

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: AUGUST 24, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2006-SC-0113-MR

DATE 9-14-06 ELLA GRANT, P.C.

DEPARTMENT OF REVENUE, FINANCE AND
ADMINISTRATION CABINET,
COMMONWEALTH OF KENTUCKY

APPELLANT

V.

REVIEW FROM COURT OF APPEALS
2005-CA-2528
McCRACKEN CIRCUIT COURT NO. 05-CI-0793

HON. R. JEFFREY HINES, JUDGE
McCRACKEN CIRCUIT COURT, DIVISION I

APPELLEE

AND

MARQUETTE TRANSPORTATION
COMPANY, INC.

REAL PARTY IN INTEREST/
APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Department of Revenue, Finance and Administration Cabinet, Commonwealth of Kentucky, (hereinafter "Revenue"), seeks the extraordinary writ of prohibition merely to review the trial court's routine decision to deny a Motion to Dismiss. The merits to be determined in this matter involve the application of Kentucky corporation income taxes, and the question ultimately to be decided in this proceeding

is the financial impact of KRS 141.120(8)(b)¹ on the taxes to be paid by Marquette Transportation Company, Inc., (hereinafter "Marquette") the real party in interest. This dispute concerns the extent of the compensation/wages to be included in the numerator of Marquette's payroll apportionment factor. The McCracken Circuit Court found that it had subject matter jurisdiction pursuant to KRS 131.370(1) and KRS Chapter 13B².

Since Revenue has failed to show it lacks an adequate remedy by appeal, we affirm the denial of the petition for an extraordinary writ. A challenge to the interlocutory denial of a motion is appropriately addressed by appeal once the case has been concluded on the merits, and not by a petition for an extraordinary writ of prohibition or

¹ KRS 141.120(8)(b) provides for calculating apportionment according to a payroll factor which is defined as follows:

- (b) The payroll factor is a fraction, the numerator of which is the total amount paid or payable in this state during the tax period by the corporation for compensation, and the denominator of which is the total compensation paid or payable by the corporation everywhere during the tax period. Compensation is paid or payable in this state if:
1. The individual's service is performed entirely within the state;
 2. The individual's service is performed both within and without the state, but the service performed without the state is incidental to the individual's service within the state; or
 3. Some of the service is performed in the state and the base of operations or, if there is no base of operations, the place from which the service is directed or controlled is in the state, or the base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this state.

Id.

² Any party aggrieved by any final order of the Kentucky Board of Tax Appeals, except on appeals from a county board of assessment appeals, may appeal to the Franklin Circuit Court or to the Circuit Court of the county in which the party aggrieved resides or conducts his place of business in accordance with KRS Chapter 13B. Any final orders entered on the rulings of a county board of assessment appeals may be appealed in like manner to the Circuit Court of the county in which the appeal originated. KRS 131.370(1).

mandamus. Revenue will suffer neither a great injustice nor irreparable harm if this matter proceeds forward on the merits.

PROCEDURAL HISTORY

On December 23, 2003, Marquette filed a Petition of Appeal with the Kentucky Board of Tax Appeals, (hereinafter "KBTA") in response to Revenue's Final Ruling Letter pursuant to KRS Chapter 13B, KRS 131.110, KRS 131.340 and 802 KAR 1:010.

In its Petition of Appeal to the KBTA, Marquette stated:

The primary issue presented in this Petition of Appeal is whether payroll of Marquette's employees working on towboats which travel on the Mississippi River and the Illinois River should be excluded from the numerator of the payroll factor for purposes of Kentucky corporation income and license taxes because it does not constitute "compensation [that is] paid or payable in this state" pursuant to KRS 141.120(8)(b) and KRS 136.070(3)(c).

Marquette also requested, *inter alia*, that the KBTA: (1) set aside Revenue's Final Ruling Letter; (2) state that Marquette was not subject to the tax assessments alleged by Revenue; and (3) direct Revenue to issue refunds to Marquette for the 1995, 1996, and 2001 tax years.

On June 23, 2005, the KBTA issued a Final Order which Revenue interpreted as being in Marquette's favor, but Marquette interpreted as being unclear and adversely affecting some of its legal rights.

