BEFORE THE COURT OF TAX APPEALS
STATE OF KANSAS

IN THE MATTER OF THE APPEAL OF BURCH, IAN A. FROM AN ORDER OF THE DIVISION OF TAXATION ON ASSESSMENT OF CONTROLLED SUBSTANCES TAX	Docket No. 2005-5738-DT

ORDER GRANTING KANSAS DEPARTMENT OF REVENUE'S MOTION FOR SUMMARY JUDGMENT

COMES NOW this matter before the Court of Tax Appeals of the State of Kansas on a motion for summary judgment filed by the Kansas Department of Revenue (the "Department"). This tax appeal involves an assessment imposed by the Department pursuant to the marijuana and controlled substances tax act (K.S.A. 79-5201 *et seq.* (1997 & Supp. 2008)), commonly referred to as the "drug tax."

ORDERED AND ADJUDGED that the Department's motion for summary judgment is granted in full for the reasons set forth herein.

I.
Procedural Background

The taxpayer, Ian A. Burch, appealed from a final determination of the Secretary of Revenue's designee, dated June 30, 2005, which upheld a drug tax assessment issued against Mr. Burch consisting of tax and penalties totaling $17,761. In reaching its final determination, the Department considered certain evidence that had been suppressed in an earlier criminal proceeding in Trego County District Court. In the criminal case, the district court suppressed the evidence after finding that the investigating officer's entry into Mr. Burch's motor home was an illegal search under the Fourth Amendment to the U.S. Constitution.

On December 4, 2006, Mr. Burch filed a motion for summary judgment, asserting that the evidence suppressed in the criminal case should likewise be suppressed by this administrative tax tribunal and that the Department's assessment should be dismissed, as a matter of law, for lack of evidentiary support. The Department did not, at that time, file a cross motion for summary judgment. On February 7, 2007, this court issued an order denying Mr. Burch's motion for summary judgment.

On April 14, 2008, the Department filed the instant motion for summary judgment. Jurisdiction is proper pursuant to K.S.A. 2008 Supp. 74-2438. We shall apply K.S.A. 2008 Supp. 60-256 and Kansas Supreme Court Rule 141 in deciding this motion. *See* K.A.R. 94-2-8 (authorized by and implementing K.S.A. 2008 Supp. 74-2437).

II.
Summary Judgment Standards

Summary judgment is appropriate where the "pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." K.S.A. 2008 Supp. 60-256(c).

The purpose of summary judgment is to eliminate delay in legal disposition where there is no real issue of material fact. *Timi v. Prescott State Bank,* 220 Kan. 377, 386, 553 P.2d 315, 323 (1976). Summary judgment is nonetheless a drastic remedy. The movant has the burden of demonstrating that there are no genuine questions of material fact and that he is entitled to judgment as a matter of law, which is a strict burden. *See Saliba v. Union Pacific R.R.*, 264 Kan. 128, 131, 955 P.2d 1189, 1192 (1998).

The facts averred by the moving party in a motion for summary judgment must be matters admissible in evidence. K.S.A. 2008 Supp. 60-256(e). The party opposing summary judgment must respond with specific evidence to demonstrate that a genuine issue of material fact remains for trial. *See id.* The opposition evidence must be probative of the non-movant's position on a material fact. *See Hare v. Wendler*, 263 Kan. 434, 444, 949 P.2d 1141, 1148 (1997). A fact might be disputed, but if it does not affect the legal outcome of the controlling issues, the fact is not a material fact. *See Stone v. City of Kiowa*, 263 Kan. 502, 509, 950 P.2d 1305, 1310 (1997).

III.
Kansas Drug Tax Statutes

The drug tax is imposed pursuant to K.S.A. 79-5201 *et seq* (1997 & Supp. 2008). The tax is due and payable immediately upon acquisition or possession in this state by a dealer. K.S.A. 79-5204(d) (1997). The definition of "dealer" is statutory and is based on the amount of narcotics acquired or possessed. *See* K.S.A. 79-5201(c) (1997).

The procedural framework for Kansas drug tax assessments is well defined by statute. The director of taxation may "immediately assess a tax based on personal knowledge or information available to the director of taxation." K.S.A. 2008 Supp. 79-5205(a). In making its assessment, the Department "may consider but shall not be bound by a plea agreement or judicial determination made in any criminal case." K.S.A. 2008 Supp. 79-5205(c). Upon proper service and notice of the assessment, the director may "immediately collect the tax, penalties and interest" following procedures prescribed by law. K.S.A. 2008 Supp. 79-5205(a).

