

By: Representative Eads

To: Ways and Means

HOUSE BILL NO. 278

1 AN ACT TO AMEND SECTION 27-7-23, MISSISSIPPI CODE OF 1972, TO
2 REVISE THE METHOD OF DETERMINING NET BUSINESS INCOME OF FOREIGN
3 MANUFACTURERS WHO SELL PRINCIPALLY AT WHOLESALE PRICES; AND FOR
4 RELATED PURPOSES.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

6 **SECTION 1.** Section 27-7-23, Mississippi Code of 1972, is
7 amended as follows:

8 27-7-23. (a) **Definitions.**

9 (1) "Doing business" means the operation of any
10 business enterprise or activity in Mississippi for financial
11 profit or economic gain, including, but not limited to, the
12 following:

13 (A) The regular maintenance of an office or other
14 place of business in Mississippi; or

15 (B) The regular maintenance in Mississippi of an
16 inventory of merchandise or material for sale, distribution or
17 manufacture, regardless of whether kept on the premises of the
18 taxpayer or otherwise; or

19 (C) The selling or distributing of merchandise to
20 customers in Mississippi directly from a company-owned or operated
21 vehicle when title to the merchandise is transferred from the
22 seller or distributor to the customer at the time of the sale or
23 distribution (transient selling); or

24 (D) The regular rendering of service to clients or
25 customers in Mississippi in person or by agents or employees; or

26 (E) The owning, renting or operating of business
27 or income-producing property, real or personal, in Mississippi; or



28 (F) The performing of contracts, prime or sublet
29 work, for the construction, repair or renovation of real or
30 personal property.

31 (2) "Business income" means income of any type or
32 class, and from any activity that meets the relationship described
33 in the transactional test or the functional test described in this
34 paragraph (2). The classification of income by occasionally used
35 labels, including, but not limited to, manufacturing income,
36 compensation for services, sales income interest, dividends,
37 rents, royalties, gains, operating income, and nonoperating income
38 shall not be considered when determining whether income is
39 business or nonbusiness income. All income of the taxpayer is
40 business income unless clearly classifiable as nonbusiness income.
41 A taxpayer seeking to overcome a classification of income as
42 business income must establish by a preponderance of the evidence
43 that the income has been incorrectly classified.

44 (A) Transactional test. Business income includes
45 income arising from transactions and activity in the regular
46 course of the taxpayer's trade or business.

47 (i) If the transaction or activity is in the
48 regular course of the taxpayer's trade or business, part of which
49 trade or business is conducted within Mississippi, the resulting
50 income of the transaction or activity is business income for
51 Mississippi. Income may be business income even though the actual
52 transaction or activity that gives rise to the income does not
53 occur in Mississippi.

54 (ii) For a transaction or activity to be in
55 the regular course of the taxpayer's trade or business, the
56 transactions or activity need not be one that frequently occurs in
57 the trade or business, although most frequently occurring
58 transactions or activities shall be considered to be in the
59 regular course of a trade or business. It is sufficient to
60 classify a transaction or activity as being in the regular course



61 of a trade or business if it is reasonable to conclude
62 transactions of that type are customary in the kind of trade or
63 business being conducted or are within the scope of what the trade
64 or business does.

65 (B) Functional test. Business income includes
66 income from tangible and intangible property if the acquisition,
67 management and/or disposition of the property constitute integral
68 parts of the taxpayer's regular trade or business operation.

69 (i) Under the functional test, business
70 income need not be derived from transactions or activities that
71 are in the regular course of the taxpayer's own particular trade
72 or business. It shall be sufficient if the property from which
73 the income is derived is or was an integral, functional, necessary
74 or operative component of the taxpayer's trade or business
75 operations, part of which trade or business is or was conducted
76 within this state.

77 (ii) Income that is derived from isolated
78 sales, leases, assignments, licenses and other infrequently
79 occurring dispositions, transfers or transactions involving
80 property, including transactions made in liquidation or the
81 winding up of business is business income if the property is or
82 was used in the taxpayer's trade or business operation. Income
83 from the licensing of intangible assets, such as patents,
84 copyrights, trademarks, service marks, goodwill, know-how, trade
85 secrets and similar assets, that were developed or acquired for
86 use by the taxpayer in his trade or business operations,
87 constitute business income whether the licensing itself
88 constituted the operation of a trade or business and whether the
89 taxpayer remains in the same trade or business from or for which
90 the intangible asset was developed or acquired.

91 (iii) Under the functional test, income from
92 intangible property is business income when the intangible
93 property serves an operating function, as opposed to solely an



94 investment function. The relevant inquiry shall focus on whether
95 the property is or was held in furtherance of the taxpayer's trade
96 or business, that is, on the objective characteristics of the
97 intangible property's use or acquisition and its relation to the
98 taxpayer and the taxpayer's activities. The functional test is
99 not satisfied where the holding of the property is limited solely
100 to an investment function as in the case where the holding of the
101 property is limited to mere financial betterment of the taxpayer
102 in general.

