Chapter 11: State and Local Taxation

Edward F. Hines Jr.
CHAPTER 11

State and Local Taxation

EDWARD F. HINES, JR.*

§11.1. Introduction. There were an unusually large number of developments in the state and local tax area during the Survey year. There were twenty-three decisions of the Supreme Judicial Court, eleven reported decisions of the Appellate Tax Board, three decisions of the Appeals Court and, finally, a decision of the First Circuit. In addition, there were a number of important administrative rulings and releases. Only on the legislative front was the Survey year a sparse one. Although a number of tax bills did pass during the Survey year, most of the important pending tax legislation was still bottled up in committee as the Survey year drew to a close.¹

A. REAL AND PERSONAL PROPERTY TAXES

§11.2. Equalized Valuations. Section 9 of chapter 58 of the General Laws provides that on or before April first of each even numbered year, the State Tax Commission (the "Commission") must "determine and establish for each city and town a proposed equalized valuation which shall be the fair cash value of all property in such city or town subject to local taxation as of January first in such year." The equalized valuations so established are the basis for apportioning school aid, and highway and lottery funds among the 351 cities and towns of the Commonwealth¹ and also the basis for apportioning county and other taxes.²

Cities or towns dissatisfied with the equalized valuations determined

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¹ In addition to the Governor’s substantive tax proposals, H. 6450 (1975), there were a number of other important tax bills pending in the Legislature when the Survey year drew to a close; among them are: (1) H. 6429 (1975), a bill designed to repeal the existing inheritance tax system and replace it with a state estate tax patterned after the federal estate tax, and (2) H. 339 (1975), a State Tax Commission proposal that would repeal the administrative provisions of all existing state tax chapters (primarily G.L. cc. 60A-65 and enact in their place a new chapter (proposed c. 62A) containing uniform provisions for the administration of all state taxes.

by the Commission may appeal to the Appellate Tax Board on or before June first of the year the valuations are proposed. §11.2 Such appeals must be decided by the Appellate Tax Board no later than the following December first; if the Board fails to act on an appeal within that time, the appeal is deemed denied. §11.2 The Commission must then prepare and submit to the Legislature no later than the following December thirty-first a final equalization and apportionment report based on "the equalized valuations determined under sections nine and ten A, as modified by the appellate tax board under section ten B."3

On April 5, 1974, pursuant to section 9 of chapter 58 of the General Laws, the Commission announced its proposed equalized valuations for the 351 cities and towns for 1974. With respect to the City of Boston, the Commission proposed to determine that the fair cash value of all the property in the City subject to local taxation as of January 1, 1974 was $4,630,400,000. The City, claiming that the value of the property did not exceed $1,784,200,000, its aggregate assessed value, appealed to the Appellate Tax Board under section 10B of chapter 58 of the General Laws. After a hearing at which both sides introduced evidence, the Appellate Tax Board, in City of Boston v. State Tax Commission,6 found that the fair cash value of the City's property on January 1, 1974 was $2,600,000,000.7

At the hearing, witnesses for the City testified that Boston valued all of its commercial and industrial real estate and most of its residential real estate using the capitalization of income approach. The City's witnesses testified that the comparable sales approach was not used to any appreciable extent.8

The Commission's proposed valuation was based largely on two sources. The first was a prospectus, prepared by the City in connection with a bond issue, which represented that the value of the property in the City was $5,000,000,000.9 The second was a study of the ratio of assessed value to sales price in the case of about 6000 sales occurring in the City during the years 1972 to 1973. On the basis of this study, the Commission concluded that residential property in the City was assessed on the average at 24 percent, that commercial property in

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3 Id. § 10B.
4 Id. The statute provides that "the decision of the board shall be final."
5 Id. § 10C.
7 Id. at 27.
8 Id. at 6-7.
9 Counsel for the underwriters of the bonds would probably be interested in the testimony of the Collector/Treasurer of the City with regard to this representation. According to the Board, he testified that "he agreed with that value only insofar as it was related to the bond issue; it was, he said, a case of the City putting its best possible foot forward." City of Boston v. State Tax Comm'n, No. 73037, at 8 (App. Tax Bd. Jan. 31, 1975).
the City was assessed on the average at 35 percent, and that industrial
property in the City was assessed on the average at 50 percent. 10

The Board found the Commission’s evidence unpersuasive. It
dismissed the valuation contained in the prospectus as based on studies
“not intended . . . for the purpose of estimating the ‘market value’ of
the City’s properties.” 11 Moreover, it discounted the value of the
sales/assessment study because it concluded that the sales included in
the study were not adequately screened to insure that they reflected
only arms’-length prices. 12 In addition, the Board said that insufficient
commercial and industrial sales were included in the study. The
Board stated that, where the number of commercial and industrial
sales are low, but the percentage of such property in the City is high,
other valuation techniques, including the capitalization of income ap-
proach, should be used in appraising commercial and industrial prop-
erty.

The decision of the Board in the Boston case was greeted with out-
rage by many of the other cities and towns, 13 and the Commission was
urged to appeal. When it declined, several of the other cities and
towns filed a complaint in the single justice session of the Supreme
Judicial Court seeking to have the Commission recompute, in light of
the Board’s decision in the Boston case, 14 the equalized valuations of
those cities and towns that had not appealed their proposed valuations
to the Board. In City of Malden v. Appellate Tax Board, 15 the Supreme
Judicial Court held that, under the equalization statutes, the Commis-
sion had neither the duty nor the power to revise the equalized valua-

10 Id. at 20. The Commission’s valuation was based on these ratios and information as
to the total property included in each category (residential—32 percent; commercial
—56 percent; industrial—12 percent).
11 Id. at 23. Although the Board devoted most of its lengthy (39 pages) report to a
detailed, and at times rather ad hominem, criticism of the evidence introduced by the
Commission, it offered no explanation for its own $2,600,000,000 figure. The Board
did suggest, id. at 7, that the City gave too little weight to the comparable sales ap-
proach in arriving at the assessed value of its real estate. This may account for the in-
crease over the figure proposed by the City.
12 Annexation E of the Board’s opinion contains a list of twenty-four factors that the
Board indicated should be taken into consideration in screening sales for a
sales/assessment study.
13 Among other things, the decision led to the introduction of a bill, S. 1446 (1975),
to abolish the Appellate Tax Board. The bill, introduced and supported by the Senate
Chairman of the Joint Committee on Taxation, was anything but frivolous and the
hearing on the bill on March 4, 1975 was lively and well-attended. No action had been
taken on the bill by the close of the Survey year.
14 The sales/assessment study approach used by the Commission in determining
Boston’s proposed equalized valuation presumably was also used in developing the
proposed valuations of other cities and towns. Presumably, no more screening of sales
was done in the other cases than was done in the Boston case. Accordingly, there was
much to be said for the argument that the nonappealing cities and towns would proba-
ble have had their valuations reduced by the Board had they appealed.
tions of other municipalities in light of the Board's decision in the Boston case. The Court read section 10C of chapter 58 of the General Laws as requiring the Commission to prepare its final equalization and apportionment using the equalized valuations originally proposed, except to the extent modified by the Board in an appeal under section 10B. With some logic, the Court observed that introduction of a discretionary element at this stage would make nonsense of the statutory timetable, particularly the December 31 deadline for submitting a final report to the Legislature.

In light of the Court's decision in the Malden case, its decision in City of Fall River v. State Tax Commission is particularly interesting. This case was an appeal from a decision of the Appellate Tax Board allowing a plea in bar of the Commission. The City had filed an appeal with the Board under section 10B of chapter 58 of the General Laws, challenging the equalized valuation proposed for it by the Commission. The Commission filed its answer and then, two weeks later, filed a plea in bar. The City took the position that the plea was not properly before the Board, arguing that under the rules of the Board a motion for leave to file the plea was necessary since the Commission had already filed its answer. The Court affirmed the Board's decision, holding that no such formality was necessary where the claim was lack of subject matter jurisdiction.

The interesting aspect of the Fall River case is that the Court did review the Board's decision, even though section 10B of chapter 58 of the General Laws provides that decisions of the Board in equalized valuation appeals are "final." There is some authority for the proposition that the term "final" in this context does not preclude review of the Board's decision by the Supreme Judicial Court. However, as the Court itself observed in the Malden case, if the Board's decision in

16 Id. at 1026, 326 N.E.2d at 345. In addition, the Supreme Judicial Court held that the equalization statutes do not violate the constitutional guarantees of due process and equal protection. Id. at 1027-30, 326 N.E.2d at 345-46.
17 Id. at 1026, 326 N.E.2d at 345.
18 Id.
20 Id., 326 N.E.2d at 904.
21 Id. at 1453, 326 N.E.2d at 904.
22 Id. at 1454, 326 N.E.2d at 904. In addition, the Court held that Rule 37 of the Board, which reserves the right to waive formalities, permitted the Board to overrule the objection to the belated plea in bar. Id. at 1454-55, 326 N.E.2d at 904-05. As to pleas in bar before the Appellate Tax Board, see Assessors of New Braintree v. Pioneer Valley Academy, Inc., 355 Mass. 610, 618-19, 246 N.E.2d 792, 797 (1969); Singer Sewing Machine Co. v. Assessors of Boston, 341 Mass. 513, 515, 170 N.E.2d 687, 688 (1960).
equalization appeals is not final in an absolute sense, it is difficult to see how the Commission can be expected to meet the December 31 deadline for submitting its final report to the Legislature. 25

Another Survey year case, Town of Brookline v. County Commissioners. 26 involved a bill for declaratory relief challenging the constitutionality of the manner in which Norfolk County taxes were apportioned and assessed for the eighteen-month fiscal year ending June 30, 1974. The County Commissioners had assessed and apportioned taxes among the various cities and towns of the county for this period based on the valuations established in section 1 of chapter 660 of the Acts of 1963. Since section 1 of chapter 660 reflected the latest state valuation, and since section 31 of chapter 35 of the General Laws, as then in effect, required apportionment in accord with the “latest state valuation,” the Commissioners conceded that they had acted in accordance with the governing statute. The plaintiffs argued, however, that apportionment based on the values established by section 1 of chapter 660 of the Acts of 1963 violated the rule of proportional taxation established in article IV of section I of chapter I of part II of the Massachusetts Constitution. 27

The Court stated that the strict rule of proportionality, applicable in the case of individual taxpayers, does not apply to decisions of the Legislature in allocating public burdens among the cities and towns. 28 Nonetheless, the Court reached the result urged by the plaintiffs on a different basis. The Court noted that the final paragraph of the constitutional provision 29 requires a revaluation of all property in the Commonwealth at least every ten years. Accordingly, the Court held: “In light of this constitutional imperative, it is evident that a distribution of county taxes based on valuations more than ten years out of date, when the distribution is based on valuation alone, is unconstitutional...” 30

Section 31 of chapter 35 of the General Laws was amended by section 4 of chapter 492 of the Acts of 1974, effective for the fiscal year ending June 30, 1975, to require apportionment of county taxes in

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25 It will be interesting to observe how the cities and towns respond when the equalized valuations for 1976 are proposed. In the light of the 1974 experience, it may be assumed that most communities will appeal their proposed valuations to the Board. If the Fall River case does mean that decisions of the Board in equalization cases are appealable, some cities and towns will undoubtedly exercise that right. The statutory timetable, and in particular the December 31 deadline for filing a final report with the Legislature, will then be put to the test.
27 MASS. CONST. pt. II, c. I, § I, art. II.
28 Id. at 955, 327 N.E.2d at 694, citing Thomson v. City of Chelsea, 358 Mass. 1, 260 N.E.2d 699 (1970). In the Chelsea case, the Supreme Judicial Court held that a 1909 statute exempting Chelsea, Revere, and Winthrop from liability for county taxes was constitutional as a reasonable compensation for Boston’s exclusive control of county affairs. 358 Mass. at 6-9, 260 N.E.2d at 702-04.
29 MASS. CONST. pt. II, c. I, § I, art. II.
acord with the most recent equalization report of the State Tax Commission under section 10C of chapter 58 of the General Laws. The plaintiffs urged that the County Commissioner be directed to use the most recent equalization report in lieu of the valuations established by section 1 of chapter 660 of the Acts of 1963. The Court held, however, that it was without power to impose such a requirement and left the remedy to be worked out by the parties.31

§11.3. Disproportionate Assessments. Certainly the most publicized development in the local tax area during the Survey year was the Supreme Judicial Court's decision in Town of Sudbury v. Commissioner of Corporations & Taxation.1 The case arose when the Town of Sudbury sought a declaratory judgment2 as to the role of the Commissioner of Corporations & Taxation (the "Commissioner") and the State Tax Commission (the "Commission") in enforcing the duty of local assessors to assess property at its full fair cash value. Since the decision was analyzed at some length in the 1974 Survey,3 only the highlights will be repeated here.

Initially, the Supreme Judicial Court noted that the Commissioner's powers over local assessors were not merely advisory or educational, but included powers of direction. Thus, the Court stated that section 1 of chapter 58 of the General Laws grants the Commissioner power to "require" the assessors to take any action necessary "to produce uniformity throughout the commonwealth in valuation and assessments."4 Moreover, the same section provides that the Commissioner "may cause an assessor to be prosecuted . . . for any violation of law relative to assessment of taxes for which a penalty is imposed."5 Furthermore, section 4 of chapter 58 permits the Commissioner to "direct" the assessors to adopt certain methods of recordkeeping and of information-gathering,6 and sections 6 and 7 of chapter 58 allows the Commissioner to "require" certain reports and information from the assessors.7 Finally, section 27 of chapter 41 of the General Laws allows the Commissioner to remove and replace the assessors if they fail to perform their duties.8 In light of these statutory provisions, the Court held that it was "incumbent" on the Commissioner to direct the

31 Id. at 959, 327 N.E.2d at 696.

3 Injunctive relief was also sought, but declined as inappropriate in light of the expressed willingness of both the State Tax Commission and the Commissioner of Corporations and Taxation to carry out whatever duties were defined for them by the Court. Id. at 2422-23, 321 N.E.2d at 648.
5 Glazer & Bruskin, State and Local Taxation, 1974 ANN. SURV. MASS. LAW § 15.9, at 331-35.
6 Id. at 2415, 321 N.E.2d at 646, quoting G.L. c. 58, § 1.
7 Id.
assessors to comply with their statutory and constitutional obligations regarding 100 percent valuation.9

Turning to the Commission, the Court held that it too was under an obligation to require 100 percent valuation from the local assessors in connection with its equalized valuation functions.10 Section 10 of chapter 58 of the General Laws provides that in connection with preparing the equalized valuations, the Commission may “require” from state, city and town officers such returns and statements relative to the amount and value of taxable property in the several cities and towns “as it deems necessary.”11 If a city or town fails to furnish the information requested by the Commission, it loses its right of appeal to the Appellate Tax Board in the event it is dissatisfied with the equalized valuation proposed.12 The Court suggested that, if the Commission deemed “necessary” accurate statements of fair cash value, it would have the power under these provisions to “require” such statements from local officials.13 Moreover, the Court added that, to the extent such statements were necessary in order to prepare equalized valuations, it was the duty of the Commission to require them.14

The Supreme Judicial Court has consistently held, since its landmark 1961 decision, Bettigole v. Assessors of Springfield,15 that local assessors must tax property at its full and fair cash value.16 The Sudbury case provides for the first time an enforcement mechanism to implement the Court’s holding. Although the effects of the Sudbury case are not yet clear, and may not be for several years to come, the decision finally offers at least some hope of a solution to what is certainly one of the most vexing problems faced by practitioners in the local tax field: the problem of proving disproportionate assessment on an individual taxpayer basis. In many cases, the cost of establishing disproportionate assessment on an individual basis is far out of proportion

9 Id. at 2417, 321 N.E.2d at 647.
10 Id. at 2420-21, 321 N.E.2d at 648. G.L. c. 58, § 9, provides that on or before April 1 of each even-numbered year, the Commission must determine for each city or town a proposed equalized valuation which represents the fair cash value of all the taxable property of the city or town as of the preceding January first. Equalized valuations so established are used as the basis for apportioning school aid and highway and lottery funds and also as the basis for apportioning county and other taxes. See § 11.2 supra.
13 Id. at 2420-21, 321 N.E.2d at 648.
14 Id. at 2421, 321 N.E.2d at 648. The plaintiff’s bill in equity was originally filed in the county court. A single justice referred the case to a master, and later confirmed the master’s report and reported the case to the full court without decision. The master’s findings showed that fractional valuation made the equalization task “much more difficult, if not impossible.” Id. at 2419, 321 N.E.2d at 647.
to the amount at stake. Under these circumstances, unless it is possible to enter into a stipulation with the assessors concerning the assessment percentage actually used in the community,\(^{17}\) the taxpayer is without any practical remedy. Moreover, even where the amount at stake is sufficiently large to justify the effort, there is considerable uncertainty as to the quantum of proof necessary to establish disproportionate assessment.

