STATE OF MICHIGAN

COURT OF APPEALS

GLOBAL IMPORTS, INC., EXPORT INTERNATIONAL, INC., AMER-CAN SHOP, INC., and THOMAS SALAMEY,

Plaintiffs-Appellees/
Cross-Appellants,

v

MICHIGAN DEPARTMENT OF TREASURY,

Defendant-Appellant/
Cross-Appellee.

UNPUBLISHED
January 17, 1997

No. 183497
LC No. 95-502544

Before: Gribbs, P.J., and Saad and J. P. Adair,* JJ

PER CURIAM.

Defendant, the Michigan Department of Treasury (the Department), appeals from the trial court's February 10, 1995, judgment granting permanent injunctive relief to plaintiffs. Plaintiffs cross-appeal from the trial court's March 2, 1995, order partially granting defendant's motion for reconsideration of the February 10, 1995, order. The February 10, 1995, judgment compelled the Department to return all the property it seized from plaintiffs during an investigation of alleged violations of the Tobacco Products Tax Act (TPTA),[1] and enjoined the Department from seizing or forfeiting any of plaintiffs' property pursuant to that Act. The March 2, 1995, order reversed the initial judgment with respect to certain portions of the seized property. We reverse and remand for further proceedings.

I.

On December 1, 1994, agents of the Michigan State Police Treasury Enforcement Team obtained warrants to search the Amer-Can Shop in Dearborn, Michigan, the residence of plaintiff Thomas Salamey (the shop's owner), and various vehicles associated Amer-Can and Salamey. According to the supporting affidavits, the Department's agents requested these warrants to obtain

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* Circuit judge, sitting on the Court of Appeals by assignment.

"necessary evidence for the prosecution of [Salamey and other] individual[s] for failure to abide by the provisions of the Cigarette Products Act." The Department's agents seized business records, business equipment, a red 1994 cargo van, approximately 1,124 cartons of cigarettes, a safe, and approximately $231,000 in cash.

On December 5, 1994, the Department served upon plaintiffs a "Bill for Taxes Due" and a tax collection and enforcement division warrant. Each indicated that $240,000 was due in taxes and penalties with respect to the cigarettes seized on December 1, 1994. The warrant indicated that "the amount due constitutes a lien against all of the real and personal property" of Salamey and/or Amer-Can. On December 6, 1994, the Department served upon Salamey and Amer-Can a "Notice of Seizure of Inventory," which stated that the cigarettes and vehicle would be forfeited to the state if demand for a hearing before the Commissioner of Revenue was not made within five days. Such a hearing was never held, however. Instead, there was a series of correspondences between defendant and plaintiffs' counsel.

On January 27, 1995, plaintiffs filed a complaint for injunctive and declaratory relief. Specifically, plaintiffs sought a preliminary injunction enjoining the seizure of plaintiffs' property and ordering the immediate return of all property seized. On February 10, 1995, the trial court issued such an order, ruling from the bench that the search of plaintiffs' premises was illegal and, consequently, the Department had no right to seize the property. Furthermore, the court refused to enforce the Department's "Bill for Taxes Due" and ordered that all property be returned to plaintiffs. A permanent injunction implementing this ruling was entered on the same date.

On March 2, 1995, the trial court partially granted the Department's motion for reconsideration. Specifically, the trial court ruled that the Department could seize, retain, and obtain forfeiture of the cash seized from the residence, but had to return the other property. We granted the Department's motion for immediate consideration on March 14, 1995, and plaintiffs' cross-appeal followed.

II.

The Tobacco Products Tax Act, 205.421 *et seq.*; MSA 7.411(31) *et seq.*, took effect March 15, 1994, repealing earlier provisions for a cigarette tax, MCL 205.501 *et seq.*; MSA 7.411(1) *et seq*. According to its preamble, the Act provides for a tax upon the sale and distribution of tobacco products, regulates manufacturers, wholesalers and others who deal in tobacco products, provides for the collection and disposition of the tax, provides for enforcement of the Act, and prescribes penalties and remedies for the violation of the Act.

In terms of penalties and remedies, there are at least three sanctions which the Act authorizes for violations. First, under MCL 205.428(1); MSA 7.411(38)(1), a non-licensee who is in "possession of tobacco product contrary to this act . . . shall be personally liable for the tax imposed by this act, plus a penalty of 100% of the amount of tax due under the act." Second, under MCL 205.428(2); MSA 7.411(38)(2), a person who possesses $50 (wholesale value) or more of tobacco product contrary to

the Act is guilty of a felony punishable by up to five years' imprisonment and a $5,000 fine. Third, under MCL 205.429(3) and (5); MSA 7.411(39)(3) and (5), any contraband tobacco product seized under the Act is subject to forfeiture to the state, which may then sell it at public sale with the proceeds going to the general fund of the state.

