(99) years from November 1, 1934; and, in this connection, it is noted that the application made by the Railroad Company for a lease of this property provides that said application is made "for a lease for a term of ninety-nine (99) years, subject to reappraisement at the end of each fifteen-year period." Inasmuch as the officers of the Pennsylvania Railroad Company who signed this lease for it had no authority to execute a lease of this property to it as lessee otherwise than in accordance with the directions of the Board of Directors of the Railroad Company evidenced by the resolution of the Board, above mentioned, it follows that the officers of the Railroad Company signing this lease had no authority to execute a lease on behalf of the Railroad Company as lessee for a term of ninety (90) years. And the validity of this conclusion is not affected by the fact that there was and is no authority under the laws of this state for the execution of a lease on this property to this railroad company or to any other named lessee for a term of ninety-nine (99) years.

No other legal infirmity is noted in this lease and if the Board of Directors of the Railroad Company by proper action see fit to ratify the act of the officers of the company in executing this lease as the same has been written, no reason is seen why this lease should not be approved by me. However, until this is done and proper evidence of such ratification is presented and made a part of the lease, I do not feel that I am authorized to approve this lease. I am accordingly returning this lease without my approval endorsed thereon, trusting that the lease will soon be re-submitted in such form as will permit my approval of the same.

Respectfully,

JOHN W. BRICKER,

Attorney General.

5506.

SHARES OF STOCK IN DOMESTIC CORPORATION—OWNED BY FOREIGN CORPORATION DOING BUSINESS IN OHIO —INCLUDED IN COMPUTATION OF FRANCHISE TAX OF FOREIGN CORPORATION.

SYLLABUS:

The issued and outstanding shares of stock of an Ohio corporation, all of which shares of stock are owned by a foreign corporation doing business in this state, have a situs in this state for purposes of franchise taxes to be paid by such foreign corporation, and the value of such shares of stock may be included as the property of the foreign corporation in determining the amount of franchise taxes to be paid by it in this state.

COLUMBUS, OHIO, May 12, 1936.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN: This is to acknowledge the receipt of your recent communication which reads as follows:

"Under the provisions of Section 5498 of the General Code, the Tax Commission is required on or before the first Monday in May, to determine the value of the issued and outstanding shares of stock of every domestic corporation for profit to file a report. Such determination is made as of the then current annual accounting period. The value of the issued and outstanding shares of stock is deemed to be the total value as shown by the books of the company, of its capital stock, surplus, whether earned or unearned, undivided profits and reserves, but exclusive of reserves for depreciation, depletion, and for taxes due and payable during the year for which the report is made, and after deducting from such total value the item of good will as set up in the annual report of the corporation when said annual report is accompanied by certified balance sheet showing such item of good will carried as an asset on the books of the company as an asset, and such further amount as upon satisfactory proof furnished by the corporation, the tax commission may find to represent the amount, if any, by which the value of the assets, other than good will, as carried on its books exceeds the fair value thereof. Then if the corporation has property outside of this state, or transacts business outside of this state, the commission shall proceed to determine the proportionate value of the shares of issued and outstanding stock represented by property or business in Ohio.

The commission has had presented to it from reports submitted by two companies, the question as to how to value the stock of one of these companies, said companies for sake of example, to be designated as the 'A' company and 'B' company.

(1) The 'A' company is a corporation organized and existing under and by virtue of the laws of the state of Delaware but qualified to do business within the state of Ohio and for each of the years, namely 1930, 1931, 1932, 1933, 1934 and 1935, allocated to the state of Ohio its entire property and business for the purpose of determining the amount of the franchise tax payable.

(2) The 'A' company was during each of the years above mentioned, the owner of the entire authorized and issued capital

stock of the 'B' company, a corporation organized under the laws of the state of Ohio, which last mentioned corporation in each of said years made returns for franchise tax purposes, allocating all its property to Ohio as a basis for the determination of the franchise tax payable.

(3) During each of said years the 'A' company included in its valuations of property for franchise tax purposes the cost of its investment in the 'B' company, namely, Six Hundred Dollars ($600.00).

