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C H A P T E R 3

State and Local Taxation

GEORGE T. SHAW

§3.1. Introduction. During the SURVEY year, the Massachusetts personal income tax law was completely revised and rewritten. Not only did the legislature change the method of determining the tax, but, in so doing, it rejected the concept of the tax as a property tax, as it had been construed historically by the Supreme Judicial Court. The statute that made this sweeping change, Chapter 555 of the Acts of 1971, principally Section 5 thereof, also made significant changes in other taxing statutes of the Commonwealth. These other changes will be discussed later in this chapter.

A. INCOME TAXES

§3.2. Definitions. Acts of 1971, c. 555, §5, repeals G.L., c. 62, §§1-8, the basic operative provisions of the personal income tax statute, substituting in their place new Sections 1-8. Each person preparing Massachusetts income tax returns or providing advice with respect to Massachusetts tax matters will need to read the new law carefully. The starting point under the new statute is the determination of “gross income,” “adjusted gross income,” and “income subject to taxation.”

“Gross income” is gross income for purposes of the Internal Revenue Code (hereafter, the “Code”), to which is added (i) interest on certain federally exempt governmental obligations, (ii) the federal dividend exclusion, (iii) earned income from foreign sources, and (iv) employer contributions to annuity plans for employees of certain charitable organizations and public schools; and from which is subtracted (i) federally taxable interest on United States obligations and (ii) federal Code Subchapter S income.

“Adjusted gross income” is gross income as above defined, less the deductions allowable by Code §62 in determining adjusted gross income, and less the deduction under Code §404 for contributions to certain employee benefit plans. However, the following Section 62 deductions are not allowed: (i) the 50 percent long-term capital gains deduction, (ii) the depreciation and depletion deductions for life tenants and trust income beneficiaries, (iii) that part of moving expense deductions attributable to moves to a principal place of work where the income from such work is not subject to Massachusetts taxation, (iv) any Subchapter S deduction, and (v) deductions relating to non-taxable income.

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“Income subject to taxation” is adjusted gross income as above defined, less the following exempt income: (i) interest from obligations of Massachusetts and its political subdivisions, (ii) income from employee benefit plans of the United States or Massachusetts and its political subdivisions, to which the employee has contributed, (iii) income received by corporations, except with respect to certain income of corporate trustees, (iv) income of public charitable trusts and organizations, (v) income received from a fiduciary to the extent such income is taxed to the fiduciary, (vi) dividends from taxable transferable share trusts, partnerships and associations to the extent such dividends are exempt under Chapter 62 of the General Laws, (vii) income received by a fiduciary for a nonresident to the extent such income would be exempt from tax if received directly by the nonresident, and (viii) interest and dividends from certain savings accounts and deposits to the extent of \$100 for a single person or \$200 for a husband and wife filing a joint return.

§3.3. Classes of income under the 1971 amendment. Income subject to taxation, which is the net result of the additions to and subtractions from federal gross income described in the preceding paragraphs, is then divided into two separate classes of income, Section 4(a) income and Section 4(b) income. To the extent Section 4(a) income exceeds allowable exemptions and deductions, it is taxed at 9 percent. To the extent Section 4(b) income exceeds allowable exemptions and deductions, it is taxed at 5 percent.

Briefly stated, Section 4(a) income consists of net capital gain, and interest and dividends from corporations and from trusts, partnerships, and associations with transferable shares. Specifically excluded from the interest taxable at 9 percent are interest and dividends from savings deposits, savings accounts, and shares and share savings accounts in specified Massachusetts and national savings or cooperative banks, trust companies, credit unions, and savings and loan associations. The interest excluded from Section 4(a) does constitute Section 4(b) income and is taxable at 5 percent, subject to the \$100/\$200 exclusion mentioned above.

Capital gain and capital loss are determined pursuant to the rules in the Code, except that the 50 percent capital gains deduction is not allowed. “Net capital gain” is defined in Section 4(a)(3) as the excess of gains over losses “from sales or exchanges of capital assets or from other transactions deemed to be sales or exchanges of capital assets or granted gains treatment under the provisions of the Code.” There is a parallel definition for net capital loss. Under both definitions, capital loss carrybacks and carryovers are not taken into account. Net capital gain includes capital gains distributions of regulated investment companies and real estate investment trusts. Gains resulting from the taking of property by eminent domain are no longer taxed at a special rate. Any gain taxed as ordinary income under the Code is taxed as Section 4(b) income rather than Section 4(a) income. Up to \$1000 of the net capital loss is set off against interest and dividends, and any

excess net capital loss is available for the next five years to offset other Section 4(a) income and \$1000 of interest and dividends.

The limited deduction for interest paid on certain debts is carried over without substantial change to the new statute and is offset against Section 4(a) income. Against Section 4(b) income a taxpayer may deduct social security taxes paid and income from specified contributory governmental pension and retirement funds. However, Massachusetts taxes paid on business income may no longer be deducted.

