

purchase of this property was made. The contract encumbrance record has been corrected and the same now shows a sufficient unencumbered balance in the appropriation account made to the credit of the Division of Forestry in your department, to pay the purchase price of this property, which purchase price is the sum of \$750.00. Of this purchase price, the sum of \$375.00 is to be paid to Albert H. Arnholt, as administrator of the estate of Alice M. Sellers, deceased, and \$375.00 is to be paid to D. Homer Graven, as guardian of George A. Liggett.

It further appears, by way of recital in said contract encumbrance record, as well as by the Controlling Board certificate therewith filed, that said Controlling Board has approved the purchase of this property and has released from the appropriation account the money necessary to pay the purchase price of the property.

Subject to the exceptions above noted, I am approving the title to this property and I am herewith returning to you the abstract of title and other files submitted, with the exception of the deeds which I am forwarding to Mr. D. Homer Graven for correction with respect to the description of the property in the particulars pointed out above.

Respectfully,

JOHN W. BRICKER,
Attorney General.

4945.

TREASURY STOCK—PART OF ISSUED AND OUTSTANDING
SHARES OF STOCK IN DETERMINING FRANCHISE TAX.

SYLLABUS:

The treasury stock of a corporation as defined in Section 8623-2, General Code, is to be considered as a part of the issued and outstanding shares of stock by the Tax Commission in determining the franchise tax of said corporation, under the provisions of Section 5498, General Code, and for said purpose the treasury stock should be computed at its fair value.

COLUMBUS, OHIO, November 29, 1935.

The Tax Commission of Ohio, State Office Building, Columbus, Ohio.

GENTLEMEN:—Your request for my opinion reads as follows:

“The commission desires your written opinion on the following question:

Section 8623-2 defines treasury shares as shares issued and thereafter acquired by the corporation.

Section 8623-39 provides the manner in which treasury shares may be retired. Pursuant to this section, it would seem that unless a certificate is filed in the office of the Secretary of State to retire treasury shares, the value of such shares is part of the capital of a corporation.

Section 5498 provides in part as follows: 'For the purpose of this act, 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 goodwill as set up in the annual report of the corporation when said annual report is accompanied by certified balance sheet showing goodwill 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 shall 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 * * *.'

We desire to know whether the treasury stock of a corporation as defined in Section 8623-2 is to be considered a part of the issued and outstanding shares of stock in determining the value of issued and outstanding shares of stock under the provisions of Section 5498. If so, are treasury shares to be reported and set up as a part of the original issue at their par value or the then stated value before such shares were acquired by the company, and taxable for franchise purposes.

If not taxable at their par value, at what value are treasury shares taxable for franchise purposes?'

Annually, between January 1, and March 31, each corporation, incorporated under the laws of this state for profit, is required to make a report in writing to the Tax Commission. Section 5497, General Code, states what that report shall include. After the filing of the annual corporation report the Tax Commission, if it finds the report correct, determines the value of the issued and outstanding shares of stock of every corporation required to file such report. The value of the issued and outstanding shares of stock of any such corporation, according to Section 5498, General Code, "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, * * * ". The same section then states the base upon which the franchise tax is computed.

Section 8623-2, General Code, which is a part of the General Corporation Act enacted in 1929 defines "treasury shares" as shares issued and thereafter acquired by the corporation. Long before the enactment of Section 8623-2, General Code, the term "treasury shares" was regarded as having the meaning expressed in that section. Thus in *Opinions of the Attorney General for 1916*, Vol. I, page 289, the then Attorney General said:

"As I understand the term, 'treasury stock' of a corporation is subscribed and issued stock which has later become the property of the corporation."

Perhaps it is worthy of comment at this point that the more recent major revisions of the system of taxation in this state, which effected fundamental changes, are those of 1910 and 1931, especially the latter, which created two distinct classes of personal property, namely, tangible and intangible, and regulated the taxation of each.

The question which you have asked was presented to this office on several occasions between the years 1910 and 1931. Through those years this office consistently held that "treasury shares" are issued and outstanding shares within the meaning of the Franchise Tax Law. In *Opinions of the Attorney General for 1916*, Vol. II at page 1322, the syllabus of an opinion reads:

"The purchase by a corporation of its own stock, which has been previously subscribed, issued and outstanding, does not restore such stock to the status of unissued stock. It continues to retain its character as subscribed, issued and outstanding stock.

