IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2019-CA-00570-COA

UNITED ROOFING & CONSTRUCTION OF MS, INC. **APPELLANT**

v.

MISSISSIPPI DEPARTMENT OF REVENUE **APPELLEE**

DATE OF JUDGMENT:	03/07/2019
TRIAL JUDGE:	HON. JOHN C. McLAURIN JR.
COURT FROM WHICH APPEALED:	RANKIN COUNTY CHANCERY COURT
ATTORNEY FOR APPELLANT:	JAMES GARY McGEE JR.
ATTORNEY FOR APPELLEE:	MATTHEW TIMMONS HENRY
NATURE OF THE CASE:	CIVIL - STATE BOARDS AND AGENCIES
DISPOSITION:	AFFIRMED - 12/08/2020
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE BARNES, C.J., GREENLEE AND WESTBROOKS, JJ.

BARNES, C.J., FOR THE COURT:

¶1. United Roofing & Construction of MS Inc. (United) appeals the Rankin County Chancery Court's granting of summary judgment in favor of the Mississippi Department of Revenue (MDOR). United sought judicial review of two adverse orders issued by the Mississippi Board of Tax Appeals (Board of Appeals) for sales tax assessments of $188,501 and $157,074. The chancery court found no genuine issue of material fact and rendered judgment as a matter of law. The court determined United's roof services were subject to sales tax under Mississippi Code Annotated section 27-65-17 (Rev. 2017),[1] and therefore

[1] The statutes in this Title were revised several times before 2017, but none of the revisions affect the portions under consideration here; therefore, we will reference the 2017

MDOR's assessments were proper. Finding no error, we affirm.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

¶2. United is a Mississippi corporation located in Brandon, Mississippi. Jon McCoy is the sole shareholder. MDOR conducted two audits of the company from July 2009 through April 2016. During this time, United was in the business of selling and installing roofing materials (shingles), as well as providing other roofing services to both residential and commercial customers throughout Mississippi.

¶3. Prior to the formation of United, McCoy was the president and sole shareholder of United Construction Company (UCC) from January 2004 through May 2007. UCC performed roof installations as well. During this time, UCC was also audited.[2] McCoy was informed of MDOR's position that the sale and installation of roofing materials is a taxable event that is subject to either sales or contractor's tax, depending on whether the job is residential or commercial, respectively.[3]

¶4. In 2013, MDOR first audited United for July 1, 2009, through August 31, 2013, resulting in an assessment of $188,501 in additional sales-tax liability, which included tax, penalties, and interest. MDOR concluded that United's proceeds for the period at issue were subject to sales tax. The audit revealed United was not registered for a sales tax account.

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version for all sections cited.

[2] A lien is currently enrolled against UCC for unpaid sales tax.

[3] A contractor's tax is a tax on commercial contracts over $10,000 for the installation of personal property, such as roofing, tile, siding, fences, or floor coverings, at the rate of 3.5% of the total contract price. Miss. Code Ann. § 27-65-21(1)(a)(i). A contractor's tax is not applicable to residential property. Miss. Code Ann. § 27-65-21(1)(b)(i).

United claimed that "[d]ue to the ambiguity of the controlling statutes and regulations," it did not routinely collect or remit sales taxes. A review of United's invoices showed it only charged customers approximately $8,273 in sales tax during this audit period; even then, United did not remit any of the sales tax it collected. Additionally, United purchased tax-exempt roofing materials by relying on UCC's inactive retail sales-tax permit. Accordingly, United did not pay sales tax to any vendor for the purchase of its roofing materials during the first audit period.

¶5. United appealed the first assessment to the MDOR's Board of Review, an internal-hearing tribunal and the first level of the administrative-appeals process. In January 2016, the Board of Review upheld the assessment, and United appealed to the Board of Appeals. After a hearing, the Board of Appeals upheld the Board of Review's order.

¶6. Also in 2016, MDOR conducted a second audit of United for the period from September 1, 2013, through April 30, 2016. During this audit period, United did not routinely remit sales taxes on its sales and installation of roofing materials on residential and commercial properties. This second audit resulted in an assessment of additional tax liability of $157,074, including tax, penalties, and interest. United again appealed to MDOR's Board of Review, which upheld the assessment. United appealed to the Board of Appeals, and after a hearing, the Board of Appeals upheld the Board of Review's order.