Income subject to taxation is exempt if total income for the year is less than \$3000 for a single person and \$5000 for a husband and wife filing a joint return, and no tax can reduce total income below those figures. Under the old law the applicable amounts were \$2000/\$2500.

§3.4. Exemptions. The exemptions are substantially the same as before, except for the following changes: the exemption for a husband and wife filing a joint return has been increased from \$2000 to \$2600; the exemption for a married person filing a separate return has been reduced from \$2000 to \$1000; and a new exemption has been added for the premium for compulsory motor vehicle insurance for a single non-business passenger vehicle. A husband and wife must file a joint return to claim this new exemption. In cases of short taxable years not caused by the taxpayer's death, exemptions are to be apportioned. The exemptions are applied against Section 4(b) income; any excess may be applied against Section 4(a) income.

§3.5. Basis of property. The old law contained its own provisions for determining the basis of property in the case of its sale or exchange. As illustrated by the following examples, the basis of property for Massachusetts purposes sometimes differed from the federal basis: (i) property passing by reason of death took as its basis for Massachusetts purposes the value at the time of death, while for federal purposes its basis was either its value at date of death or its value one year later if the alternate valuation election was made; (ii) the basis of mutual fund shares was reduced by capital gains distributions for Massachusetts purposes, but not for federal purposes; and (iii) Massachusetts did not permit increasing the basis of donated property by the amount of gift taxes paid on account of the gift, as was permitted under the Internal Revenue Code.

The new law provides that for property acquired after January 1, 1971, the basis shall be determined, "insofar as applicable," in accordance with the Code, but if the basis of property was adjusted under G.L., c. 62 prior to January 1, 1971, such adjustments shall continue in effect. It is likely that the State Tax Commission will take the position that the "insofar as applicable" provision will be operative where the federal basis would be the value on the alternate valuation date or would be adjusted by reason of gift taxes paid on donated property. In these cases, because alternate valuation election and gift taxes are alien to the Massachusetts taxing system, the federal basis will not be used. The new statute is silent as to what basis will be used in the above situation, but presumably it would be the basis under the

old statute, i.e., the value at date of death with respect to alternate valuation election, and the donor's basis with respect to donated property. The new statute needs clarification in this regard.

§3.6. Dividends, earnings, and profits. Transferable share trusts, partnerships, and associations engaged in Massachusetts in any business, activity, or transaction for the purpose of financial profit or gain, are now taxed under G.L., c. 62. Section 8(b) excludes from this provision regulated investment companies, real estate investment trusts, certain holding companies, and trusts, partnerships, and associations deriving less than 10 percent of their income within Massachusetts. Dividends paid by partnerships, trusts, and associations subject to tax are exempt, while dividends paid by those not subject to tax are not exempt. Transitional rules will ensure that previously untaxed accumulated earnings and profits are not distributed to the shareholders free of tax. Eliminated are (a) the provisions whereby such partnerships, trusts, and associations were not subject to tax, but still had distributions treated as dividends to the shareholders, and (b) the provisions by which the entity could consent to be taxed itself, thereby making distributions which were tax free to the shareholders.

There are several obvious textual errors in Section 5 of Chapter 555 as enacted,¹ presumably attributable to the haste with which it was drafted and the pressure placed upon the draftsmen by the legislative process. Corrective legislation will likely be prepared and submitted to the legislature. Anyone dealing with Chapter 555 will be well advised to look for the corrective legislation, which should be enacted during the 1972 SURVEY year.

§3.7. Policy changes. As the foregoing discussion has shown, the new law is closely tied to the determination of federal gross income. All Section 4 income, unless specifically excluded or offset by allowable exemptions or deductions, is subject to tax, either at 5 percent or 9 percent. In addition, some items not subject to federal tax are subject to Massachusetts tax (for example, earned income from foreign sources). The concept of an all-inclusive income tax is new to Massachusetts, and the changes which this new concept will make on a given tax return may not be readily apparent. However, some of the more important changes not described above should be noted: (1) annuities which were formerly taxed at 2 percent are now taxed to the extent taxed under the federal exclusion ratio; (2) rental income from real estate is taxable; (3) alimony payments are taxable to the extent taxed for federal purposes, but no corresponding deduction is allowed to the former spouse making the payments; and (4) gains from the sale of a principal residence are taxable in the same manner as they are for federal purposes.

