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Chapter 13: State and Local Taxation

George T. Shaw

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C H A P T E R 1 3

State and Local Taxation

GEORGE T. SHAW

A. INCOME TAX: COURT DECISIONS

§13.1. **Personal income tax: Income from foreign real estate trusts.** In 1963, the taxpayer in *State Tax Commn. v. Fine*,¹ a Massachusetts resident, received distributions from the Mesabi Trust, a Minnesota real estate trust with transferable shares, the primary asset of which was land in Minnesota. This land was mined for iron ore and other minerals by a lessee who paid royalties to the trust for the privilege of removing the minerals. The trust distributed all its net income, consisting solely of the royalties, to the holders of beneficial interests in the trust.

Under G.L., c. 62, §1, a Massachusetts resident is not taxed on dividends received from a trust with transferable shares which owns exclusively real estate or which is engaged principally in the ownership, management, and operation of real estate. However, this exemption is conditioned on the trust's filing an agreement with the Commissioner of Corporations and Taxation to pay a 6 percent tax on its income, to the extent that the income would be taxable under Section 1 if received by a Massachusetts resident.

The Mesabi Trust had not filed this agreement with the commissioner and had not paid a Massachusetts tax on its income. The taxpayer was granted an abatement by the Appellate Tax Board on the tax paid by her by reason of the dividends from the Mesabi Trust received in 1963. The Court affirmed the decision of the Appellate Tax Board in an interesting but sometimes difficult to follow opinion by Justice Cutter.

The *Fine* decision cannot be understood without looking first at two earlier decisions of the Court. In *State Tax Commn. v. Colbert*,² the taxpayer received income with respect to transferable shares he owned in a Massachusetts trust which owned Massachusetts real estate. The trust had neither filed an agreement with the commissioner nor paid a tax on its trust income. Accordingly, Chapter 62, Section 1 would seem to have required that the taxpayer be taxed on the dividend distribution. Nevertheless, the Court concluded that the taxpayer, as a beneficial owner of the trust, held an equitable interest in the trust's real estate, from which the income (gains from the sale

GEORGE T. SHAW is associated with the firm of Hemenway and Barnes, Boston.

§13.1. ¹ 1969 Mass. Adv. Sh. 827, 247 N.E.2d 701.

² 344 Mass. 494, 183 N.E.2d 277 (1962).

of trust real estate) was derived. A then operative statute exempted from the income tax "income derived . . . from real estate,"³ and the Court held that the taxpayer's income in question was "derived . . . from real estate" and was exempt. The income from real estate thus was allowed to pass through the trust to the taxpayer without a change of identity from real estate income to dividend income.⁴ That the income reached the taxpayer as a dividend for other purposes was not controlling for Massachusetts tax purposes: the important characterization was that the income was derived from real estate. By this characterization the Court avoided imposing a tax which seemed to be required in view of the failure of the trust to file the agreement, stating that "[t]axation of shareholders' income derived from real estate trusts we think ought not to depend on whether the trustees have filed the agreement [with the Commissioner]."⁵

In *State Tax Commn. v. Wheatland*,⁶ decided less than four months prior to *Colbert*, the Court placed great weight on the nature of the income. There, the taxpayer, a co-owner of Maine forest land, received the net proceeds of timber severance royalties paid by loggers cutting timber from the Maine real estate. The commissioner sought to tax this income as business income. The Court referred to its earlier decisions holding that the income tax is a property tax on the underlying property and then said:

. . . The substance of this tax, however, is upon payments for the privilege of severing from the land a substantial part of its value. This is the predominant aspect of the payments. They are analogous to rent payments. If a tax upon rents is a property tax on the real estate from which the rents are derived, the tax under consideration seems at least equally a tax upon the land.⁷

If the Court had allowed the tax to be imposed, as interpreted by its own decisions, it would have been allowing Massachusetts to impose a "property tax" on Maine real estate. Fearing that such a result would be impermissible under the Federal Constitution, the Court construed the business income statute narrowly as not taxing the timber severance royalties.

As can be seen from the foregoing discussion of *Colbert* and *Wheatland*, *Fine* presents an interesting combination of the significant factors of the earlier cases. Like *Colbert*, *Fine* involves distributions of income from a real estate trust with transferable shares, and like *Wheatland*, it involves payments for the removal of natural resources

³ G.L., c. 62, §22, as appearing in Acts of 1939, c. 486, §2. A more narrow exemption for rental income now appears in G.L., c. 62, §8(1).

⁴ Page, *Massachusetts Real Estate Syndication: Tax and Other Pitfalls*, 43 B.U.L. Rev. 491, 509 n.70 (1963).

⁵ *State Tax Commn. v. Colbert*, 344 Mass. at 497, 183 N.E.2d at 279.

⁶ 343 Mass. 650, 180 N.E.2d 340 (1962).

⁷ *Id.* at 653, 180 N.E.2d at 342.

from out of state realty. As might be expected, the *Fine* decision follows the rationale of the other cases.

The Court first noted that historically the Massachusetts income tax has always been considered a property tax. It then used the conduit theory of *Colbert* to decide that Mrs. Fine had received income of the same nature as the trust, notwithstanding its distribution to her in the form of a dividend. The real estate income exemption statute applicable in *Colbert* had been amended prior to the year in question in *Fine*. Formerly it had been sufficient if the income was derived from real estate, but the statute applicable at the time of *Fine* exempted only "income from rentals of real estate."⁸ Given the conduit theory, gains from sales of trust real estate in *Colbert* clearly constituted income derived from real estate, but the mining royalties in *Fine* could be "income from rentals of real estate" only by equating them with the timber severance royalties of *Wheatland* and further by construing *Wheatland* as holding, not that the timber severance royalties were *analogous* to rents (as the *Wheatland* opinion said they were),⁹ but that they *were* rents. The Court in *Fine* accepted both challenges and held that the mining royalties received by the Mesabi Trust constituted rental income.

