Chapter 8: State and Local Taxation

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§8.1. Introduction. The Survey year was a quiet one in the tax area. The most significant legislative development was the consolidation of the administrative provisions of all the state taxes\(^1\) into one new chapter of the General Laws.\(^2\) The most significant case decided by the Supreme Judicial Court dealt with the validity of the bank excise tax as applied to federal savings and loan associations\(^3\) and is of somewhat limited interest even to most tax practitioners.

§8.2. Administration of Taxes: Legislation: Passage of Chapter 62C. The most important tax development during the Survey year was the passage of chapter 62C of the General Laws,\(^1\) which consolidates into one chapter the provisions dealing with the administration of almost all state taxes\(^2\) and to a great extent, imposes a uniform method of administering all taxes. The following discussion is a summary treatment of chapter 62C, touching only a few of its 77 sections; any practitioner with a specific question should refer directly to the statute. Provisions of chapter 62C of special significance to a particular tax are discussed in the section dealing with that tax.\(^3\)

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\(^1\) Acts of 1976, c. 415. See § 8.2 infra.

\(^2\) G.L. c. 62C.


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\(^1\) Acts of 1976, c. 415.

\(^2\) Local taxes, such as the property tax, are not affected by G.L. c. 62C. Also, certain state tax administrative provisions are not affected. Thus, the administrative provisions for the property tax are still contained in G.L. c. 59, and certain aspects of Appellate Tax Board procedures are still to be found in G.L. cc. 58, 58A and 63. These provisions, as well as c. 62C, should be read in conjunction with the provisions as to administrative procedure found in G.L. c. 30A.

\(^3\) See §§ 8.3-8.12 infra.
Chapter 62C applies, "so far as pertinent and consistent," to the motor vehicle excise tax, the personal income tax, the various excises on different types of corporations (including corporations described in chapter 121A), the gasoline and other fuel excises, the meals tax, the cigarette tax, the deeds tax, the room occupancy tax, the sales and use taxes, the inheritance tax, both the old and new estate taxes, the games tax, the tax on alcoholic beverages, and the tax on raffles. In addition, it applies to the withholding of income tax from wages by employers and the declaration of estimated tax by corporations.

Chapter 62C details the reporting requirements for the taxes listed above, covering both tax and information returns. For all such returns, an extension of the time for filing may be granted "for good cause," provided a portion of the tax is paid. For the various corporation excises contained in chapter 63 and the excise on chapter 121A corporations, 50% of the tax must be paid; for all other taxes 80% must be paid.

As a general rule, subject to extension by agreement with the taxpayer, the Commissioner may assess a tax any time within three years from the date a return was filed or was due, whichever occurs later. An assessment may be appealed to the State Tax Commission (Commission) within three years from the date of the return (determined without regard to any extension of time), two years from the date of assessment, or one year from the date of payment whichever occurs last. If the Commission refuses to abate the tax, the taxpayer may appeal within 60 days from the Commission’s decision or within six months from the time the taxpayer’s appeal to the Commission is deemed denied. The taxpayer may further appeal to the Appellate Tax Board or, in some cases arising under chapter 65c (the Massachusetts Estate Tax) to the probate court having jurisdiction of the estate. Generally if any tax is refunded, the refund includes interest at 6% and if a tax is not timely paid, the taxpayer is charged 8% interest on the outstanding balance. In addition, if a return is not timely filed a penalty of 1% per month of the outstanding tax due up to a maximum of 25%, is imposed.
Chapter 62C also deals with the procedure for collecting unpaid taxes by levying on the taxpayer's property17 (largely taken from chapter 58), and with the procedure for registering vendors and other persons required to register vendors and other persons required to register by chapters 64A through 64I.18

§8.3. Property Tax: Judicial Developments: Exemption from Tax for Manufacturing Corporations. This year, as in many past years, the property tax was the most fertile field for litigation. The issue most frequently raised during the Survey year was whether the taxpayer was a manufacturing corporation under section 2 of chapter 58, so as to be exempt from local property taxes under section 5 of chapter 59.1

The Supreme Judicial Court and the Appellate Tax Board, following the time-honored approach of applying the common meaning of the term "manufacturing,"2 rejected three novel attempts by taxpayers to come within the scope of the exemption. In First Data Corp. v. State Tax Commission,3 the taxpayer, a computer time-sharing business, sought to satisfy the statutory requirement by arguing that the conversion of data fed into the computer into new information constituted manufacturing. Alternately, the taxpayer argued that the "flow of one stream of electrons into the computer, and the flow out of another"

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17 Id., § 54.
18 Id., § 67.

§8.3. 1 G.L. c. 59, § 5, cl. Sixteenth, ¶ (3) exempts from local property tax "all property" of a qualified manufacturing corporation except "real estate, poles and underground conduits, wires and pipes."

2 See Franki Foundation Co. v. State Tax Comm'n, 361 Mass. 614, 281 N.E.2d 865 (1972); Commissioner of Corps. & Taxation v. Assessors of Boston, 321 Mass. 90, 71 N.E.2d 874 (1947). In Assessors of Boston the Court posited a definition of manufacturing which assumed that the "usual and ordinary meaning," Id. at 97, 71 N.E.2d at 879, was intended by the statute and held that manufacturing involved "the process of transforming raw or finished materials by hand or machinery, and through human skill and knowledge, into something possessing a new nature and name and adapted to new use." Id. at 94, 71 N.E.2d at 877. This "transformation" requirement was echoed in Assessors of Boston v. Commissioner of Corps. & Taxation, 323 Mass. 730, 740, 84 N.E.2d 129, 136 (1949), quoting Boston and Maine R.R. v. Billerica, 262 Mass. 439, 444-45, 160 N.E. 419, 422 (1928), where the Court defined manufacturing to require "application of forces . . . which result[s] in the transformation of some preexisting substance or element into something different . . . ."