In 1965, the Supreme Judicial Court in *Shoppers' World, Inc. v. Assessors of Framingham*\(^ {18}\) held that disproportionate assessment issues were properly raised in abatement proceedings.\(^ {19}\) However, *Shoppers' World* offered little guidance as to the type or amount of proof necessary to establish disproportionate assessment.\(^ {20}\) It was not until 1971, in *First National Stores, Inc. v. Assessors of Somerville*,\(^ {21}\) that the Supreme Judicial Court explained what, in its view, would constitute adequate proof of disproportionate assessment.

In *First National Stores*, the taxpayer contended that in 1964, 1965, and 1966 its property was assessed at from 75 to 125 percent of fair cash value while most of the rest of the real estate in the city was assessed at below 50 percent of fair cash value.\(^ {22}\) To support this contention, the taxpayer introduced evidence of the sales price of most of the real estate sold in Somerville during the years 1960 through 1966. A certified copy of each deed of Somerville real estate recorded in those years was introduced. The number of sales involved for the years 1960 through 1962 was 1016 and the number of sales involved for the years 1963 through 1965 was 852.\(^ {23}\)

In addition to certified copies of the deeds, the taxpayer introduced a tabulation of the sales, giving for each sale, deed, and parcel the following information: (a) the month and year of sale; (b) the street location; (c) the record book and page; (d) the value of affixed revenue stamps; (e) the sales price thereby indicated; (f) the assessment as of the January 1 next following; (g) later change, if any, in the assessment; and (h) the ratio of assessed value to sales price.\(^ {24}\) Based on these tabulations, the taxpayer was able to establish the following summaries:\(^ {25}\)

\(^{17}\) See, e.g., Jordan Marsh Co. v. Assessors of Quincy, 1975 Mass. Adv. Sh. 2278, 331 N.E.2d 61, in which the parties stipulated that property in Quincy was assessed at 40 percent of fair cash value. See also Assessors of Lynn v. Shop-Lease Co., 1974 Mass. Adv. Sh. 107, 307 N.E.2d 310, 311. In the *Jordan Marsh* case, the Court indicated in a footnote that its acceptance of the stipulation was not intended to weaken its holding in the *Sudbury* case. See 1975 Mass. Adv. Sh. at 2278 n.1, 331 N.E.2d at 61 n.1.


\(^{19}\) Id. at 377, 203 N.E.2d at 819.

\(^{20}\) See id. at 377-78, 203 N.E.2d at 820.

\(^{21}\) 358 Mass. 554, 265 N.E.2d 848 (1971).

\(^{22}\) Id. at 555, 265 N.E.2d at 849.

\(^{23}\) Id. at 555-59 & n.2, 265 N.E.2d at 849-50 & n.2.

\(^{24}\) Id. at 555, 265 N.E.2d at 849-50.

\(^{25}\) Id. at 556, 265 N.E.2d at 850.
The Court held that, as a matter of law, this evidence was sufficient to support an inference of disproportionate assessment, commenting as follows:

The evidence was in various respects somewhat disorderly and vague. Stores, however, did show that most real estate sale prices in Somerville during the years immediately preceding the three assessment years (1964-1966) had far exceeded the assessments of the same properties as of the next succeeding January 1. Actual sales are, of course, very strong evidence of fair market value, for they represent what a buyer has been willing to pay to a seller for a particular property . . . . When one considers 852 sales in a city over a three-year period there is basis for believing that these, on the average, reflect a market based on arms length negotiations. Although it is unlikely that any large part of all the properties in

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of Sales in Prior Year</th>
<th>Total Sales Value</th>
<th>Total Assessed Value</th>
<th>Assessment-Sales Price Ratio</th>
</tr>
</thead>
<tbody>
<tr>
<td>1964</td>
<td>318</td>
<td>$5,500,000</td>
<td>$2,238,800</td>
<td>40.7%</td>
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<tr>
<td>1965</td>
<td>269</td>
<td>4,961,100</td>
<td>1,922,700</td>
<td>38.8%</td>
</tr>
<tr>
<td>1966</td>
<td>265</td>
<td>5,215,550</td>
<td>2,113,000</td>
<td>40.5%</td>
</tr>
</tbody>
</table>

TOTAL 852 $15,676,650 $6,274,500 40.0%

<table>
<thead>
<tr>
<th>Assessment-Sales Price Ratio</th>
<th>Parcels of Property Having Column (1) Assessment-Sales Price Ratio</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1)</td>
<td>(2)</td>
</tr>
<tr>
<td>0%—19%</td>
<td>1964</td>
</tr>
<tr>
<td>20%—29%</td>
<td>32</td>
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<tr>
<td>30%—39%</td>
<td>135</td>
</tr>
<tr>
<td>40%—49%</td>
<td>32</td>
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<tr>
<td>50%—59%</td>
<td>20</td>
</tr>
<tr>
<td>60%—or over</td>
<td>35</td>
</tr>
</tbody>
</table>
§11.3

STATE AND LOCAL TAXATION

a city, or particular district of a city, will be sold in any three-year period, the volume of sales here considered represents a substantial sampling, particularly if widely distributed as these sales appear to have been. Most sales listed were at prices strongly suggesting that residential properties had been sold. Comparison of the aggregate sales prices with the aggregate tax assessments of those properties in the year following the sale [see Table A, supra], gives strong support to an inference that the substantially consistent aggregate assessment-aggregate sales price ratio reflects general assessment policy in the city. Particularly is this so ... where indications concerning certain prior years are generally comparable to the figures for the most pertinent years. It is hard to imagine any other method of testing assessment policy likely to be as informative.26

The First National Stores case involved the years 1964 through 1966 and the taxpayer introduced evidence of the ratio of assessed value to sales price of most of the real estate sold in Somerville during the years 1960 through 1965. The collection and compilation of this data clearly was an expensive and time-consuming task. Moreover, to conduct such a study in a city such as Boston would be even more difficult because of the larger volume of sales occurring each year.27 Yet, the Court's opinion in the First National Stores case gives no indication as to whether less complete data would have been sufficient.

During the Survey year, two disproportionate assessment cases did reach the Supreme Judicial Court. Unfortunately, both were decided on procedural grounds and thus neither sheds any additional light on the quantum of proof necessary to show disproportionate assessment. In Coomey v. Assessors of Sandwich,28 the taxpayers had introduced at the Appellate Tax Board hearing an exhibit consisting of a list of sales and assessments purporting to show that the assessors had discriminated against their property.29 In addition, the taxpayers had introduced evidence to show that their property was overassessed in relation to four other specific properties in the town.30 The Board held for the town, finding that the four specific properties were not comparable. The Board also declined to consider the list of sales on the grounds that the taxpayers failed to offer evidence "as to the types of properties involved, whether personal property was part of the sale or whether they in any way were comparable to the subject property."31 On appeal, the taxpayers urged that the Board erred in deciding that

26 Id. at 560-61 & n.7, 265 N.E.2d at 852-53 & n.7.
27 For example, instruments recorded at the Suffolk County Registry of Deeds from July 1, 1972 to June 30, 1973 fill about 95 complete books, each with over 700 pages.
29 Id. at 1688, 329 N.E.2d at 120.
31 Id. at 3.
they had not proved their case. Nonetheless, the Court affirmed, holding that, in the absence of a stenographic transcript of the pro-
ceedings before the Board, the Court was foreclosed from considering whether, as a matter of law, the evidence before the Board warranted its findings.\footnote{32}

The second case, \textit{Assessors of Kingston v. Sgarzi},\footnote{33} was an appeal by the assessors from a decision of the Appellate Tax Board reducing the assessed value of the taxpayers' real estate from $6,000 to $1,800. The assessors urged that no decision for the taxpayers was permissible in light of exhibits introduced at the hearing tending to show that the taxpayers had purchased the property for a price more than twice the original assessed value.\footnote{34} Since there was no statement of agreed facts, report by the Board, or transcript of the proceedings, the Court first considered the question whether the assessors' contentions were reviewable. The Court concluded that the issue raised on appeal was fundamentally different from that involved in the \textit{Coomey case}\textemdash i.e., not whether the findings of the Board were warranted in light of all the evidence, but whether the findings of the Board were permissible as a matter of law in light of certain specific exhibits.\footnote{35} Turning to the assessors' contentions, the Court found them without merit. The taxpayers' petition had alleged disproportionate assessment and the Court held that, on the meager record before it, it was compelled to assume that the taxpayer had introduced sufficient evidence to justify a finding in accord with the allegation.\footnote{36}

\textbf{§11.4. Real Estate Tax: Methods of Valuation.} The decision of the Supreme Judicial Court in \textit{Town of Sudbury v. Commissioner of Corporations \& Taxation}\footnote{1} has generated much discussion concerning the propriety and relative merits of different methods of valuation. The City of Boston, with its heavy concentration of industrial and commercial property, has been a strong supporter of the capitalization of income approach. The State Tax Commission, on the other hand, has seemed to favor the comparable sales approach.

Two decisions of the Supreme Judicial Court during the \textit{Survey} year are relevant in connection with this ongoing discussion. In \textit{Jordan Marsh Co. v. Assessors of Quincy},\footnote{2} the Court affirmed a decision of the Appellate Tax Board determining the value of the taxpayer's property primarily on the basis of its original cost.\footnote{3} The Court noted that

\footnotesize{\textsuperscript{32} 1975 Mass. Adv. Sh. at 1689, 329 N.E.2d at 120.  
\textsuperscript{34} Id. at 1693, 329 N.E.2d at 123.  
\textsuperscript{35} Id. at 1693-94, 329 N.E.2d at 123.  
\textsuperscript{36} Id. at 1696, 329 N.E.2d at 124.}
since the property was new, depreciation was not a significant factor.\(^\text{4}\) In *Assessors of Weymouth v. Tammy Brook Co.*,\(^\text{5}\) the Board relied on the capitalization of income approach to determine the value of a number of two-story apartment buildings, the rentals from which were subject to regulation by the U.S. Department of Housing and Urban Development.\(^\text{6}\) The Court affirmed the Board’s decision, noting that the capitalization of income approach was “particularly appropriate in light of the Federal restrictions on the income which may be realized from the project.”\(^\text{7}\)

§11.5. Abatement Applications: Time for Filing. Section 59 of chapter 59 of the General Laws provides that if a local real estate tax bill is first sent out after September first of a year, the person assessed may apply for an abatement on or before the thirtieth day after the date on which the bill is first sent out. In *Canron, Inc. v. Assessors of Everett*,\(^\text{1}\) the Supreme Judicial Court held that the same time requirements apply to persons other than the person assessed, even though such persons must pay the tax before they apply for an abatement.\(^\text{2}\) The Court also held that the tax bill involved in the case was effective to begin the running of the thirty-day period even though it was not mailed in accordance with the statutory requirements.\(^\text{3}\) The Court held that the taxpayer was not substantially prejudiced by the collector’s failure to comply with the technical terms of the statute.\(^\text{4}\)

Although not startling in itself, the Court’s decision has some interesting implications in connection with the recent change-over of cities and towns from a December 31 to a June 30 fiscal year.\(^\text{5}\) In connection with the change-over, a “one-shot” six-month tax bill was issued for the first six months of 1974 and section 57 of chapter 59 of the General Laws was amended to provide that regular tax bills issued

\(^{4}\) *Id.*  
\(^{6}\) *Id.*, 331 N.E.2d at 532.  
\(^{7}\) *Id.*

\(^{2}\) *Id.* at 86, 322 N.E.2d at 85.  
\(^{3}\) *Id.* at 89, 322 N.E.2d at 86.  
\(^{4}\) *Id.* G.L. c. 60, § 3, directs the collector to “send notice to each person assessed, resident or non-resident, of the amount of his tax; if mailed, it shall be postpaid and directed to the town where the assessed person resided on January first of the year in which the tax was assessed.” Early decisions of the Supreme Judicial Court indicated that tax bills not sent in accordance with the statute were ineffective, Hunt v. Holston, 185 Mass. 137, 138-39, 70 N.E. 96, 97 (1904), or a “nullity,” Bartlett v. Tufts, 241 Mass. 96, 98, 134 N.E. 630, 631 (1922). More recent decisions have held that minor irregularities in a tax bill do not render it ineffective if the taxpayer’s rights are not prejudiced as a result of the errors. Trustees of the Hawes Fund in Boston v. City of Boston, 346 Mass. 26, 27, 190 N.E.2d 118, 120 (1963); McManus v. Boston, 320 Mass. 585, 70 N.E.2d 819, 820 (1947).  
in 1974 and in subsequent years will be payable in two equal install­ments, one due in November of the year of assessment and the other due the following May. Despite this change, however, taxes are still ordinarily assessed to the person who was the record owner of the land on January first of the year of assessment. Thus, if a taxpayer buys land after January first of a given year, the tax bill for the year (payable one-half in November of that year and one-half in the following May) will ordinarily be issued in the name of the preceding owner. As a person other than the "person assessed," the new owner will have to pay "the tax" before he is eligible to apply for an abatement.

In light of Canron, it seems clear that the new owner will be sub­ject to the same time limits as the person assessed. Thus, he must file the abatement application by October first of the year of the bill or, if the bill was first sent out after September first, within thirty days of its mailing. Accordingly, unless the words "the tax" in the third sentence of section 59 of chapter 59 of the General Laws are construed to mean only the first installment of the tax—a result which seems somewhat unlikely—this means that the new owner will have to pay both installments of the tax by October 1, or by the thirtieth day after the bill was mailed, whichever is later, in order to be in a position to apply for an abatement.

No doubt this trap for the unwary, if it is one, is an unintentional by-product of the shift from annual to semi-annual property tax bills. However, this is likely to be of little solace to those affected. The problem may be particularly acute for new homeowners. Typically, new homeowners are short of cash and thus raising the funds necessary to prepay the second installment of the tax may be particularly burdensome. Moreover, many communities make it a practice to reassess property when it changes hands. Thus, new homeowners are perhaps more likely to want to apply for an abatement than the average taxpayer. A legislative solution seems clearly called for.

