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Chapter 6: State and Local Taxation

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§6.1. **Personal Income Tax.** The most novel and potentially the most significant income tax case decided this Survey year is the Appellate Tax Board decision of *Daley v. State Tax Commission*. In *Daley* the taxpayer claimed that the taxation of a lump-sum distribution from a qualified employee benefit plan at two different rates, as mandated by General Laws chapter 62, section 4, was in violation of article XLIV of the Articles of Amendment to the Massachusetts Constitution. Under chapter 62 as in effect for the year at issue, all distributions from employee benefit plans were taxed entirely at five per cent except lump-sum distributions received on death or retirement. Such distributions were taxed at five per cent to the extent they consisted of an amount attributable to the employer's contributions after 1969, and at nine per cent to the extent they consisted of an amount attributable to the employer's contributions through 1969. This method of taxation resulted from the pattern of federal taxation of such distributions under the Internal Revenue Code, coupled with the definitions of "net capital gain" in then chapter 62, section 4(a)(3) as any excess of gain over loss from "transactions deemed to be sales or exchanges of capital assets or granted gains treatment under the provisions of the [Internal Revenue] Code." The tax-

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2 Daley arose under former G.L. c. 62, § 4, as amended by Acts of 1971, c. 555, § 5. Under present law, the rate of tax on what is now called "Part A" income is 10% rather than 9%, and the method of taxation of distributions from employee benefit plans is somewhat different due to the redefinition of "Code" in G.L. c. 62, § 1(c) as the Internal Revenue Code as amended on November 6, 1978. See Acts of 1979, c. 408, § 1. (See also Acts of 1977, c. 599, which redefined "Code" as the Internal Revenue Code as in effect on May 23, 1977.) Nonetheless, a similar issue exists under present law.


4 See Acts of 1971, c. 559, § 5. A similar definition is now found in G.L. c. 62, § 1(k).
payer claimed that the taxation of lump-sum distributions in a manner different from all other distributions, and the imposition of different tax rates on lump-sum distributions depending on the date of the employer's contributions violated article XLIV's mandate to tax income derived from the same class of property, or income not derived from property, at "a uniform rate." The taxpayer further claimed that the rate which must be imposed on lump-sum distributions in their entirety is five per cent, the rate at which all other distributions from qualified plans are taxed.

The Appellate Tax Board held in favor of the taxpayer, but not entirely on the grounds argued by him. It agreed that the taxation of lump-sum distributions at two different rates raised serious constitutional doubts, but stopped short of holding the statute unconstitutional. Instead, it held that chapter 62 could be construed so as not to include in the term "net capital gain" (and thus not taxable at nine per cent) any portion of a lump-sum distribution from a qualified plan—a result which takes something of a leap of faith in view of the specific phraseology of the definition of "net capital gain" in former section 4(3). It reasoned that lump-sum distributions were taxable in their entirety at five per cent, primarily, it seems, because they could be considered in the nature of compensation income and compensation income is taxed at five per cent. The taxpayer had not taken a position on whether lump-sum distributions were compensation income or any other class of income, claiming that under the statutory structure of chapter 62 the only rate at which they could constitutionally be taxed was five per cent, regardless of what class of income they were or whether they derived from property or not.

Following the Survey year, the Supreme Judicial Court affirmed the result reached by the Appellate Tax Board, but it did so on grounds different from those adopted by the Board. Acknowledging that the Board's approach was based primarily on an attempt to sidestep the constitutional issue presented by article XLIV, the Court disagreed with the Board's questionable statutory construction that had excluded all portions of lump-sum distributions from the statutory term "net capital gain." The Court then went on to hold that taxation of lump-sum distributions at two rates under the circumstances in Daley did indeed conflict with article XLIV, and hence the Court affirmed the result reached

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5 2 STATE TAX REP., MASS. (CCH) ¶ 200-500 at 10,487. See MASS. CONST. amend. art. XLIV.
6 2 STATE TAX REP., MASS. (CCH) ¶ 200-500 at 10,487.
7 Id. at 10,489.
8 Id. at 10,488-89.
10 Id. at 3152-53, 3153 n.8, 383 N.E.2d at 1142, 1143 n.8.
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by the Board.\textsuperscript{11} Although the Court recognized that the legislature has wide latitude in defining different classes of property for purposes of article XLIV,\textsuperscript{12} it held that the distinction in \textit{Daley} between post-1969 and earlier contributions to the same benefit plan was untenable.\textsuperscript{13}

The \textit{Daley} result could well encourage other suits similarly challenging other items of income which are taxed in part at five per cent and in part at ten per cent by reason of the fact that for federal purposes they are taxed in part as ordinary income and in part as capital gains.\textsuperscript{14} Cases of this kind, many of which would have to be decided in favor of the taxpayer, could work a significant dislocation of the method of taxation which the legislature, obviously not cognizant of this problem, intended to set up in conforming chapter 62 to the federal model. Nevertheless, the Supreme Judicial Court decision in \textit{Daley} restores some confidence in the state taxing process, for it means that article XLIV still serves as a meaningful restraint on the taxing power of the Commonwealth.

