

1974 WL 27843 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

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*1 An indenture securing a corporate bond issue is not taxable by the provisions of Section 65-688.

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Dear Mr. Lennon:

The South Carolina Tax Commission has asked that I respond on the following:

Duke Power Company executed and delivered an Indenture dated December 1, 1927, referred to as the Company's 'First and Refunding Mortgage' to Guaranty Trust Company of New York, now Morgan Guaranty Trust Company of New York, as Trustee, to secure bonds to be issued from time to time as provided for in said Indenture. Supplemental Indentures are executed describing new bond issues which supplement the Original Indenture. The Thirty-fourth Supplemental Indenture to Morgan Guaranty Trust Company of New York, dated May 1, 1974 is the latest such Indenture. It was issued for and in consideration of the premises and \$1.00. The question has been asked whether or not the 1974 amendment to Section 65-688 of the Code requires documentary stamps to be affixed to this latest Supplemental Indenture under which the new series of bonds, to be known as the Company's 'First and Refunding Mortgage Bonds, 9 3/4% Series due 2004' are to be issued.

Article 2 of Chapter 11 of Title 65 of the South Carolina Code of Laws provides for documentary stamp tax upon instruments enumerated in Sections 65-682 through 65-690 of the Code. The general imposition statute is Section 65-681 of the Code.

Section 65-688 of the Code generally provides for the taxation of instruments which relate to the creation of an indebtedness, with the exception of instruments relating to corporate finance which are covered by Section 65-682 of the Code.

Section 65-688 as last amended in 1974 provides 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 with the State or recorded within the State.

Provided, however, that the tax upon a mortgage that secures future advances shall be upon the stated amount of the note executed contemporaneously with such mortgage and secured thereby, rather than upon the maximum principal amount as stated in such mortgage. Notes or other written obligations of indebtedness executed in this State, or secured by a mortgage previously executed or recorded in this State, shall be taxed upon the execution; and documentary stamps shall be affixed evidencing the additional advance.'

Section 65-682 provides:

‘On all bonds, debentures or certificates of indebtedness issued by any person and all instruments, however termed, issued by any corporation with interest coupons or in registered form, known generally as corporate securities, on each one hundred dollars of face value or fraction thereof the tax shall be ten cents. Every renewal of any of the foregoing shall be taxed as a new issue but when a bond conditioned for the repayment or payment of money is given in a penal sum greater than the debt secured the tax shall be based upon the amount secured.’

*2 We are informed that amendments in 1973 and 1974 to Section 65-688 were in part enacted to facilitate and insure the collection of the documentary stamp taxes provided for in this section. The amendment among other things made mortgages taxable and excluded instruments of indebtedness secured by such mortgages. Prior thereto all instruments of indebtedness except those incorporated in a mortgage were taxable. Only mortgages incorporating instruments of indebtedness were taxable. We are informed that the sole reason for the change was to insure the collection of the Section 65-688 tax by taxing the instrument customarily presented for recordation.

A bond issue secured by an Indenture is not within the taxing provisions of 65-688, but is instead within the provisions of Section 65-682. It must therefore be taxed according to Section 65-682. An Indenture executed solely in connection with or in anticipation of a corporate bond and in compliance with the Trust Indenture Act, [15 U.S.C.A. 77bbb](#), in our opinion is not clearly within the provisions of Section 65-688. Therefore it is not subject to tax. Our conclusion is based upon the reasoning that Section 65-688 does not tax instruments in the form of corporate securities or issued as an integral part of a corporate security issue.

Administratively, the Tax Commission has never construed Section 65-688 so as to require documentary stamps upon Indentures securing a bond issue. It is prospected rule of construction that the interpretation given a statute by an administrative agency is entitled to respectful consideration and is not to be overruled unless such is obviously erroneous. [Hadden v. South Carolina Tax Commission](#), 183 S. C. 38, 190 S. E. 249; [Read Phosphate Co. v. South Carolina Tax Commission](#), 169 S. C. 314, 168 S. E. 722.

It is a general principal that taxing statutes are not to be extended beyond the clear import of the language used and doubt relative to any question of taxability is to be resolved in favor of the taxpayer and against the government. [Cooper River Bridge v. South Carolina Tax Commission](#), 182 S. C. 72, 188 S. E. 508; [Pacolet Mfg. Co. v. Query](#), 174 S. C. 359, 177 S. E. 653; [Hadden v. South Carolina Tax Commission](#), supra. A statute is to be reasonably construed as a whole with the view of carrying out its purpose and intent. [Hay v. Leonard](#), 212 S. C. 81, 46 S. E. 2d 653; [Crescent Mfg. Co. v. Tax Commission](#), 129 S. C. 480, 124 S. E. 761.

If the Indenture is to be taxable under Section 65-688 and the bonds are taxable under Section 65-682, the transaction is taxed twice. It is a general principal that double taxation is not favored and in the absence of a specific legislative intent so providing, the courts will not permit it. [Wingfield v. South Carolina Tax Commission](#), 147 S. C. 166, 144 S. E. 846.

We therefore conclude that an Indenture in the form of a refunding mortgage which secures a corporate bond issue is not taxable by the provisions of Section 65-688. We advise that the Thirty-fourth Supplemental Indenture given by Duke Power Company to Morgan Trust Company is not required to bear documentary stamps. Any corporate bonds issued and executed within South Carolina, however, are taxable under Section 65-682 of the Code.

Yours very truly,

*3 G. Lewis Argoe, Jr.
Assistant Attorney General

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