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Chapter 16: State and Local Taxation

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CHAPTER 16

State and Local Taxation

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§ 16.1. Real Estate Taxation — Disproportionate Assessment. An issue continually addressed by the Supreme Judicial Court has been the legality of the disproportionate assessment of real property by local officials. The Massachusetts Constitution requires local assessors to assess uniformly real property at full and fair cash value.[1] Widely disparate valuations, however, "have long been the rule rather than the exception throughout the Commonwealth ."[2] During the *Survey* year, the Court decided three cases relating to the remedial mechanisms available to a taxpayer whose real property has been disproportionately assessed.[3]

In *French* v. *Assessors of Boston*,[4] the Court upheld an Appellate Tax Board decision that single-family residences could, in appropriate circumstances, comprise a class for purposes of the so-called *Tregor* remedy.[5] In 1979, the Court held in *Tregor* v. *Assessors of Boston*[6] that owners of overassessed Boston property were entitled to property tax abatements which would result in their tax rate equalling the average assessment of the most favored class (i.e., the lowest substantial class) of property in their community.[7] The question in *French* was whether, for purposes of determining the "most favored class," one was limited to the four major classes (resi-

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§ 16.1. [1] The Massachusetts Constitution has, since its adoption in 1780, mandated that the legislature, in the exercise of its power to tax, impose "proportional and reasonable assessments, rates and taxes, upon all the inhabitants of . . . the said Commonwealth." MASS. CONST. part 2, c. 1, § 1, art. 4.

[2] Town of Sudbury v. Commissioner of Corporations and Taxation, 366 Mass. 558, 563, 321 N.E.2d 641, 645 (1974).

[3] A taxpayer must file for an abatement with his local board of assessors within 30 days of the receipt of his tax bill. G.L. c. 58, § 59. If unsuccessful with his initial appeal, the taxpayer may file a timely appeal to the Appellate Tax Board, G.L. c. 58, § 65, and ultimately to the Supreme Judicial Court. G.L. c. 56A, § 13. The failure to make a timely appeal is a jurisdictional defect which is fatal to a claim of disproportionate assessment.

[4] 1981 Mass. Adv. Sh. 1048, 419 N.E.2d 1372.

[5] *Id.* at 1050, 419 N.E.2d at 1374.

[6] 377 Mass. 602, 387 N.E.2d 538 (1979).

[7] *Id.* at 602, 387 N.E.2d 539. *But see* St. 1979, c. 797, § 10 (amending G.L. c. 58A, § 14, to limit abatements to the municipal average from fiscal years 1980 through 1983).

dential, commercial, industrial, and open space), or whether one of the various sub-classes (i.e., single family residences) could qualify as a "most favorable class." The Court upheld the Appellate Tax Board's finding that single family residences were "one of the two or three largest classes of real property" in Boston,[8] and that accordingly such residences could comprise the "lowest substantial class" of real property in the city for purposes of determining the amount of an abatement. The formula applies in all tax years prior to fiscal year 1980, and after fiscal year 1983.[9]

In *D'Errico* v. *Board of Assessors of Woburn*,[10] the Court addressed numerous property tax remedy issues. The plaintiff taxpayer brought an action in superior court seeking a declaration that taxes assessed on his property by the City in fiscal 1974, 1975 and 1976 were based upon illegal assessments, and that he was entitled to recover a portion of his property taxes paid in those years. The taxpayer's complaint, brought as an action for contempt pursuant to chapter 231A, section 5,[11] was premised upon findings made with respect to the City's assessing practices in an earlier Appeals Court decision, *Chomerics, Inc.* v. *Assessors of Woburn.*[12]

In *Chomerics*, several commercial and industrial taxpayers in the City of Woburn sought relief from allegedly excessive assessments.[13] The trial court judge in *Chomerics* determined that the City's assessment practices were illegal, and ordered refunds for each named plaintiff.[14] The judge also awarded prospective relief, requiring the city to assess all property uniformly and at full value.[15] The taxpayer in *D'Errico* sought to participate in the retrospective relief mandated by the Court in *Chomerics* by filing his own post-*Chomerics* lawsuit. At the same time, he failed to perfect his abatement appeal rights[16] — a tactic he no doubt came to regret.

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[8] Single family residences were found to be the largest class in Boston in terms of area, members of parcels, and total assessed for estimated full value. 1981 Mass. Adv. Sh. at 1050, n.4, 419 N.E.2d at 1373, n.4.

[9] *E.g.*, Keniston v. Assessors of Boston, 1980 Mass. Adv. Sh. 1485, 407 N.E.2d 1275.

[10] 1981 Mass. Adv. Sh. 1859, 424 N.E.2d 509.

[11] *Id.* at 1860, 424 N.E.2d at 510. G.L. c. 231A, § 5, inserted by St. 1974, c. 630, § 3, provides, in relevant part:

> when a decree has already been entered declaring an administrative practice or procedure as defined in section two to be illegal, and a person not a party to the original action involving said practice or procedure is adversely affected by the same . . . said person may seek relief under this chapter by filing a petition for contempt against the agency or agent continuing said practice or procedure after the entry of said decree.

[12] 6 Mass. App. Ct. 394, 376 N.E.2d 1246 (1978).

[13] *Id.* at 395-97, 376 N.E.2d at 1246-47.

[14] *Id.* at 396, 376 N.E.2d at 1247. The case was not brought as a class action.

[15] *Id.*

[16] 1981 Mass. Adv. Sh. at 1866, 424 N.E.2d at 514. The Court took the opportunity in *D'Errico* to reiterate the "well-settled principle that the statutory abatement procedures are exclusive, absent exceptional circumstances." *Id.* at 1864, 424 N.E.2d at 512. The Court suggested

D'Errico advanced several novel legal theories in his quest for relief. First, he sought a declaration that his assessments had been illegal, relying on the relaxed standard for declaratory relief in tax cases articulated in *Sydney* v. *Commissioner of Corporations and Taxation.*[17] The Court was not persuaded to issue a declaration under this standard because D'Errico failed to meet any of the *Sydney* prerequisites: he failed to raise a new or recurrent issue, the issue raised was not novel (since it had been fully litigated in *Chomerics*), and the issues raised were not of public importance.[18] The Court further distinguished D'Errico's claim, limited as it was to "the particulars of his own excessive tax,"[19] from the broad based declaratory and injunctive relief awarded in response to the substantial "public considerations" presented by the taxpayers in *Bettigole* v. *Assessors of Springfield.*[20]

Moreover, the Court did not permit D'Errico to realize retroactive relief. The Court, as an initial matter, considered the contempt action an inappropriate vehicle for relief. The Court noted that chapter 231, section 5 was de-

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that the abatement remedy was the taxpayer's best and only method of recovery, absent joinder as a named plaintiff in the *Chomerics* case. *Id.* at 1867, 424 N.E.2d at 514.

[17] 371 Mass. 289, 356 N.E.2d 460 (1976). In *Sydney*, the Court indicated that in tax cases, a litigant might be entitled to a declaration of the law even if he has failed to exhaust available administrative remedies. *Id.* at 293-95, 356 N.E.2d at 463-64. However, the Court made plain that "[u]nless the administrative remedy is 'seriously inadequate' under all the circumstances of the case, it should not be displaced by an action for a declaration. . . ." *Id.* at 294, 356 N.E.2d at 463. In addition, the Court reiterated its narrow and long-standing policy of not requiring exhaustion of administrative remedies only if "the case reduces to an issue of law without dispute as to the facts." *Id.* at 295, 356 N.E.2d at 464. *See also* S.V. Groves & Son, Co. v. State Tax Commission, 372 Mass. 140, 143, 360 N.E.2d 895, 898 (1977) (declaratory relief appropriate in a tax case which "reduces to an issue of law without dispute as to the facts . . .").

[18] 1981 Mass. Adv. Sh. at 1864-65, 424 N.E.2d at 512-13.

[19] *Id.* at 1864, 424 N.E.2d at 513.

[20] *Id. See* 343 Mass. 223, 235, 198 N.E.2d 10, 17 (1961). In fact, the *Bettigole* remedy, which enjoined the City of Springfield from collecting on its tax bills and required the City to issue an entire new set of bills, is in disfavor. The remedy was labeled "extraordinary" in Leto v. Assessors of Wilmington, 348 Mass. 144, 148, 202 N.E.2d 922, 925 (1964), where the Court noted that "[t]o grant wholesale relief, rather than to remit the complaining taxpayers to less drastic remedies, may seriously affect a town's ability to conduct its public services and cause great fiscal confusion." *Id.* at 147, 202 N.E.2d at 924-25.

The *Bettigole* remedy has been rejected by subsequent courts and commentators. *See, e.g.*, Tregor v. Assessors of Boston, 377 Mass. 602, 606, 387 N.E.2d 538, 541 (1979) (*Bettigole* remedy is extraordinary and drastic relief which is narrowly confined); Coan v. Board of Assessors of Beverly, 349 Mass. 575, 578, 211 N.E.2d 50, 52 (1965) (*Bettigole* remedy only appropriate if such relief "will have not immediate effect on city finances"); Boston v. Second Realty Corp., 9 Mass. App. Ct. 282, 283, 400 N.E.2d 876, 877 (1980) (similar); Note, *The Road to Uniformity in Real Estate Taxation Valuation and Appeal*, 124 U. PA. L. REV. 1418, 1446 (1976).

signed to assist a person "who might subsequently become aggrieved by a contemnor's failure to adhere to . . . [a] prospective command."[21] D'Errico was not entitled to relief under this statute because *Chomerics*, the case upon which he based his claim, was not a class action, and retrospective relief in that case was limited to its named plaintiffs.[22]

D'Errico, in support of his final argument requesting retrospective relief, pointed to the characterization of the city's tax scheme as "wholly void" by the judge in *Chomerics*. *D'Errico* reasoned that since a wholly void tax is void *ab initio*,[23] he was entitled to recovery on the illegal tax. The Court rejected this argument, noting that the mere characterization of a tax as "wholly void," without more, would not "permit discretionary relief in retrospect."[24] A wholly void tax has been defined as an unenforceable nullity — a tax levied on a person or property over which assessors lack jurisdiction.[25] Although the judge in *Chomerics* termed the City's tax scheme as wholly void, it was, in reality, a scheme characterized by taxes based on an erroneous assessment of the taxable property.[26] The taxes were not invalid as to the subject property, person or purpose, and were therefore not wholly void.

A final case, which raised substantial questions of both liability and remedy, escaped resolution by the Court. The question of a court's jurisdiction to hear a case is fundamental to the litigation process. This was made plain in *Litton Business Systems, Inc.* v. *Commissioner of Revenue*,[27] which began as "the first test of taxation by a city pursuant to the 'Classification Amendment,' " and ended by being dismissed for want of subject matter jurisdiction.[28]

The *Litton* plaintiffs brought a substantial complaint in the superior court against the City of Fitchburg and the Commissioner of Revenue. The jurisdictional basis for the action against the city[29] was the ten-taxpayer provision of chapter 40, section 53.[30] That provision permits "ten-taxable inhabitants" of a city or town to petition the Supreme Judicial Court or the superior court to determine the propriety of a prospective levy and, "before

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[21] 1981 Mass. Adv. Sh. at 1865, 424 N.E.2d at 513.

[22] *Id.*

[23] *See* Harrington v. Glidden, 179 Mass. 486, 491-92, 61 N.E.2d 54, 55 (1901), *aff'd* Glidden v. Harrington, 189 U.S. 255 (1903), where the Court characterized a wholly void tax as no assessment at all.

[24] 1981 Mass. Adv. Sh. at 1866, 424 N.E.2d at 513.

