

**FILED**  
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EDDIE JEAN CARR, CHANCERY CLERK  
*[Signature]*

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT  
OF HINDS COUNTY, MISSISSIPPI

MISSISSIPPI DEPARTMENT OF REVENUE

PETITIONER

V.

CIVIL ACTION NO. G-2022-558 G/2

WATKINS CONSTRUCTION, INC.

RESPONDENT

**ORDER GRANTING RESPONDENT'S RESPONSE  
IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT  
AND CROSS MOTION FOR SUMMARY JUDGMENT [MEC #13]**

THIS CAUSE is before the Court on *Mississippi Department Of Revenue's Motion For Summary Judgment, Or In The Alternative, For Partial Summary Judgment [MEC #10]* filed by Petitioner, Mississippi Department of Revenue as well as *Respondent's Response In Opposition To Motion For Summary Judgment And Cross Motion For Summary Judgment [MEC #13]* filed by Respondent Watkins Construction, Inc. This Court held full hearing on the matter, allowing all argument in support and opposition thereto. This Court has carefully considered the matter and has reviewed all the filings and pleadings of the parties as well as all relevant statutory and case law. After careful review, this Court finds that *Respondent's Response In Opposition To Motion For Summary Judgment And Cross Motion For Summary Judgment [MEC #13]* is well taken and should be granted.

On May 9, 2022, Mississippi Department of Revenue (“MDOR”) filed its *Petition Appealing Order of The Mississippi Board of Tax Appeals* [MEC #2] in this Court. Petitioner seeks reversal of the Board of Tax Appeals Order of March 9, 2022, reducing Petitioner’s assessment of sales tax against Respondent for the audit period of January 1, 2014, through August 31, 2017. On May 9, 2023, Petitioner filed its *Mississippi Department Of Revenue’s Motion For Summary Judgment, Or In The Alternative, For Partial Summary Judgment* [MEC #10]. On July 11, 2023, Respondent filed the *Respondent’s Response In Opposition To Motion For Summary Judgment And Cross Motion For Summary Judgment* [MEC #13]. Both parties assert that there are no genuine issues of material fact which exist and that they are each, respectively, entitled to prevail as a matter of law.

### **FACTS**

Watkins Construction, Inc. (“Watkins”) is a roofing and repair company with a home base which was located in Jackson, Mississippi during the audit period. Watkin’s primary customer base consists of roofing repairs due to insurance claims, but there are a small number of installation sales to commercial and residential roofing customers in the State of Mississippi. Watkins purchases its roofing supplies and materials from a supply house in Pearl, Mississippi, for which it pays sales tax. Watkins did not sell materials from its location in Jackson, Mississippi. No customers come to the location in Jackson. In the normal course of business, a customer would call the Watkins’ office in Jackson to make an appointment for a sales representative to meet the customer at the residence. The sales representative would then handle all communication by cell phone or email. All services are performed at the customers’ respective residence. The

Watkins' office in Jackson never housed roofing supplies or materials, never served as a place of sales of materials, and never served as a venue for customers to patronize.

In 2015, Watkins was issued an audit assessment assessing sales tax in the amount of \$46,004.00, excluding any penalties and/or interest, for the audit period of January 1, 2011 through August 31, 2014. The assessment stated that it related to the period of 2013 alone. On October 11, 2017, MDOR notified Watkins that it was beginning a sales tax audit for January 1, 2014 through August 31, 2017. As a result of this second audit, an assessment was issued to Watkins assessing sales tax and special sales tax in the amount of \$524,283.00, including penalties and interest. Watkins then appealed the audit assessment to the Board of Review. After a full hearing, the Board of Review issued its order reducing the overall assessment to \$423,375.00. Thereafter, Watkins appealed to the Board of Tax Appeals ("BTA"). After full hearing, the BTA entered its Order reversing the decision of the Board of Review and reducing the overall assessment to \$168,474.00, including all applicable penalties and interest. Feeling aggrieved, MDOR timely appealed the BTA Order to this Court in accordance with Miss. Code Ann. §27-77-7.

