Chapter 7: State and Local Taxation

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§7.1. Introduction. The Survey year was a fairly full one in the development of the tax laws of the Commonwealth. A major tax bill\(^1\) was passed, and several cases involving issues of some importance were decided by the Supreme Judicial Court. This chapter will discuss the various major taxes separately, and in each case deal with the type of development (legislative or judicial) which was of most importance during the Survey year. A final section will deal with the large volume of tax cases that went off on procedural grounds during the Survey year. The abundance of these cases brings home to the practicing attorney the importance in the tax area, as in any other, of choosing the proper forum, meeting all relevant filing deadlines, and preserving an adequate record on appeal.

§7.2. Personal Income Taxes: Chapter 555 of the Acts of 1971. Several of the income tax cases decided during the Survey year, like those of the past few years,\(^1\) involved questions arising as a result of the rather hasty superposition by chapter 555 of the Acts of 1971 of federal concepts upon much of the structure of the old Massachusetts law regarding the taxation of income under chapter 62 of the General Laws. However, since chapter 62 was again substantially amended in 1973 in an effort to resolve these difficulties,\(^2\) some of the cases arising after the 1971 amendment but prior to the 1973 amendment are already of historical interest only.

In *B. W. Company v. State Tax Commission*,\(^3\) the Supreme Judicial Court held that under chapter 62 of the General Laws, as amended through chapter 555 of the Acts of 1971, a business trust with trans-

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\(^1\) Acts of 1975, c. 684.


\(^3\) For a discussion of the Appellate Tax Board’s decision, see Hines, *State & Local Taxation*, 1975 ANN. SURV. MASS. LAW § 11.22, at 241-42.
ferable shares, which was treated for federal tax purposes as a corporation, was entitled to exclude from its income the gain from a sale of assets which qualified for nonrecognition of gain under section 337 of the Internal Revenue Code of 1954 (the "Code"). The Court allowed the exclusion because section 2(a) of chapter 62 equates Massachusetts gross income with federal gross income and, therefore, since the "taxpayer's gain clearly was not part of its federal gross income ... [such gain] literally ... was not part of the taxpayer's Massachusetts gross income ...."

In reaching this result, the Court rejected the Commission's argument that business trusts are taxed as persons for Massachusetts income tax purposes. The Court noted that chapter 555 of the Acts of 1971 "directs only that such a trust be considered to be an individual (and not a corporation) '[i]n determining the Code deductions allowable to such ... trust.'" The Court reasoned that, in light of such a provision specifically referring to the determination of deductions, the absence of a similar provision regarding gross income was significant, indicating that "[i]f the Legislature had intended that a trust with transferable shares should be treated as if it were an individual in determining its gross income, it could have said so." The Court also rejected the Commission's argument that a literal application of the federal income tax definition of gross income would not permit the appreciation in the taxpayer's assets to be taxed at all by Massachusetts on liquidation, since the taxpayer in 1964 had entered into an agreement under section 1 of chapter 62 of the General Laws as then amended, which barred the taxation of its dividends. In response to this argument, the Court noted, without deciding the point, that the trust's shareholders might be subject to tax on any gain which they realized from the liquidation of the trust.

In light of the 1973 amendments to chapter 62 of the General Laws, the result reached in B. W. Company would no longer be possible. As amended by section 2 of chapter 723 of the Acts of 1973, section 8(a) of chapter 62 now provides that the Massachusetts adjusted gross income of a corporate trust shall be determined as if such trust were a resident natural person, with certain exceptions not here relevant. Therefore, for the purpose of determining Massachusetts in-

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7 Id., 345 N.E.2d at 887, citing G.L. c. 62, § 8(a), as amended through Acts of 1971, c. 555, § 5 (emphasis added by the Court).
9 G.L. c.62, §§ 1(c) and (e), as amended through Acts of 1935, c. 489, §6, and Acts of 1963, c. 496, respectively.
10 Id. at 840-41, 345 N.E.2d at 887.
11 Id. at 841-42, 345 N.E.2d at 887.
come tax, the nonrecognition provisions of section 337 of the Code are no longer available to corporate trusts.\(^\text{13}\)

In *Forté Investment Fund v. State Tax Commission*,\(^\text{14}\) the issue was not the allowability of an exclusion from gross income but rather of a deduction therefrom for a business trust under chapter 62, as amended through chapter 555 of the Acts of 1971.\(^\text{15}\) Section 8(a) of chapter 62 as amended through 1971 specifically provided that for purposes of determining the Code deductions allowable to a business trust the trust was to be considered an individual.\(^\text{16}\) As a result, the Court held that an investment trust could not deduct investment expenses because such expenses, considered as those of an individual, were not "trade or business" expenses deductible under section 62 of the Code,\(^\text{17}\) even though they would be considered trade or business expenses of a corporation.\(^\text{18}\) The Court reserved judgment with respect to whether it would reach the same result if the business trust had made short-term investments expecting to profit from fluctuations in a securities or commodities market, rather than long-term investments with the expectation of profit from the success of the businesses in which the trust had invested.\(^\text{19}\) The distinction between the two types of investments seems to turn on whether the trust is expecting to profit primarily from its own judgment and trading activity or from the efforts of the management of the corporations in which it has invested.\(^\text{20}\)

In *Dogon v. State Tax Commission*,\(^\text{21}\) the Court decided an issue raised by chapter 555 of the Acts of 1971 by relying on section 63(d) of chapter 62 of the General Laws, a section which was substantially re-written in 1973.\(^\text{22}\) The question raised was whether the gain from an installment payment received in 1971 from a 1965 sale of foreign real estate, which sale was reported on the installment basis for federal

\(^{13}\) "Corporate trusts" are defined as including any trust, the beneficial interest of which is represented by transferable shares. G.L. c. 62, § 1(j), as amended through Acts of 1973, c. 723, § 2.


\(^{15}\) Id. at 546-47, 343 N.E.2d at 421.

\(^{16}\) See text at note 7 supra.


\(^{18}\) 1976 Mass. Adv. Sh. at 549, 343 N.E.2d at 422. This result follows without difficulty under the law as in effect in 1971 and 1972, but it is made even clearer by Acts of 1973, c. 723, which amended c. 62, § 2 so as to permit the deduction of expenses allowed under § 62 of the Code only from Part B (earned) income to the extent of such income. See G.L. c. 62, § 2(d). If there is an excess of deductions allowable under § 62 over earned income, it may be applied to that portion of unearned income which is "effectively connected with the active trade or business of the taxpayer." G.L. c. 62, § 2(c)(1).

\(^{19}\) 1976 Mass. Adv. Sh. at 549, 343 N.E.2d at 422.


purposes, was subject to Massachusetts taxation. Instead of deciding the fundamental question of whether a 1971 tax statute could constitutionally tax gain arising from a 1965 sale, the gain from which was not taxable at the time of the sale, the Court decided in favor of the taxpayers' position by relying on section 63(d) of chapter 62, as added by section 18 of chapter 555 of the Acts of 1971. Section 63(d) provided that if the Commission did not "permit" a taxpayer to use the installment method for state tax purposes and the taxpayer was using that method for federal purposes, the taxpayer's income for any year in which he had installment income for federal purposes was to be "adjusted accordingly." This section was intended to prevent gain which was clearly taxable from being taxed twice by Massachusetts due to the different methods of reporting for federal and state purposes. The Court held, however, that since in this case the taxpayers had never applied for permission to report on the installment basis, "the conditions of § 63(d) are met" and therefore "the installment gain taxable for Federal tax purposes in 1971 must be removed from the taxpayers' income subject to taxation." The Court summarily rejected the Commission's argument that section 63(d) applied only where a taxpayer had requested permission to use the installment method and had been refused, stating that there was "no authority or legislative history to support these contentions." However, it could hardly be expected that authority could be found under a rather obscure section which was in force for only two years, and there was probably no meaningful legislative history of the section at all. On the contrary, it would appear that neither authority nor legislative history would be necessary to support the Commission's interpretation of the section, which was in accordance with the section's obvious purpose and the plain meaning of the words used.