[25] See note 23, *supra*.

[26] 179 Mass. at 492-93, 61 N.E.2d at 55.

[27] 1981 Mass. Adv. Sh. 1207, 420 N.E.2d 339.

[28] *Id.* at 1210-11, 420 N.E.2d at 342.

[29] The plaintiffs sought a declaration against the Commissioner pursuant to G.L. c. 231A.

[30] G.L. c. 30, § 53 provides:

If a town, regional school district, or a district as defined in section one A, or any of its

the final determination of the cause, restrain the unlawful exercise or abuse of such corporate power."

The plaintiff taxpayers alleged in their complaint that they were taxable inhabitants of the city. Initially, counsel for the defendants admitted this point in their answers and in a statement of agreed facts.[31] Upon appellate review, however, appellate counsel for the city moved for the first time to dismiss the action pursuant to Mass. R. Civ. P. 12(b)(1), alleging a lack of subject matter jurisdiction because the named plaintiffs did not include ten-taxable inhabitants of the city.[32] The Commissioner of Revenue, at the same time, asked to be relieved of her assent to the statement of agreed facts as improvident.[33]

In fact, several of the *Litton* plaintiffs were corporate taxpayers. The court re-affirmed earlier holdings that "inhabitants" are natural persons, and not corporations, and that an "inhabitant" of a city must be domiciled in the city.[34] The Court elected not to allow the plaintiffs to amend their complaint to include additional natural persons.[35] This decision was based upon the Court's agreement with the Commissioner's view that the factual record was inadequate to support a decision touching upon vital statutory and constitutional issues. Instead, the case was remanded to the superior court, where it was dismissed upon the plaintiffs' failure to demonstrate the presence of ten natural persons among their numbers.[36]

The adoption by Massachusetts voters of the revenue limitation measure

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officers or agents are about to raise or expend money or incur obligations purporting to bind said town, regional school district, or district for any purpose or object or in any manner other than that for and in which such town, regional school district, or district has the legal and constitutional right and power to raise or expend money or incur obligations, the supreme judicial or superior court may, upon petition of not less than ten-taxable inhabitants of the town, or not less than ten-taxable inhabitants of any town in the regional school district, or not less than ten-taxable inhabitants of that portion of a town which is in the district, determine the same in equity, and may, before the final determination of the cause, restrain the unlawful exercise or abuse of such corporate power.

[31] 1981 Mass. Adv. Sh. at 1211, 420 N.E.2d at 343.

[32] *Id.*

[33] *Id.* at 1211-12, 420 N.E.2d at 343.

[34] *Id.* at 1210, 420 N.E.2d at 341-42.

[35] *Id.* at 1211, 420 N.E.2d at 342.

[36] *See* Macioci v. Commissioner of Revenue, 386 Mass. 752, 759, 438 N.E.2d 786, 791 (1982). A companion case to *Litton*, *Macioci* was filed in the county court and promptly transferred to Suffolk Superior Court, where it was consolidated with several Worcester Superior Court actions brought by the corporate taxpayers pursuant to G.L. c. 60, § 98. The cases were tried before a Superior Court judge in September, 1981. The defendants prevailed and an appeal was heard by the Supreme Judicial Court in March, 1982. The Court found that the Commissioner of Revenue had improperly certified the City, but that the taxpayers were nonetheless without a remedy to alter the effects of that decision. 386 Mass. at 771, 438 N.E.2d at 798.

commonly referred to as Proposition 2½[37] is certain to have a profound effect on the nature of real property litigation in the future. Since 1961 and the *Bettigole* decision, the Supreme Judicial Court made plain its willingness to play an active role in ensuring municipal compliance with state constitutional and statutory assessment requirements. The 1975 *Sudbury* case and the 1979 *Andover* decision[38] expanded the role and clarified the authority of the Commissioner of Revenue in the enforcement of the law. At the time of the *Survey* year, there was little in the way of new law that was left to be made in the area. The emphasis, as *French*, *D'Errico* and *Litton* make plain, was on remedy and a tying up of loose ends left in the aftermath of prior decisions.

Proposition 2½, which limits the amount of money a community can raise in a tax year to a fixed percentage of the community's fair cash value, will encourage compliance with the obligation of municipalities to assess at full value. The operation of levy limitation provisions of Proposition 2½ encourages all cities and towns to keep assessments at full value across the board. It makes fiscal sense for a municipality to raise a fixed percentage of 100% of full value, rather than a fixed percentage of some substantially lower figure. The real challenge to communities will no longer be the expeditious implementation of revaluation programs but the year to year maintenance of "full value" values for the purpose of calculating annual levy limitations.

§ 16.2. Proposition 2½ — Introduction — Decisional Law. Proposition 2½, the tax limitation provision enacted into law through the Initiative process in November, 1980,[1] was the most far-reaching matter affecting state and local taxation in the 1981 *Survey* year. The enactment was wide ranging and, in the realm of state and local taxation, provided (1) for limits on the amount of money a community can raise in a fiscal year (having the effect of lowering the tax rate),[2] and (2) for a "renter's deduction" of fifty-percent of one's rent in a tax year.[3] Proposition 2½ also had the perhaps unintended affect of accelerating the movement of local officials to revalue real property so that it is assessed at 100% of full and fair cash value — a long held, long unattainable, state constitutional goal.[4]

In order to appreciate fully the dimensions of the municipal tax and expenditure limitations enacted into law in 1981, it is essential to have a

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[37] St. 1980, c. 580.

[38] Commonwealth v. Town of Andover, 378 Mass. 370, 391 N.E.2d 1225 (1979).

§ 16.2. [1] On November 4, 1980, the voters approved Proposition 2½ by a vote of 1,438,768 to 998,839.

[2] *See* St. 1980, c. 580, § 1.

[3] *See* St. 1980, c. 580, § 11.

[4] *See, e.g.*, Town of Sudbury v. Commissioner of Corporations and Taxation, 366 Mass. 558, 321 N.E.2d 641 (1974).

basic understanding of the recent history of judicial, legislative and administrative efforts to establish statewide conformity with the state constitutional requirements. It is equally appropriate, considering Massachusetts' reliance on the property tax for revenue production, to focus attention on particular events relating to the taxation of real property. Only recently in Massachusetts' history, for example, have the courts and the legislature made special efforts to enforce the state constitutional requirement that all real property in the Commonwealth be valued in a manner consistent with state constitutional requirements.[5]

The legislative response to the historic failure of cities and towns to comply with the law was twofold. First, the General Court established a statutory framework that would require and encourage local assessors to conform local assessments to the constitutional requirement of proportionality in chapter 58.[6] The most important provision appears in chapter 59, section 38, which provides that taxes must be assessed against the "fair cash value" of real property, a requirement which has been in continuous existence since 1853.[7]

Second, the legislature sought to reform the property tax system altogether, in response to both the increasing tax burden[8] and accelerated judicial enforcement of the fair cash value requirement against local assessors. In the last decade, particular attention focused on amending the

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[5] *See* Coomey v. Board of Assessors of Sandwich, 367 Mass. 836, 837, 329 N.E.2d 117, 119 (1975), and cases cited therein. The Massachusetts Constitution has, since its adoption in 1780, mandated that the legislature, in the exercise of its power to tax, impose "proportional and reasonable assessments, rates and taxes, upon all the inhabitants of . . . the said Commonwealth." MASS. CONST. Part 2, c. 1, § 1, art. 4. *See also* Declaration of Rights, Art. 10 (each individual is obliged to contribute "his share" of the expenses of government).

The principle of proportionality was imported into the Constitution from the Province Charter of 1691. Opinion of the Justices, 324 Mass. 724, 728, 85 N.E.2d 222, 225 (1949). A concise history of the property tax in Massachusetts is set forth in the FIRST REPORT OF THE SPECIAL COMMISSION TO DEVELOP A MASTER TAX PLAN RELATIVE TO CONSTITUTIONAL LIMITS ON THE TAX POWER, 1969 Mass. Sen. Doc. No. 126 (Sept. 1969) [hereinafter cited as FIRST REPORT], at 12-44 and in Legislative Research Council, CLASSIFICATION AND ASSESSMENT OF REAL PROPERTY, 1969 Mass. House Doc. No. 532 (May 21, 1969), at 21-30.

[6] For a discussion of the statutory framework *see* Town of Sudbury v. Commissioner of Corporations & Taxation, 366 Mass. 558, 563-67, 321 N.E.2d 641, 646-47 (1974); *see also* Tregor v. Board of Assessors of Boston, 377 Mass. 602, 604, 387 N.E.2d 538, 540 *cert. denied*, 444 U.S. 841 (1979) (the Commonwealth's statutes require assessors to assess property at its 'fair cash valuation').

[7] *See* St. 1853, c. 319, § 1.

[8] Massachusetts per capita property tax levies increased from $69.33 in 1949 to $221.84 in 1968. Measured in constant 1957-59 dollars, the per capita tax more than doubled during this period. As a consequence, the per capita property tax collections ranked fourth in the United States (behind California, Wyoming, and Nebraska). SECOND REPORT OF THE MASTER TAX COMMISSION, 1971 Mass. Sen. Doc. No. 1281 (Jan. 1971), at 49, 286. *See also* Legislative Research Council, CLASSIFICATION AND ASSESSMENT OF REAL PROPERTY, *supra* note 5 at 26-27.

state Constitution in order to apportion the burdens more fairly among the Commonwealth's taxpayers. Efforts to amend the state constitution to authorize different tax treatment of separate classes of property began shortly after the Supreme Judicial Court's decision in *Bettigole* v. *Assessors of Springfield*.[9] Proposals were defeated by the legislature, sitting in joint sessions, in 1961, 1962, 1963, and 1967.[10] A proposal for a Constitutional amendment similar in most respects to the one subsequently ratified by the voters in 1978 was placed on the state ballot for ratification in the general election of November 3, 1970, and was defeated.

The landmark *Sudbury* decision, in December, 1974,[11] gave new impetus to the classification movement. Five months after the *Sudbury* decision the General Court, in joint session, approved a proposed amendment by a vote of 220 to 53. In a second joint session on September 7, 1977, the legislature again approved the proposal by a 243 to 20 vote. The proposed amendment appeared on the November 7, 1978 state ballot as Question #1. After a hotly contested election,[12] the voters ratified the amendment by a vote of 1,285,865 to 649,400. The legislature has twice attempted to implement the Classification Amendment;[13] each attempt worked a complete transformation on the Massachusetts property tax system.

The legislature's first response to the Classification Amendment, chapter 580, section 38 of the Acts of 1978, was a decisive statement in support of favorable tax treatment for residential property.[14] This initial act was short-lived, however, and was never implemented in any city or town. The next act, statute 1979, chapter 797, codified what, with minor changes, now stands as the system of property classification in Massachusetts.[15] Under the current system, municipalities have the ability to determine, within certain fixed limits, the respective tax burdens of the four classes of real property.[16]

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[9] 343 Mass. 223, 178 N.E.2d 10 (1961). The Master Tax Commission observed that the classification amendment presented to the voters in 1970 was "put forward in response to recent court decisions which have ordered local assessors to assess at 100% of fair cash value. . . ." FIRST REPORT, *supra* note 5, at 44, 14. The proposed amendment would "empower the General Court to legitimize existing assessment practices" which resulted from the existing "impossibility of legislative differentiation" among different classes of property. *Id.*

[10] *Id.*

[11] 366 Mass. 558, 321 N.E.2d 641 (1974).

[12] *See* Opinion of the Justices, 378 Mass. 802, 804, 393 N.E.2d 306, 307-08 (1979); Anderson v. City of Boston, 376 Mass. 178, 380 N.E.2d 628 (1978).

