

822.

SECURITIES ACT—QUERIES RESPECTING SUB-SECTION 1 OF SECTION 8624-5, GENERAL CODE, DISCUSSED.

SYLLABUS:

1. Under the provisions of Sub-section 1 of Section 5 of the Ohio Securities Law, earnings available for dividends on shares of stock of a subsidiary, which are owned by any person may be considered as earnings of such person, to the extent only that such earnings are available for dividends on the particular shares so owned.

2. Sub-section 1, of Section 5 of the Securities Act, makes no reference to the length of time a person must be an owner of a property or business before being authorized to qualify thereunder but merely provides that the business or property owned by a person must, among other things, meet the requirements as to having been in continuous operation, as therein provided, before securities issued or guaranteed by such person may be qualified thereunder.

3. The earning capacity of a business acquired by a person seeking to qualify under Sub-section 1 of Section 5 of the Securities Law, may only be utilized in determining the right to so qualify where the applicant has acquired substantially all of the business or property in the event that the acquisition is not through the purchase of voting stock; but in the event that a business and property are acquired through the medium of stock ownership, it is only necessary, in order to make available earnings records, to acquire fifty percent of the stock of the subsidiary corporation.

COLUMBUS, OHIO, September 3, 1929.

HON. ED. D. SCHORR, *Director of Commerce, Columbus, Ohio.*

DEAR SIR:—Your letter of recent date is as follows:

“The following question has been raised under Section 5, Sub-section 1 of the Securities Act, under that provision of this sub-section which states: ‘For the purposes of this sub-section the earnings available for dividends on shares of stock of a subsidiary which are owned by any person should be considered as earnings of such person; provided, such person owns at least 50% of all voting stock of such subsidiary.’

The question on which I respectfully request your opinion is,—‘B’ a holding company owning 51% of corporations ‘X,’ ‘Y’ and ‘Z’ wishes to qualify under a descriptive registration. In attempting to comply with Sub-sections (a), (b) or (c) as to earnings, can ‘B’ show the entire earnings of each subsidiary using the entire earnings of each to qualify for the earning power of ‘B’ or must ‘B’ use only the earning power of 51% of ‘X,’ ‘Y’ and ‘Z’ in computing the earning power of ‘B’?

Sub-section 1 provides for securities issued or guaranteed by a person owning a property or business which has been in continuous operation for not less than three years prior to the date of sale of such securities and which has shown during a period of consecutive years next preceding the offering of such securities * * * average net earnings . . . ’

In the above case, if ‘B’ the holding company is a new concern and ‘X,’ ‘Y’ and ‘Z’ have been in business for more than three years prior to the date of the sale of securities, can ‘B’ qualify its stock under this section?

This section further provides that it shall apply to ‘the securities of a person which acquires substantially all of the business and property of any one person, etc.’

The next paragraph refers to the 50% ownership of all voting stock in such subsidiary. Does the 50% and the term 'substantially all' qualify each other?"

Section 5 of the Securities Law, in so far as is pertinent, is as follows :

"The following securities may be sold within this state upon compliance with Section (7) of this act :

(1) Securities issued or guaranteed by a person owning a property or business which has been in continuous operation for not less than three years prior to the date of sale of such securities and which has shown during a period of consecutive years next preceding the offering of such securities (which period shall be not less than two nor more than five years) average annual net earnings, after deducting all charges and specified dividends on securities of prior rank, except the charges and specified dividends on any securities to be retired out of the proceeds of such sale, as follows :

(a) In the case of interest bearing securities, not less than one and one-half times the annual interest charged on such securities and on all other outstanding interest bearing obligations of equal rank.

(b) In the case of shares having a specified dividend rate, not less than one and one-half times the annual dividend requirements on such securities and on all outstanding shares of equal rank.

(c) In the case of shares wherein no dividend rate is specified, not less than five per cent (5%) annually on the par value thereof and on all outstanding shares of equal rank.

The provisions of this sub-section shall apply to the securities of a person which acquires substantially all of the business and property of any one person whose earnings record, or of several persons whose combined earnings record, meets the requirements hereinabove specified.

For the purposes of this sub-section the earnings available for dividends on shares of stock of a subsidiary which are owned by any person, shall be considered as earnings of such person ; provided, such person owns at least 50% of all voting stock of such subsidiary."

A careful reading of the last paragraph of the section, as quoted above, discloses that if a person owns at least 50% of all voting stock of a subsidiary, *the earnings* available for dividends *on shares of stock* of such subsidiary *which are owned* by such person, shall be considered as earnings of such person. There is nothing here said to the effect that the entire earnings available for dividends of such subsidiary on shares of stock which may not be owned, shall be considered as earnings. It is evident that only the earnings accruing to the holder by reason of his ownership are to be considered.

Specifically answering your first question, therefore, I am of the opinion that under the provisions of sub-section 1 of Section 5 of the Ohio Securities Law, earnings available for dividends on shares of stock of a subsidiary which are owned by any person may be considered as earnings of such person, to the extent only that such earnings are available for dividends on the particular shares so owned.

