

**STATE OF TENNESSEE  
OFFICE OF THE ATTORNEY GENERAL**

**March 16, 2015**

**Opinion No. 15-21**

**Constitutionality of SB 354 -- Public Highway Maintenance Act of 2015**

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**Question 1**

Does SB 354 discriminate against interstate commerce in violation of Article I, Section 8, Clause 3 of the United States Constitution, referred to as the Commerce Clause, by only providing a tax credit to certain motor carriers domiciled in this state?

**Opinion 1**

Yes. The credit provisions of SB 354 violate the Commerce Clause because they apply only to motor carriers domiciled in Tennessee and do not apply to motor carriers domiciled in other states.

**Question 2**

Does SB 354 violate any other provision of the Tennessee Constitution or the United States Constitution?

**Opinion 2**

Yes. The credit provisions of SB 354 violate the Equal Protection Clause of the U.S. Constitution because they effectively impose a higher tax rate on out-of-state motor carriers solely because of their domicile.

**ANALYSIS**

Senate Bill 354 proposes legislation that, if enacted, would be known as the Public Highway Maintenance Act of 2015. The act would require motor carriers to pay, in addition to the existing diesel fuel tax, a surcharge of 13¢ per gallon of diesel fuel used to operate on public highways within this state. The act additionally would require motor carriers to pay a highway maintenance fee of \$2.85¢ per mile traveled for each commercial motor vehicle weighing in excess of 59,999 pounds. As currently drafted, SB 354 would give motor carriers domiciled in this state a credit for these surcharges and fees against their franchise and excise taxes paid to the state. Senate Bill 354 does not provide a credit to motor carriers not domiciled in Tennessee.

The Commerce Clause vests Congress with the power to regulate commerce among the several states. U.S. Const. art. I, § 8, cl. 3. The United States Supreme Court consistently “has held that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they

mandate ‘differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.’” *Granholm v. Heald*, 544 U.S. 460, 472 (2005) (quoting *Oregon Waste Sys., Inc. v. Department of Env’tl. Quality*, 511 U.S. 93, 99 (1994)). “State laws discriminating against interstate commerce on their face are ‘virtually *per se* invalid.’” *Fulton Corp. v. Faulkner*, 516 U.S. 325, 331 (1996) (quoting *Oregon Waste Sys.*, 511 U.S. at 99).

On its face, SB 354 mandates differential treatment of motor carriers domiciled in Tennessee and those domiciled elsewhere. The proposed act gives motor carriers domiciled in this state a credit against their franchise and excise taxes for the additional surcharges and maintenance fees imposed by the act. This credit is not extended to motor carriers domiciled in other states, although they also are subject to this state’s franchise and excise taxes if they operate in Tennessee. As drafted, therefore, the credit provision of SB 354 violates the dormant Commerce Clause. *See Armco Inc. v. Hardesty*, 467 U.S. 638 (1984) (invalidating West Virginia’s wholesale gross receipts tax which exempted in-state, but not out-of-state, manufacturers).

The credit provisions of SB 354 likewise violate the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. “[T]he Equal Protection Clause forbids a State to discriminate in favor of its own residents solely by burdening ‘the residents of other state members of our federation.’” *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 878 (1985) (quoting *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 533 (1959)). A “State may not constitutionally favor its own residents by taxing foreign corporations at a higher rate solely because of their residence.” *Ward*, 470 U.S. at 878. The “promotion of domestic business within a State, by discriminating against foreign corporations that wish to compete by doing business there, is not a legitimate state purpose” for purposes of Equal Protection analysis. *Id.* at 880. Inasmuch as the credit provisions of SB 354 effectively tax out-of-state motor carriers at a higher rate solely because of their domicile, the provisions violate the federal Equal Protection Clause.

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