

By: Senator(s) Minor

To: Finance

SENATE BILL NO. 2320

1 AN ACT TO AMEND SECTION 27-7-23, MISSISSIPPI CODE OF 1972, TO
2 PROVIDE THAT INCOME RECEIVED OR ACCRUED BY FOREIGN INVESTORS OR
3 FOREIGN LENDERS FROM A TRUST OWNING PROPERTY OPERATING CERTAIN
4 PROJECTS SHALL BE EXCLUDED FROM MISSISSIPPI GROSS INCOME AND
5 EXEMPT FROM THE MISSISSIPPI INCOME TAX LEVY AND ANY REPORTING
6 REQUIREMENTS; AND FOR RELATED PURPOSES.

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

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

10 27-7-23. (a) **Definitions.**

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

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

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

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

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

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



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

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

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

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

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



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

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

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

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

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



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

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

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

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



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

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

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

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

141 (b) **Nonresident individuals, partnerships, trusts and**
142 **estates.**

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

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

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



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

171 (c) **Foreign corporations, associations, organizations and**
172 **other entities.**

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

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



194 corporation to a net income tax regardless of whether the state
195 does or does not subject the corporation to a net income tax.

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

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

202 (B) Net rents and royalties from tangible personal
203 property are allocable to the state in which the property is used,
204 or to this state in their entirety if the corporation's commercial
205 domicile is in this state and the corporation is not organized
206 under the laws of or taxable in the state in which the property is
207 utilized.

208 (C) Capital gains and losses from sales of real
209 property are allocable to the state in which the property is
210 located.

211 (D) Capital gains and losses from sales of
212 tangible personal property are allocable to the state in which the
213 property is located, or to this state if the corporation's
214 commercial domicile is in this state and the corporation is not
215 taxable in the state in which the property had a situs.

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

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

221 (G) Patent and copyright royalties are allocable
222 to the state in which the patent or copyright is utilized by the
223 payer, or to this state if and to the extent that the patent or
224 copyright is utilized by the payer in a state in which the
225 corporation is not taxable and the corporation's commercial
226 domicile is in this state.



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

229 (I) All expenses connected with earning
230 nonbusiness income, such as interest, taxes, general and
231 administrative expenses and such other expenses relating to the
232 production of nonbusiness income, shall be deducted from gross
233 nonbusiness income. Nonbusiness interest expense shall be
234 computed by using the ratio of nonbusiness assets to total assets
235 applied to total interest expense.

236 (d) **Foreign lenders.**

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

251 (2) In the case of any foreign lender exempted in
252 paragraph (1) of this subsection, interest income received on any
253 loan finalized or consummated after January 1, 1977, shall be
254 excluded from Mississippi gross income and the net profits derived
255 therefrom shall be exempt from the Mississippi income tax levy for
256 the life of such loan.

257 (e) **Insurance companies.** Insurance companies, other than
258 life insurance companies, deriving premium income from within and
259 without the state, may determine their Mississippi net income from



260 underwriting by apportioning to this state a part of their total
261 net underwriting income by such processes or formulas of general
262 apportionment as are prescribed by the commissioner; provided that
263 a company adopting this method of reporting for any year must
264 adhere to said method of reporting for subsequent years, unless
265 permission is granted by the commissioner to change to a different
266 method of reporting; and provided that all affiliated companies of
267 the same group shall use the same method of reporting.

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

285 (g) **Beneficiaries of Major Capital Project Trusts.** In the
286 case of any foreign investor or foreign lender (corporation,
287 association, organization, individual, partnership, limited
288 liability company, trusts or estates) investing in or lending to a
289 trust owning property in the operation of a project as defined in
290 Section 57-75-5(f)(iv)1, income received or accrued from such
291 trust on or after January 1, 2001, shall be excluded from
292 Mississippi gross income and exempt from the Mississippi income



293 tax levy and any reporting requirements. This subsection shall
294 not apply to:

295 (1) A foreign investor or foreign lender qualified
296 under the general laws of this state to do business in this state;
297 or

298 (2) A foreign investor or foreign lender which
299 maintains an office or place of business within this state.

300 **SECTION 2.** This act shall take effect and be in force from
301 and after its passage.