(4) During each of said years the 'B' company in its returns for franchise tax purposes, included the net book value of its assets, including all earned and undistributed surplus, and which is as follows:

	Capital	Surplus
1930	$600	$41,753
1931	600	52,585
1932	600	64,209
1933	600	75,228
1934	600	88,619
1935	600	101,198

(5) Under the method of reporting assets for franchise tax purposes as set forth, each of the corporations paid to the state of Ohio in each of the years above indicated a tax based upon the net book values of the assets of each of the corporations.

(6) The commission now proposes to require the 'A' company to pay an additional franchise tax upon the net worth of the 'B' company, which is 100% owned and controlled by the 'A' company.

The commission desires to know whether the net worth of the 'A' company is determined by taking into consideration the entire net worth of the 'B' company, which for example, in the year 1935, was reported by the 'B' company to be $101,198.00, but reported by the 'A' company to be $600.00 and carried in their books for said amounts.

The particular issue presented herein raises by inference the more general question of whether the commission, in determining the value of the shares of stock of any corporation for franchise tax purposes, is limited in its findings of such value to the book value of the assets or whether it may, if it finds the facts so indicate, determine the book value of the assets to be understated and establish the fair value of such assets for the purpose of determining the value of the shares of

stock of such companies, we therefore request your further opinion on the more general question."

The questions presented in your communication relate generally to the method of ascertaining the value of the property and assets of a corporation for the purpose of determining the valuation of the issued and outstanding shares of stock of such corporation for franchise tax purposes under the provisions of Sections 5495, et seq., General Code, and, more particularly, to the rules for ascertaining the valuation of the issued and outstanding shares of stock of a domestic corporation which are owned and held as assets by a foreign corporation doing business in this state for the purpose of determining the franchise taxes to be paid by such foreign corporation on its own issued and outstanding shares of stock.

In the consideration of these questions, it is not deemed necessary to set out at length, by quotation or otherwise, all of the statutory provisions relating to the assessment and collection of franchise taxes on corporations doing business in this state. It is sufficient in this connection to note that by Section 5495, General Code, it is provided that as to a domestic corporation organized for purposes of profit such franchise tax is the fee charged against the corporation for the privilege of exercising its corporate franchise during the calendar year in which such tax is payable, and that as to foreign corporations organized for profit, the tax is one against such corporations for the privilege of doing business in this state or for owning or using a part or all of its capital or property in this state or for holding a certificate of compliance with the laws of this state authorizing it to do business in this state, during the calendar year in which such fee is payable.

For the purpose of enabling the Tax Commission to determine the valuation of the issued and outstanding shares of stock of the corporation, whether the same be a domestic corporation or a foreign corporation, represented by the property owned and business done by the corporation in this state, which is to be determined in the manner provided by Section 5498, General Code, and upon which the corporation is required to pay a tax at the rate prescribed by Section 5499, General Code, Section 5495-2, General Code, provides that annually between the first day of January and the thirty-first day of March, each corporation, incorporated under the laws of this state for profit, and each foreign corporation for profit, doing business in this state or owning or using a part or all of its capital in this state, or having been authorized by the Secretary of State to transact business in this state, shall make a report in writing to the Tax Commission in such form as the Commission may prescribe. Section 5497, General Code, sets out in detail the matters and things to

be included in such report and, among other things, provides that there shall be set out therein the following:

> "7. The amount of its capital, surplus, whether earned or unearned, undivided profits and reserves, as shown by the books of the corporation. A complete schedule shall be filed with the report showing the object and amount of each such reserve; also there shall be filed with said report a schedule of the annual rates of depreciation and depletion;
>
> 8. The location and value of the property owned or used by the corporation as shown on its books, both within and without the state, given separately; and the total amount of business done and the amount of business done within the state by said corporation during its preceding annual accounting period, given separately. Business done within this state by domestic corporations shall include all business except extra-state business."

