

1990

Louie E. Sims v. Collection Division of the Utah State Tax Commission : Brief of Appellee

Utah Supreme Court

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900324

IN THE SUPREME COURT OF THE STATE OF UTAH

LOUIE E. SIMS,	:	Case No. 900324
Petitioner/Appellant,	:	
v.	:	
COLLECTION DIVISION OF THE	:	Category No. 15
UTAH STATE TAX COMMISSION,	:	
Respondent/Appellee.	:	

BRIEF OF APPELLEE

APPEAL FROM A FINAL DECISION OF THE
STATE TAX COMMISSION.

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Clerk, Supreme Court, Utah

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BRIEF OF APPELLEE
- - - - -

JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from the final decision of the Utah State Tax Commission.

This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2-2(e)(ii) (Supp. 1990).

STATEMENT OF ISSUES PRESENTED ON APPEAL

AND STANDARDS OF APPELLATE REVIEW

The sole issue properly before the Court for review is whether the Fourth Amendment exclusionary rule applies in a drug stamp tax proceeding before the Utah State Tax Commission.

Because this presents a question of law, a "correction of error" standard of review applies. City of Monticello v. Christensen, 788 P.2d 513, 516 (Utah), cert. denied, 111 S. Ct. 120 (1990); Provo City Corp. v. Willden, 768 P.2d 455, 456 (Utah 1989).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Any relevant text of constitutional, statutory, or rule provisions pertinent to the resolution of the issues presented on appeal is contained in the body of this brief.

STATEMENT OF THE CASE

Petitioner, Louie E. Sims, was served by the Utah State Tax Commission with a notice and demand for the payment of tax due as a result of petitioner's failure "to obtain the official stamps, labels or other indica [sic] required and defined by Title 59-19-103, known as Illegal Drug Stamp Act" (R. 257).

Petitioner filed a petition for redetermination of the tax assessment, and a formal hearing before the Tax Commission was scheduled (R. 41-44, 132). After the hearing, the Tax Commission affirmed the tax assessment against petitioner (R. 8-12).

STATEMENT OF FACTS

A lengthy recitation of the facts underlying the seizure of controlled substances which led to the tax assessment against petitioner is not necessary to the resolution of the single issue this Court should address on appeal. The parties stipulated to the following pertinent facts:

1. The tax was imposed as a result of a seizure of drugs from Sims' vehicle on or about July 27, 1988.
2. The drugs were determined to be cocaine and marijuana.
3. There was no evidence that drug stamps had been attached to those substances.
4. Sims did not purchase drug stamps.

5. The tax involved is an illegal drug stamp tax in the amount of \$197,053 and penalty of \$197,053 assessed on August 30, 1988, by the State Tax Commission.

(R. 144-45).

SUMMARY OF ARGUMENT

The Tax Commission was correct in refusing to apply the exclusionary rule to an Illegal Drug Stamp Tax proceeding. The tax and penalty are civil. The administrative hearing before the Commission was a purely civil proceeding.

Analysis of the history and development of the judicially created rule, in both federal and state courts, reveals that it has been primarily applied to criminal proceedings where its deterrent effect is likely to be served. When applied to civil matters, application has been limited to instances where the deterrence of unlawful conduct can be achieved. In this case, Tax Commission agents did not direct or participate in the seizure of the illegal drugs on which the tax is based. The Commission has no authority to affect the actions of law enforcement agencies. The rule should not be extended to this non-criminal administrative hearing, where there can be no deterrent effect on possible "unlawful conduct" of law enforcement agents.

Petitioner's argument that the deterrence goal of the exclusionary rule would be fulfilled in light of Utah Code Ann. § 59-16-105(6) (Supp. 1990) (tax proceeds sharing provision) is not applicable here. This statutory provision was not effective in 1988, when the taxes were assessed against the Petitioner.