[13] St. 1978, c. 580 and St. 1979, c. 797.

[14] *See* Associated Industries of Massachusetts v. Commissioner of Revenue, 378 Mass. 657, 393 N.E.2d 812 (1979). *See also* St. 1978, c. 580, § 38 (former G.L. c. 59A, §§ 5, 17, 18).

[15] For a short, concise description of current property classification law, *see* Hines, *1979 Classification Legislation*, 24 BOSTON BAR J. (1980).

[16] *See generally* Opinion of the Justices, 378 Mass. 802, 393 N.E.2d 306 (1979) (essential provisions of chapter 797 considered and relevant constitutional requirements articulated.) The four use classes established by statute are: residential (class one); open space (class two); com-

Classification did not eliminate the constitutional obligation to value property uniformly and at full value. That remains a "foundational requirement" — a prerequisite to classification.[17] The Commissioner thus embarked on a vigorous program designed to assist each of the state's 351 cities and towns achieve compliance with the constitutional goal by fiscal year 1983.[18] The Commissioner made use of her ample authority[19] to require assessors to submit and adhere to approved plans for expeditious revaluation programs.[20]

The enactment of Proposition 2½ had the unintended but unmistakable effect of encouraging cities and towns to revalue real property as promptly as possible.[21] In 1981, with a statewide push to revalue on the part of many communities, it became apparent that delays in revaluation programs, and the Commonwealth's certification program, would not enable certain communities to issue fiscal 1982 tax bills based on new (*i.e.*, revalued, hence higher) property values. Accordingly, the legislature enacted chapter 454 of the Acts of 1981 as an emergency measure.[22] Chapter 454 authorized cities and towns which would have completed and implemented revaluation programs prior to February 1, 1982, to require the payment of an estimated tax in lieu of the issuance of a tax bill for the usual fall tax payment.[23]

Permitting cities and towns with nearly complete revaluation programs to issue estimated tax bills enabled them to delay issuing a regular tax bill until the spring, thus avoiding a serious cash flow problem which would require

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mercial (class three), and industrial (class four). G.L. c. 59, § 2A(b). The Commissioner, for purposes of her valuation studies, divides the residential class into numerous sub-classes: R-1 (single family dwelling); R2 (two family); R3 (three family); R4 (four family); CD (condominiums).

[17] Opinion of the Justices, 378 Mass. 802, 805, 393 N.E.2d 306, 308 (1979).

[18] *See* Keniston v. Board of Assessors of Boston, 1980 Mass. Adv. Sh. 1485, 1487 n.4, 407 N.E.2d 1275, 1277 n.4.

[19] In the years since the *Sudbury* decision, the statutory responsibilities of the Commissioner and her authority within the statutory scheme have grown. *See, e.g.*, G.L. c. 58, §§ 1 and 3 (Commissioner may issue regulations and guidelines providing for the assessment and classification of property); G.L. c. 58, § 1A, R. 1; G.L. c. 58, §§ 1A, ¶3, 4 (The Commissioner may "direct" or "require of [assessors] such action as will tend to produce uniformity throughout the Commonwealth in valuation, classification and assessments."). This latter authority includes the power to enter a contract, on behalf of a city or town, for the reappraisal of its real property and to cause the Treasurer to deduct the cost of the contract from the community's annual state aid distribution. *See* G.L. c. 58, § 4A.

[20] *See* Commonwealth v. Town of Andover, 378 Mass. 370, 391 N.E.2d 1225 (1979).

[21] The explanation for this phenomenon is obvious: it is in the interest of a community seeking to maximize its revenue raising ability to have the ability to raise up to 2½ percent of values assessed at full (*i.e.*, 100%) value.

[22] As an emergency measure, the enactment took effect immediately upon signing by the Governor.

[23] A taxpayer's right to a tax exemption, or entitlement to an abatement, accrued not upon the issuance of the estimated bill, but upon issuance of the actual tax rate and tax bill.

costly short term, high interest borrowing.[24] The enactment required estimated bills to be no greater than 50% of the net tax payable for fiscal 1981. It further required all cities and towns issuing such bills to set a final fiscal 1982 tax rate on or before April 1, 1982. The estimated tax previously paid would be credited against the tax set by the final rate, and the balance due would be payable by May 1, 1982.[25]

Proposition 2½ was one of two laws proposed by initiative petition on the November 4, 1980 ballot designed to limit taxation in the Commonwealth.[26] The Act includes a number of provisions which either directly reduce taxes or control upwardly spiralling government costs. In the former category belong the reduction in automobile excise taxes,[27] the renter's income tax deduction,[28] and the limitation on local levies.[29] In the latter category belong the provisions limiting fiscal autonomy for school committees,[30] eliminating binding arbitration for police and firemen[31] and provisions requiring local acceptance of certain state-mandated costs.[32]

Two aspects of Proposition 2½ stand out for particular scrutiny in this chapter. The first is the limitation on local tax levies.[33] Chapter 59, section 21C, inserted into the statutory scheme by chapter 580, section 1 of the Acts of 1980, restricted the amount of taxes a municipality may raise in a tax year to 2½ percent of its full and fair cash value. Each city and town must either exist at, or roll back to, levies which are 2½ percent of its full and fair cash value. To the degree to which a community's levy limit exceeds 2½ percent of full value, it is required to roll back its levy by a maximum of 15% each year, until it reaches the statutory requirement. A small number of communities which, in fiscal 1979, had levies less than 2½ percent of their full and fair cash value were required to freeze their levies at that lower level.[34]

An additional levy limitation imposed by Proposition 2½ allows communities to raise their annual levies by a maximum of 2½ percent each fiscal year. Thus, chapter 58, section 21C(4) permanently limits annual

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[24] *See* Department of Revenue Property Tax Bureau Informational Guideline No. 81-238.

[25] *Id.*

[26] Another tax cutting measure, appearing as question #3 on the 1980 ballot, was sponsored by the Massachusetts Teachers Association, and was defeated by a vote of 816,805 (yes) to 1,473,309 (no).

[27] St. 1980, c. 580, § 9.

[28] St. 1980, c. 580, § 11.

[29] St. 1980, c. 580, § 1.

[30] St. 1980, c. 580, § 7.

[31] St. 1980, c. 580, § 5.

[32] St. 1980, c. 580, § 2.

[33] A 1979 "tax cap" enactment foretold of tax limitations to come. A two year "tax cap" provision, in part, limited the amount of money a community could spend to a sum not greater than 104% of the prior year's levy. Proposition 2½ went a substantial step further than the "tax cap" law.

[34] St. 1980, c. 580, § 1(3).

property tax increases by restricting a community's levy to 2½ percent of its prior year's levy, without regard to any increased growth in its full and fair cash valuation.

The legislature made some significant changes to the original version of the act in chapter 782 of the Acts of 1981.[35] Two modifications stand out for special attention. The first allowed cities and towns, upon the vote of the people, to exclude debt service from the act's levy limitations.[36] The second altered, and made easier, the ability of a city or town to override the strict 2½ percent limitations imposed by the original act.[37]

The experience of prior tax cutting measures across the nation, most notably California's Proposition 13,[38] apparently convinced the drafters of Proposition 2½ that only an explicit statutory benefit for those who rent their living space would ensure that all citizens would participate in the tax relief. Thus, the second major provision of Proposition 2½ was the so-called renter's deduction. Statute 1980, chapter 580, section 11 provides for a state income tax deduction of an amount equal to fifty percent of an individual's rent in a tax year.[39] Regulations promulgated by the Commissioner of Revenue make the deduction available to state residents for their principal place of residence.[40]

Two decisions of the Supreme Judicial Court during the *Survey* year concerned themselves directly with the provisions of Proposition 2½. The constitutionality of the enactment was at issue in a comprehensive challenge brought by several labor unions in *Massachusetts Teachers Association* v. *Secretary of the Commonwealth*.[41] The challenge to Proposition 2½ focused primarily upon alleged procedural irregularities in its adoption and the purported unconstitutionality of the renter's deduction. In an exhaustive opinion, the Court upheld the enactment in its entirety.[42]

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[35] For a detailed description of the modifications made by St. 1981, c. 782, *see* Department of Revenue Property Tax Bureau Informational Guideline No. 82-210.

[36] St. 1981, c. 782, § 10.

[37] *Id.*

[38] *See generally* Amador Valley Joint Union High School District v. State Board of Equalization, 149 Cal. Rptr. 239 (1978). It is plain that Proposition 2½ traces its origins to the landmark California tax cutting measure. *See* Legislative Research Bureau, REPORT RELATIVE TO TWO TAX AND SPENDING LIMITATION PROPOSALS ON THE 1980 MASSACHUSETTS STATE ELECTION BALLOT (August 4, 1980) at 19-20, 27, 30 and 233.

[39] The Legislature modified the provisions of the renter's deduction on two occasions in 1981. St. 1981, c. 782, §§ 12 and 13 limited the calendar year 1981 deduction for each renter to two thousand five hundred dollars. St. 1981, c. 795, § 17, removed that dollar limitation for future years and rewrote the statute in plainer terms. G.L. c. 62, § 3(9) thus entitled a renter to a deduction "in the case of an individual who rents his principal place of residence in the Commonwealth, an amount equal to fifty percent of such rent."

[40] *See* 830 CMR 62.40.

[41] 1981 Mass. Adv. Sh. 1764, 424 N.E.2d 469.

[42] *Id.* at 1768, 424 N.E.2d at 473.

The only portion of the Court's opinion which deals with matters relating to state taxation is the section on the constitutionality of the renter's deduction.[43] The plaintiffs raised two related challenges to the deduction: first, that it violated the equal protection guarantees of the federal and state constitutions and, second, that it violated state constitutional requirements of uniformity and proportionality.[44]

The Court quickly dispensed with the equal protection challenge, noting that the "State's scope of discretion is especially wide in the field of taxation."[45] Because property owners realize significant federal tax advantages in which renters may not participate, and because they would be receiving unique state tax advantages due to Proposition 2½, the Court found it quite reasonable for the enactment to afford residential tenants favored income tax treatment.[46]

The Court had more difficulty with the article 44 challenge. The Court reiterated prior rulings that article 44 mandates proportionality of taxation of income by requiring a uniform rate throughout the Commonwealth.[47] Special state income tax treatment for renters, the plaintiffs argued, vitiated this proportionality requirement. The Court rejected this argument, likening the deduction to a tax exemption.[48] The reasonableness of the deduction was determined by a review of the benefits enjoyed by homeowners in which renters could not participate. Chief among those benefits was the homeowner's essentially tax free equity in the home as an asset. A renter who might seek to invest money in another manner (say, the ownership of stock) is taxed on his investment. A homeowner is not taxed on his investment as an investment. Taking all of the homeowner's tax advantages together as a whole, the Court determined that "the allowance of a deduction of one-half of the rent paid annually by a residential tenant appears reasonable in relation to the benefit of a homeowner receives from the tax free use of his home."[49]

The Court considered more substantive aspects of Proposition 2½ in *Newton* v. *Commissioner of Revenue*.[50] The determination of a commun-

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[43] *Id.* at 1793, 424 N.E.2d at 486. The vast majority of the decision concerns questions relating to the initiative process.

[44] *Id.* at 1795-96, 424 N.E.2d at 487-88. *See* MASS. CONST. amend. art. 44.

[45] *Id.* at 1795, 424 N.E.2d at 487.

[46] *Id. See generally* Kee & Moon, *The Property Tax and Tenant Equality*, 89 HARV. L. REV. 531, 533 (1976).

[47] *Id.* at 1796, 424 N.E.2d at 488. *See, e.g.*, Opinion of the Justices, 354 Mass. 792, 794, 236 N.E.2d 882, 884 (1968).

