

levy taxes on corporations doing business in the state of Ohio would be applicable to such corporation except as authorized in such section.

2. When an agency of the United States Government, in the performance of the governmental duties placed upon it by federal statute, incorporates subsidiary companies the stock of which is solely owned by such governmental agency, and conducts the operation of its business within the state of Ohio through such instrumentality, such corporation and its franchises are not subject to taxation by the state of Ohio except to the extent set forth in Section 10 of the Reconstruction Finance Corporation Act.

Respectfully,

GILBERT BETTMAN,  
*Attorney General.*

4647.

FRATERNAL LODGE—ACCOMMODATING MEMBERS WITH OCCASIONAL MEALS—PERSONAL PROPERTY USED IN SUCH EXEMPT FROM TAXATION.

SYLLABUS:

1. *Where an incorporated fraternal lodge or social club serves occasional meals to members and others, as a matter of convenience, and not for the purpose of gain, profit or income, the tangible personal property used in connection with the preparation and serving of such meals is exempt from taxation by reason of the provisions of Section 5328, General Code.*

2. *Where an incorporated fraternal lodge or social club incorporated not for profit, owns taxable property as defined in Am. S. B. 323, enacted by the 89th General Assembly, such corporation is required to file a return, listing such property so owned.*

COLUMBUS, OHIO, September 23, 1932.

HON. CALVIN CRAWFORD, *Prosecuting Attorney, Dayton, Ohio.*

DEAR SIR:—Your recent request for opinion reads:

"1. A corporation, not for profit, organized before the present corporation act was adopted, and before Section 8623-102 of the General Code was enacted, issued certificates of membership which it called certificates of stock. There was no provision of any kind for their redemption.

(a) Must these certificates be returned by the holders as non-productive investments?

(b) Must a corporation file a list of such holders?

2. An incorporated fraternal lodge and a social club, incorporated not for profit, serves occasional meals to members and others for convenience.

(a) Must the tangible personal property used in connection with such meals be returned for taxation?

(b) Are such corporations required to make any return?"

Your first inquiry pertains to the taxation of intangibles. Section 5372-1,

General Code, specifically places the duty of administering the provisions of Chapter 3, of the so-called "Intangible Tax Law" in the Tax Commission. The first sentence of such section reads:

"The commission shall administer the provisions of this chapter which shall be deemed to be one of the laws which the commission is required to administer, within the meaning of sections 1465-9, 1465-12 to 1465-30 inclusive, 1465-32, 1465-34 and 12924-3 of the General Code."

Section 5376, General Code, in so far as is material, reads:

"Except as to property listed in returns which the county auditor is required to assess finally as its deputy, the commission shall assess all taxable property as defined in this chapter and shall list and assess all such property which is not returned for taxation and for that purpose shall have and exercise all powers whatsoever in it vested by any provision of law for any purpose relating to any other law which the commission is required to administer."

Section 5623, General Code, reads as follows:

"The tax commission of Ohio shall decide all questions that may arise with reference to the construction of any statute affecting the assessment, levy or collection of taxes, in accordance with the advice and opinion of the attorney general. Such opinion and the rules, regulations, orders, and instructions of the commission prescribed and issued in conformity therewith shall be binding upon all officers, who shall observe such rules and regulations and obey such orders and instructions unless and until the same are reversed, annulled or modified by a court of competent jurisdiction."

It is therefore evident that any construction of the "intangible tax law", which is administered by the Tax Commission, must be made by that body in order to have official effect. I therefore hesitate to render an opinion in this matter since the authority I have in advising prosecuting attorneys is contained in Section 343, General Code, which section reads as follows:

"When requested by them, the attorney general shall advise the prosecuting attorneys of the several counties respecting their duties in all complaints, suits and controversies in which the state is, or may be a party."

And especially, since the only duties which the county auditor has in connection with the administration of the Intangible Tax Law are as agent of the Tax Commission of Ohio, I am somewhat adverse to construing its provisions except upon request from such body. However, as to your remaining inquiries, it is not so apparent that the county auditor is not acting in his official capacity as distinguished from his capacity as agent for the Tax Commission.

In reply to your second inquiry, it must be borne in mind that only such persons or corporations are exempt from taxation as have been made exempt either by the constitution or by statute enacted pursuant to constitutional authority.

Article XII, Section 2, of the Constitution of the State of Ohio, contains the following language:

"No property, taxed according to value, shall be so taxed in excess of one and one-half percent of its true value in money for all state

and local purposes, but laws may be passed authorizing additional taxes to be levied outside of such limitation, either when approved by at least a majority of the electors of the taxing district voting on such proposition, or when provided for by the charter of a municipal corporation. Land and improvements thereon shall be taxed by uniform rule according to value. All bonds outstanding on the first day of January, 1913, of the state of Ohio or of any city, village, hamlet, county or township in this state, or which have been issued in behalf of the public schools of Ohio and the means of instruction in connection therewith, which bonds were outstanding on the first day of January, 1913, and all bonds issued for the world war compensation fund, shall be exempt from taxation, and, without limiting the general power, subject to the provisions of article I of this constitution, to determine the subjects and methods of taxation or exemptions therefrom, general laws may be passed to exempt burying grounds, public school houses, houses used exclusively for public worship, institutions used exclusively for charitable purposes, and public property used exclusively for any public purposes, but all such laws shall be subject to alteration or repeal; and the value of all property so exempted shall, from time to time, be ascertained and published as may be directed by law."

Any provision to exempt property must be found in the statutes passed by authority of such Article XII, Section 2.

Sections 5305, 10093, 10101, 10103 and 10192, General Code, exempt burial grounds from taxation.