INTRODUCTION TO ARGUMENT

Petitioner has raised eight issues on appeal. Seven of the eight issues relate to the legality of the roadblock at which he was stopped and the search of his vehicle conducted at that roadblock pursuant to his consent. Although these issues were raised by petitioner below, the Tax Commission did not rule on them because it concluded that the exclusionary rule did not apply to civil tax proceedings.

Given the Tax Commission's ruling regarding the exclusionary rule, this Court should address only the propriety of that ruling. If the Court were to conclude that the exclusionary rule does not apply in proceedings before the Tax Commission, the legality of the roadblock and the consent search would be irrelevant. On the other hand, if the Court were to reach a contrary conclusion, the matter should be remanded to the Tax Commission for a determination of the exclusion question. Such a procedure would be appropriate in light of the fact that the roadblock and consent search issues have been presented to the Utah Court of Appeals in a pending appeal from petitioner's criminal conviction of possession of a controlled substance with intent to distribute. State v. Sims, No. 890463-CA. If the tax matter were remanded to the Commission by this Court, the Commission would in all likelihood have the benefit of the court of appeals' decision on the search and seizure issues.

In sum, this Court should address only one of the eight issues raised by petitioner: Does the exclusionary rule apply in a drug stamp tax proceeding before the Tax Commission? Assuming

they become relevant, the search and seizure issues are better resolved in the appeal from petitioner's criminal conviction and in the first instance by the Tax Commission. The State will therefore limit its argument in this brief to the issue of the exclusionary rule's application.

ARGUMENT

POINT I

THE TAX COMMISSION WAS CORRECT IN REFUSING TO APPLY THE EXCLUSIONARY RULE TO ILLEGAL DRUG STAMP TAX APPEAL PROCEEDINGS.

A. The Administrative Hearing Before the Commission Was a Civil Proceeding.

Central to this issue is whether the penalties for violation of the Illegal Drug Stamp Tax Act, Utah Code Ann. § 59-19-101 et seq. ("the Stamp Act") are civil or criminal. Rules of statutory construction and case law establish that the tax and penalty provisions of the Act are civil. The Act clearly implies separate civil and criminal penalties.

A purely civil tax on illegal activities is common. For instance, gains from illegal transactions, such as bootlegging, gambling, extortion, or fraud are included in gross income under the Internal Revenue Code.¹ The application of a tax on income from illegal sources does not change the civil

¹ See United State v. Sullivan, 274 U.S. 259 (1927) (gains from illegal gambling activities are taxable income); E.C. James, 366 U.S. 213 (1961) (embezzled funds are to be included in gross income of the embezzler in the year in which the funds are embezzled); and G.D. Wood, 693 F.Supp. 452 (1988) (taxpayer was required to pay income taxes on income received from illegal drug activities even though all proceeds from illegal drug transactions were eventually forfeited to the government).

nature of the taxing process. Likewise, a tax assessed upon an illegal substance does not convert the nature of the tax from civil to criminal.

The Stamp Act clearly defines a tax and establishes a 100% penalty on any of these unpaid taxes. This is a civil penalty which is assessed and collected as part of the tax. Utah Code Ann. § 59-19-106(1) (Supp. 1990).

The subsection immediately following states: "In addition to the tax penalty imposed, a dealer distributing or possessing marihuana or controlled substances without affixing the appropriate stamps, labels, or other indicia is guilty of a third degree felony and is subject to a fine of not more than \$10,000" § 59-19-106(2) (emphasis added). If the legislature had intended the entire statute to impose either a civil or criminal penalty, it would not have distinguished between the two. Thus, the legislature clearly expressed a separate civil tax and penalty assessment.

In United States v. Ward, 448 U.S. 242 (1980), the Supreme Court held that a penalty imposed on persons discharging hazardous substances into navigable waters was a civil penalty, stating that the question of whether a penalty is civil or criminal is a matter of statutory construction. The Court accepted the congressional label of "civil". It said:

Our inquiry in this regard has traditionally proceeded on two levels. First, we have set out to determine whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other. Second, where Congress has indicated an intention to establish a civil penalty, we

have inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention. In regard to this latter inquiry, we have noted that "only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground."

