

FSM SUPREME COURT TRIAL DIVISION

SINGKORO HARPER,	)	CIVIL ACTION NO. 2013-1004
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
CHUUK STATE DEPARTMENT OF	)	
ADMINISTRATIVE SERVICES,	)	
	)	
Defendant.	)	
_____	)	

ORDER DENYING PRELIMINARY INJUNCTION

Dennis K. Yamase  
Associate Justice

Hearing: September 11, 2013  
Decided: September 16, 2013

APPEARANCES:

For the Plaintiff:	Marstella Jack, Esq. P.O. Box 2210 Kolonias, Pohnpei FM 96941
For the Defendant:	Johnny Meippen, Esq. (briefed) Chief Litigator Felicity Chamberlain, Esq. (argued) Assistant Attorney General Office of the Chuuk Attorney General P.O. Box 1050 Weno, Chuuk FM 96942

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HEADNOTES

Constitutional Law – Case or Dispute – Standing; Taxation – Constitutionality

When the State Tax Act provides that no person shall have a right of action to challenge the validity of any tax levied by the Act unless that person first pays to the state the tax in question, under protest, and when the state has seized by tax levy \$2,931.29, and the state rightly considers that seizure to be a partial payment under protest, the court, without having to analyze it further, unquestionably has jurisdiction over a challenge to the cigarette tax because a cigarette tax payment was made under protest. Harper v. Chuuk State Dep't of Admin. Servs., 19 FSM R. 152 (Chk. 2013).

Civil Procedure – Motions

Although Rule 6(d) requires that motions contain both a memorandum of points and authorities and a certification that a reasonable effort has been made to obtain the opposing party's "agreement

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or acquiescence" and whether it has been obtained, only the failure to include points and authorities results in the motion's mandatory denial. Harper v. Chuuk State Dep't of Admin. Servs., 19 FSM R. 147, 152 (Chk. 2013).

Civil Procedure – Motions

Whether the court denies a motion because it lacks a certification concerning the opposing party's "agreement or acquiescence," is a matter left to the court's discretion, and, in the case of certain motions, the court has, and will, overlook the lack of a certification when it is apparent from the motion's nature that no agreement would ever be forthcoming from the opposing party and that any attempt to seek such an agreement would be futile. Harper v. Chuuk State Dep't of Admin. Servs., 19 FSM R. 147, 152 (Chk. 2013).

Civil Procedure – Motions

Since the Rule 6(d) requirement of acquiescence is not absolute, particularly when the motion is of a nature that acquiescence would not be forthcoming, when the court is satisfied that no acquiescence would have been forthcoming and that any attempt would have been futile, the court will not deny a motion on this ground. Harper v. Chuuk State Dep't of Admin. Servs., 19 FSM R. 147, 152 (Chk. 2013).

Civil Procedure – Injunctions

In exercising its broad discretion in considering whether to grant a preliminary injunction, the court will consider four factors: 1) the likelihood of success on the merits of the party seeking injunctive relief, 2) the possibility of irreparable injury to the movant, 3) the balance of possible injuries or inconvenience to the parties that would flow from granting or denying the relief, and 4) any impact on the public interest. Harper v. Chuuk State Dep't of Admin. Servs., 19 FSM R. 147, 152 (Chk. 2013).

Civil Procedure – Injunctions – Irreparable Harm; Taxation – Recovery of Taxes

When, under the State Tax Act, amounts paid under protest must be kept and deposited in a separate and restricted account which must be returned to the taxpayer if he prevails and since any funds levied by the state to pay the movant's assessed tax liability are rightly considered partial payments under protest and are therefore deposited into "a separate and restricted account," it does not seem that the movant will be irreparably harmed if an injunction does not issue because the return of his money would seem to adequately compensate him. Harper v. Chuuk State Dep't of Admin. Servs., 19 FSM R. 147, 153 (Chk. 2013).

Civil Procedure – Injunctions – Irreparable Harm

The threat of irreparable harm before the litigation's conclusion is a prerequisite to preliminary injunctive relief, but when money damages or other relief will fully compensate for the threatened interim action, a preliminary injunction should be denied. Harper v. Chuuk State Dep't of Admin. Servs., 19 FSM R. 147, 153 (Chk. 2013).

