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Chapter 15: State and Local Taxation

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CHAPTER 15

State and Local Taxation

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§15.1. Introduction. Although little significant legislation in the field of state and local taxation was produced during the 1974 Survey year, there were a number of interesting decisions from the Supreme Judicial Court and the Appellate Tax Board. This chapter will discuss the more important judicial and administrative decisions and the more important legislation within the areas of sales and use taxes,[1] real and personal property taxes,[2] personal income taxes,[3] and corporate excise taxes.[4]

A. Sales and Use Taxes

§15.2. Lease constituting a sale. In *Zayre Leasing Corp. v. State Tax Commission*,[1] the Supreme Judicial Court, reversing and remanding a decision of the Appellate Tax Board,[2] held that certain leases of goods constituted sales and were thus exempt from the imposition of a sales tax under the provisions of a temporary sales tax statute.[3] Zayre Leasing was engaged in the business of leasing furniture, fixtures and other equipment to Zayre department stores. It had entered into eighteen lease agreements with the stores, all prior to 1966. All leases were in the same form, differing only as to length of term, name of lessee, property leased, and rental covenants. Rent was expressed in each lease as a flat yearly amount which was payable in advance in equal monthly installments. All leases were said to be nonterminable, with certain exceptions not here relevant.

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§15.1. [1] See §§ 15.2-.8 infra.
[2] See §§ 15.9-.13 infra.
[3] See §§ 15.14-.17 infra.
[4] See §§ 15.18-.23 infra.

§15.2. [1] 1974 Mass. Adv. Sh. 823, 311 N.E.2d 888.
[2] 2 CCH State Tax Rep., Mass. ¶ 200-382, at 10,284 (1973).
[3] 1974 Mass. Adv. Sh. at 829, 311 N.E.2d at 892.

The Commissioner of Corporations and Taxation assessed sales tax deficiencies against Zayre Leasing for the monthly rents paid under the leases during the thirteen months from April 1966 through April 1967. Zayre paid the tax but sought an abatement on the ground that the applicable taxing statute did not cover these leases. The Appellate Tax Board found against Zayre, which then appealed to the Supreme Judicial Court.[4]

The question before the Court was whether "leases" constitute "sales" for the purposes of certain sections of the temporary sales tax law declared in force on March 2, 1966. That law, section 3 of chapter 14 of the Acts of 1966, provided in part that:

> Agreements for the sale of goods subject to the tax imposed by section one of this act and the storage, use or other consumption in this commonwealth of tangible personal property subject to an excise imposed by section two of this act entered into before the effective date of this section shall be exempt from the tax imposed by said section; provided, that such agreements are in writing, signed by the vendor and purchaser, and impose an unconditional liability on the part of the purchaser to buy the goods covered thereby at a fixed price without escalator clause, and an unconditional liability on the part of the vendor to deliver a definite quantity of such goods at the contract price; and provided, further, that delivery is made not later than June thirtieth, nineteen hundred and sixty-six.[5]

Section 79 of chapter 14 of the Acts of 1966 provided that this section was applicable to all "sales at retail of tangible personal property" during the period commencing April 1, 1966, and ending December 31, 1967. Furthermore, the statute enacting the permanent sales tax in 1967[6] made it clear that the temporary sales tax statute was to apply for the period specified therein.[7]

The parties stipulated that each of the eighteen leases was in writing, was signed by the vendor (lessor) and purchaser (lessee), imposed an unconditional liability on the purchaser (lessee) to lease the goods covered thereby at a fixed price without an escalator clause, imposed an unconditional liability on the vendor (lessor) to deliver a quantity of such goods at the contract price, and that delivery of such goods was made prior to 1966.[8] Thus, the sole question was whether these leases constituted sales so as to fall within the exemptive provisions of the temporary sales tax statute.

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[4] Id. at 823-24, 311 N.E.2d at 889-90.
[5] Acts of 1966, c. 14, § 3.
[6] Acts of 1967, c. 757, inserting G.L. c. 64H.
[7] Acts of 1967, c. 757, § 4.
[8] 1974 Mass. Adv. Sh. at 823-24, 311 N.E.2d at 889-90.

