

REPORT
STATE OF WISCONSIN
JOINT SURVEY COMMITTEE ON TAX EXEMPTIONS
2023 ASSEMBLY BILL 438

[Introduced by Representative Brooks and cosponsored by Senator Feyen]

This report relates to 2023 Assembly Bill 438, relating to baseball park district administration and funding for improvement of professional baseball park facilities.

GENERAL NATURE OF PROPOSAL

The bill includes two tax-exemption provisions: (1) an expansion of the current sales and use tax exemption on building materials, supplies, and equipment purchased by a tax-exempt sports and entertainment home stadium; and (2) the creation of a new sales and use tax exemption for sales to a professional baseball park district.

With regard to the first provision, currently there is a sales and use tax exemption for the sales price, storage, and other costs of building materials, supplies, and equipment for construction, renovation, or development of property of a tax-exempt sports and entertainment home stadium. [ss. 77.54 (41) and 70.11 (36), Stats.] The bill expands this exemption so that, in addition to applying to construction, renovation, and development of a tax-exempt sports and entertainment home stadium, the exemption also applies to purchases for improvement, repair, and maintenance of such facilities and structures.

With regard to the second provision, currently there is a sales and use tax exemption for the sales price, storage, and other costs of tangible personal property and taxable services used by certain entities, such as governmental units, hospitals, and local cultural arts districts. [s. 77.54 (9a), Stats.] The bill adds a local professional baseball park district to the list of entities to which sales of tangible personal property and taxable services are sales and use tax exempt.

Both exemptions would be effective the day after publication.

LEGALITY INVOLVED

The bill raises potential issues relating to the receipt of federal funds through the state fiscal recovery fund (SFRF) created under the 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 Assembly Bill 438, 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 exemption provisions in Assembly Bill 438 are estimated to have a minimal effect on general tax fund collections, as described below. Therefore, it appears unlikely that the Treasury would determine there were insufficient funds from other sources to offset any reduction under Assembly Bill 438.

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.

Similarly to these states, 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

With respect to the sales and use tax exemption for construction, renovation or development of a tax-exempt sports and entertainment home stadium, DOA estimates that the expansion of the exemption to include improvement, repair, and maintenance would have a minimal effect on

general fund tax collections. Also, DOA estimates that the creation of a sales and use tax exemption for sales to a local professional baseball park district would have a minimal effect on general fund tax collections.

PUBLIC POLICY INVOLVED

The Joint Survey Committee on Tax Exemptions finds that the tax exemptions created in the bill are good public policy on a vote of Ayes, 5; Noes, 4.

10/16/23

JOINT SURVEY COMMITTEE ON TAX EXEMPTIONS