Chapter 16: State and Local Taxation

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§16.1. Personal Income Taxes—Decisional Law. In the Survey year two cases and one administrative ruling dealt with the interplay between the general comprehensive income tax statute of Massachusetts and its underlying state constitutional basis.1 Potential conflict arises in part because the Massachusetts income tax law is patterned closely after the Federal Internal Revenue Code,2 which of course is not restricted by the Massachusetts constitution. Massachusetts income taxation is, however, subject to the state constitutional stricture that although “[s]uch tax may be at different rates upon income from different classes of property . . ., [it must] be levied at a uniform rate . . . upon incomes derived from the same class of property.”3

In Daley v. State Tax Commission,4 the Supreme Judicial Court found this constitutional principle to conflict with the clear and unambiguous Massachusetts code provisions concerning the taxation of a recipient of a lump sum distribution5 from a qualified employee retirement plan. Upon his retirement in 1972, the taxpayer received from his employer’s qualified employee retirement plan6 a lump sum distribution of over

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§16.1. 1 MASS. CONST. amend. XLIV.
2 Since 1971, Massachusetts has had three tax codes each modeled upon the Internal Revenue Code applicable to a particular year. Chapter 555, § 5, of the Acts of 1971 inserted into G.L. c. 62, § 1(c), the following definition: “‘Code’, The Internal Revenue Code of the United States, as amended on January the first, nineteen hundred and seventy one.” Id. Acts of 1973, c. 723, revamped portions of G.L. c. 62 to conform the Massachusetts income tax more closely with the federal income tax but retained the 1971 definition of the Code. Acts of 1977, c. 599, § 1, amended G.L. c. 62, § 1(c), to read “(c) ‘Code’ the Internal Revenue Code of the United States, as amended on May twenty-third, nineteen hundred and seventy-seven and in effect for the taxable year.” See also Acts of 1979, c. 408, § 1, updating the “Code” to the “Internal Revenue Code of the United States as amended on November sixth, nineteen hundred seventy-eight and in effect for the taxable year.” The 1979 Code update is discussed infra.
3 MASS. CONST. amend. XLIV (emphasis added).
5 See I.R.C. § 402(e)(4) (defining lump sum distribution).
6 For federal definitions and treatment of qualified employee retirement plans, see generally I.R.C. §§ 401-415.
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$50,000.00. The applicable federal code provision gave favorable treatment to this deferred compensation by permitting a portion of the lump sum payment to be treated as a long term capital gain.\(^7\) Accordingly, the taxpayer divided this lump sum on his 1972 federal return into three reportable categories of receipt: (1) a nontaxable return of his own contribution, (2) an ordinary income portion, and (3) a long term capital gain portion.\(^8\) On his Massachusetts return, however, the taxpayer claimed that the entire taxable portion of the lump sum was compensation income subject to the five percent tax.\(^9\) The Commissioner disagreed and assessed a further tax on the ground that the portion of the lump sum taxed federally as a long term capital gain should be taxed at the higher rate of nine percent.\(^10\)

The Commissioner’s argument was based upon a straightforward reading of the Massachusetts income tax statute. The then applicable statute divided income into two categories, nine percent income and five percent income. The statute defined nine percent income to include interest (other than certain interest principally from Massachusetts banks), dividends, and “net capital gain.”\(^11\) The five percent category was a catchall, taxing “all other” income.\(^12\) In addition, the then applicable Massachusetts code defined net capital gain as including income to which federal law artificially grants favored long term capital gain status.\(^13\) Literally applied, the Massachusetts code would have taxed the “long term capital gain” portion of the retirement distribution at nine percent and the “ordinary income portion” at five percent.

The Daley Court’s decision to reject the Commissioner’s interpretation of the Massachusetts income tax provision involved an examination of both the state constitution’s taxing provision and the Federal Code’s deferred compensation provision.\(^14\) As the Daley Court noted, article 44 of the Articles of Amendment to the Massachusetts Constitution, the sole basis for imposition of a statewide income tax, requires a uniform rate of taxation on income from a single class of property.\(^15\) The Court ruled that the lines drawn under the legislative power to create and define different classes of property must reflect “actual underlying differences in the property.”\(^16\) The Court noted the long unquestioned

\(^7\) I.R.C. § 402(a)(2) (1972).
\(^9\) Id.
\(^10\) Id.
\(^12\) Id., § 4(b).
\(^13\) Id., § 4(a)(3).
\(^15\) Mass. Const. amend. XLIV.
interpretation that "property" includes the right to contract for personal employment, thereby bringing the state constitutional tax restrictions in issue. The Daley Court examined the basis for the federal bifurcation of this deferred compensation into ordinary and capital gains income. It noted that Congress had provided that in certain instances qualified lump sum retirement and death benefits would be taxed in part as capital gains and in part as ordinary income. For instance, amounts traceable to pre-1970 employer contributions and accumulations thereon were to be taxed federally at the favorable capital gains rate. The Daley Court held that incorporation of this federal chronological distinction into the Massachusetts tax code violated article 44, since there was no basis for finding the portion of the income attributable to pre-1970 contributions generically different from that attributable to post-1969 contributions. In short, the Court found that the entire lump sum payment was derived from one class of property, i.e., earned income, and that under the 1971 Code taxed entirely as five percent income.

Despite substantial revisions of both federal and Massachusetts tax laws since 1972, Daley remains significant. The Daley Court invited the legislature to amend the Massachusetts code when it noted that the retirement plan contributions in the article 44 property sense were clearly distinguishable from the interest or appreciation earned on such contributions. Grasping this distinction between compensation income and investment income, the Department of Revenue issued Letter Ruling 79-34. This ruling involved a lump sum distribution from the Massachusetts retirement plan.

18 Id. at 3152, 383 N.E.2d at 1143. See I.R.C. § 402.
19 Id.
20 Id. The maximum federal effective rate on capital gains, ignoring the minimum tax, was then thirty-five percent.
21 Id. at 3155, 383 N.E.2d at 1143-44.
22 Id. In Massachusetts the converse holds true, and ordinary income, such as wages, is more favorably treated than capital gain income.
23 The current Internal Revenue Code electively taxes a recipient of a qualified lump sum distribution at capital gains rates to the extent the payment is attributable to pre-1974 contributions. I.R.C. § 402(a)(2). The current Massachusetts code utilizes the federal definition of "net capital gain," and consequently, the ten percent tax literally applies. G.L. c. 62, § 1(k). The Department of Revenue now instructs taxpayers to treat such federal "capital gain income" as five percent income. See instructions to 1979 Massachusetts Income Tax Form 1, page 6, item 16(c).
24 1978 Mass. Adv. Sh. at 3155, 383 N.E.2d at 1143-44. The payment in the Daley case consisted of employer contributions, employee contributions, and the appreciation or earnings on those contributions accumulated over the employee's years of participation in the plan. The unstated logic is apparent. The employer contributions so made are clearly compensation for services rendered, while the appreciation element accruing on such contributions, on the other hand, is investment income.
25 (1979) STATE AND LOCAL TAX'N (MASS.) (P-H) ¶ 58.074.
chusetts Public Retirement System. Since contributions to that retirement plan are taxable to the employee when made, only the appreciation on such contributions is taxable when distributed.26 This ruling, therefore, was not concerned with taxing the compensation element of the lump sum distribution and, unlike Daley, faced no article 44 issue.27 The Department of Revenue focused on the distinction between earned and unearned income, and, after noting that such interest was not derived from a Massachusetts savings bank,28 ruled that the interest portion of the distribution should be taxed at the higher rate.29

Letter Ruling 79-34 may anticipate administrative attempts to tax at ten percent the unearned portions of lump sum distributions from other similar retirement plans. A self-employed individual under the Keogh Plan or a retiree from an employer-maintained Individual Retirement Account or a Simplified Employee Pension Plan may soon see the interest element 30 of his lump sum retirement payment taxed at this higher rate if the Department of Revenue extends the concept of Letter Ruling 79-34 to these situations. Since interest from Massachusetts banks is taxed at five percent,31 the question whether this noncompensatory element of such lump sum retirement distributions is to be taxed at ten percent or five percent may turn on whether the trustee is a Massachusetts or foreign bank.

Regardless of the identity and location of the trustee, it does not necessarily follow that the taxable portion of a lump sum payment from a Keogh or IRA trust must be entirely subject to the ten percent income tax. Under section 11 of chapter 62, a Massachusetts resident receiving income from an untaxed foreign retirement trust 32 or from a Massachusetts trust which was not previously taxed under chapter 62 is taxed

26 Id.
27 Id.
30 The contributions to such plans are taxed by the commonwealth to the self-employed or employee-participant in the taxable year when made, G.L. c. 62, § 2(7), (9). Therefore, only the interest or appreciation element of the balance of such accounts will be subject to Massachusetts income tax when distributed in a lump sum payment. Consequently, the constitutional issue present in Daley is not raised.
31 Interest from banks chartered by the commonwealth or from federal banks located within the commonwealth is taxed at a rate of 5%. G.L. c. 62, §§ 2(b)(1)(A), 4.
32 Nearly all federally qualified employee benefit plans utilize formal trust instruments. See, e.g., I.R.C. §§ 401, 401(a)(10)(b) (Keogh Plan trusts); I.R.C. § 408(a) (IRA trusts); I.R.C. §§ 405, 409 (retirement bonds). Even the custodial accounts commonly utilized for Individual Retirement Accounts, which may lack formal trust attributes, seem unquestionably to create a fiduciary relationship between the bank or financial institution, on the one hand, and the participant and his beneficiaries on the other. See, e.g., I.R.C. § 408(h).
upon receipt.\textsuperscript{33} Section 11 further provides that trust income not previously subject to tax under chapter 62 will be taxed upon receipt by a Massachusetts resident beneficiary "according to the nature of the income received by such [exempt] trustees . . . ."\textsuperscript{34} Thus, if the distributed trust income consists partly of business income and partly of capital gains, the recipient beneficiary must bifurcate proportionately the distribution into five percent and ten percent income.

So viewed, section 11 would seem to apply to Massachusetts residents who receive distributions from any qualified retirement benefit trust. In light of the Daley doctrine, qualified common law employee retirement plan benefits, composed (at least in part) of previously untaxed compensation income (the employer contributions), cannot be subject to section 11 bifurcation. Since, however, the compensation element of IRA plan distributions and Keogh plan distributions to self-employed individuals has been previously taxed, no Daley constitutional problem presents itself. Section 11 would apply to the taxable interest portion of these retirement distributions. Since under section 11 the income must be traced and categorized, the practical task of tracing trust income of an investment fund over a holding period spanning a working career of possibly forty or more years will certainly be difficult and in some instances impossible.\textsuperscript{35} Neither the form nor the manner of the benefit payment would vitiate the tracing requirement.\textsuperscript{36} Annuity income as a general matter is taxed at five percent.\textsuperscript{37} If the terms of a trust require payment of an annuity to a beneficiary, section 11, if applicable, will tax the annuity to the Massachusetts beneficiary according

\textsuperscript{33} G.L. c. 62, § 11. The Massachusetts scheme of taxation of income from trust property reaches incomes to the extent it benefits a Massachusetts resident beneficiary. Second Bank-State Street Trust Co. v. State Tax Comm'n, 337 Mass. 203, 209, 148 N.E.2d 647, 651 (1958). If the income is received by a Massachusetts trustee for the benefit of a Massachusetts beneficiary, it is taxed in the year accrued or received under section 10. Under the constructive receipt doctrine, such resident will also be taxed if the income is available to him at his option. \textit{Id.} See also State Tax Comm'n v. Fitts, 340 Mass. 575, 578-80, 165 N.E.2d 586, 589 (1960); I.R.C. § 72(m)(4) and (m)(4)(A) (addressing constructive receipt of IRA and Keogh benefits, respectively).

\textsuperscript{34} G.L. c. 62, § 11.

\textsuperscript{35} This record keeping is complicated by the different effective rates which current chapter 62 applies to different items such as Massachusetts bank interest (five percent) and other interest and dividends (ten percent), G.L. c. 62, § 2(b), and long term capital gains (ten percent after allowance of the federal capital gain deduction). \textit{Id.}, § 2(b), § 2(c)(3) \textit{as amended by Acts of 1979, c. 409, § 2}. A Massachusetts capital gains deduction will be phased in over three years. Acts of 1979, c. 409, § 5. See note 22, § 2 \textit{infra}.


\textsuperscript{37} Annuity income is not "interest or dividend" income and clearly is not capital gain income. Accordingly, it would fall into the five percent catchall class of income. G.L. c. 62, § 2(b)(2).

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to the nature of the income received by the exempt trust. In addition, the section 11 tracing requirement may apply to pensions paid under the Massachusetts Public Retirement System, in essence a state retirement trust.

The difficulties of the tracing requirement could be eliminated through the creation of another class of property under the legislature's article 44 power. In the interests of simplicity and equity, this class could be designated as the "taxable portion" of all qualified retirement plans, including the compensatory contributions from qualified employee benefit plans and the unearned investment portions of all plans. Since payment of the entire benefit regardless of its immediate source closely resembles deferred compensation, income from this class of property should be subject to the five percent tax. It should be noted, in particular, that creation of such a class avoids the article 44 issue which arises when one partner of a firm elects a lump sum payment from his Keogh plan subject at least in part to the ten percent tax, while another partner of the same firm elects to receive the same retirement benefit in the form of an annuity taxable at five percent.

In Turenne v. State Tax Commission, the Appellate Tax Board considered the interplay of article 44 and another Internal Revenue Code provision which artificially treated what would otherwise be a capital transaction as an ordinary income transaction. The Turenne case involved losses on 1244 stock which, under a provision of the Federal Code, are treated as ordinary losses rather than capital losses. The 1244 stock loss was treated as an ordinary loss rather than a capital loss because it was a"small business corporation" as defined by the Federal Code.

83 305 Mass. at 24, 24 N.E.2d at 640; 287 Mass. at 469, 192 N.E. 79.
89 See generally C.L. c. 32.
40 The state retirement system closely resembles a trust. The state treasurer is the custodian of the fund in what seems to be a fiduciary capacity. C.L. c. 32, § 23(b). In addition, the retirement system requires diversification of investments between certain limited types of securities and Massachusetts savings deposits. Id., § 23(d).
41 Even Individual Retirement Accounts resemble deferred compensation. The contribution to the plan may be viewed as a percentage of earned income. The deferral is present in the sense that the percentage of earned income contributed is not available for use or consumption without penalty until the individual reaches age 59 and one half. I.R.C. § 408(f) (ten percent tax on the amount of distribution included in gross income).
43 (1979) STATE TAX RPRTR. (MASS.) (CCH) ¶ 200-533, at 10,563.
44 I.R.C. § 1244. This special rule applies to losses incurred on the sale or other disposition of the common stock of certain "small business corporations" having a total capitalization of one million dollars or less. Id.
45 A federal long term capital loss has limited utility. After offsetting long term gains, the balance of such losses may be used to offset up to $3,000 of ordinary income per year on a two for one basis. I.R.C. § 1211. Thus it takes $6,000 of long term losses to offset $3,000 of ordinary income. Ordinary losses, on the other hand, offset income on a one for one basis. I.R.C. § 165.
taxpayer in *Turenne* claimed on his Massachusetts return that this recognized security loss should offset his Massachusetts "ordinary" or five percent income. The Board noted that the then applicable section of chapter 62 defined "capital loss" without regard to whether the federal code granted such capital transaction special ordinary income treatment. The Board found for the Commissioner and held that such loss was a capital loss under Massachusetts law and hence deductible only against the taxpayer's ten percent income. The Board based its holding in part on its observation that since 1244 losses belong in the same class of losses as ordinary capital losses, they may not be subjected to taxation at a different rate than other capital losses. *The fiction of a capital loss deemed to be an ordinary loss under the Code raises a serious question about a violation of the provisions of the 44th Amendment to the Massachusetts Constitution.*

Thus, the Board disallowed the taxpayer's deduction of his 1244 loss against ordinary income.

While the *Turenne* decision has identified a constitutional issue of some significance, which will undoubtedly be raised again, the reach of the decision is unclear.

Recent amendments to the Massachusetts code should reverse the *Turenne* holding. Chapters 408 and 409 of the Acts of 1979 have replaced the former statutory definitions of "capital loss," "capital gain," "net capital loss," and "net capital gain" with the federal Internal Revenue Code definitions of such terms. Chapter 62, by virtue of its adoption of the federal definition of capital loss, now literally requires the deduction of a so-called 1244 loss against five percent income. With the deletion from chapter 62 of section 7 and subsection (K) of section 1, a 1244 loss will not appear in the computation of ten percent income. Chapter 62 now provides that a loss incurred by a taxpayer in a transaction entered into for profit, such as most stock investments, is a deduction against part B, or five percent income, provided such loss is not a federally defined "capital loss." Section 1244 losses, which

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46 (1979) *State Tax Rptr.* (Mass.) (CCH) ¶ 200-533, at 10,569.
47 *Id.* at 10,571.
48 *Id.* at 10,572.
49 *Id.* (emphasis added).
51 *Id.*
53 *Id.,* § 1.
54 G.L. c. 62, § 3B. I.R.C. § 165(f) provides that "losses from sales or exchanges of capital assets shall be allowed only to the extent allowed in sections 1211.
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are ordinary losses for federal purposes, must then be deductible against five percent income.