As above noted, Section 5498, General Code, provides for the computation of the valuation of the issued and outstanding shares of stock of a corporation represented by the property owned and business done by it in this state. This section reads as follows:

> "After the filing of the annual corporation report the tax commission, if it shall find such report to be correct, shall on or before the first Monday in May determine the value of the issued and outstanding shares of stock of every corporation required to file such report. Such determination shall be made as of the date shown by the report to have been the beginning of the then current annual accounting period of such corporation. For the purpose of this act, the value of the issued and outstanding shares of stock of any such corporation shall be deemed to be the total value, as shown by the books of the company of its capital, surplus, whether earned or unearned, undivided profits, and reserves, but exclusive of (a) proper and reasonable reserves for depreciation, and depletion as determined by the tax commission, (b) taxes due and payable during the year for which such report was made, (c) the item of good will as set up in the annual report of the corporation when said annual report is accompanied by certified balance sheet showing such item of good will carried as an asset on the books of the company (such balance sheet shall not be deemed a part of the public records, but shall be a confidential report for use of the commission only), and (d) such further amount as upon satisfactory proof furnished

by the corporation, the tax commission may find to represent the amount, if any, by which the value of the assets (other than good will) of the corporation as carried on its books exceeds the fair value thereof. Claim for the deduction of such difference must be made by the corporation at the time of filing its report. The commission shall then determine as follows the base upon which the fee provided for in section 5499 of the General Code shall be computed. Divide into two equal parts the value as above determined of the issued and outstanding shares of stock of each corporation filing such report. Take one part and multiply by a fraction whose numerator is the fair value of all the corporation's property owned or used by it in Ohio and whose denominator is the fair value of all its property wheresoever situated in each case eliminating any item of good will; take the other part and multiply by a fraction whose numerator is the value of the business done by the corporation in this state during the year preceding the date of the commencement of its current annual accounting period and whose denominator is the total value of its business during said year wherever transacted.

In determining the amount or value of intangible property, including capital investments, owned or used in this state by either a domestic or foreign corporation the commission shall be guided by the provisions of sections 5328-1 and 5328-2 of the General Code except that investments in the capital stock of subsidiary corporations at least fifty-one per centum of whose common stock is owned by the reporting corporation shall be allocated in and out of the state in accordance with the value of physical property in and out of the state representing such investments.

On the first Monday in June the tax commission shall certify to the auditor of state the amount determined by it through adding the two figures thus obtained for each corporation."

It appears from your communication that a certain foreign corporation, therein designated as the "A" company, owns all of the issued and outstanding shares of stock of a domestic corporation, designated by you as the "B" company, and the first question presented in your communication is whether in determining the valuation of the issued and outstanding shares of stock of the "A" company for the purpose of ascertaining the franchise tax to be paid by said company, the Tax Commission can take into consideration the entire net worth of the "B" company as stated by it in the report filed by said company with the Tax Commission under the provisions of Section 5497, General Code. In the consideration of this question, it is pertinent to note that the ownership of the shares of

stock of a corporation does not carry with it the ownership of the property and assets of such corporation. And this is no less true where one corporation owns all of the shares of stock in another corporation, unless such stock ownership has been resorted to by the holding company, not for the purpose of participating in the affairs of the subsidiary corporation in the normal and usual manner, but for the purpose of controlling such subsidiary corporation so that the same may be used as a mere agency or instrumentality of the corporation which owns and holds its stock. Pullman's Palace-Car Company v. Missouri Pacific Railway Company, 115 U. S., 587; Peterson v. Chicago, Rock Island and Pacific Railway Company, 205 U. S., 364; Interstate Commerce Commission v. Stickney, 215 U. S., 98, 108; Chicago, M. & St. P. R. Company v. Minn., Civic, etc., Association, 247 U. S., 490; Commonwealth v. Muir, 170 Ky., 435; Ayer and Lord Tie Company v. Commonwealth, 208 Ky., 606; Bethlehem Steel Company v. Raymond Concrete Pile Company, 141 Md., 67; Harlan Public Service Company v. Eastern Construction Company, 254 Ky., 135; Commonwealth v. J. G. Brill Company, 287 Pa., 59; Pennsylvania Company v. West Penn Railways Company, 110 O. S., 516, 519; General Motors Corporation v. Moffett, 27 O. App., 219, 227. Where, as a matter of fact, one corporation owns and holds the shares of stock in another corporation and the relationship between the corporations is such that the subsidiary company is but an instrumentality or agency of the holding company, and its property is held and used by the holding company in carrying on the business of the latter company, there is authority for the conclusion that in such situation the franchise tax upon the holding company may be computed upon a basis that would include the property of the subsidiary company. Commonwealth v. Southern Railroad Company, 193 Ky., 474. However, there are no facts stated in your communication from which it can be inferred that the corporations therein referred to are so related that one is but an instrumentality or agency of the other; and upon the facts stated in your communication it is to be assumed that each of these corporations has a separate corporate identity. It follows from this that the "A" company, referred to in your communication, does not own the property and assets of the "B" company, therein mentioned, and that the Tax Commission is not authorized to treat the property and assets of the "B" company as the property of the "A" company in determining the value of the issued and outstanding shares of stock of the "A" company for the purpose of arriving at the franchise tax to be paid by said company.

