FILED
02-11-2019
Clerk of Circuit Court
Brown County, WI
2018CV000640

STATE OF WISCONSIN CIRCUIT COURT BROWN COUNTY

BROWN COUNTY,
Plaintiff,
v.

Case No. 18-CV-640

BROWN COUNTY TAXPAYERS ASSOCIATION, et al.,
Defendants/Third-Party-Plaintiffs
v.

PETER BARCA, Secretary,
Wisconsin Department of Revenue,
Third-Party Defendant.

DEFENDANTS/THIRD-PARTY-PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Counties may choose to enact sales and use taxes, but "*only* for the purpose of *directly reducing* the property tax levy." Wis. Stat. § 77.70 (emphases added). Brown County has enacted a sales and use tax, but is using tax revenue to fund a slate of new spending projects – thereby avoiding a hypothetical increase in the levy that it might be able to impose if it could successfully negotiate the legal steps required to borrow money or raise the levy limit – none of which it has even attempted. It strains the English language to call this a reduction of any type, much less a direct one.

ARGUMENT

I) WIS. STAT. § 77.70 PLAINLY REQUIRES THAT BROWN COUNTY'S SALES AND USE TAX DIRECTLY REDUCE ITS PROPERTY TAX LEVY

A) The Text of § 77.70 Is Unambiguous

The text of Wis. Stat. § 77.70 requires county governments to apply sales and use tax proceeds to directly reduce the property tax levy. Using those proceeds to instead fund new

spending projects, as Brown County is doing, contravenes this requirement. Though Brown County suggests it might have paid for its new projects using property tax revenues, and thus did not raise the property tax levy as high as it might have, the absence of an increase in the levy is not the same as a direct reduction to the levy.

Brown County's primary argument in response is that because the Legislature failed to specifically refer to the *expenditure* of sales and use tax proceeds, instead discussing the purpose of the imposition of the tax, the County may spend those proceeds however it wants. This is true, but irrelevant. Unlike sales taxes earmarked for sports stadiums, *see, e.g.*, Wis. Stat. §§ 77.705, 77.706, county sales and use taxes may be spent on any otherwise-legal county expenditure. The county could use those revenues for the sheriff's department, or the district attorney's office, or corporation counsel, or health & human services, to take a few examples of broad expense division categories in the Brown County budget. (*See* Klingsporn Aff., Ex. D Part 1, p. 33, Dkt #58.)

But while § 77.70 does not specify *what* the proceeds of a sales tax must be spent on, it does place an important limit on *how much* a County may spend. Wherever a county decides to put the sales and use tax money, it must result in the property tax levy decreasing by that amount. That only happens if the county does not simultaneously increase spending on new projects. For example, Brown County's "Public Safety" expenditures barely changed from 2017 to 2018 – a half-percent increase. (*Id.*) In 2018, of the $55,376,383 Public Safety budget, $41,595,775 was funded by the property tax levy. (*Id.*, p. 34.) Instead of spending of the sales and use tax revenues (approximately $23,000,000) on new capital projects, Brown County could have spent that money on Public Safety. If it had done that, it only would have had to fund about $18,000,000 of Public Safety expenses with property taxes, reducing the levy by that

$23,000,000. Or it could have spent the $23,000,000 on Health & Human Services (budgeted to require over $25,000,000 of property tax revenue). The money can go to any number of places, so long as it is replacing property tax revenue that was previously being spent.

Much of what Brown County says here – that it wants to use the sales tax to avoid borrowing for projects it regards as desirable or even essential – is an argument with the statute. Brown County wants to use the sales tax to augment – rather than replace – the revenue it receives from the property tax. That might be a useful tool for counties, but the legislature had other ideas.

Finally, Brown County's discussion of its mill rate freeze (P. Resp. Br. 5, Dkt #75) is a red herring. The mill rate is a function of a county's property tax levy and the equalized value of taxable property. *See Milewski v. Town of Dover*, 2017 WI 79, ¶47, 377 Wis. 2d 38, 899 N.W.2d 303 (plurality opinion). What Brown County is saying is that it has promised to limit its levy increases to a level that does not raise the mill rate. But this is simply a variation of its erroneous argument that slowing the increase of the property tax levy is the same as a direct reduction of the property tax levy. A mill rate freeze (or even decrease) does not necessarily mean the levy decreased.

