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COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Case No. 2020AP0940

BROWN COUNTY,

Plaintiff-Respondent,

v.

BROWN COUNTY
TAXPAYERS ASSOCIATION
and FRANK BENNETT,

Defendants-Third-Party Plaintiffs-Appellants,

v.

PETER BARCA, SECRETARY,
WISCONSIN DEPARTMENT
OF REVENUE,

Third-Party Defendant-Respondent.

APPEAL FROM A FINAL ORDER ENTERED
BY THE CIRCUIT COURT FOR BROWN COUNTY,
THE HONORABLE JOHN P. ZAKOWSKI, PRESIDING

**BRIEF OF THIRD-PARTY DEFENDANT-RESPONDENT
PETER BARCA, SECRETARY,
WISCONSIN DEPARTMENT OF REVENUE**

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INTRODUCTION

This case concerns the validity of a Brown County sales and use tax. Plaintiff-Respondent Brown County brought a declaratory judgment action seeking a ruling that the tax was legal. Defendants-Appellants Brown County Taxpayers Association and Frank Bennett (collectively “BCTA”) alleged that the tax was illegal. BCTA brought Peter Barca, in his official capacity as Secretary of the Wisconsin Department of Revenue (“the Department”), into this case because the Department administers local sales taxes like Brown County’s. BCTA sought an injunction preventing the Department from enforcing the Brown County sales and use tax. The circuit court, however, ruled for Brown County.

Secretary Barca takes no position on the substantive issue presented in this appeal: whether Brown County’s sales and use tax complies with state law. Instead, the Department has concerns about the potential remedy, should Brown County’s tax be found to violate state law. As an initial matter, it is not clear that an injunction against collection of the tax is the appropriate remedy. BCTA alleges the tax violates state law because of the way the proceeds are used, not that Brown County has no authority to enact the tax. As a result, a court could order Brown County to spend the proceeds in a particular way rather than enjoin the enforcement of the tax. And this question may be best answered by the circuit court on remand, rather than this Court in the first instance. But should this Court hold that the tax violates state law and remand the case to the circuit court to enter an injunction, the Department would need at least 30 to 60 days to allow it to inform retailers to stop collecting the tax and retailers to reprogram their software to stop collection of the tax from their customers.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not necessary because the case can be resolved on the briefs. Secretary Barca agrees that the opinion should be published because there are no cases addressing the proper interpretation of Wis. Stat. § 77.70. *See* Wis. Stat. § 809.23(1)(a)1.

STATEMENT OF THE CASE

In order to provide context to the Court on potential issues with a remedy, Secretary Barca's statement of the case covers the statutory scheme for county sales and uses taxes and the Department's administration of those taxes. Because Secretary Barca takes no position on the merits of the issue presented, this brief discusses the underlying facts of the case only to the extent necessary to understand the potential issues with a remedy.

I. Statutes governing county sales and use taxes.

State law provides that a county may enact a sales and use tax of 0.5%. Wis. Stat. § 77.70. The tax is referred to as a "sales and use tax" because it applies to both the sale of particular goods and services—the sales tax—as well as the use or consumption of those goods and services—the use tax. *See* Wis. Stat. §§ 77.52–77.53. Goods and services are only taxed once; the use tax is not owed if the retailer pays the sales tax. Wis. Stat. § 77.53(2).

When Brown County enacted its ordinance in May 2017, the statute authorizing the county sales and use tax provided:

Any county desiring to impose county sales and use taxes under this subchapter may do so by the adoption of an ordinance, stating its purpose and referring to this subchapter. The rate of the tax imposed under this section is 0.5 percent of the sales

price or purchase price. The county sales and use taxes may be imposed only for the purpose of directly reducing the property tax levy and only in their entirety as provided in this subchapter. That ordinance shall be effective on the first day of January, the first day of April, the first day of July or the first day of October. A certified copy of that ordinance shall be delivered to the secretary of revenue at least 120 days prior to its effective date. The repeal of any such ordinance shall be effective on December 31. A certified copy of a repeal ordinance shall be delivered to the secretary of revenue at least 120 days before the effective date of the repeal.

Wis. Stat. § 77.70 (2015–16).¹ At issue in this case is the requirement that “the county sales and use taxes may be imposed only for the purpose of directly reducing the property tax levy.” *Id.*

II. The Department’s role in administering the county sales and use tax.

A. Reporting and payment of the tax.

While each county decides whether to impose a tax, the Department has “full power to levy, enforce, and collect county . . . sales and use taxes.” Wis. Stat. § 77.76(1). The Department, however, does not transmit taxes collected and remitted by retailers directly to Brown County.