The State Tax Commission argued that exemptive provisions should be strictly construed, citing its own Emergency Regulation No. 3, promulgated on April 28, 1966, which attempted to draw a line between true sales on the one hand and leases as assimilated sales on the other:

> "2. Each period for which a rental is paid shall be considered a complete sale for the purpose of the imposition, collection and payment of the sales or use tax .... 4. The sales or use tax shall apply to all charges for the rental or lease of tangible personal property with respect to periods beginning on and after April 1, 1966, for which a rental is paid, even though the rental agreement or contract was entered into prior to April 1, 1966 and transfer of possession to the lessee was made prior to that date."[9]

The Court pointed to the definition of the term "sale" in the temporary sales tax law, which included "[a]ny transfer of title or possession, or both, exchange, barter, *lease,* rental, conditional or otherwise, of tangible personal property for a consideration, in any manner or by any means whatsoever."[10] This definition applied to the entire temporary sales tax legislation "except where the context clearly indicates a different meaning."[11] Faced with a conflict between a temporary statute and the State Tax Commission's Emergency Regulation, the Court held that the Regulation must fail, at least on the present facts, because of its inconsistency with the statute.[12] Citing a number of non-Massachusetts cases on comparable and related questions of law, the Court reversed the Appellate Tax Board, holding that Zayre's "leases" did constitute "sales" for the purpose of the statutes in question and that the leases were exempt from sales tax.[13]

On its face, *Zayre* might appear to be a relatively inconsequential decision without much significance for future tax years since it involves a temporary statute covering only a period from 1966 to 1967. However, as will be discussed below, the decision is an important one when placed in the context of the payment or collection of a sales tax in the extensive business of leasing and renting motor vehicles.

Generally, chapter 64H of the General Laws, the sales tax statute, requires vendors to pay sales taxes imposed on the retail sale of goods and to collect reimbursements of these taxes from the purchasers of such goods. The sales tax upon the sale of motor vehicles, however, is governed by different rules. Section 3(c) of chapter 64H requires that any tax due on the sale of motor vehicles be paid by the purchaser to

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[9] Id. at 827, 311 N.E.2d at 891 (footnote omitted).
[10] Acts of 1966, c. 14, § 1(1)(12)(a) (emphasis added).
[11] Acts of 1966, c. 14, § 1(1).
[12] 1974 Mass. Adv. Sh. at 827-28, 311 N.E.2d at 891-92.
[13] Id. at 827-29, 311 N.E.2d at 891-92.

the Registrar of Motor Vehicles and specifically prohibits the vendor from collecting the tax from the purchaser:

> The excise imposed by [G.L. c. 64H, § 2] upon sales at retail of motor vehicles or trailers shall be paid by the purchaser to the registrar of motor vehicles in the manner prescribed by the commissioner. The vendor thereof shall not add the tax to the sales price and shall not collect the tax from the purchaser. The vendor thereof shall, however, furnish to the purchaser, the registrar and the commissioner a sworn statement of the sale upon a form prescribed by the commissioner, with the approval of the commission, giving such information as the commissioner may require for the determination of such tax.[14]

Based on the *Zayre* decision and the definition of "sale" presently in section 1(13) of chapter 64H, it appears that lessors of motor vehicles in Massachusetts, including but not limited to automobile rental agencies, in fact are prohibited by law from collecting a sales tax from the parties to whom they lease or rent motor vehicles. Rather, the lessee of the vehicles is the party with the responsibility for paying a sales tax "in the manner prescribed by the commissioner." Yet, no procedure appears to have been prescribed by the Commissioner to date for the collection of sales tax from the lessees of motor vehicles. In fact, the State Tax Commission has on at least one occasion taken the position that, the language of the relevant statutes notwithstanding, the *lessors* of motor vehicles are liable for payment or collection of the requisite sales tax.

