

1975 S.C. Op. Atty. Gen. 100 (S.C.A.G.), 1975 S.C. Op. Atty. Gen. No. 4028, 1975 WL 22325

Office of the Attorney General

State of South Carolina

Opinion No. 4028

May 12, 1975

***1 The contingent obligation to pay interest on a note is not a measure for the purpose of documentary stamp taxes.**

Director
License Tax Division
Columbia, South Carolina

This is written in response to the request of the South Carolina Tax Commission for an opinion whether or not the obligation to pay interest on a note is within the measure of documentary stamp taxes. The tax here in issue is imposed by Sections 65–681 and 65–688 of the Code of Laws of South Carolina.

In a related opinion dated December 14, 1973, this office advised that the measure for documentary stamp taxes on a mortgage does not include the accrued interest on the mortgage debt if the liability for the interest is contingent upon the continuation of the mortgage debt. The reasoning for this opinion is applicable and controlling on the question here considered.

In the cases of *Graniteville Mfg. Co. v. Query, et al.*, 44 F. 2d 64, and *South Carolina Electric & Gas Company v. Pinckney*, 217 S. C. 407, 60 S. E. 2d 851, the courts stated that the documentary stamp taxing statutes impose the tax upon the creation of instruments. Following these decisions the Court held that the liability for the tax must be determined from the form and the face of the instrument created. *Textron v. Livingston*, 244 S. C. 380, 137 S. E. 2d 267. The most recent decision of any court in the area of documentary stamp taxation was of the Court of Common Pleas for Richland County in the case of *Dutch Square Associates v. South Carolina Tax Commission*. In this decision the question was raised whether or not documentary stamp taxes could be required on the written obligation to make payments under a lease. The Court held that the tax did not apply in that the obligation to make the payments was a contingent obligation which was not fixed and certain upon creation of the lease. It further stated in support of its decision the general rule of statutory construction that where there is doubt as to the taxability of an instrument the doubt is to be resolved in favor of the taxpayer and against the tax.

It is the opinion of this office therefore, that interest which accrues on a note after the creation of the note is not a measure for documentary stamp tax if the interest obligation is not fixed but is contingent upon the debt remaining outstanding. If, however, the liability for interest is fixed and certain when the instrument is created, it is taxable. For example, when the terms of a note preclude an early payoff of the debt thus fixing the liability for interest, then in such case documentary stamps would be required upon the whole of the principal and interest.

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