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HEADNOTES

Mandamus and Prohibition – Authority and Jurisdiction

The FSM Supreme Court trial division has the authority to issue writs of mandamus and prohibition as they may be necessary for the due administration of justice because the Supreme Court and each division thereof has power to issue all writs and other process not inconsistent with law or with the rules of procedure and evidence established by the Chief Justice, as may be necessary for the due administration of justice. GMP Hawaii, Inc. v. Ikosia, 19 FSM R. 285, 288 (App. 2014).

Mandamus and Prohibition – Authority and Jurisdiction

Since a writ of mandamus issues from a higher tribunal to an inferior tribunal, the trial division may issue a writ of mandamus to compel a public official to perform a duty ministerial in nature and not subject to the official's own discretion. GMP Hawaii, Inc. v. Ikosia, 19 FSM R. 285, 288 (App. 2014).

Mandamus and Prohibition – Authority and Jurisdiction

An appellate court considers whether a lower court also has original jurisdiction to issue mandamus with the appellate court. GMP Hawaii, Inc. v. Ikosia, 19 FSM R. 285, 288 (App. 2014).

Mandamus and Prohibition – Authority and Jurisdiction

The FSM Supreme Court trial division is a tribunal superior to an FSM administrative agency. It has original jurisdiction over writs of mandamus directed to administrative agencies, and may in an appropriate case issue a writ of mandamus directed to the Secretary of Finance and Administration. GMP Hawaii, Inc. v. Ikosia, 19 FSM R. 285, 288 (App. 2014).

Mandamus and Prohibition – Authority and Jurisdiction

The FSM Supreme Court appellate and trial divisions have concurrent original jurisdiction to issue writs of mandamus directed to administrative agencies. Though courts of last resort are given original jurisdiction to issue writs of mandamus it does not follow that such courts whose principal function is to exercise appellate or supervisory jurisdiction, will assume original jurisdiction in all cases in which their aid may be sought and which otherwise may be a proper case for the use of the remedy. When concurrent original jurisdiction exists, the petitioner ought to show why it is essential or proper that the writ issue from the appellate court rather than from the lower court, and in the absence of such a showing the appellate court may refuse to issue the writ. GMP Hawaii, Inc. v. Ikosia, 19 FSM R. 285, 288-89 (App. 2014).

Mandamus and Prohibition – Authority and Jurisdiction

Although the FSM Supreme Court appellate division and the trial division have concurrent original jurisdiction over the issuance of a writ of mandamus directed to FSM administrative agencies, absent special circumstances, the writ should be sought first in the trial division and any petition for the writ filed in the appellate division should be dismissed without prejudice to any future filing in the trial division. GMP Hawaii, Inc. v. Ikosia, 19 FSM R. 285, 289 (App. 2014).

Mandamus and Prohibition – Procedure

The FSM Supreme Court appellate division may, in the interest of judicial economy, determine if a petition for a writ of mandamus that should have been filed in the trial division clearly should not be granted. If it is of the opinion that the writ clearly should not be granted, it will deny the petition, but if there is any doubt, it will dismiss the petition without prejudice so that the petitioner could file in the trial division. GMP Hawaii, Inc. v. Ikosia, 19 FSM R. 285, 289 (App. 2014).

Mandamus and Prohibition – Procedure

The party seeking a writ of mandamus has the burden of showing that its right to issuance of the writ is clear and indisputable. GMP Hawaii, Inc. v. Ikosia, 19 FSM R. 285, 289 (App. 2014).

Mandamus and Prohibition – When May Issue

A petition for a writ of mandamus clearly should not be granted when a factual record will need to be developed and questions of fact are best determined in the trial division; when the voluntary payment rule may bar the recovery of taxes; when the FSM may also be able to prove statute of limitations defenses for some or all of the tax payments; when the petitioner has appealed the Secretary's denial of the relief sought and that appeal should afford it a plain, speedy, and adequate remedy and a forum in which it may prove its right to relief and the extent of that relief; and because a writ of prohibition is an extraordinary writ and cannot be issued when there is a plain, speedy, and adequate remedy otherwise available that has not been exhausted. GMP Hawaii, Inc. v. Ikosia, 19 FSM R. 285, 289 (App. 2014).