¶7. United appealed both Board of Appeals orders to the Rankin County Chancery Court, and the two matters were consolidated. In November 2018, MDOR filed a motion for summary judgment, requesting the chancery court to affirm the orders of the Board of

Appeals that upheld MDOR's tax assessments. MDOR argued the sale and installation of roofing materials was a taxable activity, and thus United had a duty to collect and remit sales tax. MDOR cited as controlling *Mississippi State Tax Commission v. B. F. Hinton d/b/a Laurel Tile Shop*, 218 So. 2d 740 (Miss. 1969).[4] In *Hinton*, the Mississippi Supreme Court held that the sale of tile purchased from wholesalers to customers is a retail sale of tangible personal property and thus subject to sales tax. *Id.* at 742. Further, MDOR pointed out the applicable regulations and tax codes at that time were materially similar to those governing United's sales. In its reply to MDOR's motion, United argued *Hinton* was not applicable because roofing is not tangible personal property. Instead, United argued *Blount v. ECO Resources*, 986 So. 2d 1052 (Miss. Ct. App. 2008), applies. *Blount* established a test for whether certain property is considered real property for purposes of determining the applicability of a personal property exemption to contractor's tax—"it must be permanently attached to real property" according to the Tax Commission's rules and regulations. *Id.* at 1057 (¶18) (quoting Miss. State Tax Comm'n Reg. IV-10-01-502 (2005), Comm'n Rule 41). Under this test, United claims roofing is real property and is not subject to sales tax.

¶8. After a hearing, the chancery court granted MDOR's motion for summary judgment. The chancery court found that *Hinton* controlled because the facts were substantially similar to this case. Accordingly, the chancery court found that United is in the business of selling and installing tangible personal property, which is taxable under section 27-65-17 and subject to sales tax on the gross proceeds of its sales. The chancery court affirmed the sales

[4] The Mississippi State Tax Commission (Tax Commission) was the predecessor to MDOR.

tax assessment against United for both audit periods for a total of $422,611 through November 30, 2018, in addition to any accruing interest until the taxes were paid.

STANDARD OF REVIEW

¶9. In reviewing a trial court's grant or denial of summary judgment, the appellate court applies a de novo standard. *Castigliola v. Miss. Dep't of Rev.*, 162 So. 3d 795, 801 (¶23) (Miss. 2015). "Summary judgment is proper 'if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Id.* (quoting M.R.C.P. 56(c)).

ANALYSIS

¶10. United argues the chancery court erred in determining its roofing services are subject to Mississippi sales tax under section 27-65-17. Section 27-65-17(1)(a) provides:

> Except as otherwise provided in this section, upon every person engaging or continuing within this state in the business of selling any tangible personal property[5] whatsoever there is hereby levied, assessed and shall be collected a tax equal to seven percent (7%) of the gross proceeds[6] of the retail sales of the business.

On appeal, United raises three issues: (1) whether there are genuine issues of material fact; (2) whether *Blount* is applicable; and (3) whether MDOR overcame its burden of persuasion

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[5] "Tangible personal property" is defined as "personal property perceptible to the human senses or by chemical analysis as opposed to real property or intangibles and shall include property sold on an installed basis which may become a part of real or personal property." Miss. Code Ann. § 27-65-3(j).

[6] "Gross proceeds of sales" is defined as the "value proceeding or accruing from the full sale price of tangible personal property, including installation charges . . . ." Miss. Code Ann. § 27-65-3(h).

for summary judgment. United also discusses alleged ambiguities in the tax statutes that support its position. We shall discuss each issue in turn.

I. Genuine Issues of Material Fact

¶11. The chancery court found no genuine issues of material fact "as each legal issue is supported by controlling statutes, regulations, case law, and United's written admissions . . . ." In sum, the court ruled that the question before the court was a matter of law, not fact. We agree. "If the moving party is . . . entitled to judgment as a matter of law, summary judgment should be entered in the moving party's favor." *Clarksdale Mun. Sch. Dist. v. State*, 233 So. 3d 299, 303 (¶11) (Miss. 2017).

¶12. United argues, however, that genuine issues of material fact exist—whether its activities are within the boundaries of the allegedly "conflicting statutes and regulations." However, this and the other numerous arguments United raises are not issues of fact, but issues of law. United even admits in its brief that the "facts and circumstances leading to . . . this appeal . . . are relatively undisputed."