The Department of Revenue may cite the Daley case and permit 1244 losses as deductions only against ten percent income. It would argue that chapter 62 cannot be literally applied to the extent that it directs what the Appellate Tax Board in Turenne suggested may be called the constitutionally impermissible melding of unearned investment losses with earned income. This argument is fallacious. The Board in Turenne erroneously referred to losses as subject to taxation, thereby implying that losses are income. Income, however, is not and never has been \textit{per se} synonymous with gross receipts. The Massachusetts income tax under article 44 does not tax capital but only the income or profit made on that capital. Although article 44 requires a uniform rate of tax to be applied to income from a single class of property, it does not also require that legislatively created deductions must apply solely to the income from a single class of property. In fact, the statute in one instance permits certain business deductions to be used as an offset against both five and ten percent income. This right of offset permitting deduction of operating business losses against unearned income related to the operation of such business is contrary to the suggestion made by the Board in Turenne. The propriety of such crossover deductions, however, seems beyond reproach. Thus, a deduction against five percent income for those investment losses, which, for federal purposes, are "ordinary" rather than "capital," is well within the power of the legislature. Therefore, the statute properly may be literally applied, and 1244 losses as well as other losses labeled by the Internal Revenue Code as "ordinary" may be deducted against five percent income.

§16.2. Personal Income Taxes—Legislation. In 1979 the legislature made several revisions to the state personal income tax statute. Chapter 408 of the Acts of 1979, the most significant of the legislative changes, provided that for taxable years beginning on or after January 1, 1979, and 1212." In most instances stock in a corporation qualifies as capital asset. \textit{Id.}, § 1221. But § 1244(a), to the extent the tests of the entire section are met, over­rides such classification and mandates ordinary loss treatment.

55 (1979) \textit{STATE TAX Rptr. (MASS.)} (CCH) § 200-533, at 10,572.

56 Gross receipts may include, for example, a recovery of capital. In other words, there must be an economic gain for there to be income. \textit{See}, e.g., \textit{Eisner v. Macomber}, 252 U.S. 189, 207 (1920); Dow Chemical Co. v. Commissioner of Revenue, 1979 Mass. Adv. Sh. 1479, 1502, 391 N.E.2d 253, 264 (1979).


references to the Internal Revenue Code should be to the Code as amended on November 6, 1978, and in effect for the taxable year. Since Massachusetts gross income takes as its starting point federal gross income, the 1978 Revenue Act's new gross income exclusions should be noted. Among the notable features of the 1978 Act is the one-time $100,000 gain exclusion from the sale of one's principal residence. This exclusion permits a (1) taxpayer at least fifty-five years old, (2) who has owned and occupied a house as his principal residence for three out of the five years immediately preceding its sale, (3) to exclude the gain realized from such sale up to a maximum of $100,000 from his gross income, (4) provided the closing occurs on or after January 1, 1979. Any gain realized over $100,000 will be recognized and taxed as capital gain. In addition, gain in excess of $100,000 remains eligible for the general nonrecognition rollover available where a new principal residence is purchased within the usual eighteen month period.

The Code update effective for taxable years beginning on or after January 1, 1979, is not frozen into place. The legislature adopted the Internal Revenue Code as amended by the 1978 Revenue Act but only to the extent that such code is in effect for the particular taxable year. This provision will almost certainly cause some very difficult interpretive problems. Since the Massachusetts statute incorporates by reference the federal code as it existed on November 6, 1978, and in effect for the taxable year, if any portion of the 1978 Code is later changed by Congress, the provision as altered will not be a part of the Massachusetts code because it did not exist as a part of the federal code in November.


2 G.L. c. 62, § 2(a).

3 I.R.C. § 121, as amended by 1978 Revenue Act § 404.

4 Id.

5 Id. Several technical rules concerning the availability of the exclusion include: (1) spouses owning a residence as joint tenants or as tenants by the entirety may use the exclusion if one of them satisfies the age, holding, and use requirements; (2) a taxpayer may use the exclusion only once in his lifetime; (3) neither spouse taking the exclusion may take a subsequent exclusion if later widowed or divorced. Taxpayers who have utilized the one-time $35,000 gain exclusion previously available to individuals sixty-five or older are nonetheless eligible for this new exclusion, provided that the first election was with respect to a transaction occurring on or before July 26, 1978. I.R.C. § 121(b)(3). See also Joint Comm. on Internal Revenue Tax, General Explanation of the Revenue Act of 1978, 96th Cong., 1st Sess. (1979) [hereinafter cited as Joint Committee Report].

6 I.R.C. § 1034; Joint Committee Report, supra note 5, at 257.

7 Acts of 1979, c. 408, § 1 (emphasis added). This provision should be compared with the Massachusetts Estate Tax, which adopted the federal code as amended and in effect on January 1, 1975. G.L. c. 65c, § 1(a).

1978. Moreover, the old provision would no longer be part of the Massachusetts code since, although it did exist as a part of the November 1978 Code, it would not be in effect for the taxable year in which the federal change became effective. Any significant congressional amendment to the 1978 Code may leave a gaping hole in the Massachusetts income tax statute, which would inevitably result in confusion and litigation.

The pattern of Massachusetts personal income tax legislation in the last decade is instructive. Prior to 1971, there existed no direct relationship between the then limited reach of the Massachusetts income tax and the broad all-encompassing federal income tax. In 1971, the legislature adopted a comprehensive income tax modeled after the federal code. Both the 1971 and the 1973 legislation incorporated the Internal Revenue Code as it was amended on January 1, 1971. As adopted by the Massachusetts legislature in these years, the present problem was avoided since all provisions of the 1971 Federal Code were incorporated into the Massachusetts code irrespective of whether these federal provisions were in effect in any later year. In 1977 the legislature first added the conjunctive definitional feature by incorporated the federal code as amended on May 23, 1977, and in effect for the taxable year. It is likely that by utilizing the conjunctive definition of the "code" the legislature in 1977 and 1979 sought to avoid potentially difficult interpretive questions arising from incorporating portions of the federal code that were not for federal purposes immediately effective.

In addition, the periodic Massachusetts revisions incorporating more recent federal code provisions also evidence legislative intent to attain as much uniformity as is practicable between the state and federal codes.

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14 Both the 1978 Revenue Act and the 1977 Tax Reduction and Simplification Act, Pub. L. 95-30, 91 Stat. 126, delayed the implementation of several provisions inserted into the federal code either by prior legislation or by the two acts themselves. Some such provisions include: (1) the carryover basis rules for testamentary transfers, 1978 Revenue Act § 515; (2) the employee educational assistance exclusion, 1978 Revenue Act § 164; (3) the revised "at risk" rules of I.R.C. § 465, 1978 Revenue Act §§ 202-04; and (4) the revised medical reimbursement exclusion, 1978 Revenue Act § 366.
15 Cf. Dow Chemical Co. v. Commissioner of Revenue, 1979 Mass. Adv. Sh. 1479, 1490, 391 N.E.2d 253, 258. Ironically, the Dow Court cited as one example of the legislatively desired uniformity, subsection (k) of section 1 of c. 62, which itself was struck from c. 62 later that year by Acts of 1979, c. 409, § 1. Id. at 1490 n.11, 391 N.E.2d at 258 n.11.
If, as this pattern suggests, the Massachusetts legislature intended, through the conjunctive phrasing of the effective dates, to incorporate the various delayed provisions of the 1978 Code into state law only as they became federally effective, it should have stated this intention more clearly. The state legislature must resolve this problem before Congress re-amends the Internal Revenue Code, as it inevitably will. If total uniformity (subject only to article 44 considerations) is desired, the legislature should simply adopt the federal code as it may from time to time be amended and in effect.\textsuperscript{18}

Chapter 409 of the Acts of 1979, enacted the same day as chapter 408, also made several significant changes in income taxation.\textsuperscript{17} Section 3 of this chapter increased the dollar amount of exemptions reducing five percent income. The blindness exemption, both individual and spousal, was increased two hundred dollars to a total of $2,200.\textsuperscript{18} The age sixty-five exemption, both individual and spousal, and the dependency exemption were increased one hundred dollars to a total of seven hundred dollars each.\textsuperscript{19} In addition, in the case of a husband and wife filing a joint return the additional exemption for the spouse whose earned income is $2,000 or less, will be equal to $700.00 for 1979 and $800.00 thereafter.\textsuperscript{20}

In addition to increasing the amounts of exemptions, chapter 409 substantially changed Massachusetts capital gains taxation. Section 2 of this chapter provided for the adoption of the federal capital gains deduction as an adjustment to gross ten percent income.\textsuperscript{21} The current federal deduction of sixty percent of the net capital gain is to be phased in over three taxable years commencing in 1980.\textsuperscript{22} Sections 1 and 4 of this chapter also deleted two significant definitional provisions from the income tax statute concerning capital gains, namely subsection (K) of section 1 defining the terms "capital gain," "capital loss," "net capital loss," and "net capital gain," and section 7, defining "basis."\textsuperscript{23} Thus, for taxable years beginning on or after January 1, 1980, Massachusetts tax-

\textsuperscript{16} Notwithstanding concerns about improper delegation of state power to the federal government, the income portion of the corporate excise tax is so worded. G.L. c. 63, § 30, 5(a) (gross income) and 5(b) (allowable deductions).
\textsuperscript{17} Acts of 1979, c. 409, § 7. This chapter is effective for years commencing on or after January 1, 1979. Id.
\textsuperscript{18} G.L. c. 62, § 3B(b), as amended by Acts of 1979, c. 409, § 3.
\textsuperscript{19} Id.
\textsuperscript{20} Id. Regardless of the taxable year, the exemption for spouses under G.L. c. 62, § 3B(b)(2)(A) shall not exceed $4,600.
\textsuperscript{21} Acts of 1979, c. 409, § 2.
\textsuperscript{22} Id., § 5. For taxable years beginning in 1980 the deduction will be equal to twenty percent of the net capital gain; for taxable years beginning in 1981, the deduction will be forty percent; and thereafter the deduction will be equal to the full sixty percent of the net capital gain. Id.
\textsuperscript{23} Acts of 1979, c. 409, § 7.
payers apparently will be required to apply their federal basis for Massachusetts tax purposes.

These definitional changes may result in some initial inequity. Since Massachusetts taxation, particularly prior to 1971, had differed significantly from federal taxation, it is not surprising that many taxpayers had a Massachusetts basis different from their federal basis in the same property. Consequently, these definitional changes will have the inequitable effect of creating a windfall for some taxpayers and additional tax burdens for others. For example, a Massachusetts taxpayer who sells rental real estate held since before 1971 suffers the burden of an increased Massachusetts tax since his federal (and his new Massachusetts) basis is lower than his formerly defined Massachusetts basis. This effect results from the fact that, since income from such realty was not taxed by the commonwealth before 1971, no depreciation reduced the pre-1971 Massachusetts basis of the property. On the other hand, a taxpayer who acquires property by gift may receive a small windfall, because the donee's initial federal basis will be increased by a portion of the federal gift tax paid by the donor. Since Massachusetts has no gift tax, section 7 of Chapter 62 had adjusted the donee's initial Massachusetts basis by eliminating the federal gift tax adjustment. By contrast, this same donee will use his federal initial basis for both federal and Massachusetts purposes, and on a profitable sale of the gift, property will have a windfall equal to five or ten percent of the gift tax basis adjustment.

Another federal income tax provision incorporated into Massachusetts tax law by the Acts of 1979 changed the taxation of unemployment benefits. The November 1978 Internal Revenue Code provides that, for taxable years beginning on or after January 1, 1979, a certain portion of public unemployment benefits will be subject to federal tax. This provision requires a married taxpayer filing a joint return and having "total income" in excess of $25,000 to include the lesser of one half of such excess or the unemployment compensation itself in his taxable income. The "total income" is defined as the adjusted gross income plus all public unemployment compensation and non-taxable disability payments.
fore, the revised chapter 62 requires that the federally taxable portion of unemployment compensation be included in Massachusetts gross income.\textsuperscript{30} The Massachusetts Unemployment Compensation Statute, however, has long provided that "such benefits shall not be taxable under any provision of Chapter 62."\textsuperscript{31} The legislature resolved this conflict through the enactment of chapter 746 of the Acts of 1979, which repealed that section of the unemployment compensation law which had exempted these benefits from taxation.\textsuperscript{32} The Department of Revenue, by means of an unusual statutory construction, ruled that such benefits paid in 1979, to the extent taxable federally, will also be taxed by Massachusetts.\textsuperscript{33}

Conservation-minded taxpayers may benefit from another provision of the Acts of 1979, the energy credit.\textsuperscript{34} For the five year period beginning January 1, 1979, chapter 796 of the Acts of 1979 will permit the owner-occupant of residential property, who occupies this property as his principal residence, to take a tax credit for purchases of "renewable energy source property."\textsuperscript{35} The amount of the credit equals thirty-five percent of the "net expenditure" for "renewable energy source property," subject to a maximum $1000 credit.\textsuperscript{36} The definition of "renewable energy source property," similar but not identical to its federal counterpart,\textsuperscript{37} specifies that when such property is installed in the dwelling it (1) must transmit or use solar or wind energy to produce electricity or to heat, cool, or provide hot water, and (2) must have an estimated useful life of at least five years.\textsuperscript{38} In addition, the taxpayer must be the original

\textsuperscript{30} G.L. c. 62, § 2(a).
\textsuperscript{31} G.L. c. 151A, § 22. This exclusion of such benefits from income taxation has existed since 1945. Acts of 1945, c. 625, § 2.
\textsuperscript{32} Acts of 1979, c. 746. Since chapter 746 had been enacted without emergency preamble, the legislative repeal of the specific exclusion was not effective until 90 days later. Thus, for taxable years ending on December 31, 1979, the specific exclusion remained effective. General principles of statutory construction teach that where there is a conflict between two statutes, the specific statute, such as G.L. c. 151A, § 22, takes precedence over the general code update, such as c. 408 of the Acts of 1979.
\textsuperscript{33} See instructions to 1979 Massachusetts Income Tax, Form 1, page 6.
\textsuperscript{34} G.L. c. 62, § 6(d), added by Acts of 1979, c. 796, § 9.
\textsuperscript{35} Id.
\textsuperscript{36} G.L. c. 62, § 6(d).
\textsuperscript{37} Compare I.R.C. 44C(c). The Crude Oil Windfall Profit Tax Act of 1980 provides a higher and broader credit for residential renewable energy source expenditures. The maximum credit starting with 1980 expenditures is increased to $4,000 from $2,000. In addition, the definition of qualifying equipment is expanded to include solar and geothermal equipment utilized to provide electricity. Id., as amended by the Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96-223, §§ 202(a), (b), (c) and (d), 94 Stat. 229.
\textsuperscript{38} G.L. c. 62, § 6(d)(1). Regulations construe this legislation as creating a one-time-only credit per principal residence. Therefore, each time a taxpayer moves and acquires a new principal residence during the five year life of the statute, he
user of the property.39 Care must be taken in using the Massachusetts energy credit, since the coverage of the federal and state credits is not identical. The federal energy credit covers both “energy conservation expenditures” and “expenditures” for “renewable energy source property.”40 The Massachusetts credit applies only to “renewable energy source property”41 and thus is not available for insulation, storm door and windows, caulking, and other energy savings expenditures.

In addition to the energy tax credit, the Massachusetts legislature has attempted to create a tax incentive for energy conservation through the creation of a new class of tax exempt income for Massachusetts inventors of patents useful for “energy conservation” or for “alternative energy development.”42 Qualification for this tax benefit requires the inventor to obtain certification from the newly created Department of Energy Resources.43 Once certification is obtained two classes of individuals qualify for the special tax advantage. First, the inventor or other holder of the certified patent may for a limited time receive free of Massachusetts tax any income, including royalty income, “received from the sale, lease or other transfer of” the patent.44 Second, persons other than the inventor or patent holder may benefit from the exemption, although the operative taxing provision is capable of various interpretations. The exemption from state tax includes “any income received from the sale, lease, or other transfer of tangible, intangible, personal or real property or materials manufactured in the Commonwealth subject to such patent.”45 This definition would certainly seem to include income received by a licensor from the sale of materials manufactured in Massachusetts subject to the patent. It is less certain, however, whether income received by a Massachusetts resident from a lease or sale of property subject to such a patent qualifies for the exclusion if the lease or sale takes or she will be eligible for successive $1,000 maximum credits for qualified expenditures made with respect to each successive principal residence. 830 C.M.R. 62.50.