Id. at 248-49 (citations omitted).

Further, the Illegal Drug Stamp Tax Act is not so punitive in nature as to negate the civil penalties. The Supreme Court in Ward, referring to Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), reaffirmed the seven factors, previously established, that have "prove[n] helpful in . . . consideration of similar questions" Ward, 448 U.S. at 249. These seven factors are:

[1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of scienter, [4] whether its operation will promote the traditional aims of punishment -- retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the inquiry, and may often point in differing directions.

Mendoza-Martinez, 372 U.S. at 168-9 (emphasis in original, footnotes omitted).

When these factors are applied, it is clear that the Stamp Act is civil in nature. The Supreme Court has declared that where both a civil and criminal penalty are found in the same statute, that fact dilutes the force of an argument that the civil penalty is really a criminal penalty. Ward 448 U.S. at 250 (discussing Halvering v. Mitchell, 303 U.S. 391 (1938) (a 50% penalty for tax fraud was held to be civil)).

There is no case law in support of the proposition that payment of a stamp tax has historically been viewed as a form of criminal punishment. The traditional aims of criminal punishment, retribution and deterrence, are not served by the Stamp Act. The Act imposes statutorily fixed taxes and penalties on specific substances. See Utah Code Ann. § 59-19-103 (Supp. 1990). These taxes are not affected by a criminal conviction. The behavior to which the penalty applies is a violation of the Stamp Act or, in other words, a failure to acquire and affix the required stamps. This behavior becomes a crime only when the felony and fine aspect of Utah Code Ann. § 59-19-106(2) (Supp. 1990) is applied. The application of the felony and fine aspect is not within the jurisdiction of the Tax Commission. The tax is imposed upon a substance and is not related to a criminal conviction.

The alternative purpose assigned to the civil penalty clearly is not excessive. The South Dakota Supreme Court was faced with a similar question in determining whether a \$750.00 civil penalty was excessive for possession of less than one ounce of marijuana. See State v. Barber, 427 N.W.2d 375 (S.D. 1988). That court reasoned:

[W]e find that the civil penalty . . . [for possession of marijuana] is not so clearly excessive as to bear no relationship to the purpose for which it is imposed. Drug abuse is a peril to society and particularly to our youth. The costs to society in terms of the health and mental well-being and lost potential of young people involved in such activity are incapable of estimation. Further, in attempting to curb drug abuse, society is required to expend ever increasing financial resources in law enforcement and

drug awareness and prevention campaigns. The civil penalty . . . for possession of marijuana is of but little recompense to society for those costs.

Id. at 377.

For these reasons, the Court should conclude that the Act's civil penalties are not criminal in nature. Thus, the hearing before the Commission was a civil proceeding.

B. The Exclusionary Rule Does Not Apply To A Civil Proceeding, And Its Application Would Be Incorrect In This Case.

The relief sought by petitioner, namely application of the exclusionary rule to Commission proceedings, is inconsistent with the history and development of the rule on both the state and federal level. Its application in this case would not further the purpose of the rule.

1. History and Development of the Exclusionary Rule in Federal and Utah Courts.

Prior to the rule's creation, courts would not suppress pertinent evidence, even though illegally obtained. See Adams v. New York, 192 U.S. 585, 595 (1904). This changed when the exclusionary rule was announced in Weeks v. United States, 232 U.S. 383 (1914). The Court reasoned that without this judicial protection the Fourth Amendment right against unreasonable searches and seizures would become meaningless. Id. at 393.

However, because Weeks was not then binding on the states, the Utah Supreme Court expressly rejected its application to state court proceedings. State v. Aime, 62 Utah 476, 220 P. 704, 708 (1923); see also State v. Fair, 10 Utah 2d 365, 353 P.2d

615 (1960). The Utah Court reasoned that this constitutional right would be protected by subjecting the individual conducting the unreasonable search and seizure "to all consequences and penalties provided by law." Aime, 220 P. at 707. This rationale was directly contrary to the federal rule that was not directed at "individual misconduct" but at illegally obtained evidence.

