



ALAN WILSON
ATTORNEY GENERAL

March 30, 2015

The Honorable Larry A. Martin
Senator, District No. 2
P.O. Box 142
Gressette Senate Office Building
Columbia, SC 29202

Dear Senator Martin:

You have requested our opinion concerning the constitutionality of S. 523. You express concern that the proposed legislation contravenes Art. III, § 15 of the South Carolina Constitution which requires all bills for raising revenue to originate in the House of Representatives.

By way of background, you provide the following information:

Senate Bill 523 was reported out of the Senate Finance Committee yesterday. This bill raises the gas tax and other fees for the purpose of increasing the Department of Transportation's funding for the maintenance and repair of our State's highway system. It is my understanding that the fiscal impact of the bill will be approximately \$800 million.

Senate Bill 523 brings into debate Article III, Section 15 of the South Carolina Constitution, i.e. that bills for raising revenue must originate in the House of Representatives. Some argue that since the bill imposes a fee rather than a tax levy per se, that the bill does not violate this constitutional provision. However, it is my belief that regardless of whether it is a user fee or an outright tax levy Article III, Section 15 of the state Constitution requires such legislation to originate in the House of Representatives. Therefore, my question is: Does Senate Bill 523 violate Article III, Section 15 of the South Carolina Constitution?

Law/Analysis

Article III, § 15 of the South Carolina Constitution provides that "Bills for raising revenue shall originate in the House of Representatives but may be altered, amended, or rejected by the Senate." Several decisions of our Supreme Court, as well as a number of opinions of this Office, have interpreted this constitutional requirement. In *State v. Stanley*, 131 S.C. 513, 127 S.E. 574, 575 (1925), our Supreme Court stated that this provision of the Constitution "only applies to bills to levy (t)axes, in the strict sense of the word, and not to bills for other purposes, which may incidentally raise revenue." Likewise, in *State ex rel. Coleman v. Lewis*, 181 S.C. 10, 186 S.E. 625, 628 (1936), the Court opined:

[t]he record shows that the bill did originate in the House, as House Bill No. 1420, and was introduced on the 24th day of January, 1936 as will appear from the Journal of the House of that date. It is true that the Senate amended the bill, as it had a constitutional right to do, but the only income-providing feature of the Act is the license tag feature, which was in the bill from its inception in the House. For this reason, it is apparent that there is no merit in this continuation. But aside from this, the provision (Section 3 of the Act) requiring the payment of an annual motor vehicle license is not within the purview of this section of the Constitution, in that it is not a bill to raise revenue in the constitutional sense. State v. Stanley, 131 S.C. 511, 127. S.E. 574.

The Alabama Supreme Court held that a bill “whose chief purpose is concerned with revenue and not one which brings into play the exercise of the police power of the state with the revenue feature an incidental purpose thereto . . .” is deemed to fall within the constitutional requirement. Opinion of the Justices, 260 Ala. 81, 82, 68 So.2d 840, 841 (1953). A bill is a revenue raising measure for constitutional purposes where “the primary purpose of that piece of legislation is to generate income.” Yeoman v. Com., Health Policy Bd., 983 S.W.2d 459, 471 (Ky. 1998). Such a constitutional requirement had, as its origin, the British Constitution “because the House of Commons, in their Parliament, is the only popular department of their government, chosen by the people. . . .” Here, of course, each house is elected by the people, but the Alabama Supreme Court has, nevertheless, concluded that “it has been a canon . . . of the Constitution of this State from the time of its birth . . . [and] we feel not at liberty to disregard.” Perry Co. v. Selma, M.E., M.R. Co., 58 Ala. 546, 1877 WL 1933 at *7 (1877).

Moreover, a “tax” has often been defined by our Supreme Court. For example, in Columbia Gaslight Co. v. Mobley, 139 S.C. 107, 137 S.E. 211, 212 (1927), the Court defined a “tax” as “[a]ny governmental charge imposed for the purpose of raising revenue . . . regardless of the name by which it is called.” (emphasis added). See also, State v. Columbia, 6 S.C. 1 (1874). And, in Great Games, Inc. v. South Carolina Dept. of Revenue, 339 S.C. 79, 84, 529 S.E.2d 6, 8 (2000), the Court stated:

[t]he essential characteristics of a tax are that it is not a voluntary payment or donation, but an enforced contribution, enacted pursuant to legislative authority, in the exercise of the taxing power, the contribution being of a proportional character, payable in money, and imposed, levied, and collected, for the purpose of raising revenue, to be used for public or governmental purposes. . . .