39 G.L. c. 62, § 8(d).
40 I.R.C. § 44C.
41 G.L. c. 62, § 8(d).
43 Acts of 1979, c. 796, § 8. The secretary of that department has discretion to approve United States patents which either have been issued to or applied for by Massachusetts residents provided the patent was issued as “useful for energy conservation and related purposes or as useful for alternative energy development and related purposes.” G.L. c. 62, § 2(a)(2)(G). As an additional condition to the patent certification the Secretary of Energy Resources must find that the patent is of “economic value, practicable, and necessary for the convenience and welfare of the Commonwealth and its citizens.” Id.
44 G.L. c. 62, § 2(a)(2)(G). Since some of this income may be capital gain for federal tax purposes, the federal “net capital gain” may require adjustment before incorporation into the 10% income computation. See text at notes 21-23, supra.
place in another jurisdiction. It is unclear whether the words "in the Commonwealth" qualify "sale, lease, or other transfer" as well as the word "manufactured." Answers to these questions depend upon authoritative interpretation of the statutory language. Regulations would prove useful guidance in this area. 46

§16.3. Corporate Income Tax—Decisional Law. Two cases 1 decided during the Survey year involving large multistate foreign public corporations are of particular interest. Massachusetts corporate excise tax law requires that foreign corporations pay an income tax to the extent that income is "derived from business carried on in the commonwealth." 2 The corporate income tax is assessed by means of an allocation and apportionment formula utilizing property, payroll, and sales ratios of local to worldwide applied to the Massachusetts taxable net income. 3 Computation of tax starts with Massachusetts gross income, a term based on the federal definition of gross income. 4 Net income is then determined by subtracting from the gross income most deductions allowed by federal law. 5 From this net income additional Massachusetts deductions, including "dividends" to the extent included in income, are subtracted. 6

In Dow Chemical Co. v. Commissioner of Revenue, 7 the Supreme Judicial Court considered whether an allocation for state tax purposes should be made of certain income from a controlled foreign company "deemed" to be taxable to a United States resident under subpart F of the Internal Revenue Code. 8 This issue arose primarily because such "deemed" income is a tax fiction implemented for federal tax purposes. 9

46 However construed, the exclusion from gross income is limited in duration to five years "from the date of issuance of the United States patent or the date of approval by the Secretary of Energy Resources, whichever first expires." Id.

2 G.L. c. 63, § 38.
3 Id. The statute also provides that where the statutory formula fails to reflect accurately income derived from Massachusetts, a taxpayer may apply to the Commissioner to use another method. G.L. c. 63, § 42.
4 Id., § 30, 5(a).
5 Id., § 30, 5(b).
6 G.L. c. 63, § 38(a)(1).
8 Id. at 1481, 393 N.E.2d at 254. See I.R.C. §§ 951-964.
9 Subpart F was enacted by Congress in 1962 to limit the advantage American taxpayers formerly enjoyed by utilizing a foreign corporation to conduct their foreign business affairs and thereby leave the profits untaxed by the United States until brought back onshore. B. Bittker & J. Eustice, Federal Income Taxation of Corporations and Shareholders, ¶ 17-30 (4th ed. 1979). The Subpart F rules are addressed to a "controlled foreign corporation," which is defined as a foreign
§16.3 STATE AND LOCAL TAXATION

In the context of this chapter, it suffices to note that subpart F income is artificially created income, designed to prevent certain abuses in the deferral of domestic taxation.

On its 1969 federal income tax return, Dow included over eight million dollars as subpart F income realized by its foreign subsidiaries.\(^{10}\) In that year Dow had received over six million dollars of dividends from these foreign subsidiaries, but Dow properly did not include these dividends as income, because they were subsumed within the eight million dollars of \textit{deemed} subpart F income.\(^{11}\) Dow also received in that year, from the same subsidiaries, over three million dollars in dividends which it also properly excluded from its federal gross income, since the dividends had been in previous years included in gross income as deemed subpart F income.\(^{12}\) Dow included in its federal gross income for that year the foreign tax gross-up amounting to over \$400,000,\(^{13}\) representing the foreign taxes paid or deemed paid by its subsidiaries on subpart F income.\(^{14}\)

On its Massachusetts corporate excise return for the year, Dow included in Massachusetts gross income the subpart F income and the so-called foreign tax gross-up.\(^{15}\) The dispute arose over the inclusion of these items in Massachusetts gross income and over the "dividends" deductions taken by Dow with respect to these items. To calculate Massachusetts taxable net income, Dow deducted as dividends the subpart F income, the foreign tax gross-up, and the three million dollars of dividends actually received in the taxable year but reported to the commonwealth in previous years as subpart F income.\(^{16}\) The Commissioner disallowed all three dividend deductions.\(^{17}\) Both the State Tax Commission and the Appellate Tax Board upheld the Commissioner.\(^{18}\)

corporation more than fifty percent of whose total combined voting power is owned directly and indirectly by a limited number of United States shareholders. I.R.C. § 957(a). The rules require each United States shareholder who owns directly or indirectly ten percent or more of the controlled foreign corporation to report as income his or its pro rata share of the undistributed Subpart F income of the foreign corporation. I.R.C. § 951. The definition of Subpart F income is highly complex. See BITTKER & EUSTICE, supra note 9, at ¶ 17.32.

\(^{10}\) 1979 Mass. Adv. Sh. at 1480, 391 N.E.2d at 254.

\(^{11}\) \textit{Id.}\n
\(^{12}\) \textit{Id.}\n
\(^{13}\) \textit{Id.}\n
\(^{14}\) I.R.C. § 78. Essentially, the amount of this tax is included in the gross income of those domestic corporations who take the foreign tax credit. Inclusion of this grossed-up tax as dividend income permits proper calculations of the foreign tax credit.


\(^{16}\) \textit{Id.}\n
\(^{17}\) \textit{Id.}\n
\(^{18}\) \textit{Id.} at 1481, 391 N.E.2d at 254.
On appeal, the Supreme Judicial Court rejected Dow's initial contention that neither the subpart F income nor the foreign tax gross-up was gross income for Massachusetts purposes. Dow noted that in the year in which subpart F income is reported, Dow may not in fact have received this income. It argued, therefore, that since it received no economic benefit, therefrom, it could not be required to include the subpart F income in Massachusetts gross income. The Court dismissed this argument on the basis that the plain language of the state statute defined Massachusetts gross income as federal gross income. The Court observed that "there is no obstacle to the Legislature's treating the earned income of a foreign corporation as income taxable to its domestic parent, even if the parent chooses not to have that income distributed in the taxable year." Thus, it ruled that subpart F income must be included within Massachusetts gross income.

Having concluded that subpart F income must be included in Massachusetts gross income, the Court then rejected the Commissioner's contention that Subpart F income was a "dividend" for purposes of determining gross income, but not for deduction purposes. The Commissioner argued that the dividend deduction provided by chapter 63, section 38, did not extend to "deemed" distributions, even though such distributions were treated as income. The Court noted that the statute makes no distinction among certain dividends, deemed or otherwise, domestic or foreign. Instead, the statutory language straightforwardly provides that dividends included in net income shall be deducted to obtain taxable net income. The Court noted that a deduction in this context was required to prevent the possibility of triple taxation. The Court found it clear that the state corporate excise is designed to per-

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19 Id. at 1481, 391 N.E.2d at 254-55.
20 Id. at 1490, 391 N.E.2d at 258.
21 Id. The Court also noted that the domestic parent's control over the subsidiary was equivalent to constructive receipt of sorts of the subsidiary's undistributed income. Id. at 1497 n.17, 391 N.E.2d at 267 n.17.
22 Id. at 1490, 391 N.E.2d at 258. See G.L. c. 63, § 30, 5(a). There are some modifications to the federal definition of gross income not pertinent to this discussion.
24 Id.
25 Id. at 1499, 391 N.E.2d at 262-63.
26 Id. at 1493, 391 N.E.2d at 260.
27 Id. at 1494, 391 N.E.2d at 260.
28 G.L. c. 63, § 38(a)(1).
29 1979 Mass. Adv. Sh. at 1495, 391 N.E.2d at 260. The Commissioner had argued that the Subpart F income was only subject to tax twice because neither the federal nor the Massachusetts Code taxed foreign subsidiaries on their income. Id. The Court remarked that such analysis simply ignores the fact that the foreign subsidiaries are subject to tax in the countries in which they do business or are incorporated. Id.
form the same general functions as the foreign tax credit in the federal code.\textsuperscript{30} Thus, the Court concluded that if it were to adopt the Commissioner's position, both the "symmetry" between the Massachusetts and federal systems, and the statutory purpose of the dividend deduction would be destroyed.\textsuperscript{31} In this regard, the Court stated:

If a deduction for Subpart F income were to be disallowed, the consequence would be to prohibit a deduction for that income even when distributed. For dividends actually received—but excluded from net income because comprised in Subpart F income reported in current or previous years—are not included in Federal income, thus also excluded from State income, and hence could not be deducted therefrom.\textsuperscript{32}

Thus, the Court concluded that disallowance of the deduction would simply reinstate the multiple taxation that the state scheme sought to eliminate.\textsuperscript{33}

Notwithstanding its conclusion that subpart F income should be deductible as a dividend under state law, the Court ruled that the Commissioner properly disallowed the deduction in this instance.\textsuperscript{34} It noted that chapter 63, section 38(a)(1), permits a dividend deduction to be taken only in the year in which the dividends are reported in income.\textsuperscript{35} The three million dollar dividend deduction sought by Dow was in reference to subpart F income reported in a prior tax year.\textsuperscript{36} Therefore, the Court concluded, the deduction could not be taken in this later year.\textsuperscript{37}

The foreign tax gross-up presented a more serious theoretical problem for the Court. For federal purposes, a portion of the taxes paid or deemed paid by the controlled foreign subsidiary must be included "as a dividend" in the subpart F gross income of the domestic taxpayer.\textsuperscript{38} This fictional income is then offset by a credit for the foreign taxes deemed paid.\textsuperscript{39} Dow argued that the foreign tax gross-up was only an arithmetic procedure and could not be included in its state income without the offsetting credit.\textsuperscript{40} The Commissioner maintained that the federal tax gross-up and credit reduced the taxpayer's federal tax otherwise

\begin{itemize}
\item \textsuperscript{30}Id. at 1495, 391 N.E.2d at 261.
\item \textsuperscript{31}Id. at 1495-96, 391 N.E.2d at 261.
\item \textsuperscript{32}Id. at 1497-98, 391 N.E.2d at 262.
\item \textsuperscript{33}Id. at 1498, 391 N.E.2d at 262.
\item \textsuperscript{34}Id. at 1508, 391 N.E.2d at 266.
\item \textsuperscript{35}Id.
\item \textsuperscript{36}Id.
\item \textsuperscript{37}Id.
\item \textsuperscript{38}I.R.C. § 78.
\item \textsuperscript{39}I.R.C. § 960.
\item \textsuperscript{40}1979 Mass. Adv. Sh. at 1502-03, 391 N.E.2d at 264.
\end{itemize}
payable and conferred upon Dow an obvious economic benefit, which may be treated as Massachusetts income. In rejecting the disturbing implication of the Commissioner's suggestion that the various federal tax credits could each be construed as creating an economic benefit equivalent to income, the Court summarily concluded that "such reductions [in federal tax liability] do not conform to conceptions of taxable income." Clearly troubled by the concept of treating the foreign tax gross-up as income for Massachusetts purposes, the Court nevertheless felt compelled to adhere to a literal reading of the statute. The corporate excise statute, it noted, adopts the federal definition of gross income, which included the gross-up. Since the gross-up is treated as a dividend deemed received by the domestic corporation from its foreign subsidiary, the Court concluded that the dividend characterization must hold true for state law purposes. Hence, the Court held, the gross-up is deductible from state income as a dividend.

The Dow case will undoubtedly figure prominently in future corporate tax litigation. Using Dow as precedent, any item of income which is treated as dividend income must be eligible for the dividend deduction of chapter 63, section 38(a)(1). The Commissioner, on the other hand, doubtlessly will argue that Dow must be limited to its facts. The corporate excise tax statute does not define dividend. Therefore, the Commissioner probably will maintain that not all deemed or actual dividends included in Massachusetts net income are allowed an offsetting deduction as a dividend under section 38(a)(1).

In W. R. Grace & Co. v. Commissioner of Revenue, another case dealing with the corporate income apportionment statute, the Supreme Judicial Court considered whether a foreign parent doing business in the commonwealth had realized income "derived from business carried on within the commonwealth" when it sold its majority stock interest in another corporation having no base of operations in Massachusetts. In 1969 W. R. Grace & Co., a Connecticut corporation doing business in the commonwealth, sold its 52 percent stock interest in the Miller Brewing Company, a corporation having no base of operations in Massa-

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41 Id. at 1503, 391 N.E.2d at 264.
42 Id. at 1504, 391 N.E.2d at 265.
43 Id. at 1504-05, 391 N.E.2d at 265. See also F.W. Woolworth v. Commissioner of Taxes, 130 Vt. 544, 298 A.2d 839 (1972) (cited by the Dow Court as authority for the proposition that inclusion of the foreign gross-up in income without some offset might well require a special alteration of the apportionment formula).
45 Id.
46 Id.
47 Cf. G.L. c. 62, § 1(e) (definition of dividend for individual income tax).
49 Id. at 1927-28, 393 N.E.2d at 331.
chusetts. Grace, a company with multi-state and multi-national operations, had significant business operations in Massachusetts. The corporate excise statute taxes foreign corporations doing business in the commonwealth only on their income "derived from business carried on within the commonwealth." On this basis, Grace concluded that the income from the sale of an investment in Miller stock was wholly unrelated to its Massachusetts operations and hence exempt from the Massachusetts corporate excise tax. The Commissioner disagreed and litigation ensued. The Appellate Tax Board ruled in the Commissioner's favor. On appeal, the Supreme Judicial Court affirmed the decision of the Appellate Tax Board.

In reaching its decision, the Court first considered Grace's contention that the sale of its 52 percent stock interest in Miller was not "business income" within the meaning of chapter 63, section 38. Grace argued that its Miller holdings were a passive investment giving rise to non-business income not subject to the income apportionment formula of the corporate excise tax. Grace stated that it was not in the business of buying and selling corporate securities and that its relationship with Miller remained "arm's length." The Court, however, accepted the Appellate Tax Board's finding that part of Grace's "business included the purchase and sale of operating subsidiaries." Noting that Grace had initially sought to control Miller, the Court ruled that the Miller majority stock acquisition was the equivalent of a purchase of an operating subsidiary. The Court concluded that since Grace had acquired Miller as an operating asset, the gain resulting from the sale of the Miller interest was "derived from business" within the meaning of the income apportionment statute.

