9360-9910

ALAN WILSON
ATTORNEY GENERAL

April 8, 2015

The Honorable Raymond E. Cleary III
Senator, District No. 34
P.O. Box 142
Suite 610A, Gressette Senate Office Building
Columbia, SC 29202

Dear Senator Cleary:

You seek a follow up to our recent opinion, dated March 30, 2015, which addressed Article III, § 15 of the South Carolina Constitution. By way of background, you state the following:

> It is obvious that any "tax" must begin in the House and not in the Senate. In the past, the Senate denied (not the AG's opinion) an increase in the tax on cigarettes and that this "tax" by statute needed to begin in the House. Let me point out that this "increase in revenue" was a tax, because it was described that way in statute and the funds were going to the General Fund of the State to be spent however we decided. This is the major difference between a tax and a fee. But in this vein in the past we raised millage for a fire district, which created revenue for that district, but these were fees because it went not to a General Fund but for a specific purpose.
>
> The first part of this request is an Opinion on the constitutionality of raising LLR fees in the Senate. Although this does increase revenue to the State, it does so to address the shortfall in the service that LLR is providing. It is a fee, because it goes into a specific fund and not the General Fund. In procedure the Senate has always been allowed to adjust fees whether it be in LLR, DHEC, or the Judicial System – and these adjustments always create revenue.
>
> Now for the second part of the request. From the first paragraph to the last paragraph of your recent opinion, you referred to it as a "gas tax", but the Legislature has defined it as a "fee" that pays for specific purposes under Legislative Statute. So by our own Statute, it is a "fee" and not a "tax"; however, it does increase revenue. Incidentally this increase, which is similar to LLR fees, goes to provide an established State service and not to the General fund. One possible question is this: "Does anything that changes revenue consider something that only the House can consider?" Of course this is not the precedent of our legislature. The other question on that note is: Is the Senate allowed to remove or change exemptions in the tax code"? In this case, although revenue does change, we are only changing an exemption in Cap and not creating a new

tax or Service or Revenue. I have also included. from the National Institution, paperwork explaining taxes vs. fees.

Law/Analysis

Our opinion of March 30, 2015 reviewed the case law and the Attorney General's opinions concerning Art. III, § 15 of the South Carolina Constitution. This provision states that "Bills for raising revenue shall originate in the House of Representatives but may be altered, amended, or rejected by the Senate."

We note 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. State v. Stanley, 131 S.C. 513, 127 S.E. 574, 575 (1925). Our opinion also cited State ex rel. Coleman v. Lewis, 181 S.C. 10, 186 S.E. 625, 627-628 (1936), which dealt with the constitutionality of an Act whose Title provided as follows:

> "to create a New State Highway Commission; to Prescribe a Statewide Program of Highway Construction by said Commission and to Provide for the Financing thereof; to Provide for the Election of District Highway Commissioners; to Constitute District Highway Commissioners as the State Highway Commission; to Fix the Term of Office of District Highway Commissioners; to Direct the State Highway Commission to Reduce Annually the Principal of its Outstanding Obligations; to Limit the Aggregate Amount of Certificates of Indebtedness and Reimbursement Obligations that may be Issued in Any One Year; to Direct How and By Whom State Highway Certificates of Indebtedness may be Issued and Sold Hereafter, and to Provide Funds for the Construction of the State Highway System and for Refinancing Purposes; to Reduce the Annual License Fees on Certain Motor Vehicles; to Require the Payment Thereof, and to Provide Penalties for Violations.

In Coleman, the Court rejected the argument that the legislation violated Art. III, § 15, stating that not only had the Bill originated in the House, but that "the only income-providing feature of the Act is the license tag feature, which was in the bill from its inception in the House." 181 S.C. 10, 186 S.E. at 628. Thus, the Court determined that the Bill was not one whose primary purpose was revenue raising, but one "which may incidentally raise revenue." (emphasis added).

Accordingly, the test for violation of Art. III, § 15 is not whether the measure in question is a "fee" or a "tax," (although such characterization may be indicative), but instead, whether the "main purpose" of the legislation under review is to raise revenue. As the United States Supreme Court has stated:

> [t]he case is not one that requires either an extended examination of precedents, or a full discussion as to the meaning of the words in the Constitution, 'bills for raising revenue.' What bills belong to that class is a question of such magnitude and importance that it is the part of wisdom not to attempt, by any general statement, to cover every possible phase of the subject. It is sufficient in the present case to say that an act of Congress providing a national currency secured

> by a pledge of bonds of the United States, and which, in the furtherance of that object, and also to meet the expenses attending the execution of the act, imposed a tax on the notes in circulation of the banking associations organized under the statute is clearly not a revenue bill which the Constitution declares must originate in the house of representatives. . . . The main purpose that Congress had in view was to provide a national currency based upon United States bonds, and to that end it was deemed wise to impose the tax in question. The tax was a means for effectually accomplishing the great object of giving to the people a currency that would rest primarily upon the honor of the United States and be available in every part of the county. There was no purpose by the act, or by any of its provisions, to raise revenue to be applied in meeting the expenses or obligations of government.