\textit{Druker v. State Tax Commission},\textsuperscript{15} the only case decided by the Supreme Judicial Court during the Survey year involving the personal income tax, is primarily of historical interest inasmuch as it involves issues arising under chapter 62, as amended by Acts of 1971, chapter 555, which have been made moot by subsequent amendments to chapter 62. In brief, the Court, with Justice Braucher dissenting, held that for 1971 and 1972, losses with respect to five per cent (now “Part B”) may be offset against nine per cent (now “Part A”) income—a result which since the tax year involved in \textit{Druker} has been precluded except in limited circumstances by later law.\textsuperscript{17} The \textit{Druker} Court also held that losses incurred by two grantor trusts set up by the taxpayer could be deducted from the taxpayer’s personal income since his control over the trusts was such that they were not trusts at all.\textsuperscript{18} On the latter issue, the Court,

\begin{itemize}
\item \textsuperscript{11} Id. at 3153-55, 383 N.E.2d at 1143-44.
\item \textsuperscript{12} Id. at 3154, 383 N.E.2d at 1143.
\item \textsuperscript{13} Id. at 3155, 383 N.E.2d at 1144.
\item \textsuperscript{14} One such case has already been decided. In Turenne v. State Tax Commission, 2 State Tax Rep., Mass. (CCH) ¶ 200-533 (1979) the Appellate Tax Board held that a loss on so-called § 1244 stock, which for federal tax purposes is treated (up to fixed ceiling amounts) as an end loss, may be deducted against 9% (now “Part A”) income despite its federal tax treatment.
\item \textsuperscript{15} 1978 Mass. Adv. Sh. 80, 372 N.E.2d 208.
\item \textsuperscript{16} Id. at 81-83, 372 N.E.2d at 210.
\item \textsuperscript{17} G.L. c. 62, § 2(c)(1), as amended by Acts of 1973, c. 723, § 2, provides that deductions from Part B income in excess of the amount of Part B income may not be deducted from Part A income except to the extent that such Part A income is “effectively connected with the active conduct of a trade or business of the taxpayer.”
\item \textsuperscript{18} 1978 Mass. Adv. Sh. at 83-84, 372 N.E.2d at 210-11. In one trust, the taxpayer was settlor, trustee and beneficiary of 95% of the trust. In the second trust, the taxpayer was settlor, trustee and sole beneficiary. \textit{Id.} The Court’s ap-
like the Appellate Tax Board, purported to distinguish *Dexter v. State Tax Commission*, a case involving a revocable trust which had reached the opposite conclusion, on the basis that *Dexter* was “decided prior to the 1971 revision of our income tax laws, wherein the existence of the revocable trust was not questioned.” This suggestion that chapter 555 of the Acts of 1971 somehow adopted the federal tax treatment of grantor trusts for Massachusetts purposes, when chapter 555 did not purport to do so and this change was not made until 1976, is indeed an intriguing one and could form the basis of future litigation that might force the Court to elaborate on just what it meant in *Druker*.

*Burke v. State Tax Commission*, decided by the Appellate Tax Board, involved the threshold issue of whether the Board has jurisdiction to hear an appeal of the Commissioner’s refusal to abate a late filing penalty assessed under chapter 58, section 31A. The substantive issue in the case was whether a taxpayer is required to file the Massachusetts form M4868 with the Commissioner, in addition to filing the federal form 4868 with the Internal Revenue Service, in order to obtain the automatic two-month extension of time to file the Massachusetts tax return which parallels the automatic two-month extension of time to file the federal return. On the first question, the Board held in favor of its jurisdiction, relying on the fact that under chapter 58, section 31A, the penalty is assessed “as an additional tax” and, unlike the other (five dollars per day) penalty for late filing then provided by chapter 62, section 55, the penalty is not by statute subject to abatement by the Commissioner “in his discretion.”

On the substantive question, the Board held that the taxpayer for 1973 was not required to file form M4868 in addition to federal form 4868 because the Commissioner had ruled in 1968 that receipt of a federal extension automatically entitled a taxpayer to a comparable Massachusetts extension, provided that a copy of the approved federal extension was attached to the Massachusetts return. The Board rejected the approach now has express statutory support. Under G.L. c. 62, § 10(e), added by Acts of 1976, c. 510, § 1, the separate existence of grantor trusts is now disregarded for Massachusetts tax purposes, in conformity with the federal law.

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21 See note 18 *supra*.
22 2 STATE TAX REP., MASS. (CCH) ¶ 200-495 (1977).
23 G.L. c. 62, § 55 was repealed by Acts of 1976, c. 415, § 100.
24 2 STATE TAX REP., MASS. (CCH) ¶ 200-495 at 10,479-80.
25 *See* Income Tax Ruling 1968-3. At that time, there was no automatic two-month extension either for federal or state purposes. The automatic two-month extension for federal purposes was adopted by regulation in 1972, and the Massachusetts form M4868, patterned after the federal form 4868, followed closely thereafter.
26 2 STATE TAX REP., MASS. (CCH) ¶ 200-495 at 10,480-81.
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Commission's argument that the adoption of a new form M4868 in 1972, together with an oral statement of the Commissioner at a Bentley College Tax Forum that the new form must be filed, constituted a partial revocation of the ruling since neither procedure complied with the state Administrative Procedure Act.