Taxation – Recovery of Taxes

Under the voluntary payment rule, illegal taxes cannot be recovered unless they were paid under duress and under protest. GMP Hawaii, Inc. v. Ikosia, 19 FSM R. 285, 289 (App. 2014).

Mandamus and Prohibition – Authority and Jurisdiction

Normally a petition for a writ of mandamus filed in the appellate division when the trial division has concurrent original jurisdiction should be dismissed without prejudice to a future petition filed in the trial division, but when it is obvious that the writ clearly should not be granted, the appellate division can deny it. GMP Hawaii, Inc. v. Ikosia, 19 FSM R. 285, 290 (App. 2014).

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COURT'S OPINION

PER CURIAM:

This petition for a writ of mandamus arises from the Secretary of Finance and Administration Kensley Ikosia's denial of GMP Hawaii, Inc.'s claim that it qualified as a "foreign contractor" under 55 F.S.M.C. 113(5)(g) and was thus exempt from FSM gross revenue taxes. GMP Hawaii, Inc. ("GMP") seeks a writ that orders the Secretary to declare it an exempt foreign contractor, to release \$320,595.53 to it, and to refund earlier taxes it voluntarily paid. We deny the petition. The reasons follow.

I. BACKGROUND

GMP Hawaii, Inc. had been contracted to perform certain work on the Airport Improvement Program predominately funded by a United States agency grant. GMP voluntarily paid gross revenue taxes for some of the years it worked on the FSM airport projects. The FSM Customs and Tax Administration served on GMP a preliminary notice of tax assessment (July 25, 2012) and when GMP did not respond, it then served a notice of final assessment (Sept. 5, 2012), and then a notice of demand for final tax payment (Oct. 16, 2012), and a notice of levy and execution (Dec. 5, 2012), after which it seized \$26,026.79 in a GMP bank account and withheld checks totaling \$294,578.79 due GMP.

On December 21, 2012, GMP responded and asserted that it was exempt from FSM gross revenue taxes under a Compact of Free Association subsidiary agreement between the FSM and the

U.S. and under Title 55, section 113(5)(g) of the FSM Code. GMP sought a declaration from the FSM Department of Finance and Administration that it was exempt from taxation and a refund of the taxes it had already paid. GMP asked for an administrative hearing. The Customs and Tax Administration forwarded that request to the Secretary of Finance and Administration. The Secretary held a hearing on November 15, 2013. On December 4, 2013, he issued his Finding and Decision denying GMP any relief and concluding that GMP had not met its burden of proof to show that it qualified for a tax exemption. On December 20, 2013, GMP filed, in the FSM Supreme Court trial division, its appeal from the Secretary's decision.

On December 30, 2013, GMP filed its Petition for a Writ of Mandamus in the FSM Supreme Court appellate division seeking an order that the seized funds be released to it and that it be declared tax exempt. On January 27, 2014, the Chief Justice issued an order that asked GMP to file a memorandum on whether the FSM Supreme Court appellate division has jurisdiction over this petition or whether its petition should have first been filed in the trial division. GMP filed its memorandum on February 7, 2014.

II. WHETHER WRIT SHOULD HAVE BEEN SOUGHT IN THE TRIAL DIVISION

GMP contends that we have jurisdiction over this petition for a writ of mandamus because the appellate division has the authority to issue writs of mandamus. It asserts that 4 F.S.M.C. 117 affirms the appellate division's inherent constitutional power to issue a writ of mandamus in this case because it is necessary for the due administration of justice. We never doubted our power to issue writs of mandamus in appropriate cases. The question we posed was whether GMP should have first sought the writ from the trial division instead of proceeding directly to the appellate division.