¶13. Additionally, United claims there is a genuine issue of material fact about whether it knew or should have known about the applicable law pertained to roofing services, and whether MDOR gave it conflicting or misleading advice on the taxability of its services. In sum, United argues MDOR "failed to establish [its] factual state of mind" regarding these issues. United points to McCoy's affidavit, where he stated that he "believed he was operating his business correctly" and that he called MDOR and spoke with several different agents who provided him conflicting information. MDOR responded before the chancery

court that United did not name any individuals United allegedly contacted; therefore, contact with MDOR was not proved. More importantly, when McCoy was president of UCC, he had been audited in 2007. During McCoy's affiliation with UCC, MDOR informed him of its position that the sale and installation of roofing materials was a taxable event that was subject to either sales tax or a contractor's tax. Ostensibly, McCoy had been aware of his roofing-services taxability since that time and should have known he was not operating his business properly. In any event, United has failed to cite any authority to support the argument that a lack of knowledge is a defense to not paying his taxes. *See* M.R.A.P. 28(a)(7). Accordingly, McCoy's "state of mind" cannot be considered a genuine issue of material fact.

¶14. We conclude that the chancery court did not err in finding no genuine issues of material fact existed.

II. The Applicable Law

A. *Hinton* or *Blount*

¶15. United argues the chancery court erred in relying on *Hinton* and instead should have found *Blount* applicable. The chancery court found *Hinton* controls because the facts are substantially similar to this case. Applying *Hinton*, the court found that United is "in the business of selling and installing tangible personal property," which "is subject to the sales tax on the gross proceeds of its sales" under section 27-65-17. Therefore, the chancery court granted summary judgment in favor of MDOR.

¶16. In *Hinton*, B. F. Hinton owned a business that sold and installed tile. *Hinton*, 218 So.

2d at 742. Hinton charged his customers a flat rate, which included installation, labor, and materials. *Id.* at 741. He did not maintain an inventory of tile; instead, the material was purchased from a wholesaler for each job. *Id.* Hinton had a retail license, but he collected no tax from his customers. *Id.* The Tax Commission found that Hinton was a retailer of tangible personal property in an installed condition under Rule 60 of the Tax Commission's Sales and Use Tax Rules, subjecting him to sales tax laws. *Id.* Hinton appealed to the chancery court, which reversed the Commission's decision, finding that he was engaged in the sale of real property and entitled to a tax refund. *Id.* On appeal, however, the supreme court found the chancellor was manifestly wrong in this determination. *Id.* at 742. The supreme court noted a conflict of authority as to whether the sale of construction materials, fixtures, or supplies to a contractor, or a contractor's sale of such items to a landowner, is a retail sale within the meaning of tax statutes. *Id.* at 741. Because the issue was "not specifically set out in the Mississippi tax statutes," the court "look[ed] at the legislation in its entirety." *Id.* at 742. The court held it was the Legislature's intent that "gross proceeds" meant "the full sale price of tangible personal property including installation" and that it was "the intention of the Legislature to include such a sale as the one at bar" within the statutes. *Id.* Additionally, the court examined Rule 60 of the Sales and Use Tax Rules and noted that "[w]hile not controlling[,] . . . rules promulgated for the effective administration of the sales tax give a helpful clue to the legislative intent." *Id.* Rule 60 clarified certain questions and "clearly covered a factual situation such as the one in the case at bar." *Id.* The court noted the Legislature had recently taken the definition of "installation charges" verbatim from Rule

60. *Id.* The new legislation read:

> 'Installation charges' shall mean and include the charge for the application of tangible personal property to real or personal property without regard to whether or not it becomes a part of the real property or retains its personal property classification. It shall include, but not be limited to, sales in place of *roofing*, tile, glass, carpets, drapes, fences . . . and similar personal property. (House Bill No. 484, General Acts of the Regular Legislative Session 1969, Advance Sheet No. 7, p. 20, amending Mississippi Code 1942 Annotated Section 10104 (Supp. 1966)).

Id. (emphasis added).[7] Accordingly, the supreme court found Hinton was a retailer of tangible personal property; thus, he was subject to sales tax regardless of the fact he was paid "by the job." *Id.*

¶17. Alternatively, United cites *Blount* as controlling. In *Blount*, this Court held that repairs to water and sewer-system components were classified as personal property and thus exempt from contractor's tax. *Blount*, 986 So. 2d at 1055, 1059 (¶¶10, 32). ECO Resources, a management company that operated water and sewer systems for several municipalities, filed a refund action claiming it was exempt from contractor's tax. *Id.* at 1054 (¶¶1-2). In exchange for a flat-contract fee, ECO provided operations, management, and maintenance of the utilities. *Id.* at 1054 (¶2). The fee included labor, equipment, and minor repairs. *Id.* The Commission audited ECO and determined ECO owed contractor's tax for the minor repairs encompassed in the flat-contract fee. *Id.* at (¶¶4-5). ECO appealed to the Board and then the Commission. *Id.* at 1055 (¶¶8, 9). Both entities affirmed the assessment, but the Commission reduced the assessment. *Id.* at (¶9). ECO paid the taxes but filed a refund action in the chancery court, "claiming it was exempt from contractor's

[7] This definition is now codified in the sales tax statutes in section 27-65-3(k).

tax because the repairs it performed were to portions of the systems that were personal property." *Id.* at (¶10). The chancellor found all of the repairs ECO had made were to personal property, not real property, and therefore ECO was exempt from contractor's tax. *Id.* This Court affirmed the ruling. *Id.* at 1056 (¶14).