Subsequent to the tax year involved in Burke, the legislature repealed the statute authorizing the Commissioner to grant an extension of time for filing, and reenacted it in substantially similar form, with the addition of a proviso that in order to obtain the extension the taxpayer must file "a tentative return, in such form as the commissioner may require." On the strength of this change the Commissioner has taken the position, although still not formally revoking its 1968 ruling, that Burke is not applicable to extensions with respect to returns due after January 1, 1977, the effective date of the new law. For such returns, form M4868 must be filed in order to obtain an automatic extension.

§6.2. Property Tax: Exemptions from Tax: Charitable Organization and Manufacturing Corporation. The Survey year spawned the usual assortment of cases involving claims of exemption from the property tax. The Supreme Judicial Court decided two rather similar cases involving the exemption from tax for charitable organizations, holding in each case that the Appellate Tax Board's refusal to grant the exemption was not supported by the evidence and remanding each case for further proceedings. In both cases, Cummington School of the Arts, Inc. v. Board of Assessors of Cummington (involving an art school for arts educators and advanced art students), and Meadowbrooke Day Care Center, Inc. v. Board of Assessors of Lowell (involving a day care center), the Court was critical of the Board for adopting the "tone of a disbelieving, biased advocate rather than that of a dispassionate arbiter of the issues of fact and law argued before it." Although the Court refused to go so far as to uphold the exemption of either organization on the record before it, the tenor of both opinions strongly suggests that the Court felt the organizations, both of which were exempt from federal income taxation

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27 See note 25 supra.
28 2 STATE TAX REP., MASS. (CCH) ¶ 200-495 at 10,480.
29 Id. at 10,480-81. Massachusetts Administrative Procedure Act appears at G.L. c. 30A, §§ 1-17. See especially §§ 3 and 5.
32 See 1 STATE TAX REP., MASS. (CCH) ¶ 18-360.601 at 1747-4 to 1747-5.

§6.2. 1 See G.L. c. 59, § 5, Third.
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under section 501(c)(3) of the Internal Revenue Code, were entitled to the exemption. In Cummington the Court specifically discounted factors which the Board might have felt were significant in reaching its result, such as the lack of a "personal property 'endowment,'" the failure to pay instructional salaries, the presence of the families of a few participants, the limited amount of recreational activities of participants, and the organization's ownership of 150 acres of land. 5 Similarly in Meadowbrooke, where the corporation in question was the successor to a private corporation that had previously operated the center, the Court characterized as wrong the Board's apparent view that activities of a business corporation could not be taken over by a charitable corporation without being "tainted as noncharitable by reason of their previous sponsorship—at least for some period of time." 6

Another exemption case, The Charles River Breeding Laboratories v. State Tax Commission, 7 involved a novel but unsuccessful attempt by a breeder of a laboratory animals to bring its operation within the exemption for property of manufacturing corporations. 8 The Court correctly held that it is "plain beyond question that, in common understanding, the breeding of animals is not manufacturing. Manufacturing normally involves a change of some substance, element, or material into something new or different." 9 The Court thus rejected the taxpayers argument that the exemption should be extended to it because it was "economically similar" to the mills and factories for the benefit of which the exemption was passed in the 1930's. 10

§6.3. Sales Tax: Exemptions. The Supreme Judicial Court decided two cases involving the issue of whether a charge was for a "personal service transaction" and thus exempt from the sales tax. 1 The first case, Browning-Ferris Industries v. State Tax Commission, 2 gave the Court little trouble on this point, involving as it did a separate charge made by a rubbish collector for the use of certain trash containers by customers. The charge, which was specified as a "container service charge" on the taxpayer's invoices, was separate from the charges for the month's

8 See G.L. c. 59, § 5, Sixteenth (3).

§6.3. 1 G.L. c. 64H, § 1(13)(c) excludes from the term "retail sale" "personal service transactions which involve no sale or which involve sales as inconsequential elements for which no separate charges are made."

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pick-ups and disposals.\(^3\) Having chosen to segregate its charges in this way, the taxpayer thus brought its container use charge squarely within the definition of “sale” in section 1(12)(a) of chapter 64H,\(^4\) and was thus unable to claim the exemption for personal service transactions involving an inconsequential sale for which no separate charge is made.\(^5\) *Houghton Mifflin Co. v. State Tax Commission*\(^6\) was a more difficult case on this point. The sales tax at issue was added to charges made by typesetters and type composers (“compositors”) to the Houghton Mifflin Co., a book publisher, for “reproduction proofs”—a preliminary setting of a book in print.\(^7\) The Supreme Judicial Court agreed with the Appellate Tax Board that the object of the transaction was to obtain reproduction proofs and not to obtain the services of the compositors, although it recognized that “personal services [were] an important part of the process of preparing reproduction proofs.”\(^8\) On a subsidiary issue, the Court held that purchases made prior to August 1, 1971 were exempt from taxation under chapter 64H, section 6(r), as purchases of materials which were “consumed and used directly . . . in an industrial plant in the process of the manufacture of tangible personal property to be sold, including the publishing of a newspaper.” The Court rejected the Board’s holding that because the exemption specifically referred to publication of a newspaper it did not extend to other publishing activities.\(^9\)

Various other exemptions from the sales tax were claimed in cases decided by the Appellate Tax Board during the *Survey* year. These cases as a group are remarkable not so much for what they hold but for the diffuse, meandering opinions issued by the Appellate Tax Board,

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3 *Id.* at 1437, 376 N.E.2d at 569.

