Chapter 16: State and Local Taxation

George T. Shaw

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CHAPTER 16

State and Local Taxation

GEORGE T. SHAW

§16.1. Introduction. The 1970 survey year was not a year of dynamic decision-making or legislative activity in the field of state and local taxation. It is the purpose of this chapter to discuss and critically analyze those judicial decisions and legislative enactments of greatest consequence to the Massachusetts practitioner and his taxpaying client, personal or corporate.

State and local taxation has become a political issue and, as a result, significant developments can be expected in future years. It can be predicted with confidence that there will be a serious demand for reform of the entire state and local taxing structure to relieve the tax burden which, at the state and, more importantly, at the local level, falls primarily on those taxpayers who are least able to sustain it. The inflationary spiral, coupled with the ever-increasing demand for municipal and state services, will require a serious reappraisal of the present method of raising revenue. It is hoped that the report of the Master Tax Commission, created by the legislature in 19671 and headed by Senator George v. Kenneally of Quincy, will provide some constructive and carefully considered recommendations which will lead to the much-needed revision of the General Laws dealing with this subject. This report is scheduled to be submitted shortly after the close of the 1970 survey year, but it will probably be at least two years before any recommendations made by the commission can be enacted into law.

A. COURT DECISIONS

§16.2. Property taxes: Governmental immunity. Massachusetts exempts from local property taxes property owned by the United States "so far as the taxation of such property is constitutionally prohibited."1 This exemption can thus expand and contract as the United States Constitution is from time to time interpreted. This year the Supreme Judicial Court, following the lead of recent United States Supreme Court decisions, contracted the exemption to an extent not theretofore required by Massachusetts decisions.

In Board of Assessors of Wilmington v. Avco Corp.,2 Avco, the lessee

George T. Shaw is associated with the firm of Hemenway and Barnes, Boston.

§16.1. 1 Resolves of 1967, c. 162.

§16.2. 1 G.L., c. 59, §5, cl. 1.
of certain real estate in Wilmington, erected on the leased premises three towers for use in carrying out the project being conducted pursuant to a contract with the Air Force. The contract provided that title to the towers vested in the United States and that Avco would be reimbursed by the Air Force for out-of-pocket expenses for rent and real estate taxes. Avco's lease required it to pay as additional rent the real estate taxes on the premises. The principal issue before the Court was whether the assessment of taxes on account of the towers was valid under the statutory exemption and, by reference, the Constitution. The Court, relying on decisions of the United States Supreme Court, reversed the decision of the Appellate Tax Board and held that the tax was properly assessed because it was not "constitutionally prohibited."

The question of the validity of local or state property and sales taxes assessed on government contractors working on a "cost-plus" basis has reached the United States Supreme Court on several occasions. In its recent cases, the Supreme Court has generally upheld the tax when the assessed property was used by the contractor in connection with its own commercial activities, notwithstanding the fact that the ultimate economic burden fell upon the United States because of the cost reimbursement provisions of project contracts. Two cases are particularly noteworthy because of the factual similarity with the instant case.

In *United States v. Allegheny County*, a war material manufacturer was assessed a local property tax on account of machinery in its plant owned by the United States and leased to the manufacturer for a nominal consideration. The United States agreed with the manufacturer to pay taxes attributable to the machinery. The Supreme Court held that the "Government-owned property, to the full extent of the Government's interest therein, is immune from taxation, either as against the Government itself or as against one who holds it as a bailee."4

During the next decade and a half, *Allegheny County* was significantly diluted and its holding restricted to its particular facts. In 1953, the Supreme Court held in *Esso Standard Oil Co. v. Evans*5 that a tax, denominated a "privilege tax" by the state, for storing government oil in Esso's tanks under a government contract which shifted the economic burden of the tax to the Government was valid even though the tax was measured by the quantity of oil stored. The Court distinguished *Esso* from *Allegheny County* on the ground that, in the latter, the tax was on the property while, in the former, Esso's privilege of storing that property was the object of the tax.