Sections 4759 and 5349, General Code, exempt public schoolhouses from taxation.

Section 5349, General Code, exempts houses used exclusively for public worship, the books and furniture used therein, and the ground attached thereto.

Section 5353, General Code, exempts "property belonging to institutions used exclusively for charitable purposes", from taxation.

Sections 5357, 5359, 5356, 5351-1, 5353, 5351 and 5352, General Code, exempt public property from taxation.

Formerly there was a section of the statutes known as Section 5364 General Code. Such section 5364, since repealed in so far as pertinent, reads as follows:

"Real or personal property belonging to \* \* a religious or secret benevolent organization maintaining a lodge system \* \* shall not be taxable, and the trustees of any such organization shall not be required to return or list such property for taxation."

This section was held to be unconstitutional in the case of *Wilson vs. Licking Aerie*, 104 O. S., 137, and thereafter was repealed by the legislature (110 O. L., 77). It is therefore evident that the property of such organization is not exempt from taxation by reason of its being the property of a fraternal lodge or social club. In other words, there is no constitutional or statutory provision specifically exempting such property from taxation.

There is a cardinal rule of law that a tax can not be collected upon any article of property unless the legislature has specifically levied such tax, or authorized the levy of such tax. To use the language of Marshall, C. J., in the case of *Caldwell, etc. vs. State of Ohio*, 115 O. S., 458, 461:

"The rule which has been often declared, and which was followed in that case, is that, where there is ambiguity or doubt as to legislative intent, the doubt should be resolved in favor of the person upon whom the burden of taxation is sought to be imposed, and that language employed in a taxation statute should not be extended by implication beyond its clear import, or to enlarge its operation so as to embrace subjects of taxation not specifically named. This rule is so well settled as not to be longer debatable. It is supported both by authority and reason."

Since the enactment of the so-called Intangible Tax Law (Am. S. B. 323) no personal property is subject to taxation except such as is taxed pursuant to the provisions of such act. In Section 5328, General Code, which is the section of such act defining the personal property subject to the unclassified tax I find the following language:

"All personal property located and used in business in this state and all domestic animals kept in this state, whether used in business or not shall be subject to taxation, regardless of the residence of the owners thereof."

From this section it is evident that two elements must concur in order that such tangible personal property shall be subject to taxation. That is, the property must be located in the state and must be used in business in the state. The expression, "used in business" is defined in Section 5325-1, General Code, which reads as follows:

"Within the meaning of the term 'used in business', occurring in this title, personal property shall be considered to be 'used' when employed or utilized in connection with ordinary or special operations, when acquired or held as means or instruments for carrying on the business, or when stored or kept on hand as material parts, products or merchandise; and 'business' includes all enterprises of whatever character conducted for gain, profit or income and extends to personal service occupations."

From the language of this section it appears that it must be used in an enterprise conducted for the purpose of gain, profit or income.

You state in your inquiry that the incorporated fraternal lodge and social club serves occasional meals for convenience. I therefore assume that such meals are served as a mere incident to the activities of the fraternal lodge or social club and not for the purpose of financial gain. If I am correct in making this assumption, the articles of tangible personal property used for such purpose would not be used in business within the meaning of Section 5328, General Code, and should not be returned for taxation. However, if such club conducts a restaurant or eating room for the purpose of serving meals to its members and others with a view to profit, the tangible personal property used in connection with such business would be taxable within the meaning of Section 5328, General Code.

Specifically answering your inquiry it is my opinion that:

1. Where an incorporated fraternal lodge or social club serves occasional meals to members and others, as a matter of convenience, and not for the purpose of gain, profit or income, the tangible personal property used in connection with

the preparation and serving of such meals is exempt from taxation by reason of the provisions of Section 5328, General Code.

2. Where an incorporated fraternal lodge or social club incorporated not for profit, owns taxable property as defined in Am. S. B. 323, enacted by the 89th General Assembly, such corporation is required to file a return, listing such property so owned.

Respectfully,  
GILBERT BETTMAN,  
*Attorney General.*

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4648.

ARCHITECT'S LICENSE—PAYMENT OF ARCHITECT'S OCCUPATIONAL TAX DOES NOT QUALIFY PERSON TO SUCH LICENSE WITHOUT EXAMINATION.

*SYLLABUS:*

1. *The payment of an occupational tax under a municipal ordinance, which requires everyone who prepares plans and specifications to be filed with an application for a building permit to pay an occupational tax as an "architect", does not entitle such person to a certificate to practice architecture in Ohio without examination pursuant to the provisions of Section 1334-7, General Code.*

2. *In order to obtain a license to practice architecture in Ohio without examination pursuant to the provisions of Section 1334-7, General Code, the applicant must show that he has such qualifications as will bring him within the exemption provided in such section.*

COLUMBUS, OHIO, September 23, 1932.

HON. R. C. KEMPTON, *Secretary, State Board of Examiners of Architects, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for opinion which reads:

"This Board has been confronted with the problem of carpenter, builder, etc., of Cincinnati, who have been paying an occupational tax as architects and who are now applying for a certificate of qualification to practice architecture based on exemption under Section 1334-7-C., claiming that the payment of this tax is sufficient evidence of the practice required by law.

(2) Section 183, of the Cincinnati ordinance, reads as follows:

'Architects. Every person, association of persons, firm or corporation engaged in the business of architect, or preparing plans and specifications for building and structures, shall pay an annual tax as follows:

Class I. No employe, twenty dollars (\$20.00) per annum.

Class II. One or more employes, or member of firm, association of persons or corporation who are architects, ten dollars (\$10.00) per annum for each employe or member of firm, association of persons or corporation in addition to the tax levied in Class I. of this section.