4 G.L. c. 64H, § 1(12)(a) defines a sale as including “[a]ny transfer of title or possession, or both, exchange, barter, lease, rental, conditional or otherwise, of tangible personal property for a consideration, in any manner or by any means whatsoever.”

5 See note 1 *supra*.


7 *Id.* at 2528-29, 370 N.E.2d at 442.

8 *Id.* at 2530, 370 N.E.2d at 443. It is difficult to evaluate the Court’s decision without a thorough understanding of the publishing process, which the author does not purport to have. However, one suspects that, whether the case was correctly decided or not, it involves a charge unique to the publishing business and thus will have little impact outside that business.

9 *Id.* at 2532-33, 370 N.E.2d at 443-44. No argument was raised that sales after August 1, 1971 were exempt under G.L. c. 64H, § 6(r), *as amended by Acts of 1971, c. 555, § 45*. Section 6(r) now requires that the material be consumed and used “in the actual manufacture” of the property to be sold. The Court characterized this change as “an attempt to tax materials which are consumed and used in the process of printing (such as reproduction proofs) unless those materials are consumed and used in the actual printing (ink and paper for example). The result of such a change is to impose a sales tax on numerous products used in the manufacturing process.” 1977 Mass. Adv. Sh. at 2532 n.5, 370 N.E.2d at 443-44 n.5.

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which feature long quotations from cases that have little to do with the issue at hand.

The most remarkable case in this regard is *Robert Welch Inc. v. State Tax Commission*. The issue before the Board was whether the *John Birch Society Bulletin*, printed monthly by the Society and distributed primarily to members, was a “magazine,” and thus exempt from the use tax. One would think that a bulletin which appeared periodically, such as this one, was a form of magazine. The Board, however, held that it was not. The opinion quotes at great length from a discussion in a federal district court case of the difference between a “periodical” and a “book.” The Board’s opinion does not even purport to relate this discussion to the case before it, and indeed contains virtually no reasoned support for the result reached, purporting in a terse last paragraph to rely on the “application of common sense.”

A somewhat more reasoned but nonetheless diffuse approach was used in *George S. Carrington Company v. State Tax Commission*. This case involved a Massachusetts company which put together mail solicitations for various out-of-state charities, dealing through their agent who, like his principals, was out-of-state. The solicitations were mailed by the taxpayer, using the customers’ nonprofit mailing permits, directly to the prospective donors, most of whom were out-of-state. The taxpayer claimed the payments to it by the charities for preparing solicitations were exempt from the sales tax on three grounds: 1) a tax could not be imposed under the interstate commerce clause of the federal Constitution; 2) the sales were under an agreement to deliver to an out-of-state purchaser and thus exempt under chapter 64H, section 6(b); and

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11 The use tax exempts transactions that are exempt from the sales tax, among which are “sales of newspapers, magazines, books required for instructional purposes in educational institutions, books used for religious worship, publications of any [charitable] corporation..., and motion picture films for commercial exhibition.” See G.L. c. 64H, G.L. c. 64H, § 6(m).
15 *Id.* at 10,460.
16 *Id.* at 10,460-61.
17 *Id.* at 10,462. The General Court has explicitly recognized the reach of the commerce clause: G.L. c. 64H, § 6(a) exempts “[s]ales which the commonwealth is prohibited from taxing under the constitution or laws of the United States.”
18 2 *State Tax Rep.*, Mass. (CCH) ¶ 200-492 at 10,462. G.L. c. 64H, § 6(b) exempts “[s]ales of tangible personal property in transit or stored at points of entry intended for export or import or which the vendor is obligated under the terms of any agreement to deliver to a purchaser outside the commonwealth or to an interstate carrier for delivery to a purchaser outside the commonwealth.”

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3) the sales were to charitable organizations and thus exempt under chapter 64H, section 6(e).\textsuperscript{19}

