

1974 WL 27839 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

June 28, 1974

\*1 The measure of documentary stamps upon a note is the amount stated upon the face thereof.

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Dear Joe:

Reference is made to a note and mortgage given to this office for opinion as to the amount of documentary stamps that is required by Section 65-688 of the South Carolina Code of Laws, as amended in 1974. Said note is to be given by Foxcroft East Apartments Co. to Berg Enterprises Realty Group. The face value of the note is stated to be \$1,989,663.75, however, only \$165,000.00 is to be advanced by Berg to Foxcroft under the terms of the note. It is further stated in said note to Berg that Foxcroft did previously execute a note to the Citizens and Southern National Bank of South Carolina for \$1,835,000.00 which Berg assumes. The C & S note provides for monthly payments of \$14,634.13, which upon execution of this note shall be paid by Berg from monthly payments of \$16,119.09 from Foxcroft to Berg. It is further covenanted that Berg shall not make payments to C & S if Foxcroft is in default under the terms of the note of Foxcroft to Berg; nor shall Berg prepay any amounts Foxcroft owes C & S. This note is secured by a second mortgage of Foxcroft to Berg, the first mortgage being from Foxcroft to C & S.

Section 65-688 of the Code as last amended in 1974 reads in part:

'The tax shall be four cents for a sum not exceeding one hundred dollars consideration, and for each one hundred dollars, or fractional part thereof, four cents on the following:

(c) Mortgages executed within the State or recorded within the State.'

Certain language from the note and mortgage must bear specific attention. We quote from the note and mortgage. Paragraph one on page 1 of the said note is quoted in its entirety because it sets out the obligation of Foxcroft to Berg. 'FOR VALUE RECEIVED, the undersigned promises to pay to the holder hereof, in lawful money of the United States of America, the principal sum of One Million Nine Hundred Eighty-Nine Thousand Six Hundred Sixty-three and <sup>75</sup>/<sub>100</sub> (\$1,989,663.75) Dollars together with interest thereon, or on so much thereof as from time to time remains unpaid from the date hereof, at the rate of eight and three-fourths (8 <sup>3</sup>/<sub>4</sub>%) per cent per annum. Said principal and interest shall be payable in three hundred seventeen equal consecutive monthly installments, in the amount of Sixteen Thousand One Hundred Nineteen and <sup>09</sup>/<sub>100</sub> (16,119.09) Dollars, each, commencing the fifteenth day of June, 1974, and on the same day of each month thereafter, until the full amount, both principal and interest, is paid. Said payments shall be applied first to interest and the balance to principal; the balance of principal and interest, if not sooner paid, shall become fully due and payable on the fifteenth day of October, 2000.'

On page 2 of said note there is further provided:

\*2 'The holder of this note agrees to pay to the holder of the First Mortgage Note in the original principal amount of One Million Eight Hundred Thirty-Five Thousand and no/100 (1,835,000.00) Dollars (less any amounts paid towards the reduction of the original principal amount) together with all interest thereon accruing thereunder from June 1, 1974, as and when required by the terms of the said First Mortgage Note by paying the constant monthly installments of Fourteen Thousand Six Hundred Thirty-Four and  $\frac{13}{100}$  (\$14,634.13) Dollars each provided to be paid thereunder commencing on June 1, 1974, and on the first day of each successive month thereafter to and including the first day of November, 2000, when the holder hereof shall pay the entire principal balance of the said First Mortgage Note and all interest thereon accrued and unpaid from June 1, 1974 to maturity. All such payments provided to be paid by the holder hereof pursuant to the provisions of this paragraph shall be made by the holder before the expiration of the applicable grace period provided for in the said First Mortgage Note. Notwithstanding the foregoing, the holder's obligation to make the respective payments of principal and interest as and when due under the said First Mortgage Note is conditioned upon the following:

(i) the maker shall not be in default under the Note;

(ii) the maker shall comply with all the terms and provisions of the said First Mortgage Note other than with respect to the payments of principal and interest due thereunder after June 1, 1974.

The holder hereof shall not be required to and the holder agrees that it will not make any prepayments of principal and interest under the First Mortgage Note unless the maker shall first consent in writing thereto. The maker hereof covenants and agrees not to exercise any right of privilege or prepayment of the said First Mortgage Note and further covenants and agrees not to enter into any agreement with the holder of the First Mortgage Note modifying or amending any of the provisions dealing with payment of principal and interest thereunder without the prior written consent of the holder thereof.