§11.6. Exemption for Property of Another Municipality. In Tax Collector of North Reading v. Town of Reading, the Supreme Judicial

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7 See G.L. c. 59, § 11. The taxes are also a lien on the land from January 1 of the year of assessment. G.L. c. 60, § 37. This has some surprising results in the case of taxable property transferred to an exempt charity after the first of the year. Under these circumstances, the charity's exemption may not be available for up to 18 months. For example, if taxable property is transferred to an exempt charity on January 2 of a particular year, a regular bill will be issued the following fall in the name of the preceding owner, payable one-half on the first of November and one-half on the following May. The parties should be aware of this and agree between themselves as to who will pay the tax.
Court reaffirmed the long-established principle that property of one municipality located within another municipality is exempt from local tax so long as it is actually devoted to a public use. The case arose when the Town of North Reading sought to recover from the Town of Reading unpaid personal property taxes assessed against personal property of the Reading Municipal Light Department located in North Reading and used to supply electricity to customers there.

In 1969, in *Gas & Electric Commissioners v. Assessors of Lakeville*, the Supreme Judicial Court, on similar facts, held that personal property of the Town of Middleborough, which was located and used to supply electricity to customers in the adjoining town of Lakeville, was exempt from tax by the latter town. North Reading sought to distinguish the Middleborough case, noting that the statute authorizing Middleborough to supply electricity to customers outside its boundaries contained language supporting the exemption whereas the statute in Reading's case did not. The Court, however, declined to read the Middleborough case as narrowly based on the particular wording of the statute there involved. Instead, the Court held that the case was based on general principles of "propriety, justice and expediency" and on the long-established rule that, absent clear statutory authorization to tax, property of a municipality is exempt from local tax so long as devoted to a public use. Reviewing the relevant statutes, the Court concluded that there was no clear authorization to impose the tax.

§11.7. Charitable Exemption: Use of Property on January 1. Under section 5 of chapter 59 of the General Laws, real estate owned by a "charitable organization," as defined therein, is exempt from local property tax if it is occupied by the organization or its officers for the purposes for which the organization was organized or by another charitable organization or organizations or its or their officers for the purposes of such other charitable organization or organizations. In *Assessors of Hamilton v. Iron Rail Fund of Girls Clubs of America, Inc.*, the issue was whether certain real estate was occupied on January 1, 1972 for the purposes for which the taxpayer was organized.

The taxpayer, Iron Rail Fund of Girls Clubs of America, Inc. ("Iron Rail"), conceded a "charitable organization" within the meaning of section 5 of chapter 59, was organized in 1954 under chapter 180 of...
the General Laws as a subsidiary of Girls Clubs of America, Inc. ("Girls Clubs"). The purpose of Iron Rail was to operate a summer camp for girls. Shortly after it was organized, Iron Rail acquired the real estate in question, 296 acres of land in the towns of Hamilton, Wenham and Essex, for that purpose. Every summer thereafter, through 1970, Iron Rail operated a summer camp on the land. In early 1971, however, it suffered a series of misfortunes, including the incapacitation of its top administrators, a fire in the camp's main building, and the loss of the backing of the camp's principal financial supporter. As a result, its 1971 camping program was curtailed although not eliminated entirely. At the end of the 1971 summer session, the buildings were closed and the furniture stored in accordance with the procedures followed in prior years.

In September of 1971, the organization's Board of Directors met and voted to petition the Supreme Judicial Court for dissolution in accordance with section 11A of chapter 180 of the General Laws, and to convey the Iron Rail assets to Girls Clubs. At the same meeting, however, the Board of Directors also directed that a committee be formed to determine whether the taxpayer should continue the same type of camping program if the funds to finance the program should become available. Apart from some further meetings and conferences, nothing further occurred until after the relevant assessment date, January 1, 1972.

On these facts, the Appellate Tax Board held the property exempt from tax, finding that the use of the property as a summer camp had not been discontinued as of the January 1, 1972 assessment date. The assessors appealed. Although the assessors did not challenge the Board's finding that, as of January 1, 1972, the property was being used, or unused, in the same manner as in prior years, they argued that the property was not held for use as a summer camp on the assessment date in light of the following subsequent events: (1) the taxpayer did file a petition for dissolution with the Supreme Judicial Court in February, 1972; (2) the taxpayer listed the property for sale in July, 1972; (3) the taxpayer conveyed all its assets to Girls Clubs, also in July, 1972; (4) the taxpayer was dissolved by order of the Supreme Judicial Court in August, 1972; and (5) the taxpayer did not conduct a camp at all in 1972. The Supreme Judicial Court rejected the assessor's contention, and affirmed the decision of the Board.

The Court noted that, in the Commonwealth, January 1 of each

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3 Id. at 884, 325 N.E.2d at 569.
4 Id. at 884-86, 325 N.E.2d at 569-70.
5 Id. at 886, 325 N.E.2d at 570.
6 Id. at 886-87, 325 N.E.2d at 570.
7 See id. at 883, 887, 325 N.E.2d at 569, 570.
8 Id. at 888-89, 325 N.E.2d at 570-71.
9 Id. at 893, 325 N.E.2d at 572.
year is the assessment date. Quoting from its decision in *Trustees of Amherst College v. Assessors of Amherst*,\(^10\) the Court said that "it is the use of the property at the time when the tax is assessed which determines whether it is exempt from taxation or not."\(^11\) Conceding that Iron Rail's intentions as of January 1, 1972 may have been relevant in determining the status of the property on the assessment date, the Court nevertheless held that the fact that it did not operate a summer camp in 1972 did not prove that it never intended to do so.\(^12\) The Court concluded that the evidence before the Board amply warranted its finding that as of January 1, 1972 the taxpayer did intend to conduct a summer camp in 1972.\(^13\)

The assessors urged that the Court's decision in *Boston Society of Redemptionist Fathers v. City of Boston*\(^14\) supported their position. In that case, the Court held the charitable exemption unavailable where the organization was not using the property for charitable purposes on the assessment date, even though it may have had an intention of using it for such purposes later in the year.\(^15\) However, the Court found *Redemptionist Fathers* plainly distinguishable. In that case, the organization had never used the property for charitable purposes. Iron Rail, on the other hand, had established a long pattern of seasonal use entitling its expressions of intention to more weight.\(^16\)


Section 5 of chapter 59 of the General Laws\(^1\) exempts from local property tax personal property and real estate of a charitable corporation only if it is "incorporated in the Commonwealth." In *Mary C. Wheeler School, Inc. v. Assessors of Seekonk*,\(^2\) this discrimination against foreign charitable corporations was held violative of the equal protection clause of the fourteenth amendment of the United States Constitution.\(^3\)

The taxpayer, a Rhode Island nonbusiness corporation, operated a day and boarding school for children. Its main campus was in Providence, Rhode Island, but it also owned a 122-acre tract of land in Seekonk, a few miles away, which it used for recreation and sports.\(^4\) The assessors conceded that the taxpayer satisfied all of the require-

\(^{10}\) 193 Mass. 168, 178, 79 N.E.2d 248, 250 (1906).
\(^{12}\) Id. at 890, 325 N.E.2d at 571.
\(^{13}\) Id. at 891, 325 N.E.2d at 571.
\(^{14}\) 129 Mass. 178 (1880).
\(^{15}\) Id. at 182. G.L. c. 59, § 5, cl. 3d extends the charitable exemption to real estate purchased by a charitable organization "with the purpose of removal thereto, until such removal, but not for more than two years after such purchase."
ments for exemption save that having to do with the state of its incorporation. Thus, the issue framed for the Court's decision was a very narrow one: could the taxpayer be denied the exemption concededly otherwise available merely because it was incorporated in Rhode Island rather than in Massachusetts.5

Although observing that states ordinarily are given wide latitude in drawing classifications for tax purposes, the Supreme Judicial Court noted that there were limits and observed that courts have usually found the limits exceeded where the distinction drawn is one which favors state residents over nonresidents.6 Relying on the United States Supreme Court's decision in a similar case, *WHYY, Inc. v. Borough of Glassboro*,7 the Court held impermissible this discrimination against foreign charitable corporations.8

The *WHYY, Inc.* case involved a Pennsylvania nonprofit corporation that operated a radio station with broadcasting facilities located in New Jersey. In accordance with New Jersey law,9 the corporation had registered and qualified to do business in the state.10 The corporation applied for a local tax exemption, but its application was denied because the statute11 then in force in New Jersey limited the availability of the exemption to domestic charitable corporations.12 The Supreme Court, reversing the New Jersey Supreme Court, held that the New Jersey statute offended the equal protection clause of the fourteenth amendment.13 The Supreme Court stated that although a state may impose conditions on the entry of foreign corporations, once it has permitted them to enter it must treat them equally with domestic corporations as regards matters of *ad valorem* taxation.14

Under Massachusetts law as it existed at the time the *Mary C. Wheeler School* case arose, foreign charitable corporations could not register to do business in the Commonwealth in the same manner as foreign profit-making corporations.15 The assessors argued, and the Appellate Tax Board held, that *WHYY, Inc.* was distinguishable on this basis.16 The Board suggested that, because of the absence of a

5 *Id.* at 2313, 331 N.E.2d at 889.
7 393 U.S. 117 (1968) (per curiam).
10 393 U.S. at 118.
11 N.J. STAT. ANN. § 54:4-3.6. See 393 U.S. at 118 n.2.
12 See 393 U.S. at 118 & n.2.
13 *Id.* at 120.
qualification system, Massachusetts would lack control over the regulation of foreign charitable corporations and would be unable to revoke their charter if they violated their public trust.\textsuperscript{17} Reversing the Board, the Court noted that the provisions of sections 8 through 8J of chapter 12 of the General Laws, which were in force during the relevant period, served much the same function as did the qualification system in New Jersey.\textsuperscript{18} Under these provisions, the Attorney General of the Commonwealth is given broad powers to supervise and control both foreign and domestic charities.\textsuperscript{19} Dismissing as unimportant such differences as there were between this system and the qualification system in New Jersey involved in the \textit{WHYY, Inc.} case,\textsuperscript{20} the Supreme Judicial Court held the latter decision controlling.\textsuperscript{21} In an important footnote, however, the Court indicated that it was merely opening the door for foreign charitable corporations to apply for exemption from local tax.\textsuperscript{22} In deciding whether such foreign corporations are “charitable” within the meaning of section 5 of chapter 59 of the General Laws,\textsuperscript{23} Massachusetts law will continue to govern.\textsuperscript{24}

\textbf{§11.9. Charitable Exemption: Cemeteries.} Section 5 of chapter 59 of the General Laws\textsuperscript{1} provides that there is an exemption from local property tax for “[c]emeteries ... so long as dedicated to the burial of the dead, and buildings owned by religious nonprofit corporations and used exclusively in the administration of such cemeteries . . . .” In \textit{Blue Hills Cemetery, Inc. v. Assessors of Braintree},\textsuperscript{2} the issue was the taxability of real estate of a cemetery that was used as part of its cemetery operations, but that was not actually dedicated to the interment of bodies. The Appeals Court affirmed a decision of the Appellate Tax Board holding that cemetery land can be “dedicated to the burial of the dead,” even though not actually used for the interment of bodies, if it is used in connection with necessary cemetery functions.\textsuperscript{3}

Despite the limited application of the court’s holding, the case is of

\begin{footnotes}
\item[17] Id.
\item[18] See id. at 2322-24, 331 N.E.2d at 892-93.
\item[19] G.L. c. 12, §§ 8, 8E, 8F, 8H, 8J.
\item[21] Id. at 2325, 331 N.E.2d at 893.
\item[22] See id. at 2320 n.5, 331 N.E.2d at 891 n.5.
\item[23] G.L. c. 59, § 5, cl. 3d.
\item[24] Id.
\item[11.9] G.L. c. 59, § 5, cl. 12th.
\end{footnotes}
general interest in at least two respects. Initially, it provides further support for the practice of partial exemption and partial taxation of the same piece of property.\footnote{4}{1974 Mass. App. Ct. Adv. Sh. at 947, 317 N.E.2d at 833-34, \textit{citing} Milton Hosp. & Convalescent Home v. Assessors of Milton, 360 Mass. 63, 70, 271 N.E.2d 745, 749 (1971).} At the hearing before the Appellate Tax Board, the parties stipulated that certain portions of the real estate were used for noncemetery functions (\textit{i.e.}, 15 percent of one building, 20 percent of a garage and 18 acres of wetlands).\footnote{5}{See 1974 Mass. App. Ct. Adv. Sh. at 944, 317 N.E.2d at 832.} Although no exemption was allowed with respect to these portions, that the property was not used exclusively for cemetery purposes was not considered fatal to the allowance of an exemption for the remainder of the property.\footnote{6}{See \textit{id}. at 947, 317 N.E.2d at 832.} The second interesting aspect of the case is that it was only the second appeal from the Appellate Tax Board transferred down to the Appeals Court by the Supreme Judicial Court.\footnote{7}{The first was Sarris v. Assessors of Swampscott, 1974 Mass. App. Ct. Adv. Sh. 577, 315 N.E.2d 892.} Unlike decisions of most lower courts in the Commonwealth, decisions of the Appellate Tax Board are appealable directly to the Supreme Judicial Court.\footnote{8}{G.L. c. 58A, § 13.}

\section{Charitable Exemption: Parsonages.} Chapter 283 of the Acts of 1975 amends clause 11th of section 5 of chapter 59 of the General Laws. Previously, clause 11th provided for a limited local property tax exemption (up to \$20,000 in value per parsonage) for parsonages owned by, or held in trust for the use of, any religious organization. The amendment limits the exemption to parsonages owned by or “held in irrevocable trust, for the exclusive benefit of” such religious organizations. Prior to the amendment, it might have been possible for an enterprising parson, who was not provided with a parsonage by his flock, to transfer his home to a revocable trust for the benefit of his denomination and claim the benefit of the exemption provided in clause 11th. The amendment will put a stop to any such practice for the future.

\section{Personal Property Tax: Exemption for Household Effects.} Section 5 of chapter 59 of the General Laws\footnote{1}{G.L. c. 59, § 5, cl. 20th.} exempts from local personal property tax a person’s household furniture and effects if stored in a public warehouse, or used or commonly kept in or about the dwelling of which he is the owner of record or for the use of which he is obligated to pay rent “and which is the place of his domicile.” The conditions on the availability of this exemption have often come as an unpleasant surprise to two classes of people: (1) those who own vacation homes in the Commonwealth, and (2) beneficiaries of trusts holding title to residential real estate that the bene-
§11.12 STATE AND LOCAL TAXATION

ficiaries are entitled to occupy rent-free.

In Weinstock v. Town of Hull, the plaintiffs, Massachusetts residents who owned summer homes in Hull but who were domiciled elsewhere in the Commonwealth, filed a bill for declaratory relief in the superior court challenging the constitutionality of this alleged discrimination against nonresidents under both the United States and Massachusetts Constitutions. The Supreme Judicial Court affirmed the decree of the superior court upholding the constitutionality of the tax. Noting that a literal interpretation of the Massachusetts Constitution's requirement that taxation be "proportional and reasonable" could lead to the invalidation of all exemptions, the Court held that the Legislature has the right "to grant exemptions which have a reasonable relationship to the constitutional purpose of equality and proportionality, although lacking mathematical precision." The Court said that it regarded the distinction between household furniture and effects kept in or near a person's domicile, and those that are not, as a reasonable one "not productive of unconstitutional disproportionality." The Court noted that each taxpayer who has household furniture and effects in a dwelling that he owns or rents is entitled to the exemption with respect to such property if the dwelling is the place of his domicile. In this respect, the Court observed, there is complete equality of treatment among all potential taxpayers. The Court found that the loss of the exemption in the community where a person has a vacation home presented no greater prospect of disproportionality of taxation than the exemption itself, or some dollar limit on the exemption, both of which have been upheld.