[48] 1981 Mass. Adv. Sh. at 1800, 424 N.E.2d at 490. Article 44 contemplates reasonable exemptions from taxation. *See* Daley v. State Tax Commission, 376 Mass. 861, 865-66, 383 N.E.2d 1140, 1143 (1978).

[49] 1981 Mass. Adv. Sh. at 1800, 424 N.E.2d at 490.

[50] 1981 Mass. Adv. Sh. 1659, 423 N.E.2d at 1012.

ity's full and fair cash valuation for purposes of Proposition 2½ becomes "crucial because the taxes raised under the initial determination will be a benchmark for calculating the amount by which a locality can increase taxes in future years."[51] The Commissioner of Revenue issued a directive[52] on February 24, 1981, to guide local assessors in the determination of full value. For those communities which had recently undergone a complete, approved property revaluation program, the Commissioner allowed local officials to use the actual value.[53] For those communities in the process of property revaluations, the Commissioner determined that "it seems reasonable to substitute for assessed value the 1980 Equalized Valuation, increased by the uniform factor of thirteen percent. . . ."[54] This provision was challenged by the City of Newton, and the resulting Court decision provided a unique construct for judicial analysis and an important redefinition of the authority of the state Commissioner of Revenue.

Newton, a community which would not complete its revaluation program until fiscal 1981,[55] sought to maximize its revenue-sharing ability by establishing a larger full and fair cash value than the figure which resulted from the Commissioner's formula. To do this, Newton performed its own analysis of value in the city and sought the Commissioner's approval of its alternative methodology. At stake was nearly twelve million dollars.[56] The Commissioner refused to review Newton's analysis and required the City to comply with her directive. Newton's court challenge disputed the Commissioner's authority, and the reasonableness of her methodology.

The Court determined both issues in favor of the Commissioner. First, it established that the Commissioner had authority "to issue guidelines implementing a Statewide property tax scheme" requiring a measure of uniformity.[57] Next, the Court approved the Commissioner's attempt to impose a uniform methodology on communities like Newton. The Court held that the Commissioner, while implementing a law like Proposition 2½, need not fashion a formula which "achieve[s] perfection in result" if she can "fashion a normative standard based upon reliable data."[58] Significantly in times when the state property tax scheme is undergoing periodic changes

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[51] *Id.* at 1660, 423 N.E.2d at 1013.

[52] The Commissioner issued Technical Information Release 81-401, entitled "Guidelines for Adjustment of Preliminary Full and Fair Cash Value," on February 24, 1981.

[53] 1981 Mass. Adv. Sh. at 1662, 423 N.E.2d at 1014.

[54] *Id.* The 13% inflation factor was based upon an analysis of statewide real estate market trends, which the Court apparently found persuasive evidence of the reasonableness of the Commissioner's decision. *Id.* at 1661, n.5, 423 N.E.2d at 1014 n.5.

[55] *Id.* at 1661, n.3, 423 N.E.2d at 1814 n.3.

[56] *Id.* at 1664, 423 N.E.2d at 1015.

[57] *Id.*

[58] *Id.* at 1665, 423 N.E.2d at 1016.

of a substantial nature, the Court held the Commissioner to an eminently workable standard: "a judgment conceding perfection in result, in favor of a process which is orderly, expeditious, and reliable . . . is [one] that is neither arbitrary nor capricious."[59]

§ 16.3. Personal Income Taxes — Graduated Tax. In an *Opinion of the Justices*[1] to questions asked by the House of Representatives, the Court rejected a legislative proposal which would have established a *de facto* graduated income tax system. House Bill 6418 (1981) would have repealed chapter 62 of the General Laws, and added a new chapter 62E.[2] The proposed new statute would have enabled a taxpayer to compute his state income tax by applying a flat percentage rate to his federal income tax liability.[3] Because the federal income tax system taxes income at graduated rates,[4] the effect of the legislative proposal would have been to establish a graduated state income tax.[5]

The Court reiterated its long held view that article 44 of the amendments to the State Constitution[6] forbids the taxation of income from the same class of property at graduated rates.[7] A state income tax which would be

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[59] *Id.* at 1666, 423 N.E.2d at 1016.

§ 16.3. [1] 1981 Mass. Adv. Sh. 1433, 423 N.E.2d 751.

[2] *Id.* at 1433, 423 N.E.2d at 752.

[3] *Id.* The proposal would have imposed a tax on Massachusetts income "earned or received each taxable year by all individuals, estates, or trusts equal to 30% of that taxpayer's Federal income tax liability, 'reduced by a percentage equal to the percentage of the taxpayer's gross income for the taxable year which is not Massachusetts income.' " *Id.*

[4] *See* 26 U.S.C. §§ 1, 3 (Supp. 1979).

[5] 1981 Mass. Adv. Sh. at 1434, 423 N.E.2d at 752. The two questions posed by the legislature were:

1. "Would the enactment of House Bill No. 6418 constitute a permissible delegation of authority by the General Court in that it would base the determination of an individual's personal income tax liability to the Commonwealth upon federal law?"
2. "Is it constitutionally competent for the General Court to enact House Bill No. 6418 which would provide for the computation of an individual's state income tax liability through the utilization of a single rate applied to an individual's federal income tax liability under the provisions of Article 4 of Part Two Chapter 1 Section one and Article 44 of the amendments to the Constitution of the Commonwealth of Massachusetts[?]"

[6] MASS. CONST. amend. art. 44 provides that:

Full power and authority are hereby given and granted to the general court to impose and levy a tax on income in the manner hereinafter provided. Such tax may be at different rates upon income derived from different classes or property, but shall be levied at a uniform rate throughout the commonwealth upon incomes derived from property, and may grant reasonable exemptions and abatements. Any class of property the income from which is taxed under the provisions of this article may be exempted from the imposition and levying of proportional and reasonable assessments, rates and taxes as at present authorized by the constitution. This article shall not be construed to limit the power of the general court to impose and levy reasonable duties and excises.

[7] *Id.* at 1435, 423 N.E.2d at 751. In Opinion of the Justices, 266 Mass. 583, 165 N.E. 900 (1929), the Court interpreted article 44 as permitting "variation from intrinsic uniformity as to

based on a flat percentage of the federal rate would, because of the graduated nature of the federal system, "work out to a tax that had, in effect, graduated rates.[8] Noting that the uniformity requirement to article 44 is more than merely "nominal,"[9] the Court intimated that it would reject any future attempts to circumvent that requirement through ingenious modes of computation, or provisions for exemptions or deductions which "may have effects comparable to effects of graduated rates."[10]

Thus the Court rejected the proposed legislation's attempt to keep a uniform tax rate while graduating the taxable base. It is the substance, not the form of legislation to which the Court looks for guidance in determining whether the article 44 requirement of uniform rates is met. The Court's rather rigid position in this regard was justified, in part, by a reference to the will of the people, plainly articulated at the voting booth in 1915 and in subsequent efforts to amend article 44, that Massachusetts impose income taxes at a uniform, non-graduated rate. Implementation of devices such as exemptions or linkage with the graduated federal system in an effort to achieve a graduated income tax result without a graduated rate would not be tolerated.[11]

§ 16.4. Property Taxation — Manufacturing Exemptions. Two decisions provided elucidation of the meaning of "manufacturing" for purposes of qualifying for the exemptions provided by chapter 63, sections 38C[1] and 42B,[2] and chapter 59, section 5, sixteenth.[3]

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rates only with respect to reasonable classifications of property as to *sources* of income . . . [b]ut nothing in [article 44] authorizes the classification of the owners of property or of taxpayers for the same purpose. . . . If it had been intended that there might be differences in rates based upon differences in amounts of income received by the taxpayers, as well as upon differences in sources of income received by the taxpayers, it would have been simple to express that purpose in art. 44 . . . ." *Id.* at 585-88, 165 N.E. at 901-03.

[8] *Id.* at 1437, 423 N.E.2d at 754.

[9] *Id.* Plainly, the Court's concern was with the substance and not merely the form of the income tax proposal.

[10] *Id.*

[11] *But see* Opinion of the Justices, 386 Mass. 1223 (1982) (sharply divided court permits reasonable exemptions which may have the effect of a graduated income tax).

§ 16.4. [1] G.L. c. 63, § 38C and G.L. c. 58, § 5, sixteenth provide an exception for domestic manufacturing corporations.

[2] G.L. c. 63, § 42B, provides in part that a foreign manufacturing corporation "shall be taxed in the same manner and shall have the same duties under this chapter and chapter sixty-two C as other foreign corporation, except insofar as the determination of the excise under this chapter may be affected by reason of the exemption from local taxation of the machinery of a foreign manufacturing corporation."

[3] G.L. c. 59, § 5, Sixteenth provides in relevant part for exemptions from local taxation: (2) In the case of (a) a domestic business corporation or (b) a foreign corporation, both as defined in section thirty of chapter sixty-three, all property owned by such corporation other than the following: real estate, poles, underground conduits, wires and pipes, and machinery used in the conduct of the business, which term, as used in this clause,

Southeastern Sand and Gravel, Inc. v. *Commissioner of Revenue*[4] presented the Court with a straight-forward question: whether a taxpayer, whose business consisted of excavating, loading and hauling gravel to a plant where it is crushed into small pieces, was engaged in manufacturing within the meaning of chapter 63, section 38C. The Court agreed with the Appellate Tax Board that such a process was not manufacturing.[5] The term manufacturing was defined as

> a process of change effectuated by the use of forces directed by a human mind, resulting in the transformation of some preexisting substance into something different, carrying a different name and nature and adapted to a new use.[6]

The Court ruled that a taxpayer is entitled to an exemption only when the property or activity falls "cleanly and unmistakably" within the express words of the appropriate legislative provision.[7] Crushing gravel into small pieces did not satisfy that definition.[8]

More complex and timely questions arose in *Westinghouse Broadcasting Co., Inc.* v. *Commissioner of Revenue*.[9] The taxpayer, owner and operator of a Boston radio and television station, sought classification as a manufacturing corporation for state taxation purposes based on the technique it employed to transmit television and radio signals.[10] If so classified, the Company would have benefitted from a statutory exemption of its machinery, which had an estimated value of $1.3 million.[11] The State Tax Commission

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> shall not be deemed to include stock in trade or any personal property directly used in connection with dry cleaning or laundering processes or in the refrigeration of goods or in the air-conditioning of premises or in any purchasing, selling, accounting or administrative function.

[4] 1981 Mass. Adv. Sh. 2435, 429 N.E.2d 714.

[5] *Id.* at 2435, 429 N.E.2d at 715. Substantial amounts of litigation have arisen over the years regarding the characterization of various enterprises as "manufacturing" for taxation purposes. The Court in *Southeastern Sand and Gravel*, recognized the "chameleon-like" nature of the term in the absence of any statutory definition. *Id.* at 2436, 429 N.E.2d at 716. Justice Ronan, speaking for the Court in Commissioner of Corporations and Taxation v. Assessors of Boston, 324 Mass. 32, 84 N.E.2d 531 (1949), noted that "[t]he varying meanings to be attributed to the word 'manufacturing' are to a large extent determined by the object sought to be effected by the enactment in which it appears." *Id.* at 37, 84 N.E.2d at 534. *Compare* Rowe Contracting Co. v. State Tax Commission, 361 Mass. 158, 279 N.E.2d 675 (1972) (production of gravel and treated stone is manufacturing for sales tax purposes) with Wellington v. Belmont, 164 Mass. 142, 143, 41 N.E.2d 62, 62 (1895) (quarrying and crushing stone is not manufacturing).