However, Utah's independence in this area came to an end when the Supreme Court announced that the exclusionary rule would be binding on state courts. See Mapp v. Ohio, 367 U.S. 643 (1961). The basis of that decision was that the exclusionary rule would protect the "imperative of judicial integrity" by compelling the government to comply with the "charter of its own existence." Id. at 658-59 (quoting Elkins v. United States, 364 U.S. 206, 222 (1960)). In a later case, the Court made clear that "[j]udicial integrity clearly does not mean that the courts must never admit evidence obtained in violation of the Fourth Amendment." United States v. Janis, 428 U.S. 433, 458 n.35 (1976).

The Utah Supreme Court was thus compelled to apply the rule it had expressly rejected in Aime. See State v. Jasso, 439 P.2d 844 (Utah 1979).

The earlier rationale of "the imperative of judicial integrity," was later eclipsed by a policy of deterrence. In Stone v. Powell, 428 U.S. 465 (1976), the Supreme Court specified that "[t]he primary justification for the exclusionary rule then is the deterrence of police conduct that violates Fourth Amendment Rights." Id. at 486. The Court restricted application

of the rule "to those areas where its remedial objectives are thought most efficaciously served." Id. at 487-88 (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)); see also United States v. Leon, 468 U.S. 897, 906-08, 918-19 (1984).

In a corresponding footnote, the Court quoted a noted criminal law commentator: "[T]he rule is a needed, but grud[g]ingly [sic] taken, medicament; no more should be swallowed than is needed to combat the disease. Granted that so many criminals must go free as will deter the constables from blundering, pursuance of this policy of liberation beyond the confines of necessity inflicts gratuitous harm on the public interest." Stone 428 U.S. at 487 n.24 (quoting Amsterdam, Search, Seizure, and Section 2255: A Comment, 112 U. Pa.L.Rev. 378, 388-89 (1964)).

Thus, the judiciary designed the exclusionary rule to deter future unlawful conduct of law enforcement officers. The rule is properly applied in instances where its deterrent purpose is likely to be served.

2. Application of the Exclusionary Rule to Civil Matters in Federal Cases.

In United States v. Janis, the Supreme Court was asked to apply the exclusionary rule to a tax proceeding. There, the police obtained a warrant to search Janis's residence for bookmaking paraphernalia. Id. at 434. Cash and wagering records were seized. A police officer informed the IRS of these records. Based on this information, Janis was assessed wagering taxes. Id. at 437. The IRS levied on Janis's cash that had been seized by the police.

A subsequent state criminal action was brought, and the court suppressed the evidence seized by the police. The court ordered all items returned except the cash levied by the IRS. Id. at 437-38. Janis filed for a refund of the cash. After the IRS denied the request, Janis filed an action in federal district court which sought suppression of all evidence from which the assessment had been made.

The Supreme Court held "that the judicially created exclusionary rule should not be extended to forbid the use in the civil proceeding of one sovereign of evidence seized by a criminal law enforcement agent of another sovereign." Id. at 459-60. The Court expressly stated: "In the complex and turbulent history of the rule, the Court never has applied it to exclude evidence from a civil proceeding, federal or state." Id. at 447 (footnote omitted, emphasis added). The Court expressly left open the question of the rule's application where "intrasovereign" violations have taken place.² Id. at 456.