In 1973, section 63 was entirely rewritten so as to give a taxpayer an election, comparable to that under the Code, to report an "installment transaction" on the installment basis. The Court noted this change in a footnote and expressed no opinion as to the result which would have followed if section 63, as so amended, had applied in 1971. Thus, there has been no final resolution of the constitutional

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24 The Court specifically noted that it need not reach the constitutional question. Id. at 1917 n.3, 351 N.E.2d at 855 n.3.
25 Id. at 1919, 351 N.E.2d at 856.
29 Id. at 1920, 351 N.E.2d at 856.
issue raised and skirted in *Dogon*. Of course, it is fundamental that a constitutional question will not be decided where there is some other basis for decision even if that basis is only temporary, but in this situation it is submitted that there was in fact no other basis, although the Court purported to find one, and the Court should have squarely faced the constitutional issue.

In *Elwood v. State Tax Commission*, the Supreme Judicial Court decided a very narrow issue created by section 5 of chapter 555 of the Acts of 1971 in large part by reference to the law prior to 1971 and to the law after the enactment of section 2 of chapter 723 of the Acts of 1973, which latter section the Court described as "in part curative." In the case of a husband and wife filing a joint return, section 5 of chapter 555 of the Acts of 1971 permitted a personal exemption of $2,600, with an additional exemption of up to $2,000 for the "salary, wages or other compensation" of the spouse with the smaller amount of such income. The Commissioner took the position that a spouse with self-employment income was not eligible for the additional exemption. Prior to 1971, however, it was clear that the then comparable exemption extended to working spouses with self-employment income. Similarly, section 2 of chapter 723 of the Acts of 1973 specified the same result for 1973 and later years. Accordingly, although the Court conceded that the issue could not readily be resolved from the face of the statute as in effect for 1971 and 1972, it held that the exemption included self-employment income for those years since to hold otherwise would create "an odd interregnum in the law.""  

**§7.3. Personal Income Taxes: New Hampshire Commuter Tax.** The March 1975 decision of the United States Supreme Court in *Austin v. New Hampshire*, holding the New Hampshire commuter tax unconstitutional, had some tangible effects during the Survey year on Massachusetts residents who had paid the tax. After the *Austin
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In the case, the Massachusetts Attorney General, together with the Attorneys General of Vermont and Maine, sued New Hampshire to collect the approximate amount of the tax that had been unconstitutionally collected from citizens of their respective states for which the plaintiff states had allowed a credit. The Supreme Court denied recovery, stating that the injury was of their own making since the plaintiff states need not have allowed a credit for the tax. The Commissioner of Corporations and Taxation accordingly proposed to assess an additional tax in the amount of the credit on all Massachusetts residents to whom a credit had been allowed. At the same time, New Hampshire took the position that individuals could not obtain a refund of the commuter tax because of the decision of the Supreme Court in the suit brought by the affected states, even though the Austin case itself was a claim for abatement by an individual. Thus the Massachusetts taxpayer who had paid the New Hampshire tax was caught in the middle. Fortunately, the Massachusetts Commissioner later revised his position and stated that he would not pursue collection of taxes for years prior to 1975, during only three months of which the commuter tax was in effect.7

§7.4. Personal Income Taxes. Legislation. After the flurry of legislative activity with respect to the income tax in the past several years, the Survey year was a very quiet period. The primary amendment to chapter 62 during the Survey year was the increase in the rate of tax on unearned income to ten percent and the imposition of a seven and one-half percent surtax.1 In addition, Massachusetts adopted an optional one dollar per taxpayer contribution to the state election campaign fund comparable to that instituted for federal purposes in 1974.2 The Massachusetts law, however, requires the tax-

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3 Pennsylvania v. New Jersey, 426 U.S. 660 (1976) (per curiam). The opinion also discusses a similar complaint brought by Pennsylvania against New Jersey. Id. at 661.
4 Id. at 664.
5 Conversation with Ms. Joyce Hampers, Associate Commissioner of Corporations and Taxation.
6 Id. According to Ms. Hampers, New Hampshire claimed, in addition, that the commuter tax in Austin was valid for the years prior to 1975, when it was declared unconstitutional by the United States Supreme Court.
7 Department of Corporations and Taxation, Technical Information Release: New Hampshire Commuters Income Tax, TIR-76-1 (August 27, 1976). The last paragraph of the release indicates that the Commissioner intended to press for collection of the tax for 1975. Since the release, however, and after the Survey year, the Legislature adopted a bill authorizing the Attorney General to commence legal proceedings in behalf of the residents of Massachusetts to recover from New Hampshire the taxes paid by Massachusetts commuters. Acts of 1977, c. 102. The Commissioner has indicated informally that collection of the 1975 taxes will be held in abeyance pending the outcome of the suit. Conversation with Ms. Joyce Hampers, Associate Commissioner of Corporations and Taxation. See Boston Herald American, March 27, 1977, at 21, col. 4.

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payer to pay one dollar in *addition* to his tax liability, whereas the analogous federal option provides for the application of one dollar of the taxpayer's tax liability to a campaign fund.

§7.5. **Corporation Excise Tax: Definition of “Engaged Exclusively” in Securities Investment.** In recent years section 38B of chapter 63 of the General Laws which provides favorable tax treatment for corporations that are “engaged exclusively in buying, selling, dealing in, or holding securities on [their] own behalf and not as a broker,”¹ has been the subject of several decisions. In the latest in this line of cases, *State Tax Commission v. The PoGM Co.*,² the Supreme Judicial Court, reversing the Appellate Tax Board,³ took a narrow approach to section 38B and held that a corporation that received income from a note secured by a mortgage on property it had sold was not engaged “exclusively” in securities investment and thus not entitled to favorable tax treatment under the section.⁴

*PoGM* involved a manufacturing corporation which decided in 1967 to cease its manufacturing activities and enter the investment field. In selling its assets the corporation was forced to take back a note for $59,000 secured by a mortgage on the real estate it sold.⁵ In the years after 1967, the corporation operated as a security company and was considered a personal holding company under federal income tax law.⁶ The value of the corporation's total assets was not stated, but it appeared that interest on the mortgage note and gain from the sale of the real estate constituted about thirty-seven percent of the corporation's total income during its 1971 tax year.⁷

The corporation applied for but was denied classification as a security corporation under section 38B and was therefore found liable for taxes as a domestic business corporation.⁸ On appeal, the Appellate Tax Board held that the circumstances surrounding the corporation's acquisition of the promissory note secured by a mortgage on the real estate it had formerly owned did not prevent the company from qualifying as a security corporation under section 38B of chapter 63 of the General Laws.⁹ In so holding, the Board relied on two of its earlier cases, *Arcade Malleable Iron Co. v. State Tax Commission* ¹⁰

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¹ G.L. c. 63, § 38B(a)(b).
⁵ *Id.* at 290, 341 N.E.2d at 286.
⁶ *Id.* at 290-91, 341 N.E.2d at 286.
⁷ *Id.* The rest of the corporation's total income for that year came from interest on Treasury Bills, commercial paper, and savings accounts. Docket No. 64515, 2 CCH STATE TAX REP., MASS. ¶ 200-426, at 10,345 (1975).
⁸ Docket No. 64515, 2 CCH STATE TAX REP., MASS. ¶ 200-426, at 10,345.
⁹ *Id.* at 10, 346-47.
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Commission\textsuperscript{10} and A&\textsuperscript{S} Inc. v. State Tax Commission,\textsuperscript{11} both unappealed, in which the Board had decided that former manufacturing corporations qualified under section 38B even though, in the one case, the corporation continued to hold title to unmarketable real estate\textsuperscript{12} and, in the other, it was still in the process of liquidating some of its assets during the year in question.\textsuperscript{13} In fact, such reliance in \textit{PoGM} would appear to have been unnecessary for it was a considerably easier case than either \textit{Arcade} or A&\textsuperscript{S}. In \textit{PoGM}, all the corporation’s assets were securities held for income, whereas in the earlier cases the corporations had not yet disposed of all the assets used in their previous business.

