The State of South Carolina

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The Honorable Isadore E. Lourie
Senator, District No. 21
303 Gressette Building
Columbia, South Carolina 29202

Dear Senator Lourie:

In a letter to this Office you questioned whether a provision of Section 56-3-660 of the Code may be construed as creating an undue burden on interstate commerce and therefore violative of the commerce clause of the Federal Constitution.

In considering the constitutionality of an act of the General Assembly, it is presumed that the act is constitutional in all respects. Moreover, such an act will not be considered void unless its unconstitutionality is clear beyond any reasonable doubt. Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1937); Townsend v. Richland County, 190 S.C. 270, 2 S.E.2d 777 (1939). All doubts of constitutionality are generally resolved in favor of constitutionality. While this Office may comment upon potential constitutional problems, it is solely within the province of the courts of this State to declare an act unconstitutional.

Section 56-3-660 establishes a fee schedule for purposes of registration and licensing based on the gross weight of a vehicle. The fee schedule is applicable to vehicles not exceeding 80,000 pounds. The provision states in part:

> Notwithstanding any other provision of this chapter, the Department ... (of Highways and Public Transportation) ... may enter into agreement with other states in a registration and license reciprocal agreement known as the International Registration Plan and the registration and license required in this section may be apportioned for vehicles which qualify and are licensed in accordance with the provisions of the International Registration Plan ....

A further provision states

> An additional registration fee of $11.25 per each thousand pounds or fraction thereof over 80,000 pounds shall be paid for all vehicles operated in this state which exceed 80,000 pounds gross vehicle weight ....

I am informed that pursuant to such provisions there is an apportionment of the fees collected in this State which are assessed out of state vehicles based upon the mileage traveled in this State. In your letter criticizing the $11.25 per thousand pounds additional fee you stated:

> Overweight truck movements have always operated under permit, without any other burdensome vehicle registration requirements. South Carolina's enforcement of this provision may create problems for large interstate fleets who operate in various jurisdictions, particularly if our registration laws conflict with other states.

The United States Supreme Court in its decision in Complete Auto Transit Inc. v. Brady, 430 U.S. 274 (1977) determined that a state tax may be upheld under a challenge brought pursuant to the Commerce Clause

> ... when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State.

430 U.S. at 279. If it is determined that a tax provision violates any one of these four criteria, it is in violation of the Commerce Clause.

In American Trucking Associations Inc. v. Scheiner, 483 U.S. 266 (1987) the Supreme Court determined that unapportioned "flat taxes" imposed by the State of Pennsylvania on the operation of out-of-state trucks operating in interstate commerce on its highways resulted in an unfair burden being placed on these trucks when compared to intrastate trucks. 1/ In reviewing the manner of

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1/ In Commonwealth of Kentucky, Transportation Cabinet v. American Trucking Associations, Inc., 746 S.W.2d 65 (1988) the Kentucky Supreme Court defined an unapportioned flat tax as ... one imposed by a state for the privilege of making commercial entrances into its territory that is not graduated in accordance with the taxpayer's presence within the state....

assessment of the "flat tax", the Court in Scheiner stated that

> ... the Commerce Clause prohibits a State from imposing a heavier tax burden on out-of-state businesses that compete in an interstate market than it imposes on its own residents who also engage in commerce among States.

483 U.S. at 282. In its decision, the Court applied a formula devised to determine whether a tax is fairly apportioned, the "internal consistency" test, which had been originally set forth in the case of Armco Inc. v. Hardesty, 467 U.S. 638 (1984). The Court indicated that

> To pass the "internal consistency" test, a state tax must be of a kind that, "if applied by every jurisdiction, there would be no impermissible interference with free trade" ... If each State imposed flat taxes for the privilege of making commercial entrances into its territory, there is no conceivable doubt that commerce among the States would be deterred.

483 U.S. at 284. As stated by the Court in Goldberg v. Sweet, 488 U.S. 252 (1989)

> ... the central purpose behind the apportionment requirement is to ensure that each State taxes only its fair share of an interstate transaction ... (W)e determine whether a tax is fairly apportioned by examining whether it is internally and externally consistent ... To be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result.

488 U.S. at 260-261. However, in Amerada Hess v. N.J. Taxation Division, 490 U.S. 66 (1989) the Court stated

> Even if a tax is fairly apportioned, it may discriminate against interstate commerce ... (A) tax may violate the Commerce Clause if it is facially discriminatory, has a discriminatory intent, or has the effect of unduly burdening interstate commerce ....

490 U.S. at 75.

In reviewing the Pennsylvania "flat tax", the Court in Sheiner concluded that

> Although out-of-state carriers obtain a privilege to use Pennsylvania's highways that is nominally equivalent to that which local carriers receive, imposition of the flat taxes for a privilege that is several times more valuable to a local business than to its out-of-state competitors is unquestionably discriminatory and thus offends the Commerce Clause ....

483 U.S. at 296. The Court determined therefore that the Pennsylvania "flat tax" which was applicable to all trucks traveling highways in that State placed a disproportionate burden on interstate trucks when compared to intrastate trucks inasmuch as the interstate trucks traveled less miles each year in Pennsylvania. Citing Scheiner the Kentucky Supreme Court in Commonwealth of Kentucky, Transportation Cabinet v. American Trucking Associations, Inc., 746 S.W.2d 65 (1988) struck down as violative of the Commerce Clause a State supplemental highway users tax. The tax, which levied fees on trucks weighing more than 60,000 pounds based on the mileage traveled in Kentucky, was construed to be a tax "flat and unapportioned on either end of the mileage spectrum" based on the manner in which the tax was levied.

Based upon the above, while we must presume constitutionality, we cannot say with absolute certainty that a court would hold Section 56-3-660 to be constitutional insofar as the provision levies an additional fee on vehicles operated in this state which exceed 80,000 pounds in weight. As set forth, based upon the cases which have analyzed similar fees and taxes, there is a potential basis for a constitutional challenge to the $11.25 fee. Ultimately any decision in such regard would depend on the test utilized by a court in reviewing the provision as well as all relevant facts and the manner of imposition of the fee at issue. See: Commonwealth of Kentucky v. American Trucking, supra. However, as noted above, this Office must presume the constitutionality of the foregoing provision and thus this letter should not be construed as commenting on the ultimate manner in which a court would construe the situation at issue here.

I understand that the Highway Department may have recognized potential problems relating to the $11.25 fee and has issued a moratorium as to the registration of trucks with a gross vehicle weight

in excess of 80,000 pounds. Such appears to be prudent in light of the foregoing analysis.

With kind regards, I am

Very truly yours,

Charles H. Richardson
Assistant Attorney General

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REVIEWED AND APPROVED BY:

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