Chapter 16: State and Local Taxation

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CHAPTER 16

State and Local Taxation

OLIVER OLDMAN

A. Summary

§16.1. State tax developments. There were few notable developments in taxation in Massachusetts during the 1961 Survey year. The only development to which more than a few sentences are devoted in this Survey year’s tax chapter is the Atlantic Refining case, which permitted the town of Newton to apply its property tax to state-owned property located along Route 128 and leased to Atlantic Refining Company. The case is discussed in the last section of this chapter.

Guy J. Rizzotto, former head of the Inheritance Tax Bureau, became Chairman of the State Tax Commission and Commissioner of Corporations and Taxation in March, 1961. In January, 1961 the State Tax Commission, then under the chairmanship of Robert T. Capeless, submitted to the General Court the 40-page Special Report of the State Tax Commission Relative to the Advisability of a More Simplified and Equitable Corporation Income Tax. The report was printed as Senate Document No. 512 and was prepared pursuant to Chapter 103 of the Resolves of 1960. It is briefly discussed below. Copies are available from the Greater Boston Chamber of Commerce. Reported cases and other pronouncements are discussed below in the sections on corporate taxes and personal income tax. Only a few of the numerous statutory changes in state taxation during the 1961 Survey year are discussed below. An enumeration and brief summary of these changes appears at pages 9975 through 9982 of 2 CCH Massachusetts State Tax Reporter. Also, a 22-page mimeographed explanation of these changes, prepared by John Dane, Jr., is available from the Greater Boston Chamber of Commerce.

§16.2. Local tax developments. In May, 1961, the Greater Boston Economic Study Committee, which is an Associate Center of the Committee for Economic Development, published a 40-page study entitled Financing Local Government in the 1960's: A Policy Statement

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The timeliness of this study became only too apparent in the hubbub over the Bettigole case, which requires assessment of property at 100 percent of fair cash value. That case is not discussed below because it was decided after the end of the 1961 Survey year. There was no judicial development with respect to the Prudential Back Bay center. However, Prudential's application under the revised Urban Redevelopment Law was submitted during the year and litigation was instituted in order to test the legality of the project under the revised law. The Supreme Judicial Court's decision approving the project was handed down just as this chapter of the 1961 Survey was completed. Legislation on local taxes during the year related mainly to minor exemptions and procedural problems. It is summarized at pages 9977 through 9979 of 2 CCH Massachusetts State Tax Reporter. Virtually all reported cases dealing with property taxes are noted below. One, the Atlantic case, is discussed at length.

B. PERSONAL INCOME TAX

§16.3. General. In March, 1961, the constitutional amendment authorizing the imposition of a graduated income tax was approved by a joint session of the House and Senate for the second time. The amendment will therefore appear on the ballot at the November, 1962, election. By Chapter 57 of the Resolves of 1961 the General Court asked the State Tax Commission to make a study of correlating Massachusetts taxation of partnerships with federal practice with respect to replacing the income tax presently levied against the partnership with a tax levied against its members. The Commission is to report by the end of January, 1962. A Technical Discussion of 1960 Personal Income Tax Legislation was presented by Commissioner Capeless in December, 1960, and is reprinted at §200-119 of 1 CCH Massachusetts State Tax Reporter.

§16.4. Strike benefits. Benefits paid to strikers out of a union strike fund are not taxable business income, according to a letter from the Commissioner of Corporations and Taxation, reprinted in part at §15-408.25 of 1 CCH Massachusetts State Tax Reporter. In view of the fact that union dues paid by employees are deductible in computing business income, it would seem questionable to exclude from such income any eventual return of these dues in the form of strike benefits, especially when the only rationale offered is that the strike benefits are "in the nature of a gift." However, the treatment accorded strike benefits is at least parallel to that accorded social security, pay-

§16.2. 1 See front page of any Boston newspaper for November 21, 1961, and days immediately thereafter.
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ments toward which are deductible and payments from which are now excludable from income.¹

§16.5. "Negative" tax. In a unique case decided by the Supreme Judicial Court during the 1961 survey year the taxpayer, appearing pro se, computed a minus or negative tax at the business income rate on her net loss in the business income category.¹ She sought to credit this against the tax due on account of income from gains and from dividends and interest. The Court, finding the Massachusetts personal income tax to be a series of separate taxes and finding no statutory warrant for the credit, denied her the credit. The case points up a weakness in Massachusetts tax law; virtually all the other income tax states have at least some means of offsetting current business losses against other current income. Also, the case is reminiscent of former Chief Judge Magruder's well-known concurring opinion which discusses the subject of negative basis.²