The burden of persuasion which an aggrieved taxpayer must meet — i.e., a demonstration that the Appellate Tax Board's definition of the term "manufacturing" was erroneous as a matter of law, 1981 Mass. Adv. Sh. at 2436, 429 N.E.2d at 716 — is substantial.

[6] 1981 Mass. Adv. Sh. at 2436, 429 N.E.2d at 716.

[7] *Id.* at 2437, 429 N.E.2d at 716.

[8] *Id.*

[9] 1981 Mass. Adv. Sh. 183, 416 N.E.2d 191.

[10] *Id.* at 183, 416 N.E.2d at 191.

[11] *Id.* at 183-84, 416 N.E.2d at 191.

denied the company's application for this favored classification, and the Appellate Tax Board affirmed the Commission's finding.[12] The Company appealed to the Supreme Judicial Court.

The Court, in deciding whether the Company's operations qualified for the classification and resultant tax exemption, noted the alleged manufacturing activities of the Company. In describing its activities and "manufacturing process," the company explained how, in television and radio broadcasting, acoustical and visual energy and information is changed into an electrical signal, which through the application of complex technology, is transmitted to distant receivers.[13] The Court concluded that, based upon this description, the decision of the Appellate Tax Board could not be held wrong as a matter of law.[14]

At the outset of its analysis, the Court defined "manufacture" as the process of transforming raw or finished materials into an essentially new or different item.[15] The Court observed that the definition of manufacture would have to be significantly distorted to be able to include broadcasting activity, and termed the Company's activity more appropriately as "a transmission of intelligence."[16]

The Court likened such broadcasting to cases involving computer time sharing and telephonic trasnformation processes where similar applications had been similarly rejected.[17] The taxpayer's constitutional challenge, seeking treatment on an equal footing with local newspaper publishers (which were classified as manufacturing corporations),[18] was rejected by the Court on the basis that such line-drawing was a necessary incident of an elusive concept like "manufacture."[19] The Court noted that "[t]ax statutes customarily make narrow distinctions without running into [constitutional] trouble."[20]

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[12] *Id.* at 184, 416 N.E.2d at 191.

[13] *Id.* at 186, 416 N.E.2d at 193. According to the taxpayer, television broadcasting consisted of changing optical information "into an electrical signal which is modified in many ways by the application of extremely complex technology, encoded and placed on the broadcaster's carrier and sent out to be received by a reviewing set at a great distance." *Id.* The company characterized radio broadcasting as the transformation of acoustical energy "into an electronic signal . . . beamed through the broadcaster's carrier to receiving stations." *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.* at 187, 416 N.E.2d at 193.

[17] *Id.*

[18] *Id.* at 188, 416 N.E.2d at 194. The equal protection claim raised by the taxpayer alleged unconstitutionally disparate treatment of various arms of the media. The exemption of two newspaper publishing corporations as manufacturing corporations was challenged as particularly invidious since those corporations are engaged in "First Amendment activities." *Id.* The Court was unpersuaded and rejected any nexus between the First Amendment nature of the broadcasting business and the propriety of state taxation of such an enterprise. *Id.*

[19] *Id.*

[20] *Id.*

The decision relied on the legislative history of chapter 59, section 5, sixteenth, noting the original legislative intent to save factories in the post-Depression era.[21] Broadcasting was deemed "outside this matrix of intention and expectation."[22] The Court nonetheless made plain that it was less than comfortable with its decision, noting that

> the criteria of manufacture, as defined in the light of its historical provenance, may not serve the needs of the year 1981. But redefinition is for the legislature.[23]

Future *Survey* years may provide clarity to this particular area of tax law.

§ 16.5. Corporate Income Tax — Rental Income. Massachusetts taxes as income the rent derived from the ownership of real estate.[1] The taxpayer in *Smith* v. *Commissioner of Revenue*,[2] was a Massachusetts trust which had been assessed a state income tax on its net rental income from real estate which was also subject to local taxation. The taxpayer reasoned that the taxation of its net rental income violated both article 44 of the amendments to the State Constitution, and the equal protection clause of the State and Federal Constitution.[3] Both arguments were rejected.

First, the Court noted that chapter 62, section 2(a), as rewritten in 1971,[4] evinces an explicit legislative intent to subject rental income derived from real estate to the state income tax.[5] The Court reasoned that this construction was not inconsistent with article 44, which "grants complete authority to tax the full range of incomes."[6]

An equal protection claim raised by the taxpayer was also quickly dismissed. The claim was a straightforward allegation that chapter 59, section 5, twenty-seventh, by exempting all income-producing property, other than real property, from local taxation if that property is or would be subject to state income taxation, created an impermissible classification.[7] The Court

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[21] *Id.* at 187, 416 N.E.2d at 193.

[22] *Id.*

[23] *Id.* at 189, 416 N.E.2d at 194.

§ 16.5. [1] *See generally* G.L. c. 62, §§ 1 *et seq.* In 1971, the legislature enacted comprehensive changes in G.L. c. 62. St. 1971, c. 555, §§ 1 *et seq.* The Court has commented that the 1971 act "completely rewrote the Income Tax Law, and in many respects completely revised the basic nature of the tax." Ingraham v. State Tax Commission, 368 Mass. 242, 244-45, 331 N.E.2d 795, 796 (1975) (quoting Burnes v. State Tax Commission, 363 Mass. 589, 592-93, 296 N.E.2d 510, 512 (1973)). Among the changes affected by the legislature was the establishment of state income tax liability for business trusts engaged in any business activity or transaction for financial profit in Massachusetts.

[2] 1981 Mass. Adv. Sh. 677, 417 N.E.2d 967.

[3] *Id.* at 677-78, 417 N.E.2d at 968.

[4] The state's income tax laws were substantially rewritten in 1971. *See* St. 1971, c. 555.

[5] 1981 Mass. Adv. Sh. at 678, 417 N.E.2d at 678.

[6] *Id.* (quoting Ingraham v. State Tax Commission, 368 Mass. 242, 246, 331 N.E.2d 795, 797 (1975)).

[7] *Id.* at 678, 417 N.E.2d at 968.

dealt with this equal protection claim summarily, reiterating the long established standard of review: "Any distinction in a tax statute that has a rational basis will survive a challenge under the equal protection clause. The breadth of legislative discretion available to the Legislature is wide in tax classifications."[8] The taxpayer was unable to meet his substantial burden of persuasion. The Court rejected its constitutional claim, holding that the distinction between income-producing real property and other income-producing property was rational because real property generally realizes greater benefits in the form of local services than other forms of property.[9]

§ 16.6. Corporate Excise Tax — Relation to Federal Law. The income component of the corporate excise came under scrutiny in *Parker Affiliated Co., Inc.* v. *Department of Revenue*,[1] where the corporate taxpayer, in the computation of its state tax liability, sought to apply certain federal tax provisions while disregarding others.[2]

In 1973, the tax year in question, the taxpayer sold its entire interest in a subsidiary and, for federal tax purposes, realized a net long-term capital gain of $1,545,700.[3] In the calculation of the Massachusetts corporate excise, the taxpayer was obliged to calculate its income in accordance with chapter 63, section 30(5)(a), which incorporates the federal definition of "gross income"[4] and chapter 63, section 30(5)(b), which defines "net income" for state tax purposes.[5] The precise amount of the income portion of the excise tax was calculated in accordance with chapter 63, section 38(a)(2), which adopted the federal definitions as to gross and net income.[6] The crucial portion of the statute, for the taxpayer's purposes, required inclusion of one-half of "the long-term capital gains realized . . . from the sale or exchange of capital assets . . . to the extent includable in taxable net income reported to the federal government . . . ."[7]

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[8] *Id.* at 679, 417 N.E.2d at 969 (citations omitted).

[9] *Id.*

§ 16.6. [1] 1981 Mass. Adv. Sh. 77, 415 N.E.2d 825.

[2] *Id.* at 78, 415 N.E.2d at 826-27.

[3] *Id.* at 78, 415 N.E.2d at 826.

[4] G.L. c. 63, § 30(5)(a) defines gross income as "gross income as defined under the provisions of the Federal Internal Revenue Code, as amended and in effect for the taxable year . . . ."

[5] "Net income" is defined by G.L. c. 63, § 30(5)(b) as "gross income less the deductions, but not credits allowable under the provisions of the Federal Internal Revenue Code, as amended and in effect for the taxable year. Deductions with respect to the following items, however, shall not be allowed:— . . . (ii) losses sustained in other taxable years . . . ."

[6] 1981 Mass. Adv. Sh. at 80 n.7, 81, 415 N.E.2d at 827-28 n.7, 828.

[7] G.L. c. 63, § 38(a)(2). The provision states in relevant part:

> Long-term capital gains realized and long-term capital losses sustained from the sale or exchange of intangible property affected under the provisions of the Federal Internal Revenue Code . . . shall not be included in any part [of the calculation of net income].

In calculating its net taxable income under chapter 63, the taxpayer sought to use a figure other than the capital gain reported on its federal return. In the taxable year, the federal figure had been adjusted downward by some $491,403.[8] The figure used by the taxpayer was in accordance with unique federal provisions requiring application of a carry-over loss from deductions not taken in prior tax years.[9] Thus, in reporting its net taxable income on its Massachusetts corporate excise return, the taxpayer sought to use a net income tax figure made artificially low because of the application of a capital gains figure substantially higher than the amount of capital gains reported to the federal government.

The taxpayer advanced two arguments to support its position, both rejected by the Appellate Tax Board and the Supreme Judicial Court. The taxpayer initially argued that the state statutes may be interpreted to allow its method of determining state tax liability. The taxpayer suggested that, since chapter 63, section 30(5)(b)(ii) forbids prior loss carry-over as a matter of state law, the federal law provisions adjusting its basis downward because of prior loss carry-over should be disregarded for purposes of a state tax calculation.[10] The Court rejected this argument noting that it is not unusual for the state to use a federal tax benchmark while at the same time "carving out peculiar variations to further the State's tax policies."[11] Here, the Court declared that it was fully appropriate for the state to prohibit prior year loss carry-over, while at the same time employing a federal capital gains figure in the calculation of state taxable income which, for federal tax purposes, had been adjusted downward because of the same carry-over loss.[12] The Court therefore concluded that there was nothing inconsistent in the mechanism employed by the state statutory scheme.

The taxpayer also challenged the Board's decision as an improper delegation of state taxing authority to the federal government. The Court plainly stated that the "prospective incorporation of federal tax law does not constitute impermissible delegation of legislative authority,"[13] observing that although federal action "may influence the amount of the tax payable, . . . the taxing power has not been delegated" to the federal government.[14]

The Court also discussed the relation of federal tax laws to chapter 63, section 22A.[15] The Massachusetts statute requires a domestic insurance

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[8] 1981 Mass. Adv. Sh. at 78, 415 N.E.2d at 826-27.

[9] *Id.* at 79 n.6, 415 N.E.2d at 827 n.6 (citing Treasury Regulation § 1.1502-32).

[10] *Id.* at 81, 415 N.E.2d at 828.

[11] *Id.* at 82, 415 N.E.2d at 829.

[12] *Id.* at 82-84, 415 N.E.2d at 829-30.

[13] *Id.* at 87, 415 N.E.2d at 831.

[14] *Id. See* First Federal Savings and Loan Association v. State Tax Commission, 372 Mass. 478, 363 N.E.2d 474 (1977).

