1980 WL 120817 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
August 12, 1980

RE: Agricultural Loans Under Act No. 326 of 1980

***1** The Honorable Eugene C. Stoddard
South Carolina House of Representatives
P. O. Box 11867
Spartanburg, South Carolina 29211

Dear Representative Stoddard:
You have requested an opinion as to whether the sale of farm machinery by a dealer would fall within the provisions of Act No. 326 of 1980, which limits the interest rate on agricultural loans to one (1%) percent above the discount rate on ninety-day commercial paper. You have also enclosed a letter from J. Herman Power Company detailing their procedure for handling the sale of agricultural equipment and examples of their Sales Contract and the Investment Agreement between the dealer and Palmetto Production Credit Association. I have also reviewed a copy of the informal opinion of Kathleen Goodpasture Smith of the Department of Consumer Affairs, dated July 29, 1980, in response to a similar inquiry made to her.

Ms. Smith states in her opinion that this transaction apparently would not be governed by the South Carolina Consumer protection Code because of the exclusion provided for 'sales primarily for agricultural purposes' under Section 37-1-202 of the South Carolina Code of Laws (1976). I will defer to her opinion on that matter, since her office is charged with responsibility of administering and interpreting the South Carolina Consumer Protection Code. The question, therefore, narrows to whether the transaction would be considered a credit sale under the 'time price' doctrine or a loan subject to Act No. 326 of 1980. It is clear that if this transaction is not considered a bona fide sale under the time price doctrine, then it would fall within the provisions of Act No. 326 of 1980.

The time price doctrine was discussed by the South Carolina Supreme Court in Brown v. Crandall, 218 S.C. 124, 61 S.E.2d 761 (1950), and generally provides that a bona fide sale may be made with a higher 'time price' (credit price) than the cash price even if the difference between the two prices would be greater than the maximum interest that could be charged on a loan under the usury laws. Two factors must be present to fall within the doctrine: (1) the transaction must be a sale with the difference between the price for the purchase of goods on credit and the cash price clearly indicated; and (2) the sale must be bona fide, i.e., with no intent to evade the usury laws. South Carolina courts have indicated that it is the substance of the transaction, and not the form, which will determine whether a transaction is in reality a cloak for usury. See, Note, Usury Laws: Underseveloped Protection in an Overdeveloped Market, 21 S.C.L. Rev. 206 (1969). However, a number of decisions have also emphasized the importance of the form of the transaction. See, Devenport v. Unicapital Corporation, 267 S.C. 691, 230 S.E.2d 905 (1976). While I can perhaps offer my opinion on matters of form by reviewing the enclosed Sales Contract, it is more difficult to draw any conclusion as to whether the 'substance' of the transaction would meet the requirements of the time price doctrine. That question can only answered in light of the facts involved in a particular transaction.

***2** With regard to form, the courts in other jurisdictions have noted several grounds for concluding that an agreement was intended to evade the usury laws: (1) the sales contract failed to quote, and thus to give the purchaser the choice between the two prices, i.e., the cash price and the credit price; (2) the conditional sales contract signed by the buyer was immediately assigned by the seller to a concern engaged in the business of loaning money or discounting commercial paper, with whom the seller maintained very close relations on a more or less permanent basis; (3) the sales contract contained charges against the purchaser phrased in misleading or ambiguous language which tended to cover up the essential nature of transaction which was a cash

sale with part of the purchase price being borrowed; and (4) the excess of the claimed 'credit' price over the claimed cash price was calculated in language usually reserved for computing interest. See, Annot., 14 A.L.R.3d 1065 (1967). Unfortunately, there are no reported decisions in South Carolina on these various points.

In this case, the enclosed document is denominated a 'sales contract' and the parties to the contract are initially referred to as 'seller' and 'purchaser.' However, at the conclusion of the contract the reference is changed from 'purchaser' to 'debtor.' Moreover, much of the credit price is presented in the contract in terms normally reserved for computing interest on a loan, such as 'finance charge' and 'annual percentage rate.' Also, the deferred payment price (credit price) in this particular contract is apparently computed by applying a certain schedule of rates or charges to the cash price. Such methodology has been held by some courts to indicate that the transaction is essentially a loan. See, Lloyd v. Gontgsell, 175 Neb. 775, 124 N.W.2d 198. Finally, I observe that J. Herman Power Company has entered into a formal agreement with Palmetto Production Credit Association to assign their interest in the credit sales.

The difficulty in reaching a conclusion as to whether this particular transaction would be a bona fide time price sale or in fact a loan is due to the absence of legal precedent in South Carolina. Neither of the two South Carolina decisions previously cited involved a transaction in which the credit sale contract would be assigned to a third party or in which the time (credit) price was calculated by applying a rate schedule to the cash price. While the order cases in this area upheld such transactions merely because they were a 'sale,' the modern trend has been to examine the sale closely to determine if it is merely a scheme to defeat the usury statutes. See, Annot., 14 A.L.R.3d 1065 (1967). It should be noted that the Investment Agreement with Palmetto Production Credit Association (para. 4(d)) specifically limits the 'finance charge,' (which in this case is the difference between the 'deferred payment price' and the 'cash price' minus taxes), to a rate not exceeding the South Carolina usury law. It is apparent from Mr. Lewis H. Power's letter of July 9, 1980, to Michael Malony that he is attempting to get around Act No. 326 of 1980 because 'we are charged more by Palmetto Production Credit Association than we are allowed to charge the buyer.' Under these circumstances it is questionable that the court would find a 'bona fide' credit sale. However, the matter is not free from doubt, and J. Herman Power Company perhaps should seek a declaratory judgment to get a definitive answer to this question.
Very truly yours,

***3** Richard B. Kale, Jr.
Senior Assistant Attorney General

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