In light of the Supreme Judicial Court's clear pronouncement in *Zayre*, it is submitted that no further sales tax should be assessed or collected from the lessors of motor vehicles, at least until such time as the legislature specifically indicates that section 3(c) of chapter 64H is not applicable to the leasing of motor vehicles. Rather, the Commissioner should take immediate action to devise a system whereby sales tax can be collected simply and efficiently from the lessees of motor vehicles, as is required by the statute. Any continued attempt to collect sales taxes from the lessors of motor vehicles will run afoul of not only the prohibitions of the Massachusetts statutes, but also the recent pronouncement of the highest court of the Commonwealth in *Zayre*.

§15.3. Sales for resale: Interstate sales. In *Clark Franklin Press Corp. v. State Tax Commission*,[1] the Supreme Judicial Court affirmed a decision of the Appellate Tax Board[2] which held that the sale of certain printed travel brochures was subject to the Massachusetts sales

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[14] G.L. c. 64H, § 3(c).

§15.3. [1] 1974 Mass. Adv. Sh. 139, 307 N.E.2d 566.
[2] 2 CCH State Tax Rep., Mass. ¶ 200-376, at 10,266 (1973).

tax.[3] Clark Franklin was a Massachusetts corporation engaged in the printing and lithograph business. During 1969 and 1970 it printed and sold travel brochures to its then parent company, American International Travel Service, Inc. (AITS), also a Massachusetts corporation. AITS was in the business of arranging group travel tours for various organizations, at least ninety per cent of which were located outside of Massachusetts. AITS' services included arranging and coordinating airplane landing rights, hotel accommodations, meals, guided tours, car rentals, and other related matters, as well as providing the organizations with travel brochures printed by Clark Franklin. No separate charge was made for these travel brochures, but their cost to AITS was included in the ultimate selling price of the entire package of services. For part of the period in question, Clark Franklin, at the request of AITS, mailed the travel brochures directly to the organizations with which AITS was doing business. For the remaining part of the period Clark Franklin delivered the travel brochures directly to AITS in Massachusetts. AITS attached mailing labels to the cartons of travel brochures without opening the cartons of brochures, and then shipped the cartons to the various organizations. AITS at all times in question was listed as the purchaser of the travel brochures on Clark Franklin's invoices.[4]

Clark Franklin argued (1) that its sales to AITS were sales for resale in AITS' regular course of business and thus were exempt from being taxed under section 2 of chapter 64H of the General Laws because they did not constitute "sales at retail" as defined in section 1(13) of chapter 64H;[5] and (2) that even if the sales were sales at retail, they were nonetheless exempt from sales tax either as "[s]ales which the commonwealth is prohibited from taxing under the constitution or laws of the United States,"[6] or as "[s]ales of tangible personal property in transit or stored at points of entry intended for export or import or which the vendor is obligated under the terms of any agreement to deliver to a purchaser outside the commonwealth or to an interstate carrier for delivery to a purchaser outside the commonwealth,"[7] based on sections 6(a) and 6(b) of chapter 64H respectively.

The Court rejected these contentions. It regarded it as "simplistic" to say that AITS resold the travel brochures to its customers, since AITS was in the business of selling travel services, not travel brochures. According to the Court:

The transfer of brochures constituted only an insignificant part of

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[3] 1974 Mass. Adv. Sh. at 144, 307 N.E.2d at 570, aff'g Clark Franklin Press Corp. v. State Tax Comm'n, 2 CCH State Tax Rep., Mass. ¶ 200-376, at 10,266.

[4] 1974 Mass. Adv. Sh. at 140-41, 307 N.E.2d at 567-68.

[5] Id. at 141-42, 307 N.E.2d at 568.

[6] G.L. c. 64H, § 6(a), quoted in 1974 Mass. Adv. Sh. at 142-43, 307 N.E.2d at 569.

[7] G.L. c. 64H, § 6(b), quoted in 1974 Mass. Adv. Sh. at 143, 307 N.E.2d at 569.