B) BCTA's Extrinsic Evidence Should Not Be Struck

In order to bolster its textual argument, BCTA produced extrinsic materials related to the history of § 77.70's enactment, many of them obtained from the Legislative Reference Bureau. In a footnote, Brown County requests that

> this Court strike all extrinsic evidence submitted by the Defendants . . . on the grounds that such exhibits are extrinsic evidence and are not appropriate for a statutory analysis interpretation given Defendants' position that Wis. Stat. § 77.70 is unambiguous.

(P. Resp. Br. 8, n.5.) This request is without merit. Contrary to Brown County's suggestion, BCTA's reliance on extrinsic sources is not at all inconsistent with BCTA's position that § 77.70 is unambiguous. But the Wisconsin Supreme Court confirmed as recently as 2016 that "[w]hile extrinsic sources are usually not consulted if the statutory language bears a plain meaning, *we nevertheless may consult extrinsic sources 'to confirm or verify a plain-meaning interpretation*.'" *Sorenson v. Batchelder*, 2016 WI 34, ¶12, 368 Wis. 2d 140, 885 N.W.2d 362 (emphasis added) (quoting *State v. Grunke*, 2008 WI 82, ¶12, 311 Wis. 2d 439, 752 N.W.2d 769).

Even were this rule not the law, BCTA explicitly presented its discussion of legislative history as an *alternate* argument. (*See Id.* ("*Though not necessary to an interpretation of Wis. Stat. § 77.70*, the legislative history of the statute further confirms that the obvious meaning of the statute is the correct one.") (emphasis added).) The presentation of an alternate argument like this one is important because the Court might disagree with BCTA that the statute is unambiguous. This Court should deny Brown County's request.

C) County Practice Is Inconsistent but Supports BCTA's Interpretation

In its initial brief, BCTA explained that a review of the 66 existing county sales and use tax ordinances shows that while county practice is inconsistent, the earliest counties to adopt a sales tax – those closest to the conditions that led to the statutory change – were the most likely to adopt language adhering to the statute's plain meaning. Brown County argues that BCTA has "not pointed to any Wisconsin county, in the late 1980's or otherwise, which adopted a sales and use tax and subsequently used the revenues to provide a dollar-for-dollar reduction to their property tax levy." (P. Resp. Br. 10, Dkt #75.)

The many variables affecting the county budgeting process make proving that a dollar-for-dollar reduction has occurred in a particular year difficult, but the available data suggests that these reductions do, in fact, occur. For example, Ashland County imposed its sales and use tax in 1988.[1] It collected $258,496.05 in sales tax revenue that year[2] and reduced its property tax levy by a little more at the same time – $259,106[3]. Langlade County also enacted its sales and use tax in 1988,[4] collecting $279,308.29 in sales tax revenue that year[5] and reducing its property tax levy by $282,938 the next year[6]. While BCTA cannot prove with 100% certainty how Ashland or Langlade Counties spent their sales and use tax revenues, these figures strongly suggest that they properly applied that revenue to directly reduce their property tax levies.

Amicus Wisconsin Counties Association makes a similar argument, but notably limits its own analysis of county practice to the years after the 1998 Attorney General opinion. (Amicus Br. 4, Dkt #83.) But the practices of counties that enacted sales and use taxes in the 1980's are more probative of the statute's meaning. *See* Sutherland Statutory Construction § 49:1 (7th Ed.) ("Where an act's language is ambiguous, then, courts may find interpretive guidance in the way the statute was construed when it first became operative.").

Amicus' argument that the legislature needed to take "corrective" action when enacting county levy limits is a *non sequitur*. The levy limit places a cap on property tax revenue that can be exceeded only in specified ways. There is no inconsistency between such a limit and the idea that sales tax revenue can only be used to directly reduce the levy itself. Nor is it inconsistent with the Attorney General's opinion. Whether or not, as the Attorney General saw the question,

[1] https://www.revenue.wi.gov/Pages/FAQS/pcs-taxrates.aspx#txrate4, last accessed February 11, 2019.
[2] https://www.revenue.wi.gov/Pages/RA/CountySalesTaxDistributions.aspx, last accessed February 11, 2019 (use arrow buttons to select the desired year).
[3] Knapp Aff. Ex. A, p. 1, Dkt #85.
[4] https://www.revenue.wi.gov/Pages/FAQS/pcs-taxrates.aspx#txrate4.
[5] https://www.revenue.wi.gov/Pages/RA/CountySalesTaxDistributions.aspx.
[6] Knapp Aff. Ex. A, p. 1, Dkt #85.

something could be financed by the property tax must now be determined in light of the levy limit.[7]

Amicus also falsely claims that no county reduced its levy dollar-for-dollar after the opinion. (*See* Amicus Br. 4, Dkt #83.) Despite the opinion, Lafayette County reduced its property tax levy on a greater-than dollar-for-dollar basis not one year, but two years in a row. It imposed a sales and use tax in 2001,[8] collecting $247,123.80 in revenue[9] and reducing its levy by $292,050[10]. The next year it collected $465,956.42[11] and reduced its levy by $487,337[12].