[15] G.L. c. 63, § 22A provides:

company to calculate its excise as a figure equal to one percent of its total gross investment income, as reported to the Commissioner of Insurance on its annual statement of financial condition.[16] In a rare reversal of an Appellate Tax Board decision, the Court in *Commissioner of Revenue* v. *Massachusetts Mutual Insurance Co.*,[17] determined that it was inappropriate for insurance companies to exclude from the excise calculation certain items included in the annual statement to the Insurance Commissioner, but which the companies believed were not properly characterized as gross investment income in the tax sense.

The essential holding of the *Massachusetts Mutual* case was that it was fully appropriate for the legislature to make an insurance company's financial statement to the Insurance Commissioner a benchmark for determining the excise due for the privilege of doing business in Massachusetts.[18] Thus, the Court rejected the companies' argument that the use of the annual financial statement to determine the excise amounted to an improper delegation of authority to the Insurance Commissioner. Relying on decisional law permitting reliance on the federal tax scheme to determine the state tax due,[19] the Court reiterated the now firmly established rule that while the action of other entities (such as the Insurance Commissioner) "may influence the amount of tax payable, . . . the taxing power has not been delegated to them."[20]

Every domestic insurance company coming within the scope of the definition of a domestic company in section one of chapter one hundred and seventy-five, except life insurance companies as defined in section one hundred and eighteen of said chapter one hundred and seventy-five, which are also life insurance companies as defined under subsection (a) of section 801 of the Federal Internal Revenue Code, as amended, and in effect for the taxable year, shall annually pay, as part of its excise imposed under this chapter, an amount equal to one percent of its total gross investment income earned during the preceding calendar year, as reported in its annual statement for said year filed with the commissioner of insurance and as shown in Exhibit 3 of said statement for a life insurance company or in Item 10, Column 8, Part 1, of the Underwriting and Investment Exhibit for any other domestic insurance company.

[16] G.L. c. 175, § 25 provides in relevant part:

Every company shall annually, on or before March first or sixty days from such date authorized by the commissioner, file with the commissioner a statement showing its financial condition on December thirty-first of the previous year or such other date as the commissioner may authorize for such company, and its business of that year. The commissioner may, for cause shown, extend the filing date of the annual statement, or of schedules or exhibits which are a part of such statement or which are required by the commissioner, for not more than sixty days beyond March first or the date authorized by the commissioner in said year.

[17] 1981 Mass. Adv. Sh. 2233, 428 N.E.2d 297.

[18] *Id.* at 2235-39, 428 N.E.2d at 300-02.

[19] *See, e.g.*, Parker Affiliated Cos. v. Department of Revenue, 1981 Mass. Adv. Sh. 77, 87, 415 N.E.2d 825, 831; First Federal Savings & Loan Ass'n v. State Tax Commission, 372 Mass. 478, 491, 363 N.E.2d 474, 483 (1977).

[20] 1981 Mass. Adv. Sh. at 2236, 428 N.E.2d at 301.

The Court determined that the operative phrase of section 22A, "total gross investment income earned during the preceding calendar year, as reported in the annual statement," should be read as a unitary concept designed to approximate, in as reliable a manner possible,[21] the value of insurance companies for purposes of calculating an excise.[22] With that interpretation of the statute, the Court addressed specific items of income listed on the annual statement which, over the insurance companies' objections, were included in the calculation of their respective excises. For example, the interest earned on certain federal obligations was deemed properly included in the calculation of the excise, even though such obligations are exempt from state taxation, because the subject of the excise was a tax on the corporate franchise, not corporate property.[23] Similarly, the Court found that the tax exempt status of projects undertaken pursuant to chapter 121A did not preclude income derived from those projects from being part of the excise calculation.[24]

§ 16.7. Real Property — Charitable Organization Exemption. During the *Survey* year, the Supreme Judicial Court decided two cases involving the charitable exemption for real property. The Court in *Lynn Hospital* v. *Board of Assessors of Lynn*[1] was asked to determine the propriety of a Board decision that a parking garage owned by the hospital and located on land adjacent to the hospital was not totally exempt from local taxation by virtue of the hospital's charitable exemption.[2] The garage was not limited in use solely to hospital business but was used also, for example, by a small partnership of doctors who split their time between the hospital and private medical practice at an adjacent medical building.[3] The Court determined that the mere relatedness of the garage to the hospital did not entitle it to a full charitable exemption.[4]

The Court reiterated a view expressed earlier[5] that a tax exemption is permissible "only to the extent that the property was in actual use for chari-

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[21] It is well established that rough approximations, rather than precision, is allowed in state tax situations. "Taxation is a practical matter, and mathematical uniformity in the distribution of the public burdens . . . is an impossible attainment." Roberts v. State Tax Commission, 360 Mass. 724, 728, 277 N.E.2d 499, 502-03 (1972) (quoting Old Colony R.R. v. Assessors of Boston, 309 Mass. 439, 446, 35 N.E.2d 246, 251 (1941)). *Cf.* Springfield Ins. Co. v. State Tax Commission, 342 Mass. 505, 513, 174 N.E.2d 455, 460 (1961).

[22] 1981 Mass. Adv. Sh. at 2239, 428 N.E.2d at 302.

[23] *Id.* at 2240-41, 428 N.E.2d at 304.

[24] *Id.* at 2243-44, 428 N.E.2d at 305.

§ 16.7. [1] 1981 Mass. Adv. Sh. 537, 417 N.E.2d 14.

[2] *Id.* at 539-40, 417 N.E.2d at 16.

[3] *Id.* at 538, 417 N.E.2d at 16.

[4] *Id.* at 541, 417 N.E.2d at 17.

[5] *See* Milton Hospital & Convalescent Home v. Assessors of Milton, 360 Mass. 63, 271 N.E.2d 745 (1971).

table purposes" during a given fiscal year.[6] Massachusetts thus recognizes the rule of proportionate exemption,[7] and the Court judges the extent of the charitable usage by considering whatever indicia (*i.e.*, usage, income) emerge from a given set of facts. In *Lynn Hospital*, the Court took into account the usage of the facility by reviewing the parking garage patrons[8] and determined that, because the garage was used for both hospital and non-hospital uses, it was entitled to a partial exemption.[9]

The question posed in *Harvard Community Health Plan, Inc.* v. *Board of Assessors of Cambridge*[10] was whether the taxpayer qualified as a charitable organization for purposes of the property tax exemption codified at chapter 59, section 5, third.[11] The Court upheld the Appellate Tax Board's finding that a building owned by the Harvard Community Health Plan, Inc. (HCHP) was entitled to the charitable organization exemption.[12]

HCHP owned real property which housed a "full service clinic" providing an array of health services to subscribers.[13] All physicians working at the facility were HCHP employees, and the clinic served as a clinical training center for medical students.[14] The aggregate of services performed at and by HCHP characterized it as a health maintenance organization, a relatively new medical services phenomenon offering subscribers health services "in a broader range and at a lower cost than traditional health insurance coverage."[15] The question for taxation purposes was whether such a facility qualified for the "charitable purposes" exemption provided in chapter 59, section 5, third. HCHP was found to have sustained its "grave burden" of proving its entitlement to the exemption.[16]

HCHP met the first half of its burden by demonstrating that it operated for the common good. HCHP met the second part of the burden by proving that it provided low cost, comprehensive medical services to a wide ranging population of persons in the greater Boston area. The Court ruled that this group was extensive enough to warrant the conclusion that HCHP's dedication to the promotion of health was of direct "benefit to the community at large."[17]

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[6] 1981 Mass. Adv. Sh. at 542-43, 417 N.E.2d at 18.

[7] *Id.* at 541, 417 N.E.2d at 17.

[8] *Id.* at 545, 417 N.E.2d at 19.

[9] *Id.* at 544-45, 417 N.E.2d at 19.

[10] 1981 Mass. Adv. Sh. 2143, 427 N.E.2d 1159.

[11] G.L. c. 59, § 5, third provides for an exemption from taxation of property of a "charitable organization," which is defined as "a literary, benevolent, charitable or scientific institution . . . incorporated in the Commonwealth."

[12] 1981 Mass. Adv. Sh. at 2143, 427 N.E.2d at 1160.

[13] *Id.* at 2145-46, 427 N.E.2d at 1160-61.

[14] *Id.*

[15] *Id.* at 2146-47, 427 N.E.2d at 1161.

[16] *Id.* at 2151, 427 N.E.2d at 1164.

[17] *Id.*

In so deciding, the Court rejected the assessors' argument, rooted in antiquated policy notions, that a charitable organization must be essentially an "almshouse for the poor."[18] The Court reasoned that major changes and developments in health care distribution required a more expansive view of the kind of facility which qualifies as a charitable organization.[19] The standard adopted and employed by the Court was whether the "dominant purpose" of the institution is "for the public good and the work done for its members is but the means adopted for this purpose."[20] Here, because HCHP's primary purpose was not to establish a facility for profit-making private practitioners, it was entitled to the charitable organization exemption.

§ 16.8. Sales and Use Taxes. In *Seiler Corp.* v. *Commissioner of Revenue*,[1] the Court was faced with the question whether the sale of snack foods from vending machines was an event taxable under chapter 64H.[2] The Court ruled that such sales were subject to taxation under the statute, and rejected the taxpayer's statutory and constitutional claims.[3]

The statutory scheme embodied in chapter 64H exempts most food products from the sales tax, but "meals," whether sold for consumption on or off the premises of the sale, are subject to the tax.[4] "Meals" are defined by the statute to include food products and beverages "prepared for human consumption and provided by a restaurant."[5] Paragraph 4 of that same section specifically characterizes vending machines as restaurants for purposes of the tax. The Court noted, that "[the] products sold by vending machines are normally subject to the meals tax."[6]

The Commissioner of Revenue interpreted the statutory scheme as permitting taxation of food items from vending machines.[7] The taxpayer disagreed and challenged the Commissioner on statutory and constitutional grounds. The statutory argument depended upon the taxpayer's contention that the food items at issue in the case[8] were not "meals" as that term is

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[18] *Id.* at 2150, 427 N.E.2d at 1163.

[19] *Id.*

[20] *Id.* at 2151, 427 N.E.2d at 1164 (quoting Massachusetts Medical Society v. Assessors of Boston, 340 Mass. 327, 332, 164 N.E.2d 325, 328 (1960)).

§ 16.8. [1] 1981 Mass. Adv. Sh. 2263, 429 N.E.2d at 11.

[2] G.L. c. 64H imposes an excise, commonly known as the sales tax on meals.

[3] 1981 Mass. Adv. Sh. at 2267-68, 429 N.E.2d at 14.

[4] *Id.* at 2265, 429 N.E.2d at 12.

[5] G.L. c. 64H, § 6(h), para. 3.

[6] 1981 Mass. Adv. Sh. at 2266, 429 N.E.2d at 13.

[7] *Id.* at 2264-65, 429 N.E.2d at 12.