361 Mass. at 619-620, 281 N.E.2d at 868-69. Thus, the distinction established by the cases has restricted the exemption to property used in manufacturing as conventionally understood, requiring changes in the form of structure of a preexisting substance.

constituted such an alteration of the preexisting form into a new form as would constitute manufacturing.\(^4\) The taxpayer also argued that as a matter of tax policy the computer industry was as worthy of preferential tax treatment as were more conventional manufacturers.\(^5\) The Court rejected the taxpayer's position on the ground that "'manufacturing,' according to ordinary acceptation, does not include the transmission or manipulation of knowledge or intelligence.'"\(^6\) It also rejected the taxpayer's policy argument calling it "beyond our province."\(^7\)

In *Hopkinton LNG Corp. v. State Tax Commission*,\(^8\) the taxpayer's business was converting natural gas into a liquid and storing it in that form, then vaporizing it and distributing it to its customers. In a brief opinion the Supreme Judicial Court held, affording the Appellate Tax Board, that the Board's findings did not require a conclusion that the gas had a new nature or use after it had been liquified and vaporized.\(^9\)

In *The Charles River Mouse Farms, Inc. v. State Tax Commission*,\(^10\) a somewhat less credible attempt to qualify as a manufacturing corporation was made by a breeder and producer of laboratory animals. The Appellate Tax Board rejected the notion that the breeding, raising and selling of animals that are germ-free or exposed to certain kinds of bacteria is manufacturing, holding that to do so would put "a forced, strained and unnatural construction" on the word manufacturing.\(^11\)

In addition to cases involving the question whether a particular activity was manufacturing, the Court decided one case during the Survey year involving the question of whether a sufficient portion of the taxpayer's activities were manufacturing so as to enable it to qualify for the exemption. In *Fernandes Super Markets, Inc. v. State Tax Commission*,\(^12\) the taxpayer was a supermarket chain which ran a small bakery at each of its stores. The bakery was the taxpayer's only manufacturing activity and accounted for 2.79 percent of the taxpayer's gross receipts, and 7.5 percent of its gross profit; and in addition it employed 12.6 percent of its employees.\(^13\) The Court held that this activity was not sufficient to warrant classifying the taxpayer as a manufacturing corporation, with the resulting exemption of all its equipment from local property taxes. While refusing to draw a "strict line" as to what percent

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\(^1\) *Id.* at 2734, 357 N.E.2d at 934-35.
\(^2\) *Id.* at 2734, 357 N.E.2d at 935.
\(^3\) *Id.* at 2735, 357 N.E.2d at 935.
\(^4\) *Id.* at 2736, 357 N.E.2d at 936.
\(^6\) *Id.* at 645, 362 N.E.2d at 205-06.
\(^7\) *Id.* at 10,419.
\(^8\) Docket Nos. 74599, 74600, 82037, 82038 (1976), *reprinted at 2 Mass. Tax Cas. (CCH)* ¶ 200-472, at 10,417.
\(^9\) *Id.* at 10,419.
\(^11\) *Id.* at 2574, 357 N.E.2d at 297.
of a taxpayer's activities must be manufacturing in order to qualify for the exemption, the Court laid down the general guideline that manufacturing must constitute a substantial component of the taxpayer's activities, although it need not necessarily be its principal business.\[^{14}\] It rejected the taxpayer's claim that manufacturing need only be something more than "trivial" or "incidental," noting that the reason for the exemption was not to confer a windfall on corporations whose activity was essentially non-manufacturing.\[^{16}\]

\section*{§8.4. Property Tax: Judicial Developments: Other Exemptions.}

United Church of Religious Science v. Board of Assessors of Attleboro involved a claim that property was exempt under G.L. c. 59, § 5, which exempts "[p]ersonal property owned by or held in trust within the commonwealth for religious organizations, whether or not incorporated, if the principal or income is used or appropriated for religious, benevolent or charitable purposes." (Emphasis supplied.) Although the taxpayer was a religious organization, the property in question, machinery used in the manufacture of electrical wire and cable, was not used for religious purposes. The income generated by the taxpayer's wire and cable business was, however, used for religious purposes, thereby presenting the Court with the question of whether the statute could be interpreted, despite its literal language, to deny an exemption to a charitable organization for essentially commercial property.\[^{2}\]

The Appellate Tax Board had rejected the taxpayer's claim without really coming to grips with the statutory language.\[^{3}\] The Supreme Judicial Court squarely faced the question whether the statute, despite its language, requires both income and principal to be used for religious purposes in order to qualify for the exemption. The Court answered affirmatively by relying on the "history and purpose" of the exemption.\[^{4}\] The Court pointed out that as originally enacted in 1918,\[^{5}\] the exemption required that both income and principal be used for religious purposes, and that the change in phraseology from "and" to "or" occurred when the general laws were codified in 1921. The Court further noted that there was no indication at the time of the codification of any intent to change the meaning of the exemption and concluded that "the verbal change from 'and' to 'or' in the circumstances of these cases did not

\[^{14}\] Id.
\[^{16}\] Id. at 2578, 357 N.E.2d at 299.

\section*{§8.4.}

change the meaning of the statute."