Instead, the Department’s payment to the county is based on a formula using the amounts retailers, purchasers, and other filers reported to the Department, regardless of whether the amount was actually paid to the Department. Wis. Stat. § 77.76(3). The statute specifically provides that the

¹ The current version of Wis. Stat. § 77.70 was amended since that time, including an added exception under Wis. Stat. § 66.0621(3m) for counties that have an electronics and information technology manufacturing zone. *See* 2017 Wis. Act 17; 2017 Wis. Act 58. The amendments are not relevant here.

Department “shall distribute 98.25 percent of the county taxes reported for each enacting county, minus the county portion of the retailers’ discounts, to the county” from “the appropriation under s. 20.835(4)(g),” known as general program revenue. Wis. Stat. § 77.76(3). While many filers pay the correct amount reported, not all filers pay the full amounts due with their reports. (R. 61:2 ¶ 7.) The Department has the authority to collect unpaid or delinquent sales and use tax. Wis. Stat. § 77.62.

Generally, sales and use taxes are reported and paid quarterly, although large retailers may do this monthly and small retailers may do this annually. The general rule is that sales and use taxes “are due and payable on the last day of the month next succeeding the calendar quarter for which imposed.” Wis. Stat. § 77.58(1). Large retailers, those with taxes exceeding \$3,600 per quarter, report sales and use tax on a monthly basis, with the tax “due and payable on the 20th day of the month next succeeding the calendar month for which imposed.” Wis. Stat. § 77.58(1)(b). Very small retailers with tax liabilities of \$600 or less are only required to file annually. Wis. Admin. Code Tax § 11.93(1).

The Department is required to make the sales and use tax distribution to the county “no later than 75 days following the last day of the calendar quarter in which such amounts were reported.” Wis. Stat. § 77.76(3). In practice, the Department makes monthly sales and use tax payments to counties. (R. 61:3 ¶ 10.) After the Brown County ordinance took effect on January 1, 2018, the Department paid counties, including Brown County, on February 28, 2018, based on all sales and use tax reports received between January 16 and February 15, 2018. (R. 61:3 ¶ 11.) From the enactment of the Brown County sales and use tax to the time of the summary judgment motion below, the Department made a total of 12 monthly payments to Brown County, in the total amount of \$22,643,051.49. (R. 61:3 ¶ 12.)

B. Rate changes.

The Department must notify sellers of any changes in the state sales tax rate “at least 30 days prior to the change’s effective date and any such change shall take effect on January 1, April 1, July 1, or October 1.” Wis. Stat. § 77.61(18). The Department is also required to provide at least 30 days of advance notice for changes to county tax rates. *See* Wis. Stat. §§ 77.61(18), 77.79.

With respect to the Brown County sales and use tax, in October 2017 the Department began notifying the public of the pending change in the tax rate. The Department posted an article in the Wisconsin Tax Bulletin with an email notification sent to subscribers of electronic mailing lists, notified Certified Service Providers and the Streamlined Governing Board, updated its website pages relating to county sales and use tax and tax rates, provided email notice to electronic filers of sale and use tax returns and a letter to paper filers, and notified the Wisconsin Departments of Transportation and Natural Resources who collect tax on certain vehicle registrations. (R. 61:4–5 ¶ 18.) The Department also updated its forms and instructions. (R. 61:4–5 ¶ 18.) The Department provided advance notice of changes to the Brown County sales tax rates because retailers need to adjust their systems for calculating and collecting the tax, which requires the updating of software, websites, applications, or even manual tables. (R. 61:5 ¶ 19.)

C. Procedures for sales and use tax refunds.

Both retailers and purchasers may file for sales and use tax refunds. A person may, with some exceptions, “file with the department a claim for refund of taxes paid to the department by that person” within four years. Wis. Stat. § 77.59(4)(a).

A seller requesting a refund must file an amended sales and use tax return either electronically in My Tax Account (the Department's online filing system) or on a paper Form ST-12. (R. 61:3-4 ¶ 14, 6-7 (Ex. A).) If a seller files for a refund, it has to remit refunds to buyers, or if they are not known, to the Department. Wis. Stat. § 77.59(5m).

The Department adjusts the amounts it pays to counties to account for refunds, including interest, which the Department pays to taxpayers. Wis. Stat. § 77.76(3) ("The county taxes distributed shall be increased or decreased to reflect subsequent refunds, audit adjustments, and all other adjustments of the county taxes previously distributed.").

