

IN THE SUPREME COURT OF MISSISSIPPI

2016-CA-00549

MARLENA ROBINSON

APPELLANT

VS.

ED MORGAN, IN HIS OFFICIAL
CAPACITY AS THE COMMISSIONER
OF REVENUE OF THE MISSISSIPPI
DEPARTMENT OF REVENUE

APPELLEE

APPEAL FROM THE CHANCERY COURT OF
THE FIRST JUDICIAL DISTRICT OF
HINDS COUNTY, MISSISSIPPI
CAUSE NO. G2015-819 S/2

BRIEF OF THE APPELLEE

ORAL ARGUMENT NOT REQUESTED

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TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
STATEMENT ON ORAL ARGUMENT	iii
STATEMENT OF THE ISSUE(S)	1
STATEMENT OF THE CASE	2
A. Nature of the Case, the Course of Proceedings, and Disposition of the Court Below	2
B. Statement of Facts	3
SUMMARY OF THE ARGUMENT	4
ARGUMENT	5
I. STANDARD OF REVIEW	5
II. THE CHANCELLOR CORRECTLY DISMISSED ROBINSON’S PETITION FOR FAILING TO POST THE REQUISITE BOND WITH THE FILING OF THE SAME	5
a. The Amended Version of Miss. Code Ann. § 27-77-7 cannot be Retroactively Applied to Robinson’s Appeal	5
b. Section 19 of House Bill 799 is Part and Parcel of Miss. Code Ann. § 27-77-7	7
CONCLUSION	8
CERTIFICATE OF SERVICE	10

TABLE OF AUTHORITIES

Cases

<i>Benson v. Neshoba Cnty. Sch. Dist.</i> , 102 So. 3d 1190 (Miss. Ct. App. 2012)	5
<i>Khurana v. Mississippi Dep't of Revenue</i> , 85 So. 3d 851 (Miss. 2012)	5
<i>Southside, Inc. v. Mississippi Dep't of Revenue ex rel. Morgan</i> , 158 So. 3d 277 (Miss. 2014)	5
<i>State ex rel. Pittman v. Ladner</i> , 512 So. 2d 1271 (Miss. 1987)	6
<i>Stone v. Independent Linen Serv. Co.</i> , 55 So.2d 165 (Miss. 1951)	6
<i>USPCI of Mississippi, Inc. v. State ex rel. McGowan</i> , 688 So. 2d 783 (Miss. 1997)	6

Statutes, Rules & Regulations

Miss. Code Ann. § 27-7-307	3
Miss. Code Ann. § 27-65-55	3
Miss. Code Ann. § 27-77-5	3, 7
Miss. Code Ann. § 27-77-7	passim
2014 Miss. Laws Ch. 476 (HB 799), § 19	4, 6, 7, 8

STATEMENT ON ORAL ARGUMENT

The MDOR believes that this Court's review of this case would not be significantly aided by oral argument. The facts and legal arguments are adequately presented in the record and briefs, and the issues presented are readily determined through reference to established law.

STATEMENT OF THE ISSUE(S)

Did the Court below have appellate jurisdiction to entertain the merits of Robinson's
Petition under Miss. Code Ann. § 27-77-7 (Rev. 2010)?

STATEMENT OF THE CASE

A. Nature of the Case, the Course of Proceedings, and Disposition of the Court Below

The sole issue in this appeal is whether the lower Court had appellate jurisdiction to consider the merits of Robinson's appeal from an adverse order entered by the Mississippi Board of Tax Appeals (hereinafter "BTA"). Robinson commenced the matter below through the filing of her Petition from Order of the Board of Tax Appeals on June 1, 2015 (R. at 4).¹ In lieu of filing an answer, the MDOR opted to file a Motion to Dismiss Robinson's Petition on June 25, 2015 (R. at 17). The basis for the MDOR's motion was that Robinson failed to perfect her appeal from the BTA Order by failing to post a surety bond with the filing of her petition, and by likewise failing to pay the disputed tax amount under protest prior to the filing of her petition (R. at 19).

