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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: SEPTEMBER 18, 2014
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 10-9-14 E.M.A.

2013-SC-000624-MR

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

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2013-CA-000545-OA
BOYD CIRCUIT COURT NO. 13-CI-00209

HONORABLE DAVID HAGERMAN,
JUDGE, BOYD CIRCUIT COURT — APPELLEE

AND

OVWD, INC. (f/k/a OHIO VALLEY
WHOLESALE DISTRIBUTORS, INC.) — REAL PARTY IN INTEREST

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The Department of Revenue[1] appeals from an Order of the Court of Appeals denying the Department's Kentucky Rule of Civil Procedure (CR) 81 petition for a writ prohibiting the Boyd Circuit Court from exercising jurisdiction in a declaratory judgment action brought by the real party in interest, OVWD, Inc. The declaratory judgment action challenges the validity of certain cigarette-tax assessments. The Department also asked the Court of

[1] The Department is an agency within the Finance and Administration Cabinet. KRS 42.014. The Commonwealth (through the Attorney General) and both the Secretary of the Cabinet and the Commissioner of the Department have been named as party defendants in the underlying suit. For simplicity's sake, we shall refer to the appellants as the Department.

Appeals to mandate that the action be dismissed with prejudice and that the plaintiff be sanctioned. The Court of Appeals panel held, in effect, that the Department's petition is not ripe inasmuch as the Department has not yet sought relief in the trial court. The Department maintains that in the unusual circumstances of this case mere dismissal of the action by the trial court is not an adequate remedy and that the Court of Appeals therefore erred by denying extraordinary relief. Although we understand the Department's frustration, we agree with the Court of Appeals that the resort to CR 81 is premature.

RELEVANT FACTS

According to its pleadings, OVWD, Inc. (formerly known as Ohio Valley Wholesale Distributors, Inc.) is a Kentucky corporation with its principal place of business near Ashland, Kentucky. It is a licensed wholesaler of cigarettes and other products, both tobacco and non-tobacco. According to the Department, an audit in or about early 2011 revealed that OVWD had underpaid cigarette and other tobacco-product excise taxes to the tune of more than $8 million. The Department thereupon issued notices of tax due, which notices OVWD timely protested, in accord with Kentucky Revised Statute (KRS) 131.110(1) (allowing taxpayers a forty-five day protest period after notice of an assessment). Following what apparently were protracted negotiations, the Department ultimately advised OVWD that it rejected the company's protest. Before the Department could issue a final ruling, however (KRS 131.110(3) ("After considering the taxpayer's protest . . . the department shall issue a final ruling on any matter still in controversy.")), OVWD, on March 4, 2013, brought

suit in the Boyd Circuit Court seeking a declaration that the taxes demanded by the Department had been assessed illegally, in contravention of the cigarette-tax statute (KRS 138.140), and in violation of both the state and the federal constitutions.

The Department was annoyed by what it deemed a frivolously premature lawsuit, a lawsuit filed before OVWD had exhausted its administrative remedies. *See* KRS 131.110(5) ("After a final ruling has been issued, the taxpayer may appeal to the Kentucky Board of Tax Appeals pursuant to the provisions of KRS 131.340.").[2] Thus, the Department, on March 22, 2013, apparently before it answered the complaint or moved for CR 12 relief, petitioned the Court of Appeals not only for a writ mandating dismissal of OVWD's complaint, but also for "a Published Order . . . reaffirming the longstanding body of law which requires the exhaustion of administrative remedies," as well as "an Order noting and sanctioning the impropriety of **intentionally** ignoring" the exhaustion-of-remedies requirement. Such relief is called for in this case, the Department maintains, because, according to the

[2] As the Department correctly notes, the general rule is that a taxpayer challenging an assessment must exhaust administrative remedies as a prerequisite to proceeding in court. *Revenue Cabinet v. Gillig,* 957 S.W.2d 206, 211 (Ky. 1997) (noting the KRS 131.110 protest and appeal provisions and reaffirming "the well established requirement that a taxpayer must exhaust his administrative remedies before resorting to the courts."); *Popplewell's Alligator Dock No. 1, Inc. v. Revenue Cabinet,* 133 S.W.3d 456, 472 (Ky. 2004) (upholding the trial court's dismissal of taxpayer's declaratory judgment action where administrative remedies had not been exhausted and noting that the failure to exhaust administrative remedies could "deprive[] the . . . Circuit Court of subject-matter jurisdiction."). Not surprisingly, however, there are exceptions to this general rule, and OVWD claims that its otherwise premature complaint is justified by one of them. As explained below, this dispute is not presently before us.

