1974 S.C. Op. Atty. Gen. 58 (S.C.A.G.), 1974 S.C. Op. Atty. Gen. No. 3706, 1974 WL 21225

Office of the Attorney General

State of South Carolina
Opinion No. 3706
February 8, 1974

***1 Under the described circumstances, an out-of-state bank would not be required to qualify to do business in this State since such property transfers are not part of the primary function for which the bank was organized and the transaction is an isolated one.**

Secretary of State
State of South Carolina

With regard to your letter of October 12, 1973, concerning the letter and question of Mr. Herry M. Lightsey, Jr., Mr. McLeod has referred it to me for answer. You asked whether or not, under the following set of circumstances, a bank must qualify to do business in this State.

Briefly, here is the fact situation as I understand it. An out-of-state bank trustee is the assignee of the right, title and interest of a company in certain nuclear and other materials. This nuclear material, to which the trustee holds title, will be transported from a facility located outside of South Carolina to one located within the State, where the material will be processed and encased in a matrix. The processed nuclear material encased in the matrix will then be transported by the company bringing the nuclear material into the State to one of its own facilities located within the State. Here the company will deliver title to the matrix to the bank trustee. Immediately after this transfer, the bank trustee will pass title to another company pursuant to a contract between the trustee and the company. From the facts, it appears that the bank trustee will hold title to the nuclear materials only long enough for the materials to be encased in a matrix, title to the matrix to be passed to the trustee and the trustee to pass both titles to the second company. This will be a single transaction in that this type nuclear material, once processed, lasts approximately twenty years. It is the opinion of this Office that the above actions of the bank trustee do not constitute 'doing business' within this State, and therefore, the bank is not required to qualify to do business in this State.

The question as to whether a foreign corporation is doing business within a state depends primarily on the facts and circumstances in each particular case and the purposes and language of the statute or statutes involved. Consequently, this opinion is based strictly on the facts as stated above.
[I]t is recognized that a foreign corporation is 'doing' . . . business in that state when, and only when, it has entered the state by its agents and is there engaged in carrying on and transacting through them some substantial part of its ordinary or customary business, usually continuous in the sense that it may be distinguished from merely casual, sporadic, or occasional transactions and isolated acts. 36 Am. Jur.2d, *Foreign Corporation* § 318 at 314–415 (1968).

Section 12–23.1(b)(9) CODE OF LAWS OF SOUTH CAROLINA (1962) (cum. supp.) provides:
Without excluding other activities which may not constitute doing business in this State, a foreign corporation shall not be deemed to be doing business in this State, for purposes of this chapter, solely by reason of carrying on in this State any one or more of the following activities:
***2** . . .

Conducting within this State an isolated transaction which is completed within a period of thirty days and which is not in the course of a series or number of repeated transactions.

Thus, since the very idea of 'doing business' implies a continuous or repeated activity, a single or isolated transaction provides no basis for holding a foreign corporation to be 'doing business'. This fact has been recognized in South Carolina by ruling of a federal court in *Kirven v. Virginia Carolina Chemical Co.*, 145 F. 288, 293–294 (4th Cir., 1906). Here, the assumption is that the actual transfer of title to the nuclear material and matrix will be completed within the thirty (30) day period provided for in § 12–23.1(b)(9), CODE OF LAWS OF SOUTH CAROLINA (1962) (cum. supp.).

Furthermore,
. . . many courts have held that acts and transactions of such a corporation [foreign corporation] within the state which are not a part of the business it was formed to conduct, including those which are mere incidents to a future or past engagement in such a business in the state or to the present conduct of such business in other states, are insufficient to constitute doing business in the state, as that term is variously employed with respect to foreign corporation. . . . In applying such test it may not always be easy to distinguish between acts done in the exercise of corporate powers, but the rule is that the latter, where merely incidental, are not such a doing of business as will subject the corporation to state statutes imposing conditions on foreign corporations doing business in the state. *There must be 'a doing or transacting of business for which the corporation was incorporated, and not merely what it might have authority to do*'. 36 Am. Jur. 2d, Foreign Corporations § 331 at 328–329 (1968). (Emphasis supplied) (Citation omitted); *see also* 35 ALR 629; 59 ALR 2d 1133.

Obviously, the above described assignment of nuclear material and the subsequent transfer of the same is not 'a doing or transacting of business for which the [bank] corporation was incorporated'.

Thus, relying upon the facts presented in Mr. Lightsey's letter and the assumptions incorporated in this opinion, the bank would not be required to qualify to do business in this State since such property transfers are not part of the primary function for which the bank was organized and the transaction is an isolated one.

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