III. Relevant procedural history.

BCTA filed a third party complaint requesting a permanent injunction prohibiting Brown County and the Department "from levying, enforcing, or collecting the Tax and directing [Brown County] and [the Department] to take to-be-specified steps to refund illegally-collected taxes and prevent further collection of the Sales Tax." (R. 9:19-20.) As in this appeal, Secretary Barca took no position on the merits of this case but highlighted issues regarding a potential injunction against collecting the Brown County sales and use tax. (R. 62.) The circuit court did not reach the issue of remedy because it ruled in favor of Brown County on the merits. (R. 103; 115.)

ARGUMENT

As noted above, Secretary Barca takes no position as to whether Brown County's sales and use tax complies with Wis. Stat. § 77.70. Should this Court hold for BCTA, however, Secretary Barca has several concerns regarding a potential injunction against collection of Brown County's sales and use tax. First, an injunction against collection of the tax may not be the appropriate remedy in this case. Second, any injunction

should give the Department and retailers time to implement a halt in the collection of the tax.

I. An injunction against collection of the tax may not be the appropriate remedy.

Wisconsin law plainly allows counties to impose a sales tax “for the purpose of directly reducing the property tax levy.” Wis. Stat. § 77.70. The issue in this case is not whether Brown County has authority to impose the tax—it clearly does—but whether it uses the tax’s proceeds consistent with Wis. Stat. § 77.70. If this Court rules in favor of BCTA, the appropriate remedy may be to direct that the sales and use tax proceeds be used for property tax relief. This may be more practical than enjoining the tax and allowing retailers to pursue refunds, especially since it may not be possible to locate or identify the original buyer who paid the tax in the first instance. *See* Wis. Stat. § 77.59(5m) (if the buyer is not known, any refund amount given to the retailer must be returned to the Department).

Further, if this Court reverses the circuit court on the substantive legal question, it may wish to remand the case to the circuit court for consideration of the proper remedy. *See Sunnyside Feed Co. v. City of Portage*, 222 Wis. 2d 461, 473–74, 588 N.W.2d 278 (Ct. App. 1998) (saying that court “would ordinarily remand for the trial court’s further consideration” of whether to enter an injunction). And because BCTA’s appeal brief does not address the remedy issue, the Court likely will have insufficient information to weigh whether an injunction is appropriate. Thus, a remand to the circuit court for further consideration would be appropriate.

II. The Department would need time to halt the administration of the Brown County sales and use tax in an orderly fashion.

If this Court were to direct the circuit court to enjoin the Brown County sales and use tax, the Department would need sufficient time to inform retailers, and retailers would need sufficient time to change their systems to stop the collection of the tax. The Brown County sales and use tax has been in effect since January 1, 2018, and the plans for implementing the tax were in effect for even longer. The ordinance establishing the tax was delivered to the Department in August 2017. (R. 61:4 ¶ 16.) The Department communicated the new rate for Brown County to Brown County sellers in October 2017 to allow them to begin collecting the correct amount after January 1, 2018. (R. 61:4–5 ¶ 18.)

As Secretary Barca explained to the circuit court on summary judgment, sales and use tax rates need to be communicated to retailers with sufficient lead time for them to alter their method for collecting the correct amount—whether that is software, mobile applications, or even hand tables. (R. 61:4–5 ¶¶ 17–19.) For this reason, Wisconsin law requires the repeal of a county tax to take place at the end of the year. Wis. Stat. § 77.70. In addition, the Department must provide at least 30 days' notice for changes to county tax rates, which can only take effect on January 1, April 1, July 1, or October 1. *See* Wis. Stat. §§ 77.61(18), 77.79 (applying statutes like Wis. Stat. § 77.61(18) to county sales and use taxes). An immediate injunction changing the rate that retailers collect will cause confusion among retailers selling in Brown County. If this Court were to rule for BCTA and order the circuit court to enter an injunction, it should instruct the circuit court to build into the injunction, at a minimum, a period of 30 to 60 days to allow the Department to give proper notice to all sellers collecting the tax. That will allow the Department to communicate any changes to the tax

to retailers in Brown County, who can then change their collection practices.

CONCLUSION

Secretary Barca respectfully requests that, if this Court rules in favor of BCTA on the merits, that it consider whether an injunction against the Brown County sales and use tax is appropriate and whether to remand the case to the circuit court for consideration of the appropriate remedy. If the Court concludes that an injunction is appropriate, then Secretary Barca respectfully requests that this Court instruct the circuit court that any injunction should give the Department sufficient time to stop collection of the tax in an orderly fashion.

Dated this 2nd day of September, 2020.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2565 words.

Dated this 2nd day of September, 2020.



BRIAN P. KEENAN

Assistant Attorney General

**CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § 809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 2nd day of September, 2020.



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