

STATE OF WISCONSIN
REPORT OF THE JOINT SURVEY COMMITTEE ON TAX EXEMPTIONS
2013 ASSEMBLY BILL 709

[Introduced by Representatives Knudson, Murtha and Severson; cosponsored by Senator Jauch.]

General Nature of Proposal

2013 Assembly Bill 709 would modify s. 70.111 (18), Stats., which provides a property tax exemption for biogas or synthetic gas energy systems, solar energy systems, and wind energy systems. The exemption for biogas and synthetic gas energy systems was added to s. 70.111 (18), Stats., by 2013 Wisconsin Act 20, the 2013-15 Biennial Budget Act. Under Assembly Bill 709, the exemption for biogas or synthetic gas energy systems would be limited to exclude “property subject to a tax incremental financing agreement that was in effect on January 1, 2014, and not subsequently modified, amended, or extended.”

Legality Involved

Wisconsin Constitution, Article VIII, Section 1

The question may arise as to whether 2013 Assembly Bill 709 conforms to the requirements of the Uniformity Clause of the Wisconsin Constitution.

The general principles of the Uniformity Clause were set forth in *Gottlieb v. Milwaukee*, 33 Wis. 2d 408, 147 N.W.2d 633 (1967). In that case, the Wisconsin Supreme Court stated that the Uniformity Clause requires that for direct taxation of property, there can be but one constitutional class. All property within that class must be taxed on a basis of equality so far as practicable and all property taxed must bear its burden equally on an ad valorem basis. All property not included in that class must be absolutely exempt from property taxation. The Legislature may classify between property that is to be taxed and that which is to be wholly exempt and the test of such classification is reasonableness.

Constitutional analysis can be especially challenging when a constitutional test involves reasonableness. In fact, Uniformity Clause analysis has been described to require “an ad hoc, almost intuitive determination.” [Jack Stark, *The Uniformity Clause of the Wisconsin Constitution*, 76 Marq. L. Rev. 577, 619-20 (1993).] However, it is rare, historically, that a court will choose not to defer to the Legislature when the test for legislative action is reasonableness. Several courts have discussed the requirement of reasonableness in distinctions drawn in assessment of the general property tax.

In *Estate of Heuel v. State*, 4 Wis. 2d 400 (1958), the court held that uniformity means “taxation which acts alike on all persons similarly situated.” In *Associated Hospital Service, Inc. v. City of Milwaukee*, 13 Wis. 2d 447, 472 (1960), the court upheld a law that treated Blue Cross differently from other insurers, finding that real differences existed between the two classes of insurers. Nonetheless, the court also has noted that, “[w]hen we are presented with a case in which the exemption is arbitrary and in which other persons of the same class owning property of the same general description are awarded

exemptions of a lesser amount, the situation is one in which the rule of uniformity is violated.” [See *Board of Trustees of Lawrence University v. Outagamie County*, 150 Wis. 244 (1912).]

Similarly, a previous attorney general has opined on the application of the Uniformity Clause to a proposed exemption of homestead property. In the opinion, the Attorney General concluded that, despite a presumption of constitutionality, it would be unreasonable to consider homestead property as “so separate and apart” from residential property used for other purposes (e.g., rental or vacation property) so as to be distinct classes under the Uniformity Clause. [66 Op. Atty. Gen. 337 (1977).]

Application of the Uniformity Clause to Assembly Bill 709

With regard to Assembly Bill 709, the question relating to uniformity is whether it is reasonable to differentiate between “biogas and synthetic energy systems, generally,” and “biogas and synthetic energy systems that are subject to a tax incremental financing agreement that was in effect on January 1, 2014” as separate classes of property for the purpose of property tax exemption. As discussed below, although legislation enjoys a presumption of constitutionality, arguments may be made both for and against the constitutionality of the bill.

Based on the cases and opinions described above, it appears possible, and perhaps likely, that, if challenged, the modification of s. 70.111 (18), Stats., proposed by Assembly Bill 709 would be determined to violate the Uniformity Clause. In the context of *Estate of Heuel* and the Attorney General’s opinion regarding a homestead exemption, it is possible that a court would consider the presence of a TIF district to be similar to the presence of homestead property, because those statuses each relate to use and legal classification of the property rather than the physical property characteristics that typically constitute “reasonable” classes for the purposes of exemption under the Uniformity Clause. In other words, the distinction may be questioned because, in terms of physical description, a biogas or synthetic energy system in a TIF district appears no different than a system outside a district.

On the other hand, a court could find a reasonable explanation for the distinction of biogas and synthetic energy systems based on presence in a TIF district. Generally, under TIF, a local unit of government will incur debt to make investments in local infrastructure in order to encourage private development in the TIF district. These debts are then serviced by dedicating the tax proceeds of the increment of any increases in property value that arise for properties that benefit from the local infrastructure investments. Given the reliance interests of the local unit of government, the benefit to private property, and the expectation of a revenue stream to service the debt for previous infrastructure investments, a court may find it reasonable to distinguish between properties based on presence of a TIF district.

In that regard, the treatment of s. 70.111 (18), Stats., proposed by Assembly Bill 709, appears substantially similar in terms of “reasonableness” to at least one other property tax exemption in s. 70.11, Stats. In particular, 1985 Wisconsin Act 29 created s. 70.11 (32), Stats., a property tax exemption for nonprofit youth hockey associations, except facilities financed with industrial revenue bonds. The tax exemption was later amended to remove the financing exception for properties placed in operation after January 1, 1988. [1989 Wisconsin Act 25.] While the absence of a challenge is unlikely to be considered persuasive by a court, I am not aware of any challenges to 1985 Wisconsin Act 29 prior to enactment of 1989 Wisconsin Act 25, despite the denial of exemption to a sub-class of property based solely on the presence of industrial revenue bond financing by the original Act. Additionally, the

drafting file for 1989 Wisconsin Act 25 offers no indication that the purpose for enactment of Act 29 related to the Uniformity Clause.

Fiscal Effect Upon the State and Its Subdivisions

With regard to the biogas facility in the Village of Turtle Lake, the Department of Revenue estimates Assembly Bill 709 would shift approximately \$710,000 in annual property taxes to the facility from other properties subject to the property tax. The bill would also increase collections of the state forestation property tax by \$4,200 on an annual basis.

Public Policy Involved

The bill is good public policy.

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