The question of whether a particular contribution, charge or burden is to be regarded as a tax depends on its real nature and not on its designation.

(emphasis added). See also, Op. S.C. Atty. Gen., September 3, 1985, No. 85-95, 1985 WL 166065; Op. S.C. Atty. Gen., March 23, 1981, 1981 WL 158198; Op. S.C. Atty. Gen., March 23, 1970, 1970 WL 16758.

The so called “gas tax” has been on the books in South Carolina in one form or another since the 1920’s. In State ex rel. Edwards v. Osborne, 193 S.C. 158, 7 S.E.2d 526, 533 (1940), our Supreme Court, in holding that the gas tax could not be diverted to general State purposes, observed:

. . . the gasoline tax and the motor vehicle license tax constitute a special fund for the payment of highway certificates of indebtedness, reimbursement agreements and other purposes specified in the law, and that this fund is not subject to a process of attrition by occasional or systematic diversion that will deplete the primary source with which to pay the heavy outstanding obligations of the State Highway Department.

At that time, the “highway fund” was funded by a five cents gasoline tax and the motor vehicle license tax. *Id.* at 530. See also, State ex rel. Richards v. Moorner, 152 S.C. 455, 150 S.E. 269 (1929) [upholding the gas tax]; State ex rel. Brown v. Bates, 198 S.C. 430, 18 S.E.2d 346, 350 (1941) [“It is significant that in dealing with the gasoline tax, the amount of which is six cents per gallon, the 1929 Act specifically excepts such portion of the tax as is required to be turned over to the counties.”]; Dean v. Timmerman, 234 S.C. 35, 37, 106 S.E.2d 665, 666 (1959) [“to avoid (a) deficit, the General Assembly determined to renew the so-called ‘7th cent’ of the gasoline tax, which in the absence of such legislation would have expired as of June 30, 1958.”]; Myers v. Patterson, 315 S.C. 248, 249, 443 S.E.2d 841, 842 (1993) [“In 1987, the Legislature levied additional gasoline taxes for the purpose of funding the Strategic Highway Plan for Improving Mobility and Safety (SHIMS).”]. Thus, it is apparent that, for decades, the gasoline tax was recognized for what it is in reality, a true tax. And, in an Opinion, dated August 2, 1972, 1972 WL 26163, we described this tax as follows:

Section 65-1051 of the South Carolina Code of Laws provide that the gasoline tax is primarily an excise tax upon purchasers of gasoline and that gasoline dealers are agents of the State for the collection of such tax. The United States Code, Title 26, Section 4081, provides for Federal tax upon gasoline at the rate of four cents per gallon and the same has been held to be a sales tax upon the purchaser and not a tax upon the gasoline dealer. . . . Thus, both State and Federal gasoline taxes are upon the purchaser and not upon the retail gasoline dealer although the dealer is required to collect the same and pay them directly to the State or Federal Government.

Notwithstanding this long history of the gasoline tax in South Carolina, pursuant to Act No. 69 of 2003, the General Assembly provided that “The Code Commissioner is directed to make the following changes in Title 12, Chapter 28: In all instances, substitute ‘user fee’ for ‘tax’ and ‘motor fuel subject to the user fee’ for ‘taxable motor fuel.’” However, given this history of the gas tax and, as our Supreme Court has recognized, the label given to a charge does not control, it is our opinion that the designation given by the legislature in Act No. 69 of 2003 is not determinative. As the Court concluded in Columbia Gaslight Co., *supra*, a governmental charge may constitute “a tax regardless of the name by which it is called.” See also, Brown v. County of Horry, 308 S.C. 180, 417 S.E.2d 565 (1992).

We thus believe the primary purpose of S. 523 is, quite simply, the raising of revenue. Regardless of the General Assembly’s more recent designation of the charges imposed upon the purchase and consumption of gasoline as a “user fee,” this charge is the historic “gas tax,” by another name. Moreover, the other “fees” imposed by the Bill are also “taxes” for purposes of Art. III, § 15, because their purpose is revenue raising. But even if these charges may properly be designated “fees,” such is not determinative for purposes of the Constitution. Whether given the name of a “tax” or a “fee,” if designed to raise revenue, rather than raising revenue incidentally, the Constitution requires the measure to originate in the House of Representatives. Such is the case here.