One factor prevented the Court from concluding, without further discussion, that the income received by Mrs. Fine was not taxable simply on the authority of *Colbert* and *Wheatland*. Subsequent to *Colbert*, Chapter 62, Section 1(e), was amended to read as follows, the amendment adding the italicized language:

Any such dividend issued by partnerships, associations, or trusts, the beneficial interest in which is represented by transferable shares, *regardless of their source and whether taxable or not*, shall be taxable under this section if the said partnership, association or trust fails to file an agreement with the commissioner as hereinbefore provided. [Emphasis added.]¹⁰

The legislative history of the amendment¹¹ reveals that the State Tax Commission recommended that the legislature clarify its intent with respect to the decision in *Colbert*. The amendatory language which the commission recommended and which was enacted "sets out in adequate language that which the Department of Corporations and Taxation has always felt was the original basis for the initial passage of the law."¹²

It is not clear from this history whether the amendment was intended to deal with the particular facts of *Colbert* (a Massachusetts trust owning Massachusetts land making income distributions to a

⁸ See note 3 *supra*.

⁹ 343 Mass. at 653, 180 N.E.2d at 342.

¹⁰ G.L., c. 62, §1(e), as amended by Acts of 1963, c. 496.

¹¹ 1963 H. Doc. No. 101, at 2-3, quoted in *Fine*, 1969 Mass. Adv. Sh. at 832 n.10, 247 N.E.2d at 705-706 n.10.

¹² *Ibid*.

Massachusetts resident) or whether it was intended to apply equally to all real estate trusts with transferable shares, whether owning land within or without the Commonwealth. The latter interpretation, if accepted by the Court, would have forced the Court in *Fine* to face the constitutional issue it evaded in *Wheatland*: could the Massachusetts income tax, previously construed by the Court as a property tax on the property producing the income, be applied to income from foreign real estate?

In addition to the ambiguity of the legislative history, there is ambiguity in the language of the amendment itself. First, does "their" refer to "any such dividend," to "trusts" or to "shares"? Application of the rules of grammar would eliminate "dividend" as an antecedent, but, in the context of the statute, neither "trusts" nor "shares" have a source and neither is "taxable." It is submitted that the only reasonable interpretation is to read the amended statute "any such dividend . . . regardless of [its] source and whether taxable or not." The second ambiguity relates to "source." Is "source" used in a geographical sense (Massachusetts or foreign trust owning Massachusetts or foreign land), or is it used with reference to the type of income from which the dividend is paid (rental income, farming income, timber severance royalties)? While the former interpretation is the more reasonable, in *Colbert* there was no issue raised as to the geographical source of the dividend, and it seems strange that the word "source" would be used if the amendment were intended solely to apply to a factual situation like *Colbert*.

The Court in *Fine*, without noting the above ambiguities, concluded that the amendment was intended to deal only with facts like those presented in the *Colbert* decision. As noted earlier, a contrary conclusion would have made the Court decide a constitutional issue, with which it was clearly unwilling to wrestle, whether the Massachusetts income tax, which the Court has always viewed as a form of property tax, could constitutionally tax gains derived from sister-state property. The merits of this constitutional issue have been examined elsewhere,¹³ and it is sufficient to note here with respect to that issue that it is likely that the United States Supreme Court would not feel bound by the Supreme Judicial Court's characterization of the Massachusetts income tax as a property tax and would conclude independently that the Massachusetts income tax is more akin to what is commonly thought of as an income tax than to a true property tax. Nevertheless, the court in *Fine* again evaded this issue by holding that the 1963 amendment did not show a legislative intent to extend application of the Massachusetts tax to the *Fine* situation.

It is submitted that the Court reached the wrong result with respect to the interpretation of the 1963 amendment. It must be remembered that the *Wheatland* decision, raising the constitutional issue in a direct ownership context, was handed down only a few months prior to

¹³ See 1962 Ann. Surv. Mass. Law §17.17.

Colbert. Surely the State Tax Commission could easily foresee that issue arising in the context of a *Colbert*-type trust owning foreign real estate. It does not do violence to either the legislative history of the 1963 amendment or its language to construe it as a legislative decision to extend the income tax to its constitutional limits. If, as it is herein suggested, the legislature was pushing the Court into making the decision on the constitutional issue, it failed, and a new statute, specifically made applicable to foreign trusts and foreign real estate, can be expected.

§13.2. **Trust income: Exemption for accumulations for nonresidents.** Massachusetts exempts from the income tax imposed by Chapter 62 of the General Laws certain types of income payable to or accumulated for nonresidents of the Commonwealth.¹ That exemption does not apply, however, when the income is "accumulated for unborn or unascertained persons or persons with uncertain interests. . . ."² An uncertain interest includes "any future interest other than a remainder presently vested in a person . . . in being not subject to be divested by the happening of any contingency expressly mentioned in the instrument creating the trust."³

In *State Tax Commn. v. New England Merchants National Bank of Boston*,⁴ the trustee accumulated capital gains for a nonresident beneficiary of a Massachusetts testamentary trust. The trust instrument directed the trustee to pay to the beneficiary on request all or any part of the principal and accumulated income free and discharged of all trusts. The State Tax Commission appealed a decision of the Appellate Tax Board granting an abatement to the trustee with respect to the income taxes on the accumulated capital gains. The Court held that the nonresident beneficiary had a present rather than a future interest in the accumulated income of the trust and that therefore the exemption limitations applying to future interests were not pertinent.

In earlier cases,⁵ the Court relied on a theory of constructive receipt to tax Massachusetts taxpayers on income received by nonresident trustees of trusts created by the taxpayers. In those cases, the governing trust instrument authorized the settlors to receive income upon demand and, with the consent of another trustee—a nonadverse party—to amend or revoke the trust. In view of the powers held by the settlors to obtain principal and interest on demand, the Court in each case held that the taxpayer "received" the trust income for purposes of the Massachusetts taxing statute, although the income was not actually distributed to them.

The principle of these decisions was relied upon by the Court in the present case. It is not a large step to move from a holding that a tax-

§13.2. 1 G.L., c. 62, §8(d).

² G.L., c. 62, §10.

³ *Ibid.*

⁴ 1969 Mass. Adv. Sh. 355, 245 N.E.2d 448.