On the constitutional question the Board held that there was no constitutional bar to imposition of the tax since all the work involved in the sales was done in Massachusetts.\textsuperscript{20} This conclusion seems sound, although the opinion does not directly address the taxpayer's argument that sales to an out-of-state purchaser who does not take delivery in the state cannot be taxed. On the second issue, however, the opinion bogs down. Citing as "authority" a 1966 law review article,\textsuperscript{21} the Board took the position that the section 6(b) out-of-state exemption could apply only if title to the goods passed at the point of destination (outside Massachusetts).\textsuperscript{22} To decide this point, the Board recited relevant portions of the Massachusetts Uniform Commercial Code\textsuperscript{23} and noted three cases in other states\textsuperscript{24} construing those provisions from which it concluded that title to the solicitations passed to the charitable organizations (the purchasers) when delivered in Massachusetts to the post office.\textsuperscript{25} Thus, the Board was of the opinion that the exemption of section 6(b) did not apply.\textsuperscript{26} All of this seems unnecessary. The exemption applies only to goods "in transit or stored at points of entry," a phrase that could hardly apply to the solicitations in question, which were prepared entirely in Massachusetts. The Board entirely ignored this point. Instead, in the one paragraph which assumed arguendo that section 6(b) does not turn on the passage of title, the Board relied on the fact that the section 6(b) exemption requires delivery to "a purchaser" outside the state,\textsuperscript{27} whereas here delivery was to prospective donees who were not themselves purchasers. Although this holding is correct as a literal reading of the statute, it would seem that in an appropriate case the exemption must apply where delivery was made on behalf of an out-of-state purchaser as well as directly to it.

\textsuperscript{19} 2 \textsc{State Tax Rep.}, Mass. (CCH) ¶ 200-492 at 10,462. G.L. c. 64H, § 6(e) exempts sales to charitable organizations if the item is used in the conduct of the organization's charitable enterprise, the organization obtains a certificate from the Commissioner stating that it is entitled to the exemption, and the vendor keeps specific records of the sale or sales.

\textsuperscript{20} 2 \textsc{State Tax Rep.}, Mass. (CCH) ¶ 200-492 at 10,462-63.


\textsuperscript{22} 2 \textsc{State Tax Rep.}, Mass. (CCH) ¶ 200-492 at 10,464.

\textsuperscript{23} See G.L. c. 106, § 2-401(2)(a) and (b).


\textsuperscript{25} 2 \textsc{State Tax Rep.}, Mass. (CCH) ¶ 200-492 at 10,465.

\textsuperscript{26} Id.

\textsuperscript{27} Id.
On the third issue, the Board correctly held that the charitable exemption did not apply because the purchasing organizations had not obtained the exemption certificates required by section 6(e).\(^{28}\)

Subsequent to the close of the Survey year, the Supreme Judicial Court affirmed the Appellate Tax Board’s decision.\(^{29}\) The Court did not use the Board’s elaborate Uniform Commercial Code analysis,\(^{30}\) however. Instead, the Court reasoned that the taxpayer delivered the products not to a “purchaser” within the meaning of chapter 64H, section 6(b),\(^{31}\) but to a designee of the purchaser.\(^{32}\) The Court ruled that since the section 6(b) exemption applies only when a purchaser takes delivery, the taxpayer was unable to claim this exemption. In so ruling, the Court explicitly refused to adopt the taxpayer’s argument that delivery to the designee should be considered constructive delivery to the purchaser.\(^{33}\)

*Spectrum Communications, Inc. v. State Tax Commission*\(^ {34}\) is certainly the most reasoned of the published sales tax decisions of the Appellate Tax Board rendered during the Survey year, but it too suffers from extensive quotation of authority some of which is only marginally relevant. The issue was whether the operator of a community antenna television system (CATV) was exempt from sales tax on the purchase of machinery and equipment under chapter 64H, section 6(r) and (s), which exempt materials and machinery “used directly in the operation of commercial radio broadcasting or television transmission.” The Board held, relying on a case decided under the Virginia sales tax,\(^ {35}\) that the operation of a CATV system was not broadcasting.\(^ {36}\) However, it went on to hold that the taxpayer was engaged in “television transmission” and thus was covered by the exemption.\(^ {37}\) In reaching the latter conclusion, the Board quoted from cases involving the application of the Federal Communications Act to CATV,\(^ {38}\) the amenability of CATV to state regulation,\(^ {39}\) and the status of a CATV transmission as a “performance” so as to constitute

\(^{28}\) *Id.*. An additional ground that might have been available to the Board for denying the § 6(e) exemption is that goods purchased (solicitations) were not used in the performance of the organization’s charitable functions. See note 19 *supra*.


\(^{30}\) See text at notes 22-26 *supra*.

\(^{31}\) See note 18 *supra*.


\(^{33}\) *Id.*

\(^{34}\) 2 STATE TAX REP., MASS. (CCH) 200-491 (1977).

\(^{35}\) See Winchester TV Cable Co. v. State Tax Comm’n, 216 Va. 286, 217 S.E.2d 885 (1975).

\(^{36}\) 2 STATE TAX REP., MASS. (CCH) 200-491 at 10,457.

\(^{37}\) *Id.* at 10,457-59.


a copyright infringement. The net effect of these extensive citations is to leave the reader in a state of considerable, and unnecessary, confusion, since most of them shed little light on the particular question which was before the Board. The opinion would have benefited considerably had the Board explained the relevance of the citations to the issue before it or, to the extent that it could not do so, deleted the citations altogether.