Twin City Nat. Bank of New Brighton v. Nebeker, 167 U.S. 196, 202-203 (1897) (emphasis added). Other cases from various jurisdictions are in accord: see Sizemore v. Krupp Oil Co., 597 So.2d 211, 213 (Ala. Civ. App. 1992), quoting Beeland Wholesale Co. v. Kaufman, 234 Ala. 249, 260, 174 So. 516, 525 (1937) ["(w) hen an act has for its main purpose provision for the general welfare by enacting a scheme within the State's police power, it is not one to raise revenue, though it does so as an incident to such scheme."]; U.S. v. Newman, 889 F.2d 88, 98 (6th Cir. 1989) ["only if the primary purpose of the bill is to raise revenue must it originate in the House of Representatives."]; U.S. v. Conner, 715 F.Supp. 1327, 1330 (W.D.N.C. 1989) ["the requirement that a bill for raising revenue originate in the House of Representatives does not apply to a bill that Congress enacted for purposes other than to raise revenue even though the bill incidentally creates revenue."]; Morgan v. Murray, 328 P.2d 644, 648 (Mont. 1958) ["Bills which have for their purpose some policing regulation, and are enacted pursuant to the State's police power, which incidentally levy or impose a tax or license fee are not revenue raising measures in the strict sense of the word."].

Thus, courts look to the underlying nature of a charge or assessment, rather than whether that assessment has been designated or labelled as a "fee" or "tax." As was said in Columbia Gaslight Co. v. Mobley, 139 S.C. 107, 137 S.E. 211 (1927), "[a]ny governmental charge imposed for the purpose of raising revenue is a tax regardless of the name by which it is called." And, for purposes of the federal Tax Injunction Act, the Sixth Circuit Court of Appeals noted that "[i]t is elemental, we think, that the label given an assessment by state law is not dispositive. . . ." Wright v. McClain, 835 F.2d 143, 144 (6th Cir. 1987).

While labels given to a particular charge are not dispositive, a good discussion of the legal distinction between a tax and fee, particularly in the context of road construction, is found in State v. Perry, 138 S.C. 329, 136 S.E. 314, 316 (1927). There, our Supreme Court, addressing the validity of a one dollar driver's license fee, mandated by a town ordinance, stated as follows:

> [i]f no distinction could be made between the license tax imposed by state law upon a motor vehicle and the charge of $1 operator's license fee, as provided for in respondent's ordinance, then the ordinance clearly would be void as being in conflict with the state law. The license imposed by the State is purely for the purpose of raising revenue for the building and maintenance of state highways. It is not a tax or license upon the operator of the machine, but upon the machine

> itself, and it is not intended to be and is not a police regulatory measure. On the other hand, as we have pointed out, the charge of $1 under the ordinance is merely for the purpose of raising a sufficient amount to meet the expense incident to the issuance of the operator's license, etc., under same.
>
> A motor vehicle when improperly operated, or when operated by incompetent or irresponsible persons, becomes a source of grave danger to the public. And this is particularly true on the crowded streets of a city, where carefulness, skill, and clear thinking are required, especially in emergencies which often arise, to avoid accidents which may result in loss of life or destruction of property. The operation of motor vehicles under such conditions is a matter that demands careful supervision and control in the interest of public safety. The ordinance in question, under which the respondent endeavors to regulate its traffic, is nothing more than a police regulatory measure, and the charge of $1, as we have already pointed out, does not change in any way the nature of the power exercised.

Id. (emphasis added).

As our March 30, 2015 opinion concluded, the label of "user fee," given by the General Assembly of the longstanding "gas tax" by Act. No. 69 of 2003, is not determinative of whether Art. III, § 15 applies to S. 523 or to any other legislation. As we stated in the March 30, 2015 opinion,

> [o]ur Supreme Court has often indicated that it is not the label, but the purpose, which controls. In this instance, the principal purpose of the legislation (S. 523) 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.

A particularly instructive decision in this area is United States v. Hagen, 711 F.Supp. 879 (S.D. Tex. 1989). There, the Court concluded that a statute imposing a special assessment upon convicted defendants violated the origination clause of the United States Constitution. The Court rejected Congress's label of "special assessment" as controlling for purpose of the origination clause, concluding instead that the primary purpose of the legislation was to raise revenue:

> [a]lthough the adopted version of S. 2423 uses the term special assessment, indicating a specific charge or tax to raise funds, the label alone does not always explicitly indicate the true purpose of the statute. The legislative history, however, indicates that the purpose of S. 2423 was to add new income for the federal government.