In *DeCenzo v. Board of Assessors of Framingham*, an unusual fact situation gave rise to the question of the meaning of the word "person" in the preamble to section 5 of chapter 59, which provides that "any person" who receives an exemption under certain clauses (including clauses twenty-two and thirty-seven) shall not receive an exemption for the same property under any other clause. The taxpayer qualified for the veterans' exemption under clause twenty-two and his wife qualified for the blind persons' exemption under clause thirty-seven. The wife received her exemption on property that she and the taxpayer owned as tenants by the entirety, but the taxpayer was denied an exemption under clause twenty-two for the same property. The Court quite sensibly rejected the assessors' argument that the taxpayer and his wife were essentially one person for tax purposes, and held that both exemptions were allowable.

The final case dealing with an exemption from the property tax, *City of Boston v. Mac-Gray Company, Inc.*, involved the question of whether self-service, coin operated washing machines and driers that the taxpayer had placed in apartment houses pursuant to an agreement with the landlords were taxable as "machinery used in the conduct of business" or non-taxable as "stock in trade," under clause sixteen (2) of G.L. c. 59, § 5. The Court held that the machines were not stock in trade and were therefore taxable, since they were not available for sale or lease but rather were installed in the buildings under a license agreement with the owner. The taxpayer's stock in trade, if he had one, was the performance of the machines.

§8.5. Property Tax: Judicial Developments: Procedure. In *Lorantos v. Board of Assessors of Medfield*, a rescript opinion, the Supreme Judicial Court reaffirmed its decision in *Assessors of Saugus v. Baumann*, to the effect that the Appellate Tax Board has no jurisdiction over appeals under clause eighteen of section 5 (the so-called "hardship exemption" for the old, infirm or poor). The *Baumann* decision was startling not because of its holding but because of one of the rationales given: the Board is not specifically given jurisdiction of such appeals. Since the Board is specifically given jurisdiction over appeals

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3 Id. at 955, 362 N.E.2d at 915-16.
5 Id. at 209, 359 N.E.2d at 948.

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involving only clauses seventeen and twenty-two of section 5 but has routinely entertained appeals involving other clauses (which in turn have been appealed to the Supreme Judicial Court with no jurisdictional question being raised) the effect of the Baumann decision, if it were taken seriously, would be to alter substantially the appellate procedure in property tax matters.

It appears likely, however, that in spite of the Lorantos decision, the Court will confine the scope of Baumann to appeals under clause eighteen. This view is supported by the fact that the Lorantos decision does not repeat the troubling rationale offered in Baumann, and by the fact that one day after its decision in Lorantos the Court issued its decision in United Church of Religious Science, an appeal from the Appellate Tax Board’s denial of a property tax exemption under clause ten of section 5. Although the Court could have raised a jurisdictional objection in the latter case under the reasoning of Baumann, it did not. Nonetheless, even if the Court does not intend to apply literally the jurisdictional limitations on the Appellate Tax Board contained in section 6 of chapter 58A, with Baumann it has given those who might wish to apply the limitation literally a reminder and a ready tool.

Two cases decided by the Supreme Judicial Court dealt with relatively minor procedural aspects of property tax appeals. In Board of Assessors of Salem v. State Tax Commission, the Court held that under G.L. c. 58, § 14, a local board of assessors has 10 days from the receipt rather than from the mailing of notice of the State Tax Commission’s valuations of state-owned lands to contest these valuations. In Altman v. Board of Assessors of Randolph, the Court held that a taxpayer may appeal to the Appellate Tax Board under G.L. c. 59, sections 64 and 65 (as amended through 1973), if the tax at issue is over $1,500 and the taxpayer has paid as tax an amount equal to the tax which would be due on a valuation equal to the average of the valuation over the previous three years, despite the fact that the appeal is under the informal procedure or that during the previous three years an improvement was made to the property, substantially increasing its assessed value. The Court held that the Appellate Tax Board erred when it dismissed the taxpayer’s appeal for want of jurisdiction, and that an appeal from the Board’s decision was proper even though the taxpayer had chosen the

4 Id.
7 Id. at 2692, 357 N.E.2d at 767.
9 Id. at 631, 361 N.E.2d at 1253.
10 Id.
informal procedure because the appeal involved a question of law raised by the pleadings.\textsuperscript{11}

\textbf{§8.6. Property Tax: Legislative Developments.} The few changes in the property tax statutes during the Survey year consisted for the most part of minor amendments in the procedure for assessment and appeal. A sentence was added to section 59 of chapter 59, the section outlining the procedure for applying for an abatement of tax, which makes it clear that one who purchases property during the year may file for an abatement of tax on the property for that year, even though the tax was assessed to the previous owner.\textsuperscript{1} The time prescribed in section 75 of chapter 59 for assessing real or personal property omitted from the annual assessment was moved back from December 20 to June 20.\textsuperscript{2} In addition, a sentence was added to section 75 providing that valuations which were erroneous because of "clerical or data processing errors" would be considered omitted assessments for purposes of the section.\textsuperscript{3}

Chapter 61A, which permits agricultural and horticultural land to be valued for property tax purposes according to such use upon application of the owner to the assessors, was amended so as to enable the owner of such property to have the benefit of the special valuation where the city or town in which the property lies has undertaken a program of property revaluation and the program is not completed in time for the owner to meet the usual filing deadline of October 1 on the year preceding that for which special valuation is sought.\textsuperscript{4} In these cases the filing deadline was extended to 30 days following the mailing of the tax bill reflecting the new valuation. The application, if approved, was made effective for the tax year of the revaluation program.\textsuperscript{5}

Section 38A of chapter 59, which deals with the valuation of pipelines not owned by a gas or electric company, was amended to extend the deadline for the State Tax Commission to value such pipelines from March 1 to March 15 and similarly to extend the deadline for the owner or board of assessors to appeal from these valuations from April 1 to April 15.\textsuperscript{6}