However, it appears that the "A" company holds as property and assets all of the issued and outstanding shares of stock of the "B" company; and these shares of stock are to be considered as property and assets of the "A" company for the purpose of determining the valuation of its issued and outstanding shares of stock, unless the consideration of the

value of the shares of stock of the "B" company owned by the "A" company for the purpose of determining the franchise taxes to be paid by the latter company, is prevented by some rule or principle of law hereinafter noted and discussed. In the first place, it will be observed that the shares of stock issued by the "B" company and which are owned by the "A" company, are intangible property; and inasmuch as it appears from your communication that the "A" company is a foreign corporation, the common law situs of such shares of stock for purposes of taxation would not be in this state but would be in the state of Delaware where the "A" company has its legal domicile. In re Pantlind Hotel Company, 232 Mich., 330; Callery's Appeal, 272 Pa., 255; Commonwealth v. Sunbury Converting Works, 286 Pa., 545. In the case of In re Pantlind Hotel Company and in the other cases cited in this connection, it was held, applying the common law rule with respect to the situs of intangible property for purposes of taxation, that the capital stock of a domestic corporation, owned by a foreign corporation, had its situs at the domicile of the owner and was not subject to a franchise or privilege tax in the state where the subsidiary corporation was organized and had its legal domicile.

However, in the later case of In re Dodge Brothers, 241 Mich., 665, where a like question was presented under the corporation franchise or privilege tax law of the state of Michigan, it was held that the common law rule with respect to the situs of intangible property for purposes of taxation might be changed by statute, and that a situs of such intangible property might be established for the purpose of a corporation privilege tax apart from that of the domicile of the foreign corporation owning such property without offending "the fundamental law or judicial pronouncements" with respect to the situs of property of this kind for tax purposes. This principle thus pronounced suggests a consideration of certain provisions in Section 5498, General Code, above quoted. This section provides that in determining the amount or value of intangible property, including capital investments, owned or used in this state by either a domestic or foreign corporation, the Tax Commission shall be guided by the provisions of Sections 5328-1 and 5328-2 of the General Code "except that investments in the capital stock of subsidiary corporations at least fifty-one per centum of whose common stock is owned by the reporting corporation shall be allocated in and out of the state in accordance with the value of physical property in and out of the state representing such investments". It may be assumed from the facts stated in your communication that all of the physical property of the domestic corporation, designated in your communication as the "B" company, is located in this state; and, this being true, it follows that under the provisions of Section 5498, General Code, here noted, the shares of stock of the "B" company which are owned by the "A" company, a foreign cor-

poration, are to be allocated to this state in determining the franchise tax to be paid by this foreign corporation. Moreover, since it appears that all of the business of the "A" company is done in this state where its property is owned, the situs of the shares of stock of the "B" company owned by it may be allocated to this state for purposes of taxation without offending the due process of law clause of the Fourteenth Amendment to the Federal Constitution or any other constitutional provision. Touching this question, the Supreme Court of the United States in its opinion in the case of Safe Deposit and Trust Company v. Virginia, 280 U. S., 83, 92, said:

> "Intangible personal property may acquire a taxable situs where permanently located, employed and protected. New Orleans v. Stempel, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110; Bristol v. Washington County, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585; State Assessors v. Comptoir National d'Escompte, 191 U. S. 388, 48 L. ed. 232, 24 Sup. Ct. Rep. 109; Metropolitan L. Ins. Co. v. New Orleans, 205 U. S. 395, 51 L. ed. 853, 27 Sup. Ct. Rep. 499; Liverpool & L. & G. Ins. Co. v. Board of Assessors, 221 U. S. 346, 55 L. ed. 762, L. R. A. 1915C, 903, 31 Sup. Ct. Rep. 550."