¶18. United argues the four factors articulated in *Blount* for determining whether ECO's repair services were to personal or real property should be applied to this case:

> For personal property to be considered real property, it must be permanently attached to real property. To be considered permanently attached, one or more of the following criteria must be met:
>
> 1. The property or equipment must be attached to building walls, floors, and/or ceiling in such way as to require design or structural alterations to the real property to which it is being attached, or
>
> 2. The property could not be removed intact or its removal would result in the alteration or destruction of the structure or property, or
>
> 3. The property must become an independent structure, itself (real property),
>
> 4. And the property must lose its identity as personal property.

Id. at 1057 (¶17) (quoting Miss. State Tax Comm'n Reg. IV-10-01-502 (2005), Comm'n Rule 41).[8] United argues that these factors are not expressly linked to contractor's tax and are thus applicable to sales tax; the factors merely clarify when personal property should be considered permanently attached and thereby become real property, as here.

¶19. We agree with the chancery court and MDOR that *Hinton*, not *Blount*, is applicable here. *Blount* dealt with a different type of tax that fell under a different portion of the tax code and on a different type of work than the type in *Hinton*. *Blount* dealt with contractor's

[8] United refers to these factors as the "Rule 41 test."

tax on repairs to components of utility systems, not sales tax on roofing services. Further, there is no need to classify the property as personal or real in the instant case under the *Blount* factors because the definition of "tangible personal property" includes "property sold on an installed basis which may become part of real or personal property" under section 27-65-3(j) and thus is subject to sales tax. Finally, *Blount* did not hold that all "installed sales" should be treated in the same manner.

¶20. Similar to the tile company in *Hinton*, United does not maintain an inventory. United charged a flat rate, paid a wholesaler by the job for materials, and did not remit taxes. Further, the application of tiles to a floor is analogous to shingles on a roof. Moreover, the regulations and statutes in effect at the time of *Hinton* are similar to those currently governing United's sales. The *Hinton* court relied on the provisions of the Mississippi Code of 1942. MDOR correctly points out these same provisions are found in the current Mississippi Code of 1972, with the exception of a sales-tax rate increase from 3.5% to 7%. Also, while the term "installation charges" is now defined in section 27-65-3(k), it is the same definition as found in *Hinton* under the 1942 statute, as amended.

¶21. Moreover, MDOR notes that United presents the same "real property" argument that was advanced in *Hinton* before the chancery court.[9] Hinton argued that he was in the business of selling real property, not tile on an installation basis. The chancery court agreed and found that the material was real property because "it was delivered in an installed condition and had become a part of the house or business of the customer. . . ." On appeal,

[9] MDOR attached the chancery court's opinion in *Hinton* to its reply to United's response in opposition to summary judgment.

however, the supreme court rejected this argument, finding Hinton was a retailer of tangible personal property "in an installed condition." *Hinton*, 218 So. 2d at 742. Moreover, the supreme court warned that "[t]o affirm [the chancery court's] decision would do grave damage to the Mississippi Sales Tax and would fly in the face of the intention of the legislature as expressed in the statutes." *Id.* We find the installation of tiles in *Hinton* is analogous to the installation of shingles here, and *Hinton* provides the correct analysis of the taxation issues at bar. Accordingly, the chancery court did not err in finding *Hinton* applicable and rejecting *Blount*'s analysis.

B. Statutory Ambiguities

¶22. United argues that ambiguities exist in the controlling statutes and regulations, which led to McCoy's alleged confusion about his taxes. United cites the statute on sales tax for tangible personal property under section 27-65-17(1)(a), the definition of "tangible personal property" under section 27-65-3(j), and a list of miscellaneous business exceptions to sales tax under section 27-65-23, which does not include roofing. He argues an administrative code section[10] provides that persons selling and installing personal property are subject to sales tax, but persons only installing personal property are not taxed on labor, unless the service is enumerated in section 27-65-23, and roofing services are not.