\textbf{§8.7. Personal Income Tax: Legislation.} Following the trend of past years, conformity of chapter 62 to the federal income tax was taken one step further during the Survey year; section 10 of chapter 62 was amended to provide that the income from any portion of a trust which

\begin{itemize}
\item \textsuperscript{11} \textit{Id.} at 631-32, 361 N.E.2d at 1253.
\item \textbf{§8.6.} \textsuperscript{1} \textit{Acts of 1977, c. 198.}
\item \textsuperscript{2} \textit{Acts of 1977, c. 166.}
\item \textsuperscript{3} \textit{Id.}
\item \textsuperscript{4} \textit{G.L. c. 61A, § 8, as amended by Acts of 1976, c. 506.}
\item \textsuperscript{5} \textit{Id.}
\item \textsuperscript{6} \textit{Acts of 1977, c. 199.}
\end{itemize}
is taxable to the grantor for federal tax purposes under the grantor trust rules\textsuperscript{1} will likewise be taxable to the grantor rather than to the trust for Massachusetts tax purposes.\textsuperscript{2} If the grantor is a nonresident, the trustee must withhold the tax on any income which is taxable to a nonresident under G.L. c. 62, section 5A.

The legislature also passed an act\textsuperscript{3} authorizing the Attorney General, on behalf of the residents of Massachusetts, to sue New Hampshire to recover payments of the New Hampshire commuter tax, which was held unconstitutional by the United States Supreme Court in 1975.\textsuperscript{4} The Legislature acted in response to New Hampshire's refusal to abate the tax for years prior to 1975 and the Supreme Court's rejection of a suit brought by the Attorney General against New Hampshire to collect the approximate amount of the illegally collected tax.\textsuperscript{5} The act stipulates that one-half of any recovery shall be turned over to the Massachusetts residents who paid the tax.\textsuperscript{6}

Of the many procedural changes affecting the income tax brought about by the passage of chapter 62C,\textsuperscript{7} two are worth noting. A general requirement is imposed on every individual, corporation, trust, organization or other entity doing business in the Commonwealth to report the names of any residents or other persons to whom it has paid income which is taxable under chapter 62 and the amount paid.\textsuperscript{8} These reports are to be made "on the same basis as is required by the federal government."

Second, if a taxpayer's federal income tax liability has been adjusted in a way so as to increase his Massachusetts tax liability, the taxpayer has an affirmative obligation to report and pay any additional Massachusetts tax due within one year of the determination of the change in the taxpayer's federal tax liability.\textsuperscript{10} Under the previous law, the adjustment in the taxpayer's federal tax liability merely triggered a right in the Commonwealth to assess additional Massachusetts tax.\textsuperscript{11}
§8.8. Personal Income Tax: Judicial Developments. One of the few cases decided during the Survey year which has relevance under the current version of chapter 62 is Aubin v. State Tax Commission.\(^1\) There the Appellate Tax Board considered whether excess deductions arising from the taxpayer's business of owning and operating rental properties could be applied against the taxpayer's capital gain from the sale of these properties. Under G.L. c. 62, § 2(c)(1) excess deductions against "Part B" (5%) income may be taken against "Part A" (10%) income only to the extent that the Part A income is "effectively connected with the active conduct of a trade or business of the taxpayer." After reciting the history of the taxpayer's involvement with the ownership and management of rental properties, the Board concluded without further discussion that the deductions were allowable. The Board did not refer to the fact that by treating the gain as Part A income (i.e. as gain from the sale of a capital asset), the taxpayer was implicitly taking the position that the gain was not from the sale of property held for sale to customers in the ordinary course of business.\(^2\) In other words, the taxpayer was taking the position that his business was the rental of properties, not their sale. It is probably correct that even so the sale of properties is effectively connected with the business of renting them, but the proposition is scarcely so obvious as not to warrant any discussion at all.

Druker v. State Tax Commission,\(^3\) another case decided by the Appellate Tax Board involved three issues that have been made obsolete by changes in the income tax law since Acts of 1971, c. 555, first amended G.L. c. 62 so as to transform it into an income tax based on the federal income tax.\(^4\) The Board decided that under G.L. c. 62, as amended through Acts of 1971, c. 555, excess deductions against Part B income could be taken against Part A income since the intent of the statute, as indicated by the Supreme Judicial Court in Barnes v. State Tax Commission,\(^5\) was to tax in toto no more than the federal adjusted gross income, against which all the deductions at issue were allowable.\(^6\) Second, the Board held that the net operating loss deduction provided by section 172 of the Internal Revenue Code could be taken for the purpose

\(^{1}\) Docket No. 81657 (April 22, 1977), reprinted at 2 Mass. Tax. Cas. (CCH) ¶ 200-489, 10,452.
\(^{2}\) Id. at 10,453.
\(^{6}\) As indicated in the text, G.L. c. 62, § 2(c)(1), as amended by Acts of 1973, c. 723, § 2, now permits excess deductions against Part B income to be taken only against that portion of Part A income which is effectively connected with the conduct of a trade or business.
of computing Massachusetts taxable income again because it was allowable for federal tax purposes in computing adjusted gross income and was nowhere disallowed by G.L. c. 62. Finally, the Board held that the taxpayer could deduct losses sustained by two trusts from his personal income. The taxpayer was not only the grantor but also the sole trustee and beneficiary of one of the trusts and the Board therefore held that as a matter of trust law no trust had in fact been created. The second trust was identical to the first trust except that another person had a 5% beneficial interest. There, the Board found that the beneficiaries had sufficient control over the trustee to make the trustee in fact an agent for the beneficiaries with respect to the trust property so that again no trust was created. The Board’s opinion in Druker contains dicta indicating that Dexter v. State Tax Commission, holding that losses realized by a revocable trust may not be offset against gains on the grantor’s personal return, may not be good law since the 1971 changes to chapter 62. This rather provocative suggestion may be followed up by the Board or by the Supreme Judicial Court in other cases involving pre-1976 tax years, but it has been made moot for years later than 1975 Acts of 1976, c. 510, which conforms Massachusetts law to the grantor trust provisions of the Internal Revenue Code (sections 671-678).