*Detroit v. Murray Corp. of America*6 involved a tax levied against Murray, a cost-plus government contractor, with respect to government-
owned property held by Murray as a bailee for completion of its subcontract. The value of the government property was included in the assessment of the tax. The tax in question clearly seemed to be an ad valorem property tax assessed on government property. A tax so applied was proscribed in Allegheny County, and the Sixth Circuit Court of Appeals held the earlier case and Murray indistinguishable. A sharply divided Supreme Court disagreed and distinguished Allegheny County: in that case, the tax was a property tax; in the case before the Court, the tax in essence was a tax upon the privilege of using personal property. The dissenting opinions of Justices Whittaker and Frankfurter show, convincingly to this writer, that the tax in Murray was as much a property tax as that in Allegheny County. Two other cases decided the same day as Murray (and, with Murray, forming the so-called Michigan Trilogy) also demonstrate how narrow—if it exists at all—is the tax immunity of government contractors with respect to government-owned property used in connection with private commercial activities.

This writer believes Murray was incorrectly decided. Had Murray held the tax then in question invalid, the tax in Avco probably would have been invalid as well. However, given the decisions in the Michigan Trilogy and the sub silentio overruling of Allegheny County, the decision of the Supreme Judicial Court in Avco was correct. The Court, as required by the exemption statute, permitted the tax to reach to the edge of constitutional proscription.

§16.3. Property taxes: Exemption for the elderly. In Board of Assessors of Cambridge v. Bellissimo,1 the Supreme Judicial Court was called upon to construe the exemption from real property taxes granted to certain elderly persons.2 In Bellissimo, the taxpayers, husband and wife, had owned certain real estate in Cambridge as joint tenants for over forty years. On February 13, 1964, they conveyed the property, through their son as a straw, to themselves as trustees and life beneficiaries, reserving the power to sell, lease or mortgage the premises during their lives or the life of the survivor. The trust was to terminate on the death of the survivor and the property was then to be divided equally among the taxpayers' children. One of the conditions to the granting of this exemption is that the person to whom the tax is assessed must have owned the property "either individually, jointly, or as a tenant in common, for the preceding five years."3 The assessors claimed that the conveyance from the taxpayers to the straw and concurrently from the straw to the taxpayers as trustees interrupted the continuous five-year ownership requirement and made the exemption...
unavailable. The Court held that the exemption was not destroyed by that transfer because the taxpayers occupied the property as their residence without interruption and because the conveyance through a straw altered the form but not the substance of the ownership.

The decision of the Court is generally consistent with its earlier cases and allows the purpose of the exemption (mitigating the financial hardships of elderly taxpayers) to be carried forward and, at the same time, gives elderly taxpayers a certain flexibility in their estate planning.

In Coroa v. Board of Assessors of Fall River, the taxpayer, the surviving joint tenant of certain real estate, conveyed the property to herself and her two children as joint tenants in April, 1962. In December of 1965, they conveyed the property to the taxpayer for life, with a remainder to the two children. The taxpayer was held entitled to the exemption for the tax assessed on January 1, 1966, notwithstanding the two conveyances during the preceding five years. In Coady v. Board of Assessors of Fall River, the facts were essentially the same, except that the conveyance creating a life estate from the taxpayer was made through a straw rather than directly, as was done in Coroa. The Court in Coady held the exemption was available to the taxpayer and that the conveyance through a straw did not interrupt the five-year continuous ownership requirement which clearly was otherwise present.

In the principal case, the Court had to distinguish the earlier case of Kirby v. Board of Assessors of Medford in which the owner of certain real estate, who otherwise qualified for the exemption, conveyed the real estate to a trustee, reserving the power to revoke and amend the trust. The tax was assessed against the trustee as record owner, and the question presented was whether the exemption was available, because the beneficial owner essentially had outright ownership of the property by virtue of his power to amend or revoke the trust. The Court in Kirby held that the exemption was available on those facts only to a person who was the record owner of real estate.