A drug tax assessment by the director is "presumed to be valid and correctly determined and assessed," and the burden falls upon the taxpayer to show the incorrectness or invalidity of the assessment. K.S.A. 2008 Supp. 79-5205(b). The statute also states as follows:

> Any statement filed by the director of taxation with the court or any other certificate by the director of taxation of the amount of tax, penalties and interest determined or assessed is admissible in evidence and is prima facie evidence of the facts it contains.

Id. The director of taxation is authorized to issue warrants for immediate collection of drug tax assessments. K.S.A. 2008 Supp. 79-5212(a).

IV.
Uncontroverted Facts and Contentions

The Department sets out in its lead brief five statements of fact which it claims are uncontrovered. The factual statements are contained in separate, numbered paragraphs and are accompanied by references to the record in accordance with Supreme Court Rule 141(a). The Department's statements of fact chronicle the procedure the Department followed in receiving information from law enforcement officials and then issuing the drug tax assessment and warrant against Mr. Burch.

In his reponsive brief, Mr. Burch asserts that the Department's first and second statements of fact are controverted because the evidence set forth in those statements was suppressed in a related criminal case and, for that reason, cannot be considered in this civil tax matter.[1] Mr. Burch does not controvert the balance of the Department's factual statements. He does, however, offer fourteen additional

[1] The two factual statements that Mr. Burch attempts to controvert involve communications between the Kansas Highway Patrolman who allegedly found the controlled substances and an enforcement agent with the Kansas Department of Revenue.

affirmative statements of fact. These statements are accompanied by citations to a transcript of the criminal hearing in which the evidence was suppressed. The fourteen statements averred by Mr. Burch summarize testimony given by the investigating patrolman concerning the stop and search that gave rise to the subject drug tax assessment. The Department does not dispute any of these additional facts asserted by Mr. Burch.

All factual statements set out by the parties, except the Department's first two statements, have been admitted either affirmatively or by lack of response. Mr. Burch's only responses are objections to the admissibility of the Department's first two statements of fact; yet Mr. Burch makes no attempt to rebut the Department's facts with countervailing facts. We therefore find that none of the facts averred by either party has been controverted pursuant to K.S.A. 2008 Supp. 60-256(e).

V.
Conclusions of Law

In view of the posture taken by the parties in the papers filed with this court, the question presented is narrow and relatively straightforward. Based on the facts and contentions set forth in Mr. Burch's brief – which address only the suppression of evidence in a related criminal case under the so-called "exclusionary rule" – has Mr. Burch come forward with sufficient proof to create a triable issue of material fact in this civil tax matter?

We acknowledge that summary judgment is a drastic remedy and should not be used to "prevent the necessary examination of conflicting testimony and credibility in the crucible of a trial." *See Mastin v. Kansas Power & Light Co.*, 10 Kan. App. 2d 620, 624, 706 P.2d 476, 479 (Kan. Ct. App. 1985). Nevertheless, based on the uncontroverted facts and controlling law, we find no reason to delay our disposition of this case.

Mr. Burch's only response to the Department's motion for summary judgment is that certain evidence relied on by the Department in issuing its assessment and warrant had been suppressed in an earlier criminal proceeding. Consequently, Mr. Burch argues, all facts put forth by the Department in support of its motion for summary judgment are either inadmissible in this civil tax matter or, at the very least, subject to further examination through an evidentiary hearing.

The Department's contra position is that it is not relying on the allegedly tainted evidence in support of its motion for summary judgment. According to the Department, even if the evidence could be suppressed in this civil tax matter, the Department still would be entitled to complete summary judgment.

In effect, the Department argues that it is entitled to summary judgment based on the uncontroverted facts because it has established a *prima facie* case for the assessment, not by means of the evidence that was suppressed in the related criminal case but, rather, by operation of law. The Department notes that statements filed by the director of taxation are "admissible in evidence" (not mere allegations) and are in fact "prima facie evidence" of the facts contained therein. *See* K.S.A. 2008 Supp. 79-5205(b). Moreover, the Department notes that the Kansas Legislature has established a presumption of validity and correctness in favor of the Department in drug tax cases and that the burden is on the taxpayer to demonstrate that the drug tax assessment is invalid and incorrect. The statutes are silent on the topic of how the exclusionary rule may be applied, if at all, in Kansas drug tax cases.