⁵ *Dewey v. State Tax Commn.*, 346 Mass. 43, 190 N.E.2d 203 (1963); *State Tax Commn. v. Pitts*, 340 Mass. 575, 165 N.E.2d 586 (1960).

payer is deemed to receive income which is available to him upon demand to a holding that a person to whom income is distributable upon demand has a present, not a future, interest in the income for purposes of the limitation on the exemption in question. There should be no difference because this legal principle results in the imposition of a tax in one case and the allowance of an exemption in another.

§13.3. Corporate excise tax: Deduction for nonpatronage dividends paid by farmers' cooperatives. In *Ocean Spray Cranberries, Inc. v. State Tax Commn.*,¹ the Court was called upon to construe the definition of net income appearing in G.L., c. 63, §30, cl. 5, in the context of a deduction against gross income claimed for nonpatronage dividends on capital stock paid during the taxable years 1960-1962 by Ocean Spray, a Delaware farmers' cooperative with a usual place of business in Massachusetts. For purposes of the Massachusetts excise tax on foreign corporations,² Ocean Spray was classified as a foreign manufacturing corporation.³

The then operative language of Section 30, Clause 5 defined "net income" as gross income from all sources, "less the deductions, . . . other than dividends, allowable . . ." by the Internal Revenue Code for that year. The Court was initially assisted by the decision in *Broadway National Bank of Chelsea v. Commissioner of Corporations and Taxation*⁴ which, more than 20 years earlier, had held, in construing nearly identical statutory language relating to the taxation of banks, that "other than dividends" meant "other than dividends received." Given the decision in *Broadway National Bank* and the apparent stipulation in *Ocean Spray* that the dividends paid during the years in question were deductible for federal tax purposes, it would have been difficult for the Court to conclude that *Ocean Spray* was not entitled to the claimed deduction. The Court, as might have been expected, held for the taxpayer and reversed the decision of the Appellate Tax Board which had denied the deduction. The Court clearly felt that it was bound by the "plain meaning of [Section 30, Clause 5's] language."⁵

As a result of the decision, the taxpayer owed no taxes for the years in question since the nonpatronage dividends paid exceeded its gross income allocable to its Massachusetts business. It might have been this factor which led the State Tax Commission to make a curious argument before the Court. General Laws, c. 157, §18, exempts from taxation under Chapter 63 certain agricultural and horticultural corporations organized without capital stock pursuant to Section 10 of Chapter 157. The commission appeared to be contending that, since the General Court had seen fit to exempt from taxation under Chapter 63 only those cooperative organizations without capital stock, all other coopera-

¹ 1969 Mass. Adv. Sh. 553, 246 N.E.2d 654.

² G.L., c. 63, §§39-43.

³ G.L., c. 63, §42B.

⁴ 321 Mass. 25, 71 N.E.2d 607 (1947).

⁵ *Ocean Spray Cranberries, Inc. v. State Tax Commn.*, 1969 Mass. Adv. Sh. at 556, 246 N.E.2d at 656.

tives must pay a tax. What is curious about this argument is that Ocean Spray was not contending that it was exempt from excise taxation; it was simply claiming a deduction which, if allowed, would have the effect of offsetting its Massachusetts gross income, leaving no tax due to the Commonwealth. Ocean Spray did have capital stock and thus was a wholly different type of organization from that described in Section 18 of Chapter 157. The legislature was surely aware of cooperatives with capital stock such as Ocean Spray, because Sections 3-9 of Chapter 157 make specific provision for their organization. When viewed in the context of the complete statutory scheme in Chapter 157, the limited exemption in Section 18 is narrow indeed. There is no similar exemption from Chapter 63 taxation for capital stock cooperatives such as Ocean Spray, and the definition of a foreign manufacturing corporation under Chapter 63, Section 42B is broadly worded. That Ocean Spray was subject to tax pursuant to Chapter 63 seems clear.

Clause 5 of G.L., c. 63, §30, was amended⁶ subsequent to the years in controversy in this case but prior to the present decision. The present language would not change the result of the case. A 1966 amendment⁷ reworded Clause 5 to provide specifically that deductions shall not be allowed for dividends received. Thus, the decision in *Broadway National Bank* was given statutory support. While not mentioned by the Court in the present case, the 1966 amendment must have provided further support for the Court's decision to follow the earlier case.

B. INCOME TAX: LEGISLATION

§13.4. **Federal income tax deduction.** The deduction of federal income taxes attributable to business income for purposes of computing Massachusetts business income has been eliminated.¹ Because this change was applicable to taxable years commencing after December 31, 1968, taxpayers were required to adjust their withholding and estimated tax payments accordingly after the July 18, 1969, effective date.

§13.5. **Exemption for dependents.** The Massachusetts personal income tax statute, which grants an exemption of \$600 against business income for each dependent of the taxpayer,¹ previously contained an extensive definition of "dependent" closely paralleling the definition in the federal statute.² The Massachusetts statute was amended this year³ to provide that a \$600 exemption is allowable for each dependent

⁶ Acts of 1966, c. 698, §46; Acts of 1967, c. 755.

⁷ Acts of 1966, c. 698, §46.

§13.4. ¹ Acts of 1969, c. 546, §1, amending G.L., c. 62, §6(c).

§13.5. ¹ G.L., c. 12, §5B(4).

² Int. Rev. Code of 1954, §§151(e), 152.

³ Acts of 1969, c. 557.

who qualifies for an exemption as a dependent under the federal statute. This change will simplify the task of the tax return preparer by eliminating two standards for dependent status and by making pertinent the not inconsiderable body of federal law of legislative, administrative and judicial origin relating to dependents. It is to be hoped that this type of adoption by reference of the federal tax statutes will continue in the future.

§13.6. **Qualified retirement and death benefit trusts.** The provisions exempting from taxation payments made by taxpayers' employers to certain pension, annuity, disability, death benefit-sharing and stock bonus plan trusts have been rewritten to exempt specifically payments by employers which are deductible by employers under Section 404 of the Internal Revenue Code of 1954.¹ Similarly, the provisions relating to the exemption of income of such trusts have been rewritten to exempt specifically income of a trust qualified under Section 401 of the Internal Revenue Code of 1954.²

§13.7. **Extension of time: Deferred payment.** The authority granted to the commissioner to extend the time for payment of income taxes in the event of undue hardship and to abate a part or all of the interest resulting from a delayed payment has now been revoked.¹ The commissioner retains the authority to extend for a maximum of six months the time of filing a return.