Robinson filed a Response in Opposition to the MDOR's Motion to Dismiss on July 31, 2015, and likewise filed a Motion for Leave to Amend on the same date (R. at 32, 36). Robinson filed the latter motion in the event the lower Court deemed that the posting of a surety bond was necessary, and in order to cure the deficiency (R. at 37). The MDOR followed suit through the filing of its Response in Opposition to Petitioner's Motion for Leave to Amend on August 4, 2015, and through the filing of a Reply to Respondent's Response in Opposition to the MDOR's Motion to Dismiss two (2) days later (R. at 43, 57).²

The MDOR's Motion to Dismiss was heard on September 17, 2015,³ and the lower Court subsequently granted the same on March 15, 2016 (R. at 62). Robinson subsequently filed her Notice of Appeal from this order with this Court on April 14, 2016 (R. at 65).

¹ The abbreviation "R" is in reference to the record (also referred to as "Clerk Papers"), and the abbreviation "Tr" is in reference to the transcript of the hearing concerning the MDOR's Motion to Dismiss.

² The heading for the reply should have read "MDOR's Reply to **Petitioner's** Response in Opposition to the MDOR's Motion to Dismiss.

³ Tr. at 1.

B. Statement of Facts

Robinson was previously married to Charles David Smith (hereinafter “Smith”), and together they owned and operated D&M Enterprises, LLC (hereinafter “D&M”) (R. at 13). D&M’s line of business was tire service and automobile repair (*Id.*).

D&M went out of business in August 2013, but was assessed with sales and withholding tax assessments prior to closure (*Id.*). The time frame covered by the sales tax assessments would be from July 1, 2012 through June 30, 2013, and the time frame covered by the withholding tax assessments would be from March 1, 2012 through June 30, 2013 (R. at 12).

Prior to D&M going out of business, Robinson and Smith obtained a divorce in 2006 (R. at 5). After divorcing Smith, Robinson continued to have a fifty percent (50 %) ownership interest in D&M, and continued to perform services for D&M during the relevant time periods in this matter (R. at 14). These services included responsibility for D&M’s accounts receivables (*Id.*). Additionally, Robinson had access to D&M’s business bank account (*Id.*).

After D&M’s closure, and after its respective sales and withholding tax assessments became finally determined, the MDOR issued a Responsible Person Assessment against Robinson for these assessments; the same was issued on February 3, 2014 (R. at 8). This assessment was issued against Robinson under the auspices of Miss. Code Ann. §§ 27-65-55(2) and 27-7-307(2), which permit the MDOR to hold specified individuals responsible for finally determined sales and withholding tax liabilities incurred by corporations and LLCs.

Aggrieved by the assessment, Robinson utilized the administrative appeals process under Miss. Code Ann. § 27-77-5, first with the MDOR’s Board of Review (hereinafter “BOR”) and then with the BTA (R. at 5-6). Both administrative bodies affirmed Robinson’s Responsible Person Assessment, with the BTA entering its Order on April 1, 2015 (*Id.*). Continuing to be aggrieved, Robinson appealed the BTA’s Order to chancery court on June 1, 2015 (R. at 4). However, Robinson neither posted a

surety bond with the filing of her appeal petition, nor paid the disputed amount under protest prior to filing (R. at 19).

Due to the omission of either a surety bond or payment under protest, the MDOR moved to dismiss Robinson's petition because the same had not been perfected, and because the chancery court did not have appellate jurisdiction over Robinson's appeal as a result (R. at 17). Based on extensive precedent from this Court holding that perfection of appeals under Miss. Code Ann. § 27-77-7 through the posting of a surety bond or payment under protest is mandatory and necessary for appellate jurisdiction to attach, the lower Court granted the MDOR's Motion to Dismiss (R. at 62). Robinson now appeals the lower Court's Order to this Court (R. at 65).

SUMMARY OF THE ARGUMENT

Robinson's argument that a surety bond did not have to accompany the filing of her appeal petition is premised on her belief that the current version of Miss. Code Ann. § 27-77-7 applies to her appeal. This version of the statute dispenses with both the bond requirement, and the alternative means of perfection through payment under protest prior to filing. Robinson's position in this regard is incorrect because the current version of Miss. Code Ann. § 27-77-7 ("HB 799") only applies to assessments issued on or after January 1, 2015; Robinson's Responsible Person Assessment was issued roughly eleven (11) months prior to this date.