The trial court ruled that the forfeiture provisions of the TPTA were unconstitutional because they did not guarantee plaintiffs an opportunity to have a timely hearing before the Department after the seizure of the property. The court also ruled that, because the forfeiture provisions of the TPTA were unconstitutional, the Department's search and seizure was also illegal. Consequently the court ordered the return of all of plaintiffs' property. The court partially reversed itself following the Department's motion for reconsideration, but still ruled that the Department could not retain any of the property seized from the Amer-Can Shop.

III.

We agree with the trial court that the forfeiture provisions of the TPTA are unconstitutional. Both the United States and Michigan Constitutions guarantee that the state shall not deprive an individual of property without due process of law. US Const, Am XIV; Const 1963, art 1, § 17. In the context of a forfeiture statute, due process consists of "the means of demanding and enforcing [the property owner's] constitutional rights," and a statute which does not provide such procedures is unconstitutional on its face. *People v Campbell*, 39 Mich App 433, 438-440; 198 NW2d 7 (1972) (quoting *Hibbard v People*, 4 Mich 125, 130-131 (1856)). Moreover, the means of demanding and enforcing constitutional rights must be contained within the language of the statute itself or *in pari materia* with another statute. If the statute itself does not provide such means and if such means cannot be incorporated from another statute, then the forfeiture provisions of that statute are unconstitutional even if due process was actually provided in a particular case. *Campbell, supra*, 39 Mich App 439-441. *See also Barry v Barchi*, 443 US 55; 99 S Ct 2642; 61 L Ed 2d 365 (1979); *Sea Lar Trading Co v Michael*, 433 NYS2d 403 406-407; 107 Misc 2d 93 (1980).

The forfeiture provisions of the TPTA are found in MCL 205.429; MSA 7.411(39). Specifically, in December 1994, when the Department seized the property,[2] subsection (3) provided as follows:

> As soon as possible after the seizure, the person making the seizure must deliver to the person from whom the seizure was made an inventory statement of the property seized. This statement also provides notice to the person that the property will be forfeited unless a demand for a hearing is made within 5 days. If a person demands a hearing, then he is entitled to appear before the Department, to be represented by counsel, and to present testimony and argument. The Department then makes one of two possible determinations: the property is either returnable to the person entitled to possession, or subject to seizure and forfeiture. If the Department determines that the property is

> subject to forfeiture, then the property will be forfeited by operation of law unless the aggrieved person appeals to the circuit court. MCL 205.429(3); MSA 7.411(39)(3).

Under subsection (4), if the aggrieved person appeals to the circuit court, then "the court shall hear the action and determine the issues of fact and law involved in accordance with rules of practice and procedure as in other in rem proceedings." MCL 205.429(4); MSA 7.411(39)(4).

The problem with this version of the statute is that it is silent with respect to critical aspects of the Department's forfeiture hearing. For example, while a property owner is entitled to a hearing, there is no time period within which the Department must hold the hearing. Nor does the statute provide a deadline by which the Department must issue its decision after the hearing is held. Without such limits, the statute would allow the Department to seize property and hold it indefinitely, without giving the person from whom it was seized an opportunity to be heard. If the statute could be enforced in this way, it would be unconstitutional on due process grounds. *See Campbell, supra*, 39 Mich App 442-443 (statute which does not guarantee procedure whereby person can obtain hearing before forfeiture does not guarantee due process).

Also, the revenue commissioner failed to promulgate rules to implement the act as required by MCL 205.433(2); MSA 7.411(43)(2). While such rules could have cured the problems described above, no such rules had been promulgated when the Department seized plaintiffs' property. Therefore, we agree that the forfeiture provisions of the TPTA are unconstitutional, and that they could not be enforced even if plaintiffs were accorded due process in this particular case.

IV.

While we agree with the trial court that the forfeiture provisions of the TPTA were unconstitutional, we do not agree that this defect precluded the Department from seizing plaintiffs' property in order to enforce other provisions of the TPTA. To see why, it is important to distinguish between a *forfeiture* and a *seizure*. In some contexts, the ruling that a forfeiture statute is unconstitutional leads to the conclusion that the government cannot seize or hold the property either. See, e.g., *Campbell, supra*, 39 Mich App 443-444. However, this reasoning does not apply when the government has another, constitutionally acceptable reason for seizing an individual's property.

Forfeiture is only one of three sanctions authorized by the TPTA. In addition, the Act authorizes a tax and penalty for a non-licensee who is in "possession of tobacco product contrary to this act." MCL 205.428(1); MSA 7.411(38)(1). Finally, a person who possess $50 (wholesale value) or more of tobacco product contrary to the Act is guilty of a felony punishable by up to five years' imprisonment and a $5,000 fine. MCL 205.428(2); MSA 7.411(38)(2). Thus, the question becomes whether the Department can seize plaintiffs' property in order to enforce these provisions.