Of equal, if not greater, importance than the mechanics of calcula-

¹ §3.6. These textual errors involve typographical errors and errors relating to juxtaposition of paragraphs, e.g., the last three paragraphs of c. 555, §4(d) should be in §4(c).

ting the tax is the new philosophy of taxation which the statute represents. It will be remembered that the Supreme Judicial Court, in a long line of decisions,¹ has held that the tax imposed by G.L., c. 62 (prior to the 1971 amendment) was not an income tax of the excise type,² but rather was a tax upon the property producing income and, hence, a property tax.³ A consequence of this characterization of the tax as a property tax has been the Court's unwillingness to apply the Massachusetts tax to income derived from out-of-state property, on the grounds that the tax would be on the foreign property itself. Thus, the Court held that timber severance royalties received by a Massachusetts taxpayer with respect to Maine timberland were not subject to tax.⁴ Mining royalties were similarly exempted where received as a dividend from a transferable share trust whose sole asset was Minnesota real estate.⁵ The new statute should end once and for all the dispute between the Court and the legislature over whether or not the personal income tax is a property tax. Short of an express legislative declaration that the new law is to be construed as a true income tax, the legislature has done as much as possible to enact a tax having all the characteristics of an income tax. It is to be hoped that the Supreme Judicial Court will construe it as such, for this interpretation will allow the Chapter 62 tax to be an efficient and effective revenue-collecting measure.

B. CORPORATION TAXES

§3.8. Net income, deductions, gross investment income. Acts of 1971, c. 555, made several changes in G.L., c. 63, relating to the taxation of corporations. In computing "net income," banks and trust companies may no longer deduct foreign, state, and local income, nor may they deduct franchise and capital stock taxes paid. Furthermore, they may not take advantage of credits allowed under the Internal Revenue Code.¹ Similarly, in computing "net operating income," savings and cooperative banks and savings and loan associations may not deduct federal and state taxes paid.²

Domestic insurance companies within the scope of Chapter 175 are now subject to a tax equal to 1 percent of their total gross investment income,³ and savings banks having insurance departments must pay a tax equal to 1 percent of the total gross investment income earned

§3.7. ¹ E.g., *State Tax Commn. v. Fine*, 356 Mass. 51, 247 N.E.2d 701 (1969), and cases therein cited.

² *Riesman v. Commissioner of Corps. and Taxation*, 326 Mass. 574, 576, 95 N.E.2d 656, 658-659 (1950).

³ "In its essence a tax upon income derived from property is a tax upon the property." Opinion of the Justices, 220 Mass. 613, 624, 108 N.E. 570, 574-575 (1915).

⁴ *State Tax Commn. v. Wheatland*, 343 Mass. 650, 180 N.E.2d 340 (1962).

⁵ *State Tax Commn. v. Fine*, 356 Mass. 51, 247 N.E.2d 701 (1969).

§3.8. ¹ Acts of 1971, c. 555, §25, amending G.L., c. 63, §1.

² Acts of 1971, c. 555, §26, amending G.L., c. 63, §11.

³ Acts of 1971, c. 555, §27, adding §22A to G.L., c. 63.

from the assets of their insurance departments.⁴ These measures are clearly revenue-raising in purpose. The same cannot be said for the provision imposing a tax on insurance companies (other than life insurance companies) equal to 50 percent of increased income, above a specified level, which is attributable to savings in costs under the no-fault insurance law but is not returned to the policyholders.⁵

Brought within the definition of “domestic business corporations” and “foreign corporations” under Chapter 63, and made subject to tax thereunder, are charitable corporations organized under Chapter 180 which are not exempt from taxation under Code §501.⁶ In determining “taxable net income,” domestic business corporations and foreign corporations may no longer deduct from net income dividends received from transferable share trusts, partnerships, and associations engaged in business in Massachusetts,⁷ or taxes paid to Massachusetts which are deductible under the Code.⁸

C. SALES AND USE TAXES

§3.9. Definitions. Minor changes have been made in G.L., cc. 64H and 64I, which impose the sales and use taxes. The definition of “engaged in business in the Commonwealth” has been rewritten, but no substantive change has been made,¹ and the definition of “retailer” has been amended to include the Commonwealth or any of its political subdivisions or agencies when making retail sales of a kind ordinarily made by a private person.² This latter change appears to have been prompted in part by a decision³ of the Supreme Judicial Court during the SURVEY year, holding invalid a regulation of the State Tax Commission⁴ which subjected to the sales tax those sales by the United States, the Commonwealth, or any political subdivision or agency of property ordinarily sold by private persons. The Court concluded that there was no statutory authorization for the regulation since the word “person” in the sales tax statute was not broad enough to include governmental bodies, specifically municipal electric light departments.

The meals tax, which is akin to a sales and use tax, now is applied to alcoholic beverages sold for consumption on the premises, whether or not accompanying meals.⁵ In a related change, alcoholic beverages

⁴ Acts of 1971, c. 555, §29, amending G.L., c. 63, §18.

⁵ Acts of 1971, c. 555, §27A.

⁶ Acts of 1971, c. 555, §32, amending G.L., c. 63, §30.