However, we must also note that, based upon court decisions, there is likely no judicial review of a violation of Art. III, § 15. The Supreme Court has stated, time and again, that the “enrolled bill” rule controls in these circumstances. For example, in Wingfield v. South Carolina Tax Commission, 147 S.C. 116, 144 S.E. 846 (1928), the Court had before it Act No. 574 of 1928, which imposed a license tax on soft drinks, etc. and a tax upon documents. The Act was challenged on several constitutional grounds, among them that the legislation was a measure raising revenue, and that it did not originate in the House. The Court quoted from State ex rel. Hoover v. Chester, 39 S.C. 307, 17 S.E. 752 (1893) as follows:

“We announce that the true rule is, that when an act has been duly signed by the presiding officers of the General Assembly, in open session in the Senate-House approved by the Governor of the State, and duly deposited in the Office of the Secretary of State, it is sufficient evidence, nothing to the contrary, appearing upon its face, that it passed the General Assembly, and that it is not competent either by the journals of the two houses, or either of them, or by any other evidence, to impeach such an act. And this being so, it follows that the court is not at liberty to inquire into what the journals of the two houses may show as to the successive steps which may have been taken in the passage of the original bill.”

In Wingfield, the Court enumerated the reasons for the “enrolled bill” rule:

Public policy, certainly as to what the law is, convenience, and that respect due by the courts, to the wisdom and integrity of the legislature, a co-ordinate branch of the government, all require that the enrolled bill, when fair upon its face, should be accepted without question by the courts.

144 S.E. at 849. Therefore, while we believe the proposed bill contravenes Art. III, § 15, as a revenue raising measure, because not initiated in the House of Representatives, nevertheless, should such legislation be enacted, a court likely will not review the constitutionality on this ground, so long as the Act is “fair on its face” and meets the other requirements of the Constitution. See, Crouch v. Benet, 198 S.C. 185, 17 S.E.2d 320, 324 (1941) [“This Court has often held that an Act of the General Assembly cannot be impeached in this way.”].

Conclusion

Art. III, § 15 of the South Carolina Constitution requires all revenue raising bills to originate in the House of Representatives. It is our opinion that S. 523 has as its primary purpose to raise revenue. Thus, we believe S. 523 must originate in the House.

The Bill increases the “gas tax” and other fees for the purpose of funding the Department of Transportation in order to repair roads, bridges, etc. The gas tax has a long history in South Carolina as a funding mechanism for road construction and repairs. Our Courts have repeatedly recognized this charge as a “tax” upon the purchase and consumption of gasoline. The fact that the General Assembly has labelled the charges imposed by S. 523 as “user fees” is thus not, in our opinion, determinative. Our Supreme Court has often indicated that it is not the label, but the purpose, which controls. In this

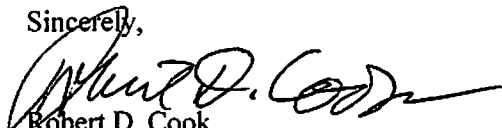
The Honorable Larry A. Martin
Page 5
March 30, 2015

instance, the principal purpose of the legislation is the raising of revenue for highways, roads, and bridges, no matter the label. Thus, we believe Art. III, § 15 requires S. 523 to originate in the House.

However, we must also advise that the “enrolled bill” rule would likely apply here should the matter come before a court in the form of a constitutional challenge to the Act, pursuant to Art. III, § 15. Our Supreme Court has emphasized that it will not entertain such challenges to legislation as violative of that constitutional provision, so long as the Act is valid on its face, and meets all other requirements of law to constitute an Act at the General Assembly. The reason for such judicial restraint is deference to a co-ordinate branch of government. Thus, as we have previously opined, whether a Bill complies with Art. III, § 15, such “is ultimately a matter for the General Assembly to determine in which house a bill is introduced and in which house it may be introduced first.” Op. S.C. Atty. Gen., Op. 89-37, 1989 WL 406127 (March 27, 1989). See also, Op. S.C. Atty. Gen., Sept. 5, 2007, 2007 WL 4284637 [“our Supreme Court (has) indicated that no other branch of government may adjudicate questions concerning the operations or procedures of either the House or the Senate.”].

Given that this legislation is a revenue raising measure, required by the Constitution to originate in the House, and in light of our Supreme Court decisions concluding that the “enrolled bill” rule ordinarily precludes judicial review thereof, it would be a matter for the General Assembly, rather than the courts, to ensure that there is compliance with the Constitution.

Sincerely,



Robert D. Cook
Solicitor General