

1975 S.C. Op. Atty. Gen. 81 (S.C.A.G.), 1975 S.C. Op. Atty. Gen. No. 4009, 1975 WL 22307

Office of the Attorney General

State of South Carolina

Opinion No. 4009

March 31, 1975

***1 In the absence of a statement in the mortgages showing the amount of consideration, first and second mortgages given on a piece of property located in S. C. as partial security for a large out-of-state loan should each bear documentary stamp taxes based on the full value of the S. C. property.**

South Carolina Tax Commission
Columbia, S. C.

This is in reply to your request for an opinion of this office on the proper treatment of the following transaction for documentary tax purposes. The facts on which this opinion is based are as follows:

Two separate and distinct mortgages (hereinafter referred to as the first and second mortgages) are to be given by a South Carolina based corporation covering the corporation's real property within this State. The South Carolina corporation is a subsidiary of a foreign corporation with principal offices located in New Jersey. The mortgages are given as partial security for two loans which are made to the foreign parent. The first mortgage is given to the N. Bank and the M. Bank as partial security for term loans of \$3,250,000 and \$1,000,000 respectively from these institutions. The second mortgage is given to N. Bank as partial security for an accounts receivable loan which may not exceed \$3,250,000 and at present is in the amount of \$1,633,000. The following caption appears on the face of the first mortgage: 'THE WITHIN MORTGAGE is one of a series of mortgages executed by Mortgagor or (parent corporation) to secure the aforementioned term loan, such other properties being located in Trenton, New Jersey, Bordentown Township, New Jersey, and Plainville, Connecticut'.

The second mortgage recites the same caption except that the words 'term loan' are replaced by the words 'accounts receivable loan'. An affidavit accompanying the mortgage states that the value of the South Carolina property on which the two mortgages are given is \$665,433.

Section 65–688 of the Code imposes a tax on 'mortgages executed within the State or recorded within the State'. The Section provides that the amount of tax shall be based on consideration. A recent opinion of this office (copy attached) written on June 6, 1974, considered the question of the proper amount of tax to be imposed when a large loan, closed out of state, was secured by a master mortgage on property located in numerous states, including South Carolina. The opinion concluded that the consideration expressed on the face of the mortgage advanced with respect to property in South Carolina was the proper base on which to impose the tax. This is in accord with the case of *Textron, Inc. v. Livingston*, 244 S. C. 380, 137 S. E. 2d 267, which held that the liability for stamp taxes is to be determined from the face of the instrument.

In the instant case, the amount of consideration advanced in respect to the South Carolina property is not expressed on the face of the mortgages, however, the mortgages are only partial security for the loans and an attached affidavit gives the value of the property in South Carolina. Both mortgages encumber the entire property and create separate liens on it. The documentary stamp tax has been held by the United States Supreme Court to be on the creation of the instruments within this State. See *Graniteville Mfg. Co. v. Query*, 283 U. S. 376. Two separate instruments have been created.

*2 In the absence of an expression of the consideration advanced for each mortgage written on the face of the mortgages themselves, it is our opinion that the proper base of the stamp tax on each separate mortgage is the value of the property encumbered and that each mortgage should bear stamps in the full amount of the value of the property encumbered (i.e. \$665,433 on the first mortgage and \$665,433 on the second mortgage).

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