103 (iv) If the property is or was held in
104 furtherance of the taxpayer's trade or business beyond mere
105 financial betterment, then income from the property may be
106 business income even though the actual transaction or activity
107 involving the property that gives rise to the income does not
108 occur in Mississippi.

109 (v) If, with respect to an item of property,
110 a taxpayer takes a deduction from business income that is
111 apportioned to Mississippi, or includes that item of property in
112 the property factor, it is presumed that the item of property is
113 or was integral to the taxpayer's trade or business operations.
114 No presumption arises from the absence of any of this action.

115 (vi) Application of the functional test is
116 generally unaffected by the form of the property. Income arising
117 from intangible property is business income when the intangible
118 property itself or the underlying value of the intangible property
119 is or was an integral, functional, necessary or operative
120 component to the taxpayer's trade or business operation.
121 Therefore, while treatment of income derived from transactions
122 involving intangible property as business income may be supported
123 by a finding that the issuer of the intangible property and the
124 taxpayer are engaged in the same trade or business, establishment
125 of such a relationship is not the exclusive basis for concluding
126 that the income constitutes business income. It is sufficient to



127 support a finding of business income if the holding of the
128 intangible property served an operational rather than an
129 investment function.

130 (3) "Nonbusiness income" means all income that does not
131 meet the definition of business income.

132 (4) "Commercial domicile" means the principal place
133 from which the trade or business of the taxpayer is directed or
134 managed.

135 (5) "State" means any state of the United States, the
136 District of Columbia, the Commonwealth of Puerto Rico, any
137 territory or possession of the United States, and any foreign
138 country or political subdivision thereof.

139 (b) **Nonresident individuals, partnerships, trusts and**
140 **estates.**

141 (1) The tax imposed by this article shall apply to the
142 entire net income of a taxable nonresident derived from
143 employment, trade, business, professional, personal service or
144 other activity for financial gain or profit, performed or carried
145 on within Mississippi, including the rental of real or personal
146 property located within this state or for use herein and including
147 the sale or exchange or other disposition of tangible or
148 intangible property having a situs in Mississippi.

149 (2) Income derived from trade, business or other
150 commercial activity shall be taxed to the extent that it is
151 derived from such activity within this state. Mississippi net
152 income shall be determined in the manner prescribed by the
153 commissioner for the allocation and/or apportionment of income of
154 foreign corporations having income from sources both within and
155 without the state.

156 (3) A taxable nonresident shall be allowed to deduct
157 expenses, interest, taxes, losses, bad debts, depreciation and
158 similar business expenses only to the extent that they are
159 allowable under this article and are attributable to the



160 production of income allocable to and taxable by the State of
161 Mississippi. As to allowable deductions essentially personal in
162 nature, such as contributions to charitable organizations, medical
163 expenses, taxes, interest and the optional standard deduction,
164 such taxable nonresident shall be allowed deductions therefor in
165 the ratio that the net income from sources within Mississippi
166 bears to the total net income from all sources of such taxable
167 nonresident, computed as if such taxable nonresident were a
168 resident of Mississippi.

169 (c) **Foreign corporations, associations, organizations and**
170 **other entities.**

171 (1) Corporations and organizations required to file.
172 All foreign corporations and other organizations which have
173 obtained a certificate of authority from the Secretary of State to
174 do business in Mississippi, or corporations or organizations which
175 are in fact doing business in Mississippi, are subject to the
176 income tax levy and are required to file annual income tax returns
177 unless the corporation or organization is specifically exempt from
178 tax by this article.

179 (2) Allocation and apportionment of income. Except as
180 provided in Sections 27-7-24, 27-7-24.1, 27-7-24.3, 27-7-24.5 and
181 27-7-24.7, Mississippi Code of 1972, any corporation or
182 organization having business income from business activity which
183 is taxable both within and without this state shall allocate and
184 apportion its net business income as prescribed by the
185 commissioner. If the business income of the corporation is
186 derived solely from property owned or business done in this state
187 and the corporation is not taxable in another state, the entire
188 business income shall be allocated to this state. A corporation
189 is taxable in another state if, in that state the corporation is
190 subject to a net income tax, or a franchise tax measured by net
191 income, or if that state has jurisdiction to subject the



192 corporation to a net income tax regardless of whether the state
193 does or does not subject the corporation to a net income tax.
194 For tax years ending on or after December 31, 2002, any formula of
195 apportionment prescribed by the commissioner regarding the net
196 business income of manufacturers selling principally at wholesale
197 shall provide that all net business income of such manufacturers
198 shall be apportioned to this state by multiplying the income by a
199 fraction, the numerator of which shall be the property factor plus
200 the payroll factor plus twice the sales factor and the denominator
201 of which shall be four (4).