Addressing itself to this question, the Supreme Court of the United States in the case of Farmers Loan and Trust Company v. Minnesota, 280 U. S., 204, 213, said:

> "New Orleans v. Stempel, 175 U. S. 309, Bristol v. Washington County, 177 U. S. 133, and Liverpool & L. & G. Ins. Co. v. Board of Assessors, 221 U. S. 346, recognize the principle that choses in action may acquire a situs for taxation other than at the domicile of their owner if they have become integral parts of some local business."

The same principle was stated by that court in another way in the case of Safe Deposit and Trust Company v. Virginia, supra, where it was said that "while the fiction of *mobilia sequuntur personam* may be applied in order to determine the situs of intangible taxable property for taxation, it must yield to established fact of legal ownership, actual presence and control elsewhere".

On the considerations above noted, it seems clear that the shares of stock of the "B" company now owned and held by the "A" company have a taxable situs in this state under the provisions of Section 5498, General Code, and that they may be included as a part of the property and assets of the "A" company in determining the value of the issued and outstand-

ing shares of stock of this corporation in the assessment of the franchise taxes to be paid by it.

In this connection, it may be further noted that no valid objection can be made to the inclusion of these shares of stock as a part of the property and assets of the "A" company in determining the franchise taxes to be paid by this corporation, by reason of the fact that the "B" company has paid or is required to pay a franchise tax on these shares as its own issued and outstanding shares of stock based upon the property owned and business done by the "B" company in this state. Even if the tax here in question in its application to the "A" company were a property tax in the form of a capital stock tax on this corporation, the Tax Commission of Ohio as the constituted taxing authority of the state would not be required to exclude from the computation of the value of the capital stock of the "A" company the value of shares of stock of other corporations, owned and held by it. Dallas County v. Home Fire Insurance Company, 97 Ark., 254; State v. Fort Smith Lumber Company, 131 Ark., 40; State v. Morrison and Sons, 155 N. C., 53; Schley v. Lee, 106 Md., 390; Peoples Bank and Trust Company v. Passaic County Board of Taxation, 90 N. J. Law, 171; Fort Smith Lumber Company v. Arkansas, 251 U. S., 532.

The case of State v. Fort Smith Lumber Company, supra, was an action by the state of Arkansas against the lumber company, a domestic corporation, to recover taxes that had escaped assessment in former years. It appeared that the lumber company, in returning its capital stock for taxation, had deducted investments of its surplus in shares of stock of other domestic corporations. In holding such deduction to be unauthorized and improper the court in its opinion said:

> "Nor does this construction of the statute operate as a discrimination against a corporation and in favor of individual owners of shares of stock. The capital stock of a corporation has its own value. It is assessable as such for taxation, and the failure to deduct investments in the shares of stock of other corporations does not constitute double taxation. The two elements of value are separate and distinct, for the shares of stock themselves are not assessed for taxes. Of course it would constitute double taxation * * * to tax the shares of stock in other corporations held by this corporation and also its capital stock, but the failure to deduct the value of such shares of stock from the capital stock is not tantamount to assessing the shares of stock in the other corporations. * * * a corporation has a separate assessable valuation in its capital stock which is not possessed by an individual, and it constitutes no discrimination against a corporation to fail to deduct the value of such shares

of stock held in other corporations from the assessment of its capital stock."

The decision of the Supreme Court of Arkansas in this case, after the question involved had been again heard by that court in a case reported under the style of Fort Smith Lumber Company v. State, 211 S. W., 662, was affirmed by the Supreme Court of the United States in the case of Fort Smith Lumber Company v. Arkansas, 251 U. S., 532.