§13.8. **Extension of time: Deferred filing of return.** By another amendment,¹ the validity of an extension of time granted to a corporation for filing a return is conditioned upon the corporation's paying at least 80 percent of the "tax shown on the return for the taxable year" not later than the date otherwise prescribed for the payment of the tax. As a consequence of the extension's becoming null and void if the 80 percent payment test is not satisfied, the penalty provisions relating to late returns become applicable.² Although the quoted language is ambiguous, it appears that the 80 percent test is measured against the tax shown on the final return and not against the tax shown on the tentative return filed with the application for an extension.³ The latter interpretation would, it is submitted, directly contradict the first two paragraphs of the amended section which require payment of the amount of tax reasonably estimated to be due with the submission of the application for extension and the tentative return. If the tentative tax is less than 80 percent of the final tax computed during the extension period, the extension is null and void under the new statute

§13.6. ¹ Acts of 1969, c. 629, §1, amending G.L., c. 62, §8(c).

² Acts of 1969, c. 629, §1, amending G.L., c. 62, §8(j).

§13.7. ¹ Acts of 1969, c. 534, amending G.L., c. 62, §29.

§13.8. ¹ Acts of 1969, c. 621, amending G.L., c. 63, §68B.

² See the discussion concerning Acts of 1969, c. 531, at §13.26 *infra*.

³ See Stuetzer, *Massachusetts Taxation of Corporations* 12 n.28 (1969); *contra*, CCH State Tax Rep., Mass. ¶9976 (1969).

and a penalty of up to 25 percent of the tax may be assessed. Accordingly, a corporation which seeks an extension when it has reason to believe that the tax shown on its final return may for any reason differ significantly from that shown on the tentative return would be well advised to pay more than the tentative tax lest it fail to meet the 80 percent test.

C. PROPERTY TAX: COURT DECISIONS

§13.9. **Estimated tax payments.** During the 1969 SURVEY year the Justices rendered an advisory opinion¹ to the House of Representatives relating to the constitutionality of a proposed amendment to Chapter 59 of the General Laws² which would have authorized cities, towns and districts adopting the amendment to require partial payment of property taxes on May 1 of each year. The amendment provided that an estimated tax bill was to be sent out not later than April 1 of each year in an amount equal to one-fourth of the tax assessed on that property in the prior year. Payments made were to be credited to the true tax bill, and, in the event that the estimated tax paid exceeded the true tax bill, any interest paid on the unpaid estimated tax was to be credited as a prepayment of taxes and any interest not paid was not required to be paid.

The Justices noted that the estimated tax bill took no account of valuation changes occurring during the preceding year and that consequently the estimated tax would in some cases be computed on the basis of more or less than full fair cash value. This possibility, the Justices concluded, would cause the estimated tax proposal to violate the proportional tax requirement of Mass. Const. Pt. II, c. 1, §1, art. 4, and the equal relative share provision of Article 10 of the Declaration of Rights. The adjustments in the estimated tax were "entirely inadequate"³ to make the taxes proportional when ultimately and validly assessed for the year.

It is unclear to what extent this opinion forecloses use of a periodic payment plan for property taxes similar to that now used by the Commonwealth for income taxes. There is an intimation in the opinion that a more detailed system of refunds and credits would save the estimated tax payment scheme from the constitutional proscription against other than proportional taxation. On the other hand, the cost of the administrative machinery necessary to manage such a system might detract from the overall benefit of such a plan to the local taxing districts. A similar difficulty presumably would stand in the way of assessments on a semiannual or more frequent basis. The interest of the local taxing districts in receipt of their revenues from property taxation on a quarterly or semiannual basis is substantial, and it may be expected that future years will see additional attempts by the legislature to draft a statute to achieve that result

§13.9. 1 1969 Mass. Adv. Sh. 1017, 249 N.E.2d 23.

2 The amendment would have added a new section, 57A.

3 1969 Mass. Adv. Sh. at 1020, 249 N.E.2d at 24.

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§13.10. Exemptions: Computer memory drum. Personal property of a corporation other than "machinery used in the conduct of the business, which term . . . shall not be deemed to include stock in trade or any personal property directly used . . . in any purchasing, selling, accounting or administrative function"¹ is exempt from the personal property tax. In *Ultronic Systems Corp. v. Board of Assessors of Boston*,² the property in question was a computer memory drum which received, stored and transmitted stock market information sent from stock exchanges to the drum over telephone lines and subsequently sold to Ultronic's Boston subscribers through electronic devices leased by Ultronic to the subscribers. The Appellate Tax Board found that Ultronic was in the business of leasing these devices to subscribers and supplying the information stored in the computer memory drum to them through the leased devices.

Ultronic contended that the drum was an integral part of its stock in trade because without it the leased equipment (clearly part of its stock in trade) would be useless to the subscribers. Rather, the Court held, following a decision³ relating to cigarette vending machines, the drum was "machinery used in the conduct of the business" and not stock in trade. The Court also refused to accept Ultronic's contention that the drum was used directly in a purchasing, selling, accounting or administrative function. The Court agreed with the Appellate Tax Board's finding that the drum was used in those functions only indirectly.

§13.11. Exemptions. During the 1969 SURVEY year, the Court had occasion to consider two cases dealing with the taxability of certain parcels of real estate owned by exempt organizations which were used for purposes allegedly incidental to, or not directly related to, the primary function of the exempt organization.

In *Board of Assessors of New Braintree v. Pioneer Valley Academy, Inc.*¹ the real estate in question consisted of 18 parcels of land, each with a house and attached garage thereon, used as faculty residences by members of the faculty of Pioneer Valley Academy, a nonprofit residential college preparatory school operated by the Seventh Day Adventists. The residences in question were located in close proximity to the boys' dormitory. Because a close relationship between the faculty and students was considered by the trustees of the school to be an integral part of the education and character-building carried on by the school, faculty members were required to live in these residences or other school housing. The faculty members were expected to partake in the social and recreational activities of the students and were charged with supervisory duties during the evenings and on weekends. The Court affirmed the grant of an abatement as to the faculty residences,

¹ G.L., c. 59, §5, cl. 16(2).