In reaching this conclusion, the Court weighed the "likelihood of deterring the conduct of the state police . . . [against] the societal costs imposed by the exclusion" Id. at 454. The Court reasoned that "the deterrent effect of the exclusion of relevant evidence is highly attenuated when the 'punishment' imposed upon the offending criminal enforcement officer is the removal of that evidence from a civil suit by or

² The court stated: "[T]he seminal cases that apply the exclusionary rule to a civil proceeding involve "intrasovereign" violations, [] a situation we need not consider here." Janis, 428 U.S. at 456 (footnote omitted).

against a different sovereign." Id. at 458. The Court went on to state:

This attenuation, coupled with the existing deterrence effected by the denial of use of the evidence by either sovereign in the criminal trials with which the searching officer is concerned, creates a situation in which the imposition of the exclusionary rule sought in this case is unlikely to provide significant, much less substantial additional deterrence. It falls outside the offending officer's zone of primary interest.

Id. (emphasis added).

The Court decided that the societal costs imposed by the rule were too severe because "the enforcement of admittedly valid laws would be hampered by so extending the exclusionary rule, and, as is nearly always the case with the rule, the concededly relevant and reliable evidence would be rendered unavailable." Id. at 447.

In petitioner's case, county law enforcement officers brought a criminal action against Sims. As a result of the criminal charges arising out of the possession of the controlled substances, the district court ruled that the search of the petitioner's vehicle was lawful (R. at 9). These law enforcement officers were not under the control of the Commission, nor does the Commission have any authority to control their activities. The relationship of county law enforcement officers and Utah Highway Patrol officers to the Utah State Tax Commission is extremely attenuated. An application of the exclusionary rule to tax proceedings is unlikely to effect the deterrent purpose of the rule because tax law enforcement is well outside the arresting officers' zone of primary interest.

In INS v. Lopez-Mendoza, 468 U.S. 1032 (1984), the Supreme Court addressed the issue it had expressly left open in Janis: whether the exclusionary rule applied in a civil case involving intrasovereign violations. There, Lopez-Mendoza challenged the deportation order of an immigration judge because his alien status had come to the attention of officials of the Immigration and Naturalization Service (INS) by illegal means. Id. at 1034. The Court found that a "deportation proceeding is a purely civil action . . . ," id. at 1038, although it "is a civil complement to a possible criminal prosecution" Id. at 1042. The immigration judge could not "adjudicate guilt or punish . . . for any crime related to unlawful entry into or presence in this country. Consistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation hearing." Id. at 1038.

The Court, in applying the balancing test of Janis, concluded that exclusion would not deter the INS from Fourth Amendment violations because of a comprehensive scheme by the INS to prevent this type of conduct. Id. at 1046. On the other side of the equation, the Court found that the social cost was "both unusual and significant." Id. It stated that ongoing violations of immigration law would occur, that the streamlined deportation hearing would become cumbersome, and that administration of the exclusionary rule by the Board of Immigration Appeals would become costly. Id. at 1048-49. Thus, the Court found the exclusionary rule inapplicable in civil cases involving

intrasovereign violations where the balancing test of Janis is satisfied.

The Second Circuit in Tirado v. Commissioner of Internal Revenue, 689 F.2d 307 (2nd Cir. 1982), considered whether evidence allegedly seized unlawfully by federal narcotics officers for use in a criminal trial was also barred by the exclusionary rule in a subsequent federal tax proceeding. The court concluded that the deterrence rationale of the exclusionary rule is not served by applying the rule to exclude evidence from a proceeding where the evidence was not seized with the participation or collusion of, or in contemplation of use by, agents responsible for the proceeding in which the evidence is presented. The court held that the rule was inapplicable in the tax proceeding.

The Lopez-Mendoza and Tirado cases are substantially similar to this appeal. The tax proceedings conducted before an administrative body with limited jurisdiction are separate from possible criminal prosecutions held before a court with proper criminal jurisdiction. The Tax Commission cannot adjudicate guilt or impose criminal sanctions. Additionally, it cannot guide or direct the efforts of law enforcement personnel, nor can it correct any conduct by law enforcement personnel which may be violative of constitutional rights. The courts in the cases discussed above concluded that exclusion of evidence in these proceedings would not deter Fourth Amendment violations by the agency in its investigation of possible criminal activity. Petitioner's case is analogous. Application of the rule to tax

proceedings would not achieve any deterrent effect. It would be inappropriate to apply criminal protections to these purely civil tax proceedings.