### **ANALYSIS**

Mississippi Code Annotated §27-77-7(5), as it existed at all times relevant to this appeal, sets forth the standard of judicial review for decisions of the BTA:

Based on the evidence presented at trial, the chancery court shall determine whether the party bringing the appeal has proven by a preponderance of the evidence or a higher standard if required by the issues raised, that he is entitled to any or all of the relief he has requested.

Miss. Code. Ann. § 27-77-7(5) (Rev. 2017). For such appeals, “the chancery court shall give no deference to the decision of the Board of Tax Appeals, the Board of Review or the Department of Revenue....” Miss. Code. Ann. § 27-77-7(5) (Rev. 2017). In appeals pursued under §27-77-7:

The chancery court shall try the case de novo and conduct a full evidentiary judicial hearing on all factual and legal issues raised by the taxpayer which address the substantive or procedural propriety of the actions of the Department of Revenue being appealed.

Miss. Code. Ann. § 27-77-7(5) (Rev. 2017). The parties herein have fully agreed to the facts of this matter. Furthermore, this Court has conducted a full hearing on all issues. Therefore, this Court need only address three legal determinations as set forth by the parties: (1) whether the situs of certain sales, as defined by Section 27-65-3, were within the City of Jackson such that Section 27-65-241’s one percent (1%) infrastructure applies to those sales; (2) whether the January 1, 2014 through August 31, 2014 periods were properly included in the current audit; and (3) whether Watkins was entitled to prior audit relief under Section 27-65-37.

Section 27-65-241 of the Mississippi Code Annotated provides, in pertinent part:

(2)(a) Subject to the provisions of this section, the governing authorities of a municipality may impose upon all persons as a privilege for engaging or continuing in business or doing business within such municipality, a special sales tax at the rate of not more than one percent (1%) of the gross proceeds of sales or gross income of the business, as the case may be, derived from any of the activities taxed at the rate of seven percent (7%) or more under the Mississippi Sales Tax Law, Section 27-65-1 et seq.

(b) The tax levied under this section shall apply to every person making sales of tangible personal property or services within the municipality

Miss. Code Ann. § 27-65-241 (West). Section 27-65-3 states that “[t]he situs of a sale for the purpose of distributing taxes to municipalities shall be the same as the location of the business from which the sale is made”. Miss. Code Ann. § 27-65-3 (West). On April 25, 2014, MDOR issued its Notice 72-14-2, specifically providing that “All businesses located in the City of Jackson should collect the one percent (1%) Special Infrastructure Tax on all sales of tangible personal property regardless of the point of delivery in Mississippi.” Based upon these statutes and the Notice, MDOR maintains that Watkins’ business location in Jackson, Mississippi serves as the situs of certain sales which are then subject to the one percent (1%) infrastructure tax.

However, as set forth above, Watkins does not maintain inventory at the business location in Jackson. Further, the building materials are purchased at a supply house in Pearl, Mississippi; the materials are delivered to the customer’s residence. The only business conducted at the business location is the receipt of a customer call and the scheduling of an appointment for a meeting with a sales representative at the customer’s residence. There is simply no sale of tangible property which occurs at the business location **within** the municipality. See Miss. Code Ann. § 27-65-241(2)(a) (West). This Court agrees with the BTA that the situs of the sale is the customer’s residence. Therefore, the one percent (1%) infrastructure tax does not apply to the roofing jobs outside of the City of Jackson because such sales are not within the municipality as set forth in § 27-65-241.

