

**UNITED STATES TAX COURT
WASHINGTON, DC 20217**

SUPERIOR ORGANICS,)	
)	
Petitioner,)	
)	
v.)	Docket No. 23020-17.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	

ORDER

This case is currently set for trial at the session of the Court scheduled to commence on January 14, 2019, in Phoenix, Arizona. Superior Organics has filed a motion in limine asking the Court to determine that the burden of proof as to the applicability of section 280E is on the Commissioner. Superior Organics also filed a motion for judgment on the pleadings arguing that section 280E is unconstitutional. Except in limited situations, none of which are present here, the burden of proof is on the taxpayer. Rule 142(a)(1).

Background

Superior Organics is a medical marijuana dispensary licensed under Arizona law. Section 280E disallows deductions for amounts incurred in a trade or business that consists of trafficking in controlled substances. Marijuana is a controlled substance as defined by section 280E. The Commissioner assessed deficiencies for tax years 2013 and 2014 based in part on the denial of deductions under section 280E. Superior Organics timely filed a petition disputing the application of section 280E.

Like previous motions file by Superior Organics, these motions relate to the legality of medical marijuana. Superior Organics previously filed two motions for protective order one of which we granted in part, albeit on grounds wholly unrelated to arguments about section 280E.¹ In the first motion, Superior Organics

¹ Our reason for granting one of the motions in part was unrelated to Superior Organics’s 280E arguments. We granted Superior Organics’s motion for a

argued that a protective order was necessary because requiring it to produce “incriminating evidence” would be “grossly unfair” to “defend against the IRS’s administrative decision” to apply section 280E. Essentially, Superior Organics asked not to be required to substantiate, or to produce the information underlying, the amounts reported and expenses claimed.

In the motions currently before us, Superior Organics asks us to determine that the burden of proving predicate fact underlying the applicability of section 280E is on the Commissioner. It argues that: “[i]f the applicability of Section 280E is on the taxpayer, it will be for the Taxpayer to disprove that it is engaged in criminal enterprise. As discussed, below, such a burden of proof is not appropriate under our constitutional system.” Superior Organics also asks us to determine that section 280E is unconstitutional.

Superior Organics argues that it is a violation of due process to require the taxpayer to “disprove engaging in criminal enterprise.” Superior Organics cites Speiser v. Randall, 357 U.S. 513 (1958) for the proposition that “placing the burden of proof on the taxpayer to disprove criminal activity violate[s] due process.” It also claims that sections 7454 and 162(c) support the idea that due process requires taxpayers not have the burden of disproving criminal conduct.

Discussion

Rule 142 addresses which party bears the burden of proof in a given situation. Generally, under Rule 142(a)(1) “[t]he burden of proof shall be upon the petitioner, except as otherwise provided by statute or determined by the Court * * *.” Therefore, the Commissioner’s determinations in the notice of deficiency are presumed correct, unless the taxpayer can meet his burden by proving error. Welch v. Helvering, 290 U.S. 111, 115 (1933).

Superior Organics claims who bears the burden of proof as to issues of section 280E has not yet been decided by this Court. This argument ignores our general rule stated above that unless otherwise provided, the burden is on the taxpayer. Superior Organics cites to a footnote in Olive v. Commissioner, 139 T.C. 19, 30 n.11 (2012), aff’d, 792 F.3d 1146 (9th Cir. 2015), but that footnote stands for the unremarkable general proposition that there is no need to address who has the burden of proof when the question would not affect the outcome of the

protective order as to interrogatories 18 and 19 because we found they violated the limit on the number of interrogatories set forth in Rule 90.

case. In fact, we have addressed the issue. Counsel for Superior Organics filed a similar motion in Feinberg v. Commissioner. See Petitioners' Motion in Limine, Feinberg v. Commissioner No. 10083-13 (Oct. 2, 2014). We denied that motion, writing:

