



WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

Memo No. 1

TO: MEMBERS OF THE STUDY COMMITTEE ON REVIEW OF TAX INCREMENTAL FINANCING

FROM: Melissa Schmidt, Senior Staff Attorney

RE: The Public Purpose Doctrine's Limitation on Donating Positive Tax Increments to a Tax Incremental Financing District with Different Overlying Taxing Districts

DATE: August 7, 2014

At the July 17, 2014 meeting of the Study Committee on Review of Tax Incremental Financing (TIF), information was requested regarding the ability of a tax incremental district (TID) to donate its positive tax increments to a recipient TID with different overlying taxing jurisdictions (e.g. school districts, technical college districts, sewerage districts, public inland lake protection and rehabilitation districts, etc.). Current law allows a TID to donate its positive tax increments to a recipient TID only if the donor and the recipient TIDs share the same overlying taxing jurisdictions. [See s. 66.1105 (6) (e) 1. a., and (f) 1., a., Stats.]

The current statutory limitation on the ability of one TID to donate positive tax increments to another TID reflects the limits of the public purpose doctrine, a principle arising under the Wisconsin Constitution. This Memo discusses the public purpose doctrine's limitation on the ability for one TID to donate to another TID.

THE PUBLIC PURPOSE DOCTRINE

The public purpose doctrine is one of the limitations placed on the state and local governments' taxing power. While not expressly stated in the Wisconsin Constitution, the public purpose doctrine is accepted as a well-established constitutional principle. In *Sigma Tau Gamma v. Menomonie*, 93 Wis. 2d 392, 412-13 (1980), the Wisconsin Supreme Court explained this limitation on taxation as follows:

A second limitation on the taxing power, however, is that taxes must be levied and expended for a public rather than a private

purpose. Although linked to the uniformity requirement, the public purpose doctrine is a separate and inherent limitation on the power of taxation. As enunciated by this court, the public purpose doctrine has two aspects:

1. The tax must be for a public - not private - purpose.
2. The purpose of the tax must be one which pertains to the public purpose of the district within which the tax is to be levied and raised. [Citation and quotations omitted.]

Taxes for Public - Not Private - Purpose

In *Town of Beloit v. County of Rock*, 2003 WI 8, ¶27 (2003), the court summarized that the analysis of the first aspect of the public purpose doctrine involved the following:

In determining whether a public purpose exists, courts have considered whether the subject matter or commodity of the expenditure is one of “public necessity, convenience or welfare,” as well as the difficulty private individuals have in providing the benefit for themselves. Courts also look to see if the benefit to the public is direct or remote. Additionally, provided that the primary purpose of the expenditure is designed for a public purpose, any direct or incidental private benefit does not destroy the public purpose and render the expenditure unconstitutional. [Citations omitted.]

Purpose of the Tax for the District Within Which the Tax is Levied

The second aspect of the public purpose doctrine is discussed in the book, *The Wisconsin State Constitution: A Reference Guide* [Jack Stark, Greenwood Press (1997)]. In it, Mr. Stark cites nine Wisconsin appellate court opinions in support of the proposition that the “Public Purpose Doctrine” of the Wisconsin Constitution requires a unit of government that raises a tax to be the unit of government that spends the proceeds of the tax.

The second part of the public purpose doctrine is that a unit of government that raises the tax must be the unit of government that spends the proceeds of the tax. This is a logical concomitant to this doctrine’s more general rule. As we have seen, the general doctrine has its roots in conceptions of government’s taxing power, so it is fitting that one of the doctrine’s rules apply solely to taxation. Also, it seems logical that a purpose is not truly public if one “public” provides money and another “public” reaps its benefits. [p. 224.]

The second aspect of the public purpose doctrine is discussed in some detail in *Buse v. Smith*, 74 Wis. 2d 550 (1976). In *Buse*, the court addressed the constitutionality of state school

aid payments, which at the time required some school districts to pay negative aid payments into a state fund for redistribution to other school districts in the state. The law provided that the negative aid payments were derived from a portion of property taxes levied at the local level. The court found that the revenues from the negative aid payments paid into the state fund were derived not from a state tax but from local property taxes, locally levied, locally assessed, and locally collected, and held the following:

“It is the general rule applicable to appropriations that a tax must be spent at the level at which it is raised.” ... Regardless of the merits of the legislative enactment or the worthiness of the cause, we conclude that the state cannot compel one school district to levy and collect a tax for the direct benefit of other school districts or for the sole benefit of the state. [*Buse*, at 579 (citations omitted).]

In reaching this decision, *Buse* cited court cases dating back to 1902 that explained the second aspect of the public purpose doctrine as follows:

Wisconsin has long recognized this rule of constitutional interpretation, i.e., the purpose of the tax must be one which pertains to the public purpose of the district within which the tax is to be levied and raised. ... “By taxation is meant a certain mode of raising revenue for a public purpose in which the community that pays it has an interest.” ... “An act authorizing the levy of contributions for a private purpose, or a purpose which, though public is one in which the people from whom it is exacted have no interest, is not a law, but a judicial sentence, and not within legislative authority.”... “The rule is, local taxation for local purposes, or taxation on the benefits conferred, but not beyond them.” [*Buse*, at 577 (citations omitted).]

In *Sigma Tau Gamma*, the court analyzed the constitutionality of TIF law based upon the public purpose doctrine. Distinguishing TIF law from the negative aid payments addressed in *Buse*, the court held both aspects of the public purpose doctrine were satisfied.

For unlike negative aid financing, tax revenue taken from the other taxing authorities under tax incremental financing is used to accomplish a public purpose within their territorial limits. As the legislature expressly found, taxing authorities which share the cities’ tax base do benefit from the expansion of that tax base which results from urban redevelopment or other public improvements. Because whatever money generated from the tax increments district is used only to pay for public improvements in that district and because the elimination of blight is a public purpose, both requirements of the public purpose doctrine would seem to be satisfied. [*Sigma Tau Gamma*, 93 Wis. 2d at 413-14.]

DISCUSSION

Based upon the court cases cited above, current TIF law regarding donor TIDs satisfies the second aspect of the public purpose doctrine because a donor TID may only donate positive tax increments to a recipient TID that shares the same overlying taxing jurisdictions. Accordingly, it would appear to be an unconstitutional violation of the second aspect of the public purpose doctrine to allow a donor TID to donate to a recipient TID with different overlying taxing jurisdictions.

If the committee is interested in amending current TIF law to allow a donor TID to donate to a greater number of recipient TIDs throughout the city or village, the committee could consider removing the property taxes collected from certain overlying taxing jurisdictions from the calculations of the TID's base value and tax increments. For example, the committee could consider removing sewerage districts or public inland lake protection and rehabilitation districts from these calculations. While eliminating these taxing jurisdictions would reduce the TID's base value and tax increments, doing so would allow at least some TIDs to possibly donate to more recipient TIDs without violating the public purpose doctrine.

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