> AITS's transactions with its customers, and it is obvious that the services provided by AITS were the predominant factor in the charges made to its customers. The fact that no separate charge was listed for the brochures underscores this point. These brochures, provided by AITS to its customers for promotional and advertising purposes, in and of themselves had no consumer value.[8]

Furthermore, the Court rejected the claim for exemption under section 6(a) of chapter 64H since it found that the sales transactions were entirely between Clark Franklin and AITS, both Massachusetts corporations (with places of business within Massachusetts), and thus they were in all respects intrastate sales.[9] Finally, the Court found section 6(b) of chapter 64H to be inapplicable not only because it failed to see any agency relationship between AITS and its out-of-state customers such that delivery could be said to be to AITS' out-of-state customers, but also because it thought that the legislature must have intended section 6(b) to apply only when the "direct purchaser", *i.e.*, AITS, the party to the primary sales agreement, was located outside Massachusetts.[10]

The decision in *Clark Franklin* appears correct and predictable. What is somewhat surprising, however, is the State Tax Commission's apparent interpretation of the scope of the *Clark Franklin* decision. If an out-of-state individual orders an item from a mail order catalog of a Massachusetts department store, there should be no question that this sale will be exempt from Massachusetts sales tax under sections 6(a) and 6(b) of chapter 64H, and that this result is entirely unaffected by *Clark Franklin.* However, if an out-of-state individual orders an item from a mail order catalog of a Massachusetts department store but requests that the store deliver it to another out-of-state individual, the State Tax Commission's position appears to be much less clear. The Commission apparently has taken a firm position in at least one case that if an out-of-state individual or business orders a "large" number of items from a Massachusetts company and requests that these items be mailed to various out-of-state individuals whose names and addresses are submitted with the purchaser's order, that these sales are in fact subject to a Massachusetts sales tax. It is not clear what constitutes a "large" number of items, though it has been suggested that one hundred items is enough.

It appears that the State Tax Commission considers the additional mailing services provided by a Massachusetts seller to be enough to turn an otherwise exempt sale into a taxable Massachusetts sale, al-

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[8] 1974 Mass. Adv. Sh. at 142, 307 N.E.2d at 568-69.
[9] Id.
[10] Id. at 143-44, 307 N.E.2d at 569-70.

most as if the original purchasers were constructively pulled into Massachusetts to accept delivery of the items as agents for the out-of-state individuals who were to be the ultimate recipients of the items, thus presumably bringing the sale within the scope of *Clark Franklin.* Why the additional mailing services should cause sales to become "Massachusetts sales," especially in cases where a "large" number of orders is placed, is far from clear. To the extent that *Clark Franklin* is interpreted to permit imposition of a sales tax in such a situation, where the direct mail order purchaser is not a Massachusetts individual or corporation, it is submitted that the State Tax Commission is severely distorting the Court's decision in *Clark Franklin.* Furthermore, such an interpretation directly contradicts the language of sections 6(a) and 6(b).

It is submitted that *Clark Franklin* should be construed strictly and be limited to cases with similar facts, *i.e.,* where the direct purchaser is a Massachusetts individual or corporation. Any broadening of the *Clark Franklin* rationale ought to be undertaken with extreme caution in light of the seemingly wide latitude of the exemptive provisions of sections 6(a) and 6(b). Furthermore, it should be noted that too narrow an interpretation of these sections could raise serious federal constitutional questions. The Due Process Clause of the Fourteenth Amendment requires that the state have a sufficient interest in the sale before it is constitutionally permitted to tax the sale.[11] This interest is usually measured by the degree of business contacts with the taxing jurisdiction maintained by the parties to the sale. The exemptive provisions of the Massachusetts statute appear to be a legislative attempt to incorporate these limitations into state law.

§15.4. Filing of sales or use tax return: Amusement games prizes subject to use tax. In *Prince v. State Tax Commission,*[1] taxpayers, who owned and operated an amusement concession at Lincoln Park, claimed that the prizes awarded to successful contestants were subject only to a sales tax[2] based on the amount charged for playing the game (ten to twenty-five cents). The State Tax Commission, however, contended that taxpayers should be assessed a use tax[3] "based on the storage, use or other consumption of the items awarded as prizes . . . ."[4] The Commission assessed substantial use taxes, plus interest and penalties, against the taxpayers.[5] The Appellate Tax Board ruled

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[11] See National Bellas Hess, Inc. v. Dep't of Revenue, 386 U.S. 753 (1967).

