REPORT
STATE OF WISCONSIN
JOINT SURVEY COMMITTEE ON TAX EXEMPTIONS
2023 SENATE BILL 344

[Introduced by Senator Quinn and cosponsored by Representative Snyder]

This report relates to 2023 Senate Bill 344, relating to designating an unborn child as a dependent for income tax purposes and increasing the income tax exemption for a dependent.

GENERAL NATURE OF PROPOSAL

The individual income tax exemption for dependents is increased from $700 to $1,000 under the bill. Also, the bill contains certain legislative findings, including a finding that human life begins at conception. It provides that a "dependent" includes an unborn child, for purposes of an income tax exemption, subtraction, or credit. An individual claiming the exemption for an unborn child must submit an attestation from a person qualified to perform an ultrasound that the person has detected a fetal heartbeat. Also, under the bill, no individual may claim the exemption for a pregnancy that ends in an abortion. The change would first apply to tax years beginning on January 1, 2023.

LEGALITY INVOLVED

The bill raises potential issues relating to the receipt of federal funds through the state fiscal recovery fund (SFRF) created under the federal American Rescue Plan Act (ARPA). In total, Wisconsin received $2.53 billion in SFRF funds. ARPA prohibits states from using SFRF funds "to either directly or indirectly offset reduction in [their] net tax revenue" that results from a change in law that "reduces any tax." [42 U.S.C. s. 802 (c) (2) (A).] This is sometimes referred to as the "tax offset" provision under ARPA.

Treasury Determination

The question posed by the tax offset provision, in relation to the bill, is whether the U.S. Department of the Treasury (the Treasury) would determine there were insufficient funds from other sources to offset the reduction in revenue under the bill. The state Department of Administration (DOA) is responsible for reporting reductions in net revenue under ARPA. The department calculates that, as of August 28, 2023, the remaining margin for tax reductions before triggering potential recoupment is around $113 million for fiscal year 2023-24 and $319 million for fiscal year 2024-25. Meanwhile, the provisions in the bill are estimated to reduce revenue by **$20.2 million annually**, as described below. Therefore, it appears unlikely that the Treasury would determine there were insufficient funds from other sources to offset the reduction caused by this bill.

Federal Court Injunctions

In addition to the fact that an adverse determination from the Treasury appears unlikely, the outcomes in several recent court actions have cast doubt over the federal government's ability to enforce the tax offset provision under ARPA. Various states have filed lawsuits, individually or in combination with other states, against Treasury Secretary Janet Yellen and the Treasury, in relation to the enforcement of the provision.

Most significantly, the tax offset provision was held unenforceable by the U.S. Court of Appeals for the Eleventh Circuit, in *West Virginia v. U.S. Dep't of the Treasury*, 59 F.4th 1124 (11th Cir. 2023). The Eleventh Circuit upheld a lower court's order enjoining enforcement against 13 state plaintiffs. In its decision, the court affirmed that Congress is given spending authority in the Constitution and has the power to condition giving money to states on certain action, but that any conditions must be (among other factors) unambiguous. [*Id.* at 1140-41.] However, in this case, the court said the provision fails to provide a standard against which a state can assess whether it will reduce or has reduced net tax revenue, and it fails to define what a "direct or indirect offset" means. The court also said the novelty and scope of ARPA compounds those issues because the restriction is targeted at a state's entire budget. Ultimately, the Eleventh Circuit found in favor of the plaintiffs and upheld an injunction preventing the tax offset provision from being enforced against the 13 states. [*Id.* at 1144-47.]

Additionally, the U.S. Court of Appeals for the Sixth Circuit upheld an injunction blocking enforcement of the tax offset provision against Tennessee, one of the two state plaintiffs in *Kentucky v. Yellen*, 54 F.4th 325 (6th Cir. 2022). In its ruling on the merits, the Sixth Circuit found that the language of the offset provision was "impermissibly vague." [*Id.* at 330.] According to recent news reports, the Treasury has chosen not to appeal this decision.

Finally, in a lawsuit brought by Texas, Mississippi, and Louisiana, a federal district court in Texas upheld an injunction against enforcement of the tax offset provision against those states, in *Texas v. Yellen*, 597 F.Supp.3d 1005 (N.D. Tex. 2022). The court said it granted an injunction because the provision was coercive and commandeering. [*Id.* at 1012-15.] The U.S. Court of Appeals for the Fifth Circuit granted an appeal, and heard oral arguments on April 3, 2023, but the court has not yet released a decision.

In this case, if the Treasury sought recoupment of any SFRF funds expended by Wisconsin, as a result of the enactment of the bill, the state could contest the validity of the Treasury's action in court. This could include arguments against enforcement that have been successful in other jurisdictions.

FISCAL EFFECT

The Department of Revenue (DOR) estimates that adjusting the dependent exemption level from $700 to $1,000 would reduce state income tax revenue by $19.5 million annually, and including unborn children as dependents would reduce such revenue by $700,000 annually, beginning in 2023-24. Therefore, DOR estimates that there would be a total reduction in such revenue of **$20.2 million annually** beginning in 2023-24 under the bill.

DOR anticipates incurring **$94,000 annually** in ongoing costs to review claims associated with the bill. In the initial year, this would be accompanied by an unspecified amount of one-time administrative costs to develop materials and procedures for claiming unborn children.

PUBLIC POLICY INVOLVED

The Joint Survey Committee on Tax Exemptions finds that the tax exemptions created in the bill are not good public policy on a vote of Ayes, 6; Noes, 3.

10/31/23 **JOINT SURVEY COMMITTEE ON TAX EXEMPTIONS**