

The lease here under consideration, which is one for a term of fifteen years, has been executed subject to a number of conditions and restrictions therein provided for and the same calls for an annual rental of one hundred and fifty dollars, payable in semi-annual installments.

This lease has been executed by the Conservation Commissioner under the authority of section 471 of the General Code, as amended in the enactment of the Conservation Act. On examination of said lease, I find that the same has been properly executed by the parties thereto and that the terms and provisions of the same are in conformity with the above noted and other sections of the General Code, relating to the execution of leases of this kind.

I am accordingly approving said lease, as to legality and form, and I herewith return the same, together with the duplicate and triplicate copies thereof, with my approval endorsed thereon.

Respectfully,

GILBERT BETTMAN,
Attorney General.

3251.

CORPORATION—APPROPRIATING MONEY FROM ITS PROFITS FOR PURCHASE AND RETIREMENT DURING ENSUING FISCAL YEAR OF SHARES OF ITS PREFERRED STOCK—SUCH APPROPRIATION NOT A "DEBT" ELIMINATING A TAXABLE EXCESS CREDIT.

SYLLABUS:

Where a manufacturing and commercial corporation in this state by action of its board of directors appropriates and thereby sets aside a certain sum of money from the profits accruing from the business of the corporation for the purchase and retirement during the following fiscal year of a certain number of shares of an issue of second preferred stock at a call price per share therein stated, which action by the board of directors is followed by an entry made on the books of the corporation by its treasurer as to the purpose and effect of such action by the board of directors; HELD, that such action on the part of the board of directors and the treasurer of the corporation did not have the effect of making the sum of money thus appropriated for the purchase and retirement of said stock a debt that it could set up against its gross credits for the purpose of determining the taxable credits of such corporation for the ensuing tax year.

COLUMBUS, OHIO, May 25, 1931.

The Tax Commission of Ohio, Wyandotte Building, Columbus, Ohio.

GENTLEMEN:—This is to acknowledge receipt of your communication with which you enclose a communication received by you from the county auditor of Cuyahoga County, Ohio, in which it is said:

"The Patterson-Sargent Company, an Ohio Corporation, closes its fiscal year as of October 31, 1929. Prior to said closing, the Board of Directors of The Patterson-Sargent Company held a meeting at the office of the Company, 1325 East 38th Street, Cleveland, Ohio, October

29, 1929, at 1:30 o'clock P. M. pursuant to waiver of notice thereof, signed by all of the directors and filed with their records, the following resolution, upon motion duly made and seconded, was unanimously passed, viz:—

RESOLVED, That the sum of \$262,500 be, and the said amount hereby is appropriated and set aside forthwith from the profits arising from the business of the company for the purchase and retirement during the fiscal year 1930 (fiscal year ending October 31, 1930) of 2500 shares of the company's Second Preferred Stock Outstanding, at not more than the call price of \$105 per share; that the treasurer of the company be directed by the Board of Directors to give notice of the said appropriation and disburse the sum from time to time during the fiscal year.—See Exhibit A, B, C, and D, Certified correct.”

It appears further that pursuant to the resolution of the board of directors of the Patterson-Sargent Company, above quoted, the treasurer of said company endeavored to give effect to said resolution by an entry in the minutes of the meeting of said board of directors, which entry is in words and figures as follows, to-wit:

“Now comes R. N. Hotchkiss, Treasurer of the Patterson-Sargent Company, who states that the declaration made by the Board of Directors of The Patterson-Sargent Company, as outlined above, constitutes or creates a liability or a legal bona fide debt of \$262,500, and that the amount of \$262,500 should be used as a deduction or offset against its Cuyahoga County credits, thereby eliminating a taxable excess credit of \$230,270 for the year of 1930.”

Upon the above facts my opinion is requested on the question stated in said communication as follows:

“Does the declaration to retire 2500 shares of preferred stock outstanding at not more than call price, \$105.00 per share (\$262,500) duly made and seconded and unanimously passed by the Board of Directors prior to the closing of the company's fiscal year, October 31, 1929, constitute a legal bona fide debt?”

The question here presented on the facts stated in the communication received by you from the county auditor relates to the taxes to be paid by the corporation therein named for the year 1930, at which time section 2 of article XII of the state constitution, so far as the same was pertinent to this question, provided that “laws shall be passed, taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also all real and personal property according to its true value in money.”

Section 5328, General Code, which is applicable alike to individuals and corporations, provides:

“All real or personal property in this state, belonging to individuals or corporations, and all moneys, credits, investments in bonds, stocks, or otherwise, of persons residing in this state, shall be subject to taxation, except only such property as may be expressly exempted therefrom. Such property, moneys, credits, and investments shall be entered on the list of taxable property as prescribed in this title.”

Section 5404, General Code, relating to corporations other than public utilities and corporations otherwise taxed, provides:

"The president, secretary, and principal accounting officer of every incorporated company, except banking or other corporations whose taxation is specifically provided for, for whatever purpose they may have been created, whether incorporated by a law of this state or not, shall list for taxation, verified by the oath of the person so listing, all the personal property thereof, and all real estate necessary to the daily operations of the company, moneys and credits of such company or corporation within the state, at the true value in money."