On page 3 of said note the first paragraph states:

'The principal amount of this note is One Million Nine Hundred Eighty-Nine Thousand Six Hundred Sixty-Three and  $\frac{75}{100}$  (\$1,989,663.75) Dollars however the maker hereof acknowledges that the holder has paid to the maker the sum of One Hundred Sixty-Five Thousand and no/100 (\$165,000.00) Dollars and does hereby acknowledge and agree that the balance of the principal indebtedness totalling One Million Eight Hundred Thirty-Five Thousand and no/100 (\$1,835,000.00) Dollars (less any reductions of principal which may, from time to time, have been paid) has been validly incurred by holder agreeing to pay unto the holder of the First Mortgage Note the unpaid principal balance in accordance with the terms hereof.'

A mortgage, of even date of the note, acknowledges a debt of Foxcroft to Berg in the amount of \$1,989,663.75 and secures said debt by said mortgage deed. Such is dated in the second paragraph of page 1 of said mortgage.

\*3 'NOW, KNOW ALL MEN BY THESE PRESENTS, in consideration of the aforesaid indebtedness, and to better secure the payment thereof, and to secure the payment of any other sums advanced by the Mortgagee under the terms of the Mortgage with interest thereon as provided herein, and also in consideration of the further sum of Three and no/100 (\$3.00) Dollars to the said Mortgagor in hand well and truly paid by the Mortgagee, the receipt whereof being hereby acknowledged, the Mortgagor does by these presents grant, bargain, sell and release unto the Mortgagee, its successors and assigns all that certain real property situate in Richland Court, more particularly described in Exhibit A attached hereto and made a part hereof.

On page 10 in paragraph 27 there is provided:

'With respect to the principal indebtedness of Mortgagor to Mortgagee in the sum of \$1,989,663.75 evidenced by the note of even date herewith, made by Mortgagor to Mortgagee and secured by this Mortgage, Mortgagee has paid to Mortgagor on the execution hereof the sum of \$165,000.00 and Mortgagor and Mortgagee hereby agree that the balance of said principal indebtedness totalling \$1,835,000.00 (less any reduction of principal which may from time to time have been paid) has been validly incurred by Mortgagee hereby agreeing to pay to the holder of the First Mortgage the unpaid principal balance in accordance with the terms hereof.'

Additionally, subparagraph (c) under numbered paragraph 27 of the mortgage conditions Berg's liability under the mortgage upon payments from Foxcroft. We quote:

'(c) Notwithstanding the foregoing, Mortgagee's obligation to make the respective payments of principal and interest as and when due under the First Mortgage is conditioned upon the following:

(i) Mortgagor shall not be in default under this Mortgage;

(ii) Mortgagor shall comply with all of the terms and provisions of the First Mortgage other than with respect to the payments of principal and interest due thereunder after June 1, 1974.'

The above provisions in the opinion of this office obligate Foxcroft to pay to Berg \$1,989,663.75, less any amounts paid to the reduction of the first mortgage prior to execution of this note and mortgage. This obligation of Foxcroft is not speculative, conditional or contingent upon the happening of any event or upon any further action of Berg or upon the receipt of any property from Berg. We thus believe this amount to be the measure of the tax. It was stated in [Textron, Inc. v. Livingston](#), 244 S. C. 380, 137 S. E. 2d 267:

'Liability to pay stamp tax, and the amount thereof, is as a general rule determinable from the form and face of the instrument in question. [Willcuts v. Investors' Syndicate](#), 8 Cir., 57 F.2d 811; [United States v. ??](#), 17 Wall. 496, 21 L. Ed. 728. In the last cited case it is said:

'It is not permissible to the courts, nor is it required of individuals who use the instrument in their business, to inquire beyond the face of the paper. Whatever upon its face it purports to be, that it is for the purpose of ascertaining the stamp duty. The paper has the distinctive form of a promissory note. It falls under that specific description, and is to be taxed according to that description, not varied by proof, and not ranked under any general terms contained in the statute.'

\*4 Further support for this conclusion is found in the language of Section 65-689 of the Code relating to documentary stamp taxes upon conveyances of real estate. This section specifically excludes from the measure of documentary stamps the value of any outstanding lien or encumbrance assumed by the grantee of property as a part of the consideration for the conveyance. Had the General Assembly intended to exclude from the measure of documentary stamp taxes on notes or mortgages any amount assumed, then similar legislation would, in the opinion of this office, have been provided.

'It is elementary that the cardinal rule for the construction of statutes is to ascertain and give effect to the intention of the lawmaking body.' [Arkwright Mills v. Murph](#), 219 S. C. 438, 65 S. E. 2d 665.

It is therefore the conclusion of this office that the measure of documentary stamp taxes upon the mortgage given by Foxcroft to Berg is \$1,989,663.75.

Yours very truly,

G. Lewis Argoe, Jr.  
Assistant Attorney General

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