In all of these cases there runs a common thread of attempts by elderly persons to make various provisions for the management of their real estate, either by reserving life estates or creating trusts. In each case, the elderly person, for all practical purposes, was the owner of the real estate and had been the owner for the required five years. All that had been altered was the form of ownership. The purpose of the statute is satisfied if the exemption is made available whenever an elderly person can be considered to be the owner of the real property upon examination of the substance and not the form of the ownership. The exemption should be interpreted to permit flexibility in estate planning for elderly persons without destroying the exemption, as long

as, in substance, the elderly person remains the owner of the property. Following this policy, the principal case was correctly decided. The Kirby case, however, is inconsistent with the other cases for in Kirby the form of transaction was allowed to control the substance.

§16.4. State-owned property: Distributions to cities and towns in lieu of property taxes. Those Massachusetts cities and towns which have land owned and used by the Commonwealth for various state purposes receive distributions each year from the Commonwealth to compensate them to some extent for the real estate taxes which otherwise would be collected on account of such land. One of the elements in determining the amount of the annual reimbursement is the value of the lands used by the state in each city and town. For this purpose, the State Tax Commission is required each five years to determine the “fair cash value of all land” used for specified purposes. The meaning of the quoted clause was drawn into question in the case of Board of Assessors of Amherst v. State Tax Comm. In that case, the commission had found the value of the land in Amherst used by the University of Massachusetts on January 1, 1967, to be approximately $800,000. The Board of Assessors had assessed that land at nearly $10 million. The Appellate Tax Board, attempting to resolve the dispute between the commission and the Board of Assessors, found the fair cash value of the land to be approximately $1.3 million. The Board of Assessors appealed to the Supreme Judicial Court because of allegedly erroneous rulings of law by the Appellate Tax Board.

In substance, the Appellate Tax Board held that the statutory phrase “fair cash value” did not have its commonly accepted meaning of the highest price which a willing buyer would pay to a willing seller in an open market. Rather, the board, relying largely on obscure language in a 1910 report to the legislature, ruled that “fair cash value” for purposes of this statute meant the assessed value of the land. Secondly, the board held that “land” for purposes of this statute meant land in its unimproved condition, without consideration of improvements made to the land (other than buildings).

The Court reversed the decision of the Appellate Tax Board and held, quite correctly, that “fair cash value” in this statute has the meaning ordinarily given to it under the real property tax assessment statutes and is the equivalent of fair market value. The Court could find no clear indication in the cited legislative history that would require it to deviate from its statutory duty of defining statutory terms in accordance with the common and approved usage of the language unless inconsistent with the manifest intent of the legislature. The decision of the Court on this point was buttressed by its earlier decision in Bettigole v. Assessors of Springfield, which held that all real estate...
in the Commonwealth must be assessed at its full fair cash value. In that case, the Court struck down the practice of some assessors of applying different percentages of full value to different classes of real estate. The State Tax Commission was in effect contending in the principal case that the same valuation scheme used by assessors for the ordinary real estate tax should be used under the statute in question. The commission apparently feared that, if this statute required the determination of fair cash value as ordinarily construed, inconsistencies would arise in affected towns because other real estate might be valued on a different basis. The Bettigole case, however, undercut that argument, and the instant decision makes clear that consistent valuation practices must be employed.

The Court followed much the same line of reasoning in construing the word land. It found that for purposes of assessment requirements, land includes improvements made to it, other than buildings. It could perceive nothing to indicate an intent by the legislature that the word in this statute should have any different meaning. The Court found further support for its conclusion from the apparent legislative purpose of compensating municipalities as nearly as possible for the tax revenues lost because of the presence of nontaxable state-owned land.

§16.5. Sales and use taxes. The case of Supreme Council of the Royal Arcanum v. State Tax Commn., decided by the Court during the 1970 Survey year, raised several interesting questions relating to the sales and use tax. The case arose on a bill for declaratory relief brought by Royal Arcanum, a fraternal benefit society under G.L., c. 176, seeking a declaration that it was exempt from payment of sales or use taxes. Royal Arcanum placed reliance upon G.L., c. 176, §49, which provides that

Every society organized or licensed under this chapter is hereby declared to be a charity and benevolent institution, and all of its funds should be exempt from all and every state, county, district, municipal and school tax other than taxes on real estate and office equipment.