B. SALES AND USE TAXES

§11.12. Sales Tax: Immunity of Federal Reserve Banks. In Federal Reserve Bank v. Commissioner of Corporations & Taxation, the United States Court of Appeals for the First Circuit was called upon to decide whether a Massachusetts sales tax could be collected on build-

3 Id. at 537, 323 N.E.2d at 870.
4 MASS. CONST. pt. II, c. I, §1, art. IV.
6 Id. at 535, 323 N.E.2d at 869.
7 Id. at 535-36, 323 N.E.2d at 869.
8 Id. at 536, 323 N.E.2d at 869. See Newhall v. Assessors of Brookline, 329 Mass. 100, 104, 106 N.E.2d 432, 434 (1952); Day v. City of Lawrence, 167 Mass. 371, 372, 374, 45 N.E. 751, 752 (1897). In Weinstock, the Court also held that the denial of an exemption for personal property in vacation homes did not violate the fourteenth amendment of the United States Constitution. 1975 Mass. Adv. Sh. at 536, 323 N.E.2d at 869.

§11.12. 1 520 F.2d 221 (1st Cir. 1975).
ing materials and supplies purchased for use in the construction of the Bank's new office building located near South Station in downtown Boston. The case arose when the Commissioner of Corporations and Taxation refused to issue an exemption certificate under section 6(f) of chapter 64H of the General Laws, which exempts sales of materials and supplies to be used in the construction of government-owned buildings "used exclusively for public purposes," because of plans to rent some of the office space in the new building to private tenants. To circumvent the position taken by the Commissioner, the Bank amended its contract with the general contractor to provide that the Bank itself, and not the contractor or its subcontractors, would purchase all necessary materials and supplies. The Commissioner took the position that this "end run" was unsuccessful because, among other things, the general contractor remained in substance, if not in form, the true purchaser. The First Circuit disagreed and held the purchases exempt from tax.

Relying upon section 531 of title 12 of the United States Code, which exempts Federal Reserve Banks from state and local taxes other than taxes on real estate, and upon the United States Supreme Court's decision in First Agricultural National Bank v. State Tax Commission, the Court reasoned that no tax would be permissible if, in light of the contract amendment, the Bank were entitled to be treated as the purchaser of the materials. Then, turning to whether or not the contract change was effective to accomplish that result, the Court held that it was, relying on the United States Supreme Court's decision in Kern-Limerick, Inc. v. Scurlock.

In Kern-Limerick, the Supreme Court held that no state sales tax could be imposed on the purchase of materials and supplies used by a government contractor pursuant to a "cost-plus-fixed-fee" contract.

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2 Id. at 223.
3 Id.
4 Id.
5 Id. at 225.
7 520 F.2d at 224. The district court had held that the materials and supplies were exempt from the sales tax under G.L. c. 64H, §§ 6(d) and (f). Federal Reserve Bank v. Commissioner of Corps. & Taxation, 382 F. Supp. 207, 210 (D. Mass. 1974). G.L. c. 64H, § 6(d), exempts sales to the United States and its "agencies." G.L. c. 64H, § 6(f), exempt sales of building materials and supplies to be used in the construction of buildings owned by or held in trust for governmental bodies described in G.L. c. 64H, § 6(d), which are used "exclusively" for public purposes. By shifting the basis of the holding in the case to 12 U.S.C. § 531, the First Circuit was able to avoid the Commissioner's contentions that (1) the Bank was not an "agency" of the United States within the meaning of the statute, see First Agricultural Nat'l Bank v. State Tax Comm'n, 353 Mass. 172, 176, 229 N.E.2d 245, 248 (1967), rev'd on other grounds, 392 U.S. 339 (1968), and (2) the building was not to be used "exclusively" for public purposes, cf. Chatham Corp. v. State Tax Comm'n, 362 Mass. 216, 219, 285 N.E.2d 420, 422 (1972).
8 520 F.2d at 224.
that provided that title to all such materials was to pass directly from the vendor to the United States government. The Commissioner argued that Kern-Limerick was no longer good law. Nonetheless, subsequent to the oral argument in the case, the Supreme Court handed down two decisions citing Kern-Limerick with approval. In light of these decisions, the First Circuit found itself unable to conclude that Kern-Limerick was not controlling. Noting that this was "an area involving distinctions which are often without obvious differences," the court commented:

What is "form" and what "substance" can be argued either way in the present transaction. Since the materials are destined to be incorporated in the government building, their brief ownership by a private contractor is arguably merely "formal;" the real party in interest may be the Government. Conversely, of course, the Government's assertion of title earlier than might be usual may be called "formalistic." However, to insure predictability in a situation like this, much can be said for giving controlling weight to the terms of the contract.

§11.13. Use Tax on Ships Built Outside Massachusetts. Boston Tow Boat Co. v. State Tax Commission was an appeal from a decision of the Appellate Tax Board. The Board upheld a use tax assessed on a 123-ton harbor tug that the taxpayer purchased in Louisiana and brought to Boston for use in its business here. There was no question as to the propriety of the assessment from a statutory standpoint. The taxpayer, however, challenged the constitutionality of the statutes imposing the tax because no sales or use tax would have been incurred had the vessel been built in and purchased from a Massachusetts shipyard. The Supreme Judicial Court reversed the Board, agreeing with the taxpayer that this discrimination against vessels constructed outside the state was clearly unconstitutional as a burden on interstate commerce. In reaching this decision, the Court relied on the rule laid down in Kern-Limerick, if not overruled, by the "Michigan" Cases—City of Detroit v. Murray Corp. of America, 355 U.S. 489 (1958); and United States v. City of Detroit, 355 U.S. 466 (1958); United States v. Township of Muskegon, 355 U.S. 484 (1958).

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10 Id. at 122-23.
13 520 F.2d at 225.
14 Id. at 223.
15 Id. at 225 n.1.

2 Id. at 2277, 319 N.E.2d at 910. G.L. c. 64H, § 6(o), exempts from the sales tax "sales of vessels or barges of fifty tons burden or over when constructed in the commonwealth and sold by builders thereof." G.L. c. 64L, § 7(b), exempts from use tax sales exempt under G.L. c. 64H.
down in the 1963 United States Supreme Court case, Halliburton Oil Well Cementing Co. v. Reily:4 "[E]qual treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out-of-state."5

§11.14. Sales and Use Tax: Prizes Awarded in Amusement Games. In Prince v. State Tax Commission,1 the issue was how prizes awarded at amusement games were to be taxed under the sales and use tax law. The taxpayers, who operated amusement games at Lincoln Park in North Dartmouth, argued that the prizes were purchased for the purpose of resale in the ordinary course of their business. Thus, they claimed that the purchase of the objects was exempt from sales tax under section 1(13) of chapter 64H of the General Laws2 and from use tax under section 1(5) of Chapter 64I of the General Laws.3 Under the taxpayer's view, the only amount due the Commonwealth was a sales tax on the amounts paid by successful contestants in order to participate in the games.4 The Supreme Judicial Court affirmed the Appellate Tax Board's decision in favor of the State Tax Commission.5 The Court agreed with the Commission that "the fee paid by a contestant in order to play one of these games is not a 'sale at retail' under the sales tax law."6 Thus, the Court held that the prizes in question were used or consumed by the taxpayers in the course of operating the amusements.7

§11.15. Sales Tax: Credit Sales. In Continental-Hyannis Furniture Co. v. State Tax Commission,1 the Supreme Judicial Court held that a vendor's liability for the sales tax arises at the time of the sale, and is measured by the full sales price, irrespective of whether the sale is a cash sale or a credit sale.2 Thus, if a vendor extends credit to a customer, he will be liable for the sales tax on the full sales price even if the customer later defaults and the account is not collected.3 The

4 373 U.S. 64 (1963).
5 Id. at 70.

2 G.L. c. 64H, § 1(13), defines a "sale at retail" as a "sale of tangible personal property for any purpose other than resale in the regular course of business." Under G.L. c. 64H, § 2, the sales tax is imposed only on sales at retail.
3 G.L. c. 64I, § 1(5), defines "use" as the "exercise of any right or power over tangible personal property incident to the ownership of that property, except that it does not include the sale of that property in the regular course of business."
5 Id. at 2273, 319 N.E.2d at 726.
6 Id. at 2272, 319 N.E.2d at 725.
7 Id. at 2273, 319 N.E.2d at 726.

2 Id. at 2016, 319 N.E.2d at 619.
3 Id. at 2017, 319 N.E.2d at 619.
Court said that, despite the seeming inequity of this result, it was clearly compelled by the plain terms of the statute. Moreover, the Court noted that vendors who were unwilling to assume the risk of sales tax liability on uncollected accounts could avoid it by requiring payment of the tax at the time of sale and financing only the actual purchase price.

§11.16. Sales and Use Taxes: Newspaper Advertising Supplements. Sears, Roebuck & Co. v. State Tax Commission was an appeal to the Appellate Tax Board from the State Tax Commission's refusal to abate use taxes assessed against Sears, Roebuck & Co. ("Sears Roebuck"). The use taxes were assessed on the cost of advertising supplements that the taxpayer had printed by an out-of-state commercial printer and that were sent to various newspapers in the Commonwealth for distribution with specified editions.

The agreed statement of facts filed with the Board indicated that each supplement was imprinted with the name and logo of the newspaper it was intended to accompany, together with the date of the particular edition with which it was to be distributed. As each order was completed, the printer folded the supplements, selected and retained a common carrier, and shipped the supplements, freight prepaid, directly to the particular newspaper involved. Under its separate contract with Sears Roebuck, the printer was thereafter reimbursed for the transportation charges and paid the invoice cost of the supplements. Upon receipt of the supplements, each newspaper inserted them into, and distributed them with, the particular edition they were intended to accompany. Sears Roebuck's contract with the newspapers, separate from its contract with the printer, provided for a fee to each newspaper based upon the number of supplements distributed.

4 Id. Under G.L. c. 64H, § 2, the sales tax is imposed as a specified percentage of the "gross receipts" of the vendor. G.L. c. 64H, § 1(6), defines "gross receipts" as the "total sales price" received by vendors as a consideration for retail sales. G.L. c. 64H, § 1(14)(ii), provides that in determining the "sales price," there shall be included "any amount for which credit is given to the purchaser by the vendor."

5 Id. at 2017, 318 N.E.2d at 620. The Court's suggestion may be relatively easy to implement in the case of retail establishments, such as furniture stores, which typically require a down payment well in excess of the amount of the sales tax. However, its commercial feasibility may be more doubtful in other cases. Large department stores such as Jordan Marsh, Sears Roebuck, and Lechmere Sales ordinarily provide their own financing and usually require no down payment, even on substantial purchases. These stores might find it very difficult, both administratively and competitively, to institute the procedures suggested by the Court.


2 Id. at 10,353. Apparently 1 percent of the supplements were purchased from Massachusetts printers. With respect to these, the taxpayer relied only on the first two arguments described below. Id. at 10,354.

3 Id. at 10,353.

4 Brief for Appellant at 3.
Section 6(M) of chapter 64H of the General Laws exempts from the sales tax "[s]ales of newspapers" and General Laws section 7(b) of chapter 64I of the General Laws exempts from the use tax sales exempt under chapter 64H. Citing supporting authorities from other jurisdictions,\(^5\) Sears Roebuck argued that the supplements were exempt from use tax because they were designed, and functioned exclusively, as component parts of newspapers.\(^6\) The taxpayer also argued that the supplements were exempt under section 6(r) of chapter 64H of the General Laws, which exempts sales of materials "which become an ingredient or component part of tangible personal property to be sold."\(^7\) Finally, Sears Roebuck argued that even if the sale of the supplements would have been taxable had it occurred in Massachusetts, no use tax was permissible because it relinquished all control and possession of the supplements outside the Commonwealth when the printer delivered them to the common carrier for shipment to the newspapers.\(^8\) Section 2 of chapter 64I of the General Laws imposes a use tax only when tangible personal property is stored, used, or otherwise consumed "in the commonwealth."

The Board rejected the taxpayer's arguments and held the use taxes properly assessed.\(^9\) The Board conceded that the supplements would have been exempt if they had been printed directly by the newspapers involved rather than by a commercial printer.\(^10\) Nonetheless, the Board held that the supplements did not become "part of" a newspaper merely because they were distributed "with" or "by" one.\(^11\) Moreover, the Board found that, insofar as it was a question of fact, the taxpayer "used or otherwise consumed" the supplements.\(^12\) The Board's decision is being appealed to the Supreme Judicial Court by the taxpayer.

§11.17. Sales and Use Taxes: Property Purchased and Shipped to Out-Of-State Branch Offices: Commercial Art Work. Massachusetts Mutual Life Insurance Co. v. State Tax Commission\(^1\) was a decision of the Appellate Tax Board involving two separate issues. The first con-

\(^7\) See id.
\(^10\) Id. at 10,354.
\(^11\) Id.
\(^12\) Id. at 10,355.

cerned section 1(5) of chapter 64I of the General Laws, which pro-
vides that, for the purposes of the use tax, the terms "store," "stor-
age," and "use" do not include "keeping, retaining, or exercising any
right or power over tangible personal property for the purpose of
subsequently transporting it outside the commonwealth for use there-
after solely outside the commonwealth." The taxpayer had purchased
various office supplies and promotional materials from out-of-state
vendors. The supplies and materials were shipped to its home office
in Springfield, and unpacked and stored in its warehouse there.
Thereafter, as they were needed, the materials and supplies were
withdrawn from storage and either used by the taxpayer at its home
office or repackaged and shipped to its various branch offices located
both within and without the Commonwealth. The issue was whether
the above-quoted language from section 1(5), exempted from use tax
that portion of the materials and supplies eventually shipped to the
out-of-state branch offices.

The State Tax Commission took the position that in order to qual-
ify for the exemption, goods must be purchased for out-of-state use,
stored in Massachusetts in their original packages, and segregated
from the taxpayer's general inventory. The taxpayer argued that the
"original package" doctrine was irrelevant because it only had to do
with whether or not the state had power to tax, and the power of the
state to tax was conceded. Instead, the taxpayer argued that the ques-
tion was really one of statutory construction and claimed that the re-
strictions imposed by the Commission on the availability of the ex-
emption were not justified.