On appeal, however, the Supreme Judicial Court held that \textit{PoGM} was not a security company because it did not acquire the mortgage note “in the normal course of investment,” but rather “as the apparently unavoidable consequence of the circumstances under which it had to sell its real estate.”\textsuperscript{14} Therefore, the note was not “the type of security which the Legislature had in mind in § 38B.”\textsuperscript{15} The Court purported to rely on its decision in \textit{Industrial Finance Corp. v. State Tax Commission,}\textsuperscript{16} where a corporation in the business of lending money was found not to be a security corporation even though its only assets were notes.\textsuperscript{17} That case, however, seems clearly distinguishable. There, as the Court pointed out in its decision, the corporation’s business was not investment but rather lending money,\textsuperscript{18} whereas in \textit{PoGM} the corporation’s major business was the holding of securities, including the note in question.\textsuperscript{19}

Although the Supreme Judicial Court in \textit{PoGM} did not discuss \textit{Arcade} and A&\textsuperscript{S}, the Court, by implication, overruled those prior Appellate Tax Board decisions. It is clear that the Court would find that neither of the former manufacturing corporations involved in \textit{Arcade} and A&\textsuperscript{S} would qualify as a security company under section 38B since both companies actually retained business assets during the taxable years in question.\textsuperscript{20} It is submitted that the Court in \textit{PoGM} took an unjustifiably narrow approach to section 38B. It would seem that the relevant test should be not how a corporation’s securities were acquired, but rather whether they were in fact held as investments.

\textsuperscript{10} Docket No. 46882, 2 CCH \textit{STATE TAX REP., MASS.} \textit{¶200-274} (1968).
\textsuperscript{11} \{1953-1967 Transfer Binder\} CCH \textit{STATE TAX REP., MASS.} \textit{¶200-175} (1963).
\textsuperscript{12} \textit{Arcade}, 2 CCH \textit{STATE TAX REP., MASS.} \textit{¶200-274}, at 10,072, 10,074 (1968).
\textsuperscript{13} A \& S, \{1953-1967 Transfer Binder\} CCH \textit{STATE TAX REP., MASS.} \textit{¶200-175} at 10,485 (1969).
\textsuperscript{15} Id.
\textsuperscript{17} Id. at 977-78, 326 N.E.2d at 5. The Court stated that the corporation did not hold its promissory notes for investment in the “necessary sense” of G.L. c. 63, § 38 B. 1975 Mass. Adv. Sh. at 977-78, 326 N.E.2d at 5.
\textsuperscript{18} 1975 Mass. Adv. Sh. at 977, 326 N.E.2d at 5.
\textsuperscript{20} See text at notes 12-13 supra.
§7.6. Corporation Excise Tax: Gross Income: Interest Reduction Payments. Two cases decided by the Supreme Judicial Court during the Survey year both involved the same issue under the excise tax imposed on urban redevelopment corporations by section 10 of chapter 121A of the General Laws, prior to its amendment by section 7 of chapter 827 of the Acts of 1975. Morville House, Inc. v. Commissioner and Rosenthal v. Commissioner raised the question whether “gross income . . . from all sources,” as used in section 10, included “interest reduction payments” made by the federal government directly to the mortgagee of a chapter 121A project. The effect of such payments is to reduce to one percent the effective rate of the mortgage to the mortgagor, with the government making up the rest. The Commissioner argued that the payments represent the discharge of an indebtedness of the mortgagor and therefore are income to him. This position was supported by a recent ruling in which the Internal Revenue Service held that such payments were indeed “gross income” under section 61 of the Internal Revenue Code. The Supreme Judicial Court explicitly stated that the measure of gross income in section 10 is the same as that described in section 61 of the Code, but nonetheless held that the payments in question were not income under section 10.

The opinion of the Court is strained and unpersuasive. First, it states that the payments are in the nature of a subsidy similar to welfare or food stamps. However, as the Internal Revenue Service pointed out in its ruling, the payments are for the benefit of the tenant, not the mortgagor as such, and therefore only the tenant should be immune from the tax consequences which would otherwise follow. Second, the Court differentiated the situations present in Morville and Rosenthal from the usual constructive receipt situation on

2 1976 Mass. Adv. Sh. 788, 344 N.E.2d 884. Rosenthal was decided the same day as Morville and adopted the reasoning in Morville without further elaboration. Id. at 792, 344 N.E.2d at 886. Therefore most of the discussion in the text will be based on Morville.
3 Such payments are made pursuant to 12 U.S.C. § 1715z-1 (1970).
9 Id. at 775, 344 N.E.2d at 879.
10 Id. at 780, 344 N.E.2d at 882.
the ground that, in the former, the mortgagor was not permitted to receive the payments under federal law. Finally, the Court held that neither Morville nor Rosenthal presented the usual discharge of indebtedness situation in that the payments by the government to the mortgagor were essentially worked out directly between them, and the government's obligation to make the payments ran directly to the mortgagor and not to the plaintiffs. Neither of these latter two points, however, would seem to affect the basic fact that the payments are a discharge of the mortgagor's liability, at least in that the mortgagor would otherwise have to pay the liability himself.

It is difficult to believe that the Court was in fact very much swayed by the reasons it cited in its decision. Rather, it seems likely that the Court was aware that a contrary result would work a considerable hardship on the mortgagor—a consequence which would not arise under the Code because of the difference between the methods of taxation under the Code and section 10. In the ruling cited by the Court, the Internal Revenue Service indicated not only that interest reduction payments are includable in income, but also that they are deductible as interest. On the other hand, section 10 of chapter 121A as in effect prior to its 1975 amendment taxed "gross income" without any offsetting deductions. Thus, inclusion of the payments in federal income would have no effect on the federal tax, but inclusion in Massachusetts income would have a considerable and burdensome effect in terms of the Massachusetts tax. It is surprising that the Court did not therefore differentiate "gross income" as used in section 10 from the federal concept and decide the case on the basis of the particular structure of the state excise tax.

The Court might also have cited the 1975 amendment of section 10 as casting some light on the Legislature's original intent, as it did in an analogous situation in Elwood v. State Tax Commission, thereby reaching the conclusion that the payments in Morville and Rosenthal were not includable in income by a less strained route. Instead, the Court chose to embrace unnecessarily the federal concept of gross income, and then to struggle to reach a result which that concept did not really permit.

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15 G.L. c. 121A, § 10, as in effect prior to Acts of 1975, c. 827, § 7.


18 The Court turned to the federal concept by reference to G.L. c. 63, § 30, cl. 5, since under G.L. c. 121A, § 10 ¶5, as in effect prior to Acts of 1975, c. 827, § 7, G.L. c. 63 is applicable in all matters of assessment, collection, payment, and abatement of the § 10 tax. Morville, 1976 Mass. Adv. Sh. 779, 344 N.E.2d 881. However, it does not follow that the operative terms of § 10 are to be defined by reference to c. 63.
§7.7. Corporation Excise Tax: Machinery and Equipment Exemption. One issue that appeared to have been laid to rest by the 1973 decision of the Supreme Judicial Court in *State Tax Commission v. MSF Leasing Corp.* was raised again in a case decided by the Appellate Tax Board during the Survey year. The issue is whether a corporation whose business is the leasing of machinery and equipment, rather than the use of such equipment directly, is eligible for the partial exemption from tax provided by section 30(7) of chapter 63 of the General Laws as amended through section 1 of chapter 539 of the Acts of 1969. The Commissioner has taken the position since the passage of the exemption in 1962 that a corporation leasing machinery and equipment is not eligible for the exemption, on the theory that since the property of such a corporation is exempt from local taxation as "stock in trade" under clause sixteenth of section 5 of chapter 59, it cannot be considered "machinery" for purposes of chapter 63. Conversely, the Commissioner has indicated that if leased machinery is considered machinery for purposes of chapter 63, it should also be considered machinery for purposes of chapter 59 and, being machinery of a business rather than a manufacturing corporation, should not be exempt from local taxation.