⁷ Acts of 1971, c. 555, §33, amending G.L., c. 63, §38A.

⁸ Acts of 1971, c. 555, §34, amending G.L., c. 63, §38A; Acts of 1971, c. 555, §36, amending G.L., c. 63, §42A.

§3.9. ¹ Acts of 1971, c. 555, §40, amending G.L., c. 64H, §1(5).

² Acts of 1971, c. 555, §41, adding subsection (e) to G.L., c. 64H, §1(9).

³ *City of Taunton v. Commissioner of Corps. and Taxation*, 1971 Mass. Adv. Sh. 501, 268 N.E.2d 676.

⁴ Emergency Regulation No. 13, dated July 27, 1966.

⁵ Acts of 1971, c. 555, §44A, amending G.L., c. 64B, §1.

served as a part of a meal and subject to the meals tax are defined as “food products” and thus are exempt from the sales tax.⁶ Also, the exemption from the sales tax of sales of alcoholic beverages to the extent such sales are subject to tax under Chapter 63A (gross receipts tax on sales by licensed alcoholic beverage sellers) has been repealed.⁷

Of more importance is the narrowing of the definitions of certain key terms relating to the exemption from the sales tax of sales of materials, tools, and fuels which become an ingredient or component part of tangible personal property to be sold, or which are consumed and used directly and exclusively for certain manufacturing and production processes, including use in an industrial plant in the actual manufacture of property to be sold. Formerly, “consumed and used” and “industrial plant” were not defined; that omission has now been remedied.⁸ A material is “consumed and used” only if it has a normal useful life of less than one year or if its cost is currently deductible for federal income tax purposes. An “industrial plant” is defined as a factory at a fixed location primarily engaged in manufacturing, converting, or processing property for retail sale. Similarly, machinery or its replacement parts must be used “directly and exclusively” for specified manufacturing and production processes in order for its sale to be exempt. There are now detailed criteria for determining whether such machinery and parts are used “directly and exclusively” for the specified purposes.⁹ Questions of interpretation under these exemptions and comparable ones in other states have been legion.¹⁰ The new statute should resolve some of the problems presented by these exemptions,¹¹ but one can still expect considerable litigation to arise under these provisions.

D. INHERITANCE TAXES

§3.10. Statutory changes. Chapter 555 of the Acts of 1971 also made significant changes in the substantive and procedural taxing provisions of the inheritance tax law. One important change relates to the taxability of proceeds of life insurance on the decedent’s life. Heretofore the law with respect to the taxation of such proceeds was a matter of case law, with the general rule being that such proceeds were not subject to the inheritance tax if they were payable to a named beneficiary (including the trustee of an inter vivos trust) other than the decedent’s executor or administrator or the trustee of his testamentary

⁶ Acts of 1971, c. 555, §44, amending G.L., c. 64H, §6(h).

⁷ Acts of 1971, c. 555, §45, amending G.L., c. 64H, §6(g).

⁸ Acts of 1971, c. 555, §45, amending G.L., c. 64H, §6(r).

⁹ Acts of 1971, c. 555, §45, amending G.L., c. 64H, §6(s).

¹⁰ See, e.g., *Courier Citizen Co. v. Commissioner of Corps. and Taxation*, 1971 Mass. Adv. Sh. 21, 266 N.E.2d 284; *Wakefield Ready-Mixed Concrete Co. v. State Tax Commn.*, 356 Mass. 8, 247 N.E.2d 869 (1969), discussed in 1969 Ann. Surv. Mass. Law §13.20.

¹¹ For example, the issue posed in *Courier Citizen Co. v. Commissioner of Corps. and Taxation*, 1971 Mass. Adv. Sh. 21, 266 N.E.2d 284, relating to possible sales tax exemption of particular items of materials, machinery, and replacement parts, was thereafter resolved by Acts of 1971, c. 555, §45, amending G.L., c. 64H §§6(r) and (s).

trust.¹ As a result of a new statute, applicable to decedents dying on or after July 22, 1971, life insurance proceeds are taxable to the extent of (i) amounts receivable by the decedent's executor or administrator and (ii) amounts receivable by all other beneficiaries under policies with respect to which the decedent possessed, at the time of his death, any of the incidents of ownership within the meaning of Internal Revenue Code §2042.² However, the first \$25,000 of such amounts receivable by a surviving spouse or by surviving children as named beneficiaries is exempt. Provisions are made for allocating the exemption among the spouse and children. It is understood that the Massachusetts Inheritance Tax Bureau considers the \$25,000 exemption applicable to life insurance proceeds payable to the trustee of an inter vivos trust for the benefit of the spouse and/or children. The result of these changes is that the federal rule for the taxability of life insurance proceeds is for all practical purposes the new Massachusetts rule, subject to the \$25,000 exemption. Estate planning with respect to life insurance should be made easier now that the tax consequences of various planning techniques will be essentially the same for federal estate and Massachusetts inheritance tax purposes.