§8.9. Estate and Inheritance Taxes: Legislation. During the Survey year several changes were made in the estate tax law in order to make it work more fairly for both the Commonwealth and the taxpayer.

The estate tax as originally passed imposed a tax on all Massachusetts real and tangible personal property of nonresidents, but allowed the nonresident only an allocable portion of the deductions and exemptions to which a resident would be entitled. This method of computation was changed in 1976; the tax is now determined as if the decedent were a Massachusetts resident, then multiplied by the ratio of the nonresident Massachusetts gross estate (i.e. real estate, and tangible personal property located in Massachusetts) to what the Massachusetts gross estate would have been had the decedent been a Massachusetts resident.
The estate tax was changed to assure that Massachusetts always received at least the maximum federal credit allowed for state death taxes where the Massachusetts taxable estate was reduced by the exclusion of power of appointment property with respect to which future interest taxes had previously been settled. This change was effected by adding to section 2(b) of chapter 65C a sentence providing that for purposes of determining the maximum federal credit the Massachusetts taxable estate would include such power of appointment property.

In order to facilitate the settlement of future interest taxes on pre-1976 estates, G.L. c. 65 was amended to confer authority on any executor, administrator or trustee to settle future interest taxes unless the will or trust instrument provides to the contrary. The executor is also given authority to make transfers from principal to income where settlement of the tax is inequitable to the income beneficiary.

The final substantive changes in the death tax statutes were in the apportionment statute, G.L. c. 65A, § 5, which allocates federal and state estate taxes on probate and non-probate assets in accordance with the ratio of such assets to the "net estate." When the estate tax was originally passed, the definition of "net estate," for purposes of apportioning the c. 65C tax only, was changed to the definition of net estate contained in that chapter — i.e. the Massachusetts gross estate less funeral expenses, claims, and debts with respect to property included in the estate. For other taxes the original definition of net estate (the federal gross estate less applicable deductions other than specific exemptions) was retained. Since there was no apparent reason for apportionment to operate differently depending on what tax was being apportioned, the definition of net estate was returned to substantially its original form in 1976. Also during the Survey year, a provision was added, effective July 1, 1978, for decedents dying after January 1, 1978,
permitting apportionment of interest and penalties other than as provided in the statute, if a court determines that the statutory formula is inequitable.\footnote{G.L. c. 65A, § 5(5), as added by Acts of 1976, c. 515, § 1.}

The changes in the taxation of nonresidents, in the measurement of the maximum federal credit for state death taxes, and in the definition of "net estate" were intended as corrective changes in the original estate tax law. Accordingly, as originally submitted to the legislature, these changes were to be retroactive to January 1, 1976. However, as passed the changes are not effective until January 1, 1977.\footnote{Acts of 1976, c. 515, §§ 32, 35.} This change in the effective date was apparently accidental and bills to change it have been submitted to the legislature.\footnote{House Bill 272, House No. 4570. See THE TAXATION OF ESTATES IN MASSACHUSETTS (MCLE/NELI) (1977).} In the meantime the Estate Tax Bureau has indicated it will apply the amendments in question retroactively.\footnote{A gaffe which is on its face far more sweeping was also made in the effective date of G.L. c. 65C itself. As originally passed, the third sentence of Acts of 1975, c. 684, § 97, contained the effective date of G.L. c. 65C specifically, that sentence provided that c. 65 would apply to decedents dying on or after January 1, 1976. The fourth sentence of § 97 specified that G.L. c. 65 would remain applicable to decedents dying prior to January 1, 1976 (except for certain future interests in property subject to powers of appointment which would not be subject to c. 65). Acts of 1976, c. 415, § 97 amends Acts of 1975, c. 684, § 97 by striking out the third sentence and replacing it with a sentence substantially identical to the fourth sentence of Acts of 1975, c. 684, § 97, with the added proviso that c. 65A shall remain in effect with respect to such (pre 1976) estates. The result is that there was no statement of the effective date of c. 65C. This result was, of course, unintentional. Legislation to restore the effective date of c. 65C was passed producing the desired effective dates. Acts of 1977, c. 76.}

§8.10 Estate and Inheritance Taxes: Judicial Developments: Election of Itemized Deductions under § 27 of G.L. c. 65. *Perry v. Commr. of Corporations & Taxation*,\footnote{1977 Mass. App. Ct. Adv. Sh. 253, 360 N.E.2d 654 (rescript).} decided by the Appeals Court, involved the requirement in c. 65 that an executor who qualifies for the standard deduction make an election if he wishes instead to itemize the deductible debts and administration expenses of the estate for inheritance tax purposes.\footnote{G.L. c. 65, § 27.} The issue before the court was what estates qualify for the standard deduction, which in turn required an interpretation of the statutory language that the standard deduction shall be allowed "for aggregate values subject to taxation under this chapter of less than $100,000." The commissioner claimed that this phrase referred to estates with a probate value of less than $100,000, whereas the appellant, an executor who had not elected to itemize deductions but who wished to claim them, took the position that the phrase referred only to estates

\[\text{[References omitted for brevity.]}\]
with a *gross value* of less than $100,000. The Commissioner relied on previous announcements by his department supporting his position that only probate assets were included, but the court pointed out that concurrent announcements by the Commissioner also supported the appellant's position. In view of this conflict in the Commissioner's published positions, the court gave them little weight and rested its decision instead on the basic principle that "ambiguities in tax statutes are to be resolved in favor of the taxpayer." Resort to this principle should not have been necessary; the phrase "aggregate values subject to taxation under this chapter" on its face includes the entire gross estate subject to tax, not merely the probate estate.