In *MSF Leasing*, the Court, in a brief rescript opinion, held that a corporation whose business was the leasing of machinery to its parent was entitled to the exemption, but the Court did not deal explicitly with the Commissioner's argument as outlined above. As a result the Commissioner did not feel that the Court adequately dealt with his position and has been attempting to limit the precedential effect of the case to parent-subsidiary situations such as was involved in *MSF Leasing*. Apparently the Commissioner has in effect been seeking an opportunity to relitigate the entire issue and is not seriously maintaining that a distinction should be made between parent-subsidiary leasing arrangements and others. However, the Commissioner has lost the first round of this new battle. In *Granite Computer Leasing Corp. v. State Tax Commission*.

3 Section 30(7), prior to the passage of Acts of 1970, c. 634, provided a 5-year exemption from the tangible property measure of the tax for machinery and equipment with a useful life of 8 years or more which is exempt from local taxation. See Acts of 1962, c. 756, § 2, for the text of the provision allowing the 5-year exemption. Although the exemption was removed by Acts of 1970, c. 634, § 1, § 6 of c. 634 permits corporations that had already qualified for the exemption to continue to take it for the rest of the 5 year period, so that an exemption could be taken through 1973.
5 This view is based upon a memorandum from a meeting with the Commissioner on February 13, 1974. The memorandum is on file at the offices of the *Annual Survey of Massachusetts Law*.
7 See note 5 supra.
The availability of the exemption was once again raised, and the Appellate Tax Board held that a corporation that leased computers to unrelated customers was entitled to the exemption. The Board again did not specifically deal with the argument raised by the Commissioner, but rather relied exclusively on the MSF Leasing case.

§7.8. Corporation Excise Tax: Legislation. The legislative changes in the corporation excise tax during the Survey year were directed toward increasing revenue and thus primarily involved rate changes. Higher rates were imposed on banks, domestic corporations, foreign corporations, and security corporations. In addition, the three factor apportionment fraction used in determining the income measure of the tax imposed on domestic corporations that have business activity taxable both within and without Massachusetts was changed by doubling the weight to be given to the sales factor.

9 Id.
10 Id. After the end of the Survey year, the case was appealed to the Supreme Judicial Court and later withdrawn. Nos. SJC-833-836 (January 19, 1977).

§7.8. 1 G.L. c. 63, §§ 2, 11, as amended by Acts of 1975, c. 684, §§ 43, 44. Section 2 formerly taxed banks at a rate equal to that assessed on other financial corporations, but in no event higher than ten percent. G.L. c. 63, § 2 as amended through Acts of 1966, c. 14, § 9. Section 2 now taxes all banks at the rate of twelve and fifty-four one hundredths percent. The 1975 amendment increased the annual excise tax imposed on savings banks, co-operative banks, and savings and loan associations under G.L. c. 63, § 11 as amended through Acts of 1966, c. 14, § 11, as follows: in subparagraph (a) of § 11 "six hundred twenty-seven one thousandths percent" was substituted for "one-half of one percent," and "one-sixteenth" was substituted for "one-twentieth;" and in subparagraph (b) of § 11 "one and two hundred fifty-four one thousandths percent" was substituted for "one percent," and "one-sixteenth" was substituted for "one-twentieth." In addition, surtax equal to 10 percent of the sum of taxes due under § 11 of G.L. c. 63, plus any surtax which may be imposed on savings banks, co-operative banks, and state or federal savings and loans associations subject to G.L. c. 63, § 11, was imposed upon such banks or loan associations for taxable years ending on or after October 31, 1975 and before October 31, 1976. Acts of 1975, c. 684, § 89. A similar ten percent surtax was imposed on all corporations, banks, or other entities taxable under any provision of G.L. c. 63 other than § 11. Acts of 1975, c. 684, § 89. The fourteen percent surtax formerly imposed by Acts of 1969, c. 546, § 18, which applied, inter alia, to taxes levied under G.L. c. 63, § 11, was amended so as to no longer apply to § 11. Acts of 1975, c. 684, § 85.
2 G.L. c. 63, § 32(a)(2), as amended by Acts of 1975, c. 684, § 48. The rate was raised from seven and one half percent to eight and thirty-three hundredths percent of net income.
3 G.L. c. 63, § 39(a)(2), as amended by Acts of 1975, c. 684, § 53. The rate was raised from seven and one half percent to eight and thirty-three one hundredths percent of its net income.
4 G.L. c. 63, § 38B, as amended by Acts of 1975, c. 684, § 51. The rate under § 38B(a) for corporations that are not regulated investment or bank holding companies under the Internal Revenue Code defined in Int. Rev. Code of 1954, §§ 851 and 1103 respectively was changed from one percent to one and thirty-two one hundredths percent. The rate under § 38B(b) for regulated investment or bank holding companies was changed from one quarter of one percent to thirty-three one hundredths percent.
and increasing the denominator from three to four.\textsuperscript{5} Finally, the activities that would subject a domestic or foreign corporation to tax were specified.\textsuperscript{6} These activities were, in essence, the qualification to do business in the Commonwealth; the buying, selling, or procuring of services or property; the exercise of the corporation's charter; and the possession or use, in a corporate capacity, of any part of the corporation's capital, plant, or other property in Massachusetts. The avowed intention of the Legislature in specifying the activities that would subject a corporation to tax was "to require the payment of this excise . . . for the enjoyment under the protection of the laws of the commonwealth, of the powers, rights, privileges and immunities derived by reason of the corporate form of existence and operation."\textsuperscript{7}

\textbf{§ 7.9. Inheritance Tax: Legislation.} The primary legislative development with respect to death taxes during the Survey year was the replacement of the inheritance tax by an estate tax based on the federal model. Chapter 65C of the General Laws, which was added by section 74 of chapter 684 of the Acts of 1975, imposes a tax at graduated rates ranging from five percent to sixteen percent on the estates of Massachusetts residents dying after December 31, 1975.\textsuperscript{1} The Massachusetts gross estate is based on the federal gross estate as determined under the Internal Revenue Code as of January 1, 1975,\textsuperscript{2} with the following differences. Real and tangible personal property having an actual situs outside the Commonwealth is excluded from the gross estate, and similarly deductions attributable to such property are not allowable.\textsuperscript{3} In addition, the marital deduction is measured by the Massachusetts rather than the federal adjusted gross estate.\textsuperscript{4} The specific exemption for Massachusetts estate tax purposes is limited to $30,000,\textsuperscript{5} with an additional "disappearing exemption" of $30,000 in

\textsuperscript{5} G.L. c. 63, §§ 38(c), 38(g), as amended by Acts of 1975, c. 684, §§ 49, 50. Prior to the amendment, a corporation that had income from business activity which was taxable both within and without the Commonwealth determined its taxable net income attributable to the Commonwealth by multiplying its taxable net income by a fraction, the numerator of which was the property factor plus the payroll factor plus the sales factor, and the denominator of which was three. G.L. c. 63, § 38(c), as amended through Acts of 1966, c. 698, § 58. After the 1975 amendment, the numerator of the fraction was the property factor plus the payroll factor plus twice the sales factor, and the denominator of the fraction became four. G.L. c. 63, § 38(c), as amended by Acts of 1975, c. 684, § 49.

\textsuperscript{6} G.L. c. 63, §§ 32(1)-(3), 39(1)-(3), as amended by Acts of 1975, c. 684, §§ 47, 52. Section 47 relates to domestic corporations and § 52 to foreign corporations.


\textsuperscript{1} G.L. c. 65C, § 2. The statute provides for an estate tax rate of 5% for estates of $50,000 or less. At the other end of the spectrum, estates of more than $4,000,000 are taxed at $547,000 plus 16% of the excess over $4,000,000.

\textsuperscript{2} G.L. c. 65C, § 1(a)(f). For the provisions which define a federal gross estate, see INT. REV. CODE of 1954, § 2031 et seq. G.L. c. 65C replaces the provisions of G.L. 65 "and all other provisions of law imposing any tax on legacies and successions" for decedents dying on or after January 1, 1976. Acts of 1975, c. 684, § 97.

\textsuperscript{3} G.L. c. 65C, §§ 1(f), 3(b).

