emphasis added); *see also* *Fulton Cty. v. T-Mobile, South, LLC*, 699 S.E.2d 466 (Pa. 1972); *Sagar Trust v. Dep't of Treas.*, 514 N.W.2d 514 (Mich. 1994); and *Hedberg & Sons Co. v. Cty. of Hennepin*, 232 N.W.2d 743 (Minn. 1975).

Another State Supreme Court addressed the start date for overpayment interest without a statute where the taxing authority denied the claim for refund and the taxpayer challenged the denial in court. *See Cities Serv. Oil Co. v. Pittsburgh*, 297 A.2d 466 (Pa. 1972). The Supreme Court of Pennsylvania held that overpayment of interest started when the taxpayer made the demand for refund, not years later when a court held that the retention by the taxing authority was improper and that the refund should be paid. *Id.*

There has never been a court case that gave the State tax authority the unrestricted discretion to determine how much, if any, overpayment interest is owed to a taxpayer. Further, WCSD counsel has reviewed all of the State statutes that address interest on refunds of tax overpayments. (See Appendix E with list of state statutes that are in line with the state court cases above and the interpretation of § 27-65-53, 3rd par. advocated by WCSD.) Not a single statute from all of the other 49 states follows the approach of

the Mississippi Supreme Court when it interpreted Mississippi's statute governing interest on overpayments of tax to give MDOR unrestricted discretion to make determinations as to overpayment interest. No legislative body or court (other than the Mississippi Supreme Court) has ever ruled that a State tax administrative agency has unfettered discretion to determine how much, if any, interest is owed to a taxpayer on a tax overpayment. It should not be assumed that the Mississippi Legislature chose to stand alone and enact a statute on overpayment interest that is not like any other State statute governing overpayment interest, or any court case addressing overpayment interest, particularly not in a way that brings the constitutionality of the Legislature's statute in question.

F. Mississippi Supreme Court's Opinion is Contrary to Cardinal Rule of Statutory Construction.

Finally, the United States Supreme Court has followed a cardinal rule of construction when interpreting statutes:

The only way out of the muddle is by a different rule of construction. It is a hoary one that, in a case of statutory ambiguity, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." [Citations omitted.] "Federal statutes are to

be so construed as to avoid serious doubt of their constitutionality. ‘When the validity of an act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.’ [Citations omitted.] *Cf. Parsons v. Bedford*, 28 U.S. 433, 448-449, 7 L.Ed. 732 (1830) (Story, J.) (a construction that would render a statute unconstitutional should be avoided); *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118, 2 L.Ed. 208 (1804) (Marshall, C.J.).

Concrete Pipe & Prods. v. Constr. Laborers Pension Trust, 508 U.S. 602 (1993). *See also* 73 Am.Jur. 2d Statutes § 163 (“[A] court presumes that the legislature intends reasonable, just and constitutional results from the statutes it enacts.”)

With all due respect, the Mississippi Supreme Court’s opinion seems to violate this significant rule.



CONCLUSION

For all these reasons, the United States Supreme Court should grant the petition for certiorari and reverse the decision and opinion of the Mississippi Supreme Court.

Respectfully submitted,

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