The prior version of Miss. Code Ann. § 27-77-7, the version that became effective on July 1, 2010, is the version that applies to Robinson's appeal. This version of the statute mandates that either a surety bond be posted with the filing of the petition, or that payment of the disputed amount under protest be made to the MDOR prior to filing. Robinson did neither, and the lower Court correctly dismissed her appeal due to it lacking appellate jurisdiction to consider the merits of her appeal from the BTA's Order. Thus, the MDOR respectfully requests that this Court affirm the lower Court's Order.

ARGUMENT

I. STANDARD OF REVIEW

The lower Court granted the MDOR's Motion to Dismiss, and did so based on the fact that it did not have appellate jurisdiction to consider the merits of Robinson's appeal from the BTA's Order. The grant or denial of a motion to dismiss is subject to de novo review. *See Khurana v. Mississippi Dep't of Revenue*, 85 So. 3d 851, 853 (Miss. 2012). Likewise, a determination whether a chancery court has jurisdiction over a matter is also subject to de novo review. *See Benson v. Neshoba Cnty. Sch. Dist.*, 102 So. 3d 1190, 1193 (Miss. Ct. App. 2012) (citations omitted).

II. THE CHANCELLOR CORRECTLY DISMISSED ROBINSON'S PETITION FOR FAILING TO POST THE REQUISITE BOND WITH THE FILING OF THE SAME

a. The Amended Version of Miss. Code Ann. § 27-77-7 cannot be Retroactively Applied to Robinson's Appeal

Robinson's petition was filed pursuant to Miss. Code Ann. § 27-77-7, which permits taxpayers (and the MDOR) to appeal adverse BTA Orders to chancery court. The current version of this statute does not require the posting of a surety bond with the filing of the appeal petition, or payment of the disputed assessment under protest to the MDOR prior to filing, in order to perfect an appeal. The prior version of the statute unquestionably imposed such a requirement, as recently determined by this Court:

We have held that "the chancery court is without appellate jurisdiction over an appeal filed under Mississippi Code Section 27-77-7 that is not in full compliance with the statutory requirements." In this case, the taxpayers failed to comply with the statutory requirements by either paying their taxes under protest before appealing, or posting a surety bond with their petition. So the chancery court lacked appellate jurisdiction over the taxpayers' appeal. And the chancellor properly dismissed their petition.

Southside, Inc. v. Mississippi Dep't of Revenue ex rel. Morgan, 158 So. 3d 277, 279 (Miss. 2014), reh'g denied (Mar. 12, 2015).

Thus, the outcome of this matter hinges on which version of Miss. Code Ann. § 27-77-7 applies to

Robinson's appeal petition.

Since Robinson neither posted a bond with the filing of her petition, nor paid the disputed tax amount to the MDOR under protest beforehand, she asserts that the current version of Miss. Code Ann. § 27-77-7 applied to her appeal of the BTA's Order affirming her Responsible Person Assessment. She supports this assertion by arguing that her appeal petition was filed after January 1, 2015, the effective date concerning HB 799. The MDOR asserts that this position is erroneous because the provisions of HB 799 apply to assessments issued on or after January 1, 2015, not appeal petitions from adverse BTA Orders filed on or after this date. This is evident in the savings clause contained within HB 799:

*Nothing in Sections 15, 16 or 17 of this act shall affect or defeat any assessment, refund claim, request for waiver of a tax penalty or claim for tax credits or incentives or the administrative appeal or judicial appeal thereof where the initial date of said assessment, refund claim, tag penalty, claim for tax credits or incentives is before the date on which this act becomes effective. **The provisions of the laws relating to the administrative appeal or judicial review of such actions which were in effect prior to the effective date of this act are expressly continued in full force, effect and operation for the purpose of providing an administrative appeal and/or judicial review of any assessment, refund claim, request for waiver of a tag penalty or claim for tax credits or incentives where the initial date of said assessment, refund claim, tag penalty, claim for tax credits or incentives is before the date on which this act becomes effective.***

2014s. Laws Ch. 476 (H.B. 799), § 19, eff. Jan 1, 2015 (emphasis added).