711 F. Supp. at 880. In rescinding the "assessment," the Court made it clear that the legislation was required by the federal Constitution to have originated in the House of Representatives, rather than the Senate. In the words of the Court,

> [o]observance of specific provisions like the origination clause is crucial to continuing the protections provided in the Constitution. The framers recognized

> that the power over the purse had been extraordinarily important in Anglo-American history, and they bestowed this power on the House. . . . Discerning the proper application of the monumental but indefinite clauses of the Constitution . . . may confuse thoughtful people, but the origination clause is no harder to apply then the requirement that the President must be thirty-five years old. The assessment will be rescinded.

Id. at 883.

Our March 30, 2015 opinion also addressed the possible applicability of the "enrolled bill" rule to the situation in which Art. III, § 15 may have been violated. We cited therein decisions such as State ex rel. Hoover v. Chester, 39 S.C. 307, 17 S.E. 752 (1893), Wingfield v. South Carolina Tax Commission, 147 S.C. 116, 144 S.E. 846 (1928) and Crouch v. Benet, 198 S.C. 185, 17 S.E.2d 320 (1941) for the proposition that a court will ordinarily not look behind the face of the Act to review a challenge pursuant to Art. III, § 15, so long as the Act "is 'fair on its face' and meets the other requirements of the Constitution." Op. at 4.

Despite the "enrolled bill" rule, we note, however, that in one original jurisdiction case, State ex rel. Coleman v. Lewis, supra, our Supreme Court did in fact address the question of whether the legislation in question violated Art. III, § 15. There, in concluding that the legislation was properly initiated in the House, the Court stated that "[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." 186 S.E.2d at 628. In that case, therefore, the Court looked beyond the face of the legislation as enacted to examine the House Journals to determine in which house the legislation originated. See also, Wingfield v. South Carolina Tax Comm., 144 S.E., supra at 859 (Cothran, J. dissenting) ["In my opinion it would present a most anomalous situation, that the Legislature, in the passage of an act, could ignore the requirements of the Constitution and slip into the bomb-proof of enrollment, ratification, approval, and filing of the act against all inquiry as to the constitutional regularity of their proceedings. . . ."]. While the Court thus ordinarily defers to the "enrolled bill" rule in such circumstances, there are other cases in which it has not done so.

Conclusion

1. The March 30, 2015 opinion is reaffirmed.

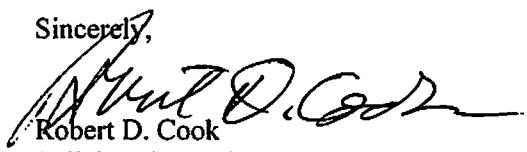
2. The test for a violation of Art. III, § 15 of the South Carolina Constitution, requiring bills raising revenue to originate in the House of Representatives, is not whether a particular assessment is a "tax" or a "fee," but whether the purpose of the legislation is to raise revenue. In our opinion, therefore, any designation by the General Assembly of an assessment as a "fee" is not controlling. If the purpose of the legislation is the raising of revenue, that legislation must originate in the House. Such would include not only S. 523, but legislation concerning the raising of revenue for LLR. We cannot evaluate the constitutionality of each and every bill introduced. Such is a factual question beyond the scope of an opinion. Op. S.C. Atty. Gen., December 2, 1983.

3. Any reference in our March 30, 2015 opinion to the "gas tax" was merely historical. We pointed out that until Act. No. 69 of 2003 was enacted, this charge had historically been referred to as the

"gas tax" in South Carolina. Only with passage of Act No. 69 of 2003 were the words "user fee" substituted for "tax." In any event, a court will not necessarily abide by this characterization, but will look to whether the purpose of the legislation is to raise revenue.

4. A court may well apply the "enrolled bill" rule to avoid judicial review of any violation of Art. III, § 15. In State ex rel. Richards v. Moorer, 152 S.C. 455, 150 S.E. 269, 273 (1929), involving a challenge to the gas tax pursuant to Art. III, § 15, the Court stated: "As the enrolled act in the present case fully meets all the requirements of the enrolled bill rule as laid down in the Wingfield case, it is not competent to impeach it by evidence outside the act itself." We caution, however, that in State ex rel. Coleman v. Lewis, supra, the Court did examine the Journals to determine that Art. III, § 15 had not been violated. Thus, it would be a matter for the Court to determine as to whether or not to apply the "enrolled bill" rule in a given instance. In any event, as we stated in the March 30, 2015 opinion, Art. III, § 15 should be adhered to by the General Assembly.

Sincerely,



Robert D. Cook
Solicitor General