

1994 S.C. Op. Atty. Gen. 116 (S.C.A.G.), 1994 S.C. Op. Atty. Gen. No. 52, 1994 WL 578554

Office of the Attorney General

State of South Carolina

Opinion No. 94-52

September 13, 1994

SUBJECT: Taxation and Revenue - Documentary Stamps on the Sale of Standing Timber

SYLLABUS:

*1 The documentary stamp tax of S.C. Code Ann. § 12-21-380 (Supp. 1993) is imposed only upon the sale of realty. The imposition of the stamp tax must be based upon the form and the face of the document executing the transfer. A document which conveys timber to be cut is statutorily classified by the Uniform Commercial Code (S.C. Code Ann. § 36-2-107(2) (Supp. 1993)) as a contract for the sale of goods and is a document conveying personalty. Such a document is not a document selling realty and, thus, is not subject to the documentary stamp tax of § 12-21-380.

APPLICABLE LAW: S.C. Code Ann. §§ 12-21-380 and 36-2-107 (Supp. 1993).

Honorable Donald H. Holland
Senator, District No. 27

QUESTION: Is a document that conveys timber to be cut subject to the documentary stamp tax?

DISCUSSION:

The documentary stamp tax is a tax on the making of specified instruments. *Investors Premium Corp. v. South Carolina Tax Commission*, 260 S.C. 13, 193 S.E.2d 642 (1973). One such class of instruments involves conveyances. Section 12-21-380 imposes a stamp tax on the creation of certain documents used in the conveyance of property. Those documents are identified as follows:

A deed, instrument, or writing whereby any lands, tenements, or other realty sold is granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or any other person by the purchaser's direction

In deciding if a document is taxable, two inquiries are needed. The decision to tax or not to tax the creation of a document is first made by a review of the face of the document without examining facts surrounding the document. If the first inquiry is satisfied, the second inquiry asks whether the document conveys property consistent with the statutory requirements of the imposition statute.

A. Face of the Document

The form and face of the instrument must be examined. A court will not look behind a document, but rather will examine the four corners of the instrument to determine if the document creates a taxable instrument. *Textron, Inc. v. Livingston*, 244 S.C. 380, 137 S.E.2d 267, 270 (1964); cf. *Beaty Trust Co., Inc. v. South Carolina Tax Com'n*, 278 S.C. 113, 292 S.E.2d 788 (S.C., 1982) (where the substance of a transaction was disputed, but no dispute existed as to the document itself).

The liability of an instrument to a stamp duty, as well as the amount of such duty, is determined by the form and face of the instrument, and cannot be affected by proof of facts outside of the instrument itself.

United States v. Isham, 17 Wall. 496, 504, 21 L.Ed. 728 (1873).

The typical document transferring timber to be cut usually carries the markings of a “deed” and, thus, the face of the document lends itself to taxation.¹ Even if the normal markings of a deed are not present, the document will still lend itself to taxation on its face since the coverage of § 12-21-380 is very broad. Such coverage includes any writing conveying property for a consideration. Thus, were there no other considerations, such deeds or documents would be taxable. The literal statutory requirements, however, must also be examined to determine if taxation is appropriate.

B. Statutory Requirements

*2 Among other requirements, § 12-21-380 requires that the property conveyed be “lands, tenements or other realty” South Carolina has a long history of classifying standing timber as realty. *Alexander v. Herndon*, 84 S.C. 181, 65 S.E. 1048 (1909) and *Graham v. Prince*, 293 S.C. 77, 358 S.E.2d 714 (1987). More specifically, South Carolina has treated the sale of timber to be cut as the sale of real property. In *Wilson Lumber Co. v. D. W. Alderman & Sons Co.*, 80 S.C. 106, 61 S.E. 217, 218 (1908), the sale of “all the pine trees and timber . . . suitable for milling purposes . . .” was the sale of realty creating an “. . . estate in the trees and timber [of] a fee-simple estate; . . .”

In recent years, however, specific statutory changes have been made relative to the sale of timber to be cut. In Act No. 494, 1988 S.C. Acts, § 3, now codified as § 36-2-107(2) the following is stated:

A contract for the sale . . . of timber to be cut is a contract for the sale of goods within this chapter whether the subject matter is to be severed by the buyer or by the seller even though it forms part of the realty at the time of contracting, and the parties can by identification effect a present sale before severance.