In another move bringing the Massachusetts tax in closer conformity with the federal estate tax, the legislature has provided that annuities and life estates shall be valued in accordance with the valuation tables in the federal estate tax regulations,³ rather than pursuant to the American Experience Table, which formerly had been used.⁴ This change, too, applies to deaths on or after July 22, 1971.

The due date of inheritance taxes has been changed to conform with recent changes in the due date for the federal estate tax. For deaths on or after July 22, 1971, taxes on present interests are due nine months after the date of death, taxes on future interests are due six months after the right of possession or enjoyment accrues, and the succession tax under Chapter 65A is due twelve months after the date of death.⁵

The procedure and timing for filing inheritance tax forms have been clarified and simplified. These changes become effective on January 1, 1972. The procedure which is about to be superseded has been subject to considerable confusion because the Inheritance Tax Bureau has issued policy directives and memoranda which have not only seemed at odds with existing statutes but which themselves were changed with some frequency. The result was that many practitioners felt uncertain about the procedure to be followed. It is hoped that this confusion and uncertainty will be dispelled by the new statute. It should be noted that the bureau feels that the statute does not prescribe a new procedure but rather codifies the existing practice administratively established by the bureau.

Chapter 555 of the Acts of 1971 provides that a "return" shall be

§3.10. ¹ See generally Barrett and Bailey, 4A Mass. Practice Series §1037 (1970).

² Acts of 1971, c. 555, §52, amending G.L., c. 65, §1.

³ Treas. Reg. §20.2031-10 (1970).

⁴ Acts of 1971, c. 555, §56, amending G.L., c. 65, §13.

⁵ Acts of 1971, c. 555, §§54 and 62, amending G.L., c. 65, §7, and c. 65A, §2, respectively.

filed on or before the due date of the tax.⁶ At least initially the “return” will consist of the familiar “L” series of forms: the L-1, L-16, L-16A and L-19X; but it is to be hoped that these forms can be consolidated into a single form similar to the federal Form 706. The return is to include or be accompanied by a full and complete inventory, an attested copy of the will, a copy of the federal estate tax return (if applicable), a computation of the tax, and a list of deductible debts and expenses (if an election is made to itemize the deductions rather than take the standard deduction). The return is also to be accompanied by payment of any balance of the tax shown to be due and a \$10 filing fee. In cases where a federal estate tax return must be filed, the commissioner is authorized to grant an extension for filing the return until three months after final settlement of federal estate taxes. Extensions may be granted in other cases for good cause, but in any case (including federal estate tax cases) are not automatic but must be applied for on new form 58-31A. The application must be filed on or before the due date of the tax and must be accompanied by an amount equal to the tax estimated to be due. If at least 80 percent of the tax actually due is not paid as of the due date, any extension previously granted will be deemed void, and the return will be treated as a late return with corresponding penalties. However, of more importance is the requirement that the entire tax due must be paid on or before the due date of the tax in order to avoid interest payments.⁷ Hereafter, payment of 80 percent of the final tax on or before the due date will prevent the imposition of a penalty but not imposition of interest at 8 percent.

The election to itemize deductions rather than take the standard deduction, available in cases of less than \$100,000 of property subject to taxation, will henceforth be made when the return is filed.⁸ Formerly the election had to be filed within 210 days of the filing of the bond of the executor, administrator, or other person responsible for the tax.

To summarize the statutory procedure, in nonfederal estate tax cases the return with the necessary supporting documents and payment of the tax due must be filed on or before the due date of the tax. Nothing is required to be filed before that time. In federal estate tax cases an application for extension must be filed on or before the due date, together with payment of the estimated tax due; the return and the balance of the tax, if any, is due three months after the federal estate tax is settled.

There is also a new procedure for obtaining abatement of inheritance taxes by application and hearing from the State Tax Commission.⁹ This is in addition to existing procedures available in the probate courts.

§3.11. Nonqualified employee benefit plans. Jacob Narva entered

⁶ Acts of 1971, c. 555, §57, amending G.L., c. 65, §22.

⁷ Acts of 1971, c. 555, §55, amending G.L., c. 65, §11.

⁸ Acts of 1971, c. 555, §59, amending G.L., c. 65, §27.

⁹ Acts of 1971, c. 555, §59, adding §27A to G.L., c. 65A.

into an employment contract with his corporation providing, inter alia, for annual payments of a specified amount in the event of his retirement or disability and for payment of a lump sum to his widow upon his death, in addition to monthly payments to the widow for her life, up to a maximum of 120 payments. The imposition of inheritance taxes attributable to the benefits payable upon Mr. Narva's death was contested in *Narva v. Commissioner of Corporations and Taxation*.¹ The Supreme Judicial Court held that the death benefit constituted property in which Mr. Narva had an interest at his death and, further, that the transfer to his widow was intended to take effect in possession or enjoyment after death. Accordingly, the death benefit was held subject to the inheritance tax.