Constitutional Law – Foreign and Interstate Commerce; Federalism – National/State Power; Taxation – Constitutionality

Only the national government can impose taxes on imports and no state may impose taxes that restrict interstate commerce. Harper v. Chuuk State Dep't of Admin. Servs., 19 FSM R. 147, 153 (Chk. 2013).

Taxation

The Chuuk cigarette tax is part of a tax on the first sale in Chuuk of all tangible items, except unprocessed and unpackaged items. Cigarettes are taxed at the rate of two dollars per pack of 20

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cigarettes or at a rate of 10 cents per one cigarette. The statute requires that all sellers keep accurate sales records of taxable sales and that they are to compute their tax liability from those records, and cigarettes are presumed sold within four months of receipt in Chuuk unless the importer can prove the contrary. The importer has the burden of overcoming this statutory presumption and proving that there were no taxable sales. Harper v. Chuuk State Dep't of Admin. Servs., 19 FSM R. 147, 153-54 (Chk. 2013).

Statutes – Presumptions

Statutory presumptions come in three types: permissive inference, mandatory rebuttable presumption, and conclusive mandatory presumption. Harper v. Chuuk State Dep't of Admin. Servs., 19 FSM R. 147, 154 (Chk. 2013).

Statutes – Presumptions

Under a mandatory rebuttable presumption, once the predicate facts have been proven, the burden of persuasion shifts to the defense to rebut the presumption, although the burden of proving guilt beyond a reasonable doubt remains with the prosecution, or in a civil case, liability by the preponderance of the evidence. Harper v. Chuuk State Dep't of Admin. Servs., 19 FSM R. 147, 154 (Chk. 2013).

Statutes – Presumptions

Under the permissive inference type of statutory presumptions, the state is not relieved of the burden of persuasion since the presumption is effective only so long as there is no substantial evidence contradicting the conclusion flowing from the presumption, and the fact-finder is left free to accept or reject the inference. Harper v. Chuuk State Dep't of Admin. Servs., 19 FSM R. 147, 154 (Chk. 2013).

Statutes – Presumptions; Taxation

Unless a cigarette importer produces evidence to overcome the Chuuk tax act's presumption that the cigarettes were sold after importation, the statutory presumption that he sold the cigarettes he brought into Chuuk would stand and he therefore would be liable to the state for the sales tax he should have collected from the buyers when the cigarettes were sold. Harper v. Chuuk State Dep't of Admin. Servs., 19 FSM R. 147, 154 (Chk. 2013).

Constitutional Law – Foreign and Interstate Commerce; Taxation – Constitutionality

Since imported cigarettes are not taxable unless sold (or presumed sold) and may be nontaxable if not, the Chuuk cigarette tax appears to be a sales tax and not an import tax because the taxable event is their sale not their importation. Harper v. Chuuk State Dep't of Admin. Servs., 19 FSM R. 147, 154 (Chk. 2013).

Taxation – Constitutionality

If the Chuuk cigarette tax is imposed on the buyer (customer) and collected by the seller from the buyer for remittance to the state, then the tax statute was carefully crafted to avoid constitutional infirmity. The hallmark of a constitutionally sound state sales tax is that the sale is the taxable incident and the tax is paid by the buyer – the customer or consumer – and not the seller; otherwise it is an unconstitutional income tax. Harper v. Chuuk State Dep't of Admin. Servs., 19 FSM R. 147, 154 (Chk. 2013).

Constitutional Law – Due Process – Notice and Hearing

Notice and an opportunity to be heard are the essence of due process of law. Harper v. Chuuk State Dep't of Admin. Servs., 19 FSM R. 147, 155 (Chk. 2013).

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Administrative Law; Constitutional Law – Due Process – Notice and Hearing; Search and Seizure; Taxation

Due process would seem to require a prompt post-seizure hearing before the administrative agency that has administratively levied execution of unpaid taxes. Harper v. Chuuk State Dep't of Admin. Servs., 19 FSM R. 147, 155 (Chk. 2013).