¶23. United contends that "[d]oubts in tax statutes should be resolved in favor of the taxpayer." *Blount*, 986 So. 2d at 1055 (¶12) (quoting *Stone v. W.G. Nelson Exploration Co.*, 211 Miss. 199, 205, 51 So. 2d 279, 282 (1951)). Yet we find no such ambiguities or

[10] 35 Miss. Admin. Code Part IV, R. 4.08:100 (repealed Nov. 17, 2011).

inconsistencies exist in the controlling statutes and regulations. It is unclear why United cites to the administrative code as a source of McCoy's confusion for whether roofing services is taxable, when the definitions in section 27-65-3 clearly apply to sections 27-65-17 and -23. The definition of "installation services" in section 27-65-3(k) includes "sales of roofing" and "similar personal property." The plain language of the statutes require those selling and installing roofing materials to remit sales tax on the gross proceeds of their sales. Further, the Legislature clearly included the sale and installation of roofing materials to be a taxable event under section 27-65-3. A discussion of statutory interpretation principles is not needed, as there is no ambiguity in the applicable statutes.

III. Burden of Persuasion and Presumption of Correctness

¶24. Finally, United argues that summary judgment in favor of MDOR was improper because MDOR did not and cannot overcome its burden of persuasion due to the invocation of a "presumption of correctness" under section 27-65-37(1) during its audit and assessment of taxes. We are not persuaded.

¶25. First, United is correct that section 27-65-37(1) on the assessment of taxes invokes a statutory presumption of correctness. The statute provides:

> If adequate records of the gross income or gross proceeds of sales are not maintained or invoices preserved as provided herein, or if an audit of the records of a taxpayer, or any return filed by him, or any other information discloses that taxes are due and unpaid, the commissioner shall make assessments of taxes, damages, and interest *from any information available, which shall be prima facie correct . . . .*"

(Emphasis added). In *Marx v. Bounds*, 528 So. 2d 822, 825-26 (Miss. 1988), the supreme court explained that section 27-65-37 comports with Mississippi Rule of Evidence 301 on

presumptions in civil cases. Rule 301 provides:

> In a civil case, unless a Mississippi statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.

Taxpayers are required to keep adequate records of gross income and sales. Miss. Code Ann. § 27-65-43. When they do not, a presumption that the Commission's assessments are prima facie correct arises. *Marx*, 528 So. 2d at 825. However, in order for the assessments to be prima facie correct, the auditor must make them "from any information available" according to section 27-65-37, not necessarily "from the best information available." *Id.* at 826. Finally, "[o]nce [this] presumption arises, the taxpayer bears the burden of proof showing that a genuine dispute exists regarding the correctness of the assessment." *In re Fugitt*, 539 B.R. 289, 299 (Bankr. S.D. Miss. 2014).

¶26. Next, United incorrectly contends that due to this presumption, summary judgment in favor of MDOR is impossible. United argues MDOR cannot meet the burden of proving there is no genuine issue of material fact because the presumption itself creates a genuine issue of material fact; that is, there is an absence of direct proof and thus a factual dispute. United also claims any judgment as a matter of law "is nullified" because the presumption must be evaluated at trial, not at the summary judgment stage. Further, United claims MDOR did not meet its burden of persuasion because the presumption would have been enacted at trial.

¶27. United's arguments are an attempt to assert that MDOR relied on a "presumption of correctness" in the chancery court. Such is not the case. As MDOR states, United is trying

to "muddle" the established burdens of proof by creating a situation where it did not have to provide any substantive evidence to survive summary judgment. Here, there was no issue of inadequate tax-assessment records as in *Marx*; the audits were performed based upon United's own records. Accordingly, the statutory "presumption of correctness" never attached, and the burden of persuasion shifted to United, who could not meet it.

¶28. Further, United confuses the burden of persuasion for summary judgment and the burden of persuasion at trial. MDOR bore the initial burden of persuasion for summary judgment. Once satisfied, the burden shifted to United to "produce significant probative evidence" of a genuine issue for trial. United would also have the ultimate burden of persuasion for this appeal. Mississippi Code Annotated section 27-77-7 provides that in reviewing an MDOR action "the chancery court shall determine whether the party bringing the appeal has proven by a preponderance of the evidence . . . that he is entitled to any or all of the relief he has requested." The "party bringing the appeal" is United.

¶29. We conclude MDOR met its burden of persuasion for summary judgment.

CONCLUSION

¶30. The chancery court did not err in determining United's roofing services are subject to Mississippi sales tax under section 27-65-17. The chancery court properly found there to be no genuine issue of material fact, and judgment was proper as a matter of law.

¶31. **AFFIRMED.**

CARLTON AND WILSON, P.JJ., GREENLEE, WESTBROOKS, McDONALD, LAWRENCE AND McCARTY, JJ., CONCUR.