Even cases cited by Robinson (and as conceded by Robinson herself)⁴ clearly hold that an amended statute will not be applied retroactively in the event of the same being accompanied by a savings clause. *See USPCI of Mississippi, Inc. v. State ex rel. McGowan*, 688 So. 2d 783, 787 (Miss. 1997); *State ex rel. Pittman v. Ladner*, 512 So. 2d 1271, 1275 (Miss. 1987); *Stone v. Independent Linen Serv. Co.*, 55 So.2d 165, 168 (Miss. 1951). Section 19 of House Bill 799 is a savings clause as it unambiguously

⁴ Appellant's Brief, pg. 10.

states that pre-amendment laws relating to the administrative appeal or judicial review (which would be Miss. Code Ann. §§ 27-77-5 and 27-77-7) of tax assessments preceding the effective date of the statutory amendment (January 1, 2015) “are expressly continued in full force, effect and operation for the purpose of providing an administrative appeal and/or judicial review” of such an assessment.

If Robinson contends that Section 19 of HB 799 is somehow not a savings clause, then the MDOR challenges her to submit through her Reply Brief an example of what would be a valid savings clause in either a taxing statute or a statute setting forth remedies for a tax assessment, either via Mississippi statute or Mississippi case law; the MDOR predicts that Robinson will be unable to accomplish this feat. Thus, Robinson’s argument that the amended version of Miss. Code Ann. § 27-77-7 can be retroactively applied to her judicial appeal of the adverse BTA Order is without merit.

b. Section 19 of House Bill 799 is Part and Parcel of Miss. Code Ann. § 27-77-7

Robinson likewise tries to get around the foregoing savings clause by arguing that it is extraneous to Miss. Code Ann. § 27-77-7, and that since the amended statute is “unambiguous,” then the savings clause is superfluous (Appellant’s Brief, pg. 12). This argument is nonsensical; if Section 19 of HB 799 is not part of the amended version of Miss. Code Ann. § 27-77-7, then neither is Section 17 of HB 799, which references all sub-sections of the judicial review statute, and the amendments made thereto. Using Robinson’s logic, if HB 799, which includes both Sections 17 and 19, is not part of the amended version of Miss. Code Ann. § 27-77-7, or is somehow deemed unnecessary, then the judicial review statute would have never been amended in the first place as HB 799 was the catalyst for this change.

Additionally, the “Credits” section referenced in Miss. Code Ann. § 27-77-7 (and all other statutes) indicates when a statute was amended, and the House or Senate Bill containing the amendment. If House or Senate Bills were not referenced in or deemed part of statutes, then attorneys and courts would be in the dark as to when and whether a statute was amended, and the effect of the

amendment (whether it was to be applied prospectively or retroactively). Thus, Robinson's argument in this respect is without merit.

CONCLUSION

Robinson, no matter how hard she tries, cannot get around the savings clause contained within Section 19 of HB 799. Robinson concedes that an amended statute cannot be retroactively applied when the same is accompanied by a savings clause. Without question, the language contained within Section 19 of HB 799 is a savings clause; it unambiguously holds that pre-amendment laws relating to the administrative appeal or judicial review of tax assessments preceding the effective date of the statutory amendment of Miss. Code Ann. § 27-77-7, being January 1, 2015, "are expressly continued in full force, effect and operation for the purpose of providing an administrative appeal and/or judicial review" of such an assessment. This section of HB 799 is likewise not extraneous, but part and parcel of Miss. Code Ann. § 27-77-7.

Since Robinson's Responsible Person Assessment was issued roughly eleven (11) months prior to the effective date of HB 799, then the prior version of Miss. Code Ann. § 27-77-7 applied to her appeal of the BTA's Order. This version of the statute mandated that Robinson either post the requisite surety bond with the filing of her appeal petition, or pay the disputed tax under protest beforehand. Since she did neither, then the lower Court appropriately dismissed her appeal petition for lack of appellate jurisdiction, and the MDOR respectfully requests that this Court affirm the lower Court's decision.

RESPECTFULLY SUBMITTED this the 25th day of October, 2016.

/s/ Jon F. Carmer, Jr.

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CERTIFICATE OF SERVICE

I, Jon F. “Jack” Carmer, Jr., one of the attorneys for the Mississippi Department of Revenue, hereby certify that I have this day filed the foregoing Brief of Appellee electronically via the Mississippi Electronic Court’s (MEC) filing system, which sent notification of such filing to all registered MEC participants including the following:

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Further, I hereby certify that I have mailed by United States Postal Service the document to the following non-MEC participant:

Hon. William H. Singletary
Chancellor, Hinds County Chancery Court
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SO CERTIFIED this the 25th day of October, 2016.

/s/ Jon F. Carmer, Jr.

Jon F. “Jack” Carmer, Jr.