Both sections 5328 and 5404, General Code, above quoted, require credits to be listed for taxation as in other personal property of the corporation. The term "credits" as used in sections 5328 and 5404, General Code, above noted, is defined by section 5327, General Code, the provisions of which, so far as they are pertinent to the question at hand, are as follows:

"The term 'credits' as so used, means the excess of the sum of all legal claims and demands, whether for money or other valuable thing, or for labor or service due or to become due to the person to pay taxes thereon, including deposits in banks or with persons in or out of the state, other than such as are held to be money, as hereinbefore defined, when added together estimating every such claim or demand at its true value in money, over and above the sum of legal bona fide debts owing by such person. In making up the sum of such debts owing, there shall not be taken into account * * * an acknowledgment of indebtedness, unless founded on some consideration actually received, and believed at the time of making such acknowledgment to be a full consideration therefor; nor an acknowledgment made for the purpose of diminishing the amount of credits to be listed for taxation."

Speaking with reference to the meaning of the term "debt," as the same is used in section 5327, General Code, above quoted, the Supreme Court of this state in the case of the *Tax Commission of Ohio vs. The National Malleable Castings Company*, 111 O. S. 117, held that "The Legislature in its definition of 'credits,' in section 5327, General Code (95 O. L. 533), used the word 'debts' in the significance of an obligation based upon contract express or implied." Following the decision of the Supreme Court in the case above cited, the Court of Appeals of the First District, in its opinion in the case of *Life Insurance Company vs. Hess, Auditor*, 28 O. App. 107, 119, said:

"A debt is a sum of money due by certain and express agreement. It originates in, and is founded upon, contract, express or implied."

In view of the restricted meaning of debts, which, under the provisions of section 5327, General Code, may be deducted from the gross credits of an individual or corporation, for the purpose of arriving at the taxable credits of such individual or corporation, it seems quite clear that the voluntary action of the board of directors of the corporation here in question, setting aside money or other property to the amount of \$262,500.00 as a fund for the purchase and retirement during the fiscal year 1930 of outstanding shares of the company's

second preferred stock issue, did not and could not have the effect of giving said sum of \$262,500.00 or any part thereof the status of a debt of said corporation such as under the provisions of section 5327, General Code, it could set up against its gross credits for the purpose of reducing or eliminating the same for the purposes of taxation. There is no statutory provision which required said corporation to purchase and retire said second preferred stock issue or any part thereof; nor, if it be important, does it appear that there was anything in its articles of incorporation which required said issue or any part thereof to be purchased and retired at said time.

In the case of *Hess, Auditor, vs. Insurance Company*, 116 O. S. 416, the Supreme Court of this state held that the reserve created and maintained by an Ohio life insurance company as required by law represents an indebtedness of the company to its policyholders, and that by virtue of the provisions of sections 5327 and 9357, General Code, the amount of such reserve may be deducted from its gross credits in making its return of property for taxation. As above indicated, the court in this case arrived at the conclusion above stated by recognizing that the reserve of a life insurance company is, under the laws of this state, providing therefor, a liability of such life insurance company and by giving effect to section 9357, General Code, which defines its "reserve" as "being the amount of debts of life insurance companies by reason of their outstanding policies in gross, and which may be so treated in the returns for taxation made by them." Touching the question at hand, it is to be noted that the reserve of an insurance company is not given the status of a debt within the meaning of section 5327, General Code, unless the nature of the reserve is such as to create a liability of the company or unless by some valid statutory provision such reserve is made a debt within the meaning of the taxing statute above quoted. *Insurance Company vs. Cappellar*, 38 O. S. 560; *Ohio Casualty Insurance Company vs. Long, Auditor*, 111 O. S. 424; *City of Yale vs. Michigan Farmers Mutual Fire Insurance Company*, 179 Mich. 254.

Whatever may be said with respect to the above cited cases relating to the status of the reserve funds of an insurance company with respect to the question at hand, it is certain that the voluntary action of an ordinary manufacturing or commercial corporation of the kind here in question in setting aside and thereby appropriating a part of its moneys or other property for the particular purpose of buying in and thereby retiring preferred stock issued by it can not have the effect of exempting such money or other property from taxation, or of giving such fund the status of a debt within the meaning of section 5327, General Code, for the purpose of determining its taxable credits. See *Valentine, Auditor, vs. The Canada Life Assurance Company*, 106 O. S. 273. On the contrary the action of the corporation here in question indicated by the resolution of its board of directors above quoted, and the entry by the treasurer of the corporation of the purpose of this resolution, are obviously in substance and effect "an acknowledgment made for the purpose of diminishing the amount of credits to be listed for taxation" within the meaning of that provision in section 5327, General Code, which by its terms prohibits the deduction sought to be made by the corporation in this case.

For the reasons above stated, and by way of specific answer to the question presented in your communication, I am of the opinion that said question should be answered in the negative.

Respectfully,

GILBERT BETTMAN,
Attorney General.