The Court held, first, that the Royal Arcanum did not bear the incidence of the sales tax on goods purchased by it and, therefore, there was no basis for an exemption; and, second, that there was no requisite showing of an "actual controversy" within the meaning of the declaratory judgment statute, thus making unnecessary a discussion of the merits of Royal Arcanum's claimed exemption from the use tax, the incidence of which concededly fell upon the plaintiff. The Court went on, however, to discuss the merits and concluded after an examination of the pertinent statutes that Royal Arcanum was subject

2 Purchases and rentals by Royal Arcanum of property otherwise subject to tax averaged $30,000 over three years. Record at 20.
3 G.L., c. 231A, §1.
to the use tax since the use tax statute4 did not include fraternal benefit societies among the list of persons exempt from the tax.

The Court's decision did not discuss whether the declaratory judgment procedure could be used to challenge the sales or use tax. Both the sales and the use tax statutes provide an abatement procedure to challenge excessive or illegal taxes, and both statutes state that the abatement procedure shall be the exclusive remedy available with respect to the tax.5 In First Agricultural Natl. Bank of Berkshire County v. State Tax Commn.,6 the commission demurred to a bill for declaratory relief with respect to the imposition of the sales tax on the ground that the sales tax statute provided the exclusive remedy by which the question of sales tax liability may be raised. The Court overruled the demurrer, not on the ground that the statute was not exclusive, but on the ground that what was being questioned was an administrative regulation promulgated under the statute. That case left open the question of whether, absent an applicable regulation, declaratory relief could be obtained as to a sales or use tax liability. If the provision that the abatement procedure is the exclusive remedy is to have any meaning, the Court should not allow it to be subverted by the use of the declaratory judgment statute. Except in extraordinary cases, the Court enforces the "exclusive and adequate remedy" under the property tax abatement provisions.7 Thus, the Court could have refused to deal with the merits of the case and held that declaratory relief was not available to question the sales and use tax statutes. It should be noted that the commission expressly agreed that the declaratory judgment procedure was a proper means of resolving the controversy.8

In First Agricultural, the Court held that the incidence of the sales tax was upon the vendor, and not the purchaser. The United States Supreme Court held, in reviewing this case in First Agricultural Natl. Bank of Berkshire County v. State Tax Commn.,9 that, insofar as the question of the legal incidence of the tax affected the immunity of a federal instrumentality, the legal incidence of the tax was upon the purchaser under the Massachusetts statute. Of course, in the instant case, there was no question of federal immunity. The Supreme Judicial Court decided that, in cases not involving a federal instrumentality, it would construe the sales tax incidence as falling upon the vendor and not the purchaser. There thus results the rather interesting situation of the United States Supreme Court saying the incidence of the tax is on the purchaser and the Supreme Judicial Court saying the incidence is

4 G.L., c. 64I.
5 See G.L., cc. 64H and 64I, respectively.
6 353 Mass. 172, 229 N.E.2d 245.
8 Record at 10; paragraph 10 of the commission's answer.
on the vendor. Neither Court apparently feels constrained to follow the other.

The decision of the United States Supreme Court is far more compelling on the question of who bears the legal incidence of the tax. A reading of the sales tax statutes directs one to the conclusion that the sales tax not only may be passed on to the purchaser (as the Supreme Judicial Court suggests) but shall be passed on to the purchaser (as the United States Supreme Court says). Certainly, as a practical matter, the tax is passed on to the purchaser. The erroneous interpretation of the statute made by the Supreme Judicial Court in the First Agricultural case has not only been repeated but compounded by the present case. It is hoped that, when the issue is next presented, the Supreme Judicial Court will reverse itself and bring its decision into conformity with that of the United States Supreme Court.