The exclusionary rule is a judicially created remedy designed to deter government officials from engaging in unconstitutional conduct. *See Martin v. Kansas Department of Revenue*, 285 Kan. 625, 640, 176 P.3d 938, 949 (2008). The rule is remedial and is designed to safeguard Fourth Amendment rights; however, it is not mandated by the Constitution itself. *See id.* "A Fourth Amendment violation is 'fully accomplished' by an illegal search or seizure, and no exclusion of evidence from a judicial or administrative proceeding can 'cure the invasion of the defendant's rights which he has already suffered.'" *Id.* (quoting *United States v. Leon*, 468 U.S. 897, 906 (1984)).

The Fourth Amendment does not preclude consideration of evidence obtained in violation of its mandates. *Id.* Thus it must follow that legislative bodies are empowered to limit – and even to abrogate – application of the exclusionary rule, particularly in civil matters. *C.f. Martin*, 285 Kan. at 632, 176 P.3d at 945 (holding that procedural due process did not require agency review of search and seizure issues in administrative drivers license suspension proceeding).

Based on the principles discussed above, we find that the Kansas drug tax act reflects an intent by our legislature to limit the scope and applicability of the exclusionary rule in civil drug tax cases, at least as the rule applies to the quantum of proof necessary for the Department to establish, *prima facie*, the validity and correctness of its assessment. The drug tax act delineates detailed notice and assessment procedures and establishes a strict evidentiary burden in favor of the Department and against the taxpayer. These precepts have been set out unambiguously by our legislature without limitation or condition.

This is not a criminal case, and criminal penalties are not involved. *See State v. Matson*, 14 Kan. App. 2d 632, 640, 798 P.2d 488, 495 (Kan. Ct. App. 1990) (Although the primary purpose of Kansas drug tax is to combat illicit drug use, revenue collection also is an objective of the tax.) While in criminal drug

prosecutions there are strong presumptions and evidentiary burdens that weigh heavily against the government, these constitutional imperatives do not apply to civil drug tax matters in Kansas.

In criminal drug prosecutions, the government must overcome the heavy presumption of innocence; in Kansas drug tax matters, the government benefits from a presumption of validity and correctness. In criminal drug prosecutions, the government bears the burden of proof beyond a reasonable doubt and must rebut the presumption of innocence with sufficient competent evidence; in Kansas drug tax matters, the burden falls on the taxpayer to disprove the assessment. Finally, in criminal drug prosecutions, the evidence required for the government to make out its case is considerable; in civil drug tax matters, a mere statement or other certification "filed by the director of taxation . . . of the amount of tax, penalties and interest determined or assessed . . . is prima facie evidence of the facts it contains." K.S.A. 2008 Supp. 79-5205(b). *Prima facie* evidence is evidence that, if unexplained or uncontradicted, is sufficient to sustain a judgment in favor of the issue it supports. *Van Brunt v. Jackson*, 212 Kan. 621, 623, 512 P.2d 517, 520 (Kan. 1973).

Upon consideration of the evidence and contentions of the parties, we find the Department has established a *prima facie* case through the official statements of the director of taxation and by operation of the statutory presumption of validity and correctness. Mr. Burch has failed, in turn, to come forward with evidence to raise a genuine issue of material fact. While Mr. Burch has offered assertions that might give rise to a dispute regarding the applicability of the exclusionary rule in this civil context, that dispute does not go to the predicate facts of the matter, *i.e.*, the tax assessment itself. Moreover, in his responsive brief, Mr. Burch does not even attempt to rebut the statutory presumption of validity and correctness in favor of the Department.

In order to have any basis for proceeding to trial in this case, we first would have to find legal authority to look behind the Department's assessment and reject the director's official statements as *prima facie* evidence, notwithstanding the clear procedural and evidentiary rules set forth in K.S.A. 2008 Supp. 79-5205(b). As an administrative tribunal, our authority is limited to that which is conferred by statute. *See Salina Airport Authority v. Board of Tax Appeals*, 13 Kan. App. 2d 80, 87, 761 P.2d 1261, 1266 (Kan. Ct. App. 1988) (holding that the Court of Tax Appeals has no general or common law powers but only that authority given it, expressed or implied, by the Legislature), rev. denied, 244 Kan. 738 (1988).

We find no statutory grant of authority, express or implied, that would permit this court to eschew clear evidentiary rules prescribed by the Kansas Legislature in favor of the exclusionary rule in civil drug tax cases. In fact, we find the opposite. Pursuant to K.S.A. 2008 Supp. 79-5205(c), the Department "may

consider *but shall not be bound by* a plea agreement or judicial determination made in any criminal case." Thus, in making a drug tax assessment, the Department has the authority to disregard a prior determination in a criminal case concerning the suppression of evidence under the exclusionary rule.