\textsuperscript{4} Id., § 3(b).

\textsuperscript{5} Id., § 3(a).
cases where the Massachusetts net estate$^6$ is less than $60,000.$^7$ The "net estate" is a concept unique to Massachusetts and was added in order to make allowance for estates that have a substantial amount of debt.$^8$ It figures not only in the disappearing exemption but also in a limitation of the estate tax to twenty percent of the excess of the Massachusetts net estate over $60,000.$^9$ This limitation will apply to only a narrow range of estates—generally, those for which the net estate is between $60,000 and $70,000.$^10$

The new law continues the "sponge" tax, designed to use the maximum federal credit, apparently without suspending the similar tax already contained in chapter 65A.$^{11}$ The only difference between the two is that chapter 65A extends the sponge tax to foreign decedents with intangible property in Massachusetts, whereas chapter 65C$^{12}$ makes no provision for taxation in such instances.$^{13}$

For decedents dying prior to January 1, 1976, chapter 65, which provides for the taxation of legacies and successions, remains in full force and effect, except that future interests subject to powers of appointment that are included in the estate of the holder of the power under chapter 65C are not taxable to the donor of the power under chapter 65.$^{14}$ However, if the inheritance tax on the property has

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$^6$ The Massachusetts net estate is defined as the Massachusetts gross estate less funeral expenses, claims against the estate, and unpaid indebtedness on property included in the estate, to the extent deductible under the Code and § 3 of G.L. c. 65C. G.L. c. 65C, § 1(g).

$^7$ G.L. c. 65C, § 3(a). The statute provides that if the Massachusetts net estate is $60,000 or less, the exemption shall equal the net estate.


$^9$ G.L. c. 65C, § 2(a).

$^{10}$ Wheeler & Reynolds, supra note 8, at 17.

$^{11}$ Thus, under G.L. c. 65C § 2(b), if the maximum credit for state death taxes allowable under the federal estate tax, see INT. REV. CODE OF 1954, § 2011, exceeds the estate tax imposed by Massachusetts, the amount of the excess is added to the tax imposed under the graduated rates found in G.L. c. 65C, § 2(a). An analogous provision is found in G.L. c. 65A, § 1, which is still in effect with respect to the estates of decedents who died prior to January 1, 1976. See Acts of 1975, c. 684, § 97.

$^{12}$ See note 2 supra.

$^{13}$ Chapter 65C taxes the estates of nonresident decedents only on the real estate and tangible personal property located in the Commonwealth. G.L. c. 65C, § 4. At the present time, for purposes of determining the taxable estate of a nonresident the various exemptions and deductions attributable to the property are not allowed in full but only in the same proportion as the value of the Massachusetts gross estate bears to the federal gross estate. Id. This method of calculation could clearly work a substantial hardship on nonresident decedents. After the close of the Survey year, the Legislature amended c.65C, § 4, so that a nonresident decedent's estate tax would be determined by applying a fraction, equal to the decedent's Massachusetts gross estate divided by his total gross estate, to the tax which the decedent would pay on his total estate determined as if he were a Massachusetts resident. Acts of 1976, c. 415, § 90, effective January 1, 1977.

been settled prior to the death of the holder of the power of appointment, \(^{15}\) the property will not be includable in the taxable estate of the holder of the power. \(^{16}\) In an effort to settle the numerous estates of pre-1976 decedents with future interests outstanding, the Estate Tax Bureau announced in June a special settlement program under which it would settle future interest taxes at the rate of two percent on the first $100,000 of taxable property, four percent on the next $400,000, and seven percent on any excess. The offer is for a one year period, ending July 1, 1977, after which time "all offers to settle future interests will be strictly reviewed and settled only under assumptions most favorable to the commonwealth." \(^{17}\) The offer was designed to be, and for most estates probably is, more favorable than a settlement under the traditional procedure, which was based on the probable actual disposition of the property. \(^{18}\) In addition, it makes avoidance of the estate tax possible on property subject to a general power of appointment.

§7.10. Inheritance Tax: Judicial Developments. Only two cases involving the inheritance tax under chapter 65 of the General Laws were decided by the Supreme Judicial Court during the Survey year. \(^{1}\) Boston Safe Deposit & Trust Co. v. The Children's Hospital \(^{2}\) signaled a possible limitation on the Court's previously manifested willingness to interpret a will in a way so as to minimize federal estate taxes. \(^{3}\) Boston Safe involved the question whether future interest taxes on a marital deduction trust should be borne by the trust itself or by the residue of the estate, which residue was to go to charity under the will. \(^{4}\) The tax clause of the will fairly clearly placed all death taxes on the residue, \(^{5}\) and the Court therefore rejected the charitable legatees' position that future interest taxes, unlike all other death taxes, should be borne by the trust itself. \(^{6}\)

Boston Safe was considerably complicated by the federal estate tax position of the estate. At the time the case was heard by the Supreme Judicial Court, a petition was pending before the Tax Court claiming

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\(^{15}\) See G.L. c. 65, § 14.

\(^{16}\) Acts of 1975, c. 684, § 83.

\(^{17}\) Form S.S.P.-1, Department of Corporations and Taxation, Estate Tax Bureau.

\(^{18}\) See G.L. c. 65, §§ 13, 14.


\(^{5}\) Id. at 1948-49, 351 N.E.2d at 850. The tax clause actually contained in the decedent's will was almost meaningless due to the apparent omission of a line. The Court, however, filled in the omission by reference to the will of the decedent's wife which had an identical tax clause. Id. at 1949 n.6, 351 N.E.2d at 850 n.6.

\(^{6}\) Id. at 1949, 1956, 351 N.E.2d at 853.
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that if Massachusetts law should require that the future interest taxes should be paid out of the marital trust property, such taxes would not reduce the value of the marital deduction as the Internal Revenue Service claimed. The Supreme Judicial Court noted that if the estate prevailed in the Tax Court case and taxes were paid out of the trust, then the estate would save a substantial amount of federal taxes over what it would have to pay if future interest taxes were payable out of the residue, thereby reducing the estate’s charitable deduction. However, if the estate’s petition to the Tax Court was not successful, the federal tax would be exactly the same regardless of whether the trust or the residue paid future interest taxes, since in either case the applicable deduction would be reduced by the amount of the tax. Accordingly, the Court apparently tried to reach its decision by reference to the terms of the will itself, uninfluenced by the possible federal tax consequences of the alternative positions before it. In view of the uncertainty regarding the tax consequences of the two possible interpretations of the will, the Court’s refusal to be guided by tax considerations does not necessarily foreshadow a general tendency in this direction.

Restricting its analysis to the terms of the will, the Court found support for its interpretation of the tax clause in another clause of the will stating that all questions with respect to the marital trust should be resolved so as to preserve the marital deduction. It held further, no doubt correctly, that another provision of the will charging “taxes, expenses and other liabilities of the trusts hereunder” to the respective trusts had no application to death taxes, and that while the failure of the will to set up a method for payment of future interest taxes out of the residue was a “regrettable” omission, it was not insuperable.