§15.4. [1] Appellate Tax Board, Sept. 28, 1973, digested in 2 CCH State Tax Rep., Mass. ¶ 200-385, at 10,295, aff'd, 1974 Mass. Adv. Sh. 2267, 319 N.E.2d 723.

[2] G.L. c. 64H, § 21.

[3] G.L. c. 64I, § 22.

[4] 1974 Mass. Adv. Sh. at 2268, 319 N.E.2d at 724.

[5] Id.

in favor of the Commission, holding that the Board lacked jurisdiction of the matter since the taxpayers had failed to allege and prove compliance with either the sales or use tax statutes by filing a return at or before the filing of their application for abatement.[6]

Subsequent to the conclusion of the Survey year, the Supreme Judicial Court affirmed the Board's ruling, but bypassed the jurisdictional question and decided the case on the merits since it was probable that it presented "an issue which will recur in the future . . . ."[7] The Court held that the prizes awarded were only inducements to play taxpayers' games and not sales at retail, and that the prizes were "clearly 'used' or 'consumed' in the course of operating the amusements" and were thus subject to the use tax.[8]

§15.5. Definitions of "sales price" and "gross receipts." In *T.J. Walsh Co. v. State Tax Commission,*[1] the Appellate Tax Board held that a company engaged in the business of making fabricated cabinets, counter tops, and other products from lumber which it sold to individuals and contractors had to pay sales tax on the full sales price of the finished product paid by the purchaser of the finished product, based on the definitions of "gross receipts" and "sales price" in chapter 64H of the General Laws.[2] The company unsuccessfully argued that it should pay sales tax on the basis of only fifty per cent of the sales price, since the other fifty per cent of the sales price resulted from the increased value of the lumber created through its labor. According to the Board, it did not matter that the company's practice stemmed from the alleged advice of an employee of the State Tax Commission since, based on *O'Brien v. State Tax Commission*[3] and section 3 of chapter 14 of the General Laws, the employee did not have authority to bind the Commission.[4]

§15.6. Use tax on ships. In *Boston Tow Boat Co. v. State Tax Commission,*[1] a use tax[2] was upheld as validly imposed on a tug boat purchased from an out-of-state builder by a tow company for use in Boston harbor. Even though this boat would have been exempt from

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[6] Id. at 2269, 319 N.E.2d at 724.
[7] Id. at 2270, 319 N.E.2d at 725.
[8] Id. at 2273, 319 N.E.2d at 726.

§15.5. [1] 2 CCH State Tax Rep., Mass. ¶ 200-394, at 10,310 (1974).
[2] Id. at 10,310. "Gross receipts" is defined as "the total sales price received by vendors as a consideration for retail sales." G.L. c. 64H, § 1(6). "Sales price" is defined as "the total amount paid by a purchaser to a vendor as consideration for a retail sale, valued in money or otherwise." G.L. c. 64H, § 1(14).
[3] 339 Mass. 56, 70, 158 N.E.2d 146, 156 (1959).
[4] 2 CCH State Tax Rep., Mass. ¶ 200-394, at 10,310.

§15.6. [1] 2 CCH State Tax Rep., Mass. ¶ 200-395, at 10,311 (1974), rev'd, 1974 Mass. Adv. Sh. 2275, 319 N.E.2d 908.
[2] The tax was imposed under G.L. c. 64I, § 1.

sales tax under section 6(o) of chapter 64H if purchased from a Massachusetts ship builder, the Appellate Tax Board held that the imposition of a use tax on this out-of-state purchase neither discriminated against interstate commerce nor violated the Due Process or Equal Protection Clauses of the United States Constitution.[3] The Massachusetts sales tax exemption for ships built in Massachusetts had a very definite and limited purpose, *i.e.,* to keep Massachusetts ship builders competitive with out-of-state builders. (Several other states (including Louisiana, where this particular boat was built) have sales tax exemptions similar to section 6(o) for ships built in the home state.) The Board found that no such purpose would be served by exempting the tow company here involved from a use tax.[4]

Subsequent to the end of the Survey year, the Supreme Judicial Court reversed the Board.[5] Basing its decision on the United States Supreme Court case of *Halliburton Oil Well Cementing Co. v. Reily,*[6] the Court held that the imposition of the use tax unconstitutionally discriminated against interstate commerce by imposing a greater tax on vessels manufactured outside the Commonwealth than on those manufactured within it.[7]

