

1972 S.C. Op. Atty. Gen. 145 (S.C.A.G.), 1972 S.C. Op. Atty. Gen. No. 3322, 1972 WL 20461

Office of the Attorney General

State of South Carolina

Opinion No. 3322

June 1, 1972

***1 The tax is imposed on a note executed by delivery in South Carolina although the maker is a foreign corporation.**

Director

License Tax Division

South Carolina Tax Commission

You have requested the opinion of this office on whether or not a certain unsecured promissory note given in payment for real estate is subject to the South Carolina Documentary Stamp Tax imposed by Section 65–681 of the Code. The amount of the documentary stamp tax on promissory notes is computed under Section 65–688 of the Code.

The pertinent facts contained in a letter to you and in telephone conversations with the taxpayer's attorney are as follows: The payer of the note is a Georgia corporation. The note is prepared and signed at the corporation's office in Augusta and mailed to Camden, South Carolina. The payee of the note is a New York trustee. The New York trustee has retained a South Carolina attorney whose function is to receive the note in Camden, examine the note for legal sufficiency and to then mail a deed conveying certain real estate to the Georgia corporation. The final act of the attorney is to discount the note with a South Carolina bank.

It is settled law that the South Carolina Documentary Stamp Tax is an excise tax levied with respect to the creation of instruments within this State. See *Graniteville Mfg. Co. v. Query*, 44 F. 2d 64, affirmed 283 U. S. 376, 51 S. Ct. 515 (1931). The execution of a note, if not the actual creation of the instrument, is a vital part of its creation. It is therefore important to determine whether the promissory note under consideration was executed in South Carolina. Delivery is the final step in the execution of an instrument and constitutes its issuance. The following statement from 11 Am. Jur. 2d, Section 270, Bills and Notes, is applicable:

‘As a general rule, a negotiable instrument, like any other written instrument, has no legal inception or valid existence as such until it has been delivered in accordance with the purpose and intention of the parties. Until that is done, it is a nullity and not the subject of ownership. The payee acquires no rights in the instrument prior to delivery. For all legal purposes an instrument is to be considered as made on the day it is delivered.’

Because delivery is the final act in the execution of a note, it therefore becomes necessary to determine where the subject note was delivered. The note was mailed by the corporation from Augusta, Georgia, to the payee's attorney in Camden, South Carolina. The attorney, after receipt of the note, mailed the deed of real estate to the corporation.

The following statement from 11 Am. Jur. 2d, Section 278 is in point:

‘Accordingly, in the usual case execution may be deemed complete upon the deposit of the instrument in the mail * * *. But in some cases some act remains to be done by the payee before the instrument is binding upon the obligors or its purpose effected, and in such case the instrument is deemed executed at the place where it is actually delivered to the payee, accepted by him, and the act performed.’

***2** An opinion of this office dated May 15, 1969, held that a note, delivered in South Carolina was therefore executed here and was subject to the documentary stamp tax.

It does not appear that the note in question was binding on the Georgia corporation until the obligation for which it was issued was created by the transfer of the deed which was mailed from Camden. Delivery and therefore execution of the note took place in South Carolina.

It is the opinion of this office that under these circumstances, the note was created at least in part in South Carolina, and therefore documentary stamps should be affixed to the note.

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