3. Application of the Exclusionary Rule by
State Courts.

This Court has never articulated a state exclusionary rule for civil administrative cases. It should not extend the exclusionary rule to administrative proceedings before the Tax Commission.

Other state courts have rejected the application of the rule in civil proceedings. The Supreme Court of Virginia in County of Henrico v. Ehlers, 379 S.E.2d 457 (Va. 1989), held: "[T]he Fourth Amendment exclusionary rule should not be extended from criminal cases to civil cases." Id. at 462. That court reasoned that deterrence is not served by the rule because no empirical proof exists as to its effectiveness. The court further rejected the rule because it renders reliable and probative evidence unavailable; it deflects the truth-finding process; and it risks engendering disrespect for law by promoting procedure above the fundamental search for truth and justice. Id.

The Missouri Court of Appeals in Green v. Director of Revenue, 745 S.W.2d 818 (Mo.App. 1988), held that the exclusionary rule does not apply to civil proceedings for revocation of a driver's license. In that case the Director of Revenue conceded that the stop which resulted in Green's arrest for intoxication was unlawful. Green refused to take a chemical breath test, which refusal resulted in revocation of his driver's

license. Green asserted that the exclusionary rule should apply on review of the revocation. The court characterized its review of revocation for failure to take the breath test as judicial review of an administrative decision, which is a civil proceeding, and "not subject to the rules of evidence in criminal cases." Id. at 820. The court adopted the reasoning of an Iowa decision, which concluded that "the improbable deterrent effect of applying the rule in license revocation proceedings, when weighed against the loss of reliable and relevant proof . . . necessitated a finding that the exclusionary rule was inapplicable in the license revocation proceeding." Id. at 820 (citing Westendorf v. Iowa Dept of Transportation, 400 N.W.2d 553, 557 (Iowa 1987)). The Westendorf court had refused to extend the use of the exclusionary rule formulated under the fourth and fourteenth amendments to the United States Constitution to the use of evidence in an administrative action revoking a driver's license. Westendorf, 400 N.W.2d at 556.

The New Jersey Supreme Court in Delguidice v. New Jersey Racing Commission, 100 N.J 79, 494 A.2d 1007 (1985), was called upon to determine whether the New Jersey Racing Commission, in a jockey licensing hearing, could consider evidence obtained by law enforcement officers through illegal means. The court determined that a finding of entrapment and resulting dismissal of criminal proceedings against a jockey did not prevent use of incriminating evidence in the jockey's licensing hearing before the Racing Commission. The court began with the proposition that "in an administrative hearing, unlike a

criminal trial, all relevant evidence is admissible This difference is explained in part by the varying goals of the two proceedings: whereas the former is penal, the latter is regulatory." Id. at 1009. The court utilized the reasoning and balancing test of Janis and Lopez-Mendoza and determined that "the deterrent effect of excluding evidence is highly attenuated when the entity forbidden from using the evidence is not the same entity whose agents engaged in the illegal maneuvers." Delguidice, 494 A.2d at 1011. The court pointed out that the law enforcement agents had already been deterred from committing future acts of entrapment by reason of the dismissal of the criminal indictments, and "[t]hat result has to be of substantial concern to the police. Extending the exclusionary sanction to the subsequent licensing proceeding would have, at best, only a marginal deterrent effect." Id. at 1101.

Exclusion of evidence by the Commission would not deter county and other law enforcement agencies from Fourth Amendment violations. Their primary goal is arrest and prosecution for violation of criminal statutes. Application of the rule would have significant social costs. Barred evidence of drugs and drug sales that escape taxation leaves the community to bear the enormous burdens and costs of the social ills they cause. Administrative hearings before the Commission would become cumbersome. Additional costs, time requirements, and hearings would be required to resolve the issue of admissibility. Direct judicial review by this Court would be required whenever an alleged violation of the rule is appealed. Thus balancing of

interests clearly weighs in favor of not extending the exclusionary rule to administrative tax proceedings.