The second issue in the case involved section 1(13) of chapter 64H
of the General Laws, which excludes from the definition of "sale at
retail," for the purpose of the sales tax, "professional, insurance, or
personal service transactions which involve no sale or which involve
sales as inconsequential elements for which no separate charges are
made." The taxpayer had hired a number of commercial artists to
prepare, photograph, and develop art designs for use with the
taxpayer's promotional materials. The amounts paid to the artists in-
cluded payment for their services as well as payment for the materials
upon which the designs were prepared and developed. The State Tax
Commission took the position that amounts paid to the artists were
subject to the sales tax since, in its view, the true substance of the
transaction was a purchase of art work. The taxpayer argued that the

2 Id. at 10,360.
3 Id. at 10,361.
4 Id. at 10,362.
transaction was really a personal service transaction exempt under section 1(13).\(^7\)

The Appellate Tax Board held for the taxpayers on both issues.\(^8\) With respect to the first issue, the Board ruled that it was immaterial that the property was not kept in its original packages. It held that property is not subject to tax where it is "retained for the purpose of subsequently transporting it outside the Commonwealth for use thereafter solely outside the Commonwealth."\(^9\) With respect to the second issue, the Board held that

the principle test of taxability is whether, on the one hand, the dominant character of the transaction is the purchase and sale of the commercial artist's services, with the paper, cardboard or other material upon which the services are rendered regarded as inconsequential elements, in which case the transaction is not taxable as a sale of tangible personal property, or, on the other hand, it is the material upon which the art work is performed that constitutes the real substance of the transaction, in which case, of course, the transaction is taxable . . . .\(^10\)

§11.18. Sales Tax: Purchase or Lease of Motion Pictures For Television Broadcasting.  
*R.K.O. General, Inc. v. State Tax Commission*\(^1\) was a decision of the Appellate Tax Board involving the applicability of the sales tax to amounts paid by the taxpayer for the purchase and rental of motion pictures shown on its television station, WNAC-TV, Channel 7, in Boston. The Board held that the purchase and rental of the motion pictures was exempt from sales tax under section 6(r) of chapter 64H of the General Laws, which exempts "sales of materials, tools and fuel . . . which are consumed and used directly . . . in the operation of the commercial radio broadcasting or television transmission." The Board held that the word "and" in the phrase "consumed and used" was to be construed disjunctively rather than conjunctively in order to effectuate what it characterized as the "legislative solicitude" for the various communication media apparent in the sales and use tax statutes.\(^2\)

§11.19. Sales Tax: Materials, Supplies and Machinery Purchased by a Heating Contractor.  In *Seltzer & Co. v. State Tax Commission*,\(^1\) the taxpayer was a heating contractor engaged in the business of selling, installing, and servicing hot water and steam-generating boilers,
the oil-burning equipment used to fire them, and associated controls, regulating devices, lines and pipes. Except for a small amount of repair work, the boilers and related items were sold and installed under lump sum contracts.\(^2\) The case was an appeal to the Appellate Tax Board from the Commission's refusal to abate use taxes assessed against the taxpayer on the value of materials, supplies and machinery used in the performance of these contracts.\(^3\) The taxpayer claimed that the property was not taxable by reason of the exemption provided by section 6(r) of chapter 64H of the General Laws for "[s]ales of materials . . . which become an ingredient or component part of tangible personal property to be sold or which are consumed and used directly . . . in the furnishing of gas, water, steam or electricity when delivered to consumers through mains, lines or pipes."\(^4\) In addition, the taxpayer sought relief under the exemption provided by section 6(s) for "[s]ales of machinery, or replacement parts thereof, used directly and exclusively . . . in the furnishing of gas, water, steam or electricity when delivered to consumers through mains, lines or pipes."\(^5\) The Board, noting that the appellant was not engaged in the business of furnishing power, gas, water, or steam, held that the exemptions were inapplicable.\(^6\) Moreover, the Board held that the property was not purchased for resale within the meaning of the statute.\(^7\)

C. Personal Income Taxes

§11.20. Income from Out-Of-State Real Estate. In Ingraham v. State Tax Commission,\(^1\) the Supreme Judicial Court resolved one of the most interesting questions raised by the 1971 amendments to the personal income tax.\(^2\) The Court held that income derived from real estate located outside the Commonwealth is subject to tax and that the income tax statute, chapter 62 of the General Laws, as amended in 1971, is valid under the United States and Massachusetts Constitutions.\(^3\)

Prior to the 1971 amendments to chapter 62, it was clear that the personal income tax imposed by that chapter was not a general income tax.\(^4\) It did not generally apply to all forms of income, as such,

\(^2\) Id.
\(^3\) Id.
\(^4\) Id. at 10,366-67.
\(^5\) Id.
\(^6\) Id. at 10,367.
\(^7\) Id. at 10,366. See State Tax Commission, Sales & Use Tax Emergency Reg. No. 12, "Contractors and Subcontractors" (July 7, 1966).

regardless of their source. Instead, it applied only to certain limited types of income derived from specific sources.\(^5\) On many occasions, the Supreme Judicial Court held that the tax was in reality not a tax on income as such at all, but a property tax imposed on certain classes of property and measured by the income derived therefrom.\(^6\)

Although nothing in the United States Constitution prevents a state from imposing a general income tax on the income of residents, including income derived from out-of-state real estate,\(^7\) a state does lack power to impose a property tax on real property geographically located outside its borders.\(^8\) Sensitive to this constitutional prohibition, the Supreme Judicial Court consistently construed the tax imposed by chapter 62 in years prior to 1971 as inapplicable to income derived from out-of-state real estate.\(^9\) Indeed, in 1969 in *State Tax Commission v. Fine*,\(^10\) the Court said that in order to avoid raising doubts as to the constitutionality of the tax, an amendment to chapter 62 would not be construed as intended to reach income from out-of-state real estate absent a very clear expression of legislative intention to achieve that specific result.\(^11\)

Under chapter 62, as amended by chapter 555 of the Acts of 1971, Massachusetts residents are now subject to personal income tax on their entire “gross income.”\(^12\)

In *Ingraham*, the Supreme Judicial Court held that, by adopting the all-inclusive standards of federal gross income, the Legislature evidenced a clear intent to tax residents of the state on income from all sources, including rentals and other income from out-of-state real estate.\(^13\) Moreover, the Court held that to construe the tax so as to achieve this result would not create any problem under the United States Constitution.\(^14\) Since the “nature and effect” of the tax in *Ingraham* were those “of a tax on the income from property as distinguished from a tax on the property itself,” the Court reasoned that the tax fell within the permissible limits of state taxing power as de-
fined by the Supreme Court. Finally, the Court held that under article XLIV of the Articles of Amendment of the Massachusetts Constitution, the Legislature had power to impose a general income tax and was not restricted to imposing a limited income tax of the property type such as was in force prior to the 1971 amendments.

To the disappointment of many, the Court left unresolved what was perhaps the most interesting issue in the case, the question of the exact source of the Legislature's power to impose a general income tax. Apparently, the Court felt that its holding as to the existence of the power was all that was needed in order to dispose of the case before it. In any event, the issue was left for another day.

Prior to the adoption of article XLIV of the Articles of Amendment of the Massachusetts Constitution, the Legislature's sole source of power to impose taxes lay in article IV of section I of chapter I of part II of the Massachusetts Constitution, which provides, in part, that:

full power and authority are hereby given and granted to the said general court, from time to time . . . to impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the said commonwealth; and also to impose and levy, reasonable duties and excises, upon any produce, goods, wares, merchandise, and commodities, whatsoever, brought into, produced, manufactured, or being within the same; . . .

Under this provision, two kinds of taxes are authorized. The first clause (the "property tax clause") authorizes direct taxes on persons and property provided such taxes are both reasonable and proportional. The second clause (the "excise clause") authorizes excises on "produce, goods, wares, merchandise, and commodities." Unlike taxes on persons or property, excises need not be proportional, only reasonable.

When the personal income tax was first proposed in 1915, the Supreme Judicial Court, in response to an inquiry from the Legislature, opined that it would be a tax on property and that it would fail to satisfy the proportional requirement of the property tax clause. To remedy this problem, article XLIV of the Articles of Amendments of the Massachusetts Constitution was adopted, providing as follows:

Full power and authority are hereby given and granted to the general court to impose and levy a tax on income in the manner hereinafter provided. Such tax may be at different rates upon in-

come derived from different classes of property, but shall be levied at a uniform rate throughout the commonwealth upon incomes derived from the same class of property. The general court may tax income not derived from property at a lower rate than income derived from property, and may grant reasonable exemptions and abatements. Any class of property the income from which is taxed under the provisions of this article may be exempted from the imposition and levying of proportional and reasonable assessments, rates and taxes as at present authorized by the constitution. This article shall not be construed to limit the power of the general court to impose and levy reasonable duties and excises.

It was under the authority of the property tax clause and article XLIV jointly that the Legislature first enacted the personal income tax in chapter 62.

In Ingraham, one of the taxpayer's principal arguments was that, despite the 1971 amendments, the tax imposed by chapter 62 remained a property tax, which could not be imposed on income from out-of-state real estate without violating the United States Constitution. This argument was based largely on the taxpayer's claim that the property tax clause was the only provision of the Massachusetts Constitution that authorized the imposition of a general income tax.\(^\text{18}\)

The Appellate Tax Board, which decided the case adversely to the taxpayer in the first instance,\(^\text{19}\) held that the 1971 amendments to chapter 62 converted the personal income tax from a property tax to "a general income tax of the excise type."\(^\text{20}\) In other words, the Board held that the tax as amended was an excise measured by income, which was authorized under the excise clause.

Before the Supreme Judicial Court, the taxpayer argued that the Board's decision was insupportable. Under the excise clause, excises can be levied only on "produce, goods, wares, merchandise, and commodities."\(^\text{21}\) The taxpayer conceded that the term "commodities" had been expansively interpreted. He argued, however, that the term would have to be stretched to its breaking point to include income.\(^\text{22}\) Moreover, the taxpayer, with some logic, pointed out that article XLIV would have been completely unnecessary if the power to im-

\(^{20}\) Id. at 10,318.
\(^{22}\) But see Minot v. Winthrop, 162 Mass. 113, 122, 38 N.E. 512, 515 (1894) upholding the inheritance tax imposed by G.L. c. 65 as an excise on a "commodity," the privilege of transmitting property on death.
pose excises included the power to tax incomes.23

Perhaps persuaded by the taxpayer's argument, the Attorney General declined to support the Board's view that the tax, as amended, could be upheld as an excise. Instead, he argued that the Board's decision should be upheld on the basis of a novel, but intriguing theory first suggested by Robert McGee of Palmer & Dodge in an article that appeared in the Boston Bar Journal at about the same time the Appellate Tax Board's report in the case was issued.24 Under the property tax clause, the Legislature has power to impose taxes not only on property, but also on "inhabitants" and "residents" of the Commonwealth.25 McGee suggested26 and the Attorney General argued that the personal income tax, as amended by chapter 555 of the Acts of 1971, should be upheld as a personal tax measured by income.27

The Attorney General also suggested, as an alternative, that the tax as amended by chapter 555 of the Acts of 1971, might be authorized by the terms of article XLIV itself, i.e., that the income tax amendment might be viewed as a separate, third source of legislative taxing power independent of both the property tax clause and the excise clause.28 This possibility was rejected by the taxpayer who claimed that article XLIV was adopted only to allow a property tax on income without regard to the proportionality requirement, not to authorize a general income tax of the kind imposed by chapter 555 of the Acts of 1971.29

The Supreme Judicial Court was able to avoid choosing among the four theories before it—property tax measured by income, personal tax measured by income, excise measured by income, or pure income

23 The exact scope of the excise power has never been definitively settled. In Gleason v. McKay, 134 Mass. 419 (1883), the Court ruled that the term "commodities" in the excise clause included privileges conferred by the Legislature, but did not extend to "natural rights at common law." Id. at 425. Subsequent cases have questioned this distinction and suggested that the result in McKay could be supported on other grounds. Opinion of the Justices, 196 Mass. 603, 615-17, 85 N.E. 545, 549-50 (1908); Minot v. Winthrop, 162 Mass. 113, 122, 38 N.E. 512, 515 (1894). The present status of the "natural rights" doctrine is somewhat unclear. See Opinion of the Justices, 266 Mass. 590, 595-96, 165 N.E. 904, 906 (1929).

24 McGee, Massachusetts Taxation of Income From Foreign Real Estate, 18 BOSTON BAR J., No. 4, at 7 (April 1974) [hereinafter cited as McGee].
25 MASS. CONST. pt. II, c. 1, § I, art. IV.
26 McGee, supra note 24, at 11-12.
27 Brief for Appellee at 17-22.
28 Brief for Appellee at 20 n.10. This suggestion was not strongly pressed by the Attorney General, suggesting some lack of confidence in it. In his article, McGee concluded that the history of article XLIV indicated that it was intended only to loosen the restrictions on the property tax power so as to permit a limited income tax of the property type, not to confer a new independent source of taxing power on the legislature. McGee, supra note 24, at 10.
29 Brief for Appellant at 21.
tax authorized by article XLIV itself—only by rejecting the taxpayer's premise that the tax would be invalid under the United States Constitution if imposed under the authority of the property tax clause.\textsuperscript{30} The Court held that the character of the tax for state law purposes was irrelevant in determining its constitutionality for federal purposes.\textsuperscript{31} Under applicable federal principles, the Court said, the nature and effect of the personal income tax, as amended by chapter 555 of the Acts of 1971, would be viewed as that of general income tax rather than a tax on property.\textsuperscript{32}

Although the concern of the parties as to the exact source of the Legislature's power to impose a general income tax may seem somewhat academic, very real and very practical consequences were at stake. Until the appearance of McGee's article suggesting two new possible bases for supporting the tax,\textsuperscript{33} there appeared to be only two real possibilities—either the tax was a property tax or it was an excise. If the former, there was the question whether it could be applied to income from out-of-state real estate without offending the United States Constitution. If the tax, as amended, was an excise, on the other hand, it would not be subject to either the proportionality requirement of the property tax clause\textsuperscript{34} or the requirement of article XLIV that income taxes imposed thereunder be levied at a uniform rate throughout the Commonwealth on income derived from the same source.\textsuperscript{35} Under these circumstances, it would be possible to further amend the tax to introduce graduated rates \textit{without a constitutional amendment}. In 1972, a graduated income tax amendment was on the ballot. After an intense and sometimes bitter political battle, the measure was defeated. In light of this history, it was generally felt that the Court would be very reluctant to hand down a decision allowing the enactment of a graduated income tax without a constitutional amendment.

Although the Court was able to avoid this difficult issue in the \textit{Ingraham} case, the issue has not gone away. Indeed, in light of the state's current financial problems, it is likely that pressure for a graduated income tax will continue to mount. Sooner or later, the Legislature will undoubtedly request the opinion of the Justices as to the possibility of enacting a graduated income tax without a constitutional amendment on the basis of the excise clause. When this occurs, the question left unresolved in \textit{Ingraham} will finally receive an answer.

\textsuperscript{31} \textit{Id.}
\textsuperscript{32} \textit{Id.} at 2170, 331 N.E.2d at 798-99.
\textsuperscript{33} McGee, \textit{supra} note 24, at 10-14.
\textsuperscript{34} \textsc{Mass. Const.} pt. II, c. 1, § 1, art. IV.
\textsuperscript{35} \textsc{Mass. Const. amends. art. XLIV}.
§11.21. Chapter 555 of the Acts of 1971: Deductions Against Income Taxable At the Rate of 9 Percent. Although *Wheatland v. Commissioner of Corporations & Taxation*¹ was essentially a companion case to *Ingraham*,² it did involve an additional issue relating to the deductibility of certain expenses. The taxpayer's income from out-of-state real estate during 1971 consisted primarily of gain from the sale of standing timber located in Maine. On its 1971 federal return, the taxpayer claimed as miscellaneous itemized deductions certain expenses incurred in connection with the timber land.³ When the Commissioner of Corporations and Taxation assessed a tax on the gain from the sale of the timber at the rate of 9 percent under section 4(a)(3) of chapter 62 of the General Laws, as amended by chapter 555 of the Acts of 1971, he refused to allow the amount of the gain to be reduced by the amount of these expenses.⁴ The taxpayer argued that the Commissioner's failure to take the expenses into account was improper.⁵

Under the 1971 amendments to chapter 62, there was considerable uncertainty as to the proper treatment of allowable deductions (1) where the amount of such deductions exceeded the amount of income taxable at the rate of 5 percent ("5 percent income"); and (2) where such deductions, although not in excess of the 5 percent income, were directly attributable to income taxable at the rate of 9 percent ("9 percent income").