§16.6. Charitable exemption. The undistributed income of a trust whose principal and accumulations were to be distributed upon termination to unspecified charitable, educational, or religious organizations was held exempt from income tax, since the funds would ultimately reach a charitable destination.¹

§16.7. Out-of-state income from business and from isolated sale. The taxpayer's interest in standing timber in Maine was managed for him and others through a power of attorney given to an operator resident in Maine. The taxpayer's income from the Maine timber was held taxable as income from a trade or business, against his contention that the tax was an unconstitutional property tax on foreign real estate.¹ The taxpayer also had income from the sale of his interest in inherited Maine real estate, an isolated or casual sale. The court held it was not the purpose of the 1954 amendment to Section 6 of Chapter 62 to tax income from isolated or casual sales of real estate, a decision of doubtful value as a precedent in view of amendments made to Section 6 since 1954.

C. CORPORATION EXCISE TAX

§16.8. State Tax Commission's special report. This report, which is referred to at the beginning of this chapter, analyzed four different


plans for simplifying the corporation excise tax applicable to business and manufacturing corporations and for making it more equitable. The Commission recommended first that the present tax be replaced either by (1) a tax measured by net income only (the rate to be 8 percent plus 23 percent surtax, thus preserving present revenue from the corporate excise), or by (2) a tax measured in part by net income (the present rate of 5 1/4 percent plus 23 percent surtax) and in part by tangible property not subject to local taxation (at a rate of $7.44 per thousand plus 23 percent surtax). Secondly, the Commission recommended that the alternative measures of the minimum tax to be paid be based on gross receipts or a flat sum of up to $50. The General Court after consideration of the report approved Chapter 65 of the Resolves of 1961, which asks the Commission to continue its study but to limit the study to the second recommendation above and to the second part of the first recommendation above. The Commission is to report at the end of January, 1962.

§16.9. Interpretation. Regulations have still not been issued nor were any rulings concerning corporation excise tax issued during the 1961 Survey year. In December, 1960, Commissioner Capeless did, however, issue a Technical Discussion of 1960 Corporation Excise Tax Legislation, which is reprinted at ¶200-118 of 1 CCH Massachusetts State Tax Reporter. Also, at ¶200-126, a speech by Owen L. Clarke, Chief of the Bureau of Corporations, is reprinted, which provides the bureau's interpretation of many aspects of the corporation excise tax. Finally, at ¶18-905.30 is a bureau letter which, in stating bureau policy on debts due stockholders, refers to a 1958 tentative regulation on computation of corporate excess.

§16.10. Allocation factors. Chapter 419 of the Acts of 1961 added a sentence to Section 38(3) of G.L., c. 63, in order to eliminate from three-factor formula allocations any factor the denominator (total payroll, total receipts, or total property) of which is less than 10 percent of the part of net income to be apportioned by that factor. Thus, when three factors are being used, if one third of the corporation's net income subject to allocation is greater than ten times the total amount of the corporation's property, the property factor could not be used. Similarly, when two factors are being used, if one half of the corporation's net income subject to allocation is greater than ten times the total amount of the corporation's property, the property factor could not be used. The effect of this statutory change is to prevent allocation by insignificant factors. Whether the change can be applied more than once in computing an allocation and whether the change would ever apply to the gross receipts factor are matters on which the department may be expected to comment at an appropriate time.

§16.11. Corporate excess. The Appellate Tax Board has ruled that the market value of shares of capital stock is relevant to the determination of the "fair value" of the capital stock of a foreign corporation for

§16.8. ¹Senate Doc. No. 512 (1961), noted in §16.1 supra.
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the purposes of computing the corporate excess base of the corporation excise.¹

§16.12. Insurance companies. Two cases involving insurance companies were decided during the 1961 survey year. One involved the excise tax applicable to the value of all policies issued by a life insurance company. It was held that the tax was not applicable to a group annuity policy which was issued by the company and covered the company's own employees.¹ The other involved the excise tax measured by gross premiums when some of the premiums arose from insuring foreign risks (Hong Kong and Surinam). It was held that the excise constituted neither an undue burden on interstate or foreign commerce nor a violation of due process.²

D. Property Tax

§16.13. Personal liability for real estate tax. More than six years after the assessment of real estate taxes, the city of Boston sought to collect those taxes in a suit based on the owner's personal liability for the taxes. The six-year statute of limitations in Section 2 of G.L., c. 260, was held to bar recovery in personam, even though liens for such taxes, otherwise valid, might be enforced against the real estate.¹ The Supreme Judicial Court also held, with respect to the same parcel of real estate but a subsequent owner, that the city's foreclosure of tax title within six years did not bar recovery in personam as to amounts in excess of fair market value at the date of foreclosure.