Administrative Law; Constitutional Law – Due Process – Notice and Hearing; Taxation – Recovery of Taxes

A statute that permits a taxpayer to file an action in court to recover any challenged taxes is likely an inadequate substitute for a prompt post-seizure hearing before the tax authorities that might resolve the matter without the need for court proceedings and from which a still aggrieved taxpayer may then resort to a court suit. It may be that such an administrative hearing is available through the statute governing administrative hearings although that is not entirely clear. Harper v. Chuuk State Dep't of Admin. Servs., 19 FSM R. 147, 155 (Chk. 2013).

Attachment and Execution; Taxation

The Chuuk State Tax Act of 2012 provides that if the taxes it imposes are due and unpaid, including penalties charged, the taxes are debts to the state and will constitute liens in favor of the state on all property belonging to the person, business, association, or corporation liable for the tax, and such taxes and penalties may be collected by levy upon such property in the manner as the levy of an execution. Harper v. Chuuk State Dep't of Admin. Servs., 19 FSM R. 147, 155 (Chk. 2013).

Constitutional Law – Due Process; Search and Seizure; Taxation

The Chuuk Legislature can grant a state administrative agency the power to levy in the manner of a levy of an execution for statutory liens held by the state so long as due process concerns are addressed by such mechanisms as a prompt post-levy (or post-execution) hearing being available. Harper v. Chuuk State Dep't of Admin. Servs., 19 FSM R. 147, 155 (Chk. 2013).

Civil Procedure – Injunctions – Balance of Injuries

In evaluating the balance-of-injuries factor, a court must compare the threatened harm to each party if injunctive relief is granted or denied. Harper v. Chuuk State Dep't of Admin. Servs., 19 FSM R. 147, 156 (Chk. 2013).

Civil Procedure – Injunctions – Balance of Injuries

When the irreparable-harm factor does not favor the movant, the balance-of-injuries factor does not favor him either. Harper v. Chuuk State Dep't of Admin. Servs., 19 FSM R. 147, 156 (Chk. 2013).

Civil Procedure – Injunctions

When the public has a strong interest in seeing that the state's essential services are adequately funded and remain running and, to that end, that taxpayers are not allowed to ignore the state's tax laws and when the public also has an interest in seeing that the state does not overstep its bounds in imposing taxes or in levying execution on them, but when any tax paid under protest will, if the taxpayer prevails, be returned, there appears to be an adequate safeguard and the public interest factor will weigh in the state's favor. Harper v. Chuuk State Dep't of Admin. Servs., 19 FSM R. 147, 156 (Chk. 2013).

Civil Procedure – Injunctions

When a court decides not to issue a preliminary injunction in the plaintiff's favor, it does not mean that it is certain that the plaintiff will not prevail on the merits in a final judgment. Harper v. Chuuk State Dep't of Admin. Servs., 19 FSM R. 147, 156 (Chk. 2013).

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## COURT'S OPINION

DENNIS K. YAMASE, Associate Justice:

On August 23, 2013, the plaintiff, Singkoro Harper, filed his Complaint for Injunctive and Declaratory Relief and his Motion for a Temporary Restraining Order, Preliminary Injunction and Permanent Injunction. The defendant, Chuuk State Department of Administrative Services, filed its Answer on August 30, 2013, and its Opposition to Plaintiff's Motion for a Temporary Restraining Order, Preliminary and Permanent Injunction, on September 2, 2013. On September 11, 2013, the court heard Harper's motion for a preliminary injunction. The motion is denied. The reasons follow.

## I. BACKGROUND

On January 14, 2013, the Chuuk Department of Administrative Services ("Department") sent Singkoro Harper, and he received, a letter notifying him that he, as the first seller in Chuuk, was liable for sales tax on cigarettes he was bringing into Chuuk from Pohnpei and that, if he did not provide the requested sales records for those cigarettes, it would make sales tax assessments based on the information that was available to the Department. Two similar letters or notices were sent and delivered on May 2, and July 8, 2013. Harper did not respond to any of the letters.

On July 5, 2013, the Department sent a notice of tax assessment assessing an undeclared tax of \$297,000<sup>1</sup> plus penalties of \$54,747, totaling \$351,747. This tax assessment was based on Continental Airlines air waybills of August 7, 2012, and August 11, 2012, and bills of lading of September 1, 2012, September 18, 2012, November 13, 2012, and April 8, 2013; and a bill of lading receipt for payments on September 18, 2012, November 13, 2012, and February 2, 2013. Although Harper received this notice, he did not pay the July 5, 2013 tax assessment under protest or otherwise. He also did not respond to the notice.

