

1977 S.C. Op. Atty. Gen. 22 (S.C.A.G.), 1976 S.C. Op. Atty. Gen. No. 77-10, 1977 WL 24353

Office of the Attorney General

State of South Carolina

Opinion No. 77-10

January 10, 1977

*1 Information concerning whether or not a corporation has capital stock of \$40,000 or more may still be given to prospective lenders pursuant to Section 8-8 of the Code.

TO: Mr. C. H. Brooks
Director
Income Tax Division
South Carolina Tax Commission

QUESTION

Do the provisions of Section 65-307 of the South Carolina Code (the Income Tax Secrecy Clause) prohibit the Tax Commission from furnishing the information required by Section 8-8 of the South Carolina Code which relates to an exception to usury based on a corporate borrower having capital stock of at least \$40,000?

STATUTES

Sections 65-307, 65-602 and 8-8 of the South Carolina Code of Laws.

DISCUSSION

Section 8-8 of the Code provides that the defense of usury is not available to a borrower corporation having an issued capital stock of \$40,000 or more of par value, or stated value in the case of stock without par value. The Section further states that the amount of issued capital stock as shown in the latest annual report filed with the Tax Commission pursuant to Section 65-602 shall be conclusive evidence against such corporation as to the amount of its issued capital stock. Based on the requirements of Section 8-8, the Tax Commission has consistently informed prospective lenders whether or not the last annual report of the prospective borrower corporation shows capital stock of \$40,000 or more.

Section 65-307 of the Code contains a secrecy clause which prohibits the Tax Commission from disclosing any particulars 'set forth or disclosed in any report or return required by this Chapter'. The Chapter referred to is Chapter 5, the Income Tax Chapter. The annual report (Section 65-602) is required under Chapter 10, the License Fee Chapter; however, Section 65-604 requires the income tax return and the license tax report to be combined on one form. Notwithstanding the fact that the annual report and the income tax return have been combined, it is our opinion that the provisions of Section 8-8 require the information concerning usury to be furnished. Section 8-8 is a specific statute and without a showing of legislative intent to the contrary, it will take precedence over a general statute. See the numerous South Carolina cases cited at 17 West's South Carolina Digest, Statutes, Key 223.4.

Concern has arisen over the provisions of a recently enacted statute referred to as S. 615. That statute, which adds Section 65-308.1 to the Code, states generally that notwithstanding the secrecy clause (Section 65-307) certain information may be furnished, upon request, to the Secretary of State. Among the information allowed to be furnished is the total issued capital stock of a corporation. After a consideration of the statutory framework and history examined in the following paragraph, we

are of the opinion that this statute does not through negative implication prevent the Tax Commission from continuing to furnish usury information pursuant to Section 8-8 of the Code.

*2 Section 65-602 requires an annual report of corporations which is to contain whatever pertinent information the Tax Commission deems necessary. The annual report required by Section 65-602 is the basis on which the annual corporate license fee is computed. See Sections 65-606 and 65-607. In addition to the annual report (which is now combined with the income tax return pursuant to Section 65-604), a corporation was required to file with the Tax Commission a 'first report of corporations'. This first report was required under the provisions of Section 65-611 of the Code. Section 65-611 was recently amended (S. 617), and the Section now requires the initial report to be filed with the Secretary of State and not the Tax Commission. With the amendment to Section 65-611, Section 12-24.1 of the Code was repealed. Section 12-24.1 of the Code required the annual report of a corporation to be filed with the Secretary of State. This annual report, required by Section 12-24.1, was separate and distinct from the annual report required to be filed with the Tax Commission by Section 65-602 of the Code, although a 1964 amendment to Section 12-24.1 permitted this corporate report to also be filed with the Tax Commission. With the repeal of Section 12-24.1, the Secretary of State will no longer be furnished certain corporate information on an annual basis. The provisions of S. 615, to be codified as Section 65-308.1, afford protection to the Tax Commission when it furnishes certain information to the Secretary of State formerly provided the Secretary under Section 12-24.1. The source of the information allowed to be furnished the Secretary is the combined return of license and income tax information. It has been held in a recent Ohio decision that information prohibited by a secrecy clause cannot be provided to other state agencies. See Collins v. Ferguson, (Ohio Court of Common Pleas) filed August 11, 1975.

CONCLUSION

Information concerning whether or not a corporation has capital stock of \$40,000 or more may still be given to prospective lenders pursuant to Section 8-8 of the Code. The provisions of S. 615 (adding Section 65-308.1 to the Code) which allow certain information, including issued capital stock, to be furnished the Secretary of State do not by negative implication prohibit the information required by Section 8-8 from being furnished to prospective lenders.

John C. von Lehe
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