Watkins was previously audited in 2015 for the audit period of January 1, 2011 through August 31, 2014. The resulting assessment stated that it related to the period of 2013 alone. The audit at issue herein included the audit period of January 1, 2014 through August 31, 2017. MDOR maintains that the first assessment included only the period of 2013; therefore, the period of January 2014 through August 2014 was properly included in the current audit. However, the Board of Review noted that the prior audit notice letter, which was dated August 29, 2014, captured the January 2014 through August 2014 tax period for audit. Watkins argues that the first eight months of 2014 should be removed from the current audit since that period was covered during the prior audit and is no longer subject to review. In addition to the audit notice letter, Watkins relies upon the Affidavit of Ms. Amy Robinson, the MDOR auditor for the prior audit. Ms. Robinson avers that she conducted the prior audit and that she did audit Watkins for the period of June 2011 through August 2014. Ms. Robinson further avers that while sales tax was only assessed for 2013, she personally audited the first eight (8) months of 2014. Ms. Robinson finally avers that no additional tax was assessed for this eight (8) month period and that the tax period was considered closed by MDOR. This Court finds that MDOR has been unable to rebut Ms. Robinson's Affidavit or provide proof that the January 2014 through August 2014 was not included in the prior audit. Therefore, this Court agrees with the BTA that the tax period of January 1, 2014 through August 31, 2014 was included in the prior audit and may not properly be included in the subsequent audit.

Mississippi Code Annotated §27-65-37 states in pertinent part as follows:

- (1) 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. However, if in an audit of the records of a taxpayer it is determined that during the period being audited the taxpayer reported and paid tax in accordance with a method used during a prior period which had been audited by the commissioner and not found to result in any additional tax due, the commissioner shall be estopped from collecting any additional tax as a result of the use of this previously audited method for any period prior to notification by the commissioner or his agent during the current audit that use of the previously audited method would result in additional tax being due if it is determined, through all information available regarding this taxpayer, that:
  - (a) The method in issue was previously audited by the commissioner with no additional tax determined to be due under such method;
  - (b) The method under consideration in the current audit is the same method that was used in the prior audit;
  - (c) There has not been a statutory or regulatory change that would have resulted in additional tax being due under this method after the statutory or regulatory change; and
  - (d) The taxpayer detrimentally relied on the fact that this method had been previously audited and not found to result in additional tax.

Miss. Code Ann. § 27-65-37 (West). Watkins asserts that MDOR improperly included roofing repairs or installations due to insurance claims as taxable in the current audit.

Watkins maintains that all repairs and installations due to insurance claims were treated

as non-taxable in the prior audit. Therefore, Watkins claims that the inclusion of these jobs is prohibited by Miss. Code Ann. §27-65-37. In support of these claims, Watkins presented the Affidavit of Ms. Robinson wherein she avers that in the prior audit she treated all insurance company jobs as non-taxable. Ms. Robinson further avers that, in her capacity as an auditor for MDOR, she advised Watkins that insurance jobs were not subject to sales tax. MDOR maintains that the prior audit did not determine that insurance jobs were non-taxable. However, MDOR has failed to provide proof to rebut the Affidavit of Ms. Robinson to the contrary. MDOR further asserts that this practice of treatment of insurance jobs changed in May 2013.

The BTA determined that the treatment of insurance jobs as repairs that are non-taxable sales constituted a method used by the taxpayer as contemplated by Section 27-65-37. This Court agrees. The evidence is clear that no additional sales tax was assessed on these repairs in the prior audit period. MDOR asserts that the treatment of insurance jobs as non-taxable was changed in May 2013. However, there is no evidence of a statutory or noticed regulatory change regarding the same between the first and second audit. Finally, the Court notes that Watkins did not collect and remit sales tax on insurance jobs; therefore, Watkins detrimentally relied upon the fact that these jobs had been previously audited and found to be non-taxable. Based upon the foregoing, this Court must agree with the BTA that the inclusion of insurance jobs as taxable is improper under Miss. Code Ann. §27-65-37.



Based upon the foregoing, this Court hereby finds that the *Respondent's Response In Opposition To Motion For Summary Judgment And Cross Motion For Summary Judgment* [MEC #13] is well taken and the same is hereby granted.

Accordingly, the *Petition Appealing Order of the Mississippi Board of Tax Appeals* [MEC #2] is hereby dismissed with prejudice.

SO ORDERED, ADJUDGED, AND DECREED THIS the 1<sup>st</sup> day of February, 2024.

  
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CHANCELLOR TIFFANY GROVE