§16.14. Tax lien vs. United States-owned mortgage. After the United States Government through the Reconstruction Finance Corporation had acquired a mortgage lien against real property in the city of Springfield, the city acquired tax liens for unpaid property tax. The mortgage was subsequently foreclosed by the Federal Government. The United States District Court held that the city's tax liens were nevertheless valid.¹

§16.15. Proof of mailing of tax bill. The city of Boston's challenge to the jurisdiction of the Appellate Tax Board based upon the late filing of an application for abatement was supported by proof that the tax bill was prepared, addressed, enveloped, and placed in a mail sack which was put in a vestibule of the tax office to await pickup


by the post office. Because no proof was offered that the sack was picked up on that same day, the Supreme Judicial Court held that the city had not proved mailing on that day.¹

E. THE ATLANTIC REFINING CASE

§16.16. Municipal taxation of state-owned land: Lease to private operator. In Atlantic Refining Co. v. Assessors of Newton¹ the Supreme Judicial Court held that the city of Newton could tax to the company a parcel of real estate owned by the state along Route 128 and leased to the company for gas station and restaurant purposes. The land had been acquired by the state prior to 1953 by a statutory taking.² In 1953 it was leased to Atlantic for twenty-five years.³ Rental payments were based upon cents per gallon, percentages of restaurant sales, and similar methods of varying payment with conditions. Atlantic was to build certain kinds of buildings, title to which vested in the state. Taxes on Atlantic's personal property were to be paid by Atlantic. The lease makes no mention of other taxes. Subleasing of restaurant functions to Howard D. Johnson Company was permitted. The lease covered not only the particular parcel involved in this suit but all the other similar ones leased by the state to Atlantic along Route 128, with different payments required for different locations. Atlantic was required to furnish certain free services for the traveling public, such as "touring information, water for radiators and batteries, cleaning of windshields . . . [and] . . . toilets," as well as all services and equipment necessary for safe operation of motor vehicles. Retail prices of gasoline and oil were not to exceed prices prevailing in the vicinity of each station. Within a radius of three miles of the locus there were about a dozen gas stations of other companies, though none of these was on Route 128.⁴ Atlantic's customers were in part the traveling public and in part nurses and others from the nearby Newton-Wellesley Hospital and the industrial plants along or near Route 128.⁵

Section 5 of G.L., c. 59, contains an enumeration of types of property exempt from taxation. The second item mentioned is state-owned property, subject to several exceptions, including that provided in Section 3A of the same chapter. Section 3A eliminates the exemption of state-owned real estate "if used or occupied for other than public purposes" and provides that such property shall be taxed

⁴ The lease is reproduced in the Record, pp. 93-97.
⁵ Record, p. 257.
⁶ Id., pp. 257-261.
to the state's lessee or to the user or occupant as if a holder in fee.

Was Atlantic using the state's Route 128 property for other than public purposes? The Supreme Judicial Court's "yes" answer was based largely upon the fact that Atlantic conducted its business for its own private profit in virtually the same manner as it did for its gas stations on land not owned by the state, and also upon the decision in *Dehydrating Process Co. of Gloucester v. Gloucester*,6 which held that the state's sublessee engaged in manufacturing fish by-products on a portion of a state-owned pier was subject to the city of Gloucester's property tax.

In construing "public purpose" in the context of exemption of state-owned property from local property taxes, it is appropriate to examine the interests of those possibly affected by the result of this case: Atlantic, the municipality (six towns and one city filed a brief as amici curiae), the state (intervener in the case), and possibly other business firms.7

The interests of Atlantic may be considered both from the point of view of the lease actually involved in the case and from the point of view of Atlantic's entering into a new lease of state-owned premises under similar circumstances. In the actual circumstances, the issue of taxability first arose8 after the lease had been executed and the rental payments agreed upon, but was not resolved until after the law had become quite certain on the further issue as to whether it was the lessor or the lessee who was to bear the burden of any tax liability ultimately found. The lease itself, executed in 1953, contained no provision relating to local real estate taxes, and at that time *Gloucester Ice & Cold Storage Co. v. Assessors of Gloucester*9 had not yet been decided.