§8.11. Bank Excise Tax: Judicial Developments. The challenge by federal savings and loan associations located in Massachusetts to the income-based measure of the Massachusetts bank excise tax,¹ which was initiated at the time that measure was added to the law in 1966,² was finally resolved during the *Survey* year.³ In *First Federal Savings and Loan Association of Boston v. State Tax Commission*,⁴ a declaratory action brought by all Massachusetts based federal savings and loan associations,⁵ the Supreme Judicial Court upheld the validity of the tax. The associations raised objections under federal law and the federal and Massachusetts Constitutions to the income measure of the tax in its entirety and to the method of calculating income.

First, the associations claimed that if the tax was valid, they should be permitted to deduct interest or dividends paid to members as an

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² §8.11 G.L. c. 63, § 11(a), (b).
⁴ An action by the United States in the Federal District Court for Massachusetts, claiming that the portion of the excise based on deposits, as applied to federal savings and loan associations, was in violation of federal law, had previously been successful. *United States v. State Tax Comm'n*, 348 F. Supp. 397 (D. Mass. 1972), *modified on other grounds* 481 F.2d 963 (1st Cir. 1973). In that case, several associations intervened and raised some of the same objections to the income measure of the tax which were later raised before the Supreme Judicial Court. The federal district court rejected those objections to the income measure which it decided on the merits, 348 F. Supp. at 400; the Court of Appeals for the First Circuit determined that none of the objections should have been decided on the merits because the association had an adequate remedy in the state courts, 481 F.2d at 973.
⁶ Most of the appellants had previously filed applications for abatement of the tax, beginning in 1966, and had appealed the denial of such applications to the Appellate Tax Board. These appeals were pending at the time the declaratory judgment action was brought. All the parties agreed, however, that the action for declaratory judgment was appropriate despite the failure to exhaust administrative remedies. 1977 Mass. Adv. Sh. at 899, 363 N.E.2d at 478. See *Sydney v. Commissioner of Corps. & Taxation*, 1976 Mass. Adv. Sh. 2538, 366 N.E.2d 460.
"operating expense."

The Court determined that such payments more closely resembled dividends than interest and that dividends are not usually considered operating expenses. Even though the court considered the payments analogous to dividends it acknowledged that there was some ambiguity in the statute as to whether they were also "operating expenses," but resolved this ambiguity in favor of the Commissioner's consistent, public position that operating expenses do not include "amounts paid or accrued to depositor., savers or members."

The associations claimed that the tax was a tax on gross receipts and as such was not authorized by 12 U.S.C. § 1464(h), which permits a state to impose a tax "on such [federal savings and loan] associations or their franchise, capital reserves, surplus, loans or income . . . ." The Court disagreed, holding that the tax was in the nature of a franchise tax which is permitted by § 1461(h). Permitting as it did deductions from gross income for additions to the guaranty fund or surplus required by federal or state authorities did not change the nature of the tax from a franchise tax. Even if the tax were considered an income tax, it was permissible as a tax on "net operating income" and not impermissible as a tax on gross income.

The associations also claimed that the tax as applied to them was greater than that imposed on similar state institutions, in violation of 12 U.S.C. § 1464(h) because the additions to reserves required by federal authorities were generally less than the comparable additions required of state institutions by state authorities, thus giving the federal associations a smaller deduction than that given to state institutions. The Court held that the tax in conjunction with the difference in federal and state reserve requirements had not been shown to create a substantial competitive disadvantage for federal associations, and that whatever difference there might be was not created by the tax but was "inherent in the pattern of the federal legislation."

The Court also rejected the
claim that the tax violated section 1464(h) because credit unions were not subject to it, holding that credit unions were not "similar" to federal savings and loan associations within the meaning of section 1464(h).16

The Court summarily rejected the associations’ claims that the tax was in violation of the commerce clause and the Fourteenth Amendment to the United States Constitution; that the tax was an unconstitutional delegation of legislative powers in violation of Articles 23 and 30 of the Declaration of Rights of the Massachusetts Constitution; and that the tax was not “at a uniform rate . . . upon incomes derived from the same class of property,” in violation of Article 44 of the Amendments to the Massachusetts Constitution.17

§8.12 Sales and Use Taxes: Judicial Developments. Most of the litigation involving the sales and use tax revolved, predictably enough, around the exemptions contained in Section 6 of Chapter 64H. The Supreme Judicial Court faced two cases involving the all but in comprehensible exemptions for certain machinery, materials, tools and fuel contained in Section 6(r) and (s) of Chapter 64H.1 The first of these cases, Ace Heating Service v. State Tax Commission,2 was a claim by heating contractors for exemption of “machinery, materials and supplies” used in the performance of lump-sum contracts for the sale, installation and service of hot water and steam generating boilers and related equipment. The Court acknowledged the “uncertain scope” of the exemptions,3 but did nothing to illuminate this murky area. In holding that the exemptions were not applicable, the Court gave great deference to “contemporary administrative construction”4 and relied primarily on the Commissioner’s Emergency Regulations No. 12 which flatly states:

16 Id. at 909, 363 N.E.2d at 482.
17 Id. at 910-11, 363 N.E.2d at 482-83.

§8.12 § 6(r) exempts:
Sales of materials, tools and fuel, or any substitute therefor, which become an ingredient or component part of tangible personal property to be sold or which are consumed and used directly and exclusively in agricultural production; in commercial fishing; in an industrial plant in the actual manufacture of tangible personal property to be sold, including the publishing of a newspaper; in the operation of commercial radio broadcasting or television transmission; in the furnishing of power to an industrial manufacturing plant; in the furnishing of gas, water, steam or electricity when delivered to consumers through mains, lines or pipes.