The trial division has the authority to issue writs of mandamus and prohibition as they may be necessary for the due administration of justice. "The Supreme Court and each division thereof shall have power to issue all writs and other process . . . not inconsistent with law or with the rules of procedure and evidence established by the Chief Justice, as may be necessary for the due administration of justice" 4 F.S.M.C. 117. The trial division may issue a writ of mandamus to compel a public official to perform a duty ministerial in nature and not subject to the official's own discretion. Nix v. Ehmes, 1 FSM Intrm. 114, 118 (Pon. 1982). A writ of mandamus issues from a higher tribunal to an inferior tribunal. See Berman v. FSM Supreme Court (II), 7 FSM Intrm. 8, 10 (App. 1995) (writ of mandamus must be directed to a tribunal inferior in rank to the one issuing the writ).

"Whether a lower court also has original jurisdiction to issue mandamus with the appellate court is considered by the appellate court." 52 AM. JUR. 2D *Mandamus* § 29 (rev. ed. 2000). The FSM Supreme Court trial division is a tribunal superior to an FSM administrative agency. It has original jurisdiction over writs of mandamus directed to administrative agencies, and may in an appropriate case issue a writ of mandamus directed to the Secretary of Finance and Administration. 4 F.S.M.C. 117. The FSM Supreme Court appellate and trial divisions thus have concurrent original jurisdiction to issue writs of mandamus directed to administrative agencies.

"Though . . . courts of last resort are given original jurisdiction to issue writs of mandamus . . . it does not follow that such courts whose principal function is to exercise appellate or supervisory jurisdiction, will assume original jurisdiction in all cases in which their aid may be sought and which otherwise may be a proper case for the use of the remedy."

State ex rel. Malmo v. Case, 169 P.2d 623, 625, 165 A.L.R. 1426, 1429 (Wash. 1946) (quoting State ex rel. Ottesen v. Clausen, 214 P. 635, 635 (Wash. 1923)). When concurrent original jurisdiction

exists, the petitioner ought to "show why it is essential or proper that the writ issue from the appellate court rather than from the lower court, and in the absence of such a showing the appellate court may refuse to issue the writ." 52 AM. JUR. 2D *Mandamus* § 29 (rev. ed. 2000) (footnote omitted).

In Urusemal v. Capelle, 12 FSM Intrm. 577, 582-83 (App. 2004), the President filed a petition for a writ of prohibition directly in the appellate division just as GMP has filed a petition for a writ of mandamus directly in the appellate division. In determining whether we had jurisdiction to entertain the petition for a writ, we recounted the history of direct appeals to the appellate division and determined that direct access to the appellate division when the trial division had concurrent original jurisdiction was permitted only in cases of great national importance and extreme time sensitivity such as the Urusemal petition. Urusemal, 12 FSM Intrm. at 582-83.

In Moroni v. Secretary of Resources & Development, 6 FSM Intrm. 137, 138-39 (App. 1993), we held that judicial review of agency actions must first be sought in the trial division unless a specific statute provided otherwise. Neither GMP's petition nor its memorandum identifies a statute that provides otherwise. While in Moroni, we dealt with an attempted direct appeal from an agency decision by a cabinet secretary, this case involves a petition for a writ of mandamus directed to a cabinet secretary. That difference is insufficient reason for us to take up this matter.

We therefore conclude that this petition for a writ of mandamus should have been filed in the trial division, as the next higher tribunal, not in the appellate division. When the FSM Supreme Court appellate division and the trial division have concurrent original jurisdiction over the issuance of a writ of mandamus directed to FSM administrative agencies, absent special circumstances, the writ should be sought first in the trial division and any petition for the writ filed in the appellate division should be dismissed without prejudice to any future filing in the trial division.

