

By: Representative Eads

To: Ways and Means

HOUSE BILL NO. 495

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 was 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. For  
194 tax years ending on or after December 31, 2003, 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 total sales of the  
200 manufacturer in this state during the taxable year and the  
201 denominator of which shall be the total sales of the manufacturer  
202 everywhere during the taxable year.

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

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

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

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

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

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



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

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

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

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

243 (d) **Foreign lenders.**

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



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

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

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



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

292           **SECTION 2.** This act shall take effect and be in force from  
293 and after July 1, 2003.