In the second case decided by the Supreme Judicial Court during the Survey year, Ward v. Commissioner of Corporations and Taxation, the Court rejected a very strained attempt by the Commissioner to treat the credit against future interest taxes provided by section 3 of chapter 65A of the General Laws as an asset which was itself subject to the inheritance tax. The credit set forth in the section enables an estate that has to pay the “sponge” tax under chapter 65A to charge against it future interest taxes which subsequently become due. The Court

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7 See id. at 1955, n.12, 351 N.E.2d at 853 n.12.
8 Id. at 1952 n.8, 351 N.E.2d at 851-52 n.8. There was no question that future interest taxes payable out of the residue, a charitable bequest, would reduce the charitable deduction. See Int. Rev. Code of 1954, § 2055(c).
10 Id.
11 Id. at 1951 & n.7, 351 N.E.2d at 851 n.7.
12 Id. at 1952-53, 351 N.E.2d at 852.
13 Id. at 1954-55, 351 N.E.2d at 853.
15 Id. at 3142-43, 336 N.E.2d at 863.
held that there was no indication that chapter 65A was intended as a mechanism to collect more inheritance taxes, as opposed to a means to tax to the limit of the maximum federal credit.\textsuperscript{16} In addition, the Court held that the credit would not be considered property passing from the decedent within the meaning of section 1 of chapter 65.\textsuperscript{17} The Court noted that even if the latter provision were considered ambiguous, “the Commissioner's undenied long standing prior interpretation of G.L. c. 65, § 1, as to inheritance tax credits under G.L. c. 65A, § 3, would be entitled to great weight in resolving any such ambiguity against his present position.”\textsuperscript{18}

\section*{\textsection 7.11. Property Taxes: Judicial Developments.} Most of the cases in the area of property taxation during the Survey year involved questions under section 5 of chapter 59 of the General Laws, which section contains the available exemptions from taxation. In \textit{Board of Assessors of Saugus v. Baumann},\textsuperscript{1} the plaintiffs had sought a property tax exemption under clause eighteenth of section 5 of chapter 59 as “persons who by reason of age, infirmity and poverty are in the judgment of the assessors unable to contribute fully toward the public charges.”\textsuperscript{2} The taxpayers appealed the assessors' denial of the exemption to the Appellate Tax Board, which held in favor of the taxpayers and granted an abatement of the tax.\textsuperscript{3} On appeal by the board of assessors, the Supreme Judicial Court held that the Appellate Tax Board did not have jurisdiction to hear the appeal under section 6 of chapter 58A of the General Laws,\textsuperscript{4} which gives the Board jurisdiction to hear appeals only from clauses seventeenth and twenty-second of section 5.

Although technically the position taken by the Court in \textit{Baumann} is unarguable, over the years cases arising under other clauses of section 5 have routinely been heard by the Appellate Tax Board and the Supreme Judicial Court without any jurisdictional question ever being raised.\textsuperscript{5} It is conceivable, therefore, that the reason for the Court's decision in \textit{Baumann} was its unwillingness to second guess the assessors' judgment,\textsuperscript{6} and that the Court used the jurisdictional objection only as

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{1} Id. at 3143 & n.1, 336 N.E.2d at 863-64 & n.1.
\item \textsuperscript{2} Id. at 3144-45, 336 N.E.2d at 864.
\item \textsuperscript{3} Id. at 3145 & n.3, 336 N.E.2d at 864 & n.3.
\item \textsuperscript{4} Id. at 3144-45, 336 N.E.2d at 864-65, 345 N.E.2d at 864.
\item \textsuperscript{5} Id. at 864, 345 N.E.2d at 360.
\item \textsuperscript{6} Id. at 864, 345 N.E.2d at 361.
\item \textsuperscript{7} Id. at 864-65, 345 N.E.2d at 361.
\item \textsuperscript{8} Id. at 865, 345 N.E.2d at 361.
\item \textsuperscript{9} Id. at 3143 & n.1, 336 N.E.2d at 863-64 & n.1.
\item \textsuperscript{10} Id. at 3144-45, 336 N.E.2d at 864.
\item \textsuperscript{11} Id. at 3145 & n.3, 336 N.E.2d at 864 & n.3.
\item \textsuperscript{12} Id. at 3144-45, 336 N.E.2d at 864-65, 345 N.E.2d at 864.
\item \textsuperscript{13} Id. at 3144-45, 336 N.E.2d at 864-65, 345 N.E.2d at 864.
\item \textsuperscript{15} This possibility is given added weight by the Court's statement that “[a] hardship abatement under cl. Eighteenth is a matter in the discretion of the assessors.” 1976 Mass. Adv. Sh. at 865, 345 N.E.2d at 361.
\end{itemize}
\end{footnotesize}
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an expedient method of disposing of the case, without considering the implications of its holding. In any event, both by highlighting the fact that the terms of section 6 of chapter 58A give the Appellate Tax Board only limited jurisdiction over appeals under section 5 and by applying the statute literally, the Court's decision invites assessors to take advantage of the jurisdictional ground as a means of obtaining the dismissal of appeals to the Board under section 5. It should be noted also that the jurisdictional question could probably be raised successfully for the first time on an appeal to the Supreme Judicial Court, by which time the period in which to pursue any other avenue of appeal might well have passed. Thus, so long as section 6 of chapter 58A remains in effect in its present form, the cautious taxpayer in the future will take any appeal not expressly authorized by that section or by other statutes not to the Board but directly to the courts, for even though the Board and the Supreme Judicial Court might again be willing to ignore the jurisdictional objection, it is not certain that the assessors will likewise be willing.

Of the cases decided on substantive grounds, four involved the question whether a corporation qualified as a "manufacturing corporation" under section 2 of chapter 58 of the General Laws, with the result that its property would be exempt from local taxation under section 5 of chapter 59. In *Joseph T. Rossi Corp. v. State Tax Commission*, the Supreme Judicial Court, acknowledging that it was a close case, held that the production of cut lumber by a sawmill was not "mere extraction, packaging and transportation of a raw material" but rather the production of a new product, and as such was "manufacturing," even though the product was not "a finished product for the ultimate consumer." In *Hopkinton LNG Corp. v. State Tax Commission*, however, the Appellate Tax Board held that the processing of natural gas into liquified natural gas did not create a new product and therefore was not "manufacturing." The Board reached the same conclusion in *First Data Corp. v. State Tax Commission*, in which it held that the conversion of information received into different kinds of information by a digital computer "time sharing" system was not manufacturing but rather the performance of a service. Finally, in a rather obvious decision, the Appellate Tax

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8 Shortly after the *Baumann* case was decided H. 4825 (1976) was introduced in the General Court to give the Appellate Tax Board jurisdiction to decide appeals under all the clauses of c. 59, § 5. The bill was rejected by the House on June 8, 1976.
9 G.L. c. 59, § 5, cl. 16th(3).
11 Id. at 3413-14, 338 N.E.2d at 559.
13 Id.
15 Id. at 10,391, 10,392, 10,394.
Board held in *Fernandes Super Markets, Inc. v. State Tax Commission*,¹⁶ that a supermarket with a bakery on the premises was not a manufacturing corporation by virtue of the bakery, where only 7.5 percent of its gross profits were from the sale of baked goods, and 12.6 percent of its employees were engaged in the bakery activity.¹⁷

*United Church of Religious Science v. Board of Assessors of Attleboro*,¹⁸ involved a novel claim under clause tenth of section 5 of chapter 59, which exempts “[p]ersonal property owned by . . . religious organizations, whether or not incorporated, if the principal or income is used or appropriated for religious, benevolent or charitable purposes.”¹⁹ A religious corporation, United Church of Religious Science, claimed that machinery and stock in trade of an electrical wire and cable manufacturing plant owned and operated by it was exempt from property taxes under the clause because the income from the operation was used for religious purposes.²⁰ Literally, it seems that the exemption should have applied, but the Appellate Tax Board understandably balked at such a holding which would grant a tax exemption to property used in a manner not even remotely related to a religious purpose.²¹ Nonetheless, in order to hold that the commercial use of the property was a bar to exemption, the Board had to take the position, unsupported by any previous case law, that clause tenth set up a dual requirement that both income and principal, rather than income or principal alone, must be used for religious purposes.²²

*Board of Assessors of Melrose v. Driscoll*²³ involved the relatively recently enacted exemption for real estate owned by veterans with “a disability rating of one hundred per cent as determined by the Veterans Administration.”²⁴ The taxpayer had a 100 percent disability rating, but the rating was by its terms “based in part on unemployability” under section 4.16 of the Veterans Administration regulations.²⁵