Ultimately, this extended back-and-forth regarding county practice is beside the point, since no amount of practice can override the terms of a statute. But to the extent this Court is inclined to examine county practice, it supports BCTA's, not Brown County's, interpretation.

II) EVEN UNDER THE ATTORNEY GENERAL'S ANALYSIS, BROWN COUNTY'S SALES AND USE TAX IS ILLEGAL

BCTA pointed out in its initial brief that even under the Attorney General's interpretation Brown County's sales tax is outdated because the 2006 enactment of levy limits means that the County could not have raised its property tax levy enough to pay for all of its new projects. Brown County responds by arguing that it could have paid for its projects with new borrowing, because debt service payments are exempted from the restrictions imposed by levy limits. BCTA anticipated and addressed this argument at pages 17-19 of its initial brief: the County's position is untenable because it rests on the assumption that it would have been able to borrow the money, something it cannot prove given the numerous statutory prerequisites that must be

[7] Nor is it problematic that a county's levy limit might be reduced in future years because the county used a sales tax to reduce the property tax. That is perfectly consistent with the notion that a sales tax can only be used to directly reduce the property tax.
[8] https://www.revenue.wi.gov/Pages/FAQS/pcs-taxrates.aspx#txrate4.
[9] https://www.revenue.wi.gov/Pages/RA/CountySalesTaxDistributions.aspx.
[10] Knapp Aff. Ex. A, p. 2, Dkt #85.
[11] https://www.revenue.wi.gov/Pages/RA/CountySalesTaxDistributions.aspx.
[12] Knapp Aff. Ex. A, p. 2, Dkt #85.

met before borrowing can occur. Brown County's assertion that there is "no question that the County could have borrowed to fund the capital projects delineated in the Ordinance" is simply conclusory. (Pl. Resp. Br. 14, Dkt #75.)[13]

Brown County also argues that it is using *some* of its sales and use tax revenue to pay down existing debt, and that satisfies the statute. (*Id.* at 16.) Even if that were true, that would not satisfy the statute, because the County would not be using the sales and use tax "only" to directly reduce the levy. Some of the tax revenue would still be used for other purposes.

But it is not true that Brown County is using sales and use tax proceeds to pay existing debt. The Sales and Use Tax Ordinance details exactly what the money has to be spent on, and debt service does not appear on that list. (*See* Compl. Ex. B (revenues "**[s]hall be utilized only** to . . . fund[] the below listed specific capital projects [and] associated costs") (emphasis in original).) Nor does Brown County's 2018 budget show sales and use tax revenue being spent on debt service; rather, it shows it being spent on $17,895,065 of projects from the ordinance (Klingsporn Aff. Ex. D, Part 3, p. 82, Dkt #60), with a remaining balance of $4,574,118 unspent in a special fund (*Id.*, Part 4, Dkt #61, p. 26).[14] Brown County's own minutes show not that the revenue is paying for debt service, but rather that paying for new capital projects with the revenue would avoid borrowing for those projects, keeping the total debt down and allowing the existing debt to be paid off faster. (Chintamaneni Aff., Ex. B, p. 2, Dkt #78.)

Finally, Brown County's discussion of the process leading up to the enactment of the sales and use tax (P. Resp. Br. 15-17, Dkt #75) establishes exactly nothing about the meaning of

[13] Brown County again confuses a levy limit with a levy, arguing that the Legislature's failure to require that sales and use tax revenues be used to offset levy *limits* shows that BCTA is misinterpreting the statute. (P. Resp. Br. 14, Dkt #75.) Sales and use tax revenues must be used to offset the *levy* during the budgeting process, not the levy limit.
[14] Similarly, the 2019 budget shows sales and use tax revenue being spent exclusively on ordinance projects. (Klingsporn Aff. Ex. E, Part 3, p. 65, Dkt #64.)

§ 77.70. It is instead an attempt by the County to get points for good behavior. For example, Brown County argues that the manner in which its sales and use tax was enacted was "deliberate and transparent" and says that it "chose not to saddle property taxpayers with interest payments, bond counsel fees and consultant charges." (*Id.* at 14, 17.) The argument is ironic because the County could have left it up to Brown County voters to decide for themselves whether they preferred to be "saddled" with these costs (as opposed to saddled with a new tax) by holding a referendum on debt issuance. *See* Wis. Stat. § 67.045(1)(a). That Brown County enacted its illegal sales tax in a deliberate and transparent manner does not make it any less illegal.