Apparently Mr. Narva died before the effective date of a statute granting an exemption from inheritance taxes for payments from qualified retirement and pension plans to the extent attributable to employer contributions.² By negative inference from that statute, payments from nonqualified plans are subject to inheritance taxes. Employment agreements with retirement and death benefit provisions similar to those at issue in *Narva* are not uncommon, especially in small companies. Such agreements have most of the characteristics of unfunded employee benefit plans, but of course they are not qualified. The *Narva* decision, together with the exemption for qualified plans, will make it difficult for taxpayers to argue that such nonqualifying plans are not subject to inheritance taxes.

§3.12. Inheritance taxes payable out of the residue. In *Wellington v. Commissioner of Corporations and Taxation*,¹ decedent's will provided that all estate and inheritance taxes payable on account of his death were to be paid out of the residue of his estate. Decedent and his wife owned jointly several bank accounts on which inheritance taxes were paid. The commissioner also assessed a tax on the inheritance attributable to the jointly held property, on the theory that the tax on the jointly held property which was paid out of the residue was in effect a pecuniary legacy to decedent's wife, the surviving joint owner.

The validity of the additional assessment hinged on the interpretation of G.L., c. 65, §19, providing that "[w]hen provision is made by any will or other instrument for payment of the legacy or succession tax upon any gift thereby made out of any property other than that so given, no tax shall be chargeable upon the sum to be applied in payment of such tax." The Supreme Judicial Court was unable to decide whether this statute, standing by itself, would prohibit the additional assessment. Therefore, it avoided that issue and rested its decision that the tax was improperly assessed on the fact that from 1916 until 1968 the commissioner, as a matter of practice, had not assessed taxes where

§3.11. ¹ 1971 Mass. Adv. Sh. 117, 266 N.E.2d 638.

² G.L., c. 65, §1, added by Acts of 1969, c. 675, §1.

§3.12. ¹ 1971 Mass. Adv. Sh. 789, 269 N.E.2d 264.

inheritance taxes on joint property were paid from the residue. The Court felt that any change of 50-year-old administrative practice should more appropriately be made by the legislature. For this reason the Court refused to follow the commissioner's post-1968 interpretation of the statute, on the basis of which the additional tax was assessed.

The opinion in *Wellington* is unfortunate in that it does not resolve the question of what the statute means. The issue is apparently settled as to joint property, but not as to other property subject to tax which passes outside of the will, such as life insurance proceeds and inter vivos trusts. The tax-from-residue clause is a common provision in wills, and that statute should be clarified by either legislative or judicial interpretation so that estate planners will know its inheritance tax consequences in advance.

E. REAL PROPERTY TAXES

§3.13. Definition of real estate. A determination of what constitutes real estate for purposes of G.L., c. 59 real property taxes is in many cases difficult to make and has been the subject of considerable controversy. The statute says that real estate includes "all buildings and other things erected thereon or affixed thereto."¹ Recently the Supreme Judicial Court has decided two cases involving questions of interpretation under this definition,² and there is pending before the Court at least one other case,³ which will be decided in the 1972 SURVEY year.

In *Ellis v. Board of Assessors of Acushnet*,⁴ a 60-foot-long mobile home located in a trailer park and used as a year-round permanent residence was held to be taxable as real estate. The mobile home rested on, and was attached to, a poured concrete foundation with a full cellar in which was located a hot water heater and a 275-gallon oil tank. No wheels, axles, or hitching posts were attached to the mobile home or were owned by the taxpayer, although the mobile home had been trailed from Baltimore by the seller on the seller's wheels.

If the case could have been decided solely on the basis of the statutory definition of *real estate* referred to above, it would have been quite unremarkable because, as the Appellate Tax Board concluded,⁵ the mobile home was for all intents and purposes identical to any other conventional home. However, the case had to be considered in light of the statutory exemption⁶ from real estate taxes granted to mobile

§3.13. ¹ G.L., c. 59, §3.

² *Ellis v. Board of Assessors of Acushnet*, 1970 Mass. Adv. Sh. 1633, 265 N.E.2d 491; *Board of Assessors of Dartmouth v. B. A. Simeone, Inc.*, 1971 Mass. Adv. Sh. 904, 269 N.E.2d 663.

³ *Board of Assessors of Swampscott v. Lynn Sand and Stone Co.*, 1971 Mass. Adv. Sh. 1771, —N.E.2d—. [This case was decided subsequent to the writing of this chapter. For a further discussion, see n.16 *infra*.]

⁴ 1970 Mass. Adv. Sh. 1633, 265 N.E.2d 491.