On July 5, 2005, Marquette filed a Motion for Clarification with the KBTA, asking KBTA to clarify whether the wages of its captains/pilots were excluded from the numerator of its payroll factor and to direct Revenue to award Marquette its refund claims for the 1995 and 1996 tax years. Instead of issuing an Order, the KBTA, by letter dated August 31, 2005, declined to act on Marquette's Motion for Clarification

because Marquette's appeal to the McCracken Circuit Court (filed July 15, 2005) divested the KBTA of jurisdiction.

Marquette's petition for judicial review in McCracken Circuit Court (filed pursuant to KRS Chapter 13B and KRS 131.370) purported to address the portion of the KBTA Order adversely affecting its legal rights. In its Petition for Review, Marquette requested that the McCracken Circuit Court order Revenue to issue the 1995 and 1996 refunds and to hold that the compensation/wages of all towboat employees, not just crew members, must be excluded from the numerator of Marquette's payroll factor.

On August 8, 2005, Revenue filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction, or in the alternative, for Failure to State a Claim, in McCracken Circuit Court. Revenue's Motion to Dismiss was ultimately denied by order on November 4, 2005. On December 9, 2005, Revenue filed a Motion for Intermediate Relief from the November 4, 2005, order pursuant to CR 76.36(4) with the Court of Appeals. The Court of Appeals denied Revenue's Motion for Intermediate Relief pursuant to CR 76.36(4) on December 16, 2005.

ANALYSIS

We must determine whether a writ of prohibition is an appropriate remedy under these circumstances. "A writ of prohibition may be granted upon a showing that: 1) the lower court is proceeding or is about to proceed outside its jurisdiction and there is no remedy through an application to an intermediate court; or 2) the lower court is about to act incorrectly, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury would result if the petition is not granted." Hoskins v. Maricle, 150 S.W.3d 1, 10 (Ky. 2004).

In Bender v. Eaton, 343 S.W.2d 799, 800 (Ky.1961) we stated:

Relief by way of prohibition or mandamus is an extraordinary remedy and [courts] have always been cautious and conservative both in entertaining petitions for and in granting such relief. This careful approach is necessary to prevent short-circuiting normal appeal procedure and to limit so far as possible interference with the proper and efficient operation of circuit and other courts. If this avenue of relief were open to all who consider themselves aggrieved by an interlocutory court order, we would face an impossible burden of non-appellate matters.

Id.; see also Newell Enterprises, Inc. v. Bowling, 158 S.W. 3d 750 (Ky. 2005).

Here, extraordinary relief is not appropriate because KRS 13B.160 provides authority for Revenue to appeal any adverse judgment by the McCracken Circuit Court on the merits. Id. ("Any aggrieved party may appeal any final judgment of the circuit court under this chapter to the Court of Appeals in accordance with the Kentucky Rules of Civil Procedure."). "It is beyond dispute that mandamus may not be used as a substitute for appeal." National Gypsum Co. v. Corns, 736 S.W.2d, 325, 326 (Ky. 1987) (citing Merrick v. Smith, 347 S.W.2d 537 (Ky. 1961)).

Revenue may, if it loses in whole or in part, simply appeal the jurisdictional decision of the McCracken Circuit Court on the merits. In Farmers National Bank of Danville v. Speckman, 312 Ky. 106, 109, 226 S.W.2d 315, 317 (1949), we held: "[i]t is not in every case where the inferior court is proceeding without jurisdiction that the writ will be granted, since usually there is an adequate remedy by appeal and this precludes the granting of the writ."

We also do not find this to be one of those "limited situations where the action for which the writ is sought would blatantly violate the law, for example, by breaching a tightly guarded privilege or by contradicting the clear requirements of a civil rule." The Independent Order of Foresters v. Chauvin, 175 S.W. 3d 610 (Ky. 2005).

CONCLUSION

As Revenue simply has not demonstrated that it is without an adequate remedy by appeal, we affirm the Court of Appeals' order denying Revenue extraordinary relief in the nature of a writ of prohibition or mandamus.

All concur.

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