You next inquire whether or not the first paragraph of the section quoted above has reference to the length of time a person must own a property before securities issued or guaranteed by such person may be qualified thereunder. There appears to be no reference made in the section as to the length of time a person must own a property or business such as is described. Provision is only made for securities issued or guaranteed by a person on a property or business such as is therein de-

scribed, viz., "a property or business which has been in continuous operation for not less than three years prior to the date of sale of such securities," etc. Very possibly, a change in the ownership of a property or business may have an effect upon its future earning capacity, but it must be borne in mind that the securities act is regulatory of all business and must accordingly receive a reasonably strict construction. I am accordingly unable to place a construction thereon, beyond the clear import of the language used. This conclusion is substantiated by the language of the sub-section, wherein it is provided:

"The provisions of this sub-section shall apply to the securities of a person which acquires substantially all of the business and property of any one person whose earnings record, or of several persons whose combined earnings record, meets the requirements hereinabove specified."

Clearly, this language authorizes the purchaser of a business to utilize, as the basis of qualifying under this sub-section, the earning power of the acquired business, however recently that business may have been purchased.

In answer to your second question, therefore, I am of the opinion that Sub-section 1, of Section 5 of the Securities Act makes no reference to the length of time a person must be an owner of a property or business before being authorized to qualify thereunder, but merely provides that the business or property owned by a person must, among other things, meet the requirements as to having been in continuous operation as therein provided, before securities issued or guaranteed by such person may be qualified thereunder.

Your third question is as to whether the words "substantially all," as used in the sub-section, and requoted in the second paragraph above, bear in relation to the fifty per cent which is mentioned in the succeeding portion of the sub-section. By referring to the language of the sub-section you will observe that the fifty per cent is used solely with reference to corporate securities, as distinguished from the earnings of business and property which may not be held by a corporate entity. In my opinion, the two have no relation one to the other. This is clear, from a careful consideration of the language of the last two paragraphs which I have quoted from the sub-section.

The first of the paragraphs extends the right of qualification under the sub-section to anyone acquiring a business and property with the proper earnings record, provided the acquisition of this property has included substantially all of the business and property by which that earnings record was established. This is obviously both an enlargement, and at the same time a qualification of the rights given under the preceding portions of the sub-section. Its enlargement is to permit the counting of earnings of a business not operated by the person seeking to qualify, but the qualification is that substantially all of the business and property must be acquired. The purpose was doubtless to prevent the acquisition of a part only, of a business, and thereby take advantage of the earnings record of the whole, or of an aliquot part thereof.

On the other hand, the last paragraph which I have quoted deals with the right to count, in determining the qualifications of one seeking to qualify under Sub-section one, the dividends accruing upon stock of a subsidiary. If that stock interest be a minority interest only, then those dividends cannot be considered. The theory evidently is that the owner must have voting control in order to take advantage of the earnings of the subsidiary.

The Legislature apparently considered that an ownership of at least fifty per cent of the voting stock vests substantial control in such owner, and consequently, is the equivalent of the acquisition of substantially all of a business and property where that business is not in corporate form. As indicated, I do not feel that these two

terms in any way qualify each other, since they are related to entirely different things.

Specifically answering your third question, I am of the opinion that the earning capacity of a business acquired by a person seeking to qualify under Sub-section 1 of Section 5 of the Securities Law, may only be utilized in determining the right to so qualify where the applicant has acquired substantially all of the business or property in the event that the acquisition is not through the purchase of voting stock; but in the event that a business and property are acquired through the medium of stock ownership, it is only necessary, in order to make available earnings records, to acquire fifty per cent of the stock of the subsidiary corporation.

Respectfully,
GILBERT BETTMAN,
Attorney General.

823.

APPROVAL, TWO GAME REFUGE LEASES.

COLUMBUS, OHIO, September 3, 1929.

HON. J. W. THOMPSON, *Division of Fish and Game, Columbus, Ohio.*

DEAR SIR:—You have submitted the following leases relating to State Game Refuges, as follows:

<i>No.</i>	<i>Lessor</i>	<i>Acres</i>
597	Isabel E., Wm. S., and Anna B. Wallace, Logan County, Mc-Arthur Township.....	204.54
598	John F. Trout, Locan County, Lake Township.....	100.09
599	Effie M. Smith, Logan County, Harrison Township.....	167.68
600	John F. Trout Logan County, Harrison Township.....	68
601	J. G. Harris, ex. estate of Mary M. Harris, Logan County, Harrison Township.....	145.08
602	J. B. Forsythe & Henrietta, his wife, Logan County, Harrison and Lake Townships	47.73
603	Madison Kemper, Logan County, Lake Township.....	150
604	C. F. M. B. and Grace Bowersock, Logan County, Harrison and McArthur Townships.....	144.57

Your attention is called to the fact that I have already approved all of said leases, with the exception of the Harris and Bowersock leases, in Opinion No. 649, rendered to you on July 23, 1929.

The Harris and Bowersock leases have been corrected in accordance with the suggestions made in that opinion, and consequently, I am this day endorsing my approval thereon and returning them to you, together with the other leases heretofore approved.

Respectfully,
GILBERT BETTMAN,
Attorney General.