§15.7. Sales and use tax: Liability of national bank contractor. The Appellate Tax Board held in *Salem Glass Co. v. State Tax Commission*[1] that a contractor involved in the construction of an office building for a national bank during a prior period when national banks were exempt from sales and use taxes under federal law[2] was subject to use taxes on items purchased in performing the contract. The Board determined that the legal incidence of the tax falls on the contractor for his use or consumption of tangible personal property, and that the national bank's exemption did not extend to the contractor. Of particular interest in the decision is the Board's extended discussion about "the fiction of national banks as governmental agencies resulting in their exemption from non-discriminatory state taxation."[3]

§15.8. Sales and use tax: Construction of federal reserve bank. In *Federal Reserve Bank of Boston v. Commissioner of Corporations*

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[3] 2 CCH State Tax Rep., Mass. at 10,314.
[4] Id. at 10,313.
[5] 1974 Mass. Adv. Sh. 2275, 319 N.E.2d 908.
[6] 373 U.S. 64 (1963).
[7] 1974 Mass. Adv. Sh. at 2282, 319 N.E.2d at 912.

§15.7. [1] Appellate Tax Board, March 28, 1974, digested in 2 CCH State Tax Rep., Mass. ¶ 200-396, at 10,315.
[2] 12 U.S.C. § 548 (1970). See Massachusetts Emergency Sales and Use Tax Reg. No. 12 and Amended Emergency Reg. No. 6.
[3] Appellate Tax Board, March 28, 1974, digested in 2 CCH State Tax Rep., Mass. ¶ 200-398, at 10,315.

& Taxation,[1] the Court of Appeals for the First Circuit, reversing a decision of the federal District Court for the District of Massachusetts,[2] held that a federal reserve bank challenging the imposition of a sales and use tax on materials and supplies used in constructing a new bank building may seek a federal court declaratory judgment on the legality of such tax.[3] The Tax Injunction Act[4] was found to be inapplicable because the reserve bank was a federal instrumentality.[5] Moreover, the action was held to be properly in federal rather than state court because the question involved was largely a federal question, *i.e.,* the state's power to tax federal reserve banks.[6]

B. Real and Personal Property Taxes

§15.9. Disproportionate assessments. Of primary importance in this area during the Survey year were two decisions of the Supreme Judicial Court dealing with the issue of disproportionate property assessments.[1] These issues were originally raised almost fifteen years ago in the seminal decision of *Bettigole v. Assessors of Springfield*[2] and were most recently considered, subsequent to the close of the Survey year, in the December 1974 Supreme Judicial Court decision in *Town of Sudbury v. Commissioner of Corporations & Taxation.*[3]

In *Bettigole,* owners of various classes of real estate in Springfield alleged that the Springfield board of assessors had been assessing different classes of real estate in that city at widely differing percentages of the full fair cash value of such real estate, notwithstanding the fact that the Constitution and statutes of the Commonwealth require that all property be assessed on the basis of full fair cash value.

The Constitution of the Commonwealth empowers the General Court "to impose and levy, *proportional* and reasonable assessments, rates, and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the said commonwealth . . . ."[4] Furthermore, Article X of the Declaration of Rights provides that since "[e]ach indi-

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§15.8. [1] 499 F.2d 60 (1st Cir. 1974), digested in 2 CCH State Tax Rep., Mass. ¶ 200-404, at 10,324 (1974).
[2] 368 F. Supp. 94 (D. Mass. 1973).
[3] 499 F.2d at 62-64.
[4] 28 U.S.C. § 1341 (1970).
[5] 499 F.2d at 62 n.5.
[6] Id. at 64.