² 1969 Mass. Adv. Sh. 203, 244 N.E.2d 318.

³ *Collector of Taxes of Boston v. Cigarette Service Co.*, 325 Mass. 162, 89 N.E.2d 787 (1950).

¹ 1969 Mass. Adv. Sh. 573, 246 N.E.2d 792.

holding that the Appellate Tax Board could reasonably find that on-campus housing was essential to the successful implementation of the school's educational philosophy, and that the residences were actively appropriated to the immediate attainment of the school's educational purposes and were occupied in a manner which contributed directly to the accomplishment of those purposes.

In *Board of Assessors of Sharon v. Knollwood Cemeteries*,² the exemption issue related to real estate owned by a cemetery, which real estate was not used for burial purposes in the tax years in question but which was intended for such in the future. Cemeteries are exempt from the real property tax "so long as dedicated to burial of the dead."³ A substantial portion of the cemetery property had actually been developed and used for burial purposes and the entire property was laid out for future use. It was estimated it would take 60 years to fill the cemetery. Some areas were unsuitable for underground burial in mausoleums. The Sharon assessors sought to tax that part of the Knollwood property not actually used for burial purposes or directly related services during the years in question. The Court held that planning and substantial actual use of parts of a defined area of land for cemetery purposes may be found to constitute a present dedication of all the land for cemetery use, and that the availability of the exemption as to all the property is determined at the time of assessment and not on the basis of what may happen in the future. The Court found that these requirements had been satisfied with respect to all of Knollwood's property and accordingly affirmed the abatement granted by the Appellate Tax Board.

D. PROPERTY TAX: LEGISLATION

§13.12. Tax exempt status of charitable organizations. A new requirement¹ has been added which a charitable organization must satisfy before its real and personal property can be exempted from local taxation. Not only must the income and profits of a charitable organization be devoted exclusively to its charitable purpose, but, upon its dissolution, none of its profits, income or assets may be distributed to any stockholder, trustee or member.

§13.13. Interest on delinquent property taxes. By a confusing and awkwardly worded piece of legislation, the interest provisions relating to unpaid real and property taxes have been amended.¹ Under the existing statute,² an 8 percent interest charge, computed as of October 1, is assessed on taxes unpaid after November 1. In lieu of this pro-

² 1969 Mass. Adv. Sh. 545, 246 N.E.2d 660.

³ G.L., c. 59, §5, cl. 12.

§13.12. ¹ Acts of 1969, c. 129, amending G.L., c. 59, §5, cl. 3.

§13.13. ¹ Acts of 1969, c. 849, §68.

² G.L., c. 59, §57.

vision, the new statute provides that if any betterment assessment, water rate or sewer use charge added to a real or property tax, or more than one-half of the property tax, remains unpaid after November 1, 8 percent interest, computed as of October 1, shall be paid on the unpaid amount in excess of one-half of the tax. If any portion of the property tax remains unpaid after May 1, in lieu of the foregoing, 8 percent interest, again computed as of the previous October 1, shall be paid on any betterment assessment, water rate or sewer use charge not paid by the previous November 1, and on the unpaid amount in excess of one-half of the property tax. Interest at 8 percent, computed from April 1, is charged on the balance of the unpaid tax. In essence, this statute will permit payment of property taxes in two installments without the imposition of interest, if at least one-half of the tax is paid prior to November 1 and the balance is paid prior to the following May 1. Betterment assessments, water rates and sewer changes can be paid as late as April 30 without the imposition of interest. This statute should have the effect of increasing pressure for legislation forcing mortgagee banks to pay interest to their mortgagors on the real estate tax escrow accounts, since, under the statute, banks will be able to have the use of one-half of the tax escrow accounts for an additional six months, free of interest, if they choose to defer payments to the local tax collectors until the end of the interest-free payment period. It should be noted that this statute does not become effective until July 1, 1971.

E. INHERITANCE TAX: LEGISLATION

§13.14. Penalties and interest on delinquent inventories. A comprehensive new interest and penalty statute¹ applicable to all delinquent returns and tax payments to the commissioner became law during the 1969 SURVEY year. The statute applies to "any return," and it is understood that the Inheritance Tax Bureau takes the position that the "full and complete inventory" is a return for purposes of this statute.² For an estate subject to the federal estate tax, the inventory is not "full and complete" unless it is accompanied by the federal estate tax agent's closing letter.³ The inventory in any case is not "full and complete" unless accompanied by the newly-imposed \$10 filing fee.⁴ Once that filing fee has been paid, however, there will be no additional charges for documents such as the L-8, L-10, and others specified in G.L., c. 65, §35A.⁵

§13.15. Standard deduction for debts, expenses and taxes. The

§13.14. ¹ Acts of 1969, c. 531, discussed in greater detail at §13.26 *infra*.

² Memorandum entitled "Legislative Changes in the Calendar Year of 1969" at 1 (Sept. 3, 1969), issued over signature of Thomas B. McDavitt, acting chief, Inheritance Tax Bureau.

³ Barrett and Bailey, *Taxation*, 4A Mass. Practice Series §1136 (Supp. 1969).

⁴ Acts of 1969, c. 541, §1, amending G.L., c. 65, §22.

⁵ Acts of 1969, c. 541, §3, amending G.L., c. 65, §35A.

optional (T.D.1) deductions table promulgated by the commissioner¹ as a guide to allowable debts and expenses has been given legislative approval.² For estates with an aggregate value of less than \$100,000, a standard deduction for debts, expenses and taxes as set forth in a table to be issued by the commissioner will be used to compute the tax, unless the executor, administrator or other such person elects, within 210 days of filing his bond, to itemize deductions. Presumably, the table to be issued will be similar to the T.D.1 table of deductions.