SCA involved the question of whether a taxpayer could appeal an adverse decision of the State Tax Commission after the statutorily mandated period for appeal had expired where the taxpayer had never received the Commission's notice of its decision through no fault of either party. The Supreme Judicial Court held that it could, reasoning that "[i]t is contrary to notions of fairness and common sense to assume that the Legislature intended a taxpayer to be accountable for failure to act in timely manner on notice that was never received." The Court held further that where the taxpayer does not in fact learn of the decision until after the usual appeal period has expired, he has "a reasonable period to appeal which cannot be longer than the statutory period itself, measured from the date of receipt [of notice]." In the case before it, the taxpayer, not having received the notice of denial of its application for abatement, withdrew its consent to failure of the Commission to act within 6 months and filed an appeal with the Appellate Tax Board almost a year after the notice was mailed. Although the Court specifically

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4 Under the then applicable law, G.L. c. 64H, § 22, a taxpayer had 90 days from the date of notice of the Commission's decision to appeal. G.L. c. 64H, § 22 was repealed by Acts of 1976, c. 415, § 112 and replaced by G.L. c. 62C, § 39, which provides for a 60-day appeal period but is otherwise similar to former G.L. c. 64H, § 22.


6 Id. at 1457, 376 N.E.2d at 574.

7 Id. at 1451-52, 376 N.E.2d at 573.
rejected the taxpayer's argument that in the circumstances of this case it was entitled to use this procedure, which is permitted by statute only where the Commission has not in fact acted on an application for abatement, the Court found that the taxpayer had acted within the required "reasonable time" from actual notice of the Commission's decision. The second case, Liberty, offered the Court an opportunity to examine the position taken by the Appellate Tax Board that an appeal from a second application for abatement will not be permitted if the period for appeal from the first application for abatement has expired. Unfortunately, the Court declined to avail itself of this opportunity.

Liberty was an appeal by a life insurance company from the State Tax Commission's denial of its claim that the insurance excise tax was unconstitutional as applied to it in 1971 and 1972. Prior to filing the application for abatement at issue (the second applications), the taxpayer had applied for and been granted abatements of its 1971 and 1972 excise (the first applications) because certain premiums on which the tax was based should not have been allocated to Massachusetts. These first applications, having been granted, were of course never appealed. On appeal from denial of the second applications for abatement the Appellate Tax Board held, relying on two of its 1966 decisions, that the denial of the subsequently raised constitutional claims could not be appealed since the period for appeal to the Board with respect to the 1971 and 1972 tax years began to run when the first applications for abatement were acted on and had since expired. The Supreme Judicial Court disagreed, stating that the Board had "misapplied its earlier opinions." An otherwise proper appeal should not be barred, the Court stated, on the ground that "on its own initiative, the appellant previously had sought an abatement on an unrelated issue and had been granted that abatement." At the same time, the Court refused to pass on the correctness of the two Board decisions on which that body had relied, and even indicated that they might be correct in view of the legislature's re-

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8 See G.L. c. 58A, § 6.
10 See G.L. c. 63, §§ 20-29B.
12 See Kray Tanning Co., Inc. v. State Tax Comm'n, No. 43830 (App. Tax Bd. May 13, 1966); Robbins-Gamwell Corp. v. State Tax Comm'n, No. 43626 (App. Tax Bd. April 18, 1966). In these decisions, as in Liberty, the second applications for abatement raised issues unrelated to those in the first applications. The parties in Liberty were in agreement that a second application filed on the same ground as the first cannot give rise to a second appeal period. 1977 Mass. Adv. Sh. at 2666 n.4, 370 N.E.2d at 1010 n.4.
14 Id.
15 Id. at 2663-64, 370 N.E.2d at 1009.

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enactment of the relevant statute of limitations in 1976 without substantial change. The Court differentiated the instant case on the grounds that here the earlier decisions of the Commission were in the taxpayer's favor. In addition, in this case the first applications for abatement were "nonadversary" in nature, whereas in the 1966 cases "the first applications for abatement were the product of disputes between the commission and the corporation."

One may conclude that the denial of a second application for abatement may be appealed by a taxpayer whose position parallels Liberty's in both respects which the Court found relevant in distinguishing the earlier cases: that 1) the first application was not prompted by a deficiency but brought by the taxpayer on its own initiative, and 2) the first application was fully granted, thus providing no basis for appeal. Where either or both of these circumstances is not present, some doubt remains as to the taxpayer's ability to appeal from the denial of a second application, despite the language in the Court's opinion that it would be "illogical to permit an 'appeal' to the board on a claim not involved in an application for abatement" and that the law does not require joinder of all claims with respect to a given tax year in one application.

The third case, Becton, Dickinson, raised the question of whether an application for abatement of a foreign corporation excise tax filed after a notice of intent to assess but prior to the actual assessment constitutes a proper application for purposes of former chapter 63, section 51, which required that an application be filed by a "corporation aggrieved by the assessment of a tax" within two years of the assessment. The Court held that the premature application was proper in the unusual circumstances of the Becton, Dickinson case. Prior to filing its 1968 corporation excise tax return the taxpayer corporation had unsuccessfully sought permission from the Commissioner, under chapter 63, section 42,

16 G.L. c. 63, § 71, as amended by Acts of 1961, c. 277, provided a 90-day period for appeal to the Appellate Tax Board from a decision of the State Tax Commission by "any party aggrieved by any decision of the commission." Section 71 was repealed by Acts of 1976, c. 415, § 102 and replaced by G.L. c. 62C, § 39, which provides for a 60-day appeal period but is otherwise similar.
18 Id. at 2667, 370 N.E.2d at 1011.
19 Presumably the Court is referring to the Commissioner of Corporations and Taxation.
21 Id. at 2665, 370 N.E.2d at 1010.
22 Id. at 2666, 370 N.E.2d at 1010.
23 G.L. c. 63, § 51 was repealed by Acts of 1976, c. 415, § 102 and replaced by G.L. c. 62C, §§ 37-39. The reenactment contains language similar to that quoted in the text.