On August 21, 2013, the Department delivered to the Chuuk branches of both the Bank of the FSM and the Bank of Guam a Notice of Levy and Order of Execution for Harper's unpaid \$351,747 tax liability. Each bank notified Harper of the levies. Both banks soon froze<sup>2</sup> Harper's accounts. On August 26, 2013, the Bank of Guam remitted \$2,931.29 to the Department as per the August 21, 2013 Notice of Levy.<sup>3</sup> The Department correctly considers this to be a partial payment under protest.

This lawsuit, seeking injunctive and declaratory relief was filed on August 23, 2013. Harper seeks a preliminary injunction barring the Department from executing on its levies or taking any further action to enforce the State Tax Act of 2012, Chk. S.L. No. 11-12-07, against him until the suit has concluded. Harper also seeks a declaratory judgment that the State Tax Act is an unconstitutional infringement of the FSM national government's taxing power or an otherwise unconstitutional tax and

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<sup>1</sup> With a tax rate of \$20 per carton [\$2 per pack or 10¢ a cigarette, Chk. S.L. No. 11-12-07, § 4(2)], this would be the tax on 14,850 cartons of cigarettes (or 2,970,000 cigarettes). This seems a lot of cigarettes.

<sup>2</sup> When an account is frozen, money cannot be withdrawn from the account, but it will still continue to earn interest.

<sup>3</sup> The Bank of the FSM did not remit any funds but instead claimed a senior perfected security interest in part or all of one of Harper's accounts.

that the levy and execution without prior notice and opportunity to be heard by a court before a writ of execution is issued is a violation of his rights to due process.

## II. JURISDICTION

The court will consider the Department's jurisdictional challenge first because if the court lacks subject-matter jurisdiction over the case, it will be unable to rule on any of the other matters raised.

The Department contends that the court lacks jurisdiction over this case because, under the State Tax Act of 2012, "[n]o person shall have a right of action to challenge the validity of any tax levied by this Act unless that person shall first pay the tax in question, under protest, to the State." Chk. S.L. No. 11-12-07, § 26(1). However, this argument fails since the Department has seized \$2,931.29 by levy and the Department rightly considers that seizure to be a partial payment under protest. Thus, without having to analyze it further, the court unquestionably has jurisdiction because a cigarette tax payment was made under protest.

## III. THE MOTION

### A. *Rule 6(d) Certification*

As noted in the parties' stipulation, Harper's motion for a preliminary injunction does not comply with Civil Procedure Rule 6(d) because it does not contain a certification that a reasonable effort had been made to obtain the opposing party's consent to the motion and none was forthcoming. Although Rule 6(d) requires that motions contain both a memorandum of points and authorities and a certification that a reasonable effort has been made to obtain the opposing party's "agreement or acquiescence" and whether it has been obtained, only the failure to include points and authorities results in the motion's mandatory denial. Fan Kay Man v. Fananu Mun. Gov't, 12 FSM Intrm. 492, 496 (Chk. 2004); see also FSM Social Sec. Admin. v. Weilbacher, 17 FSM Intrm. 217, 224 (Kos. 2010).

Whether the court denies a motion because it lacks a certification concerning the opposing party's "agreement or acquiescence," is a matter left to the court's discretion. Fan Kay Man, 12 FSM Intrm. at 496. In the case of certain motions, the court has, and will, overlook the lack of a certification when it is apparent from the motion's nature that no agreement would ever be forthcoming from the opposing party and that any attempt to seek such an agreement would be futile. Fan Kay Man, 12 FSM Intrm. at 496 & n.3; see also Tipingeni v. Chuuk, 14 FSM Intrm. 539, 542 (Chk. 2007). The Rule 6(d) requirement of acquiescence is not absolute, particularly when the motion is of a nature that acquiescence would not be forthcoming so that when the court is satisfied that no acquiescence would have been forthcoming and that any attempt would have been futile, the court will not deny the motion on this ground. Berman v. Pohnpei, 18 FSM Intrm. 67, 71 (Pon. 2011). That is the nature of the current motion. Harper's motion will not be denied on Rule 6(d) grounds.