§13.16. Statute of limitations. A new statute of limitations for inheritance taxes has been enacted.¹ Taxes must be assessed and collected within ten years of the decedent's death or, in the event of future interests, within ten years of the accrual of the right to possession or enjoyment of the property; but this limitation is conditioned upon the commissioner's receiving notice of the death or accrual within five years of the event. When such notice is not given within that time, the statutory collection period does not expire until five years after such notice is given. Filing of an inventory creates a conclusive presumption that notice has been given. It is understood that the Inheritance Tax Bureau takes the position that a probate inventory filed with the probate court is also notice to the commissioner.²

§13.17. Credit for estate tax paid. The statutory provision relating to the amount of state estate tax credit allowed upon subsequent payment of inheritance taxes on future interests had been clarified.¹ Only that portion of the estate tax paid attributable to the particular future interest shall be credited against the inheritance tax. Thus, if a Massachusetts estate tax is paid on account of future interests in two pieces of property, and subsequently the future interest in one piece of property ripens into possession so that an inheritance tax is then due with respect thereto, only that part of the estate tax attributable to the future interest in that property will be allowed as a credit against the inheritance tax due.

§13.18. Increased exemptions and tax rates. The exemptions for each class of beneficiary have been increased.¹ The exemption for a spouse is now \$30,000, for other class A beneficiaries it is \$15,000, and for all other beneficiaries it is \$5,000. The rate of taxation has been raised approximately .5 percent for all beneficiaries,² however, and an

¹ See Barrett and Bailey, *Taxation*, 4A Mass. Practice Series §1086 (1969).
² Acts of 1969, c. 560.

§13.16. ¹ Acts of 1969, c. 561.

² Memorandum entitled "Legislative Changes in the Calendar Year of 1969," at 2 (Sept. 3, 1969), issued over signature of Thomas B. McDavitt, acting chief, Inheritance Tax Bureau.

§13.17. ¹ Acts of 1969, c. 562, amending G.L., c. 65A, §3.

§13.18. ¹ Acts of 1969, c. 600, §2, amending G.L., c. 65, §1.

² Acts of 1969, c. 600, §1, amending G.L., c. 65, §1.

additional 14 percent surtax has been levied.³ It is estimated that the loss of revenue resulting from the increased exemptions will be compensated for by the increased rates of taxation.⁴ The surtax is an additional revenue-raising measure. It should be noted that there is a clear error in the new statute. Section 2 thereof strikes out the second paragraph of Chapter 65, Section 1 (providing an exemption for a family residence owned by a husband and wife as joint tenants or tenants by the entirety) instead of the intended third paragraph (setting forth the existing exemptions for each class of beneficiaries). It is understood that the commissioner has been advised of the error, that he will not enforce it against the clear legislative intent, and that corrective legislation will be sought at the earliest date.

§13.19. **Employer contributions to qualified retirement plans.** By another new statute,¹ amounts attributable to an employer's contribution to a retirement plan qualified under Sections 401 and 402 of the Internal Revenue Code of 1954 which are paid to a deceased employee's beneficiaries (other than his executor) are exempt from inheritance taxation. Only the portion attributable to contributions to the plan by the deceased employee are subject to tax.

§13.20. **Exemptions.** The narrow issue before the Court in *Wakefield Ready-Mixed Concrete Co. v. State Tax Commn.*¹ was whether certain replacement parts and machinery for Wakefield's concrete mixer trucks were "used directly . . . in an industrial plant in the manufacture, conversion or processing of tangible personal property to be sold."² The trucks in question in some cases mixed the basic ingredients of the concrete while in other cases the trucks received the concrete already mixed. In either case, the trucks kept the concrete produced in a fluid state until delivery at the destination.

The Court, seemingly without difficulty, concluded that the process carried on in the trucks was manufacturing because it was an essential part of the mixing and preservation of the consistency of the concrete and that the trucks themselves, either separately or viewed as a mobile extension of their home plant, were industrial plants within the meaning of the statute. Accordingly, the decisions of the Appellate Tax Board denying abatements were reversed.

The most interesting aspect of this decision is the following statement appearing after the Court concluded that Wakefield had satisfied the manufacturing and industrial plant tests:

³ Acts of 1969, c. 546, §26.

⁴ 1969 H. Doc. 205, Recommendation 24.

§13.19. ¹ Acts of 1969, c. 675, amending G.L., c. 65, §1.

§13.20. ¹ 1969 Mass. Adv. Sh. 775, 247 N.E.2d 869.

² Acts of 1966, c. 14, §1(6)(s). That statute imposed a temporary tax which was made permanent by Acts of 1967, c. 757, §1, and which now appears as G.L., c. 64H, §6(s). The precise tax in question was a use tax under c. 64I, but, by §7 thereof, the exemptions of the sales tax statute (c. 64H) are applicable to the use tax.

... We do not regard this type of statutory provision as the type of exemption concerning which a special burden rests upon a taxpayer, claiming the benefit of the provision, to bring himself within its scope. . . . The sub-sections are merely part of the statutory definition of the type of sales and uses of tangible personal property which are to be employed in measuring the exercises and of those which are not so to be used. We perceive no legislative intention that there should be any such restrictive interpretation of the [statutory exemption] as that for which the commission contends."³

A canon for the construction of tax statutes is that exemptions and deductions are a matter of legislative grace and that the taxpayer must show himself to be clearly within the statute before he is entitled to the exemption or deduction. This rule is stated clearly in *Collector of Taxes of Boston v. Cigarette Service Co.*,⁴ a case involving an exemption from personal property taxes of cigarette vending machines. Statements in later opinions⁵ questioning this rule suggest that this rule applies only in the case of a "true exemption,"⁶ such as the exemption of charitable organizations from property taxes. In one of these opinions the statement in *Cigarette Service* was said to have been made by inadvertence.⁷ It is questionable to what extent a distinction can be drawn between true exemptions and other exemptions, and it will be interesting to watch future tax decisions of the Court to see whether this distinction is articulated or whether the general rule of tax statute construction set forth in *Cigarette Service* and other cases is rejected in toto.

§13.21. **Applicability to nonresident military personnel.** During the 1969 SURVEY year, the United States Supreme Court decided a case which, while not directly involving Massachusetts, settled an important issue bearing on the application and administration of the Massachusetts sales and use taxes.