**C. Utah Code Ann. § 59-19-105(6) (Supp. 1990)
Which Provides For a Sharing of Tax
Collection Revenues Became Effective
April 24, 1989, and Therefore Does Not
Apply Here.**

Petitioner argues that in light of Utah Code Ann. § 59-19-105(6) (Supp. 1990), application of the exclusionary rule to this case would indeed fulfill the deterrence goal. Petitioner's Brief at 18. This argument is unavailable here.

Section 59-19-105(6) provides that the Commission shall collect all taxes due under the Act (whether characterized as taxes, penalties, or interest) and that 60% of the collected revenues shall ultimately be distributed to the enforcement agency for use in the continued enforcement of controlled substance laws.

However, this sharing provision was added to § 59-19-105 by the 1989 legislature. The amendment was not effective on July 27, 1988, when the seizure of cocaine and marijuana occurred. The taxes assessed became due and payable on August 29, 1988. Subsection (6) of § 59-19-105 became effective on April 24, 1989, many months after the assessment on the controlled substances was made. A statute has retroactive application only when specifically designated as retroactive by the legislature. Utah Code Ann. § 68-3-3 (1986) states: "No part of these revised statutes is retroactive, unless expressly so declared."

Any tax revenues resulting from the Stamp Act's imposition prior to April 24, 1989, were not shared with any enforcement agency pursuant to the statutory scheme. When the seizure and arrest were made in this case, there could have been no contemplation in the arresting officers' minds of any monetary benefit to the arresting agency or officer resulting from a possible tax assessment. The sharing provision did not exist at that time. The officers' primary zone of interest was strictly criminal, and did not include a potential civil tax assessment. Therefore, the "deterrence" rationale, upon which the exclusionary rule is based, would have no application to the officers here. Although this argument may arise in a future case, it cannot be considered here.³

CONCLUSION

Based upon the foregoing arguments, the Court should affirm the decision of the Tax Commission.

Alternatively, if the Court decides that the exclusionary rule applies in a drug stamp tax proceeding before


³ In the event that this Court decides that the rule should be applied to a Tax Commission proceeding because of the deterrent effect on improper police conduct, it should modify the rule's effect. The rule acts as a prophylactic to deter future improper police conduct. See Janis, 428 U.S. 433, 454. It punishes the offending agency. If all evidence is suppressed in the Tax Commission proceeding, that purpose will not be fulfilled. The Tax Commission, a non-offending agency, will also be punished in a draconian manner; the evidence supporting its case will disappear.

the Commission, the case should be remanded to the Commission for a determination of the exclusion question.

RESPECTFULLY SUBMITTED this 14th day of March, 1991.

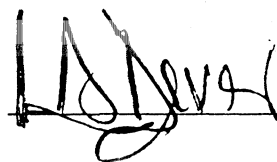
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CERTIFICATE OF MAILING

I hereby certify that a true and accurate copy of the foregoing Brief of Appellee, was mailed, postage prepaid, to G. Fred Metos, YENGICH, RICH, XAIZ and METOS, 175 East 400 South, Suite 400, Salt Lake City, Utah 84111, this 15th day of March, 1991.



³ Cont. The proper remedial measure would be to bar the offending agency from sharing in the proceeds. Hence, the prophylactic purpose of the rule would be sustained. The offending agency would be barred from reaping the benefits of its improper conduct. The non-offending agency, the Tax Commission, could then be allowed to proceed without the confines of the rule. This would satisfy the rule and be consistent with the mandates of the legislature contained within the Illegal Drug Stamp Act, specifying the distribution of proceeds: "If no law enforcement agency is involved in the collection of a specific amount under this chapter, the entire amount collected shall be applied under Subsection (6)(a)(i) to administrative costs of