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¹⁶ Docket No. 74528, 2 CCH *STATE TAX REP., MASS.* ¶ 200-446 (1975).
¹⁷ *Id.* at 10,388, 10,389.
¹⁸ Docket Nos. 75003, 75639 (April 7, 1976), *summarized at 2 CCH *STATE TAX REP., MASS.* ¶ 200-455.
¹⁹ G.L. c. 59, § 5, cl.10th.
²⁰ Docket Nos. 75003, 75639 (April 7, 1976), *summarized at 2 CCH *STATE TAX REP., MASS.* ¶ 200-455.
²¹ *See Assessors of Boston v. Lamson, 316 Mass. 166, 55 N.E.2d 215 (1944)*, where the Court granted an exemption under cl.10th for property used to print Christian Science publications and a newspaper called The Christian Science Monitor. *Id.* at 169, 175, 55 N.E.2d at 217, 220. Profits from the religious publications, after first being used to make up the deficit sustained by the Monitor, went to First Church of Christ, Scientist in Boston. *Id.* at 170, 55 N.E.2d at 218. In granting the exemption the Court stressed the religious character of the publications, including the newspaper. *Id.* at 169-70, 173, 174, 55 N.E.2d at 218, 219, 220.
²² *After the end of the Survey year, the case was affirmed by the Supreme Judicial Court. Nos. SJC-737-738 (April 1, 1977).*
²⁵ 38 C.F.R. § 4.16 (1975).
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which permits the Veterans Administration to take into account, in addition to the veteran's physical disability, his inability in fact, as a result of his disability, to obtain employment.26 The Supreme Judicial Court held that a subjective rating based in part on the employability of the veteran, in addition to an objective disability rating based only on the type or extent of disability, was within the exemption.27 Since Veterans Administration regulations predating the passage of the Massachusetts real estate exemption permitted either method for determining a 100 percent disability rating and since the Legislature did not in the statute enacting the real estate exemption differentiate between the methods, the Court held that the Legislature must have intended that a 100 percent disability rating arrived at by either method would be sufficient for purposes of determining the availability of the exemption.28 In addition, the Court held that its position did not make superfluous the further statutory requirement that the veteran be "incapable of working."29 The Court noted that it was possible for a veteran to be 100 percent disabled under the objective standard and still be capable of work.30 Furthermore, the Court stated that the inclusion of the phrase "incapable of working" appeared to be an independent statutory requirement and, as such, it was conceivable that a veteran might have a 100 percent disability rating based on the subjective unemployability standard and still be determined by the assessors to be capable of working.31

§7.12. Property Taxes: Legislation. There were few statutory changes in the Massachusetts property tax during the Survey year. The only significant amendment was made by chapter 853 of the Acts of 1975 which amended section 38 of chapter 59 of the General Laws so as to require the assessors of each city and town to submit annually to the state Tax Commission the valuation method or combination of methods that they proposed to use in making assessments for the coming year. Such methods may include comparison of sales prices,

26 1976 Mass. Adv. Sh. at 1500-01, 348 N.E.2d at 785. There are two sections dealing with total disability of veterans under the federal regulations. Under 38 C.F.R. § 4.15 (1975), a veteran is considered 100% disabled when he suffers from a disability which would make it impossible for the average person to be gainfully employed. Under § 4.16, which was applicable for the plaintiff, a subjective standard is used: a veteran is considered 100% disabled when as a result of a combination of disabling injuries he is unable to be gainfully employed. 38 C.F.R. § 4.16 (1975).


29 Id. at 1505, 348 N.E.2d at 786. G.L. c. 59, §5, cl.22d E.


31 Id. at 1505-06, 348 N.E.2d at 786-87. The Court did not hold that the statute required an independent inquiry into a veteran's employability, but merely stated "we would not at this time say that an independent determination of capability for work is in any and all circumstances foreclosed with respect to a veteran with a total disability rating based in part on unemployability." Id. at 1505, 348 N.E.2d at 787.
capitalization of income, and replacement cost less depreciation. The Commission may recommend changes in the methods proposed; if the assessors do not accept the recommendations, they may appeal to the Appellate Tax Board whose decision shall be final.

The only other amendments to chapter 59 were minor modifications of the procedure for appeal of real and personal property assessments made pursuant to sections 64, 65, 65B, and 65C of that chapter. Section 3 of chapter 677 of the Acts of 1975 removed the time limit contained in section 65B, involved in Currens v. Board of Assessors of Boston, which had required a taxpayer to file an appeal within ten days from entry of an Appellate Tax Board order granting a motion to file an appeal without full payment of the tax. In addition, the procedure for late entry of appeals contained in section 65C now applies only if the board of assessors fails to notify the taxpayer of its inaction on his application for abatement within ten days, as required since 1975 by section 63 of chapter 59.

§7.13. Sales, Use, and Meals Taxes. The primary developments during the Survey year in this area were legislative. The rate of the sales and use taxes was increased from three to five percent. On the other hand, the meals excise tax was repealed, effective July 1, 1980. For the period prior to the effective date of the repeal, however, the General Court broadened the tax by making meals under one dollar taxable. At the same time, definitions of “meal” and “restaurant” were added and rapidly amended so as to make it clear which sales by grocery stores, delicatessens, bakeries, and other such establishments were subject to tax. In addition, exemptions from the meals tax were added for meals served to students in primary and secondary schools and for meals served in hot lunch programs for the elderly. The procedural provisions with respect to the meals excise tax, formerly contained in sections 4 through 9 of chapter 64B were repealed, and a section was added making the comparable provisions of the sales tax applicable in this connection.
In the only decision by the Supreme Judicial Court involving sales and use taxes, Sears, Roebuck & Co. v. State Tax Commission, the Court held, reversing the Appellate Tax Board, that advertising supplements inserted in newspapers are themselves parts of newspapers and therefore exempt from sales and use taxes under section 6(m) of chapter 64H and section 7(b) of chapter 64I of the General Laws. The Commissioner had claimed before the Board that the sale of such supplements by out-of-state printers to an in-state retailer for distribution as supplements to newspapers was a taxable sale. The Appellate Tax Board agreed, distinguishing the case where such supplements are printed by the paper directly and therefore are clearly a part of the total newspaper. In a brief and largely conclusory opinion, the Supreme Judicial Court appeared to base its contrary decision on the fact that newspapers were intended to be free from sales and use taxes and that the tax at issue, even though it was imposed on a retailer and not on the newspaper, might have the same economic impact as a tax directly on the newspaper distributing the supplement. Even in the absence of any knowledge relative to what, if any, evidence on this matter was presented to the Court, it appears doubtful that the tax would have any economic effect on the newspaper at all because the retailer would probably pass the tax on to his customers as an additional cost of printing the supplement.

Another exemption for newspapers was involved in Attleboro Sun Publishing Corp. v. State Tax Commission. Sections 6(r) and 6(s) of chapter 64H of the General Laws exempt, inter alia, materials and machinery "used directly and exclusively ... in the actual manufacture of tangible personal property to be sold, including the publishing of a newspaper." The Commissioner claimed that sales of certain materials to a newspaper company for use in its printing process were not exempt under subsections (r) and (s). The Commissioner presumably attempted to distinguish Courier Citizen Co. v. Commissioner of Corporations and Taxation on the basis of subsequent amendments to subsections (r) and (s).
The Appellate Tax Board held that the exemption was applicable, summarily rejecting the notion that the case was in any way distinguishable from the *Courier Citizen* case.\(^\text{18}\)

\section*{Practice & Procedure on Appeal} Several cases during the Survey year were decided against the appellant because of a failure to follow the prescribed procedure and/or a failure to preserve an adequate record on appeal. Three cases involved a failure to meet a filing deadline, coupled in two instances with a record that considerably hampered the appellant's ability to present his argument either that he did not in fact file late or that his appeal should nonetheless be heard.