In *Sullivan v. United States*,¹ the Supreme Court was called upon to decide whether the Connecticut sales and use tax statutes could be applied, consistently with Section 514 of the Soldiers' and Sailors' Civil Relief Act,² to the purchase or use of personal property in Connecticut

³ Wakefield Ready-Mixed Concrete Co. v. State Tax Commn., 1969 Mass. Adv. Sh. at 778-779, 247 N.E.2d at 871-872.

⁴ 325 Mass. 162, 167, 89 N.E.2d 787, 790 (1950).

⁵ Assessors of Holyoke v. State Tax Commn., 1969 Mass. Adv. Sh. 133, 141-142, 244 N.E.2d 287, 294; e.g., Boston Gas Co. v. Assessors of Boston, 334 Mass. 549, 553-554, 137 N.E.2d 462, 446 (1956).

⁶ Id. at 553, 137 N.E.2d at 466.

⁷ Id. at 554, 137 N.E.2d at 466.

§13.21. 1 395 U.S. 169 (1969). Massachusetts joined with several other states in submitting a brief amici curiae in support of the position taken by Connecticut before the Supreme Court.

² 50 U.S.C. App. §574.

by nonresident military personnel stationed in Connecticut pursuant to military orders. After a detailed examination of the structure and language of the statute and its legislative history, the Court concluded that the federal act did not proscribe imposition of Connecticut's sales and use tax in the cases before the Court.

The Soldiers' and Sailors' Civil Relief Act prohibits a state from levying a personal property tax on personal property in the taxing state owned by nonresident military personnel living in the taxing state because of military orders. The significant finding by the Court in *Sullivan* was that the Connecticut sales tax is a tax on the privilege of buying or selling property and not a tax on the property itself. Similarly, the use tax is imposed on the privilege of using, storing or consuming property. The Massachusetts sales and use taxes are of the same nature as Connecticut's, and the Supreme Judicial Court would, in all probability, construe the taxes as excises on the privilege of transferring by sale and using personal property, not as taxes on the property itself. Thus, it is submitted that the Supreme Court would reach the same result as in *Sullivan* with respect to the Massachusetts taxes.

F. SALES AND USE TAX: LEGISLATION

§13.22. Boats and aircraft. Purchasers of boats and aircraft must now exhibit satisfactory evidence of compliance with the sales and use tax before a certificate of number for a motorboat can be issued or before a federal certificate for an aircraft can be registered.¹ Similar provisions already apply with respect to motor vehicles.² Under existing law, when a motor vehicle or boat is traded in to a dealer for a new motor vehicle or boat, the sales or use tax is applied to the difference between the purchase price of the new vehicle or boat and the trade-in allowed.³ The provision has now been extended to the trade-in of aircraft.⁴

§13.23. Intragovernmental disclosure of tax returns. The Justices gave an advisory opinion¹ to the governor relating to a dispute between the attorney general department and the commissioner of corporations and taxation concerning the disclosure by the latter to the former of individual and corporate income tax returns for purposes of determining whether criminal prosecution under the income tax statutes should be initiated.

The commissioner took the position that under applicable statutes his office must initiate criminal prosecutions for tax law violations and that therefore he was prevented by the antidisclosure provisions of the

¹ Acts of 1969, c. 558, §§1, 4, amending G.L., c. 64H and I, respectively.

² G.L., c. 64H, §26, and c. 64I, §27.

³ G.L., c. 64H, §§26-27, and c. 64I, §§27-28.

⁴ Acts of 1969, c. 558, §§2, 5.

¹ 1968 Mass. Adv. Sh. 1109, 241 N.E.2d 91.

individual and corporate income tax statutes² from disclosing to any other agency income tax returns for the purpose of developing or initiating a criminal prosecution. Those statutes prevent disclosure except, inter alia, for the purpose of criminal prosecutions under the respective chapters.

The commissioner relied on G.L., c. 14, §3, to support his contention that he must initiate all criminal prosecutions under the tax laws. That section provides in part that the commissioner "shall be responsible for administering and enforcing all laws which the department is or shall be required to administer and enforce." Certainly nothing in this language compels the conclusion that the commissioner had reached that his responsibility in these respects is exclusive.

The Justices noted that the "broad and ancient power of the attorney general in criminal prosecutions"³ is based not only on statutory authority but also in the common law. Because of the history of the attorney general as chief prosecuting and law officer of the Commonwealth, the Justices were unwilling to construe the statutes cited by the commissioner in a manner which would subordinate the attorney general in the exercise of his functions to the commissioner through the latter's refusal to disclose income tax returns. The Justices therefore answered "no" to the question propounded by the governor of whether the commissioner was prohibited from disclosing the tax returns to the attorney general department, but they declined to say whether the commissioner was required to disclose such returns.

The Justices said that before granting any request for disclosure from the attorney general, the commissioner could require the attorney general to state the grounds for the request, including the statutory authority and the basis of his belief that there had been a criminal violation of the tax statutes. They further suggested that a declaratory judgment would be the appropriate procedure to resolve a dispute as to specific requests.

This opinion is not a complete victory for the attorney general in that he cannot conduct a "fishing expedition" into tax returns held by the commissioner. Nevertheless, the opinion does strike a realistic balance between the interests of the governmental agencies by allowing the attorney general to see the returns in specific cases when he has reason to believe, independent of what is contained in a potential defendant's tax returns, that the tax statutes have been criminally violated.

§13.24. Appellate Tax Board: Timely application for abatement. In *Leonardi v. State Tax Commn.*,¹ the commission assessed an income tax on Leonardi on August 30, 1965, for income allegedly earned by Leonardi in 1951. For purposes of the appeal, the Court accepted as

² G.L., c. 62, §58, and c. 63, §71A respectively.

³ 1968 Mass. Adv. Sh. at 1113, 241 N.E.2d at 94.

§13.24. ¹ 1969 Mass. Adv. Sh. 395, 245 N.E.2d 753.

true Leonardi's assertion that in 1951 he was a full-time student with no income. Leonardi did not pay the assessment, but on March 8, 1967, he filed an application for abatement together with a tax return for 1951 showing no tax due. The Appellate Tax Board dismissed Leonardi's appeal from the denial of an abatement, giving as its reason the failure of Leonardi to make timely application for abatement.