With respect to the merits of the exemption claimed by Royal Arcanum, one is struck by two inconsistent statutes. The statute quoted above relating to fraternal benefit societies exempts such societies from "all and every" state and municipal tax except taxes on real estate and office equipment. On the other hand, the sales and use tax statutes provide exemptions of their own, but none of the exemptions relates to sales to fraternal benefit societies. In resolving this inconsistency, the Court held that by expressly exempting sales to certain types of nonprofit organizations in the sales and use tax statutes, the legislature intended to impose the tax on sales to those organizations not enumerated. By this reasoning, the Court concluded that the use tax did apply to Royal Arcanum. It can be strongly argued that a contrary result should be reached in resolving this inconsistency. The express provision in Chapter 176, Section 49, exempting fraternal benefit societies from all taxes other than those two property taxes enumerated, could hardly be made more express. It is a general exemption applied without regard to the authority attempting to impose the tax and without regard to the nature of the tax. Its general and inclusive language indicates that it was intended to cover taxes already in existence as well as taxes which may be enacted in the future. On the other hand, the exemptions specified under the sales and use tax statutes are specific and detailed, encompassing 23 subsections and filling just over four pages of text in Massachusetts General Laws Annotated. In view of the nature of the legislative process, it is far from inconceivable that sales to certain purchasers, such as fraternal benefit societies, were either omitted by mistake or were never even considered when the exemptions were drafted. The legislature, in enacting the statute relating to fraternal benefit societies, spoke as clearly as it could with respect to tax exemptions for such societies. The Court should not have cast aside

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10 G.L., c. 176, §49.
11 See G.L., cc. 64H and 64I, respectively.
that exemption language except for subsequent statutory language clearly evidencing a legislative intent to amend or repeal by implication the earlier provision. Such a showing of clear legislative intent is markedly absent from the language of the exemptions in the sales and use tax statutes. It is significant that Royal Arcanum had been granted an exemption from the New York State sales and use tax on the basis of statutory language identical to the exemption statute relied on by Royal Arcanum.12

In conclusion, the Court should have held: (1) the declaratory judgment procedure did not lie to question the sales and use taxes in this case; (2) on the merits, the incidence of the sales tax was on the purchaser, not the vendor; and (3) Chapter 176 fraternal benefit societies are exempt from payment of sales and use taxes.

§16.6. Corporate excise tax: Exclusively interstate activity. In State Tax Commn. v. Walter E. Heller Co.,1 the Court was again faced with the question of how much activity a foreign corporation may engage in within the Commonwealth while preserving its freedom from the corporate franchise tax2 because it is engaged exclusively in interstate commerce. An excise tax on the privilege of doing business in a state may not be applied, consistently with the commerce clause, to a corporation engaged solely in interstate commerce, notwithstanding the fact that there is some activity in the taxing state incidental to the interstate activity.3 Where a corporation does both an interstate and an intrastate business, a state may levy an excise tax on the intrastate business, the tax being measured by the amount of both interstate and intrastate business, reasonably apportioned. This rule was followed in M. A. Delph Brokerage Co. of New England v. State Tax Commn.,4 in which the Court held that the activity shown there was only incidental to its interstate business and not sufficient in quantity or quality to subject it to the Massachusetts tax. In Heller, the same issue arose, this time in the context of a foreign commercial financing concern engaged in lending money from out-of-state offices to Massachusetts customers through factoring, secured commercial loans, and purchasing installment obligations. The taxpayer did have some activity in Massachusetts relating to supervising its Massachusetts accounts. The activity is detailed at some length in the record and briefs of the parties. It will suffice for present purposes to note that the Massachusetts activity in Heller was less in both quantity and quality than permitted in Delph. Given the Delph case, the decision in the principal case was hardly surprising. In a short rescript opinion, the Court affirmed the decision of the Appellate Tax Board which had granted abatements of the tax.