However, the tax here in question against the "A" company is not a property tax on the valuation of its issued and outstanding stock, but is an excise or franchise tax, the amount of which is measured by the value of the issued and outstanding shares of stock of said company. That in this situation the taxing authorities in determining the value of the issued and outstanding shares of stock of the corporation for the purpose of such franchise tax, may include the value of shares of stock of other corporations owned by it, is a proposition supported by all of the authorities touching the question to which my attention has been directed. Tower Company v. Commonwealth, 223 Mass., 371; National Leather Company v. Commonwealth, 256 Mass., 419; National Leather Company v. Commonwealth, 277 U. S., 413. The case of National Leather Company v. Commonwealth, 256 Mass., 419, supra, was an action instituted in Massachusetts by the National Leather Company, a Maine corporation, to recover a certain portion of excise taxes levied against it by the taxing authorities of the state of Massachusetts for the privilege said corporation had of doing business in said state. It appeared that the plaintiff corporation was the owner of the shares of stock of two subsidiary corporations organized under the laws of the state of Maine. In ascertaining the fair cash value of the shares constituting the capital stock of the plaintiff corporation the taxing authorities included the stock held by the plaintiff in the two subsidiary corporations above mentioned; and it was to this action on the part of the taxing authorities that the plaintiff's objection was directed. In dismissing the complaint of the plaintiff in this action, it was said:

> "Doubtless tax laws are to be interpreted, where reasonably practicable, so as not to result in double taxation. Salem Iron Factory Co. v. Danvers, 10 Mass. 514. Tennessee v. Whitworth, 117 U. S. 129, 136. But the case at bar does not violate that principle. Whatever semblance to double taxation it may have is within the power of the Legislature. Fort Smith Lumber Co. v. Arkansas, 251 U. S. 532. Cream of Wheat Co. v. Grand Forks, 253 U. S. 325. * * * Direct taxation, however, is not here involved, because a part only of an excise or privilege tax is attacked.

> * * * In the case at bar there is no direct tax on property, but an excise on a foreign corporation, levied solely on the privilege of doing domestic business within this Commonwealth, measured in part on the value of stock employed in business in this Commonwealth. An excise or license tax may be measured in part by property which could not be taxed directly. Flint v. Stone Tracy Co., 220 U. S. 107, 165. Kansas City, Fort Scott & Memphis Railway v. Kansas, 240 U. S. 227, 232. Greiner v. Lewellyn, 258 U. S. 384, 387."

The decision and judgment of the Supreme Court of Massachusetts in this case was affirmed by the Supreme Court of the United States in the case of National Leather Company v. Commonwealth, 277 U. S., 413.

It may be here noted that a like decision on this question was made by the Common Pleas Court of Franklin County (Leach, J.) in the case of the Doepke Company v. H. Ross Ake, Treasurer of the State of Ohio, under date of June 25, 1930.

The question here presented, as the same is stated in your communication, assumes, perhaps, the validity of most of the conclusions reached in the above discussion which is pertinent to the general subject of the assessment of franchise taxes based on corporate assets of the kind here in question. The immediate question for consideration, assuming the taxability of the shares of stock of the "B" company which are now owned and held by the "A" company, in determining the value of the issued and outstanding shares of stock of the latter company, is as to the method of determining the valuation of the shares of stock of the "B" company thus owned and held, and as to the matters and things which may be taken into consideration by the Tax Commission in determining such valuation. As to this, it may be safely said that unless it is otherwise provided by statute the shares of stock of a corporation in the hands of the stockholder or stockholders are to be assessed at their actual value rather than at their nominal or par value or book value. Fletcher Cyclopedia Corporations, Vol. XIV, page 732, Sec. 7005; First National Bank of Junction City v. Moon, 102 Kan., 334; Newark v. Tunis, 81 N. J. Law, 45; Longcor v. Central State Bank, 85 Okla., 108. In this connection, it is to be noted that Section 5498, General Code, which prescribes a method to be used by the Tax Commission in determining the value of the issued and outstanding shares of stock of a corporation upon which valuation or a proportionate part thereof, as the case may be, the franchise tax is assessed, provides that:

> "For the purpose of this act, the value of the issued and outstanding shares of stock of any such corporation shall be deemed to be the total value, as shown by the books of the

company of its capital, surplus, whether earned or unearned, undivided profits, and reserves, but exclusive of (a) proper and reasonable reserves for depreciation, and depletion as determined by the tax commission, (b) taxes due and payable during the year for which such report was made, (c) the item of good will as set up in the annual report of the corporation * * * and (d) such further amount as upon satisfactory proof furnished by the corporation, the tax commission may find to represent the amount, if any, by which the value of the assets (other than good will) of the corporation as carried on its books exceeds the fair value thereof."

The provisions of Section 5498, General Code, just quoted, should be read in connection with those of Section 5461, General Code, which are as follows:

"When any public utility or corporation fails to make any report to the tax commission required by law or makes such report and fails to report or reports erroneously any information essential to the determination of any amount, value, proportion or other fact to be determined by the tax commission pursuant to law which is necessary for the fixing of any fee, tax, or assessment, the tax commission shall proceed to determine such amount, value, proportion, or other fact as nearly as practicable and shall certify the same as required by law. Such power and duty of the tax commission shall extend to and only to the five years next preceding the year in which such inquiry is made. Upon the determination and certification by the tax commission herein authorized a tax fee, or assessment shall be charged for collection from such public utility or corporation at the rate provided by law for the year or years when such tax, fee, or assessment was omitted, or erroneously charged so that the total tax, fee, or assessment paid and to be paid for such year or years shall be in the full amount chargeable to such public utility or corporation by law. Such charge shall be without prejudice to the collection of any penalty authorized by law."

An analysis of the provisions of Section 5461, General Code, shows that the Tax Commission is authorized to act as therein provided for when it appears to the Commission that: (1) the corporation has failed to make any report or furnish any statement which it is required to make; or that (2) the corporation has made a return or statement of a portion only of its taxable property and has failed to report the remainder; or that (3) it has reported its property or some part thereof at an incorrect

valuation. Although this section of the General Code has its chief application, perhaps, in enabling the Tax Commission to make assessments of back taxes, so-called, on corporations which in previous years have filed false or incorrect reports for purposes of franchise taxes, there is nothing in the terms of this section which prevents the Tax Commission from acting under its provisions whenever information is brought to the attention of the Tax Commission that a report filed by a corporation for franchise tax purposes is false or incorrect in any of the particulars above mentioned. On the contrary, it was held by the Attorney General in an opinion directed to the Tax Commission under date of September 24, 1915, Opinions of Attorney General, 1915, Vol. II, page 1844, that where the Tax Commission has before it information that a report filed with it by a corporation is incorrect in that the same does not set out the facts necessary to show that certain property owned by the corporation was taxable in this state under the excise and franchise tax laws, and the Tax Commission does not then act upon such information in making the proper assessment against the corporation, the Tax Commission may not in a later and in a subsequent year make an assessment of back taxes against such corporation by reason of the fact that it made a false and incorrect report. It appears, therefore, that although the Tax Commission is required to determine the value of the issued and outstanding shares of stock of a corporation for franchise tax purposes from the report filed with it by the corporation setting out the capital, surplus and undivided profits of the corporation according to book value, it is presupposed that the report filed by the corporation with the Tax Commission is with respect to these matters both true and correct. And if on information which the Tax Commission has at hand it appears that any of its property and assets set out in such report is listed at an incorrect valuation, the Tax Commission is authorized to determine the true value of such property for the purpose of arriving at the valuation of the issued and outstanding shares of stock of the corporation.