The first sentence of § 6(s) is substantially identical except that it covers sales of “machinery or replacement parts” rather than “materials, tools and fuel.” The rest of § 6(s) consists of an elaboration on the meaning of various terms used in the first sentence.

2 Id. at 2492, 356 N.E.2d at 699.
3 Id.
Contractors are the consumers of . . . machinery . . . which they use in their business. The sale or rental of such property to contractors is subject to the sales and use tax.\(^5\)

It did not discuss the consistency of the regulation with the statute and the portion of the opinion where the Court itself examines the taxpayer's right to the exemption is weak. First, the Court stated that the property in question does not constitute "materials, tools or fuel," within the meaning of Section 6(r), but gave no reason for this conclusion, although it on its face contradicts the Court's earlier description of the property as "machinery, materials and supplies." (emphasis supplied).\(^6\) It then conceded that at least some of the items are "machinery" under Section 6(s), but stated that the taxpayers do not "directly' furnish power to manufacturers or hot water or steam to either manufacturers or consumers."\(^7\) This flat statement is presumably meant to dispose of any contention that the machinery at issue is covered by the exemption for machinery used "in the furnishing of gas, water, steam or electricity when delivered to consumers through mains, lines or pipes." But the contention, is not disposed of by the Court's statement, which is misdirected. The statute does not require the taxpayer to furnish anything directly; it requires that the machinery in question do so, and it is difficult to imagine anything more directly involved in the furnishing of water and steam than the boilers installed by the taxpayers. Of course, it is possible that the taxpayers did not install boilers which furnished steam or hot water "to consumers through mains, lines or pipes," but the Court makes no inquiry into this point.

_S. J. Groves & Sons Co. v. State Tax Commission\(^8\)_ involved a sales tax exemption claimed by a construction contractor for machinery and equipment used in building a tunnel and water pipe for the Metropolitan District Commission over a three-year period. The Court, citing _Ace Heating_, disposed of the taxpayer's claim under Section 6(r) and (s) on the ground that "those exemptions do not apply to sales to contractors who do not furnish water to anyone."\(^9\) This statement continues the misconception of the statute contained in _Ace Heating_; the statute does not focus on the taxpayer but on the use to which his equipment is put.

The taxpayer in _Groves_ also relied on Section 6(f), which exempts sales of "building materials and supplies to be used in the construction . . . of (1) any building, structure, public highway, bridge or other public works . . . ."\(^10\) The issue was whether the equipment in question

\(^{5}\) Id. at 2493, 356 N.E.2d at 700.
\(^{6}\) Id. at 2492, 356 N.E.2d at 700.
\(^{9}\) Id. at 457, 360 N.E.2d at 899.
\(^{10}\) Id. at 455, 360 N.E.2d at 899.
constituted “building materials and supplies,” which is defined by the statute as including “all materials and supplies consumed, employed or expended in the construction . . . of any . . . public work, as well as such materials and supplies physically incorporated therein.”11 The Court concluded that equipment, tools and machinery not physically incorporated in the project were not “building materials and supplies” for three reasons. First, the definition of the term specifically included rental charges for “construction vehicles, equipment and machinery” rented specifically for use on the site, thus suggesting that sales of such items may not be exempt.12 The separation of “materials, tools and fuel” from “machinery” in Section 6(r) and (s) likewise suggests that machinery is not to be considered materials.13 Finally, the “ordinary usage of words” indicates that the term “materials and supplies” does not include equipment, tools and machinery.14 The Court admitted that its result required the general public to “bear the ultimate burden in an amount greater than the amount of the tax,” but stated that this objection should be directed to the legislature.15

The final issue in the Groves case was the taxability of labor charges on various invoices, primarily for repairing materials and supplies. The Court held that charges for repairs made after a sale are not subject to tax, at least where separately stated, noting that the statutory exclusion of certain labor charges from tax16 should not be taken as implying that all other labor charges are subject to tax.17

New England Truck Leasing Corp. v. State Tax Commission18 raised the question of whether a corporation which supplied school buses to several towns was providing transportation services or was merely leasing the buses. If the transaction was a contract for services, the supplier’s leasing of the buses from a related corporation was subject to the sales tax; if the transaction was a lease, the supplier’s leasing of the buses from the related corporation was exempt as a purchase for resale.19 The Appellate Tax Board held that the contracts with the towns were for transportation services, pointing out that the supplier provided drivers, operated and maintained the buses, and that the school committees

11 G.L. c. 64H, § 6(f).
13 Id.
14 Id. at 457, 360 N.E.2d at 899.
15 G.L. c. 64H, § 1(14)(c)(iii) excludes from the “sales price” the amount charged for labor or services rendered in installing or applying the property sold. Section 1(14)(c)(v) excludes transportation charges if the transportation occurs after the sale of the property.
18 G.L. c. 64H, § 1(13).
of the towns could designate the routes and time schedules of the buses. 20