The Court also rejected Grace's alternative contention that the income realized on the sale of the Miller stock was not income derived from

50 Id. at 1929, 1935, 393 N.E.2d 332, 334.
51 Id. at 1929, 393 N.E.2d at 332.
52 G.L. c. 63, § 38.
54 Id. at 1931, 393 N.E.2d at 332.
55 Id.
56 Id. at 1931-32, 393 N.E.2d at 333. See G.L. c. 63, § 38.
57 Id. at 1932, 393 N.E.2d at 333.
58 Id. at 1932-33, 393 N.E.2d at 333. The purpose of its acquisition and actual use of the stock provides the proper standard to determine whether its sale produces "business" as opposed to "investment" income. Id. at 1934, 393 N.E.2d 334.
59 Id. at 1933, 393 N.E.2d at 333.
60 Id. at 1934, 393 N.E.2d at 334. Grace's goal of complete ownership was thwarted by a minority shareholder's disinclination to sell. Id.
61 Id.
62 Id. at 1935, 393 N.E.2d at 333.
business carried on in the commonwealth.\footnote{Id. at 1940, 393 N.E.2d at 336.} The Court explained that in order for business income to be subject to section 38 apportionment, an actual physical situs of the business in the state is not required.\footnote{Id. at 1937, 393 N.E.2d at 335.} The Court recognized, however, that there must be some “minimal connection” between Massachusetts and the income producing transaction.\footnote{Id.} The Court noted that this connection has “been found when the activity sought to be taxed is a component of an enterprise which is deemed ‘unitary’ with the business carried on in the taxing State.”\footnote{Id. at 1938, 393 N.E.2d at 335.} It stated that affiliated corporations would be considered component members of a “unitary” business when “they are of mutual benefit to one another” and when “each operation is dependent on or contributory to others.”\footnote{Id. at 1939, 393 N.E.2d at 335.} The Court accepted the board’s findings that Grace had acquired its Miller holdings to bolster its consumer products division.\footnote{Id.} On this basis the Court reasoned that the Miller holding was a part of Grace’s unitary operations.\footnote{Id.} Applying this analysis, the Court concluded that the gain realized from the sale of the Miller holding was derived from business carried on within the commonwealth.\footnote{Id.}

In distinguishing between business income and investment income, the Grace Court interpreted the term “business” broadly. It rejected Grace’s contention that gain from a sale of stock could not be business income unless the corporation was in the business of buying and selling securities.\footnote{Id. at 1933, 393 N.E.2d at 333.} Instead, it emphasized that the purchase and subsequent sale of stock in an operating company could give rise to business income within the meaning of chapter 63, section 38, if one aspect of the taxpayer’s business was the acquisition and sale of operating subsidiaries.\footnote{Id. at 1933-34, 393 N.E.2d at 333-34.} The taxpayer’s failure to take an active role in the management of the company when it possessed sufficient control to do so will not change the business character of the purchase.\footnote{Id. at 1934, 393 N.E.2d at 334.} The Court stated that the purpose underlying the acquisition of the stock and the overall use of the stock during the taxpayer’s holding period should be the focus of the inquiry.\footnote{Id.} Because of the Court’s emphasis upon intent, one may...
well find the Commissioner arguing in future cases that even the sale of a minority stock interest should give rise to "business" as opposed to "investment" income of the original purchase fit within the corporation's unitary operations. 75

§16.4. Corporate Excise Tax—Legislation. The Massachusetts net income of corporations having multi-state operations is assessed by means of the apportionment formula contained in section 38 of chapter 63. 1 One of the factors in this formula is sales made within the commonwealth. 2

Chapter 530 of the Acts of 1978 modified the statutory definition and construction of the sales factors of the apportionment formula to change the tax treatment of sales to the federal government and sales to foreign purchasers. 3 Previously, if goods were delivered or shipped to the federal government in Massachusetts, they were deemed to have been sold in Massachusetts regardless of whether the goods were to be resold. 4 As amended, the statute now excludes from sales made within the commonwealth "sales of tangible personal property to the United States Government . . . for purposes of resale to a foreign government . . . ." 5 Section 38 also provides that sales by a corporation of tangible personal property are made within the commonwealth if the corporation is not taxable in the state of the purchaser. 6 Chapter 530 modifies this rule by providing that "the corporation will be deemed to be taxable in the state of the purchaser if the tangible personal property is delivered or shipped to a purchaser in a foreign country . . . ." 7 Thus, if a corporation can demonstrate that sales are made within the commonwealth only for delivery to a purchaser in a foreign country, those sales should not be considered part of the corporation's net income subject to taxation by the commonwealth.

Chapter 796 of the Acts of 1979 amended the definition of corporate gross income by inserting a deduction from gross income for qualified "income received from the sale, lease or other transfer of tangible, intangible, personal or real property or materials manufactured in the

75 See id. at 1939, 393 N.E.2d at 335.
§16.4. 1 G.L. c. 63, § 38.
2 Id. Subsection (f) states that "[t]he sales factor is a fraction the numerator of which is the total sales of the corporation in this commonwealth during the taxable year, and the denominator of which is the total sales of the corporation everywhere during the taxable year." Id.
3 Acts of 1978, c. 530, § 1. This statute is effective for taxable years ending on or after December 31, 1978.
4 G.L. c. 63, § 38(f) (for years ending on or before December 30, 1978).
6 G.L. c. 63, § 38(f)(2).
commonwealth subject to" certain energy-related patents.\textsuperscript{8} This deduction applies to patents approved by the Secretary of Energy Resources as useful for energy conservation or alternative energy development.\textsuperscript{9} Chapter 796 provides that the deduction shall extend for a maximum of five years from the date of issuance of the patent or the date of approval by the secretary.\textsuperscript{10}

Chapter 796 also inserted into the personal income tax statute a similar but not identical exclusion for individual taxpayers.\textsuperscript{11} The textual and conceptual differences between the personal deduction and the corporate deduction, however, will cause interpretive difficulties. The personal deduction specifies that the inventor or the holder of the qualified and certified patent could exclude any income "including royalty income" received "from the sale, lease or other transfer . . ." of such a patent.\textsuperscript{12} The language including "royalty income" within the meaning of "any income" is not present in the corporate exclusion.\textsuperscript{13} This omission would seem to indicate that royalty income from the complete transfer of the patent was not intended by the legislature to qualify for the corporation exclusion. The interpretive question presented, as in the case of the individual deduction,\textsuperscript{14} is whether the phrase "in the Commonwealth" modifies the words "sale, lease or other transfer" as well as the words "materials manufactured." In any event, income received by a certified Massachusetts corporation from the sale, lease, or transfer in the commonwealth of intangible property subject to such patent is to be deducted from gross income.\textsuperscript{15}

\textbf{§16.5. Sales and Use Taxation.} In \textit{Lowell Gas Company v. Commissioner of Corporations and Taxation} \textsuperscript{1} the Supreme Judicial Court considered whether gas mains, gas services, gas meters, and meter installations are exempted from sales tax.\textsuperscript{2} Chapter 64H, section 6(s), exempts from sales and use taxation "sales of machinery or replacement parts thereof used directly and exclusively . . . in the furnishing of gas, water, steam or electricity when delivered to consumers through mains, lines or pipes . . . ."\textsuperscript{3} The Court held that the disputed items are such

\begin{itemize}
  \item \textsuperscript{8} G.L. c. 63, § 30, \textit{as amended by Acts of 1979}, c. 796, § 10 (effective January 1, 1980).
  \item \textsuperscript{9} \textit{Id.}
  \item \textsuperscript{10} \textit{Id.}
  \item \textsuperscript{11} G.L. c. 62, § (2)(a)(2)(G). See § 2 \textit{supra} text at notes 42-46.
  \item \textsuperscript{12} G.L. c. 62, § (2)(a)(2)(G), \textit{added by}, Acts of 1979, c. 796, § 8 (emphasis added).
  \item \textsuperscript{13} G.L. c. 63, § 30, \textit{as amended by Acts of 1979}, c. 796, § 10.
  \item \textsuperscript{14} See § 16.2 text at notes 42-46 \textit{supra}.
  \item \textsuperscript{15} G.L. c. 63, § 30, \textit{as amended by Acts of 1979}, c. 796, § 10.
\end{itemize}
machinery within the meaning of the statute.\(^4\) Thus, the Court ruled that they are exempt from sales and use tax.\(^5\)

Beyond the substantive issue involved, the procedural posture of *Lowell Gas* is of interest to taxpayers generally. Although Massachusetts law then and now provides that the abatement procedure is the *exclusive remedy* to contest most Massachusetts taxes,\(^6\) the taxpayer in *Lowell Gas* did not bring this exemption issue before the Supreme Judicial Court by means of an abatement proceeding. Instead, it commenced a suit in equity in the county court seeking declaratory and injunctive relief.\(^7\) Consequently, it appears that if a taxpayer can demonstrate an otherwise justiciable controversy, the "exclusive remedy" provision of chapter 62C, section 41, will not bar the superior court \(^8\) from entertaining an action for declaratory relief pursuant to chapter 231A.\(^9\)

In *Northgate Construction Co., Inc. v. State Tax Commission*,\(^10\) the Supreme Judicial Court construed a second exemption from sales and use taxes. This exemption is applicable to sales of "building materials and supplies to be used in the construction . . . of any building . . . owned by or held in trust for the benefit of . . ." certain governmental bodies and agencies.\(^11\) The taxpayer, a general contractor, participated in the construction of two low income housing projects for the elderly.\(^12\) These projects were built under a plan of development known as "turn-key construction."\(^13\) These projects are arranged so that by contract of sale the developer retains title to the land and buildings until the project is completed and approved.\(^14\) Only upon approval is title transferred to the local housing authority.\(^15\) The Court found that since the contractor had title to the property when he purchased the materials, the


\(^{5}\) *Id.*

\(^{6}\) "The remedies provided by section thirty-seven to forty, inclusive, shall be exclusive whether or not the tax is wholly illegal. But the word 'exclusive' in this section shall not be construed to deprive any person of a right of action at law in any federal court." G.L. c. 62C, § 41.


\(^{8}\) A suit seeking declaratory relief can be commenced in the Supreme Judicial Court, the superior court, the land court and the probate courts, assuming of course the justiciable controversy is otherwise within their respective jurisdictions. G.L. c. 231A, § 1.


\(^{11}\) G.L. c. 64H, § 6(f).


\(^{13}\) *Id.* at 258, 385 N.E.2d at 968.

\(^{14}\) *Id.*

\(^{15}\) *Id.*
prospective purchaser, in this case the housing authority, could not be the “owner” of the project during its construction. It also determined that the developer’s contractual obligation to build and convey the property did not render him a trustee of the property for the benefit of the prospective owner. Given the specific language of the statutory exemption, the Court concluded that an expansive reading of the word “owner” was inappropriate. Reasoning that sales tax liability is determined at the point of sale and not at some future date, the Court upheld the imposition of the sales tax on the materials used in a turnkey housing project. Turnkey developers should take note and include a sales tax component in future development proposals.

During the Survey year, the Department of Revenue issued new interpretive regulations under the sales and use tax statutes. Several focused on the application of the sales and use tax to various motor vehicle transactions. Others dealt with exempt intrafamily sales, sales taxed in other jurisdictions, and service businesses.

Since a true gift involves no sale element, no sales tax can be applicable. In August 1979, the Commissioner issued regulations spelling out the exemption requirements for certain motor vehicle transfers untaxed due to a deemed lack of consideration. The regulations provide that outright gifts to the extent substantiated by the donor’s affidavit, transfers by inheritance or will, repossessions, and transfers to raffle winners are exempted from the tax. This regulation also provides, however, that the automobile dealer who donates a car to a raffle is deemed “to have used it for its own purposes,” thereby rendering the dealer liable for the use tax based upon the cost to the dealer.

This regulation also addresses the application of the sales and use tax to the leasing or rental of motor vehicles. The general rule is that the total charge for the rental period is subject to the five percent tax. If, however, any motor vehicle is leased for a year or more, additional or incidental charges, whether for insurance, excises, or registration fees, will not be taxed if such charges are separately stated. In lieu of

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16 Id. at 261, 385 N.E.2d at 969.
17 Id. at 262, 385 N.E.2d at 970.
18 Id. at 261, 385 N.E.2d at 969.
19 Id. at 260, 385 N.E.2d at 969.
20 830 C.M.R. 64H.02(6).
21 830 C.M.R. 64H.02(5).
22 Id.
23 830 C.M.R. 64H.03.
24 830 C.M.R. 64H.02(6).
25 Id.
26 830 C.M.R. 64H.02(6)(a)(4).
27 830 C.M.R. 64H.02(6)(b).
28 830 C.M.R. 64H.02(6)(b)(3).
§16.5 STATE AND LOCAL TAXATION

separately stated charges, if a "passenger automobile" is leased for a year or more, and the insurance, excises, and fees are paid by the lessor, the total rental charge may be reduced by twenty percent before applying the tax.29 If a truck is leased for a year or more in the same circumstances, the total charges may be reduced by thirty percent.30

Finally, this regulation deals with the application of the use tax to a dealer who allows vehicles held for sale to be used by his salesmen, family, or any other person for non-business purposes.31 If, for instance, a dealer brings home a car out of inventory for his spouse, a use tax based on acquisition cost is then due.32 If this car is returned to inventory and another taken, the latter will be subject to tax without allowance for the returned vehicle.33 If vehicles so used bear dealer plates, the dealer may either pay the full tax at the commencement of such use of each vehicle or pay a monthly tax on all vehicles so used based on a percentage, initially set at three percent, of his cost of those vehicles.34

In 1979, the Commissioner promulgated a regulation dealing with exempt intra-family sales.35 Chapter 64H, section 6(c), exempts from the sales tax "casual and isolated sales by a vendor who is not regularly engaged in the business of making sales at retail . . . ." 36 Sales exempt from sales tax are also exempt from the use tax, except that the purchaser of a motor vehicle in a "casual sale" must pay the use tax37 unless "said purchaser is the spouse, mother, father, brother, sister or child of the seller."38 The newly issued regulation tracks the statute in part and provides that buyers of motor vehicles "shall be exempt from tax if . . . the purchaser is the parent, spouse, child, brother or sister of the seller . . . ." 39 The regulation, however, limits the exemption to those instances where "[the sales/use] tax was previously paid."40 This latter requirement is questionable, because the statute simply exempts intra-family casual sales without requiring the prior payment of the sales/use tax.41

29 830 C.M.R. 64H.02(6)(b)(1). Note that the transaction must be a true rental as opposed to a "finance leasing" arrangement. Id.
30 830 C.M.R. 64H.02(6)(b)(3).
31 830 C.M.R. 64H.02(6)(c).
32 Id.
33 Id.
34 Id.
35 830 C.M.R. 64H.02(5)(c).
36 G.L. c. 64H, § 6(c).
37 Id., § 6(b).
38 G.L. c. 64I, § 7(b).
39 830 C.M.R. 64H.02(5)(c).
40 830 C.M.R. 64H.02(5)(c)(2).
41 Many situations can be envisioned where the selling family member or even prior owners properly did not pay the sales/use tax. For example, assume that
Another questionable regulation issued in the Survey year deals with
the use tax exemption that applies when a buyer has duly paid a validly
assessed sales tax to another state.\textsuperscript{42} The exemption, which resembles
a credit conceptually, does not apply, however, to the extent the Massa­
chusetts rate of tax, currently five percent, exceeds the rate of the other
jurisdiction.\textsuperscript{43} Thus, the buyer would be required to pay a Massa­
chusetts use tax amounting to the difference between the two rates. The
regulation provides that the exemption or credit will be available only
if all the following four requirements are met:

1. The tax paid in the other state was legally due that state.
2. The purchaser has no right to a refund or credit from that other
state either at the time of application for a Massachusetts out-of­
state purchase exemption or, in the event that exemption is granted,
following its allowance.
3. Such motor vehicle at the time it was purchased was \textit{not intended for use in Massachusetts}. A motor vehicle will be presumed to have
been bought for use in the commonwealth if it was not used for a
six month period outside of Massachusetts. This period will be
measured from the day the out-of-state purchase is completed to
the day the motor vehicle is delivered to a shipping agent, placed
in storage for shipment to the commonwealth, or is brought into
Massachusetts for use here. Conversely, if it is shown that motor
vehicle was used for the requisite six months outside of Massa­
chusetts, it will be presumed that the purchase was made for out-of­
state use. Either presumption may be overcome by evidence to the
contrary.
4. The state or jurisdiction to which a sales or use tax was paid
allows a corresponding exemption for a sales or use tax paid to this
state.\textsuperscript{44}

\begin{itemize}
\item a father, while living and working in New Hampshire, purchases a new car. Two
years later, the father is transferred by his employer to Massachusetts, where the
family takes up residence. No sales/use tax is then due when the father registers
the automobile in Massachusetts. The sales tax cannot apply to a sale outside the
commonwealth. G.L. c. 64H, § 6(a). The use tax does not apply, because the
car, although used in the commonwealth, was not purchased with the intention of
using it in Massachusetts. G.L. c. 64I, § 2. If, however, the father retires and
sells the car to his son, the new regulation would deny the son the intra-family
casual sale exemption because “no tax was previously paid.” To the extent the
regulation would deny the exemption for such lack of payment, the regulation
appears to be invalid.
\item \textsuperscript{42} G.L. c. 64I, § 7(c).
\item \textsuperscript{43} Id.
\item \textsuperscript{44} 830 C.M.R. 64H.02(5)(f).
\end{itemize}
The six month out-of-state use requirement of the regulation is problematic. The Massachusetts sales/use tax simply does not reach an out-of-state automobile purchase unless the car was purchased “from any vendor for storage, use or consumption within the Commonwealth.” Although no exemption or credit is needed unless the transaction is in the first instance subject to the tax, the Regulation would give the credit or exemption to a buyer not subject to the tax, and on the other hand deny the exemption to the buyer who is subject to the tax. To the extent of such denial, this regulation seems improper.

The Commissioner also issued a well-reasoned regulation spelling out the application of the sales tax to service business. The regulation provides that if the personal property segment of a total service transaction is “inconsequential” and the service provider does not separately state a charge for the “inconsequential personal property,” the entire transaction is exempt from sales tax. Although the regulation does not define “inconsequential,” it suggests as a guideline that a value of ten percent or less of the total charge may be considered “inconsequential.” If a service provider does separately state a charge for the property, a tax is to be collected from the customer, regardless of whether or not the property for which the separate charge was made was inconsequential. If the property is not inconsequential, the service provider would be well-advised to state separately a charge for such property, since the transaction will be subject to sales tax in either case.