Application for an abatement may be filed by "any person who is required to file a return" (1) within three years from the last day for filing the required return, (2) within one year after the date of any notice of additional tax due, or (3) within one year of the date the return was actually filed, whichever event occurs later.²

Leonardi argued that because his abatement application was filed at the same time as the return he had complied with (3) above and that the application was therefore timely. The Court disagreed, holding that (2) was applicable. On this narrow point the Court's decision seems correct. Acceptance of Leonardi's contention would mean that a person who has filed no return would have an indefinite period to file an application for an abatement by virtue of this control over when his return is filed. The reasonable interpretation of (3) is that it is applicable only where there has been an assessment based on or following the filing of a return.

The problem facing the Court was a statute which by its terms did not cover the precise situation of a person with no income during the year in question on whom a tax is assessed nevertheless. The three measuring periods for timeliness of an abatement application apply to a person "who is required to file a return,"³ and Leonardi, with no income, was not required to file a return.⁴ An abatement application by a person not otherwise required to file a return is authorized, but only as to overpayment of estimated taxes.⁵ Even (2) above is not literally applicable because Leonardi had paid no tax for the year in question, and the assessment was for the original tax, not an additional tax. The abatement application statute should be amended to provide specifically for applications for abatement by a person not required to file a return against whom a tax is wrongly assessed.

Because Leonardi had not filed his application within one year after notice of additional tax due, the Court reluctantly affirmed dismissal of his appeal. However, the Court, by way of dictum, made it clear that the State Tax Commission could, on its own motion, set aside the assessment upon a showing by Leonardi that he received no income in 1951.

§13.25. Jeopardy assessments and collections. A new jeopardy assessment and collection statute¹ applicable to state taxes provides

² G.L., c. 62, §43.

³ Ibid.

⁴ G.L., c. 62, §22.

⁵ G.L., c. 65, §43.

§13.25. ¹ Acts of 1969, c. 530, adding a new §35 to G.L., c. 58.

in essence that when the commissioner believes that collection of a tax will be jeopardized by delay, he may immediately assess the tax with any applicable penalties and interest, whereupon the tax, interest and penalties will become immediately due and payable. A jeopardy collection statute with respect to local taxes² has existed for a long time.

§13.26. Penalties and interest. A comprehensive new penalty and interest for late returns statute¹ applicable to all taxes filed with the commission has been enacted. For late returns, a penalty of 5 percent of the tax for each month the return is overdue, up to a maximum of 25 percent of the tax, is added to and becomes a part of the tax. Interest at 8 percent is charged on any amount of tax not paid on or before the statutory due date. This act applies "notwithstanding any other provision of law to the contrary," and the imposition of these additional charges is mandatory. Existing statutes relating to interest and penalties² have not been repealed, and it is uncertain whether those statutes will retain any vitality.

§13.27. Collection of delinquent taxes. The first comprehensive statute giving to the commissioner power to collect unpaid taxes by direct levy upon property of a delinquent taxpayer was enacted during the 1969 SURVEY year.¹ Some of the more significant provisions of the statute are outlined here. The power may be exercised upon the failure of the taxpayer to pay a tax within ten days after demand.² At that time the commissioner may collect the tax by a levy (including distraint and seizure by any means)³ upon all property and interests therein of the taxpayer (except as to specified exempt property).⁴ The commissioner may proceed immediately without regard for the ten-day demand period when he believes immediate collection is necessary.⁵ Property and property rights of the taxpayer may be seized whether in the possession of the taxpayer or in the possession of third persons, and serious penalties are imposed on third persons who do not surrender such property to the commissioner.⁶ Special provisions are made for a levy on insurance companies with respect to insurance or endowment contracts issued to the taxpayer.⁷ There are detailed provisions relating to sale of property and distribution

² G.L., c. 60, §19.

§13.26. ¹ Acts of 1969, c. 531, adding a new §31A to G.L., c. 58. See also §13.14, *supra*, for a specific discussion of the applicability of the statute to inheritance taxes.

² E.g., G.L., c. 62, §§37A, 41, 55 (personal income tax); G.L., c. 65, §22 (inheritance tax).

§13.27. ¹ Acts of 1969, c. 620, adding new §§36-37 to G.L., c. 58.

² G.L., c. 58, §36(a).

³ *Id.* §36(b).

⁴ *Id.* §36(a).

⁵ *Ibid.*

⁶ G.L., c. 58, §37.

⁷ *Id.* §37(b).

of the proceeds of sale.⁸ When real estate is sold, the owner of the property sold, or any lienholder thereon, or the owner's executor or administrator, may redeem the property sold within 120 days after the sale by paying to the purchaser the amount paid by the purchaser plus interest at 20 percent.⁹ The statute provides that the deed to the property purchased at the sale is prima facie evidence of the facts stated therein, and, if the statutory proceedings have been substantially in accordance with the law, the deed conveys to the purchaser all right, title and interest the former owner had in the property¹⁰ and discharges all liens, titles and encumbrances junior in priority to the Commonwealth's lien with respect to which the levy was made.¹¹ Similar provisions are made to protect the purchaser of personal property.¹²

§13.28. Appellate Tax Board: Requests for findings of fact and report. A significant development has occurred relating to procedure before the Appellate Tax Board. By a recent amendment,¹ under formal procedure, if no party requests the board to furnish findings of fact and a report, all parties are deemed to have waived all rights of appeal to the Supreme Judicial Court upon questions as to the admission or exclusion of evidence or as to the sufficiency of evidence to support a finding. In connection with this statute, it is important to note the following comment of the Court in an appeal from the Appellate Tax Board: "It is now more important than ever that a taxpayer who is interested in fully protecting his rights should use formal procedure and make request . . . for findings of fact and report in writing. Requests for rulings of law may now assume special importance."²

⁸ Id. §§39-40, 46.

⁹ Id. §41(b).

¹⁰ Id. §43(b).

¹¹ Id. §43(c).

¹² Id. §43(a).

§13.28. ¹ Acts of 1969, c. 692, amending G.L., c. 58A, §13.

² *Ultronic Systems Corp. v. Board of Assessors of Boston*, 1969 Mass. Adv. Sh. 203, 244 N.E.2d 318.