The lessor corporation apparently argued also that even if the contract between the supplier and the towns was for transportation services, it could avoid sales tax by claiming the benefit of the exempt purchaser certificates which the towns had given the supplier. 21 This argument was only briefly and somewhat obliquely dealt with by the Board, which held that even assuming an entity in the position of the lessor corporation could under some circumstances claim the protection of an exempt purchaser certificate given to another entity, the lessor corporation had not satisfied its burden of proof. 22

_Baker Transport, Inc. v. State Tax Commission,_ 23 unlike the cases discussed above, did not involve the taxability of a given transaction but rather who should bear the tax on the leasing of tractors and trailers to a supermarket chain. The lessors made the ingenious argument that G.L. c. 64H, § 3(c), which provides that the purchaser must pay the sales tax on the sale at retail of motor vehicles to the registrar of motor vehicles and which defines a sale to include a lease and a purchaser to include a lessee, 24 required the lessees to pay the tax. The Supreme Judicial Court rejected this argument observing that it clearly was at odds with the legislative intent as revealed by the entire statutory scheme, that is to insure payment of the tax upon any change of ownership of a motor vehicle. 25 The Court dealt with the dilemma posed by the definitions of “purchaser” and “sale at retail” in a footnote at the end of the opinion, in which the Court stated that the definitions did not require the result urged by the lessors because the definitions were made applicable unless “the context indicates otherwise.” 26 The Court then took the unusual step, for a court not noted for liberally construing statutes, of adding that even if the statute had not contained such a proviso its decision would have been the same because of its “duty . . . to ascertain and carry out the intent of the Legislature.” 27

§8.13. Corporation Excise Tax: Legislative Developments. The only substantive change in the corporation excise tax was an act designed to encourage the use of alternative energy sources. 1 It provides

21 G.L. c. 64H, § 6(f) provides that certain tax-exempt institutions may receive certificates from the commissioner entitling vendors to sell to them tax free.
22 2 Mass. Tax. Cas. (CCH) at 10,431.
24 G.L. c. 64H, § 1(12)(a), § 1(9).
26 Id. at 266, n.11, 360 N.E.2d at 863 n.11.
27 Id. at 266, 360 N.E.2d at 863.
that at the election of a business corporation and subject to several enumerated conditions, the income measure of the excise may be reduced for expenses paid for installing any solar or wind powered climate control or water heating unit. In addition, the tangible property measure of the excise shall not include such a unit.

In connection with the corporation excise tax a change in the procedure for adjustment of the Massachusetts excise tax, after a final determination of the federal tax is particularly worth noting. Previously, a corporation had one year from the final determination of its federal tax to report and pay any resulting increase in Massachusetts tax; that period has now been reduced to three months. If no report is filed by the corporation, the commissioner now has two years rather than three from the receipt of notice from the federal government of the change in federal tax to assess any additional excise tax. In addition, the law now specifies that any such assessment shall be limited to changes in tax resulting from the change in the federal tax liability; the previous law was silent on this point. If the change in the federal tax results in a lower Massachusetts excise, the corporation may apply for an abatement within one year of the determination of the federal tax, but the state tax commission is not limited in its consideration of the application to items related to the change in federal tax.

§8.14. Practice and Procedure on Appeal: Judicial Developments: Declaratory Actions. In Sydney v. Commissioner of Corporations & Taxation, the Supreme Judicial Court reaffirmed the principles that govern whether a declaratory action should be permitted in a tax case if administrative remedies have not been exhausted. In Sydney the developers of an urban redevelopment project under G.L. c. 121A brought a declaratory action to determine whether the excise tax in the year of completion of a project under section 10 of chapter 121A could be based on the completed "fair cash value of the project," even though the project was not completed on January 1 of that year, and whether a "maximum fair cash value" determined by the local assessors under paragraph 7 of section 10 could be ignored by the assessors in determining the fair cash value of the project under paragraph 3 of section 10.

A superior court judge had dismissed the complaint presumably because of the availability of administrative remedies, giving no indication

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1 Acts of 1976, c. 415, § 22.
2 Id.
3 Id.
4 Id.
5 Id.

2 Id. at 2540-41, 356 N.E.2d 461-62.
that he was exercising his discretion. The Court reversed this dismissal and remanded the case for a discretionary determination of whether the action should be entertained, emphasizing that a declaratory action in the tax area may not be automatically dismissed because administrative remedies have not been exhausted. Without suggesting any "comprehensive guidelines" for the exercise of the trial judge's discretion, the Court observed that a declaratory action was inappropriate unless the administrative remedy was "seriously inadequate," but that it is favored where the issue is important and of wide impact or where the question at issue is one of law and there is no dispute as to the facts. The Court gave no indication of how the superior court judge should exercise his discretion on remand, intimating that further pleadings would be called for before a decision could be made.

Unlike the decision in Sidney, the decision in S.J. Groves & Sons Co. v. State Tax Commission gives some idea of the permissible range of a trial judge's discretion in determining whether to allow a declaratory action to proceed if administrative remedies have not been exhausted. In Groves a construction contractor claimed a sales tax exemption for various materials used in connection with a public works project. The Superior Court judge took jurisdiction of the case, and the Supreme Judicial Court on appeal upheld this exercise of his discretion, pointing out that there was no argument as to the facts and that the legal issue was one of first impression which might affect persons other than the taxpayer. However, the Court acknowledged that the decision was a close one and that "we would probably have left it to the Appellate Tax Board."

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1 Id. at 2538, 356 N.E.2d at 460.
2 Id. at 2542-44, 356 N.E.2d at 463-64.
3 Id. at 2545, 356 N.E.2d 464.
5 Id. at 453-54, 360 N.E.2d at 898.
6 Id. at 454, 360 N.E.2d at 898.