Department, the law firm representing OVWD has repeatedly filed declaratory judgment actions in tax cases knowing full well that the taxpayer-client was obliged first to bring his objections before the Kentucky Board of Tax Appeals. Complaining that "Department of Revenue personnel should not have to *continuously* draft and file motions to dismiss frivolous complaints," the Department sought the "extraordinary" relief noted, as well as an award of attorney's fees and costs.

Observing that "the trial court has not been given an opportunity to rule on any of the issues presented in this case," and that, by proceeding through the trial court, the Department "has adequate remedies tailored to each of it arguments," the Court of Appeals panel ruled that the Department had not proffered grounds justifying appellate court interference with the ordinary trial and appellate processes. The Department now complains that the Court of Appeals "simply missed the point in this case," the point being, according to the Department, that mere dismissal of the frivolous case by the circuit court "does nothing to stop the frivolous complaint from being filed in the first place." For that, the Department urges, what is needed is a ruling by an appellate court, a court "with state-wide jurisdiction." The Department does not say exactly how an appellate court might "solve the problem" of "frivolous" taxpayer declaratory judgment actions, but it suggests something along the lines of imposing an automatic sanction—statewide—any time a taxpayer's suit is dismissed because of a failure to exhaust administrative remedies. We agree

with the Court of Appeals, however, that CR 81 does not authorize the relief the Department seeks, and accordingly we affirm that court's Order.

ANALYSIS

At least as well settled as the general rule requiring the exhaustion of administrative remedies, is this Court's "cautious approach to writ proceedings," and the "strict set of requirements" we have adopted for issuing a writ. *Ridgeway Nursing & Rehab. Facility, LLC v. Lane,* 415 S.W.3d 635, 639 (Ky. 2013) (citing *Hoskins v. Maricle,* 150 S.W.3d 1 (Ky. 2004)). Under our rules, writs of mandamus and prohibition are extraordinary remedies and will not be issued unless the petitioner establishes either (1) that the trial court is proceeding or is about to proceed outside its jurisdiction and relief is not available in an intermediate court, or (2) that the trial court is proceeding or is about to proceed erroneously, although within its jurisdiction; that there exists no adequate remedy by appeal or otherwise; and that, if the error is not immediately corrected, either the petitioner will suffer "great injustice and irreparable injury" or a substantial miscarriage of justice will result from the disruption of "orderly judicial administration." *Ridgeway,* 415 S.W.3d at 639-40.

The Department asserts that the trial court should be prohibited from proceeding and mandated to dismiss OVWD's complaint either because, under the first prong of our standard, until OVWD exhausts its administrative remedies the trial court does not have subject matter jurisdiction, or because, under the second prong, the Department has sovereign immunity from OVWD's

suit making it irremediably erroneous for the trial court to subject the Department to further proceedings. As the Court of Appeals noted, however, the problem with the Department's assertion is that, as the matter currently stands, it cannot be said that the trial court has either proceeded or threatened to proceed at all, much less without jurisdiction or erroneously. In short, the trial court has done nothing.

Even if it is ultimately determined that the trial court lacks subject matter jurisdiction, that court has jurisdiction to consider the jurisdictional question. *Sharp v. Waddill,* 371 S.W.2d 14, 15 (Ky. 1963) ("[T]he court has jurisdiction to determine [a] jurisdictional fact."); *United States v. United Mine Workers of Am.,* 330 U.S. 258, 290 (1947) ("[T]he District Court unquestionably had the power to issue a restraining order for the purpose of preserving existing conditions pending a decision upon its own jurisdiction."); *Bush v. United States,* 717 F.3d 920, 928 (Fed. Cir. 2013) ("A court always has jurisdiction to determine whether it has jurisdiction."). If asked, the Boyd Circuit Court may well answer that question in the Department's favor. Likewise, if given the chance, the trial court could find the Department immune to OVWD's suit. The Court of Appeals correctly declined the Department's invitation to rule on those questions in the first instance, such preemptive action being no more the appellate court's role under CR 81 than under the rules governing ordinary appeals.

CR 81, rather, authorizes an appellate court to review claims of interlocutory error in those rare instances when there is no provision for an

interlocutory appeal and finality review in the ordinary course will not adequately vindicate the interest the petitioner is asserting. It does not authorize either the petitioner or the appellate court simply to cut the trial court out of the picture, as the Department has attempted to do here, and to put the appellate court in its place. *Lee v. George,* 369 S.W.3d 29, 34 (Ky. 2012) ("[A]s we have noted time and again, the extraordinary writs are no substitute for the ordinary appellate process, and the interference with the lower courts required by such a remedy is to be avoided whenever possible."). Since at this point the Department is in no position to say that it has been aggrieved by anything the trial court has done or is about to do, its petition for CR 81 relief is unripe and was properly denied by the Court of Appeals.