Sections 2 and 3 of chapter 62, as amended by chapter 555 of the Acts of 1971, defined "income subject to taxation" as federal gross income less certain of the deductions allowable under sections 62 and 404 of the Internal Revenue Code of 1954 (hereinafter "Code deductions") with a number of further adjustments not here relevant. Sections 4(a) and (b) of chapter 62, as so amended, then provided for "income subject to taxation" to be separated into two classes, one subject to tax at the rate of 9 percent and the other subject to tax at the rate of 5 percent. The language of sections 4(a) and (b) was as follows:

(a) The amount by which the following classes of income *included in income subject to taxation* . . . exceeds the exemption allowable by section five B(b) shall be taxed at the rate of nine percent:

(1)(i) Interest . . .
(ii) Dividends . . .
(3) The net capital gain . . .
(b) The amount by which the income subject to taxation, other than

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³ Id. at 2172, 331 N.E.2d at 800.
⁴ See id.
⁵ Id. at 2173, 331 N.E.2d at 800.
the income taxable under subsection (a) ... exceeds the exemptions allowable under section five B(a) shall be taxed at the rate of five percent.\(^6\)

The statute offered no guidance as to how Code deductions were to be apportioned when "income subject to taxation" was divided into these two classes.

The Department of Corporations and Taxation early took the position that Code deductions were allowable only against 5 percent income, even though they might be directly attributable to 9 percent income. Moreover, the Department took the position that Code deductions were allowable only to the extent of 5 percent income.\(^7\) Thus, under the Department's view, a taxpayer who had $1000 of 9 percent income, $1000 of 5 percent income and $2000 of Code deductions would incur a $90 tax (9 percent of $1000) even though he had no income subject to taxation.

The position of the Department received its first test in Barnes v. State Tax Commission.\(^8\) The Department had attempted to tax the gross interest income of an unincorporated small loan company at the rate of 9 percent without any allowance for the expenses, other than interest,\(^9\) that the taxpayer incurred to produce the income. The Supreme Judicial Court, in a suit for declaratory judgment, held that the expenses were improperly disallowed.\(^10\) The Court held that the tax was a tax on net income, i.e., gross income less the costs and expenses of producing the income.\(^11\) Moreover, the Court held that the amount of income taxable at the rate of 9 percent could not exceed the total "income subject to taxation."\(^12\)

Although Barnes clearly rejected the Department's view that Code deductions were never deductible against 9 percent income, there was some uncertainty as to the exact scope of its application. Some, including apparently the Department, viewed the case as limited to the business context. Under this view, the case meant only that business expenses incurred in the conduct of an active trade or business that generated 9 percent income had to be allowed to offset the amount of such income taxable at the rate of 9 percent. Others viewed the case as only applying in situations where the amount of the Code deductions exceeded the amount of income taxable at the rate of 5 percent. Under these circumstances, unless the excess deductions were allow-


\(^{9}\) The statute specifically authorized a deduction against 9 percent income for certain types of interest expense. See G.L. c. 62, § 4(c), as amended by Acts of 1971, c. 555, § 5.


\(^{11}\) Id.

\(^{12}\) Id.
able against 9 percent income, the amount of income taxable at the rate of 9 percent would exceed the total "income subject to taxation." Finally, still others read the case as allowing Code deductions against 9 percent income not only in these two situations, but also whenever the deductions were directly attributable to items of income taxable at the rate of 9 percent. Under this view, for example, the only interest income included in "income subject to taxation" within the meaning of section 4(a)(1) of chapter 62 of the General Laws, as amended by chapter 555 of the Acts of 1971, was interest income net of the Code deductions incurred to produce it.

In the Wheatland case, the Attorney General on brief conceded, and the Court clearly implied, that the latter interpretation of the Barnes case was the correct one. The language of the Court was as follows:

In this case a further argument is made that if the income from the sale of timber on property in Maine is subject to taxation then deductions must be allowed for the expenses of earning the income and maintaining the property. It appears that the Commissioner does not dispute this as a general proposition. Income "subject to taxation" under c.62 is based on adjusted gross income as defined in §2(b) of c.62, and consequently permits "the deductions allowed under section sixty-two . . . of the [Internal Revenue] Code." Among the deductions allowed by §62 of the Code are ordinary and necessary business expenses (26 U.S.C. §162 [1970]) and expenses for the production of income (26 U.S.C. §212 [1970]). Having stated the general rule, however, the Court left it to the parties to agree upon the specific items that qualified for deduction.

13 The Attorney General said: "Hence, the 1971 Act provides that the taxable capital gain of § 4(a)(3) be arrived at by deducting expenses allowable under § 162 and § 212 of the Code." Brief for Appellee at 23.

14 The statement of facts on pages 4-5 of the Appellee's Brief indicated that the taxpayer was not actively engaged in the conduct of a trade or business and that the taxpayer did have income taxable at the rate of 5 percent during the year in question.

15 1975 Mass. Adv. Sh. at 2173-74, 331 N.E.2d at 800. The Court's statement that deductions allowable under § 212 of the Code are taken into account in determining a taxpayer's federal adjusted gross income under § 62 of the Code requires qualification. Int. Rev. Code of 1954, § 62(5) allows there to be taken into account, in determining federal adjusted gross income, only those § 212 expenses "which are attributable to property held for the production of rents or royalties."

16 Id. at 2174, 331 N.E.2d at 801. The Court may have been reluctant to pass on the deductibility of the specific items of expense involved because of uncertainty as to their status under § 62 of the Code. The taxpayer conceded that the expenses in question were in fact claimed as miscellaneous itemized deductions on its 1971 federal income tax return. Brief for Appellant at 24. Neither party, however, briefed the question whether the expenses could have been claimed as adjustments to gross income under § 62 of the Code for federal income tax purposes.
It should be noted that most of the problems under the 1971 amendments to chapter 62 relating to the allowability of deductions against 9 percent income were eliminated by chapter 723 of the Acts of 1973. Under that statute, Massachusetts gross income, which is defined by reference to federal gross income subject to certain adjustments, is first divided into "Part A" gross income (interest, dividends, and capital gain) and "Part B" gross income (all other Massachusetts gross income). Part B adjusted gross income is then defined as the Part B gross income less certain of the deductions allowable under sections 62 and 404 of the Internal Revenue Code of 1954. Part A adjusted gross income is defined as the Part A gross income less certain deductions, among them the excess of the allowable Code deductions over Part B gross income. The statute does provide, however, that excess Code deductions can only offset so much of the Part A gross income as is effectively connected with the active conduct of a trade or business.

**§11.22. Chapter 555 of the Acts of 1971: Trusts With Transferable Shares.** Prior to chapter 555 of the Acts of 1971, trusts with transferable shares (hereinafter "corporate trusts") were not subject to tax under chapter 62 unless (1) they fell into one of the three categories described in then section 1(c) of chapter 62, and (2) they elected to file an agreement to pay the tax then imposed by chapter 62. If a corporate trust did elect to file such an agreement, dividends on its shares were exempt from tax under chapter 62. If no agreement was filed, however, dividends on shares of the corporate trust were taxed at the rate of 8 percent in the same manner as corporate dividends.

Although the 1971 amendments to chapter 62 extensively revised this system of taxing corporate trusts and their shareholders, it clearly remained the intent of the Legislature that income earned by corporate trusts would be taxed only once, either at the trust level or at the shareholder level, but not at both. Under sections 8(a) and (b) of chapter 62, as added by chapter 555 of the Acts of 1971, all corporate trusts engaged in business in the Commonwealth became subject to tax unless (1) they qualified as regulated investment companies or real

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19 Id. § 2(b), as amended through Acts of 1973, c. 723, § 2.
20 Id. § 2(d), as amended through Acts of 1973, c. 723, § 2.
21 Id. § 2(c), as amended through Acts of 1973, c. 723.
22 Id.

§11.22. 1 See G.L. c. 62, §§ 1(c), 1(d), 1(e) and 5(d), as in effect prior to Acts of 1971, c. 555.
2 G.L. c. 62, § 1(c) & (e), as in effect prior to Acts of 1971, c. 555.
3 Id.
estate investment trusts under sections 851 or 856, respectively, of the Internal Revenue Code of 1954; (2) they qualified as a "holding company," as defined in chapter 555 of the Acts of 1971; or (3) they derived less than 10 percent of their income from within the Commonwealth. Under section 8(c) of chapter 62, as added by chapter 555 of the Acts of 1971, dividends on shares of corporate trusts were exempt from tax except in two situations. The first was where the corporate trust was itself exempt from tax. The second was where the dividend was paid out of "tax-free earnings and profits." The term "tax-free earnings and profits" was defined for this purpose as any earnings and profits accumulated prior to January 1, 1971, during a period when the corporate trust was not subject to tax under chapter 62 solely because it had not elected to file the agreement to pay the tax. 4

Cacciatore v. State Tax Commission 5 involved a corporate trust that had never filed the agreement to pay the tax. In 1966, the trust made an installment sale of Massachusetts real estate and, for federal income tax purposes, elected to report the gain on the installment method. 6 On its 1971 federal income tax return, the trust reported a gain of $70,043 as a result of payments received during the year on account of the sale. The Commissioner of Corporations and Taxation took the position that the gain should have been reported on the trust's 1971 Massachusetts return as well because, under chapter 555 of the Acts of 1971, the trust's Massachusetts gross income was determined by reference to its federal gross income. 7 The taxpayer disagreed, arguing that its entire profit on the sale constituted "tax-free earnings and profits." 8 If the gain did constitute "tax-free earnings and profits," of course, it would be taxable to the shareholders when distributed and thus could not be taxed to the trust without imposing what would amount to a double tax.

The Appellate Tax Board decided the case against the taxpayer, apparently on the grounds that the accrued profit on the sale was not "accumulated" prior to 1971. 9 Before the Supreme Judicial Court, however, the Attorney General did not defend the Board's decision on this basis—in effect, according to the Court, conceding that it was wrong. 10 Instead, the Attorney General argued that the profit could

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4 Id. § 8(c), as added by Acts of 1971, c. 555, § 5.
6 Id. at 2011, 330 N.E.2d at 850-51. See INT. REV. CODE OF 1954, § 453.
9 See id. at 2012, 330 N.E.2d at 851. As noted, G.L. c. 62, § 2, as added by Acts of 1971, c. 555, defined "tax-free earnings and profits" as any earnings and profits "accumulated" prior to January 1, 1971, during a period when the trust was not subject to tax under G.L. c. 62 solely because it had elected not to file the agreement to pay the tax.
not be considered as included in "tax-free earnings and profits" because it was not shown "by the books" of the trust.\textsuperscript{11} The Court held that this issue could not be considered because there was no indication that it was raised before the Board.\textsuperscript{12} Accordingly, the Court reversed the Board and held for the taxpayer, apparently on the basis of the Attorney General's concession.\textsuperscript{13}

In addition to the \textit{Cacciatore} case, there were also two decisions of the Appellate Tax Board during the 1975 \textit{Survey} year that were concerned with corporate trusts. The last sentence of section 8(a) of chapter 62, as added by chapter 555 of the Acts of 1971, provided that: "In determining the Code deductions allowable to such . . . [corporate] trust under this chapter it shall be considered to be an individual and not a corporation." The two decisions of the Board were concerned with the effect of this language.

\textit{Forte Investment Fund v. State Tax Commission}\textsuperscript{14} involved a corporate trust that was classified as an association taxable as a corporation for federal income tax purposes.\textsuperscript{15} During 1971, the trust's gross income consisted exclusively of interest, dividends, and net capital gain, and its expenses consisted largely of fees paid for investment advice. The case concerned the propriety of the Commission's refusal to allow any deduction for the trust's expenses in determining its income subject to taxation under chapter 62.\textsuperscript{16}

As amended by chapter 555 of the Acts of 1971, sections 2 and 3 of chapter 62 permitted deductions to be taken into account in determining Massachusetts income subject to taxation only if they were allowed under sections 62 or 404 of the Internal Revenue Code of 1954 (the "Code") in determining the taxpayer's federal adjusted gross income. Referring to the language in section 8(a) of chapter 62, quoted above, the Board held that the expenses were properly disallowed. The Board observed that if the taxpayer were treated as an individual rather than a corporation for federal income tax purposes, the expenses in question would not have been allowed in determining its

\textsuperscript{11} \textit{Id.} G.L. c. 62, § 8(c), \textit{as added} by Acts of 1971, c. 555, provided that, notwithstanding any other provision of law, dividends from the tax-free earnings and profits of a corporate trust would be subject to tax. G.L. c. 62, § 1(f), \textit{as added} by Acts of 1971, c. 555, defined the term "dividend" as a distribution out of current or accumulated earnings and profits, and went on to provide that: "Earnings and profits, as used herein, means the earnings and profits \textit{shown by the books} of the . . . entity making the distribution." (Emphasis added).


\textsuperscript{13} \textit{See} \textit{id.} at 2014, 330 N.E.2d at 851. Although the Court accepted the Attorney General's concession for the purposes of the case before it, it made it quite clear that it was not passing upon the propriety of the concession. \textit{Id.} at 2012-13, 330 N.E.2d at 851.

\textsuperscript{14} 2 CCH \textit{STATE TAX REP., MASS.} \textup{f}1200-427, at 10,347 (1975).

\textsuperscript{15} \textit{See} \textit{INT. REV. CODE OF 1954, § 7701(3)} and the Treasury Department regulations promulgated thereunder.

\textsuperscript{16} 2 CCH \textit{STATE TAX REP., MASS.} \textup{f}1200-427, at 10,348 (1975).
federal adjusted gross income because they were not incurred in a trade or business.\textsuperscript{17}

As a matter of statutory interpretation, it is difficult to quarrel with the Board's decision in \textit{Forte Investment Fund}. Indeed, the language in section 8(a) of chapter 62, quoted above, seems to have been drawn to accomplish precisely the result reached by the Board. The same cannot be said, however, of the Board's decision in the second case involving the effect of this language.

\textit{B.W. Company v. State Tax Commission}\textsuperscript{18} involved another corporate trust that was taxed as a corporation for federal income tax purposes. The case concerned the propriety of a tax assessed against the trust on a gain from the sale of certain real estate. The real estate was sold by the trust on April 30, 1971, pursuant to a plan of complete liquidation that was adopted by the shareholders of the trust on April 28, 1971. The gain was not recognized for federal income tax purposes because of the application of section 337 of the Internal Revenue Code of 1954.\textsuperscript{19}

The trust argued that the tax was improper because under chapter 62, as amended by chapter 555 of the Acts of 1971 its income subject to taxation was based on its federal gross income and the gain in question was excluded from federal gross income under section 337 of the Code. The trust argued that section 8(a) only required corporate trusts to be treated as individuals for purposes of determining their allowable deductions under the Code, not for purposes of determining their federal gross income. Moreover, the trust argued that it would be an unconstitutional denial of due process to apply the provisions of chapter 555 of the Acts of 1971 to the transaction because the sale was fully consummated almost three months prior to the date when that statute was signed into law and almost two months prior to the time when the legislation was first proposed. The taxpayer argued that had it known of the new law, it would have taken steps to avoid its application.\textsuperscript{20} As an example, the taxpayer suggested that it might have transferred the real estate to a corporation under section 351 of the Code in order to effect the liquidation without taxation.\textsuperscript{21}

The Appellate Tax Board rejected the trust's arguments and held the gain subject to taxation.\textsuperscript{22} Referring to the language of section 8(a), quoted above, the Board held that it was indicative of the Legislature's intent that corporate trusts be taxed as individuals not as

\textsuperscript{17} Id. at 10,348-49.
\textsuperscript{18} Id. ¶200-431, at 10,355 (1975).
\textsuperscript{19} Id. \textit{See} INT. REV. CODE OF 1954, § 337.
\textsuperscript{20} 2 CCH \textit{STATE TAX REP. MASS. } ¶200-431, at 10,356-57.
\textsuperscript{21} Id. at 10,357.
\textsuperscript{22} Id. at 10,358.
corporations. Because the nonrecognition provisions of Section 337 of the Code are only available to corporations under the Code, the Board concluded that the Legislature did not intend that corporate trusts would be able to invoke their protection. Furthermore, the Board held that the taxpayer's due process argument was without merit. Citing *Gregory v. Helvering*, the Board said it was not persuaded that the taxpayer could have avoided the tax simply by transferring the real estate to a corporation for purposes of the liquidation.