In fact, if a repairman’s records (and presumably those of other service providers) do not adequately separate the “fair retail selling price” of the property from the service charges, the Commissioner will simply presume the entire aggregate charge to be subject to tax. Since the regulation does not indicate whether wholesale or retail value should be used to determine whether property is “inconsequential,” it will have the effect of encouraging a separately stated charge for all but the most

45 C.L. c. 64H, § 2.
46 For example, a life-long Massachusetts resident travels to California where he purchases a car and pays a four and three fourths percent state sales tax. He intends to drive around the country and then return to Massachusetts. Since he purchased the car in California intending to use it in Massachusetts, he seems liable for the use tax when he registers the automobile in Massachusetts. This regulation, however, would deny him a credit for the tax paid to California because the car was purchased with the intention of using it in Massachusetts.
47 830 C.M.R. 64H.03.
48 830 C.M.R. 64H.03(2)(a).
49 830 C.M.R. 64H.03(1). Of course, in this instance, the service enterprise is itself a consumer of personal property and should pay sales tax when it purchases the property.
50 830 C.M.R. 64H.03(2)(b)(1).
51 830 C.M.R. 64H.03(2)(b)(2).
52 830 C.M.R. 64H.03(5)(a).
obviously inconsequential property. The regulation also states that a service enterprise selling personal property outside the service transaction itself will be regarded as a retailer with respect to such goods.\(^{53}\) In such instances, the service enterprise must collect from the customer the sales tax based on the retail price of the goods.\(^{54}\)

This regulation also provides that the sales tax is to be assessed on any "fabrication."\(^{55}\) A "fabrication" is defined as "[a]ny change in the form or substance of tangible personal property, or any substantial alteration in the form or shape of an existing article of tangible personal property where either party to the transaction furnishes the material . . . ."\(^{56}\) Thus, under the regulation, a reupholsterer or maker of custom curtains must collect a sales tax from his customers on the entire charge regardless of whether the material and labor charges are separately stated.\(^{57}\) Conceptually, the unstated logic is that a "fabricator" makes and sells a new product. Like any manufacturer who sells to the public, it must collect a tax on the aggregate sales price to its customer.

Finally, this regulation dealing with service enterprises speaks to service contract situations. It states that when a service provider in a service contract covering a specified period of time promises to supply necessary parts and supplies, as well as labor, for "a specified contract price," a sales tax is due from the provider on his acquisition cost of the materials and parts.\(^{58}\) If a particular part is not covered by the contract, imposition of the sales tax on the customer will turn on whether there is a separately stated charge for that item.\(^{59}\) This type of service enterprise will frequently perform two roles. Identical materials may be held as inventory for sale to customers or may be held for consumption by the service provider pursuant to his various contracts. Since the total sales tax due with respect to all materials will vary according to the portion assessed either to the provider at cost or to the customer at retail, accurate record keeping for these businesses will be essential.

In addition to regulatory developments in the sales tax area, there were legislative ones as well. In its 1979 session, the legislature added five additional exemptions to the sales tax statutory scheme. The legislature enacted a specific exemption for prescribed insulin needles and

\(^{53}\) 830 C.M.R. 64H.03(5)(b).
\(^{54}\) Id.
\(^{55}\) 830 C.M.R. 64H.03(3).
\(^{56}\) Id.
\(^{57}\) 830 C.M.R. 64H.03(5)(e),(f).
\(^{58}\) 830 C.M.R. 64H.03(5)(g). The promisee under the service contract in such case pays no tax. Id.
\(^{59}\) Id.
syringes as well as for sales of the insulin itself. It also provided an exemption for "[s]ales of patterns, molds, dies, tools, sand-handling equipment and machinery, and replacement parts thereof" provided that such property is "used exclusively in the manufacture of cast metal products to be sold in the regular course of business." Qualification for this exemption is not determined until after the sale and then according to the use to which the property is put. Since vendors may be held personally liable for the tax which is required to be collected from purchasers, a prudent seller of such property should require from his buyer an exempt use certificate in order to avoid the seller's potential tax liability to the commonwealth.

Two bills passed during the 1979 legislative session created specific sales tax exemptions of benefit to the printing industry. The first enactment created exemptions for composed type, film positives, and film negatives purchased by a printer or publisher of certain materials from a "typographer, compositor or color separator." One exemption is conditioned upon use of any of the materials by the printer or publisher in "the preparation of printed matter to be sold." The second exemption is available with respect to "the fabrication or transfer of such film positives, film negatives, reproduction proofs or impressed matter" for use in printing. The second bill inserted in the sales tax statute an exemption for the sale of printed material, manufactured in the commonwealth to the special order of a purchaser, for delivery to a purchaser or his designee located outside the commonwealth. The statute already exempted sales where the seller is obligated to deliver the goods to an interstate carrier for delivery to an out-of-state purchaser. This new exemption was undoubtedly sought by the printing industry to overcome the decision in George S. Carrington v. State Tax Commission, where the Supreme Judicial Court had denied a sales tax exemption to a printer who had manufactured certain religious materials to the specifications of its out-of-state charitable customers, because the items were delivered by an interstate carrier to an out-of-state designee.

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60 G.L. c. 64H, § 6(1), added by Acts of 1979, c. 700.
61 G.L. c. 64H, § 6(ee), added by Acts of 1979, c. 555.
62 Id.
63 See G.L. c. 64H, § 3.
64 See G.L. c. 64H, § 8(f),(g).
65 G.L. c. 64H, § 6(gg), added by Acts of 1979, c. 757.
66 Id.
67 Id.
68 G.L. c. 64H, § 6(ff), added by Acts of 1979, c. 590, § 1. This exemption was made retroactively applicable to covered transactions occurring on or after January 1, 1976. Acts of 1979, c. 590, § 2.
69 G.L. c. 64H, § 6(b).
of the buyer and not to a purchaser outside the commonwealth. The new statute does not explain what constitutes material manufactured to the special order of a purchaser. It is unclear, for instance, whether matter printed from standard photographic plates but specially selected and assembled to a customer's order would qualify. Interpretive regulations on this point would be useful.

Chapter 796 of the Acts of 1979, a statute addressing the energy needs of the commonwealth generally, has created for a limited time an exemption from sales taxes for certain sales of "equipment directly relating to any wood-fueled heating system." Only equipment approved by either the state fire marshal or the state building commission will qualify. In addition, the equipment must cost more than nine hundred dollars and be used by the consumer "as a primary heating system for . . . a person's principal residence in the commonwealth." Cautious sellers of such equipment wary of their potential tax liability should require from their buyers an exempt use certificate.

§16.6. Personal Property Taxation. There were relatively few developments in the area of personal property taxation during the Survey year. The Appellate Tax Board decided one case dealing with the domestic manufacturing corporation classification. Under section 5 of chapter 59 of the General Laws, the machinery and equipment of a domestic manufacturing corporation are exempt from local property taxes. In lieu of the local taxes, the manufacturing corporation pays a tax of two dollars and sixty cents per thousand dollars of book value of such property. Prior cases had established that corporations need not conduct an entire unitary manufacturing process to be entitled to the classification. To qualify it is sufficient that the operations in ques-

71 Id. at 550, 377 N.E.2d at 951.
72 G.L. c. 64H, § 6(hh), added by Acts of 1979, c. 796, § 11. This exemption will be available for qualifying sales made between January 1, 1979, and December 31, 1983. Acts of 1979, c. 796, § 35.
74 Id.
75 G.L. c. 64H, § 8(f),(g).

§16.6. 1 Cowles Technology Labs, Inc. v. State Tax Comm'n (1979) STATE TAX Rptr. (Mass.) (CCH) ¶ 200-537.
2 G.L. c. 63, § 38C; c. 59, § 5, cl. sixteenth.
3 G.L. c. 59, § 5, cl. sixteenth.
4 G.L. c. 63, § 32(1)(a). Most manufacturing corporations, both domestic and foreign, would probably be classified as "tangible property corporations," G.L. c. 63, § 30 (10), whose excise taxes due the commonwealth will be computed in part on the book value of their machinery and equipment. See G.L. c. 63, § 32 (domestic corporations), G.L. c. 63, § 39 (foreign corporations).
tion, while not producing a finished product ready for the ultimate consumer, form "an essential and integral part of a total manufacturing process." The Appellate Tax Board's decision in Cowles Technology Labs Inc. v. State Tax Commission reaffirmed this proposition of tax law.

The taxpayer in Cowles was a producer of crushed powders under an arrangement whereby its customers would send the taxpayer certain raw materials to be processed according to precise specifications furnished by the customer. Once processing was complete, the taxpayer sent the powders to its customers who utilized them in producing a wide range of commodities. The State Tax Commission determined that such activity did not qualify the taxpayer for qualification as a manufacturing corporation.

On appeal, the Appellate Tax Board reversed the Tax Commission's decision. The Board noted that the applicable statute lacked a definition of manufacturing. It therefore applied the Supreme Judicial Court definition of manufacturing as involving "change wrought through the application of forces directed by the human mind, which results in the transformation of some preexisting substance . . . into something different with a new name, nature or use." The Board determined that the processes employed by the taxpayer fell within this definition. Based on this finding, the Board held that, although the taxpayer did not produce a finished product, it was nevertheless entitled to classification as a manufacturing corporation, because its operations constituted an integral step in the manufacturing activities of its customer.

Two statutes in the area of personal property taxation which became effective during the Survey year are of interest. Chapter 777 of the Acts of 1979 exempts from local taxation the machinery and other personal property owned by either domestic business corporations or foreign corporations to the extent that it is directly used in drycleaning or laundering processes. Chapter 581 of the Acts of 1978 increased the

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6 Id. In Rossi, the operation of a sawmill which converted standing timber into cut lumber of different sizes was held to constitute manufacturing activities entitling the taxpayer to the manufacturing classification. Id. But see Charles River Breeding Labs, Inc. v. State Tax Comm'n, 374 Mass. 333, 373 N.E.2d 768 (1978) (animal breeding not within the common understanding of manufacturing.)

7 (1979), STATE TAX RPRTR. (MASS.) (CCH) § 200-537.

8 Id. at 10,586.

9 Id.

10 Id. at 10,585.

11 Id. See G.L. c. 63, § 38C.

12 369 Mass. at 180, 338 N.E.2d at 558.

13 (1979) STATE TAX RPRTR. (MASS.) (CCH) § 200-537 at 10,587.

14 Id. at 10,588.

personal property exemption of commercial fishermen from five thousand to ten thousand dollars.\textsuperscript{16} While chapter 777 merely created a new exemption, chapter 581 also created a new excise tax on boats, ships, and vessels in lieu of the local personal property tax.\textsuperscript{17} This statute, adding chapter 60B of the General Laws, requires owners of vessels to report annually to the municipality in which the owner has his usual mooring or docking space certain information, including a description of his vessel and his estimate of the fair cash value of the vessel.\textsuperscript{18} The excise tax, paid to the mooring municipality, is set at the rate of ten dollars per thousand dollars of fair cash value as determined by the municipality's assessors.\textsuperscript{19} The maximum excise on any vessel regardless of size is set at five hundred dollars.\textsuperscript{20} This tax is unquestionably a boon to boat owners, because payment of the new excise exempts the owner from the local property tax that would otherwise be payable.\textsuperscript{21} Since the local property tax rate is customarily much higher than the excise and is assessable on full cash value subject to no maximum, an owner of a substantial pleasure boat is advised to pay the new excise tax.\textsuperscript{22}

\section*{\textsuperscript{16} Real Estate Taxation—Decisional Law.} The Survey year witnessed substantial judicial activity in the area of real estate taxation. In the first of several decisions, the Supreme Judicial Court in \textit{Pequot Associates v. Board of Assessors of Salem},\textsuperscript{1} focused its attention on the urban redevelopment excise tax.\textsuperscript{2} The excise statute as then in effect exempted qualified low and moderate income housing projects from property taxes for forty years.\textsuperscript{3} In return for the exemption, the commonwealth imposes an excise tax at the rate of five percent of the gross income of the project plus one percent of the fair cash value of the

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\item G.L. c. 59, § 5, cl. nineteenth, \textit{as amended by} Acts of 1978, c. 581, § 2. This exemption, as before, applies "in respect to boats, fishing gear and nets owned and actually used by him in the prosecution of his business if engaged exclusively in commercial fishing . . . ." \textit{Id.} This increased exemption became effective July 1, 1979. \textit{Acts of 1978, c. 581, § 8.}
\item G.L. c. 60B, § 2.
\item \textit{Id.}
\item \textit{Id.}
\item G.L. c. 60B, § 2(d). \textit{See} G.L. c. 59, § 4.
\item For those limited exemptions from the new excise, \textit{see} G.L. c. 60B, § 3.
\item G.L. c. 121A, § 10.
\item G.L. c. 121A, § 10, \textit{as amended by} Acts of 1969, c. 540, § 1. The current scheme provides an initial period of exemption of fifteen years subject to extension of up to an additional twenty-five years. \textit{G.L. c. 121A, § 10, \textit{as amended by} Acts of 1975, c. 827, § 7 [hereinafter cited as G.L. c. 121A, § 10].}
\end{enumerate}
\end{footnotesize}
project for the benefit of the situs municipality.\textsuperscript{4} This statutory scheme requires the local assessors to determine this cash value each January 1st. The value so determined is utilized in computing the excise due for the prior calendar year.\textsuperscript{5} According to the statute, the value will not be redetermined if an original maximum fair cash valuation was made at the request of the Department of Community Affairs (DCA).\textsuperscript{6} In addition to providing an exemption from property taxes, the urban re-development statute also permits the developer to escape local special assessments and betterments by means of an optional agreement with the municipality.\textsuperscript{7}

Pequot, a limited partnership acting as an urban development corporation under chapter 121A of the General Laws, had constructed in Salem a low and moderate income housing project.\textsuperscript{8} Pursuant to a DCA request for valuation, the "maximum value" was established at $300,000 for the land and $3,470,000 for the building on completion, for a total of $3,770,000.\textsuperscript{9} In addition, Pequot made an optional agreement with the municipality to make annual payments geared to fair cash value.\textsuperscript{10} Despite the DCA maximum valuation, the local assessors redetermined the fair cash value as of January 1, 1975, to be $5,770,000, claiming that Pequot had breached the optional agreement and that the breach viti­ated compliance with the "maximum" valuation.\textsuperscript{11} In addition to their disagreement over the applicable valuation, the developer and the assessors also disagreed about the completion date of the project.\textsuperscript{12} This date determined whether the property was taxed in 1974 at $300,000, the value of the land alone, or $3,770,000, the value of the property with the completed building. The Appellate Tax Board summarily disposed of the assessor's valuation argument and ruled that, even if proven, a breach of the optional agreement would furnish no justification for exceeding the maximum valuation preliminarily established at DCA's re­quest.\textsuperscript{13} In addition, the Board, finding that the project had been completed in 1974, held that the $3,770,000 valuation applied for that year and thereafter, both for the purpose of the excise tax liability and for the contractual liability respecting the special assessments and better­ments.\textsuperscript{14}

\textsuperscript{4} G.L. c. 121A, § 10.
\textsuperscript{5} Id.
\textsuperscript{6} Id.
\textsuperscript{7} Id., §§ 6A, 10.
\textsuperscript{9} Id. at 2413, 380 N.E.2d at 649.
\textsuperscript{10} Id.
\textsuperscript{11} Id. at 2415, 380 N.E.2d at 650.
\textsuperscript{12} Id.
\textsuperscript{13} Id. at 2414, 380 N.E.2d at 650.
\textsuperscript{14} Id. at 2414-15, 380 N.E.2d at 650.
The Supreme Judicial Court affirmed the Board's determination that the project was complete in 1974 for excise tax purposes. The Court accepted the Board's findings that the project was completed when the city of Salem had approved the project for occupancy in 1974 and that the taxpayer developer had reported gross income from the project for the year. It rejected the taxpayer's argument that completion did not occur until the lender, the Massachusetts Housing Finance Authority, issued a certificate of acceptance in February 1974. The Court noted that the lender's purposes for determining completion of the project related only to its interest in ensuring the financial stability of the project. The Court therefore found no necessary connection between the date the certificate issued and the date the project starts generating income subject to the urban redevelopment excise tax. Thus, the Court concluded that for purposes of determining the completion date of property subject to the urban redevelopment excise tax, the assessors should look to the actual date of completion of construction rather than the date of the issuance of the lender's certificate of acceptance.