The Reporter's Notes to this enactment state the following:

Several timber-growing states changed the 1962 Text to make timber to be cut under a contract of severance qualify as goods, regardless of the question who is to sever them. The section is revised to adopt this change. Financing of the transaction is facilitated if the timber is treated as goods instead of real estate. A similar change is made in the definition of “goods” in Section 9-105 of the 1988 UCC Amendments. To protect persons dealing with timberlands, filing on timber to be cut is required in Part 4 of Article 9 to be made in real estate records in a manner comparable to fixture filing. See Sections 9-401(1)(b), 9-402(5) and 9-403(7) of the 1988 UCC Amendments.

In construing a statute, the language used should be given its plain and ordinary meaning. *City of Columbia v. Moser*, 280 S.C. 134, 311 S.E.2d 920 (1983); *Home Health Service, Inc. v. South Carolina Tax Com'n*, 312 S.C. 324, 440 S.E.2d 375 (S.C., 1994). While not controlling (*Moffett v. Traxler*, 247 S.C. 298, 147 S.E.2d 255 (1966)), an inquiry into the construction of language in a statute dealing with a related area is a permissible practice. *Spartanburg County v. Arthur*, 180 S.C. 81, 185 S.E. 486, 489 (1936). Further, the language of a revenue statute is to be resolved in favor of no taxation if there is substantial doubt as to the coverage of the imposition. *Deering Milliken, Inc. v. South Carolina Tax Commission*, 257 S.C. 185, 184 S.E.2d 711 (1971).

Based upon the above rules of construction, the classification of timber to be cut as the sale of personalty for UCC purposes is instructive in determining the taxation of the documents used to consummate such sales. Both the taxing statutes and the commercial code statutes deal with the sale of standing timber. The General Assembly has expressed by plain language that the sale of timber to be cut under a Uniform Commercial Code transaction is a sale of goods. There is no clear authority or policy reason that requires treating a sale of such timber as realty for taxation purposes when the transaction is statutorily the sale of personalty for commercial code purposes. Consistent treatment as personalty for both taxation and commercial purposes is in accord with the rule of construction of denying taxation where there

is substantial doubt as to the coverage of a revenue statute. *Deering Milliken, Inc. v. South Carolina Tax Commission*, supra.

*3 Florida has addressed this matter by construing the same UCC amendment to Florida's law as South Carolina has made to its UCC law. In the facts as presented in *Georgia-Pacific Corp. v. Dept. of Revenue of the State of Florida*, 410 So.2d 550 (Fla. App., 1982), prior to the UCC amendment, Florida taxed timber deeds conveying standing timber. The court was asked to determine if the UCC amendment prevented the taxation of such timber deeds. The court held that the UCC made the standing timber personalty. The court held further, however, that the deeds were still taxable, but only due to specific language which required such a result.

Faced with Section 201.22 which says that the documentary excise tax is to be applied to transactions covered by the Uniform Commercial Code just as if it [the UCC] had never been adopted and faced with Section 679.105(5) which says (despite the legislature having defined contracts for the sale of standing timber as goods) that nothing in the definition section shall alter or modify any provision of the taxing laws of the state, the Court must rule that the documentary excise tax is still applicable to contracts for the sale of standing timber. *Georgia-Pacific*, supra, at p. 552.

There is no comparable specific taxing language in South Carolina's statutes. Accordingly, a document selling timber to be cut is statutorily classified by the Uniform Commercial Code (§ 36-2-107(2)) as a contract for the sale of goods and is not subject to the documentary stamp tax of § 12-21-380.

CONCLUSION:

The documentary stamp tax of S.C. Code Ann. § 12-21-380 (Supp. 1993) is imposed only upon the sale of realty. The imposition of the stamp tax must be based upon the form and the face of the document executing the transfer. A document which conveys timber to be cut is statutorily classified by the Uniform Commercial Code (S.C. Code Ann. § 36-2-107(2) (Supp. 1993)) as a contract for the sale of goods and is a document conveying personalty. Such a document is not a document selling realty and, thus, is not subject to the documentary stamp tax of § 12-21-380.

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Footnotes

- 1 The document usually identifies itself as a "deed," describes the property being conveyed, has a granting clause designating one party as the "grantee," designates another party as the "grantor," contains a habendum clause, usually provides a warranty clause, and is signed by the grantor. Thus, on the face of the document, there is the creation of an instrument having the common elements of a deed. See 23 Am.Jur.2d, Deeds, § 18.

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