Finally, even if this court had the authority to reject official statements of the director of taxation as *prima facie* proof of a drug tax assessment, that still would not be enough for Mr. Burch to survive summary judgment under the facts before us. Regardless of the foundational legitimacy of the Department's official statements, there remains a statutory presumption which Mr. Burch has not even attempted to rebut. Thus, without evidence to the contrary, we must presume that the drug tax assessment by the director is both valid and correctly determined and assessed. *See* K.S.A. 2008 Supp. 79-5205(b). Mr. Burch was required to come forward with evidence to raise a genuine question of material fact with regard to the legal substance of the assessment itself, which he did not do.

Because this is a motion for summary judgment, we are required to resolve all facts and inferences that may reasonably be drawn from the evidence in favor Mr. Burch. *See Bracken v. Dixon Industries, Inc.*, 272 Kan. 1272, 1274, 38 P.3d 679, 681 (Kan. 2002). After a thorough review of the record and the briefs, we find that no inferences can be drawn from the facts which would allow this court to proceed to an evidentiary hearing. In the absence of any genuine issue of material fact, we find the Department is entitled to judgment as a matter of law.

We recognize the implications of this order, and we do not wish to place our imprimatur on overly zealous police conduct, particularly in light of the fact that there exists a statute on the books allowing law enforcement agencies to share in drug tax collections. *See* K.S.A. 2008 Supp. 79-5211. On its face, this revenue-sharing arrangement encourages collusive and untempered conduct by law enforcement and government revenue agents. Without an evidentiary remedy to offset the statute's pernicious incentives, the integrity of the judiciary's role in protecting against unlawful police conduct is undermined.

This court must nevertheless recognize that it has no authority to decide the constitutionality of a statute on its face. *See Zarda v. State*, 250 Kan. 364, 370, 826 P.2d 1365, 1369, *cert. denied*, 504 U.S. 973 (1992). We must therefore presume that the Kansas drug tax laws are valid and that they do not contain provisions which are, *per se*, violative of the constitutional protections against unlawful search and seizure.

For these reasons, the Department's motion for summary judgment is granted and Mr. Burch's renewed motion for summary judgment is denied.

Any party to this action who is aggrieved by this decision may file a written petition for reconsideration with this Court as provided in K.S.A. 2008 Supp. 77-529. The written petition for reconsideration shall set forth specifically and in adequate detail the particular and specific respects in which it is alleged that the Court's order is unlawful, unreasonable, capricious, improper or unfair. Any petition for reconsideration shall be mailed to: Secretary, Court of Tax Appeals, Docking State Office Building, Suite 451, 915 SW Harrison St., Topeka, KS 66612-1505. *A copy of the petition, together with any accompanying documents, shall be mailed to all parties at the same time the petition is mailed to the Court. Failure to notify the opposing party shall render any subsequent order voidable.* The written petition must be received by the Court within fifteen (15) days of the certification date of this order (allowing an additional three days for mailing pursuant to statute). If at 5:00 pm on the last day of the specified period the Court has not received a written petition for reconsideration of this order, no further appeal will be available.

IT IS SO ORDERED

THE KANSAS COURT OF TAX APPEALS

SEAL

ATTEST:

REBECCA W. CROTTY, CHIEF JUDGE

J. FRED KUBIK, JUDGE

BRUCE F. LARKIN, JUDGE

JOELENE R. ALLEN, SECRETARY

CERTIFICATE OF SERVICE

I, Joelene R. Allen, Secretary of the Court of Tax Appeals of the State of Kansas, do hereby certify that a true and correct copy of this order in Docket No. 2005-5738-DT and any attachments thereto, was placed in the United States Mail, on this 27th day of February, 2009, addressed to:

Ian Burch
Burch, Ian A.
c/o Steve Curkendall
1064 Snowbush Dr
Montrose, CO 81401

Caleb Boone, Attorney
PO Box 188
Hays, KS 67601

and a copy was placed in capitol complex building mail, addressed to:

General Counsel
Legal Services Bureau
Department of Revenue
DSOB, 915 SW Harrison, 2nd Floor
Topeka, KS 66612

IN TESTIMONY WHEREOF, I have hereunto subscribed my name at Topeka, Kansas.

Joelene R. Allen

Joelene R. Allen, Secretary