Some of the ambiguities regarding the treatment of corporate trusts have since been corrected. Chapter 723 of the Acts of 1973 rewrote section 8(a), deleting the language quoted above and inserting in its place the following:

The Massachusetts adjusted gross income of such corporate trust shall be redetermined as if it were a resident natural person, provided, however, that for purposes of any determination involving sections three hundred and fifty-one through three hundred and sixty-eight of the Code any corporate trust shall be treated as a corporation. No deductions or exemptions allowable under sections three A or three B of this chapter shall be allowed to a corporate trust.

Under section 8(a) as so amended, therefore, it is clear that corporate trusts will not be able to avail themselves of the nonrecognition provisions of section 337 of the Code for Massachusetts income tax purposes.

§11.23. Fiduciaries: Income Accumulated for Nonresidents. Section 10(a) of chapter 62 of the General Laws provides that income of trusts described in subsection (c) of that section is subject to tax under chapter 62 to the extent it is paid to or accumulated for residents of the Commonwealth. No tax is imposed to the extent such income is paid to or accumulated for nonresidents. In determining whether income is accumulated for residents or nonresidents, certain operating rules are provided. Income accumulated for unborn or unascertained persons or persons with uncertain interests is to be considered income accumulated for residents of the Commonwealth. Moreover, the statute provides that income is to be deemed accumulated for unborn or unascertained persons or persons with uncertain interests if it is accumulated for the benefit of
of "any future interest other than a remainder presently vested in a person or persons in being not subject to be divested by the happening of any contingency expressly mentioned in the instrument creating the trust."  

In 1966, in State Tax Commission v. Loring, the Supreme Judicial Court took a certain amount of liberty with this statutory language in order to exempt from tax trust income accumulated for a minor residing in California. The trust in question had been drawn to comply with the provisions of section 2503(c) of the Internal Revenue Code of 1954, so as to allow the $3000 annual gift tax exclusion to be available with respect to contributions made to it on the minor's behalf. The terms of the trust provided that, during the beneficiary's minority, the trustee had discretion to apply principal and income for her benefit. Any income not so expended was to be accumulated. Upon the beneficiary's attaining the age of twenty-one, the trust property then remaining was to be paid to her outright. If the beneficiary died prior to attaining the age of twenty-one, the trust property remaining at her death was to be distributed as she appointed by will and, in default of appointment, it was to be paid to her estate.

The Commission conceded that the minor had a presently vested remainder interest in the trust. Nonetheless, it argued that the remainder interest was "subject to be divested by the happening of . . . [a] contingency expressly mentioned in the instrument creating the trust." The Commission pointed out that, as a technical property law matter, the minor's remainder interest would be divested if she died prior to attaining the age of twenty-one after having executed a will exercising her testamentary power of appointment. The Supreme Judicial Court, however, sided with the taxpayer, holding that the accumulated income did not become taxable merely because of the existence of the testamentary power. The Court noted that the

3 Id.
5 INT. REV. CODE OF 1954, § 2503(c) provides as follows:
   No part of a gift to an individual who has not attained the age of 21 years on the
date of such transfer shall be considered a gift of a future interest in property
for purposes of subsection (b) if the property and the income therefrom—
   (1) may be expended by, or for the benefit of, the donee before his attaining
the age of 21 years, and
   (2) will to the extent not so expended—
(A) pass to the donee on his attaining the age of 21 years, and
(B) in the event the donee dies before attaining the age of 21 years, be payable
to the estate of the donee or as he may appoint under a general
power of appointment as defined in section 2514(c).
7 Brief for Appellant at 5.
8 Id.
power was presumably created in order to satisfy the requirements of section 2503(c) of the Internal Revenue Code of 1954, not to render the beneficiary's remainder interest uncertain. Moreover, the Court observed that, in fact, the existence of the power tended to augment, rather than cut down, the minor's interest in the trust. In sum, the Court held that exercise of the testamentary power there involved was not the type of divestment possibility that the Legislature had in mind.

During the 1975 Survey year, the Appellate Tax Board was called upon to decide a case that was similar in many respects to *Loring*. *DeRham v. State Tax Commission* involved a trust for the benefit of another minor residing in California. The terms of the trust were virtually identical to those of the trust in *Loring*, with one important exception. The trust in *Loring* provided that if the minor died before attaining the age of twenty-one, any trust property remaining would be paid to her estate unless she exercised her testamentary power of appointment. The trust in *deRahm* provided that if the minor died before attaining the age of twenty-one without exercising his testamentary power, the trust property would be paid to his then living issue or, if none, to the then living issue of his father and mother or, if none, to his heirs at law. Nevertheless, following *Loring*, the Board held for the taxpayer.

The development from *Loring* to *deRham* is interesting. The testamentary power of appointment, which was the sword of the Commission in *Loring*, became the shield of the taxpayer in *deRham*. In *Loring*, the Commission argued that the accumulated income was taxable because the minor's remainder interest would be divested if she died prior to attaining the age of twenty-one after having exercised the power. The Court disagreed, observing that the minor's interest was not cut down, but, if anything, augmented as a result of the existence of the power. In *deRham*, the Commission argued that the accumulated income was taxable because the minor's remainder interest would be divested if he died prior to attaining the age of twenty-one, without regard to whether or not he exercised his testamentary power. The Board held that the possibility of divestment as a result of failure to survive to twenty-one was cured by the existence of the testamentary power, which the Board said gave the minor most of the

10 *Id.* at 570-71, 215 N.E.2d at 753-54.
11 *Id.* at 571-72, 215 N.E.2d at 754.
12 See *id.* at 572, 215 N.E.2d at 755.
15 2 CCH STATE TAX REP., MASS. ¶200-425, at 10,342.
16 *Id.* at 10,344.
17 350 Mass. at 572, 215 N.E.2d at 754.
18 *Id.* at 572, 215 N.E.2d at 755.
incidents of ownership. One is reminded of the adage about letting the camel's nose under the tent flap.

§11.24. Appeal from Denial of Abatement Application: Time Requirements. Section 45 of chapter 62 of the General Laws provides that any person aggrieved by the refusal of the State Tax Commission to abate a tax assessed under that chapter may appeal to the Appellate Tax Board within thirty days after the mailing of notice of the Commission's decision or within six months after the abatement application is deemed denied under section 6 of chapter 58A of the General Laws. In *Falk v. State Tax Commission*,¹ the Commission's notice of disallowance of the abatement application was mailed on July 15, 1974 and received by the taxpayer on July 17, 1974. The taxpayer filed a petition in the Appellate Tax Board on August 15, 1974. ² The Board granted the Commission's plea in bar, holding that the petition was filed one day too late:³ "Where a remedy has been created by a statute, which prescribes the time within which the remedy must be pursued, the court has no jurisdiction to entertain proceedings begun at a later time."⁴

§11.25. Administrative Rulings Relating To ERISA. Although chapter 62 of the General Laws defines many terms by reference to their definition under the Internal Revenue Code of 1954 (the "Code"), the reference is to the Code as amended on January 1, 1971, not the Code as amended from time to time.¹ This incorporation of a dated version of the Code proved particularly troublesome in connection with the Employee Retirement Income Security Act of 1974 ("ERISA").² During the Survey year, several important rulings and releases were issued by the Department of Corporations and Taxation relating to this problem.

In letters dated December 27, 1974, and January 23, 1975, addressed to Charles Jackson, Jr., of Gaston Snow & Ely Bartlett, then Commissioner of Corporations and Taxation Nicholas L. Metaxas ruled that H.R. 10—or Keogh—Plans established in light of, or amended to conform with, ERISA, would not be considered disqualified for Massachusetts purposes merely because of a technical failure to comply with the terms of the 1971 Code. The letters did provide, however, that for Massachusetts purposes, the deduction for H.R. 10

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² Id. at 10,326.
³ Id.
⁴ Id.

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http://lawdigitalcommons.bc.edu/asml/vol1975/iss1/15
contributions would remain at the lesser of $2,500 or 10 percent of earned income.\(^3\)

Technical Information Release 1975-1 ("T.I.R. 1975-1"), issued August 1, 1975, dealt with Individual Retirement Accounts ("I.R.A.'s").\(^4\) The release provides that no deduction for contributions to an I.R.A. will be allowed under chapter 62. Amounts withdrawn from an I.R.A., even though included in federal gross income, will be excluded in determining Massachusetts gross income to the extent previously subjected to tax. Where the I.R.A. constitutes a "true trust," the trustees will be subject to tax on income earned on the account under section 10 of chapter 62. Where the I.R.A. is in the nature of a custodial account, on the other hand, income earned on the account will be taxed directly to the depositor.

T.I.R. 1975-1 also dealt with tax-free rollovers permitted under ERISA. The release provides that qualifying rollovers will be accorded nonrecognition treatment for Massachusetts purposes to the same extent as under the Code, as amended by ERISA, except where the rollover is to or through an I.R.A. In the latter situation, nonrecognition treatment will be denied for Massachusetts purposes and the individual will be taxed under chapter 62 on the amount rolled over.

D. CORPORATE EXCISE TAXES

\section*{Security Corporations.} In \textit{Industrial Finance Corp. v. State Tax Commission},\(^1\) the issue was whether the taxpayer qualified as a domestic securities corporation under section 38B of chapter 63 of the General Laws, so as to be eligible for the favorable tax treatment allowed such corporations under that section. The taxpayer was in the business of making secured and unsecured loans for business and personal purposes. The loans, which ranged from $2,000 to over $1,000,000, were represented by promissory notes. The collateral for the secured notes consisted of chattel and real estate mortgages, assignment of accounts, pledges of stock, etc.\(^2\) The taxpayer contended that the promissory notes were "securities" within the meaning of section 38B and that, accordingly, it satisfied the requirement of the statute that it be "engaged exclusively in buying, selling, dealing in, or holding securities on its own behalf and not as a broker."\(^3\)
The Supreme Judicial Court affirmed the decision of the Appellate Tax Board in favor of the Commission.\(^4\) The Court declined the taxpayer's invitation to decide the case on the narrow basis of whether or not the promissory notes constituted "securities" within the meaning of the statute.\(^5\) Instead, the Court looked to the legislative history of the statute\(^6\) and concluded that it was intended to benefit only corporations acquiring securities for investment, not corporations, such as the taxpayer, actively engaged in the business of lending money.\(^7\)

A little over a month after the Court handed down its decision in Industrial Finance Corp., the Appellate Tax Board released its report in PoGM Co. v. State Tax Commission,\(^8\) which also involved the taxpayer's eligibility for classification as a domestic securities corporation under section 38B. The taxpayer, until 1967, was actively engaged in business as a food manufacturer. In July, 1967, the taxpayer ceased manufacturing operations and sold all of its operating assets. Because of some zoning problems, it was unable to negotiate a cash sale of its real estate and it was forced to accept a $59,000 promissory note as part of the sale price. The note, which was secured by the real estate, was payable in installments over a fifteen year period and carried 7 percent interest on the unpaid balance.\(^9\) During the taxable year in question, the taxpayer received principal and interest payments on the installment note. The State Tax Commission took the position that the taxpayer's holding of the note and collecting principal and interest payments on it precluded it from securities corporation treatment because it was not engaged "exclusively" in securities transactions.\(^10\) The Board disagreed and held for the taxpayer.\(^11\) The Board relied entirely on the reasoning of a 1968 Appellate Tax Board decision, Arcade Malleable Iron Co. v. State Tax Commission,\(^12\) in reaching its decision:

The board finds that the appellant intended to terminate its business of manufacturing and to do business as a security corpora-

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\(^5\) Id. at 977, 326 N.E.2d at 5. Although the Court did not reach the question whether the promissory notes held by the taxpayer were "securities" for purposes of G.L. c. 63, § 38B, it suggested that the term "securities" might encompass promissory notes "when held for investment by a company whose business is investment." Id.

\(^6\) See id. at 972-77, 326 N.E.2d at 4-5.

\(^7\) Id. at 977, 326 N.E.2d at 5.

\(^8\) 2 CCH State Tax Rep., Mass. ¶200-426, at 10,344 (1975). Although PoGM Co. was decided on June 14, 1974, the Board did not release its findings of fact and report until May 12, 1975.

\(^9\) Id. at 10,345.

\(^10\) Id. at 10,346.

\(^11\) Id.

\(^12\) 2 CCH State Tax Rep., Mass. ¶200-274, at 10,072 (1968).
tion in the year 1963; that the appellant in good faith took all reasonable action to achieve this goal; that the holding of the title of the real estate was due to circumstances beyond the appellant's control. Insofar as it is a question of fact the board finds that the appellant did business in 1963 exclusively as a security corporation and that the real estate was held for the purpose of doing business but with the intention of selling it in liquidation of the former business. 13

§11.27. Apportionment Percentage: Sales Factor. *Joseph Pollack Corp. v. State Tax Commission* 1 was a decision of the Appellate Tax Board involving the question whether certain of the taxpayer's sales were properly includible in the numerator of the sales factor of its apportionment percentage. Section 38(c) of chapter 63 of the General Laws provides that if a corporation has income taxable both within and without the Commonwealth, its taxable net income will be apportioned to the Commonwealth by multiplying it by the corporation's apportionment percentage. During the taxable years involved in the case (1966 through 1969), the apportionment percentage was actually defined as a fraction, the numerator of which was the sum of the property factor, the payroll factor, and the sales factor, and the denominator of which was three. 2

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\text{Apportionment Percentage} = \frac{\text{Mass Property} + \text{Mass Payroll} + \text{Mass Sales}}{\text{Total Property} + \text{Total Payroll} + \text{Total Sales}}\]

Under section 38(f) of chapter 63, the sales factor is a fraction, the numerator of which is the total sales of the corporation in the Commonwealth during the taxable year and the denominator of which is the total sales of the corporation everywhere during the taxable year. During the four taxable years involved, section 38(f) provided that sales of tangible personal property were Massachusetts sales includible in the numerator of the sales factor if

... the property is shipped from an office, store, warehouse, factory or other place of storage in this commonwealth and the corporation is not taxable in the state of the purchaser and *the property was sold by an agent or agencies chiefly situated at, connected with or


2 G.L. c. 63, §§ 38(d), 38(c), 38(f).
sent out from premises for the transaction of business owned or rented by the corporation within this commonwealth...3

In Joseph Pollak Corp., it was conceded that the property involved in the sales in question was shipped from Massachusetts into a state where the taxpayer was not taxable. Thus, the issue was whether or not the property was sold by agents "chiefly situated at, connected with or sent out from" the taxpayer's Massachusetts office.4

The evidence introduced at the hearing before the Board showed that the property involved was sold by independent manufacturer's agents with whom the taxpayer had entered into commission agreements. The manufacturer's agents operated out of their own places of business outside of the Commonwealth and typically represented as many as ten other corporations in addition to the taxpayer. The taxpayer exercised no control or authority over the day-to-day activities of these agents and they dealt with the taxpayer largely by correspondence. Except in certain poor-risk situations, the agents had authority to conclude contracts without advance approval from the taxpayer.5

Based on this evidence, the Board held for the taxpayer.6 The Board concluded that the agents were neither "situated at" nor "sent out from" the taxpayer's Massachusetts office.7 Moreover, although it admitted that the agents were connected with the taxpayer's Massachusetts office, the Board held that they were not "chiefly" connected with that office "in the sense contemplated within the taxing statute."8 The Board held that the agents, as independent contractors and not employees of the taxpayer, "were chiefly connected with their own individual offices outside this state from which offices they operated in the sale of products for many corporations."9

§11.28. Classification as Business Corporation or Manufacturing Corporation. In First Data Corporation v. State Tax Commission,1 the Appellate Tax Board held that it lacked jurisdiction to entertain an appeal from the failure of the State Tax Commission to grant the

3 (Emphasis added). The language of G.L. c. 63, § 38(f), was amended by Acts of 1970, c. 562, and Acts of 1972, c. 748, § 1, to read as follows:

Sales of tangible personal property are in this commonwealth if: ... the corporation is not taxable in the state of the purchaser and the property was not sold by an agent or agencies chiefly situated at, connected with or sent out from premises for the transaction of business owned or rented by the corporation outside this commonwealth... (Emphasis added).