### B. *Factors to Be Considered by the Court*

In exercising its broad discretion in considering whether to grant a preliminary injunction, the court will consider four factors: 1) the likelihood of success on the merits of the party seeking injunctive relief, 2) the possibility of irreparable injury to the movant, 3) the balance of possible injuries or inconvenience to the parties that would flow from granting or denying the relief, and 4) any impact on the public interest. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 593 (Pon. 2011); Marsolo v. Esa, 17 FSM Intrm. 377, 381 (Chk. 2011); Continental Micronesia, Inc. v. Chuuk, 17 FSM Intrm. 152, 159-60 (Chk. 2010).

## IV. ANALYSIS OF FACTORS

A. *Irreparable Injury*

Harper contends that he will be irreparably harmed if the Department is allowed to take his money without court order because, considering the state of Chuuk's finances it would be impossible to get his money back if the court rules that Chuuk State Law No. 11-12-07 and the notice of levy process are unconstitutional.

Under the State Tax Act, "[a]mounts paid under protest shall be kept and deposited in a separate and restricted account which shall be returned to the taxpayer if he prevails . . . ." Chk. S.L. No. 11-12-07, §26(4). Thus, since any funds levied by the Department to pay Harper's assessed tax liability are rightly considered partial payments under protest and are therefore deposited into "a separate and restricted account," it does not seem that Harper will be irreparably harmed if the injunction does not issue. Money damages – the return of his money – would seem to adequately compensate him.

The threat of irreparable harm before the litigation's conclusion is a prerequisite to preliminary injunctive relief, but when money damages or other relief will fully compensate for the threatened interim action, a preliminary injunction should be denied. GMP Hawaii, Inc., 17 FSM Intrm. at 593; Ponape Transfer & Storage v. Pohnpei State Public Lands Auth., 2 FSM Intrm. 272, 276 (Pon. 1986). Accordingly, this factor weighs strongly against Harper.

B. *Likelihood of Success*

Harper contends that his likelihood of success on the merits is very great because the state tax is obviously an unconstitutional state tax on imports or restriction on interstate trade and because the levy and execution process without prior court involvement violates his fundamental due process rights. Harper asserts that it must be an import tax because, in his views, it is assessed at the point of entry into Chuuk.

1. *Cigarette Tax's Constitutionality*

Only the national government can impose taxes on imports, FSM Const. art. IX, § 2(d); Innocenti v. Wainit, 2 FSM Intrm. 173, 182 (App. 1986), and no state may impose taxes which restrict interstate commerce, FSM Const. art. VIII, § 3; Stinnett v. Weno, 6 FSM Intrm. 312, 313 (Chk. 1994). Harper contends that the cigarette tax in the State Tax Act is an import tax or a tax that restricts interstate commerce since it is a tax that is imposed on cigarettes after they are brought into the State of Chuuk.

Harper asserts that this case is similar to FSM Telecommunications Corp. v. Department of Treasury, 9 FSM Intrm. 380 (Pon. 2000). In that case, a Pohnpei state "use tax" that instead of collecting the tax at the port in order to release the goods, required the taxpayer to fill out a form prior to release of the goods after which collection of the assessment is deferred for sixty days, the court held that the tax, despite its name, was a tax on imports that usurped the national government's exclusive power to impose taxes based on imports. FSM Telecom. Corp. v. Department of Treasury, 9 FSM Intrm. 380, 386 (Pon. 2000), *aff'd*, 9 FSM Intrm. 575, 581 (App. 2000). In support, Harper points out that the state assessed his tax liability using documents (waybills and bills of lading) that are presented at the point of import although, similar to FSM Telecommunications Corp. v. Department of Treasury, the tax was not to be due until later.

The cigarette tax challenged by Harper is part of "a tax on [the] first sale in the State of Chuuk of all tangible items, except unprocessed and unpackaged items as follows: . . . 2) Cigarettes and

cigars: i. at the rate of two dollar [sic] per pack of 20 cigarettes; ii. at a rate of 10 cents per one cigarette . . . ." Chk. S.L. No. 11-12-07, § 4. The statute requires that all sellers keep accurate sales records of taxable sales and that they are to compute their tax liability from those records. *Id.* § 16. Under the Tax Act, cigarettes and other items taxable under Section 4 are presumed sold within four months of receipt in Chuuk "unless the importer can prove the contrary." *Id.* § 9(1). The importer has the burden of overcoming this statutory presumption and proving that there were no taxable sales. *Id.* § 9(2).