In another Survey year case, Henry Perkins Co. v. Board of Assessors of Bridgewater, the Supreme Judicial Court construed the state statute establishing a real estate tax exemption for buildings constructed to eliminate industrial waste. In 1972, the Henry Perkins Company, a manufacturer of metal castings, was ordered by the commonwealth to institute measures to comply with air pollution regulations. The company thereupon built a new facility for melting scrap. The facility contained a furnace designed to eliminate the offending pollution. The taxpayer sought to use the real estate tax exemption available under clause 44 for a "building . . . which is constructed, installed or placed in operation, in whole or in part, for the purpose of eliminating industrial waste . . . ." The Appellate Tax Board interpreted the statute as requiring that the dominant purpose of a building be to eliminate

15 Id. at 2420, 380 N.E.2d at 650. The Court, partially reversing the Board, also held that the developer was not liable in 1974 under the special assessments agreement with the city. Id.
16 Id. at 2418, 380 N.E.2d at 650.
17 Id. at 2416, 380 N.E.2d at 650.
18 Id. The Court also summarily dismissed the taxpayer's contention that the "completion date" for purposes of the excise tax was the date the last unit was occupied. Id. at 2417, 380 N.E.2d at 650-51.
19 Id. at 2417, 380 N.E.2d at 650.
21 G.L. c. 59, § 5, cl. forty-fourth.
23 Id. at 151, 384 N.E.2d at 1242.
24 G.L. c. 59, § 5, cl. forty-fourth. As a manufacturing corporation, the taxpayer paid no local taxes on its machinery and equipment. See G.L. c. c. 59, § 5, cl. sixteenth.
industrial waste in order to qualify for the exemption.\textsuperscript{25} Finding that the building in question had as its dominant purpose the manufacture of metal castings, the Board denied the exemption.\textsuperscript{26}

On appeal, the Supreme Judicial Court upheld the Board’s interpretation of the statute as a “reasonable reading” of the statute.\textsuperscript{27} The Court nevertheless expressed concern that the Board’s reading of the statute tended to reduce the incentive to build multi-purpose structures whose overall effect would be to reduce air pollution.\textsuperscript{28} Thus, the Court left undisturbed an interpretation which will allow only single purpose facilities to qualify for the exemption.\textsuperscript{29}

In a third Survey year decision, Community Development Company of Gardner v. Assessors of Gardner,\textsuperscript{30} the Supreme Judicial Court determined what estimated annual income figure should be used in assessing local real estate taxes for section 236\textsuperscript{31} low income housing projects. Under section 236 of the National Housing Act, the federal government closely controls the financial operation of a low income housing project, including the rents charged.\textsuperscript{32} Federal regulations require the owner to establish two monthly rental rates for each unit. The first rate, “basic monthly rental,” established by a formula assuming a mortgage cost of one percent per annum, is the rate at which qualifying tenants pay.\textsuperscript{33} The second is the “fair market monthly rental” value, which is determined on the basis of the actual mortgage rate.\textsuperscript{34} It does not reflect the amount a unit could bring on the open market. The difference between these rental rates is paid to the owner’s mortgagee, and any rents collected by the owner in excess of the subsidized level must be remitted to the federal government.\textsuperscript{35} The owner may not charge in excess of the “fair market” rental.\textsuperscript{36}

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\item \textsuperscript{25} 1979 Mass. Adv. Sh. at 152, 384 N.E.2d at 1243.
\item \textsuperscript{26} Id. at 153, 384 N.E.2d at 1243.
\item \textsuperscript{27} Id. at 154, 384 N.E.2d at 1243.
\item \textsuperscript{28} Id. at 154-55, 384 N.E.2d at 1243-44.
\item \textsuperscript{29} It seems possible, and not unreasonable, to read the statute as exempting structures that were constructed, in whole or in part, for the desired environmental effect. The Board held, however, that the use of the word “purpose” was not related to the taxpayer’s motivation for constructing the building. Similarly the phrase “in whole or in part” was found by the Board not to refer to “the purpose” but rather the use of the property itself. Id. at 153-54, 384 N.E.2d at 1243.
\item \textsuperscript{30} 1979 Mass. Adv. Sh. 443, 385 N.E.2d 1376.
\item \textsuperscript{31} Section 236 of the National Housing Act, 12 U.S.C. § 1715xx-1 (1976) [hereinafter cited as Section 236].
\item \textsuperscript{32} 1979 Mass. Adv. Sh. at 445, 385 N.E.2d at 1377 (citing 24 C.F.R. § 236.55 (1978)).
\item \textsuperscript{33} Id.
\item \textsuperscript{34} Id. at 445, 385 N.E.2d at 1377-78.
\item \textsuperscript{35} Id.
\item \textsuperscript{36} Id. at 446, 385 N.E.2d at 1378.
\end{enumerate}
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The controversy in Community Development Company of Gardner involved the determination of fair cash value of the property for purposes of the local real estate tax. 37 The local assessors adopted the "fair market" rental value of the property as the proper determinant. The Appellate Tax Board rejected the assessors' argument that the higher fair rental value should be used because the federal interest payments to the owner's mortgage were a "subsidy" to the owner. 38 The Board nevertheless adopted the higher fair rental value on the theory that such figures represented rentals that could be obtained "were it not for the federal regulations." 39

On appeal, the Supreme Judicial Court reversed the determination of the Appellate Tax Board. It accepted the taxpayer's argument that the application of the federal regulations could not be ignored in determining the value of the property. 40 The Court reasoned that this result was compelled by the federal law barring the owner from retaining rents in excess of the subsidized level and charging "the fair rental value" to low income families. 41 The Court emphasized the "unique status" of these projects whose value it found to be "inherently ambiguous." 42 The Court therefore held that, in light of the restricted income factor, assessment at the higher "fair rental value" was improper. 43

Although, as the Court intimated, these types of housing projects, and hence the law of the case, may be sui generis, the principles underlying this decision may be applicable to other taxpayers who seek abatements for property whose income or use is restricted by law. For example, rent controlled properties, taxpayers might argue, should be assessed solely by means of capitalizing the permitted annual income. Similarly, if a zoning requirement or some municipal by-law restricts the use of the property to be valued, the determination of fair value should reflect the limited utility of the property. This decision thus may presage a new approach to valuation of certain properties.

37 Id. Both parties stipulated to a capitalization rate of 18.04 percent. Id. at 446 n.8, 385 N.E.2d at 1378 n.8.
38 Id. at 446 n.9, 385 N.E.2d at 1378 n.9. See also Morville House, Inc. v. Commissioner of Corps. & Tax'n, 369 Mass. 928, 344 N.E.2d 878 (1976) (interest subsidies held not to be income for Massachusetts taxation).
40 Id. at 446-47, 385 N.E.2d at 1378.
41 Id. at 447, 385 N.E.2d at 1378.
42 Id. (quoting G. Peterson, A. Solomon, H. Madjid, & W. Apgar Jr., Property Taxes, Housing and the Cities, at 73 (1973)).
In *Tregor v. Assessors of Boston* the Supreme Judicial Court reviewed the difficult issue of remedies available to a taxpayer who has been the victim of "disproportionate assessment." The Massachusetts constitution, prior to adoption of the November 1978 amendment permitting classification of property by use, explicitly required that one class of property be subject to tax on the same basis and at the same rate applicable to any other class or classes of property. Consequently, under the prior constitutional tax provision, all property in the commonwealth whether commercial, industrial, or otherwise, had to be valued at full and fair cash value and had to be subject to a rate of tax uniformly applied to all classes of property.

Chapter 59 of the General Laws, as then in effect, provided that a taxpayer who is taxed "at more than his just proportion, or upon an assessment of any of his property in excess of its fair cash value..." is entitled to a "reasonable abatement..." Historically, however, the sole question in abatement cases had been whether the property was valued at more than its fair cash value and not whether it had been valued at more or less than similar property. This long standing rule was flatly abandoned in 1965 in *Shoppers' World, Inc. v. Assessors of Framingham*. In *Shoppers' World*, the Supreme Judicial Court held that if a taxpayer proved intentional disproportionate assessment, he should receive "an abatement... which will make the taxpayer's assessment proportional to other assessments..." In a much-cited footnote, however, the *Shoppers World* Court also added that "[i]f... it should be shown that several different percentages of full, fair cash value were employed in valuing different classes of property, ... [logically there should be] reduction of the assessment of a taxpayer against whom there had been discrimination so that such taxpayer's assessment would be proportional to the assessments of the class of property valued at the lowest percentage of fair cash value."
The Court subsequently adopted this dictum as law in *Assessors of Weymouth v. Curtis*. The *Curtis* Court's adoption of the *Shoppers' World* dictum was curious jurisprudence, however, because *Curtis* involved only a single level of discrimination, a situation amply covered by the *Shoppers' World* holding.

*Tregor* squarely presented a situation where the municipal assessment practices reflected discrimination at several levels. The sole issue presented was whether the abatement to be granted should be based upon an assessment proportional to the municipal average or whether it should be based upon an assessment proportional to the most favored class. The taxpayer in *Tregor* had been granted an abatement by the Appellate Tax Board, proportionate to the assessments of the lowest valued class of property. In this case, the parties had agreed upon the property's value. They also stipulated as to the existence of a multi-level disproportionate assessment practice under which single-family residential property was "the most favored class" of property. The dispute centered solely on the issue of the remedy. The taxpayer claimed entitlement to a reduced assessment for his commercial property proportional to the assessment of single family residences, the class of property valued at the lowest percentage of fair cash value. The city, however, claimed that the proper remedy was the reduction of the taxpayer's assessment to a level proportional to the average rate of assessments of all classes of property.

On appeal, the Supreme Judicial Court upheld the Appellate Tax Board's decision to grant an abatement based upon the lowest assessment percentage. In reaching its decision, the Court without analysis relied upon its decision in *Curtis* as requiring abatement to the average for the most favored class. Conceding that it would prefer a comprehensive remedy to produce uniform assessments at fair cash value, the Court recognized that no such remedy could be ordered by the

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54 See note 64 infra.
56 Id. at 770, 387 N.E.2d at 539. They agreed to apply the capitalization of income method, using a net income figure of $55,000 and a capitalization rate of 10%. Id. at 771, 387 N.E.2d at 539. The rate of assessment for single-family residence was 26.8%. The average rate of assessment in Boston was 50.2%. Id.
57 Id. at 771, 387 N.E.2d at 539.
58 Id.
59 Id. at 774, 387 N.E.2d at 540.
60 Id.
61 Id. at 783, 387 N.E.2d at 544.
62 Id. See text at note 53 supra. The Court was careful to point out that Boston's system of assessment was "in flagrant disregard of constitutional and statutory mandates." Id. at 773, 387 N.E.2d at 540.
Appellate Tax Board in an abatement proceeding. Therefore, the Court concluded that where the taxpayer had made out a prima facie case of disproportionate assessment, the Court would allow abatement to the average assessment of the most favored class. Declining to look beyond the stipulation that there was disproportionate assessment, the Court upheld the decision of the Appellate Tax Board.

The effect of the Tregor decision has been considerably limited by the passage of the new classification amendment and its implementing legislation. The classification amendment will permit what was previously constitutionally prohibited—differing assessments for different classes of property. It would therefore appear that the remedy ordered by the Tregor Court will not be available once assessments based on different classes of property are in effect. At that point, a taxpayer's remedy will be to seek an abatement of his tax to the average assessment of the class of property to which his property belongs.

Recalcitrant municipalities continued the use of dilatory tactics designed to forestall their constitutional and statutory duty to value all real property at its full and fair cash value. In Commonwealth v. Town of Andover, local assessors of more than a dozen municipalities submitted revaluation plans to the Commissioner of Revenue. The Commissioner approved the revaluation plans. The municipalities, however, failed to appropriate funds to carry out the approved plans or any other suitable method of achieving one hundred percent evaluation.
The commonwealth filed suit seeking a declaration that the Commissioner of Revenue was empowered to contract with commercial appraisal firms to conduct the appraisals for each recalcitrant municipality. It also sought to have the appraisal costs deducted by the state treasurer from the state aid that would be otherwise distributed to the particular municipalities.\(^69\)

The Supreme Judicial Court held that the Commissioner of Revenue had no authority, express or implied, to enter into a contract on behalf of any municipality.\(^70\) Similarly, the Court ruled that the treasurer had no authority to deduct any such payments for appraisals from state funds otherwise due the city or town.\(^71\) At the same time, however, the Court noted that the municipalities, by their refusal to appropriate funds, had thwarted the efforts of local assessors to carry out constitutionally mandated duties.\(^72\) The Court observed that, pursuant to the Court's general equity power, a single justice could formulate appropriate relief.\(^73\) It suggested that the single justice could fashion an order permitting each municipality to appropriate the necessary funds promptly.\(^74\) Should the local legislative bodies and the assessors fail to "respond promptly and fully," the Court would authorize "more drastic relief . . . ." \(^75\) In such an instance a single justice, the Court suggested, "might authorize the Commissioner to contract for revaluation services and direct that the cost of the contract be imposed on the city or town, perhaps by directing the State Treasurer to withhold funds otherwise distributable to the municipality." \(^76\) Thus, although the Court ruled that the Commissioner of Revenue could not of his own authority contract on behalf of a municipality, it conceded that in view of the special circumstances of the communities' recalcitrance on the matter of reassessment, the Court, pursuant to its equity powers, would be willing to authorize such action by the Commissioner.

**§16.8. Real Estate Taxation—Legislation—Classification Amendment.** The ratification on November 7, 1978, of the constitutional amendment 1 permitting the classification of real property for tax purposes has substantially altered the way property taxes are assessed in the commonwealth. The amendment modified the prior constitutional mandate that

\(^{69}\) *Id.* at 1621, 391 N.E.2d at 1228.
\(^{70}\) *Id.* at 1631, 391 N.E.2d at 1232.
\(^{71}\) *Id.*
\(^{72}\) *Id.* at 1629, 391 N.E.2d at 1231.
\(^{73}\) *Id.*
\(^{74}\) *Id.* at 1629-30, 391 N.E.2d at 1231.
\(^{75}\) *Id.* at 1630, 391 N.E.2d at 1231.
\(^{76}\) *Id.*

\(^{1}\) Mass. Const. amend. CXII.
all real property in the commonwealth, regardless of use, be uniformly assessed at full fair cash value for local property taxes. As amended, the constitution now permits the legislature to classify real property "according to its use in no more than four classes and to assess, rate and tax such property differently in the classes so established, but proportionately in the same class . . . ." Thus, while each class may be subject to different rates of assessment, within each class the rate must be uniform.4

Anticipating ratification in the autumn, in the summer of 1978 the legislature had enacted a statute entitled "Classification of Real Property." This statute, which was never implemented, designated four classes of real property by usage: residential, commercial, industrial or manufacturing, and open space. Under this scheme, after the assessors determined the full fair cash valuation of all real property not entirely exempt from tax, each parcel of land would then be appropriately classified by use. The statute called for the following ratios to be applied to fair cash values of each class: residential, forty percent; commercial, fifty percent; industrial, fifty-five percent; and open space property, twenty-five percent. With the exception of residential property, which was subject to an additional exemption of $5000 per parcel, the resulting figure represented the property valuations to which the local tax rate was applied.

Not content with its initial attempts at real property classification, the legislature, after obtaining a favorable advisory opinion from the Supreme Judicial Court on a similar bill, enacted chapter 797 of the Acts

\[\text{\textsuperscript{2} MA} \text{SS. CONST. pt. 2, c. 1, § 1, art. IV.}\]
\[\text{\textsuperscript{3} Id., as amended by MA} \text{SS. CONST. amend. CXII (hereinafter cited as MA} \text{SS. CONST. pt. 2, c. 1, § 1, art. IV).}\]
\[\text{\textsuperscript{4} Id.}\]
\[\text{\textsuperscript{5} Acts of 1978, c. 580.}\]
\[\text{\textsuperscript{6} The statute was repealed by Acts of 1979, c. 797, § 23, which inserted in its place G.L. c. 59, § 2A.}\]
\[\text{\textsuperscript{7} Acts of 1978, c. 580.}\]
\[\text{\textsuperscript{8} Id.}\]
\[\text{\textsuperscript{9} Id.}\]
\[\text{\textsuperscript{10} Chapter 580 was challenged by certain business interests in Associated Indus. of Mass., Inc. v. Commissioner of Revenue, 1979 Mass. Adv. Sh. 2027, 393 N.E.2d 812. The plaintiffs claimed chapter 580 to be invalid on the following grounds: (1) that the statute, enacted months before ratification, was contingent legislation; (2) that, because 100% valuation certification would not be obtained by all towns and cities within the same tax year, the act violated the constitution's proportionality and equal protection requirements; (3) that the act's utility company property tax exemption created a de facto unauthorized fifth class of property; and (4) that the $5000 residential exemption created an irrational discrimination against rent paying tenants. The Court rejected all of the plaintiff's arguments and held chapter 580 constitutional. Id. at 2027-28, 393 N.E.2d at 813.}\]
of 1979. This statute repealed the 1978 reclassification measure and created a new system of property taxation. The new version does not mandate specific assessment ratios, thereby permitting substantially more flexibility at the municipal level in terms of the allocation of the entire municipal tax burden amongst the various classes of property. As in the 1978 act, all real property in a municipality is classified by use into four categories, namely residential, open space, commercial, and manufacturing or industrial. All property regardless of classification must be valued at full and fair value. Another feature of the earlier version preserved in the 1979 classification act is that classification by use cannot be implemented by a municipality until the Commissioner of Revenue has certified that all property in the city or town has been assessed at full fair values. The act grants the Commissioner of Revenue broad supervisory and rule-making authority over all assessors and assessing practices in the state. The Commissioner has the duty of enforcing all laws relating to valuation, classification, and assessment ratios. Unlike the 1978 act, which applied flat statewide assessment ratios to each class of property prior to the application of the uniform municipal tax rate, the new act permits each municipality to tax each class of property at different rates.