The *Assessors of Gloucester* case, which examines the history of Section 15 of G.L., c. 59, concluded that even though Section 3A made the company liable for property tax on the portion of the state-owned pier subleased to the company, it could obtain tax reimbursement from its lessor. The decision was based upon a 1907 precedent10 which the Court was reluctant to overrule. If the Supreme Judicial Court struggled with the applicability of Section 15 in the *Gloucester*

7 The history of Section 3A is examined in *Gloucester Ice & Cold Storage Co. v. Assessors of Gloucester*, 337 Mass. 23, 147 N.E.2d 820 (1958). See also Nichols, Taxation in Massachusetts 234-238, 260-262 (3d ed. 1938). As far as state-owned land is concerned, Section 3A came into being in 1951. However, there have been other statutes under which state-owned lands used for private purposes have been subject to local taxation. See, e.g., Acts of 1904, c. 385, §1; *Boston Fish Market Corp. v. Boston*, 224 Mass. 31, 112 N.E. 616 (1916).
case in 1958, no doubt the lawyers involved in the negotiation of the 1953 Atlantic lease did so too. The manner in which the struggle was resolved does not appear in the record of the Atlantic Refining case; nor is it clear the extent to which the rental payments provided in the lease reflect the possibility that Atlantic might ultimately have had to bear some tax liability. However, it is clear that, as of the time Atlantic's suit against the city of Newton reached the Supreme Judicial Court, Atlantic knew that even if it were held subject to tax it would be reimbursed by the state.\textsuperscript{11} Thus, at that time Atlantic's interest was essentially only with respect to any new lease on other property or renewal of the lease involved in the suit.

Atlantic's economic position with respect to a new lease, or renewal, after this case may be only slightly changed by the result in the case. The fact that the property is subject to tax if used for gas station and restaurant purposes means that over-all costs are more than they otherwise would be. It is a complex question of real estate economics to determine the effect of this increase in costs. If the state in announcing competitive bidding for the lease says that its terms provide for reimbursement of any property tax that may be imposed on the real estate, then it would seem as if the bids submitted would be the same as if there were tax exemption. If the state sought to pass on the tax, presumably the bidders would lower their bids accordingly. Either way, the total paid by Atlantic would be essentially the same.

The burden of the tax would be on the state (or in the case of the Massachusetts Turnpike, perhaps on the bondholders). While this effect might in principle affect the state's willingness to enter into such arrangements, it in fact is unlikely to do so because of the state's position as the only one with land available on Route 128 for gas station and restaurant purposes. Perhaps, however, the tax burden will affect the state's decision as to how many such facilities to operate along the route. If so, the ultimate consequent impact upon Atlantic and other firms becomes relevant although virtually impossible to determine.

There were no briefs submitted by competitors of Atlantic or by any other private firm. The analysis in the preceding paragraph tends to indicate that their interests were too remote to be a matter of concern to them. Also it is not clear, if they were to submit briefs, for which side they would argue.

The interest of the state is essentially how much it receives, net, from the rental payments. It will receive more, net, if the local government cannot tax. How important is it that the state receive this additional amount? Was this the "public purpose" meant by Section 3A?

The interest of the local government is in the preservation of or

\textsuperscript{11} In Atlantic Refining Co. v. Commonwealth, 339 Mass. 12, 157 N.E.2d 868 (1959), the Court held that the Gloucester case decision was also applicable to Atlantic's situation and that Atlantic could obtain reimbursement from its lessor, the state.
building up of its property tax base. To the extent that the services provided by the local government and the existence of the local government are both factors in the successful operation of the gas station and restaurant, then such a government would like to be paid. Thus, perhaps local fire and police services are available for Atlantic's use. No doubt, also, the local government services which are provided to many of the nearby persons and companies who constitute customers of Atlantic are at least of indirect benefit to Atlantic. From the local government's point of view, such direct and indirect services provide good reasons for it to be permitted to tax. One can, of course, imagine a location, say along a remote reach of the Massachusetts Turnpike or some other new highway in an unsettled area of the state, where a gas station and restaurant are placed almost solely for the convenience of travelers on the highway. Such facilities, if elaborate, might constitute the most valuable real property in a given town and yet not be serviced by the town to any significant extent, directly or indirectly. Is it appropriate for such a town to regard these facilities as part of its tax base, a part that would perhaps finance a large portion of the town's expenses which are not even in the most indirect way related to the operation of the facilities? Was it the purpose of Section 3A to permit or to prevent such a town from taxing? Could it have been the purpose of Section 3A to prevent such a town from taxing, yet permit Newton to tax?