III) BROWN COUNTY'S FEARS ARE UNFOUNDED AND IRRELEVANT

Brown County continues to misuse the "absurd or unreasonable results" canon of construction, which is a guide to understanding the meaning of a statute, not *carte blanche* to engage in gross speculation about how a ruling might affect the parties. *See Anderson v. Aul*, 2015 WI 19, ¶113, 361 Wis. 2d 63, 862 N.W.2d 304 (it was inappropriate for the lead opinion to consider harm that might occur to the plaintiffs as a result of the court's holding). BCTA will not rehash its earlier explanation of why the tough choices facing Brown County after an adverse ruling have nothing to do with the meaning of the words the Legislature chose.

But one point is worth dwelling on, namely the repeated contentions by Brown County and *Amicus* that applying § 77.70 as written will lead to chaos, confusion, and litigation with respect to the statute's implementation. (P. Resp. Br. 17-18, Dkt #75.) As an initial matter, chaos, confusion, and litigation resulting from faithful implementation of the Legislature's policy choices is not an "absurd" or "unreasonable" result. Sometimes the Legislature enacts statutes that produce disfavored (by some) results. But that does not authorize courts or counties to

ignore the statute. If the implementation of a statute creates problems, it is up to the Legislature to fix them.

But the bedlam feared by Brown County is imaginary anyway. No other county will be bound by a decision of this court. Even if upheld on appeal, a ruling against Brown County will not automatically strike down the other 65 county sales and use taxes. Each county would require an individual analysis of how its sales and use tax revenue was spent, and as shown, county practice is widely disparate. Notably, only counties that enacted illegal taxes would be required to take action. But coming into compliance with the law is not "bedlam." Brown County's discussion is a bugaboo that it hopes will lead the Court to base its ruling on something other than the law.

Brown County closes its brief with a citation to *Wisconsin Dep't of Revenue v. Menasha Corp.*, 2008 WI 88, 311 Wis. 2d 579, 754 N.W.2d 95, for the proposition that the DOR's interpretation of the law is entitled to "great weight deference" and that BCTA's interpretation will upset uniformity and consistency in the Department's application of § 77.70. (P. Resp. Br. 18-19 & n. 18, Dkt #75.) It is unclear to what interpretation Brown County is referring; the DOR has "take[n] no position regarding whether Brown County's sales and use tax complies with state law." (DOR Resp. Br. 1, Dkt #71.) Brown County may be referring to the DOR's levy limit worksheet, but as BCTA previously explained, the worksheet applies to levy *limits*, not levies, and thus is not relevant here. (D. Resp. Br. 12, Dkt #73.) In any event, the proposition from *Menasha* has been overruled and courts no longer defer to agency interpretations of law. *See Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, 382 Wis. 2d 496, 914 N.W.2d 21.

But Brown County's citation to *Menasha* is illuminating in one respect. Throughout this litigation Brown County has begged the Court to defer to an Attorney General interpretation, to defer to a (supposed) DOR interpretation, and to give careful thought to how its ruling might upset the apple cart. *Amicus* even argues that "[t]he policy undergirding the doctrine of *stare decisis* . . . supports judicial restraint here" (Amicus Br. 3-4, Dkt #83 (emphasis added)), despite the fact that no court has ever ruled on this issue and there is no settled law to respect.

These arguments have a few things in common. None of them have anything to do with the text of § 77.70, which is unambiguous. Each argument encourages this Court to abdicate its duty to say what the law is. Each argument should be rejected.

CONCLUSION

There are cases when the Legislature fails to speak with clarity when enacting laws. This is not one of those cases. Brown County's sales and use tax does not directly reduce the property tax levy and is therefore void. This Court should grant BCTA's motion for summary judgment.

Dated this 11th day of February, 2019.

WISCONSIN INSTITUTE FOR LAW & LIBERTY
Attorneys for Defendants/Third-Party Plaintiffs

Electronically Signed by Thomas C. Kamenick____
Richard M. Esenberg, WI Bar No. 1005622
414-727-6367; rick@will-law.org
Thomas C. Kamenick, WI Bar No. 1063682
414-727-6368; tom@will-law.org
Anthony F. LoCoco, WI Bar No. 1101773
414-727-7419; alococo@will-law.org
1139 East Knapp Street
Milwaukee, WI 53202
414-727-9455
FAX: 414-727-6385