The fee or tax required of a corporation under Section 5498, General Code, should be computed upon all its subscribed, or issued and outstanding stock, regardless of the fact that a portion of such stock has been subsequently acquired and is owned by the corporation."

Another Attorney General reached the same conclusion in an opinion to be found in *Opinions of the Attorney General for 1917*, Vol. II, page 1543.

In 1924 the same question was submitted to the then Attorney General who held as disclosed by the syllabus:

"The stock of a corporation once issued remains outstanding within the meaning of a tax statute, although returned to the cor-

Code, "shall be entered on the general tax list and duplicate of taxable property as described in this title." Therefore the obvious intent of the General Assembly, in stating that treasury shares need not be listed, was to exempt corporations from the necessity of complying with the preceding section of the General Code, which as stated above, required all property subject to the Intangible Tax Law to be entered on the general tax list and duplicate. In fact it is stated in Section 5328-1, General Code, that "a corporation shall not be required *to list* * * * its own treasury stock." On the other hand, the sections just discussed do not in any way refer to the annual report required to be made to the Tax Commission for the purpose of computing the franchise tax. It may be presumed that the action of the General Assembly in not requiring treasury stock to be listed in Section 5328-1, General Code, was based upon the belief that treasury stock would continue to be reported and considered in determining the value of the issued and outstanding shares of stock for franchise tax purposes.

Second, the Intangible Tax Law as enacted in 1931 provided for classification of personal property and for flat rate taxation of intangibles. It did not touch franchise taxes. The only change then made in Section 5498, General Code, relating to the computation of the franchise tax, being that which instructed the Tax Commission in determining the amount or value of intangible property in computing the franchise tax to be guided by the provisions of Sections 5328-1 and 5328-2, General Code. Turning to Sections 5328-1 and 5328-2, General Code, it will be observed that the General Assembly in those sections definitely established the situs of intangibles. So that it is safe to conclude that when the General Assembly in Section 5498, General Code, instructed the Tax Commission to be guided by the provisions of Sections 5328-1 and 5328-2, General Code, in determining the value of intangible property, it meant that the *situs* established in the latter sections, for both foreign and domestic corporations, should be the guide post in the computation of the franchise tax as well as the Intangible Tax. Close scrutiny of Sections 5328-1 and 5328-2, General Code, reveals that the General Assembly determined to define the taxable situs of various classes of property. It was necessary in order that the taxing power of the state might attach and be applied to specific property that there be some permissible relation of that property to the state from the point of view of location. Furthermore sections 5328-1 and 5328-2, General Code, definitely indicate the intention on the part of the General Assembly to treat, so far as possible, residents and domestic corporations on the one hand, and non-residents and foreign corporations on the other hand, on a basis of equality with respect to business intangibles. That, I believe, accounts for the provision in Section 5498, General Code, instructing the Tax Commission to be guided by Sections 5328-1 and 5328-2, General Code, in determining the amount or value of intangible property. By this provision intangibles are allocated on the basis of situs for property tax pur-

poses as described in Sections 5328-1 and 5328-2, General Code, excepting that investments are allocated in accordance with the location of the tangible personal property represented thereby.

One further comment is necessary on this point. Section 5328-1, General Code, except for the one provision that treasury shares shall not be listed, deals practically entirely with determining the separate business situs of certain kinds of intangible property. Section 5328-2, General Code, deals entirely with establishing the situs of intangible property of both foreign and domestic corporations and does not even refer to treasury shares. It is therefore reasonable to conclude that the General Assembly was concerned with the *situs* of intangible property when in Section 5498, General Code, it instructed the Tax Commission to be guided by Sections 5328-1 and 5328-2, General Code, in determining the amount or value of intangible property, including capital investments.

Having determined that treasury shares are to be computed in determining the value of the issued and outstanding shares of stock, I now consider your inquiry as to what value shall be placed upon the treasury shares. This, I believe, should be the fair value of the treasury stock rather than the par or book values. This follows from the provisions of Section 5498, General Code, which establish the base upon which the franchise fee, provided by Section 5499 is imposed. The pertinent provision of Section 5498, General Code, reads:

“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 * * *.” (Italics the writer's.)

Specifically answering your inquiry I am of the opinion that the treasury stock of a corporation as defined in Section 8623-2, General Code, is to be considered as a part of the issued and outstanding shares of stock by the Tax Commission in determining the franchise tax of said corporation, under the provisions of Section 5498, General Code, and for said purpose the treasury stock should be computed at its fair value.

Respectfully,

JOHN W. BRICKER,
Attorney General.