Local assessors, under Department of Revenue guidelines, biennially determine which portion of the entire municipal property tax burden is to be borne by each class of real property and all personal property. The selection of two variables, namely the residential factor and the open space variable, is the means permitting local discretion in allocating the tax burden among the classes of property. Using the taxable values of the individual municipality, the Commissioner of Revenue computes a minimum "residential factor," which must fall between 65 percent and

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12 Acts of 1979, c. 797, § 23. This repeal was voided by § 46 of the repealing act. The statute was subsequently repealed by Acts of 1980, c. 261, § 16.
14 Id., § 2A(b).
15 Id.
16 Id.
17 Id., § 2A(c). Another precondition is that a majority of the assessors must be qualified to classify its property. Id. As of March 31, 1980, 129 of the 351 municipalities in the commonwealth were notified by the Department of Revenue, Bureau of Local Assessment, that they were, or could be with some adjustments, eligible to implement classification.
20 Id.
100 percent.\textsuperscript{21} For each community this figure represents the maximum discount or variation from strict proportionality allowed to residential property. The board of selectmen or mayor then adopts a residential factor that is not less than the minimum set by the Commissioner.\textsuperscript{22} Based upon this residential factor, the assessors next determine the discount permitted open space land and then compute the allocable tax burden of each class.\textsuperscript{23} The duly determined percentages then apply for the following two fiscal years.\textsuperscript{24}

In order to understand how the new allocation process functions, one must distinguish between property which is included in each class for the initial class allocation and property which is in fact taxable within each class. When property is included in a class for allocation purposes but later exempted from tax for any reason, the share of the total class burden which the other taxable property within such class will bear necessarily will be increased. The terminology of the pertinent statutes can be confusing in this regard. Section 2A of chapter 59 requires the classification of real property, regardless of whether such property is exempt from taxation under other provisions of law.\textsuperscript{25} Section 38 of chapter 59, concerning valuation as opposed to classification, requires the assessors to “make a fair cash valuation of all estate, real and personal, \textit{subject to taxation} \ldots” in the municipality.\textsuperscript{26} The answer to whether nontaxable property is valued for class allocation purposes lies in distinguishing between property which “is not subject to taxation” and property which as a general matter is subject to taxation but which for some reason, often because of the owner’s status, is exempt from taxation. The former is excluded in determining the value of each class and the latter is included in such determination. “Exemptions” therefore do not reduce the overall class burden. Instead, because they are implemented within the class itself, they consequently increase the taxable property’s relative share of the entire class tax burden.\textsuperscript{27} For example, “recreational land,” which is subject to taxation under chapter 61B but which may be exempt from taxation,\textsuperscript{28} should be valued for

\textsuperscript{21} G.L. c. 58, § 1A. In setting the minimum residential factor, the Commissioner is guided by the statutory rule that no class of real or personal property shall bear a percentage of the total tax levy in excess of 150\% of its respective proportion of all taxable property in the municipality. \textit{Id.}

\textsuperscript{22} G.L. c. 40, § 56.

\textsuperscript{23} \textit{Id.}

\textsuperscript{24} \textit{Id.}

\textsuperscript{25} G.L. c. 59, § 2A(b).

\textsuperscript{26} G.L. c. 59, § 38 (emphasis added).

\textsuperscript{27} See, \textit{e.g.}, G.L. c. 59, § 2A(b). The definition of residential class I property makes clear that although valued for allocation purposes, some residential property may be exempt from taxation under other provisions of law.

\textsuperscript{28} See G.L. c. 59, § 5, forty-eighth.
purposes of determining the commercial class allocation. Unfortunately, one cannot rely on statutory labels. Property stated to be “exempt” in fact may be “not subject to taxation.” For example, property owned and used for governmental purposes is declared to be “exempt” when in fact it is “not subject to taxation.” Consequently, its value should not be included as part of commercial class property for purposes of determining the class allocations. Thus, the class size resulting from initial classification may differ significantly from the size of the class actually bearing the burden of taxation.

The local authorities allocate the tax burden by selecting a residential factor and an open space variable. The latter factor, which discounts the value of open space land, may be any percentage, subject only to a statutory minimum equal to 85 percent of the residential factor. The percentages of the classes are determined by reference to the residential factor. Since raising the residential factor increases the proportionate burden which residential property in the municipality bears, communities wishing to minimize the tax burden of its residential property owners should opt for the minimum residential factor. Such reallocation of the tax burden is not mandatory, however. The selection of a residential factor of 100 percent and an open space variable of 100 percent will ensure that each class of real property and personal property bears its strict proportionate share.

Once the variables of the formula have been determined, the second step in the tax allocation process involves a series of interdependent arithmetic computations each based in part on class to community value ratios. It is evident that residential and open space property may be favored at the expense of both the other two classes of real property and the personal property. It is also clear that regardless of the degree of discrimination in favor of residential and open space

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29 G.L. c. 59, § 5, first.
30 G.L. c. 59, § 2A(b) (commercial property includes property used for governmental and other non-profit purposes).
31 Inclusion of certain exempt property in the initial allocation process may be quite unpopular. For instance, certain urban redevelopment property is subject to taxation but is exempt from the property tax if subject to the urban development excise. See G.L. c. 59, § 5, forty-seventh. Thus, while this property should be included in the appropriate class for determining class allocations, it will not in fact bear any of the burden of paying the tax.
32 G.L. c. 40, § 56.
33 Id. This legislation specifically requires the local authorities to select a residential factor. There is no similar specific language concerning selection of the open space variable other than the general language requiring the local authorities to “determine the percentages of the local tax levy to be borne by each class of real property . . . .” Id.
34 See id.
35 For details of the computation see G.L. c. 40, § 5b.
property the rates for commercial, industrial, and personal property will, subject to exemptions within each class, always tend to be the same in the first year following the biennial allocation. In other words, that part of the municipal tax burden which is carved away from the residential and open space classes by means of the two variables is proportionately assumed by the other three classes. Although the percentage burden of each class remains the same for two years, increases or decreases in “taxable” values within the classes occurring in the first year following the percentile allocations may cause the rates within each class to vary in the second year.

Proportionality by class does not mean that an individual real property owner within a class will not bear more than his pre-classification constitutionally required share. The total value of each class for purposes of the allocation of the tax burden may include some property which is exempt from taxation. Thus, if one class contains any significant amount of exempt property, the tax burden of an individual parcel within that class will be proportionate to the burden of the other taxable realty in its class. It will not, however, be proportionate in the preclassification community-wide sense. Since the percentage allocation to each class is prospectively determined for a two-year period, destruction in the first year of valuable property within a class will require, in the second year, the other property owners within the class to assume proportionately that share of the tax burden previously borne by destroyed property. In either of these two situations, where there is either a huge loss in value within a class after the biennial allocation or extraordinarily large exemptions within a class, a class may theoretically bear more than the permissible 150 percent of the fair value of the taxable property in such class divided by the fair value of all taxable property in the community.

With minor exceptions, the classification act’s definitions of the classes of property are straightforward. The definitions of the two favored classes of property, residential and open space, however, pose some questions. Residential property is defined as

property used or held for human habitation containing one or more dwelling units including rooming houses with facilities designed and used for living, sleeping, cooking and eating on a non-transient basis. Such property includes accessory land, buildings or improvements incidental to such habitation and used exclusively by the residents of the property or their guests. Such property shall not include a hotel or motel. Such property may be exempt from taxation under other provisions of law.\(^{36}\)

\(^{36}\) G.L. c. 59, § 2A. Undoubtedly, the meaning of “non-resident” will be of considerable interest to owners of boarding houses and vacation property.
The inclusion of "accessory" land in the definition of residential property will raise a few questions, particularly for condominium owners. Although each condominium unit is treated as an individual "parcel" of real estate and will be classified as residential, the resident or residents of such individual parcel will not be the exclusive users of the common areas which are owned and used by all the owners of all the different individual parcels. The same issue arises where two adjoining free standing homes share a common driveway. Such common areas cannot be accessory property entitled to residential classification unless the exclusive use provision is read to apply to more than one property owner. This problem is not merely a semantic one. Since all property within a single parcel will not necessarily be classified within a single class, if different uses are made of different segments of the entire property, each portion must be separately valued and classified. Thus, an owner may have "recreational" land taxed under chapter 61B, "residential" property, and "commercial" property in what the owner considers a single piece of property. As a practical matter local assessors may not carve away the common driveway for different classification from the two contiguous "residential" properties. Although the parking lot of a large apartment complex is unquestionably "accessory land or improvements" while the property is held for rental, it may not continue to be entitled to the residential classification once the complex is converted to condominium status.

The second favored class of property is open space land. It is defined as

land which is not otherwise classified and which is not taxable under the provisions of chapter sixty-one or sixty-one A, or taxable under a permanent conservation restriction or lands otherwise taxed for recreational purposes under other provisions of law, and which land is not held for the production of income but is maintained in an open or natural condition and which contributes significantly to the benefit and enjoyment of the public.88

This definition is quite similar to the definition of "recreational" land qualifying for a limited exemption from real property taxes.89 One significant difference, however, is that "open space" land does not include land held for the production of income. Thus, the owner of a commercial ski resort may opt for recreational classification with its advantages and attendant risks. If however, the owner should decide to leave the property on the tax rolls, it will be classified as "commercial"

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87 See G.L. c. 59, § 5C (eligibility for optional residential exemption).
88 G.L. c. 59, § 2A(b).
89 See generally G.L. c. 61B, § 1.
property notwithstanding its beautiful and natural condition and recreational benefit to the public. The requirement of significant contribution to the benefit and enjoyment of the public raises the issue of public access to private property. There is no question that there is public benefit derived from the preservation of so-called "open space land" in its open or natural state. The Massachusetts constitution states that conservation of such lands in their natural state is a "public purpose." 40

The recreational use statute 41 provides that certain classes of land are eligible for the "recreational land" classification if the property owner permits the public generally or the members of a non-profit organization to have access to the property. Arguably, the public can enjoy property without direct access to it. Given the premise that enjoyment of the land does not require access to the land and the lack of the express requirement of public access to open space land, it may be that the legislature did not intend that public access be a prerequisite for open space classification.

The definitions of commercial and industrial property are reasonably straightforward. Commercial property is defined as

property used or held for use for business purposes and not specifically includible in another class, including but not limited to any commercial, business, retail, trade, service, recreational, agricultural, artistic, sporting, fraternal, governmental, educational, medical or religious enterprise, for non-profit purposes. Such property may be expressly exempt from taxation under other provisions of this chapter. 42

Industrial property is defined as

property used or held for use for manufacturing, milling, converting, producing, processing or fabricating materials; the extraction or processing of materials unserviceable in their natural state to create commercial products or materials; the mechanical, chemical or electronic transformation of property into new products and any use that is incidental to or an integral part of such use, whether for profit or non-profit purposes; and property used or held for uses for the storage, transmitting and generating of utilities regulated by the department of public utilities. Such property may be exempt from taxation under other provisions of law. 43

The legislature submitted a bill 44 similar to the one enacted to the Supreme Judicial Court for an advisory opinion as to its constitutional-

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40 MASS. CONST. amend. XLIX.
41 G.L. c. 61B, § 1.
42 G.L. c. 59, 2A(b).
43 Id.
http://lawdigitalcommons.bc.edu/asml/vol1979/iss1/19
The differences between the bill considered and the one enacted are more of degree than of substance. First, the bill considered by the Court permitted a city or town to adopt a residential factor between seventy and one hundred percent. Second, the bill submitted contained no discretionary variable for open space property, but instead utilized within the open space percentage formula a specific discount factor of 62 percent multiplied by the residential factor. Notwithstanding these differences, the major conceptual feature of each bill is the discretion given municipalities to allocate the property tax burden among the various classes of property. Since the advisory opinion dealt with the constitutionality of such concept as opposed to particular details of the proposed legislation, the Court's holding is certainly relevant and probably dispositive of the constitutional questions raised by the enactment of the 1979 classification statute.

In its advisory opinion, the Supreme Judicial Court first addressed the constitutional question of delegation inherent in permitting local municipalities to set the tax rates for different classes of property. Home rule concepts notwithstanding, the legislature has always possessed the ultimate power to assess property taxes in the commonwealth. Historically, municipalities have always been delegated the power to assess property and to set tax rates. The Court, while identifying no specific authority for such delegation, noted that this delegation has always been assumed proper and, as a practical matter, necessary because of the varying revenue needs of the individual municipalities across the state. The Court held that such delegation to the municipalities is constitutionally permitted. The second question addressed by the Court focused on whether the constitutional mandate of proportionality within each class of property required proportionate rates for each class throughout the commonwealth. The Court found "no reason to believe that proportionality under the amendment of Article 4 was intended to require that municipal tax rates be uniform statewide . . . ." It concluded

46 H.R. 6371, § 1.
47 Id.
49 1979 Mass. Adv. Sh. at 1764 n.9, 393 N.E.2d at 310 n.9.
50 MASS. CONST. pt. 2, c. 1, § 1, art. IV.
52 Id.
53 Id. at 1767, 393 N.E.2d at 311.
54 Id.
55 Id. at 1769, 393 N.E.2d at 312. The constitutional principle of proportionality under article 4 has always been "understood to mean that municipal tax rates must be uniform within each municipality, not that they must be uniform across the Commonwealth." Id. at 1768, 393 N.E.2d at 311.
that the constitution requires proportionality in each class only within a *single* municipality.\(^5\)

§16.9. Real Estate Taxation—Legislation—Recreational Land. At the same time the classification amendment was ratified, the voters also ratified a constitutional amendment adding “wild” land, land retained in its natural state, and land used for recreation, to the class of forest lands which could benefit from special legislative treatment for property tax purposes.\(^1\) The amendment charges the legislature with the duty of prescribing such methods of taxation as will “develop and conserve” natural resources and “the environmental benefits of recreational lands within the Commonwealth.”\(^2\) Pursuant to the amendment, the legislature enacted chapter 713 of the Acts of 1979, codified as chapter 61B, to provide for the classification and taxation of recreational land in the commonwealth.\(^3\) Only land comprising a minimum of five acres and satisfying one of three alternative use and environmental definitions or limitations is eligible for recreational classification.\(^4\) First, land is eligible if it is “retained in substantially a natural, wild, or open condition. . . .”\(^5\) A second category of qualifying land is land which is landscaped in a way so “as to allow to a significant extent the preservation of wildlife and other natural resources . . . .”\(^6\) Finally, land “devoted primarily to recreational use” and which “is available to the general public or to members of a non-profit organization . . .” will qualify, provided there is no material interference “with the environmental benefits which are derived from said land. . . .”\(^7\) "Recreational


\(^{1}\) MASS. CONST. amend. XLI, as amended by MASS. CONST. amend. CX.

\(^{2}\) MASS. CONST. amend. XLI, as amended by MASS. CONST. amend. CX.


\(^{4}\) G.L. c. 61B, § 1, *added by* Acts of 1979, c. 713, § 1 [hereinafter cited as G.L. c. 61B].

\(^{5}\) *Id.*

\(^{6}\) *Id.*

\(^{7}\) *Id.* The Department of Revenue reads this new statute differently. The department would require first that the five acre parcel be retained either in a “natural or wild condition” or in “a landscaped condition.” Second, land meeting such state or condition requirement must then satisfy one of two use requirements. Either the land must allow to a significant extent the preservation of wildlife and other
use" for this purpose is expressly limited to "hiking, camping, nature study and observation, boating, golfing, horseback riding, hunting, fishing, skiing, swimming, picnicking, private non-commercial flying, including hang gliding, archery and target shooting." Landowners must apply annually to their local assessors for recreational classification of their land.9

The first definition of qualifying land is straightforward. If the land is retained to a substantial degree in a natural, wild, or open condition it may qualify. One issue to be clarified through regulations is how substantial this retention of such land in its natural, wild, or open state must be. In light of the constitutional purpose for such classification, it is reasonable to construe the word "substantial" as referring to the condition or state of the land rather than the size of the parcel. Since the statute utilizes the verb "retained," forested land or stripped or excavated land that has been transformed or reclaimed by man-made means to a more or less natural state will not qualify under this first definition.