III. WHETHER WRIT SHOULD ISSUE

Nevertheless, in the interest of judicial economy we will also determine if this petition clearly should not be granted. If we are "of the opinion that the writ clearly should not be granted," we will deny the petition. FSM App. R. 21(b). If there was any doubt, we would dismiss the petition without prejudice so that GMP could file a petition in the trial division, Pohnpei venue. However, we conclude that the petition clearly should not be granted and therefore deny it. Our reasons follow.

The party seeking a writ of mandamus has the burden of showing that its right to issuance of the writ is clear and indisputable. Etscheit v. Amaraich, 14 FSM Intrm. 597, 600 (App. 2007); Federated Shipping Co. v. Trial Division, 9 FSM Intrm. 270, 273 (App. 1999); Ting Hong Oceanic Enterprises v. Supreme Court, 8 FSM Intrm. 1, 4 (App. 1997); Senda v. Trial Division, 6 FSM Intrm. 336, 338 (App. 1994). It is not apparent from what is before us that GMP's right to relief is indisputable.

A factual record will need to be developed. The Secretary's December 4, 2013 Finding and Decision states that it is unclear whether two of the necessary four requirements existed for GMP to qualify as an exempt foreign contractor under 55 F.S.M.C. 113(5)(g). In re GMP Hawaii Inc., Finding and Decision at 5-6 (Dec. 4, 2013). GMP, in its appeal, may be able to prove that it can satisfy those two requirements and thus qualify as exempt under 55 F.S.M.C. 113(5)(g).

GMP states that it voluntarily paid some taxes in the past. GMP's previously paid taxes and the later assessed and levied taxes may be treated differently and not recoverable because of the voluntary payment rule that illegal taxes cannot be recovered unless they were paid under duress and under protest. See Chuuk Chamber of Commerce v. Weno, 8 FSM Intrm. 122, 125-26 (Chk. 1997), *aff'd*

sub nom., Weno v. Stinnett, 9 FSM Intrm. 200, 211 (App. 1999). The FSM may also be able to prove statute of limitations defenses for some or all of the tax payments.

GMP has appealed the Secretary’s denial of relief. That appeal should afford it a plain, speedy, and adequate remedy and a forum in which it may prove its right to relief and the extent of that relief. Questions of fact are best determined in the trial division. A writ of prohibition is an extraordinary writ and cannot be issued when there is a plain, speedy, and adequate remedy otherwise available that has not been exhausted. Berman (I), 7 FSM Intrm. at 10. Such a remedy is available. GMP’s petition clearly should not be granted.

IV. CONCLUSION

Although normally a petition for a writ of mandamus filed in the appellate division when the trial division has concurrent original jurisdiction should be dismissed without prejudice to a future petition filed in the trial division, when it is obvious that the writ clearly should not be granted, the appellate division can deny it.

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FSM SUPREME COURT TRIAL DIVISION

EOT MUNICIPALITY, ETTAL MUNICIPALITY,)	CIVIL ACTION NO. 2012-1024
FANANOU MUNICIPALITY, FANAPANGAS)	
MUNICIPALITY, LUKINOCHE MUNICIPALITY, MOCH)	
MUNICIPALITY, NOMWIN MUNICIPALITY, PAREM)	
MUNICIPALITY, RUO MUNICIPALITY, SATOWAN)	
MUNICIPALITY, TAMATAM MUNICIPALITY, and)	
UDOT MUNICIPALITY,)	
)	
Plaintiffs,)	
)	
vs.)	
)	
JOHNSON ELIMO, in his capacity as Governor of)	
Chuuk State, CHUUK STATE, and FEDERATED)	
STATES OF MICRONESIA,)	
)	
Defendants.)	
)	
-----)	
FEDERATED STATES OF MICRONESIA,)	
)	
Cross-Claimant/)	
Counter-Cross-Defendant,)	
)	
vs.)	
)	
STATE OF CHUUK,)	
)	
Cross-Defendant/)	
Counter-Cross-Claimant.)	
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