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to calculate its Massachusetts income in accordance with the "separate accounting" method rather than the statutory income allocation formula. After some correspondence between the two parties on the subject subsequent to the taxpayer's filing of its 1968 return using the separate accounting method, the Commissioner informed the taxpayer that a deficiency would be assessed against it in the amount of the tax determined under the statutory method, whereupon the taxpayer could raise its objections to the statutory method in an application for abatement. The notice of intent to assess preceded the assessment by about two and one-half months, during which period the taxpayer supplied the requested information relative to recomputation of the tax and filed its application for abatement. In these circumstances the Court held that the premature application was proper inasmuch as it "did not interfere either with administrative procedure before the commission or with the statutory policy of encouraging informal resolution of tax disputes." It is hard to imagine a set of circumstances in which the premature filing of an application for abatement could have had less significance, so it is easy to agree with the Court's result. Nevertheless, it would have been helpful if in addition the Court had stated some general rules as to when a premature application for abatement would not be fatal or at least had stated that each such situation would be considered on a case-by-case basis.

§6.5. Federal Income Taxes: Effect on Trust Administration. New England Merchants National Bank v. Converse (and two companion cases) dealt with whether a trustee is required to compensate principal for a portion of federal capital gains tax paid out of principal. The case is extremely significant for all those involved in trust administration. The issue arises by reason of the fact that for federal income tax purposes, since enactment of the 1954 Internal Revenue Code, expenses allocable to principal for probate purposes, such as trustees' principal commissions and Massachusetts taxes on gains, may not be deducted from capital gains not distributed by the trust (on which the trust pays the gains tax). Instead, these expenses are to be deducted from distributable net income, which measures the amount of income on which

25 Id. at 132-33, 372 N.E.2d at 1255.
26 Id. at 133, 372 N.E.2d at 1255-56.
27 Id., 372 N.E.2d at 1256.
28 Id. at 135, 372 N.E.2d at 1256.

§6.5. 1 1977 Mass. Adv. Sh. 2345, 369 N.E.2d 982. The companion cases were Boston Safe Deposit and Trust Co. v. Shaw, and Boston Safe Deposit and Trust Co. v. Converse. Id.
2 See I.R.C. §§ 641-692 (Subchapter J).
http://lawdigitalcommons.bc.edu/asml/vol1978/iss1/9
current income beneficiaries are taxed. The result is that the income beneficiaries obtain the tax benefit of these capital expenses, which should equitably be deductible from capital gains, and the trust may be required to pay too great a tax on gains, which arguably should be borne partly by the income beneficiaries through compensating payments from income to principal.

The Supreme Judicial Court recognized that equitable reasons exist for requiring such an adjustment, and it recognized its own power to “alter the impact of the Federal tax statute.” Had a trustee sought to make such an adjustment shortly after enactment of the 1954 Code, the Court indicated that in all likelihood it would have permitted it. However, in the circumstances of the cases before it, the Court held that countervailing practical considerations prevented it from requiring that the adjustment be made.

The cases in question arose from three trustees’ accounts filed for allowance in the probate court. The trusts were created in 1916 and 1940, and the accounts went as far back, in at least one case, as 1969. The trustees acted in accordance with the prevailing and long standing Massachusetts practice of not making the adjustment at issue. To require trustees to alter their practice and make an equitable assessment on income beneficiaries for years covered by open accounts was not, in the Court’s view, a desirable course. Moreover, the Court noted that imposing such a requirement could lead to an unwarranted disparate impact on income beneficiaries:

Accounts in large numbers must have been allowed in which the adjustment sought might have been but was not made. It is not

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3 When capital gains are distributed currently, they are includible in distributable net income, and thus deductible capital expenses may effectively be taken against the gains. In the ordinary case, however, gains are not distributed.

4 As the Court pointed out, the issue arises only when a trust realizes capital gain and pays a gains tax, for in years in which there are no gains the trust’s capital expenses would not give rise to a tax benefit unless they were used by the income beneficiaries. 1977 Mass. Adv. Sh. at 2347, 369 N.E.2d at 983.

5 Id. at 2349, 369 N.E.2d at 984 citing Holcombe v. Ginn, 296 Mass. 415, 417, 6 N.E.2d 351, 354 (1937).


7 Id. at 2351, 369 N.E.2d at 985. The issue before the Court had been raised by the objections of the guardians ad litem to the allowance of the accounts.

