NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 21-2501

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CHRISTOPHER LISOWSKI, on behalf of himself
and all others similarly situated,
Appellant

v.

WALMART STORES, INC.,

_____

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No. 2:20-cv-01729-NR)
District Judge: Honorable Nicholas J. Ranjan

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Submitted May 2, 2022

Before: GREENAWAY, JR., PORTER, and PHIPPS, *Circuit Judges*

(Opinion Filed: July 15, 2022)

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OPINION*

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* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

PORTER, *Circuit Judge*.

Christopher Lisowski purchased two 6-packs of 5-Hour Energy on separate occasions. Walmart charged him a 7% state and local sales tax of $1.88. Aggrieved by the monetary loss of approximately two dollars, Lisowski filed a putative class action in state court, alleging that 5-Hour Energy drinks are "dietary supplements" exempt from sales tax under Pennsylvania law. His claims for conversion, constructive trust, and deceptive trade practices all stem from his belief that Walmart knowingly took this charge to profit from the commission it receives for collecting sales tax. Walmart removed the suit under the Class Action Fairness Act because the alleged damages totaled more than $5 million.

Lisowski filed a motion to remand, arguing that the Tax Injunction Act ("TIA") and principles of comity required remand. The District Court determined that the TIA did not preclude jurisdiction because Lisowski, "if successful, would receive damages from a private-party defendant." *Lisowski v. Walmart Stores, Inc.*, No. 2:20-CV-1729-NR, 2021 WL 62627, at *2 (W.D. Pa. Jan. 7, 2021). The District Court then dismissed the complaint for failure to state a claim under Rule 12(b)(6). Lisowski appeals from the denial of remand and the dismissal of the complaint. We will affirm.

I

"Because a motion to remand shares an essentially identical procedural posture with a challenge to subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), it is properly evaluated using the same analytical approach." *Papp v. Fore-Kast Sales Co.*, 842 F.3d 805, 811 (3d Cir. 2016) (citing *Leite v. Crane Co.*, 749 F.3d 1117,

1121 (9th Cir. 2014)). Thus, we review de novo whether the District Court had subject matter jurisdiction. *Id.* "A challenge to subject matter jurisdiction under Rule 12(b)(1) may be either a facial or a factual attack." *Davis v. Wells Fargo*, 824 F.3d 333, 346 (3d Cir. 2016). A facial attack "challenges subject matter jurisdiction without disputing the facts alleged in the [notice of removal], and it requires the court to consider the allegations . . . as true." *Papp*, 842 F.3d at 811 (alteration in original) (quoting *Davis*, 824 F.3d at 346).

The Tax Injunction Act states that "district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. The prototypical Tax Injunction Act case concerns charges that must be characterized as either a fee or a tax. *See, e.g.*, *Texas Ent. Ass'n v. Hegar*, 10 F.4th 495, 505 (5th Cir. 2021). Alternatively, they involve charges that are clearly taxes whose *validity* is being challenged. *See, e.g.*, *Sipe v. Amerada Hess Corp.*, 689 F.2d 396, 404 (3d Cir. 1982) (TIA is implicated when the court must determine "the validity of the state tax system"). But here, the issue is whether the $1.88 charged by Walmart is a tax at all. Our jurisdiction turns on that issue. If 5-Hour Energy is taxable, then Walmart's charge is unambiguously a tax, and we lack jurisdiction to enjoin its collection. If it is not taxable, then Walmart's charge is merely a fraudulent charge that it *labeled* as a tax, and we do have jurisdiction. Lisowski argues that reaching the merits of whether an item is taxable or not falls under the scope of the Tax Injunction Act or, alternatively, is barred by the principles of comity due to its potential to interfere with the state tax system.

But Lisowski's arguments cut against his own complaint. The complaint alleges that the $1.88 is merely an improper charge that has been fraudulently labeled as a tax. *See* Appellant Br. 4–5 ("Walmart charged (and continues to charge) a higher purchase price for dietary supplements than authorized, under the guise of collecting a lawful tax."); *see also Lisowski*, 2021 WL 62627, at *2 (noting that the "complaint assumes that no tax is owed to begin with"). Nonetheless, Lisowski claims that his suit must be remanded under the Tax Injunction Act because enjoining the collection of this charge would prevent money from reaching Pennsylvania's coffers. But assuming Lisowski's allegations are true, Pennsylvania has no interest in collecting that money at all. *See Freed v. Thomas*, 976 F.3d 729, 735 (6th Cir. 2020) (TIA did not apply when the government did not "have any property right or interest in the excess sale proceeds"). And if Pennsylvania has determined that 5-Hour Energy is not taxable, Walmart does not have the power to impose a tax, even if it labels it so on its receipts.

Undeterred by the limitations of his own complaint, Lisowski argues that if Walmart denies the allegations against it, then the court will be required to "wade into the tax regulation waters," but that if Walmart admits it violated Pennsylvania tax law, then an injunction would be appropriate. Appellant Br. 18 n.6. Lisowski's argument requires that Walmart's charge is a tax when convenient, and not a tax when inconvenient. *Compare* App. 50 (requesting decree enjoining Walmart "from the further improper collection of sales tax"), *with* Appellant Br. 4. ("Walmart charged . . . a higher purchase price . . . under the *guise* of collecting a lawful tax" (emphasis added)).

We reject Lisowski's "heads I win-tails you lose" argument. Walmart need not admit it violated Pennsylvania tax law, nor was the District Court required to determine if 5-Hour Energy was taxable. Instead, the District Court merely held that the facts alleged in the notice of removal did not implicate the Tax Injunction Act.[1] Lisowski's claims rest solely on Walmart's allegedly improper collection of a charge that it was not authorized to take. And the mere potential for Walmart to eventually raise a tax-based defense did not strip the District Court of jurisdiction. *Cf. Krashna v. Oliver Realty, Inc.*, 895 F.2d 111, 113 (3d Cir. 1990) (actions not removable based on anticipated federal defenses); App. 196 ("It's true that one of our potential defenses down the line, among many, is that these charges were statutorily authorized . . . ."). Because Lisowski merely seeks to enjoin Walmart from charging an excess purchase price, we will affirm the District Court's denial of remand based on the TIA.[2]

Alternatively, Lisowski argues that principles of comity require a remand. It is well established that federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." *Colo. River Water Conservation Dist. v. United States*, 424

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[1] The District Court also held that the TIA is limited to suits challenging a taxpayer's own underlying tax liability and is thus inapplicable to suits between private parties. While we do not reach this issue, we note that other circuits have applied the TIA to private suits. *See, e.g.*, *Fredrickson v. Starbucks Corp.*, 840 F.3d 1119, 1122–23 (9th Cir. 2016) (TIA barred relief against Starbucks' withholding of state income tax); *Gwozdz v. HealthPort Techs., LLC*, 846 F.3d 738, 744 (4th Cir. 2017).

[2] In reaching this conclusion, we recognize the Fourth Circuit's contrary opinion in *Gwozdz*, 846 F.3d at 744 (TIA barred taxpayers' attempt to "repackage an allegedly unlawful sales tax collection into a faux consumer protection suit"). There, plaintiffs sued a private party for the collection of $23 on an allegedly untaxable item. *Id.* at 740. But we do not view this case as "artful pleading." Rather, we accept as true the allegations of the complaint to determine whether the Tax Injunction Act applies.

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