Statutory presumptions come in three types: permissive inference, mandatory rebuttable presumption, and conclusive mandatory presumption. FSM v. Aliven, 16 FSM Intrm. 520, 533 (Chk. 2009). The statutory presumptions in the State Tax Act appear to be mandatory but rebuttable. Under a mandatory rebuttable presumption, once the predicate facts have been proven, the burden of persuasion shifts to the defense to rebut the presumption, although the burden of proving guilt beyond a reasonable doubt remains with the prosecution, Aliven, 16 FSM Intrm. at 533 (citing 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* § 2.13(c)), or in a civil case, liability by the preponderance of the evidence. In this case, the predicate facts – that a certain amount of cigarettes were brought into the State of Chuuk – are undisputed. If the statute were read to be a permissive inference type of presumption, contrary evidence is still needed. Under the permissive inference type of statutory presumptions, the state is not relieved of the burden of persuasion since the presumption is effective only so long as there is no substantial evidence contradicting the conclusion flowing from the presumption, and the fact-finder is left free to accept or reject the inference. *Id.*

Either way, unless Harper produces evidence to overcome the presumption, the statutory presumption that he sold the cigarettes he brought into Chuuk would stand and therefore he would be liable to the state for the sales tax he should have collected from the buyers when the cigarettes were sold. Since imported cigarettes are not taxable unless sold (or presumed sold) and may be nontaxable if not, the Chuuk cigarette tax appears to be a sales tax and not an import tax because the taxable event is their sale not their importation.

Furthermore, since Section 5 of the Tax Act mandates that cigarette sellers (and other sellers) post the base price of the item plus the sale tax amount so that the customer will know how much of each the customer is paying, it appears, although the statute does not explicitly state so, that the tax is imposed on the buyer (customer) and collected by the seller from the buyer for remittance to the state. If so, then the statute was carefully crafted to avoid constitutional infirmity. The hallmark of a constitutionally sound state sales tax is that the sale is the taxable incident and the tax is paid by the buyer – the customer or consumer – and not the seller; otherwise it is an unconstitutional income tax. Truk Continental Hotel, Inc. v. Chuuk, 7 FSM Intrm. 117, 120 (App. 1995); see also Continental Micronesia, Inc. v. Chuuk, 17 FSM Intrm. 526, 531 (Chk. 2011).

Harper's likelihood of success on this ground is not good.

## 2. *Due Process*

Harper contends that his due process rights are violated because he was not given notice and an opportunity to be heard before a court before the defendant's writ of execution was levied and his bank accounts frozen. He asserts that only a court may levy execution. In effect, he argues that the State must file a court suit in order to collect the taxes it thinks are due.

The Department contends that it gave Harper plenty of notice, through its letters, that it believed he had incurred tax liability from his bringing cigarettes into Chuuk and the amount of that liability and that it gave him plenty of opportunity to discuss the matter with the Department but that Harper did



not use those opportunities.

Notice and an opportunity to be heard are the essence of due process of law. Panuelo v. Amayo, 12 FSM Intrm. 365, 374 (App. 2004). The Department gave Harper ample opportunity to respond to its allegations that he had incurred tax liability, but he did not respond. The Department further gave him notice of the exact amount of liability it thought he had incurred and informed Harper that he was "required to pay the full amount of tax and penalties outstanding on or before July 22, 2013 [and that f]ailure to pay may result in the Tax and Revenue Division of this Department taking action to recover the debt without further notice." Assessment Notice – Cigarette Tax at 1 (to Florencio Singkoro Harper from Tax & Revenue Div.) (July 5, 2013). The notice included a warning that, after July 22, 2013, the Department Could take action "without further notice." *Id.* Harper thus even had notice and an opportunity to be heard. The Department waited until August 21, 2013, before it, without further notice to Harper or court action, served the banks with Notices of Levy. The Department contends that such a procedure is necessary otherwise a taxpayer would drain his bank accounts and move the money before the taxes due the state could be levied.