8 Id. at 2350, 369 N.E.2d at 984.

9 Id. The Court stated:

To make adjustments now for a period of several years might be to deprive the income beneficiary, often the testator’s widow, of badly needed current income. In some cases the income beneficiary at the time of the capital gains may have since died, and the adjustments might then require withholding of income from a successor income interest.
suggested that such accounts could be reopened. But the rule advocated by the guardians ad litem would require the adjustment in accounts not yet allowed, covering some or all of the same periods as allowed accounts. Thus, accounts in trusts similarly situated might receive unequal treatment because of the fortuitous timing of their allowances.10

The Court was sufficiently influenced by these contending considerations to reject the guardians ad litem's contentions, stating, "the benefits in making the adjustments, at least in these cases, are not so compelling. . . ."11

It is important to keep in mind the scope of the Court's decision. The decision is not to be taken as questioning the propriety of the adjustment at issue in a case where the trustee has consistently made it.12 In addition, the Court reserved the question of whether it might be proper for a trustee to begin now "on some intelligent basis" to make the adjustment, or what should be done "if the inequity resulting from the Federal tax laws appears particularly dramatic and significant."13 The trustee of the small trust, however, has at least the comfort of the Court's assurance that "below some [unspecified] level the game is not worth the candle."14 Thus, such a trustee presumably need not concern himself with the adjustment at all.

§6.6. Federal Estate Taxes: Allocation of Taxes and Expenses to Marital Trust. The previously manifested willingness of the Supreme Judicial Court to assist in the reduction of federal taxes by an appropriate determination of state law1 continued during the Survey year, as shown by First National Bank of Boston v. First National Bank of Boston.2 The case was a declaratory judgment action brought by an executor of an estate against itself as trustee under the will and against other interested parties to the estate. The testator's will contained a marital trust of an amount equal to "the sum necessary to obtain the maximum marital deduction in determining the Federal Estate tax on my estate . . . .,"3 but it did not contain a clause apportioning taxes and expenses.4 The sole issue was whether, in the absence of a tax

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10 Id. at 2350-51, 369 N.E.2d at 984.
11 Id. at 2351, 369 N.E.2d at 984.
12 Id. at 2352, 369 N.E.2d at 985.
13 Id.
14 Id. at 2351, 369 N.E.2d at 985.

3 Id. at 1100, 375 N.E.2d at 1186.
4 Id. at 1100-01, 375 N.E.2d at 1186.

http://lawdigitalcommons.bc.edu/asml/vol1978/iss1/9
clause, taxes and expenses should be allocated proportionately to the marital trust, as would normally be the case, or only to other assets, in view of the testator’s expressed intent to qualify the marital trust for the maximum marital deduction. In the former case the marital deduction would be reduced by the amount of taxes allocated to the marital trust, thus increasing taxes and further reducing the marital trust.

All the parties were in apparent agreement that taxes and expenses should not be allocated to the marital trust on the basis of Putnam v. Putnam. In Putnam the Supreme Judicial Court held that no taxes should be allocated to a trust specifically intended to use the maximum marital deduction, despite the fact that the will directed that certain inheritance taxes should be paid from the trust. The real adversary in the present case was the Internal Revenue Service. The Service, on audit of the estate tax return and after protest, had concluded that Putnam was limited to its facts and could not be relied on in this case to prevent taxes and expenses from being chargeable to the marital trust. Under Commissioner v. Estate of Bosch, only a decision of the highest state court in the case would be binding on the Service’s interpretation of the applicable state law. Therefore, the executor faced two alternatives to change the Service’s position with regard to the applicability of Putnam. It could obtain an adjudication of the state law issue through the Supreme Judicial Court in an essentially nonadversary proceeding, since the Service could not be joined as a party in state court. The other course, less desirable from the executor’s perspective, was to litigate the estate tax liability in a federal forum in a distinctly adversary proceeding, which in turn would depend on resolution of the state law issue. Not surprisingly, the executor chose the former alternative. Not surprisingly, also, the Supreme Judicial Court held that Putnam controlled and that taxes and expenses were not allocable to the marital trust.

As noted above, none of the parties to the proceeding presented any arguments in favor of the Service’s position; only the plaintiff as executor and the guardian ad litem appointed by the probate court put in appearances and both were in agreement on the issues. Based on these facts, Justice Quirico dissented from the Court’s opinion, stating that the Court should not adjudicate an issue as to which all the parties before the Court are in agreement and the real adversary is not subject

6 Id. at 268, 316 N.E.2d at 735.
to the Court's jurisdiction. His point is well taken. Although, as the majority pointed out, resolution of the issue would affect "the proportions in which the interested parties are entitled to share," it is difficult to categorize a proceeding as "adversarial" where all the parties in fact share a single point of view and the other point of view is not represented before the Court. Nonetheless, the Court's willingness to take on this kind of case, rightly or wrongly, is a great boon to executors so long as the Internal Revenue Service refuses to accept the fact that under Massachusetts law, as recently shaped by the Court, an ambiguous or internally contradictory instrument will be construed where possible so as to minimize estate taxes.

10 Id. at 1106-07, 375 N.E.2d at 1187-88 (Quirico, J., dissenting).