12 Record at 8.

2 G.L., c. 63, §39.
§16.7. Proportional taxation. In *Thompson v. Chelsea*, seventeen Boston taxpayers sought equitable relief under the “ten taxpayers statute” as well as declaratory relief with respect to the validity of a 1909 statute which provides in essence that Boston shall pay all the taxes for operating Suffolk County and that Chelsea, Winthrop and Revere shall not be taxed for county purposes. The bill alleged that the statute was in violation of several provisions of the Massachusetts Constitution and of the Fourteenth Amendment to the United States Constitution. The Supreme Judicial Court, affirming the sustaining of demurrers to the bill, held that the “very limited and somewhat indefinite allegations of fact ... relied on to show the invalidity of the 1909 statute” did not constitute a sufficient basis for declaratory relief, and that the “absence [from the bill] of any clear statement of facts showing a threatened immediate expenditure” precluded granting relief under the “ten taxpayers statute.”

In four and one-half pages of dictum, the Court discussed some of the substantive constitutional questions. It reviewed the development of Suffolk County beginning in 1821 with the yielding by Chelsea (and subsequently by the other two towns) of certain governmental powers with respect to the county in return for exemptions from taxes for county purposes. After reviewing this history, the Court concluded that the “arrangements” embodied in the 1821 and 1831 predecessors to the 1909 statute “had many aspects of a legislative contract, supported by substantial consideration and accepted by the voters of each community.” At this point in the opinion, there is a cryptic footnote which cites cases “concerning the inability of persons who have voluntarily accepted a contract to assail its constitutionality.” Whether the Court intended by this footnote to suggest an estoppel defense based on century-old political “arrangements” is unclear.

Alternatively, the Court said that it was unable to find that the 1909 legislation and its predecessors did not rest on a reasonable legislative determination or that they established “an arbitrary or capricious allocation of the burden of county costs.”

No facts alleged are sufficient to present any substantial question (a) that the Legislature, in enacting the exemption in the 1909 statute, did not reasonably take into account all the numerous considerations (property, political, governmental, and economic) affecting the public interest, or (b) that it then exceeded its
constitutional powers, or (c) that, by lapse of time and change, the statutory arrangements have become unconstitutional.  

A comprehensive analysis of the constitutional issues involved in the case is beyond the scope of this article. For present purposes, it is sufficient to observe that the issues are not susceptible of satisfactory resolution without a considerably more thorough examination than was given by the Supreme Judicial Court. For example, the Court cites only two United States Supreme Court cases, one of which deals with the equality in population of voting districts for local election purposes;  

the other is a 1946 case relating to a constitutional challenge to alleged discriminatory property tax assessment practices in which no decision on the federal constitutional issue was reached. Citation of these two cases hardly suggests that the Court made an in-depth analysis of the questions under the Fourteenth Amendment. It is unfortunate that the Court chose to deal so superficially with the real and difficult issues raised by the present case.

B. LEGISLATION

§16.8. Tort immunity. The collector of taxes of a city or town which has taken land under G.L., c. 60, §53, because of real estate tax delinquencies may, while in possession thereof and prior to redemption, collect rent and other income from the land and, after paying expenses of caring for and managing the land, apply the net proceeds to reduce the outstanding taxes. The city or town shall not be liable to the owner for failure to collect rent or other income or to any person for injuries or damages caused by possession of the land. The latter provision granting tort immunity to the city or town changes the rule set forth in Kurtigian v. Worcester in which the city of Worcester was held liable in tort for personal injury caused by a private nuisance on land taken by the city for tax delinquencies.

§16.9. Assessment of true value: Requisite information. Assessors may require owners or lessees of real estate to make, under oath, written returns containing information needed to assess the true value of the property. They may also require testimony under oath relative to such returns or abatement applications.

§16.10. Charitable corporations and trusts. As a condition to being exempt from taxes on real and personal property, both charitable corporations and charitable trusts, as defined, must deliver to the assessors the list and statement required by G.L., c. 59, §29, and a certificate

9 Ibid.


§16.13. Excessive or illegal tax: Abatement. The statute authorizing the State Tax Commission to grant abatements in its discretion for taxes illegally assessed or levied or found to be excessive or unwarranted has been repealed. Taxpayers now must follow the regular abatement procedure to recover such taxes.


§16.11. 1 Acts of 1969, c. 561, appearing as G.L., c. 65, §33A.

2 G.L., c. 65, §1.