As before noted herein, the property here in question consists of shares of stock of a domestic corporation, all of which shares are owned by a foreign corporation doing business in this state. And the question here presented, as before stated, is as to the valuation to be placed upon these shares of stock thus owned and held by the foreign corporation for the purpose of determining the valuation of the issued and outstanding shares of stock of the foreign corporation which you have designated in your communication as the "A" company. In the case of Tax Commission v. Clark, 20 O. App., 166, where the court had under consideration the question of the proper rules to be applied in determining the valuation for purposes of inheritance taxes of a large number of the shares of stock of an insurance company owned by the decedent, the court quoted with approval from the opinion of the court in the case of The People, ex rel.,

v. Coleman, et al., Commissioners of Taxes and Assessments, 107 N. Y., 541, wherein it was said:

> "The law does not prescribe how the actual value of the capital stock of a corporation is to be ascertained. That is left to the judgment of the assessors, and in appraising the actual value they have a right to resort to all the tests and measures of value which men ordinarily adopt for business purposes in estimating and measuring values of property. They may take into account the business of the corporation, its property, the value of its actual assets, the amount and nature of its present and contingent liabilities, the amount of its dividends and the market value of its shares of stock in the hands of individuals. They may resort to any or all of these as to them seems best, and they are not confined to one of them. They may take that test which they think will be most likely to give them the actual value of the stock, and they may disregard all the others. They are not bound to seek for all the evidence which bears upon value; that would be impracticable. The law commits the matter to their judgment and when they have exercised that, it is subject to no review or correction except as prescribed by law."

It appears from the facts stated in your communication that during each and all of the years referred to in your communication, from 1930 to 1935, inclusive, the "B" company, in additon to its capital stock, had and carried on its books a surplus ranging in increasing amounts from $41,753.00 in 1930 to $101,198.00 in 1935. Notwithstanding this fact, it appears that the "A" company, which owned all of the shares of stock of the "B" company as property and assets, in each of these years returned these shares of stock in the reports filed by it for franchise tax purposes at a valuation of $600.00 which, you state, was the cost of its investment in these shares of stock. The surplus account of a corporation represents its net assets in excess of all liabilities including its capital stock. Edwards v. Douglas, 269 U. S., 204; Willcuts v. Milton Dairy Company, 275 U. S., 215, 218; Branch, Trustee, v. Kaiser, 291 Pa., 545, 549. See Section 8623-38, G. C. A recognized method in determining the value of the shares of stock of a corporation, in the aggregate, is to consider such value as represented by the aggregate sum of the capital stock, surplus and undivided profits of the corporation; and the sum of these amounts represents the net worth of the corporation. Commissioners v. Bank, 113 O. S., 37, 40; Langhout v. First National Bank, 191 Ia., 957. Apparently, in the case of the "B" company here referred to, all of the profits of the corporation were carried into surplus, and the net worth of the cor-

poration representing the value of its shares of stock in the aggregate now owned by the "A" company was in each of the years here in question a sum equal to the amount of its capital stock plus its surplus for that year.

I am of the opinion, on the considerations above noted, that the Tax Commission, in determining the valuation of the shares of the "B" company as property and assets of the "A" company for the purpose of determining the valuation to be placed by the Tax Commission upon the issued and outstanding shares of stock of the "A" company in each of the years referred to, may consider the net worth of the "B" company in each of the years above indicated, along with all other facts and factors touching the question of the value of these shares of stock of which the Tax Commission may be informed.

Your second and more general question as to whether the Tax Commission, in determining the value of the shares of stock of a corporation for franchise tax purposes, is limited in its finding of such value to the book value of the assets of the corporation as set out in the report filed by such corporation, is sufficiently answered, I believe, in the discussion of the first and more particular question here presented.

Respectfully,
JOHN W. BRICKER,
Attorney General.

5507.

APPROVAL—APPLICATIONS FOR REDUCTIONS OF CURRENT AND DELINQUENT RENTALS OF OHIO AND ERIE CANAL LANDS—N. B. BYRD; C. E. ARBAUGH; E. D. SWIGERT; C. E. AND H. J. ORTT; SARAH E. B. HORN.

COLUMBUS, OHIO, May 13, 1936.

HON. CARL G. WAHL, *Director, Department of Public Works, Columbus, Ohio.*

DEAR SIR: You have submitted for my examination and approval certain findings made by Hon. T. S. Brindle, your immediate predecessor in office as Superintendent of Public Works and as Director of said Department, with respect to reductions of current and delinquent rentals upon applications therefor filed with him by a number of persons holding leases on parcels and portions of Ohio and Erie Canal lands, which applications and the subsequent proceedings of the Superintendent of