In a civil tax case, the taxpayer must accept the consequences of asserting the Fifth Amendment and cannot avoid the burden of proof by claiming the privilege and attempting to convert “the shield *** which it was intended to be into a sword.” United States v. Rylander, 460 U.S. 752, 758 (1983); see Steinbrecher v. Commissioner, 712 F.2d 195, 198 (5th Cir. 1983), aff'g T.C. Memo. 1983-12; Traficant v. Commissioner, 89 T.C. 501 (1987), aff'd 884 F.2d 258 (6th Cir. 1989); Lee v. Commissioner, T.C. Memo. 202-95 at slip op. 12. In Rylander, the Supreme Court stated “*** [the Fifth Amendment] has never been thought to be in itself a substitute for evidence that would assist in meeting a burden of production.” United States v. Rylander, 460 U.S. at 758.

See Order, Feinberg v. Commissioner No. 10083-13 (Mar. 24, 2015). We denied a request for an interlocutory appeal and the Tenth Circuit denied a petition for a writ of mandamus. Feinberg v. Commissioner, 808 F.3d 813 (2015).

We aren't alone in having considered the question. The Tenth Circuit addressed it in Alpenglow Botanicals, LLC v. United States, 894 F.3d 1187, 1197-1198 (10th Cir. 2018), writing:

Alpenglow also contends the IRS's denial of its deductions was arbitrary because the IRS had no proof Alpenglow trafficked in a controlled substance. But in an action to recover taxes paid to the IRS, the “taxpayer has the burden to show not merely that the IRS's assessment was erroneous, but also the amount of the refund to which the taxpayer is entitled.” Dye v. United States, 121 F.3d 1399, 1408 (10th Cir. 1997). Under this rule, the burden falls on Alpenglow to show error, not on the IRS to prove trafficking. See Green Sol., 855 F.3d at 1121; Feinberg, 808 F.3d at 815.²

² As discussed in Alpenglow Botanicals, LLC and Green Solution Retail, Inc., the Commissioner's determination that a taxpayer trafficked in controlled substances for purposes of section 280E is not the same as a finding under criminal law that the person trafficked in controlled substances in violation of the Controlled

Next, Superior Organics argues that Speiser v. Randall, 357 U.S. 513 holds that due process is violated when a taxpayer is required to disprove criminal activity. Superior Organics mischaracterizes the holding in Speiser, which dealt with constitutionally protected free speech rights. The holding in Speiser, as stated by the Supreme Court, was “[w]hen the State undertakes to restrain unlawful advocacy it must provide procedures which are adequate to safeguard against infringement of constitutionally protected rights.” Id. There is no constitutionally protected right to traffic in controlled substances; Speiser is inapposite.

Finally, Superior Organics provides us two examples of statutes that shift the burden of proof to the Commissioner. Section 7454(a) expressly provides that the Commissioner bears the burden of proof as to an issue of whether the taxpayer “has been guilty of fraud with intent to evade tax.” Likewise, paragraphs (1) and (2) of section 162(c) affirmatively place the burden of proof on the Commissioner as to certain illegal payments. This shows us that Congress knows how to shift the burden but chose not to do so in the situation before us.

For the foregoing reasons, it is

ORDERED that Superior Organics’s Motion in Limine filed December 14, 2018, is denied. It is further

ORDERED that Superior Organics’s Motion for Judgment on the Pleadings filed December 14, 2018, is denied.

**(Signed) Ronald L. Buch
Judge**

Dated: Washington, D.C.
December 21, 2018

Substances Act. The Commissioner’s application of section 280E falls within his authority to determine a taxpayer’s proper liability; that determination does not require a criminal investigation or a determination of criminal culpability. See Alpenglow Botanicals, LLC, v. United States, 894 F.3d at 1196; and Green Solution Retail, Inc. v. United States, 855 F.3d 1111, 1121 (10th Cir. 2017), cert. denied, 138 S. Ct. 1281 (2018). Counsel for Superior Organics represented the taxpayer in each of those cases, as well.