§15.9. [1] Board of Assessors v. Zayre Corp., 1973 Mass. Adv. Sh. 1491, 304 N.E.2d 183; Board of Assessors v. Shop-Lease Co., 1974 Mass. Adv. Sh. 107, 307 N.E.2d 310.
[2] 343 Mass. 223, 178 N.E.2d 10 (1961).
[3] 1974 Mass. Adv. Sh. 2405, 321 N.E.2d 641.
[4] Mass. Const. pt. II, c. 1, § 1, art. IV (emphasis added).

vidual . . . has a right to be protected . . . in the enjoyment of his life, liberty and property, . . . [he] is obliged, consequently, to contribute *his share* to the expense of this protection . . . ."[5] Section 52 of chapter 59 of the General Laws requires that assessors sign, at the end of the annual valuation list and under penalties of perjury, a statement "that the real and personal estate contained in said list, and assessed upon each person in said list, is a full and accurate assessment upon all the property of each person, liable to taxation, at its *full and fair cash value,* according to our best knowledge and belief."[6]

Based on the statutory law, constitutional requirements, and earlier cases,[7] the Supreme Judicial Court in *Bettigole* held that the deliberate practice of the assessors of Springfield of classifying all the properties located therein and fixing the assessed valuations of the properties in each classification on the basis of a percentage of full fair cash value which varied considerably from the percentages assigned to other classifications was illegal and void.[8] The practical effect of such disproportionate assessment was to tax certain properties at a higher effective rate than similar properties in other classifications.

In allowing the intervention of a court of equity, the Court distinguished earlier disproportionate assessment cases on the ground that it had found " 'a widespread scheme of intentional discrimination rather than merely isolated, inadvertent lack of uniformity.' "[9]

Prior to *Bettigole,* the Court had dismissed a taxpayer's suit in *Stone v. Springfield*[10] in 1960 because the taxpayer's declaration failed to

> make specific allegations of such asserted facts as would, if proved, establish invalid official action, as, for example, the precise nature of the lack of uniformity in assessments which he expects to prove and the circumstances indicating that it was intentionally discriminatory, rather than caused by inadvertence, mistake, or incompetence.[11]

Likewise, in the cases subsequent to *Bettigole,* taxpayers have had great

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[5] Mass. Const. pt. I, art. X (emphasis added).

[6] G.L. c. 59, § 52 (emphasis added).

[7] Stone v. Springfield, 341 Mass. 246, 168 N.E.2d 76 (1960); Carr v. Assessors of Springfield, 339 Mass. 89, 157 N.E.2d 880 (1959); Opinion of the Justices, 332 Mass. 769, 126 N.E.2d 795 (1955).

[8] 343 Mass. at 232, 178 N.E.2d at 15. For example, in Springfield in 1961 some 22,005 single family residence parcels making up approximately 43% of the total fair cash value of all taxable property were paying only approximately 33% of the assessed taxes, whereas some 2,521 public utility, commercial and industrial parcels making up only 28% of the total fair cash value of all taxable property were paying as much as approximately 37% of the assessed taxes. 343 Mass. at 226-28, 178 N.E.2d at 12-13.

[9] 343 Mass. at 234, 178 N.E.2d at 17, quoting Stone v. Springfield, 341 Mass. 246, 251, 168 N.E.2d 76, 79 (1960).

[10] 341 Mass. 246, 168 N.E.2d 76 (1960).

[11] Id. at 249, 168 N.E.2d at 78.

difficulty proving the kind of "intentional discrimination" or "deliberate and substantial violation" that would support such an extraordinary remedy as declaratory or injunctive relief in equity, as opposed to the mere seeking of a single administrative abatement.[12]

During the Survey year, the Supreme Judicial Court was confronted in two cases with significant and troublesome questions regarding assessors' violations of chapter 59, section 38 of the General Laws[13] and the implications of *Bettigole*. In *Board of Assessors of Lynn v. Zayre Corp.*,[14] the board of assessors of Lynn appealed a decision of the Appellate Tax Board granting Zayre a partial abatement of real estate taxes for five successive years. Zayre alleged that "the real estate in question 'was deliberately and intentionally overvalued, overassessed and disproportionately assessed by the . . . [assessors] in relation to other taxable real estate . . . in the city of Lynn,' and that it 'was assessed in excess of its fair cash value.' "[15] The Board found that the fair cash value of the property for each of the five years was $176,000. Since the assessors had assessed it at $151,000 for each year, the Board found for the assessors on the issue of overvaluation. However, the Board also found that in Lynn for the years 1967 through 1971 the ratio of assessment to fair cash value was 30%. Thus, Zayre's real estate tax should have been computed on the basis of an assessed value of $52,800. Accordingly, the Board ordered abatements.[16]