The second definition of eligible land does permit recreational classification for land managed, handled, and modified by man. Its current state, however, must be "landscaped." Such landscaping must allow the preservation of wildlife and other natural resources to a significant or meaningful extent. The legislation lists some examples of natural resources whose preservation may qualify land for recreational classification. Natural resources are protected by the constitution.11 In the opinion of the Attorney General, they would include at the very least, without limitation: air, water, wetlands, rivers, streams, lakes, ponds, coastal, underground and surface waters, flood plains, seashores, dunes, marine resources, ocean, shellfish and inland fisheries, wild birds including song and insectivorous birds, wild mammals and game, sea and fresh water resources, or, alternatively, the land must be devoted "primarily" to recreational use. See Department of Revenue, Property Tax Bureau, T.I.R. 80-202 (March 3, 1980). Notwithstanding any contrary intention on the draftsmen's part, it is clear that the statute treats land fitting the recreational use definition as eligible for recreational classification without regard to whether such land is retained in either a "wild" or a "landscaped" condition. Rules of syntax simply do not support the department's view. In addition, the wording of the constitutional amendment authorizing this legislation would seem to support this author's reading of the statute.

8 G.L. c. 61B, § 1.
9 Id., § 3.
10 The examples are "ground or surface water resources, clean air, vegetation, rare or endangered species, geologic features, high quality soils, and scenic resources." G.L. c. 61B, § 1.
11 Mass. Const. amend. XLIX.
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fish of every description, forests and all uncultivated flora, together with public shade and ornamental trees and shrubs, land, soil and soil resources, minerals and natural deposits, agricultural resources, open spaces, natural areas, and parks and historic districts or sites. Thus, an historic site located on a landscaped five acre parcel may qualify the parcel for recreational classification.

There is a distinction between the degree of environmental protection required for the first two types of land eligible for the recreational land classification. The first definition covers land retained in its natural or open state to a "substantial" or considerable degree. The second refers to land developed by man and requires that natural resources be preserved to a "significant" extent. The "significant" or meaningful protection standard contained in the second definition of qualifying land appears less stringent than the first definition's "substantial" or considerable protection. The distinction may reflect a desire to preserve to the greatest extent possible land that has remained undisturbed.

The third definition of land eligible for "recreational" classification, unlike the previous two, requires actual recreational use of the land. Landowners in the commonwealth who have parcels of land well-suited for hiking, camping, nature study, and similar qualifying recreational uses may take advantage of the "recreational" classification without surrendering more than a modicum of their privacy. The definition does not appear to require them to open their entire property to the public. Making the property available to the local boy scout troop or similar "non-profit organization" should suffice, provided the land remains "devoted primarily" to recreational use. The statute does not require that the qualifying use occur with any frequency or on a minimum annual aggregate number of occasions. Moreover, land that is not utilized in any significant manner for anything but the defined recreational use should meet the "primary devotion" requirement regardless of the extent or frequency of use.

All three definitions of recreational land are silent with regard to the commercial nature of the land use. A large parcel containing a coal mine, a quarry, or a commercial ski resort but otherwise meeting any one of the three statutory definitions would seem to be completely eligible for "recreational" classification. In these cases, however, the new use classification statute will require the separate classification of these non-recreational portions of recreational land.

13 G.L. c. 61B, § 1.
14 See id.
15 See G.L. c. 59, § 2A. In addition, only land is eligible for recreational classification. Buildings on recreational sites are fully taxable. G.L. c. 61B, § 10.

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Although an owner of recreational land pays only about 25 percent of the otherwise assessable real estate taxes,\(^{16}\) he remains fully subject to assessments for the costs of special municipal service or betterments.\(^ {17}\) Such cost will be assessed to the recreational land only to “such pro rata extent” as is attributable either to a direct improvement of “the recreational use capability of” the land or to a “personal benefit” to the owner of the land.\(^ {18}\) The owner may elect to have the special assessment remain suspended while the qualifying use is continued.\(^ {19}\)

Although the new statute substantially reduces the normal real estate tax for recreational land, it subjects such land to two new special taxes, if the qualifying use ceases or if the property is sold for a “non-recreational” use. These two potentially severe taxes, the “conveyance tax” and “roll-back tax”\(^ {20}\) have been adopted with minor revisions from the “conveyance” and “roll-back” tax provisions in chapter 61A dealing with agricultural lands.\(^ {21}\) The conveyance tax applies to recreational lands only if the property is sold for another use, or utilized in a non-qualifying manner within the ten-year period running from the first day of the fiscal year in which the land was first classified as recreational.\(^ {22}\) The rate of tax, either ten percent or five percent, depending on the length of initial classification, is applied either to the sales price or to the fair market value of the property.\(^ {23}\) If within the first five years of the proscribed decade the property is sold for another use or its use is changed to a non-qualifying use, the tax will be ten percent of the sales price or the fair market value of the property.\(^ {24}\) If the chronologically proscribed sale or change in use occurs during the second five

\(^{16}\) G.L. c. 59, § 5, forty-eighth, added by Acts of 1979, c. 713, § 3. If the qualified use ceases, the property may then be subject to the conveyance tax on the roll-back tax. G.L. c. 61B, §§ 7, 8. The 1979 legislation inadvertently exempted “recreational land” from all taxes other than penalty taxes and the betterments taxes. In 1980, this oversight was corrected, and “recreational land” is now to be taxed annually at the rate applicable to the commercial class within the taxing community. G.L. c. 61B, § 2, as amended by Acts of 1980, c. 261, § 19.

\(^{17}\) G.L. c. 61B, § 13.

\(^{18}\) Id.

\(^{19}\) Id. Interest on the unpaid assessment must, however, be paid annually. Id.

\(^{20}\) Id., §§ 7, 8.

\(^{21}\) See G.L. c. 61A, §§ 12, 13.

\(^{22}\) G.L. c. 61B, § 7. The tax is paid by the transferor or owner to the municipality in which the land is located. Id.

\(^{23}\) Id. As initially enacted, the conveyance tax was geared to the length of ownership rather than the period of recreational classification. Consequently, land classified “recreational” for 5 years would have escaped the conveyance tax if, when sold or converted to a non-qualifying use, it should have been owned for more than 10 years by the seller or converting owner. This loophole in the conveyance tax was closed in 1980. The tax is now pegged strictly to the length of classification. G.L. c. 61B, § 7, as amended by Acts of 1980, c. 261, §§ 20, 20A.

\(^{24}\) Id.
years of initial classification the conveyance tax will be five percent.\textsuperscript{25} No conveyance tax is payable after the first ten years of such classification.\textsuperscript{26}

The conveyance tax is unusual in that it is assessed against the seller on the basis of the buyer’s prospective use of the property.\textsuperscript{27} For this reason, the statute will not impose the tax on a seller if the purchaser files with the local assessors an affidavit of his intention to buy the land for a qualified recreational use.\textsuperscript{28} A false affidavit or a failure to continue a qualifying use will make the buyer liable for the conveyance tax which would have been due when he acquired the land.\textsuperscript{29}

Complementing the conveyance tax is the so-called “roll-back” tax. This tax applies to the tax year in which the land loses its recreational status and also to each of the preceding nine years during which the land was classified as recreational.\textsuperscript{30} The roll-back tax is applicable only to the extent that it exceeds the applicable conveyance tax. In such case, the conveyance tax is superseded.\textsuperscript{31} The roll-back tax is designed to make the municipality whole, i.e., to see that the city or town, for each pertinent year within the maximum ten year roll-back period, receives the taxes to which it would have been entitled had the land been classified and taxed like any other taxable land. Thus, a change to a non-recreational use in the eleventh month of the ten year period of recreational classification triggers not only a current tax but also nine years of retroactive taxes. As an added disincentive, the roll-back tax due for each year bears interest over the entire roll-back period up to the date of payment.\textsuperscript{32}

The roll-back tax is triggered when the qualifying use has ceased. Whether the owner had applied that year for recreational classification is of no consequence.\textsuperscript{33} If, however, the qualifying use ceases during a year for which no current recreational classification is in effect, roll-

\textsuperscript{25} Id.
\textsuperscript{26} Id.
\textsuperscript{27} Id.
\textsuperscript{28} Id.
\textsuperscript{29} Id.
\textsuperscript{30} G.L. c. 61B, § 8.
\textsuperscript{31} Id.
\textsuperscript{32} Id. The rate of interest is the same as that due on any delinquent local property tax. See G.L. c. 59, § 57. Currently, the rate is 14\%, recently increased from 10\%. G.L. c. 59, § 57, as amended by Acts of 1979, c. 503, § 1. This change became effective for fiscal years beginning July 1, 1979, and thereafter. The Department of Revenue will apply this new, higher rate over the entire roll-back period. See Department of Revenue, Property Tax Bureau, T.I.R. 80-202 (March 3, 1980). A more equitable solution, however, would be to construe the roll-back tax interest provision as applying the statutory rate in effect for each roll-back year.
\textsuperscript{33} G.L. c. 61B, § 8.
back taxes will apply to the current year and to those individual years within the prior ten year period for which the classification was in effect.\textsuperscript{34} Thus, the owner who anticipates a change of use and hence does not apply for recreational classification may pay taxes for eleven years. If this owner had applied for current recreational classification and then changed the use, he would be subject to a maximum of ten years of taxes.

Land will not be subject to roll-back taxes if it is purchased for any “public purpose” by the municipality in which it is located.\textsuperscript{35} Since the conveyance tax is inapplicable after ten years of classification, an individual who sells land to the municipality for some public purpose after that land had been classified recreational for more than ten years avoids a penalty tax completely, regardless of whether a qualifying recreational use is contemplated by the acquiring municipality.\textsuperscript{36} Well-advised sellers or owners should use such tax factors as a part of their price negotiations.

Although classification as recreational land with the accompanying reduction in real estate taxes appears attractive, the potential subsequent imposition of either of the penalty taxes should make many eligible landowners wary. First, not all disqualifying events triggering the penalty taxes are within the owner’s control. For example, certain climatological events may cause a qualifying recreational use, such as skiing, to “materially interfere with the environmental benefits” derived from the land,\textsuperscript{37} thereby subjecting the landowner to a single lump sum assessment of ten years taxes. Second, the legislature added another restriction in the nature of a restraint on transferability. Recreational land cannot be sold or converted for “residential, industrial or commercial use” during the period of its recreational classification without giving the local municipality in which the land is situated a right of first refusal.\textsuperscript{38} The city or town has a ninety day option either to meet the bona fide offer, in the case of a proposed sale, or to purchase at the appraised fair market value in the case of a conversion.\textsuperscript{39} This portion of the statute requires the giving and recording of appropriate notices,

\textsuperscript{34} \textit{Id.}
\textsuperscript{35} G.L. c. 59, § 57. If, however, the municipality’s public purpose encompassed any use of the land other than “qualifying recreational” usage, the conveyance tax could be assessed. This result would occur whether such acquisition was effected by agreement of sale or by eminent domain. \textit{See G.L. c. 61B, § 7. See generally, G.L. c. 79 (eminent domain). When land is taken by eminent domain, however, the amount of the applicable conveyance tax is added to the price of the taking. G.L. c. 61B, § 7.}
\textsuperscript{36} \textit{Id.}, §§ 7, 8.
\textsuperscript{37} \textit{Id.}, § 1.
\textsuperscript{38} \textit{Id.}, § 9.
\textsuperscript{39} \textit{Id.}
affidavits, and certifications to protect innocent and bona fide transferees. Although the right of first refusal does not apply to mortgage foreclosure sales, the foreclosing party must nevertheless give the required notices. When property is sold in foreclosure, mortgagees should specify in their notice of sale whether the property is to be sold solely for "recreational" usage. Sale for another use, although possibly commanding a higher sales price, may trigger an assessment of the conveyance and roll-back taxes. Eligible landowners should weigh these possible pitfalls carefully before seeking recreational classification for their land.

The assessment and collection procedures for the penalty taxes, with some necessary modifications, are similar to the procedures applicable to property taxes generally. For example, roll-back taxes designed to reach back nine or ten years obviously cannot be subject to the short period of limitation applicable to property taxes. An owner who wishes to contest either the applicability or the amount of one of the penalty taxes has the usual abatement and appeal remedies to the appellate tax board. One significant difference in the appeal procedure is that, unlike the general property tax, no portion of the assessed tax need be paid as a condition of appeal to the appellate tax board.

The constitutional amendment permitting a recreational classification system of taxation does not require that one can be enacted. It requires only that if enacted, any such system must "develop and conserve . . . natural resources and the environmental benefits of recreational lands within the commonwealth." Although the prospect of reduced real estate taxes appears enticing, the potential for a severe penalty tax combined with the municipal option on the land may discourage some landowners from seeking recreational classification. Other taxpayers, however, such as owners of country clubs, golf courses, camps, and the like will find the recreational classification extremely attractive. The

40 Id.
41 Id. Assumedly "friendly" mortgage foreclosures, where the debtor and creditor appear to act at less than arm's lengths, may not qualify for this exemption. Courts, particularly in the area of taxation, are accustomed to ignoring the form of transactions in order to render a decision based on the economic realities of the transaction. See, e.g., Helvering v. Elkhorn Coal Co., 95 F.2d 732 (4th Cir. 1937) (step transaction approach used to defeat claimed tax-free reorganization).
42 See G.L. c. 61B, § 4 (procedure similar to omitted property assessments under chapter 59); Id., § 6 (procedure regarding application); Id., § 7 (collection of conveyance tax similar to collection of normal real estate taxes); Id., § 14 (roll-back tax assessed like omitted property assessments).
43 See G.L. c. 61B, § 14.
44 Id.
45 Compare G.L. c. 61B, § 14, with G.L. c. 59, §§ 59, 64, 65, 65B.
46 MASS. CONST. amend. XL1, as amended by MASS. CONST. amend. CX.
penalty taxes should serve this constitutional purpose well. Such taxes may discourage some from initially seeking classification, but the desire to avoid such severe taxes will surely encourage the continued recreational usage, even in the face of potential alternative and profitable development.

§16.10. Real Estate Taxation—Legislation—Miscellaneous. During the Survey period, two changes were made in the taxation of energy-related property. Chapter 388 of the Acts of 1978 extended from ten to twenty years the exemption from local property taxes for solar and wind powered energy systems which provide energy for taxable property.\(^1\) Chapter 367 of the Acts of 1979 created an exemption from local property taxes for certain hydroelectric power facilities whose construction began after January 1, 1979.\(^2\) To qualify for the exemption the owner of the facility must first agree with the municipality in which the facility is located "to make a payment in lieu of taxes which shall be at least five percent of its gross income in the preceding calendar year."\(^3\) The exemption is limited to twenty years from the date of completion of the facility.\(^4\) A utility company seeking this exemption undoubtedly will negotiate such an agreement prior to commencing construction. The statute does not address how the exemption will apply to new utility companies with no previous earnings.

Other Survey period real estate tax legislation will aid taxpayers who believe they have been victims of disproportionate assessment. Chapter 383 of the Acts of 1979 requires the Commissioner of Revenue to submit to the legislature a report stating the full cash valuations of all property in each municipality, the ratio of assessments in each municipality to full cash values of each class of property, and the ratio of total assessed values to total cash values in the particular municipality.\(^5\) In any appeal to the Appellate Tax Board concerning assessed valuation of the property, the Commissioner’s report on the taxing municipality must be admitted in evidence by the Board \textit{sua sponte}.\(^6\) Such report shall be prima facie evidence of the assessment practices of the municipality in question.\(^7\) Moreover, the Board may grant an abatement on the basis of this evidence, even though that issue has not been raised in the pleadings.\(^8\) Consequently, if a municipality has

\(\text{\$16.10. 1 G.L. c. 59, § 5, forty-fifth, as amended by Acts of 1978, c. 388 (approved July 12, 1978, effective ninety days thereafter).}\)
\(\text{\$16.10. 2 G.L. c. 59, § 5, forty-fifth A, added by, Acts of 1979, c. 367.}\)
\(\text{\$16.10. 3 Id.}\)
\(\text{\$16.10. 4 Id.}\)
\(\text{\$16.10. 5 G.L. c. 58, § 10C, as amended by Acts of 1979, c. 383, § 1.}\)
\(\text{\$16.10. 6 G.L. c. 58A, § 12C, added by Acts of 1979, c. 383, § 3.}\)
\(\text{\$16.10. 7 Id.}\)
\(\text{\$16.10. 8 Id.}\)
been guilty of disproportionate assessments, a taxpayer may obtain an abatement merely by proving the full cash value of his property.

A third area of legislative change in the taxation of real estate was interest rates. Chapter 503 of the Acts of 1979 increased the interest on late payments of local property taxes from ten to fourteen percent per annum. A Similar increases were made in the interest payable in connection with the redemption of real estate taken or sold for taxes and the interest recoverable by a purchaser or assignee of such real estate. Each rate has been increased from twelve to sixteen percent per annum, effective for land “purchased or taken under a tax title on or after” August 16, 1979.

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11 Id.