Against this conclusion, the Department insists that it need not wait to be aggrieved by the trial court since it has already been aggrieved by the mere filing of OVWD's "frivolous" complaint, and has so repeatedly been aggrieved by the filing of other such complaints that only an appellate court can provide a genuine, comprehensive remedy. Courts, however, unlike agencies such as the Department, generally do not engage in the sort of rule making the Department seems to envision. Courts decide cases one at a time, and they do so not on the basis of one of the parties' allegations, but only after having considered evidence by all sides. We agree with the Court of Appeals that to the extent the Department's concerns are justiciable at all, they appear to be amenable to the ordinary processes of litigation.

In this case, for example, if the Department believes, as clearly it does, that OVWD's complaint is not well-grounded in fact or is not warranted by existing law or a good faith argument to extend, modify, or reverse that law, but was instead filed for an improper purpose, such as harassment, delay, or the needless increase of the litigation's cost, then, as the Department itself observes, CR 11 provides the Department with an avenue for seeking relief—a motion for sanctions—and accords the trial court broad discretion to award such relief, including the attorney fee-shifting the Department claims is due.

The Department worries that the very finding that would underpin a Rule 11 sanction, a finding that the trial court lacked subject matter jurisdiction because the complainant had failed to exhaust administrative remedies, would, ironically, rob the trial court of its authority to impose the sanction. In that way, the Department contends, frivolous complaints can (again and again) be filed and dismissed while an abusive practice evades ordinary appellate review. Although understandable, the Department's concern is not well-founded. Assuming that the CR 11 motion is timely filed before the complaint is dismissed, the trial court's jurisdiction to address the alleged rule violation survives a determination that jurisdiction over the subject matter of the complaint is lacking. As the United States Supreme Court has explained with reference to the very similar federal Rule 11, a court

> may consider collateral issues after an action is no longer pending . . . [An] imposition of a Rule 11 sanction is not a judgment on the merits of an action. Rather, it requires the determination of a collateral issue: whether the attorney has abused the judicial process, and, if so, what sanction would be appropriate.

Willy v. Coastal Corporation, 503 U.S. 131, 138 (1992) (*quoting Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 395-96 (1990)); and *see, Citizens For A Better Env't v. Steel Co.,* 230 F.3d 923, (7th Cir. 2000) (noting in discussion of Rule 11 and other fee and cost-shifting provisions that, "[m]alicious prosecution and abuse of process are very old torts that reflect a defendant's entitlement to be made whole following wrongful litigation—including litigation so baseless that it does not even come within the jurisdiction of the court in which it was filed.").

It is clear then, as the Court of Appeals observed, that all of the substantive relief the Department seeks is available in the trial court—dismissal of the assertedly baseless complaint and sanctions against OVWD and/or its counsel for having filed it. Should the circuit court deny this relief, *then* the Department would be entitled to appellate review: a writ action, as explained above, for the contention that the trial court was wrongfully asserting subject matter jurisdiction; an interlocutory appeal if the trial court did not agree with the Department's assertion of sovereign immunity, *Breathitt Cnty. Bd. of Educ. v. Prater,* 292 S.W.3d 883 (Ky. 2009); or an ordinary appeal to protest the denial of a sanction or the award of an inadequate one. *Clark Equip. Co. v. Bowman,* 762 S.W.2d 417 (Ky. App. 1988). Consolidation of these matters would likely be possible if the Department sought to pursue more than one of them. The Department finds it irksome to have to prove its entitlement to such relief in each particular taxpayer case, but we have repeatedly held that a remedy is not inadequate for CR 81 purposes merely because it entails

costs and inconvenience. *Lee v. George,* 369 S.W.3d at 33-34. The Department's status as a state agency does not exempt it from this holding. *Commonwealth v. Shepherd,* 366 S.W.3d 1 (Ky. 2012).

Indeed, the taxpayers involved in these cases no doubt find the Department's assessments "irksome." They are not, to be sure, entitled, for that or for any other reason, to interpose baseless obstacles to the enforcement of the Department's orders, but they are entitled to have the alleged "frivolousness" of their objections individually considered. Only in this way, through orderly trial court proceedings where evidence can be heard, legal arguments formulated, and records established, and then through appellate review of alleged errors, is it possible for courts to arrive at anything like the rule the Department would have us concoct in this case. The Court of Appeals correctly rejected the Department's attempt to circumvent the ordinary judicial process.

CONCLUSION

In sum, extraordinary relief is not available when ordinary relief will do. The ordinary relief available to the Department in the trial court affords it adequate protection against "frivolous" law suits and thus precludes its claim for an extraordinary appellate-court "fix" of that alleged problem. The Court of Appeals correctly so held, and accordingly we hereby affirm its Order.

All sitting. All concur.

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