

# PUBLICATION

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## Spotlight on Mississippi: Highest Court Rules that State Tax Violates Commerce Clause

April 30, 2013

The Mississippi Supreme Court recently reversed a chancery court's decision upholding the "nonsettling manufacturer" or "NSM" law entered in response to a Due Process and Commerce Clause challenge by one tobacco manufacturer and two tobacco distributors (appellants). The NSM law imposed a fee on manufacturers that were not a party to the tobacco settlement agreement with the State of Mississippi in 1997 for sales, purchases and distribution of tobacco products in Mississippi, regardless of whether the tobacco products were destined for retail sale within or outside of the state. In 2011, during the course of litigation, the Mississippi Legislature amended the NSM law to remove the fees imposed against manufacturers for products sold outside of Mississippi. Therefore, the appellants' Commerce Clause challenge only related to the applicability of the NSM law prior to its amendment.

On April 4, 2013, the Supreme Court issued its opinion finding that the NSM law, as originally enacted, failed to satisfy the internal consistency test of the Commerce Clause analysis because a fee imposed on cigarettes that are distributed in Mississippi, but sold in another state with an NSM law, could be taxed in both states and therefore subjected to higher burdens than cigarettes distributed and sold within Mississippi. The Court's opinion did not, however, address the appellants' challenge under the Due Process clause.

The Court found against the appellants' claims for reimbursement of attorney fees from the Mississippi Department of Revenue brought under 42 U.S.C. 1983 and 1988. These laws can provide claimants with the federal remedy of injunctive or declaratory relief against a state tax when an adequate legal remedy does not exist under state law. The Court, however, found that all of the appellants had an adequate remedy under state law. In the conclusion of its opinion on this issue, the Court stated that, "[T]he courts of this State should refrain from considering Section 1983 claims in tax cases [*where there is an adequate remedy*], mooted Section 1988 claims for fees [*italized language added*]," which would apply to Constitutional challenges of tax laws beyond this case. Prior inconsistent holdings of the Court related to the applicability of Section 1983 in tax cases were expressly overruled.

If you have any questions regarding the issues decided in this case or how this development may affect your particular situation, please contact one of the attorneys in the Firm's Tax Department.