This sketchy examination of the interests affected by the interpretation of Section 3A indicates that the significant conflict of interests is between the state and the municipality in which highway gas station and restaurant facilities are located. The statute does not by its terms indicate in which situations which interest shall prevail. Instead, the statute just provides for local taxation "if used or occupied for other than public purposes," and leaves it to the courts to consider particular cases and to develop criteria.

A cursory examination of what has been held to be a public purpose in connection with property tax exemption of state-owned property reveals that restaurant and fish processing activities have led to local taxation of the real estate. Also taxed was land purchased as a location for a jail but rented to private persons for their private use. Uses that have resulted in tax exemption include: water works operated for private profit, parking facilities operated for

12 Pittsburgh Public Parking Authority v. Board of Property Assessment, 377 Pa. 274, 105 A.2d 165 (1954) (portion of authority's property which consisted of stores used as a restaurant, tailoring shop, florist shop, and the like, held taxable by city and county; portion used as parking garage held nontaxable even though leased to commercial operators for their private profit).
private profit,\textsuperscript{16} private urban redevelopment corporations,\textsuperscript{17} and improvements to a private airport.\textsuperscript{18} Also tax exempt, but in Ohio, was a gas station and restaurant facility located in populous Cuyahoga County on the Ohio Turnpike.\textsuperscript{19} The question of the taxability of such facilities, with Ohio and Massachusetts disagreeing, seems to be in the gray area between public and private. The factors that make for black or for white are not clearly discernible. The fact of profit has not been decisive. The additional fact that the profit has inured to the benefit of private persons has been of some importance, particularly in the case under discussion.\textsuperscript{20} Also relevant has been a vague notion as to the kinds of activities that are appropriately carried out by governments. Often, as with water and other utilities, the element of monopoly is what makes public regulation, if not public operation, appropriate. Abutting facilities on limited-access highways are monopolies of a sort, and probably it is appropriate for the state at least to regulate them. Thus, in the Atlantic Refining case the statute required the state to control and supervise the gas stations and restaurants, and the lease did limit gas prices, for example, to the prevailing level in the vicinity. Suppose the state decided to operate the gas stations and restaurants with state employees and decided to do so at a profit. Is this a use for other than a public purpose under Section 3A in a state where such activities by government have previously been unheard of?\textsuperscript{21} Is the question of taxing gas station and restaurant facilities on Route 128, with its very considerable number of access roads, different from the question of taxing similar facilities on the most recently constructed turnpikes, with their fewer access roads and their paths so divergent from previously existing routes?

The primary conflict of interests in a suit such as Atlantic's is between the state and the municipality. That conflict arises in many contexts. One might expect, as a result of this decision, that the cities and towns of Massachusetts will survey their territory and seek to tax such state-owned property as motels, restaurants, and ticket counters at airports, or possibly dormitories at a university. The conflict between state and municipality should probably neither always be resolved in favor of the latter nor always in favor of the former. Although the court in Atlantic Refining did not deal with the conflict extensively in its opinion, it did highlight the conflict by devoting


\textsuperscript{18} Opinion of the Justices, 335 Mass. 771, 142 N.E.2d 482 (1957).

\textsuperscript{19} Carney v. Ohio Turnpike Commission, 167 Ohio St. 273, 147 N.E.2d 857 (1958).


\textsuperscript{21} In Mexico, where the government owns the oil monopoly, PEMEX, the question might be easy to answer; similarly in Venezuela, where the government operates a school for waiters and cooks to staff government-owned hotels.
to it the final paragraph of the opinion. The final words of that paragraph make an appropriate conclusion for this survey of tax developments in Massachusetts.

It is not unreasonable that the ultimate effect of §3A may be an allocation of revenues between the Commonwealth and the municipality. New aspects of public purpose and new public activities call for new adjustments between the Commonwealth, the municipalities, and businesses conducted on publicly owned land.\(^{22}\)