⁵ *Id.* at 1634, 265 N.E.2d at 492.

⁶ G.L., c. 59, §5, cl. Thirty-sixth.

homes subject to the \$6 monthly license fee under Chapter 140.⁷ That chapter defined *mobile home* to mean “a dwelling unit built on a chassis and containing complete electrical, plumbing and sanitary facilities, and designed to be installed on a temporary or permanent foundation for permanent living quarters.”⁸ The taxpayer’s mobile home clearly was a Chapter 140 mobile home, and by the seemingly plain language of the statute was subject to the monthly license fee. On that basis it was exempt from the property tax.

The Court recognized that the conflict between the two statutes raised constitutional problems. If Chapter 140 was held to govern, then the taxpayer’s mobile home would not have been subject to the real estate tax, while a similar conventional house would have been. In the view of the Court, that result would have constituted a dual standard of taxation, prohibited by Article X of the Declaration of Rights of the Massachusetts Constitution. In order to resolve the case, short of passing on the constitutionality of either statute, the Court reviewed the history of the applicable sections of Chapter 140 and determined that the legislature, in enacting the 1964 amendment⁹ to Chapter 140 which inserted the definition of *mobile home* quoted above, “was not concerned with taxation but rather desired to deal with other problems.”¹⁰ The Court thereby construed Chapter 140 as not prohibiting the imposition of real estate taxes on taxpayer’s mobile home, saying that a literal reading of Chapter 140, Section 32L (the section defining a mobile home) did not “foreclose the issue of taxation in every instance.”¹¹

The Court’s decision may be sound if viewed solely in terms of not allowing the mobile home in question to escape taxation as real property. The reasoning by which the Court reached its decision is not persuasive, however. To say that legislative history indicated that the legislature was not concerned with taxation but with “other problems,” undefined in the opinion, is misleading. Chapter 59, Section 5, Clause Thirty-sixth, and Chapter 140, Section 32G, expressly provide for the exemption from real estate taxes for mobile homes subject to the monthly license fee. The collection of these fees from the mobile home park operator is effected through the procures applicable to collection of taxes on personal property. Although the monthly fee is denominated a license fee, it seems to be more in the nature of a payment in lieu of taxes, especially when applied to a permanently affixed mobile home. It should also be noted that the Mobile Homes Commission, created by the legislature in 1962, strongly recommended in its reports that mobile homes be taxed the same as conventional homes and that the exemption from real estate taxes be repealed. It can be concluded that the legislature, although aware of the problem when

⁷ G.L., c. 140, §32G.

⁸ G.L., c. 140, §32L.

⁹ Acts of 1964, c. 592, §14, amending G.L., c. 140, §32L.

¹⁰ 1970 Mass. Adv. Sh. 1633, 1636, 265 N.E.2d 491, 493.

¹¹ Id. at 1635, 265 N.E.2d at 492.

it enacted the 1964 amendment to Chapter 140, chose to extend the exemption to mobile homes such as the one in question. In truth, the Supreme Judicial Court did not “construe” Chapter 140 and its cross-references to Chapter 59 but simply ignored the clear statutory language in order to avoid the constitutional issue.

The Court could have avoided that issue in another way: by allowing the exemption to mean what it said and by deciding that the mobile home in question was not “real estate” within the meaning of Chapter 59. Chapter 140 dealt expressly with mobile homes and clearly provided an exemption, while Chapter 59, Section 3, defining *real estate*, is a general definitional section worded in a nonspecific manner. In the event of a conflict, under usual rules of statutory interpretation a statute dealing specifically with the subject matter, such as Chapter 140, is to be applied rather than a general statute, especially one at least 100 years old.¹² It is submitted that the Court more easily and more soundly could have thus distinguished factually the mobile home in question from a conventional house, thereby avoiding the problem of a dual standard of taxation. The solution suggested would not have done the injustice to Chapter 140 which did result from the Court’s opinion.

It is apparent that legislative action is needed in this area. The most equitable course for the legislature to take would be to exclude from the Chapter 140-Chapter 59 exemption all mobile homes which are so situated as to be permanently affixed to the site. The exemption would remain for homes which are truly mobile, those which can be readily towed from location to location by the owner himself.

The question of what is real estate for purposes of Chapter 59 also arises in the context of large manufacturing or processing equipment attached or affixed to the ground at commercial or industrial sites. In *Board of Assessors of Dartmouth v. B. A. Simeone, Inc.*,¹³ the Supreme Judicial Court affirmed the Appellate Tax Board’s finding that a particular type of semiportable asphalt plant was machinery used in the manufacture of bituminous concrete, could be moved after the removal of a few nuts, and was not erected on or affixed to the land. The brief for the board of assessors indicates, however, that the plant in question stands 55 feet high and weighs over 100 tons. It was manufactured in preassembled sections, shipped to the site by railroad car and truck, and assembled on foundation piers by crane. The absence of such facts in the Appellate Tax Board’s findings indicates that those findings do not present a completely accurate view of the object in question. What was involved in this case was the relationship between the application of the real estate tax to “other things” erected on or affixed to the ground, and the exemption from real estate taxes of property of a domestic manufacturing corporation other than “real estate, poles and underground conduits, wires and pipes.”¹⁴ This same rela-

¹² Cf. *Clancy v. Wallace*, 288 Mass. 557, 193 N.E. 546 (1934).