The only part of this legislative scheme that gives the court pause is that the statute does not provide for a prompt post-seizure hearing before the Department administrative agency that has levied execution.<sup>4</sup> Due process would seem to require this. See Ishizawa v. Pohnpei, 2 FSM Intrm. 67, 76 (Pon. 1985) (normally a hearing should be held before seizure of a property but when in extraordinary situations a seizure takes place before hearing, the owner must be afforded a prompt post-seizure hearing at which the person seizing the property must at least make a showing of probable cause). The statute does permit a taxpayer to file an action in court to recover any challenged taxes, Chk. S.L. No. 11-12-07, §26, but this is likely an inadequate substitute for a prompt post-seizure hearing before the tax authorities that might resolve the matter without the need for court proceedings and from which a still aggrieved taxpayer may then resort to a court suit. It may be that such an administrative hearing is available through the statute<sup>5</sup> governing administrative hearings, 17 TTC §§ 7-10, although that is not entirely clear.

The Tax Act provides that if the taxes it imposes are

due and unpaid, including penalties charged are debts to the State and shall constitute liens in favor of the State upon all property . . . belonging to the person, business, association or corporation liable for the tax, and such taxes and penalties may be collected by levy upon such property . . . in the manner as the levy of an execution.

Chk. S.L. No. 11-12-07, § 21. The court sees no reason why the Legislature cannot grant a state administrative agency the power to levy in the manner of a levy of an execution for statutory liens held by the State so long as due process concerns are addressed by such mechanisms as a prompt post-levy (or post-execution) hearing being available.

Harper's likelihood of success on this part of his claim, while better than on his claim that the cigarette tax is an import tax, is far from certain. The likelihood-of-success factor therefore does not weigh in Harper's favor overall.

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<sup>4</sup> The Tax Act does provide for a post-seizure hearing within 30 days of the seizure of cigarettes. Chk. S.L. No. 11-12-07, § 22(4).

<sup>5</sup> Or the right to a prompt post-seizure hearing could be included in the regulations required by the Tax Act's Section 22, if these regulations have been promulgated, a fact not before the court.

*C. Balance of Injuries*

In evaluating the balance-of-injuries factor, the court must compare the threatened harm to each party if injunctive relief is granted or denied. GE Seaco Servs., Ltd. v. Federated Shipping Co., 14 FSM Intrm. 159, 163 (Pon. 2006).

Each side contends that when weighing the balance of injuries, their side suffers the greater injury. The Department emphasizes that harm to it if an injunction is granted outweighs any harm to Harper because it is deprived of needed tax revenues that will become ever harder to collect as time passes while Harper, if he pays under protest, is assured of having his money returned if he prevails. Harper asserts that this factor favors him because if the preliminary injunction is denied, he will be irreparably harmed and because the court should not allow the potential civil rights (due process) violations caused by the application of an unconstitutional law in an unlawful manner.

Since the court has already determined that the irreparable-harm factor does not favor Harper, it cannot say that the balance-of-injuries factor favors him either. This factor favors the Department or, at best, favors neither side.

*D. Impact on Public Interest*

The public has a strong interest in seeing that the state's essential services are adequately funded and remain running and, to that end, that taxpayers are not allowed to ignore the state's tax laws. The public also has an interest in seeing that the state does not overstep its bounds in imposing taxes or in levying execution on them, but since any tax paid under protest will, if the taxpayer prevails, be returned, there appears to be an adequate safeguard here. This factor will therefore weigh in the state's favor.

*E. Summary*

Weighing the four factors with the special emphasis on the lack of irreparable injury, it is apparent that the factors do not favor Harper or the issuance of a preliminary injunction in his favor. This, however, does not mean that it is certain that Harper will not prevail on the merits in a final judgment. That remains to be seen.

## V. CONCLUSION AND SCHEDULING ORDER

Accordingly, the motion for a temporary restraining order and a preliminary injunction is denied. The following schedule is therefore set: 1) the parties shall make all their discovery requests by October 21, 2013; 2) all discovery shall be completed by November 13, 2013; 3) all pretrial motions shall be filed by November 29, 2013; and 4) a date for a hearing, if needed, on pretrial motions shall be set after the motions have been filed.

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