[8] The snack items at issue in the case included bakery products such as cookies, cupcakes and brownies, and fast food items such as peanuts, popcorn and pretzels. *Id.* at 2265, 429 N.E.2d at 12.

used in chapter 64H, section 6(h), paragraph 5(a).[9] The Court disposed of the taxpayer's statutory argument by focusing on the statutory language which provided that "snacks . . . or other food combinations, to the extent that such items are sold by a restaurant whose principal business is the . . . sale of such items in such forms as to be available for immediate consumption without further significant preparation . . . shall not be [exempt from the sales tax on meals]."[10] The Court observed that the snack items in dispute were covered by this provision, and concluded that the statute subjected their sale to taxation.[11]

The Court also rejected the taxpayer's constitutional argument,[12] reasoning that if the snack items were sold at lunch counters or snack bars, there would be no question that they would be subject to taxation. The Court ruled that the legislature could rationally have determined that sales of snacks through vending machines was akin in purpose and effect to the sale of the same items from a lunch counter since both sales contemplate providing prepared food for immediate consumption, and concluded that the law did not create a distinction impermissible under the equal protection clause.[13]

On two other occasions, the Commissioner unsuccessfully sought to persuade the Supreme Judicial Court that it should overturn decisions by the Appellate Tax Board in favor of corporate taxpayers. The question presented in *Commissioner of Revenue* v. *SCA Disposal Services of New England, Inc.*[14] was whether a federal income tax benefit acquired by a parent company upon the lawful merger of subsidiaries was "consideration," within the meaning of the Massachusetts use tax statute, for certain benefits attendant to the merger. Four wholly owned subsidiaries of a parent company were merged into a fifth wholly owned subsidiary, the taxpayer in this case.[15] Upon the lawful merger, the taxpayer received (among other benefits) motor vehicles from three of the liquidated sub-

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[9] The taxpayers argued that the snack items sold by vending machines were exempt from the sales tax on meals because they were food sold in unopened original containers or packages that are commonly sold in such manner in a retail food store which is not a restaurant. *Id.* at 2264, 429 N.E.2d at 12.

[10] *Id.* at 2267, 429 N.E.2d at 13.

[11] *Id.*

[12] The gravamen of the taxpayer's constitutional claim was that treatment of snack items sold through vending machines as meals was discriminatory in light of the different treatment accorded to the sale of the same items through grocery stores or supermarkets (not treated as taxable events by the Commissioner). *Id.* at 2264, 429 N.E.2d at 12. The taxpayer alleged violations of the federal equal protection clause and articles 1, 7 and 10 of the Declaration of Rights of the Constitution of Massachusetts.

[13] *Id.* at 2267-68, 429 N.E.2d at 13-14.

[14] 1981 Mass. Adv. Sh. 1337, 421 N.E.2d at 766.

[15] *Id.* at 1337, 421 N.E.2d at 767.

sidiaries.[16] A dispute arose upon the Commissioner's determination that "the transfer of ownership of the motor vehicles created an obligation to pay the excise imposed . . . on the use of the Commonwealth of tangible personal property 'purchased' from any vendor for use within the Commonwealth."[17]

The Commissioner's interpretation of the taxpayer's obligations under the statute turned on whether the transfer of ownership of the motor vehicles was a "purchase" within the meaning of the statute. Chapter 64I, section 1(2)(a) of the General Laws defined "purchase" as "[a]ny transfer of title or possession, or both . . . of tangible personal property for a consideration."[18]

The Commissioner argued that certain federal tax advantages realized by the parent corporation as a result of the merger amounted to "consideration" and thereby triggered the operation of chapter 64I, section 1(2)(a).[19] The Court rejected this argument, noting that the tax statute at issue did not incorporate "undiluted, the concept of consideration as applied in the law of contracts . . . [and that] [i]n any event, the tax benefit received by a parent through a tax-free reorganization, lawfully adopted to avoid the imposition of federal income tax, is not consideration . . . within the meaning of chapter 64I, section 1(2)(a)."[20]

Perhaps the hardest blow to the Commissioner came with the revelation that a policy memorandum issued by her predecessor in office found that no taxable event occurred with the transfer of a motor vehicle "from a wholly-owned subsidiary to the parent."[21] The Court was "hard pressed" to find a meaningful distinction between a transfer from subsidiary to parent and a transfer by merger from one wholly owned subsidiary to another wholly owned subsidiary.[22] The Court affirmed the decision of the Appellate Tax Board granting the taxpayer an abatement of the use tax imposed by the Commissioner.[23]

The Commissioner also failed to persuade the Court of the merit of her position in *Commissioner of Revenue* v. *McGraw-Hill, Inc.*,[24] where she

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[16] *Id.*

[17] *Id.* at 1338, 421 N.E.2d at 767. If the taxpayer had purchased the motor vehicles directly from the subsidiaries, a use tax would have been due the Commonwealth. *Id.* at 1339, 421 N.E.2d at 768. What the taxpayer and the liquidated subsidiaries did, through a lawful merger and transfer of assets, was to achieve precisely the same results (i.e., a transfer of motor vehicles to the taxpayer) without creating a taxable event.

[18] *Id.*

[19] *Id.* at 1139, 421 N.E.2d at 768.

[20] *Id.*

[21] *Id.* at 1340, 421 N.E.2d at 769.

[22] *Id.* at 1341, 421 N.E.2d at 769.

[23] *Id.*

[24] 1981 Mass. Adv. Sh. 957, 420 N.E.2d at 293.

sought to impose a sales tax[25] on the taxpayer's sale of construction industry information bulletins to subscribers. McGraw-Hill undertook an elaborate and sophisticated effort to compile up-to-the-minute information on various aspects of the construction industry and offer the data to individual subscribers.[26] Subscribers would provide McGraw-Hill with a "market profile" and would receive information specially tailored for their individual needs.[27] No subscriber received the same informational bulletins over a course of time.[28] The question presented was whether the sale of these reports were exempt from the sales tax by virtue of the exclusion of chapter 64H, section 1(12)(f).[29]

The Court, affirming the Board, found that the McGraw-Hill reports met the two part test embodied in the section 1(12)(f) exclusion. First, the Court found that subscribers received individualized material from the taxpayer — i.e., information specially suited to the subscriber's needs.[30] Although the potential for access to all of the taxpayer's information existed, in fact "the fundamental object" of subscribers to the taxpayer's reports was to "obtain an ongoing source of . . . information sifted and individualized by McGraw-Hill to meet the needs of the individual subscriber."[31] The second requirement of the section 1(12)(f) exclusion[32] was also deemed met by the taxpayer since "due to the variety of information collected by McGraw-Hill, no subscriber received the same reports over a long period."[33]

The Commissioner sought unsuccessfully to raise a new legal argument before the Supreme Judicial Court. The alternative argument advanced by the Commissioner attempted to persuade the Court that even if the Board was correct in its determination that the McGraw-Hill reports came within the section 1(12)(f) exclusion, the reports were nonetheless taxable as sales under section 1(12)(e).[34] The Court sharply disagreed with the Commission-

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[25] Retail sales of tangible personal property in Massachusetts are subject to the sales tax. G.L. c. 64H, § 2.

[26] 1981 Mass. Adv. Sh. at 958-60, 420 N.E.2d at 294-95.

[27] *Id.* at 959, 420 N.E.2d at 294.

[28] *Id.* at 960, 963, 420 N.E.2d at 295, 296.

[29] G.L. c. 64H, § 1(12)(f) provides a two part test to determine whether a sale is excluded from the sales tax. Transactions which include "the furnishing of information which is personal or individual in nature *and* which is not or may not be substantially incorporated in reports furnished to other persons" are not sales for sales tax purposes.

[30] *Id.* at 962-63, 420 N.E.2d at 296.

[31] *Id.* at 963, 420 N.E.2d at 296.

[32] The second requirement of the § 1(12)(f) exclusion provides that "[t]he furnishing of information . . . is not or may not be substantially incorporated in reports furnished to other persons."

[33] 1981 Mass. Adv. Sh. at 963, 420 N.E.2d at 296.

[34] G.L. c. 64H, § 1(12)(e) provides in relevant part that a "sale" includes "[a] transfer for a consideration of the title or possession of tangible personal property which has been produced, fabricated or printed to the special order of the customer, or of any publication."

er's contention that the Board erred by failing to consider the application of section 1(12)(e) to the reports, noting that the Commissioner had assented to a narrowing of the issues before the Board.[35] The Court refused to consider the question of the applicability of section 1(12)(e) to the McGraw-Hill reports because the matter was raised by the Commissioner for the first time on appeal and because she had given her assent to the narrowing of issues to the section 1(12)(f) question only.[36] The Court noted that the Commissioner "put forth no compelling reasons for us to believe her or her prior agreement."[37]

§ 16.9. Privacy — Tax Records. Massachusetts protects its taxpayers from unwarranted intrusion into their privacy by safeguarding the confidentiality of state tax returns. In two cases during the *Survey* year, the statutory scheme requiring the Commissioner of Revenue to maintain confidential tax lists was tested by federal and state government agencies seeking to perform investigatory tasks. In both cases, the courts struck a balance between the Commissioner's obligation to maintain the confidentiality of tax records and the need for public investigatory agencies to procure information relevant to their public functions.

In *In re L. Joyce Hampers*,[1] the United States Court of Appeals for the First Circuit vacated a federal district court finding that the Massachusetts Commissioner of Revenue was in contempt of a federal grand jury order to disclose certain tax records. The dispute arose when a federal grand jury, probing an arson-for-profit ring, determined that certain tax records held by the Commissioner would be helpful in determining the culpability of certain individuals under scrutiny.[2]

The federal grand jury issued a subpoena duces tecum, ordering the Commissioner to appear to testify before them and to bring documents (i.e., tax records) relevant to the ongoing inquiry.[3] The Commissioner appeared but refused to honor the subpoena duces tecum, citing chapter 62C, sections 21 and 22 of the General Laws as prohibiting her from making the disclosure.[4]

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[35] *Id.* at 964-65, 420 N.E.2d at 297.

[36] *Id.* at 965, 420 N.E.2d at 297.

[37] *Id. Compare* Litton Business Systems, Inc. v. Commissioner of Revenue, 1981 Mass. Adv. Sh. 1207, 1211-12, 420 N.E.2d 339, 342-43 (When Commissioner of Revenue sought to include essential facts in record of case, Court would relieve her of her assent to a statement of agreed facts and remand case for an evidentiary hearing).

§ 16.9. [1] 651 F.2d 19 (1st Cir. 1981).

[2] *Id.* at 20.

[3] *Id.* The tax records sought related to the sales tax on meals and beverages for the corporate owner of a restaurant facility. The restaurant had been under review as a location which may have been employed in an arson for profit scheme. *Id.*

[4] *Id.* G.L. c. 62C, § 21 provides, in relevant part:

> The disclosure by the commissioner, . . . to any person but the taxpayer or his representative, of any information contained in or set forth by any return or document filed

The federal district court found that state law must yield to the federal inquiry because of the supremacy clause, and ordered the Commissioner to furnish the grand jury with the requested documents.[5] Upon the Commissioner's continued refusal to produce the tax records, she was found in contempt and an appeal was taken to the First Circuit Court of Appeals.[6]

Two issues were raised on appeal. The first, Massachusetts' argument that the Commissioner's obligation to testify violated her fifth amendment privilege against self-incrimination, was given short shrift by the court, which found the argument "misdirected."[7] The court held that the fifth amendment privilege applied in those cases where "the possible incrimination . . . lay in the facts to be revealed by testimony and not in the fact of testifying itself."[8]

The Commonwealth's second argument triggered more exhaustive analysis. That argument framed the legal question in terms of a common law privilege against self-disclosure.[9] In support of its privilege argument, the Commonwealth cited several factors, including the long standing confidential nature of state tax returns and the federal government's failure to exhaust all other reasonable methods of procuring the sought-after information.[10]

The Court applied a balancing test, "weighing the importance of the disclosure sought in the federal prosecution against the potential injury caused a state by disclosure."[11] In this case, the Court found that Massachusetts taxpayers voluntarily submit tax returns to the Commissioner with confi-

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with the commissioner, other than the name and address of the person filing it, except in proceedings to determine or collect the tax or for the purpose of criminal prosecution under this chapter . . . is prohibited. . . . (c) Any violation of this section shall be punished by a fine of not more than one thousand dollars, or by imprisonment for not more than six months, or both, and by disqualification from holding office in the commonwealth for such period, not exceeding three years, as the court determines.