The search warrant statute, MCL 780.655; MSA 28.1259(5), provides that a police officer who executes a search warrant shall keep the property seized "so long as necessary for being produced

or used as evidence on any trial." Plaintiffs, however, argue that this statute is inapplicable to this case. Specifically, plaintiffs argue that the hearing procedures from the TPTA forfeiture provisions must be followed with respect to all property seized under the TPTA, regardless of whether the seizure was executed to enforce the forfeiture provisions or one of the other sanctions. We disagree.

The procedures in the forfeiture provisions of the TPTA refer only to "forfeitures;" there is no indication that they apply to seizures of evidence necessary to enforce the other sections of the Act. Moreover, the forfeiture provisions refer only to the seizure and forfeiture of "contraband," which is defined as "a tobacco product held . . . in violation of this act . . . and other tangible personal property containing a tobacco product in violation of this act." MCL 205.429(1); MSA 7.411(39)(1). There is absolutely no indication that the forfeiture procedures apply to property which is not "contraband" (such as business records or cash) but which is evidence of a violation of other provisions of the Act. Thus, while a party must challenge the forfeiture of "contraband" under the forfeiture provisions of the TPTA, we find that challenges to seizures made to enforce other provisions of the TPTA are not controlled by the procedures for challenging a forfeiture.

The fact that the search warrant statute controls, however, does not necessarily mean that the seizures in this case are constitutionally acceptable. With respect to enforcement of the criminal provisions of the TPTA,[3] we note that the Department seized plaintiffs' property on December 1, 1994. By January 27, 1995, however, no criminal charges had been filed. In fact, charges still had not been filed as late as March, 1995, when this appeal was taken. The reasons for this delay are not clear from the record.

We question whether the Constitution tolerates such a delay between a seizure and the filing of charges. However, the record does not indicate the reasons, if any, for the delay, or if charges have yet been filed. If no charges have been filed, the seizure cannot be justified on the basis of the potential for such charges, especially in light of the delay in bringing the charges. If charges have been filed, then an evidentiary hearing is necessary to determine the legality of the seizure in light of the delay in bringing those charges. Therefore, we remand this matter to the trial court for an evidentiary hearing to resolve these issues as if plaintiffs challenged the seizure under the search warrant statute. See, e.g., *Mason Inc v Jackson County Prosecutor*, 95 Mich App 447, 449-450; 291 NW2d 76 (1980). The trial court shall also issue a written opinion stating its findings of fact and conclusions of law.

Even if this question is resolved in plaintiffs' favor, however, that would mean only that the government could not seize the evidence to enforce the criminal provisions of the TPTA. The seizure may still be constitutionally acceptable, however, if it was necessary to enforce the tax and penalty provisions of the TPTA.[4] In fact, the Department enforced this sanction. On December 5, 1994, the Department served upon plaintiffs a "Bill for Taxes Due" and the notice that a lien had been placed on the seized property.[5] This notice came five days after the seizure of the property, and there is no indication that there was any unnecessary delay in the enforcement of these provisions. If so, the Department's seizure of plaintiffs' property to enforce the tax and penalty provisions of the TPTA was proper.

Plaintiffs dispute this conclusion. Specifically, plaintiffs argue that the tax and penalty provisions cannot be enforced by way of a jeopardy assessment. If so, plaintiffs reason, the tax and penalty provisions must be enforced by way of the procedures in the forfeiture provisions of the TPTA, which are unconstitutional. We disagree. Under the TPTA, "the tax imposed by this Act shall be administered by the revenue commissioner pursuant to . . . sections 205.1 to 205.31 of the Michigan Compiled Laws." MCL 205.433(1); MSA 7.411(33)(1). Sections 205.1 to 205.31 include the jeopardy assessment procedures, MCL 205.26; MSA 7.657(26). Therefore, assessments under the TPTA must be enforced pursuant to the jeopardy assessment procedures.

In light of the foregoing, we conclude that the Department can legally seize and hold plaintiffs' property to enforce the tax and penalty provisions of the TPTA. We express no opinion, however, as to the portions of the seized property which are necessary for the Department to do so. Therefore, on remand the trial court shall also determine which portions of plaintiffs' property are subject to seizure for this purpose. Again, the trial court shall issue a written opinion including its findings of fact and conclusions of law.

Reversed and remanded for further proceedings consistent with this opinion.

/s/ Roman S. Gribbs
/s/ Henry William Saad
/s/ James P. Adair

[1] MCL 205.421 *et seq*.; MSA 7.411(31) *et seq*.

[2] In 1995, the Legislature amended this statute to include a fifteen-day time limit for the Department to hold the hearing after receiving a post-seizure request, and a ten-day time limit for the Department to issue its decision. These amendments, however, did not take effect until June 29, 1995. 1995 PA 118.

[3] MCL 205.428(2); MSA 7.711(38)(2).

[4] MCL 205.428(1); MSA 7.411(38)(1).

[5] Plaintiffs subsequently challenged this assessment with the Tax Tribunal, which also resulted in an appeal to this Court. See *Amer-Can Shop and Thomas Salamey v Department of Treasury*, unpublished opinion per curiam of the Court of Appeals, (Docket No. 186472).