4 2 CCH STATE TAX REP., MASS. ¶200-411, at 10,329.

5 Id. at 10,328.

6 Id. at 10,330.

7 Id. at 10,329.

8 Id.

9 Id.

taxpayer's application on Form 355M for classification as a manufacturing corporation. The Board reasoned that under the governing statute, section 2 of chapter 58 of the General Laws, a taxpayer must be "aggrieved" by a classification made by the Commissioner of Corporations and Taxation (the "Commissioner") in order to have standing to file an application with the State Tax Commission on Form 355M. Since the Commissioner had not yet made any classification, the Board held that the Form 355M filed by the taxpayer was premature.

The Board's decision, which seems sound, sheds some welcome light on one of the most murky areas of Massachusetts tax practice. It can be vitally important to a taxpayer to be classified as a manufacturing, rather than as a business, corporation. Business corporations are subject to local tax on their machinery and equipment; manufacturing corporations are not. Moreover, only manufacturing corporations are eligible for the investment credit allowed under section 31A of chapter 63 of the General Laws. Despite the importance of what is at stake, however, the procedures to be followed in securing classification as a manufacturing corporation are generally not well understood.

Section 2 of chapter 58 of the General Laws requires the Commissioner to send to each board of assessors, on or before April first of each year, a list of all corporations taxable in the Commonwealth, indicating which have been classified as manufacturing corporations and which as business corporations. The statute then goes on to provide that:

2 Id. at 10,340.
3 Id.
4 See G.L. c. 59, § 5, cl. 16th.
5 In theory, the classification process is an annual event. As a practical matter, however, this is not the way the system works. In practice, corporations are presumed to be business corporations and will be so classified in the annual list unless they take the initiative and convince the Department that they are entitled to classification as a manufacturing corporation. Once they do establish that they are entitled to manufacturing corporation classification, however, the presumption shifts and they will ordinarily retain that classification absent some event that gives the Department occasion to reexamine the question.

One of the events that apparently will cause the Department to reexamine a corporation's status is a merger to which the corporation is a party. It appears to be the practice of the Department to treat the surviving corporation in a corporate merger in the same fashion as a newly organized corporation. Thus, unless some action is taken, the surviving corporation is automatically classified as a business corporation in the next annual list. This may occur even if the merger is with a shell corporation and is only undertaken to change the state of incorporation of the taxpayer. Thus, corporations that enjoy manufacturing classification and that contemplate participation in a merger should probably file a Form 355Q immediately after the consummation of the merger and should check the next annual list prepared by the Commissioner to insure that they have retained their desired status.

6 In recent years, the list has usually been sent out in mid-September or early October.
Any person aggrieved by any classification made by the commissi-
oner under any provision of chapters fifty-nine and sixty-three
or by any action taken by the commissioner under this section
may, on or before April thirtieth of said year on the thirtieth
day after such list is sent out by the commissioner, whichever is later,
file an application with the state tax commission ... stating
therein the classification claimed.

If the Commission denies or refuses to take action on such an applica-
tion, the taxpayer may, within certain specified time periods, appeal
to the Appellate Tax Board, and from the Board to the Supreme Judicial Court.

Much of the confusion regarding the proper procedure to be fol-
lowed in securing classification as a manufacturing corporation stems
from failure to appreciate the different functions served by the two
forms in current use: Form 355Q and Form 355M. Form 355Q, enti-
tled "Statement Relating to Manufacturing Activities," is the form that
is filed with the Commissioner (not the State Tax Commission) in the
first instance, in order to request classification as a manufacturing
corporation. Form 355M, entitled "Application for Classification of a
Corporation," on the other hand, is the form filed with the State Tax
Commission pursuant to section 2 of chapter 58 of the General Laws,
by corporations "aggrieved" by a classification made by the Commissi-
oner. It is the denial by the State Tax Commission of the application
on Form 355M that is appealable to the Appellate Tax Board, not the
denial by the Commissioner of the application on Form 355Q. The
Board's decision in First Data Corporation makes it clear that the Form
355M is not properly filed with the State Tax Commission until the
taxpayer is "aggrieved" by a classification made by the Commissioner.

The Board's decision in First Data Corporation does leave one point
unclear. Assume that a Form 355Q is filed with the Commissioner re-
questing classification as a manufacturing corporation and that it is
denied prior to the time when the list for the year is sent out to the
local assessors. Must the taxpayer wait for the list to be sent out, or
may he file Form 355M with the State Tax Commission on the basis
of the Commissioner's notice that the application on Form 355Q has
been denied? Until this point is clarified, the safest course of action
would probably be to wait for the publication of the list.

§11.29. Estimated Tax Payments. Effective for taxable years
commencing after December 31, 1975, corporations subject to the
Massachusetts business corporation excise tax will be required to make

7 G.L. c. 58, § 2.
9 See G.L. c. 58, § 2.
10 2 CCH STATE TAX REP., MASS. ¶200-421, at 10,340.
quarterly, rather than semiannual, estimated tax payments. Section 4 of chapter 63B of the General Laws formerly required such corporations to pay their estimated tax in two equal installments, one due by the 15th day of the sixth month of the taxable year and the other by the 15th day of the twelfth month of the taxable year. As amended by section 2 of chapter 427 of the Acts of 1975, the provision requires the estimated tax to be paid in four equal installments, the first due by the 15th day of the third month of the taxable year, the second by the 15th day of the sixth month, the third by the 15th day of the ninth month, and the last by the 15th day of the twelfth month.¹

E. Inheritance Taxes

§11.30. Life Estates with Power to Invade Principal. In Angevine v. Commissioner of Corporations & Taxation,¹ the Supreme Judicial Court rejected the Massachusetts Inheritance Tax Bureau’s position² that a gift of a life estate coupled with an unrestricted power to invade and consume principal should be treated as a gift of the complete interest in the property for inheritance tax purposes.³

The case involved a testator who died in 1970, leaving a substantial amount of property to a maximum marital deduction trust (“marital trust”) established under an inter vivos indenture. The terms of the marital trust provided that the net income was to be paid to the decedent’s wife during her lifetime and that, in addition, she was to be paid all, or any portion, of the principal upon her written request.⁴ Because of the wife’s unrestricted power to invade principal, the Massachusetts Inheritance Tax Bureau took the position that her interest in the trust was the equivalent of outright ownership.⁵ Accordingly, it assessed a present interest tax based on the total value of all property transferred to the trust rather than on the actuarial value of the wife’s life interest.⁶

¹ Subsequent to the close of the Survey year, G.L. c. 63B, § 4(a), was further amended by Acts of 1975, c. 684, § 54, so as to require 30 percent of the estimated tax to be paid with the first installment, 25 percent with the second and third installments and the remaining 20 percent with the final installment. Under Acts of 1975, c. 684, § 97, the amendment took effect on January 1, 1976.

² The Bureau’s position with respect to life estates with power to invade principal was developed internally in early 1972 and made public in the late summer of 1973. The Bureau attempted to apply its new policy only to estates of decedents dying after January 1, 1970 where the present interest tax was certified after April 1, 1971. Letter from Thomas B. McDavitt, Chief, Inheritance Tax Bureau, to “All Interested Persons,” September 25, 1973, a copy of which is on file at the offices of the Boston College Industrial and Commercial Law Review, Boston College Law School, Newton Centre, Massachusetts.

³ See id. at 1669-70, 329 N.E.2d at 125.

⁴ See id. at 1670-71, 329 N.E.2d at 125-26.

⁵ See id. at 1671, 329 N.E.2d at 126.
§ 11.31

STATE AND LOCAL TAXATION 253

Noting that the assessment would have the effect of imposing two taxes in place of one without any clear legislative mandate, the Court held the assessment improper.7 The Court observed that, under chapter 65 of the General Laws, remainder interests in trusts are not taxable until they come into "possession or enjoyment."8 The Court held that the wife, despite her power to invade principal, would not come into possession or enjoyment of the principal of the trust until she actually exercised the power.9

§11.31. Widow's Benefits. Shaughnessy v. Commissioner of Corporations & Taxation1 was a decision of the Appeals Court on a petition for abatement of an inheritance tax under section 27 of chapter 65 of the General Laws.2 The case was reserved and reported by the probate court. The decedent at the time of his death in 1968 was president and treasurer of Shaughnessy & Ahern Company (the "Company"). Subsequently, the stockholders and directors of the Company held a special meeting and voted to pay his widow $32,500 in equal weekly installments over two years. The Company had never before made payments of this sort to the estate or relatives of a deceased officer or employee, and it was under no contractual or other obligation to the decedent to do so.3 The executors of the Shaughnessy estate argued that the inheritance tax was not applicable since the widow's benefit in this case was not "property ... pass[ing] by will, or by laws regulating intestate succession, or by deed, grant or gift"4 within the meaning of chapter 65 of the General Laws. The court held that the decedent had no property interest in the payments and that the Commissioner's assessment of an inheritance tax with respect to them was improper. The court agreed that the payments were not property transferred by the decedent, but "a gratuity conferred upon the widow by an independent third party."5 Accordingly, the court held that the

7 Id. at 1675, 329 N.E.2d at 127. Under prior Bureau policy, the value of the remainder interest in the marital trust would have been taxed only once, on the death of the wife, unless the power to invade was exercised. Under the new policy, it would have been taxable twice, once on the death of the husband and again on the death of the wife, even though the power to invade was not exercised. See id. at 1672, 329 N.E.2d at 126.
8 Id. at 1669, 329 N.E.2d at 125.
9 Id. at 1675, 329 N.E.2d at 127. The importance of the Angevine case was diminished somewhat by the enactment, subsequent to the close of the Survey year, of the new Massachusetts Estate Tax, replacing the old inheritance tax in the case of all persons dying on or after January 1, 1976. Acts of 1975, c. 684, § 74, adding G.L. c. 65C. The new Massachusetts Estate Tax, which is closely patterned after the Federal Estate Tax, will in most cases eliminate the need to distinguish present and future interests for death tax purposes.

2 G.L. c. 65, § 27, permits executors and administrators, inter alia, to petition the probate court for the abatement of an allegedly erroneously assessed inheritance tax.
4 G.L. c. 65, § 1.

http://lawdigitalcommons.bc.edu/asml/vol1975/iss1/15
Commissioner's assessment of the inheritance tax was improper.  

F. MISCELLANEOUS DEVELOPMENTS

§11.32. New Administrative Provisions. Chapter 462 of the Acts of 1975 amended section 34 of chapter 58 of the General Laws so as to increase the penalty for tendering a bad check in payment of a tax liability. The penalty was formerly 1 percent of the amount of the check except that if the check was for less than $500, the penalty was $5 or the amount of the check, whichever was less. Effective with respect to payments made on or after January 1, 1976, the penalty will be 2 percent of the amount of the check except that if the check is for less than $500, the penalty will be $10 or the amount of the check, whichever is less. In addition, chapter 462 provides that the increased penalties are “in addition to any other penalties provided by law.”

Chapter 438 of the Acts of 1975 added section 51 to chapter 58 of the General Laws, introducing for the first time a long overdue timely-mailing—timely-payment rule similar to the one under the Internal Revenue Code of 1954. Section 51 provides that if a tax payment is due on or before a specific date and such payment is delivered by United States mail after such date, the date of the United States postmark stamped on the envelope will be deemed the date of payment, but only if the payment was mailed in the United States in a properly addressed envelope, first class postage prepaid, and the postmark falls on or before the due date of the tax. In the case of payments under section 5 of chapter 62B, chapters 64A-64I, and chapter 138 of the General Laws, the new timely-mailing—timely-payment rule will not apply unless the date of mailing falls on or before the second day before the due date of the payment.

§11.33. Appellate Tax Board: Practice Procedure. Under the Massachusetts Administrative Procedure Act, decisions of most state


9 Id.

10 INT. REV. CODE OF 1954, § 7502.

11 Acts of 1975, c. 438. Unlike its federal counterpart, INT. REV. CODE OF 1954, § 7502(c), the new G.L. c. 58, § 51, does not provide that, in the case of registered or certified mail, the date of registration or the date of the post office receipt will be deemed the date of postmark. This is an important omission since, absent such a provision, a taxpayer cannot protect himself against the risk that the payment letter will not be postmarked on the day it is deposited in the mails. See 26 C.F.R. § 301.7502-1(c).

12 §11.33. 1 G.L. c. 30A, §§ 1-17.
§11.33 STATE AND LOCAL TAXATION

agencies can be set aside by the courts if “[u]nsupported by substantial evidence.” As a result of a 1968 amendment, however, the state Administrative Procedure Act does not apply to the Appellate Tax Board. Under section 13 of chapter 58A of the General Laws, decisions of the Appellate Tax Board are “final as to findings of fact.” Appeals to the Supreme Judicial Court are permitted, but only “as to matters of law.” Thus, a finding of the Board can be challenged only on the grounds that, as a matter of law, it was not warranted by the evidence before the Board. Moreover, as illustrated by several decisions of the Supreme Judicial Court during the Survey year, even this limited right to challenge the findings of the Board will be lost unless certain procedural steps are taken.

In Martin v. State Tax Commission, the taxpayer appealed from a decision of the Appellate Tax Board, claiming that the evidence before the Board required a judgment in his favor. The Supreme Judicial Court held that the taxpayer was foreclosed from making this argument on appeal because he had failed to request that the Board make findings of fact and a report thereon. The Court noted that, under section 13, if no party requests such findings and report, “all parties shall be deemed to have waived all rights of appeal to the supreme judicial court upon questions as to the admission or exclusion of evidence, or as to whether a finding was warranted by the evidence.”

In Coomey v. Assessors of Sandwich, plaintiffs claimed that the town assessors had assessed all property in the town at less than its fair value and “in a manner discriminating against the taxpayers.” The Appellate Tax Board held for the assessors and the taxpayers appealed, asserting that the Board had erred in deciding that the taxpayers had not proved their case. The Supreme Judicial Court affirmed, holding that it could not consider whether, as a matter of law, the evidence before the Board warranted its findings because no stenographic report of the proceedings before the Board was either requested or made. The Court noted that section 10 of chapter 58A of the General Laws provides that if no party requests that the proceedings before the Board be reported, all parties are “deemed to
have waived all rights of appeal to the supreme judicial court upon questions as to the admission or exclusion of evidence, or as to whether a finding was warranted by the evidence".  

12 Id., citing G.L. c. 58A, § 10.