G.L. c. 62C, § 22 provides, in relevant part:

The commissioner may permit the Secretary of the Treasury of the United States or his delegate, . . . to inspect any return required to be filed with the commissioner, but such permission shall be granted or such information furnished to such officer or his representative only if the laws of the United States or such other territory, state or political subdivision thereof, as the case may be, . . . grant substantially similar privileges to the commissioner and such information is to be used exclusively for the purpose of administering the tax laws of the United States or of such territory, state or political subdivision thereof.

[5] 651 F.2d at 20-21.

[6] *Id.* at 20.

[7] *Id.* at 21.

[8] *Id.*

[9] *Id.* at 21-22.

[10] *Id.*

[11] *Id.* at 22.

dence that the returns will not be disclosed.[12] Moreover, permitting the federal government easy access to such information would have "an adverse impact on the state-taxpayer relationship."[13]

The Court turned to federal tax disclosure law as an appropriate construct for analysis. Title 28 of the United States Code, section 6103(i)(1) permits disclosure of federal tax returns only upon the order of a federal district court judge and where it is shown (1) that there is reasonable cause to believe a crime has been committed, (2) that the returns are probative of a matter in issue in the criminal prosecution and (3) that the information cannot reasonably be obtained from any other source.[14]

The First Circuit adopted the framework of section 6103 to accommodate the parties' legitimate concerns. The court held that the State Revenue Commissioner has a qualified privilege,[15] and that the federal grand jury "must proffer reasonable cause to believe that a federal crime has been committed, that the information sought will be probative of a matter at issue in the prosecution of that crime, and that the same information or equally probative information cannot be obtained elsewhere through reasonable efforts."[16]

The Supreme Judicial Court addressed similar issues in *Finance Commission of Boston* v. *Commissioner of Revenue*,[17] where a state agency (the Boston FinCom) sought tax records relating to a probe of the City's administration of chapter 121A redevelopment programs. Upon the Commissioner's failure to honor a subpoena for tax records created prior to 1976,[18] the Finance Commission brought a motion to compel the production of documents.[19] That motion was denied, and on appeal, the Supreme Judicial Court affirmed.[20]

The central focus of the Court's decision was chapter 62C, section 21(a), which "preempts the [Finance Commission's] public record claim and forecloses the need for balancing the privacy-publicity interests."[21] The Finance Commission's request for tax records pursuant to the state public

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[12] *Id.* at 23.

[13] *Id.*

[14] *Id.* at 21.

[15] *Id.* at 23.

[16] *Id.*

[17] 1981 Mass. Adv. Sh. 593, 417 N.E.2d 945.

[18] G.L. c. 121A information was designated as public record information by legislative enactment in 1975. *See* St. 1975, c. 827, § 7. The Commissioner of Revenue took the view that all c. 121A tax records prior to the effective date of the enactment came within the ambit of the all inclusive confidentially statute, G.L. c. 62C, § 21, and could not be produced. 1981 Mass. Adv. Sh. at 596, 417 N.E.2d at 947.

[19] 1981 Mass. Adv. Sh. at 594, 417 N.E.2d at 946.

[20] *Id.* at 594-95, 417 N.E.2d at 946-47.

[21] *Id.* at 595, 417 N.E.2d at 947.

records act was swiftly disposed of. The Commissioner withheld all tax records created prior to the 1975 enactment. The Court rejected the Finance Commission's view that the 1975 enactment ought to have retroactive effect in the absence of any express legislative intent to overcome the plain prospective language of the statute.[22]

The Court went further in rejecting the public records act claim by noting that the tax records in question, because of the applicability of chapter 62C, came within the exemption of chapter 4, section 7, twenty-sixth (a), which removes from the realm of public records those documents "specifically or by necessary implication exempted from disclosure by statute."[23]

Finally, the Court rejected the Finance Commission's argument that the tax records at issue came within the exemption provided in chapter 62C, section 21(a) for investigations "to determine a tax."[24] The Court determined that "no statute empowers the [Finance Commission] to determine or collect a tax."[25] Moreover, the predecessor statute to chapter 62C, which governed disclosure of the tax records at issue, contained no exemption for proceedings to "determine" a tax.[26] The Court's conclusion summed up its essential position: the Finance Commission's "subpoena power must yield to the statutory confidentiality mandate which obtained prior to March, 1976."[27]

The plain message of the federal and state court rulings on tax record disclosure was that the confidentiality of tax records is a substantial governmental interest which will only be outweighed by an explicit statutory authorization or circumstances under which the disclosure of tax records is the only reasonable method of securing information probative of matters at issue in a criminal proceeding.

§ 16.10. Practice Before The Appellate Tax Board. During the *Survey* year, the Court had several occasions to comment on practice before the Appellate Tax Board, including the scope and extent of review on appeal from that "tax court."[1]

In a rescript opinion, the Court vacated an Appellate Tax Board decision, remanding the matter for further consideration because the factual findings and report issued by the Board were inadequate.[2] In *Board of Assessors of*

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[22] *Id.* at 598, 417 N.E.2d at 948.

[23] *Id.* at 597, 417 N.E.2d at 948.

[24] *Id.* at 600, 417 N.E.2d at 949.

[25] *Id.*

[26] *Id.* at 601, 417 N.E.2d at 950.

[27] *Id.* at 602, 417 N.E.2d at 950.

§ 16.10. [1] The Appellate Tax Board "is to all interest and purposes a tax court." Cohen v. Assessors of Boston, 344 Mass. 268, 269, 182 N.E.2d 138-39 (1962).

[2] Commissioner of Revenue v. Globe Automatic Vending Co., Inc., 1981 Mass. Adv. Sh. 1342, 421 N.E.2d 1213.

Norwood v. *Barton*,[3] the Court made plain that it would not sit as a trial court on tax disputes. It thus rejected an appeal, not on the merits of the case but "because neither party requested that the board make findings of fact and a report thereof . . . . [so that] we have no way of knowing what took place before the Board."[4] The Court treated the Board's decision as final because no legal question had been adequately presented to it, and placed the burden of creating and assembling an adequate record squarely on the appellant.[5]

In *Lynn Hospital* v. *Board of Assessors of Lynn*,[6] the Court provided the practitioner with direct assistance with regard to the mechanics of tax practice. In *Lynn Hospital*, the taxpayer challenged an Appellate Tax Board decision which determined that a parking garage, owned by the hospital, was divided equally between exempt and non-exempt purposes during the tax years in question.[7] The Court determined that the Board's findings were inadequate because they were mutually inconsistent.[8] The Court noted, however, that the taxpayer had "met the three prerequisites for our consideration" of the question whether the Board's findings were supported by substantial evidence.[9] These prerequisites were, first, that the issue must have been raised before the Board; second, that the Board must have made specific findings, and third, that the record must contain ample evidence for adequate judicial consideration.[10] In *Lynn Hospital*, the Court found the Board's factual findings to be "mutually inconsistent," and remanded the matter to the Board for "a clear statement of the reasons supporting its finding. . . ."[11]

In *New Boston Garden Corp.* v. *Board of Assessors of Boston*,[12] the Court remanded to the Appellate Tax Board a finding which it determined had not been based upon substantial evidence.[13] One question before the Court was the propriety of the Board's reliance on certain testimony and modes of real property valuation. With respect to this matter, the Court

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[3] 1981 Mass. Adv. Sh. 2332, 429 N.E.2d 330.

[4] *Id.* at 2333, 429 N.E.2d at 331.

[5] *Id.*

[6] 1981 Mass. Adv. Sh. 537, 417 N.E.2d 14.

[7] *Id.* at 544, 417 N.E.2d at 19.

[8] *Id.* at 545, 417 N.E.2d at 19.

[9] *Id.* at 544 n.5, 417 N.E.2d at 19 n.5.

[10] *Id.*

[11] *Id.* at 546, 417 N.E.2d at 20.

[12] 1981 Mass. Adv. Sh. 1023, 420 N.E.2d 298.

[13] Substantial evidence is "such evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 1033, 420 N.E.2d at 304. While the Court is required to review the entire record, "and must take into account whatever in the record detracts from the weight of the agency's opinion . . . as long as there is substantial evidence to support the findings of the agency, [the Court] will not substitute [its] views as to the facts." Arthurs v. Board of Registration, 1981 Mass. Adv. Sh. 849, 854-55, 418 N.E.2d 1236, 1241 (citations omitted).

found that testimony proffered by the city's sole witness was not credible and should not have been relied upon by the Board.[14] The Court's rejection of the city's witness was rooted in various substantial factual inconsistencies established in the record.[15]

With respect to the Board's reliance on certain real property valuation methods, the Court recognized the reliability of two approaches to value: the market data approach and the capitalization of income approach.[16] The Court concurred with the Board's rejection of the market approach to value the Boston Garden facility, on the basis that prior sales were not arms-length transactions.[17] The Court did find, however, that the Board should not have rejected unrebutted, corroborated testimony establishing that the Boston facility and a St. Louis facility were sufficiently comparable to warrant consideration of the sale of the St. Louis facility as an indicator of value.[18] The Court stated that the Board "may not reject unrebutted and corroborated testimony without a basis for such rejection in the record."[19]

While it appeared that the capitalization of income approach was more appropriate to determine the facility's value,[20] the Court remanded the case to the Board because it could not find that the expense figures, capitalization rate or tax factor employed by the Board had bases in the record.[21] Again the Court found that the Board rejected unrebutted and "logically adequate" testimony without "a rational articulable basis."[22] The Court made plain that it will not hesitate to exercise its role and set aside findings "when the record . . . clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses."[23]

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[14] *Id.* at 1025-26, 420 N.E.2d 300. The taxpayer presented a substantial amount of evidence to the Board through five witnesses: a civil engineer (specializing in the design and construction of sports arenas), two independent real estate appraisers and two individuals familiar with the sales history of the arena facility. *Id.* at 1027-29, 420 N.E.2d at 301-02. The evidence submitted through these witnesses was sophisticated and overwhelming when compared with the meager evidence submitted by the city through its sole witness — a career employee of its own assessing department. *Id.* at 1032, 420 N.E.2d at 303-04.

[15] *Id.* at 1031, 1035-36, 420 N.E.2d at 303, 305.

[16] *Id.* at 1036-39, 420 N.E.2d at 305-07. Arms-length sales are the most reliable indicators of value. *See, e.g.*, Bennett v. Board of Assessors of Whitman, 354 Mass. 239, 240, 237 N.E.2d 7, 8-9 (1968) ("fair cash value" means the price at which a parcel would be sold on the open market in an arm's length transaction between a willing buyer and seller, neither of whom is under a compulsion to buy or sell).

[17] *Id.* at 1036-39, 420 N.E.2d at 305-07.

[18] *Id.* at 1036-37, 420 N.E.2d at 306.

[19] *Id.* at 1038, 420 N.E.2d at 306.

[20] In commercial property cases where there are few or no arms-length sales, or a sufficient number of comparable sales, it becomes necessary to employ the capitalization of income approach to value. *See*, SALIBA, REAL ESTATE VALUATION IN COURT (International Association of Assessing Officers 1972) at 28.

[21] 1981 Mass. Adv. Sh. at 1040-43, 420 N.E.2d at 308-09.

[22] *Id.* at 1041, 420 N.E.2d at 308.

[23] *Id.* at 1042, 420 N.E.2d at 309.

The Court properly refused to act as a rubber stamp to the Appellate Tax Board when such a disparity in the evidence existed. The substantial evidence test plainly means something, and the Court made use of *New Boston Garden* to reveal the breadth of its scope of review under that test.

The Court plainly seeks to decide appeals from the Appellate Tax Board on the basis of a complete and thoughtful record. The practitioner is under an important obligation to ensure that such a record finds its way before the reviewing appellate court.