202 (3) Nonbusiness income. Rents and royalties from real
203 or tangible personal property, capital gains, interest, dividends,
204 or patent or copyright royalties, to the extent that they
205 constitute nonbusiness income, shall be allocated as follows:

206 (A) Net rents and royalties from real property are
207 allocable to the state in which the property is located.

208 (B) Net rents and royalties from tangible personal
209 property are allocable to the state in which the property is used,
210 or to this state in their entirety if the corporation's commercial
211 domicile is in this state and the corporation is not organized
212 under the laws of or taxable in the state in which the property is
213 utilized.

214 (C) Capital gains and losses from sales of real
215 property are allocable to the state in which the property is
216 located.

217 (D) Capital gains and losses from sales of
218 tangible personal property are allocable to the state in which the
219 property is located, or to this state if the corporation's
220 commercial domicile is in this state and the corporation is not
221 taxable in the state in which the property had a situs.

222 (E) Capital gains and losses from sales of
223 intangible personal property are allocable to the state of the
224 corporation's commercial domicile.



225 (F) Interest and dividends are allocable to the
226 state of the corporation's commercial domicile.

227 (G) Patent and copyright royalties are allocable
228 to the state in which the patent or copyright is utilized by the
229 payer, or to this state if and to the extent that the patent or
230 copyright is utilized by the payer in a state in which the
231 corporation is not taxable and the corporation's commercial
232 domicile is in this state.

233 (H) Any other nonbusiness income shall be
234 allocated as prescribed by the commissioner.

235 (I) All expenses connected with earning
236 nonbusiness income, such as interest, taxes, general and
237 administrative expenses and such other expenses relating to the
238 production of nonbusiness income, shall be deducted from gross
239 nonbusiness income. Nonbusiness interest expense shall be
240 computed by using the ratio of nonbusiness assets to total assets
241 applied to total interest expense.

242 (d) **Foreign lenders.**

243 (1) In the case of any foreign lender, (corporation,
244 association, organization, individual, partnership, trusts or
245 estates), other than: (A) a foreign insurance company subject to
246 certification by the Commissioner of Insurance, as provided by
247 Section 83-21-1 et seq.; or (B) a foreign lender qualified under
248 the general laws of this state to do business herein; or (C) a
249 foreign lender which maintains an office or place of business
250 within this state; or (D) lenders that sold properties in this
251 state and financed such sale and reported on the installment
252 method, interest income received or accrued on or after January 1,
253 1977, from loans secured by real estate or from lending on the
254 security of real estate located within this state shall be
255 excluded from Mississippi gross income and exempt from the
256 Mississippi income tax levy and the reporting requirements.



257 (2) In the case of any foreign lender exempted in
258 paragraph (1) of this subsection, interest income received on any
259 loan finalized or consummated after January 1, 1977, shall be
260 excluded from Mississippi gross income and the net profits derived
261 therefrom shall be exempt from the Mississippi income tax levy for
262 the life of such loan.

263 (e) **Insurance companies.** Insurance companies, other than
264 life insurance companies, deriving premium income from within and
265 without the state, may determine their Mississippi net income from
266 underwriting by apportioning to this state a part of their total
267 net underwriting income by such processes or formulas of general
268 apportionment as are prescribed by the commissioner; provided that
269 a company adopting this method of reporting for any year must
270 adhere to said method of reporting for subsequent years, unless
271 permission is granted by the commissioner to change to a different
272 method of reporting; and provided that all affiliated companies of
273 the same group shall use the same method of reporting.

274 (f) **Bond requirements.** Any individual or corporation
275 subject to the tax imposed by this article, engaged in the
276 business of performing contracts which may require the payment of
277 net income taxes, may be required by the commissioner, before
278 entering into the performance of any contract or contracts the
279 consideration of which is more than Ten Thousand Dollars
280 (\$10,000.00), to execute and file a good and valid bond with a
281 surety company authorized to do business in this state, or with
282 sufficient sureties to be approved by the commissioner,
283 conditioned that all taxes which may accrue to the State of
284 Mississippi will be paid when due. Provided, however, that such
285 bond shall not exceed five percent (5%) of the total contracts
286 entered into during the taxable period, and, provided further,
287 that any taxpayer, in lieu of furnishing such bond, may pay the
288 maximum sum required herein as advance payment of taxes due on the



289 net income realized from any contract or contracts performed or
290 completed in this state.

291 **SECTION 2.** This act shall take effect and be in force from
292 and after July 1, 2002.