In *Sears, Roebuck & Co. v. State Tax Commission*,\(^1\) the Supreme Judicial Court affirmed the Appellate Tax Board's holding that it lacked jurisdiction over the taxpayer's appeal of sales or use tax assessments for the months from January 1969 through December 1971 because the taxpayer did not appeal within ninety days after notice of the State Tax Commission's decision not to abate those assessments.\(^2\) The taxpayer had attempted to remedy the late filing by moving to amend a petition relating to taxes for November 1968, which was timely filed, so as to include the period from January 1969 to December 1971. However, the Court held that it was not within the Board's power to "create an exception to the time limit specified by the statutes."\(^3\)

*Current v. Board of Assessors of Boston*\(^4\) concerned the procedure for an appeal to the Appellate Tax Board under section 65B of chapter 64H of the General Laws of Massachusetts.
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59 of the General Laws.\(^5\) At the time in question, section 65B provided that on payment of one-half the real estate tax assessed, a taxpayer who claimed he was unable to pay the rest of the tax could petition the Appellate Tax Board for leave to file an appeal and such a petition would be heard by a single member of the Board, who could grant leave to appeal “within 10 days from the entry of said order upon such conditions as may be imposed therein . . . .”\(^6\) In Currens leave was granted, but the taxpayer mistakenly did not file his appeal until after expiration of the ten days.\(^7\) Three years later he petitioned the Board to amend its original order by extending the time for filing so as to include the date he filed.\(^8\) The Board denied the motion after a hearing without giving any reason, and the taxpayer appealed this denial.\(^9\)

It appears that the Supreme Judicial Court’s earlier decision in Louvre, Inc. v. Assessors of Boston\(^10\) would have provided ample authority for the Court in Currens to hold that the ten-day limit was required by statute and was not within the power of the Board to extend.\(^11\) Instead, although quoting the substance of the Louvre decision,\(^12\) the Court stated that “[t]he requested amendment [extending the time to file], if made nunc pro tunc, might prevail against any argument by the assessors that the application had not been seasonably filed . . . .”\(^13\) However, the Court went on to state that since the taxpayer’s motion had been denied without any reason, there was no basis in the record for holding that “the board ever inferred, found or decided that the taxpayer’s failure to file within the original time limit was due to any excusable neglect or was for other good cause shown.”\(^14\) In addition,

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\(^{6}\) G.L. c. 59, § 65B, as amended through Acts of 1945, c. 621, § 7. The statute has since been again amended, eliminating, inter alia, the ten day filing requirement. G.L. c. 59, § 65B as amended by Acts of 1975, c. 677, § 3. See § 7.12, at notes 4-6 supra.
\(^{8}\) Id. at 1201, 345 N.E.2d at 850.
\(^{9}\) Id. at 1202, 345 N.E.2d at 851. In view of the evident lack of an order by the Board denying the applications for abatement, the Court pointed out that there was some question as to the ripeness of the case for appeal. However, it did not pursue this point since neither of the parties had raised it. Id. at 1199, n.1, 346 N.E.2d at 850, n.1.
\(^{10}\) 319 Mass. 727, 66 N.E.2d 711 (1946).
\(^{11}\) In Louvre which had essentially the same fact situation as Currens, the Court stated that “[t]he appeal of the taxpayer filed more than ten days [after the order of the Board] had no standing and could be given none by the board either as matter of right or as matter of discretion. The statute must be strictly followed.” Id. at 727, 66 N.E.2d at 712. The Currens taxpayer attempted to distinguish Louvre on three grounds: (1) in Currens, unlike in Louvre, the taxpayer filed a motion to amend the Board’s order so as to increase the original time limit for filing the application for abatement; (2) the Currens assessors did not move to dismiss the application on the ground of late filing, whereas the Louvre assessors did; (3) the rules governing civil procedure and their interpretation had been liberalized in the interim between Louvre and Currens. The Court rejected these distinctions as not relevant to the relief that the taxpayer was requesting from the Court. Currens, 1976 Mass. Adv. Sh. at 1203, 346 N.E.2d at 851.
\(^{13}\) Id. at 1201, 346 N.E.2d at 850.
\(^{14}\) Id. at 1204, 346 N.E.2d at 852.

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the Court refused to consider the taxpayer's claim that the assessors had agreed to an abatement until they discovered that he had filed late, because this allegation was "not stated or incorporated in the record on appeal."  

The taxpayer in the Currens case should at least have presented all of his evidence in the affidavit in support of his motion before the Board as to the facts that he subsequently raised in his brief before the Supreme Judicial Court. More importantly, he could have insured that there would be written findings as to the reasons for the Board's denial of his motion. The Board might have taken the position that in decisions on a motion it cannot be required, pursuant to the request of a party, to issue a report of findings of fact and rulings of law. In that event, however, the taxpayer could have pursued the case to a final dispositive order and at that time made a request for findings of fact and rulings of law pursuant to the Board's Rule 29. Had the Board found the facts in the taxpayer's favor but the law, under the Louvre decision, against him, the issue of law that the Court was able to skirt on the record before it would have been squarely presented.

In Bedford Gas & Edison Light Co. v. Board of Assessors of Dartmouth, the issue was whether the taxpayer had in fact failed to meet a filing deadline. The Supreme Judicial Court held that the appellant, by not requesting a transcript of the proceedings before the Appellate Tax Board, was precluded from claiming that the Board's finding that the appellant had filed late was not warranted by the evidence. In addition, the appellant did not raise before the Board its legal arguments as to why in the circumstances its late filing, assuming there was one, should be ignored. Therefore, the appellant was also precluded from raising these arguments on appeal under section 13 of chapter 58A of the General Laws.

Board of Assessors of Provincetown v. Vara-Sorrentino Realty Trust was decided against the appellant, the board of assessors, on the ground that the record was too sketchy to support the facts alleged. The

15 Id. at 1205, 346 N.E.2d at 852.
16 Appellate Tax Board Rule 29, 2 CCH STATE TAX REP., MASS. ¶ 89-284.
18 Id. at 3019-20, 335 N.E.2d at 899.
19 Id. at 3024-25, 335 N.E.2d at 901, citing G.L. c. 58A, § 13, as appearing in Acts of 1973, c. 1114, § 5, G.L. c. 58A, § 10. The appellant attempted to remedy the error by filing a motion after the proceedings to have a transcript included in the record, but its motion was denied. This denial was not appealed, but the Court indicated its approval in dictum. 1975 Mass. Adv. Sh. at 3020 n.3, 3025 n.10, 335 N.E.2d at 899 n.3, 901 n.10.
21 Id. at 3026, 335 N.E.2d at 901-02. The Court rejected the taxpayer's contention that since the legal issue raised on appeal was based on the federal constitution, it need not have been presented to the Appellate Tax Board. Id. at 3026-27, 335 N.E.2d at 901-02.
23 Id. at 409, 412, 341 N.E.2d at 650, 651.
case involved an appeal of the Appellate Tax Board's grant of a property tax abatement to a "hotel-restaurant-bar-shop complex" using a capitalization of income approach.\(^{24}\) The appeal was based on the argument that the assessors could not adequately employ a capitalization of income approach due to the owner's failure to supply them with the necessary information with respect to receipts and expenses.\(^{25}\) The Supreme Judicial Court, however, did not find sufficient facts in the record to support this claim.\(^{26}\) In addition, the Court pointed out that no review of the substance of the Board's decision was possible since the evidence before the Board was not reported.\(^{27}\)

In another case involving the lack of record on appeal, a finding could have been made against the appellant assessors because of a procedural flaw but since a decision on the merits would reach the same result, the Court proceeded to consider the merits.\(^{28}\) *Beardsley v. Board of Assessors of Foxborough,*\(^{29}\) like *Bedford Gas,* involved a question of the substantiality of evidence to support a finding of the Appellate Tax Board.\(^{30}\) In *Beardsley,* the lack of a transcript was excused because the evidence was largely documentary and appeared in the exhibits and the Board's findings and report.\(^{31}\) However, the assessors failed to request a ruling from the Board that the evidence did not warrant the finding in question, and the Court stated in dictum that this failure "will justify an affirmation of the decision of the Board because nothing . . . [is] properly before us for review."\(^{32}\)

\(^{24}\) Id. at 407-08, 341 N.E.2d at 649-50.

\(^{25}\) Id. at 409, 341 N.E.2d at 650.

\(^{26}\) Id.

\(^{27}\) Id. at 408, 341 N.E.2d at 650.


\(^{30}\) Id. at 647-49, 343 N.E.2d at 360-61.

\(^{31}\) Id. at 647 n.3, 343 N.E.2d at 360 n.3.

\(^{32}\) Id.