¹³ 1971 Mass. Adv. Sh. 904, 269 N.E.2d 663.

¹⁴ The pertinent statute is G.L., c. 59, §5, cl. Sixteenth (3).

tionship is again at issue in *Board of Assessors of Swampscott v. Lynn Sand and Stone Co.*,¹⁵ a case now pending before the Supreme Judicial Court. The Court in *Simeone* did not adequately resolve the question of when, if ever, machinery of such size as to be permanently affixed to the land can ever be considered real estate and be subject to the real estate tax. *Lynn Sand and Stone* will present the Court with another opportunity to deal with that question, for the case involves rock-crushing and concrete-mixing equipment which can be as long as 445 feet and weigh up to 150 tons.¹⁶

§3.14. Exemption for charitable organizations. Chapter 59 of the General Laws exempts from real estate taxes "real estate owned by or held in trust for a charitable organization and occupied by it or its officers for the purposes for which it is organized. . . ." In *Milton Hospital and Convalescent Home v. Board of Assessors of Milton*,² the issue presented was whether a portion of a hospital building rented to doctors on the hospital staff for their private offices was entitled to the exemption. The Supreme Judicial Court held, over the dissent of Justice Reardon, that the exemption was not available because the offices were not occupied by the hospital or its officers and, even if they had been so occupied, they were not occupied for the purposes for which the hospital was formed.

From the opinion it appears that doctors conducted their private practices from the offices, selecting their own patients and setting their own fees. The hospital did not control the doctors' activities. The situation was of direct benefit to the hospital, not only because the doctors were readily available in the event of emergency, but also because it helped in attracting doctors to the staff. However, the Court rightly concluded that the offices were occupied by the doctors for conducting their private medical practices, rather than by the hospital or its officers in furtherance of the hospital's charitable purpose.

§3.15. Assessment practices. *First National Stores, Inc. v. Board of Assessors of Somerville*¹ emphasized how important it is that boards of assessors pay close attention to the relationship between sales prices for properties and the assessments of those properties. Since the proper method of assessing real property is at 100 percent of fair cash value,² and since the sales price of real estate is usually a reliable indication

¹⁵ 1971 Mass. Adv. Sh. 1771,—N.E.2d—.

¹⁶ Brief for Board of Assessors at 17. [*Lynn Sand and Stone* was decided after the writing of this chapter. The Supreme Judicial Court held that "even if machinery by reason of its bulk . . . could be regarded as having become a part of real estate for some purposes, its predominant aspect for the purposes of §5, Sixteenth (3), remains that of machinery rather than of real estate." 1971 Mass. Adv. Sh. 1771, 1774,—N.E.2d—, —.]

§3.14. ¹ G.L., c. 59, §5, cl. Third.

² 1971 Mass. Adv. Sh. 1203, 271 N.E.2d 745.

§3.15. ¹ 1971 Mass. Adv. Sh. 11, 265 N.E.2d 848.

²"It is a wholly illegal practice to assess land at less than 100% of full fair cash value." *Bennett v. Board of Assessors of Whitman*, 354 Mass. 239, 237 N.E.2d 7 (1968). See Mass. Const. pt. 2, c. 1, §1, art. IV; id. pt. 1, art. X; G.L., c. 59, §§38, 52.

of its fair cash value, the sales price cannot be wholly ignored in making subsequent assessments. Yet the Somerville assessors testified in the instant case that they did not take recent sales prices into consideration when assessing properties but relied on visual observation and inspection of the properties.

In support of its claim for an abatement of real estate taxes, the taxpayer introduced evidence of real estate transactions in Somerville over a six-year period and the subsequent assessments of those same properties. That evidence showed that the aggregate assessed value of those properties, in the year following the year of sale, average 40 percent of the aggregate sales price. During the same period, contended the taxpayer, its three groups of Somerville properties were assessed at 124.2 percent, 97.2 percent, and 74 percent of their respective fair cash values. The taxpayer also had an expert witness testify as to the value of the properties for which abatements were sought.

The Supreme Judicial Court held that the evidence presented by the taxpayer, especially the disparity between sales prices and subsequent assessments, was sufficient to support an inference of discriminatory assessment practices, thereby placing the burden on the assessors to show that they had made a reasonable effort to arrive at full and fair cash value.