The board of assessors of Lynn appealed certain issues to the Supreme Judicial Court, alleging numerous grounds on which they believed the Board had made errors of law. The Court refused to consider these questions on procedural grounds, holding that the assessors were deemed to have waived their right of appeal on the issues which they were attempting to raise because neither party had requested the Board to make findings of fact and a report on these issues.[17]

It should be noted that the Court never mentioned in its opinion, even as an aside or in a footnote, that the practice of the assessors in the city of Lynn of assessing property at a ratio of 30% of fair cash value, even if proportionate and across the board, violated at the very

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[12] Sears, Roebuck & Co. v. City of Somerville, 1973 Mass. Adv. Sh. 943, 298 N.E.2d 811; Leto v. Board of Assessors, 348 Mass. 144, 202 N.E.2d 922 (1964). Cf. Shoppers' World, Inc. v. Board of Assessors, 348 Mass. 366, 203 N.E.2d 811 (1965).

[13] G.L. c. 59, § 38 requires that "[t]he assessors of each city and town shall at the time appointed therefor make a fair cash valuation of all the estate, real and personal, subject to taxation therein . . . ."

[14] 1973 Mass. Adv. Sh. 1491, 304 N.E.2d 183.

[15] Id. at 1492, 304 N.E.2d at 183, quoting petitioner's brief to the Appellate Tax Board.

[16] 1973 Mass. Adv. Sh. at 1492-93, 304 N.E.2d at 183-84.

[17] Id. at 1495, 304 N.E.2d at 185, citing G.L. c. 58A, § 13, as amended by Acts of 1969, c. 692.

least the clear language of chapter 59, section 52 of the General Laws,[18] which requires assessment at full and fair cash value. To that extent the *Zayre* case is at odds with the clear implications of the Court's prior decision in *Bettigole* and its progeny. Perhaps the Court's silence on this point in *Zayre* can be attributed to its understandable desire to dispose of the case on as narrow a ground as possible, *i.e.*, that since the assessors had waived their right of appeal there was no reason to discuss the substantive matters of the case any further.

However, the decision of the Supreme Judicial Court in *Board of Assessors of Lynn v. Shop-Lease Co.*,[19] involving the same question of an assessment practice at less than full fair cash value, is more disturbing. Here, the board of assessors of Lynn appealed a decision of the Appellate Tax Board which granted abatement of real estate taxes to Shop-Lease for the years 1970 and 1971. The parties stipulated before the Board " 'that for purposes of this hearing only substantially all properties assessed by the Board of Assessors of the City of Lynn during the years . . . 1970 and 1971 were, as a matter of policy, assessed at 30 percent of the fair cash value of such properties.' "[20]

The premises involved had been leased by Shop-Lease to various tenants for office and retail uses. In calculating the amount of real estate tax, the board of assessors used a capitalization of net earnings approach to arrive at fair cash value. Even though all parties had agreed that the assessed value of property should be 30% of fair cash value and even though the Appellate Tax Board agreed to the assessment on the basis of 30% of fair cash value computed on a capitalization of net earnings approach, the Appellate Tax Board in its formula for capitalizing net earnings used a factor for local real estate taxes based on full fair cash value and not on 30% thereof.[21]

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[18] See text at note 6 supra.

[19] 1974 Mass. Adv. Sh. 107, 307 N.E.2d 310.

[20] Id., 307 N.E.2d at 311.

[21] In order to more fully understand the mechanics of the Appellate Tax Board's computations and the Court's findings of errors in those computations, it is worth quoting at some length from the Court's decision:

> The premises were assessed for $216,700 in 1970 and $702,000 in 1971. The Lynn tax rate in 1970 was $200 for each thousand dollars of valuation and in 1971 was $207 for each thousand dollars of valuation.
>
> The [Appellate Tax Board] determined that the net income from the premises before any allowance for depreciation, return on investment and local real estate taxes was $154,450. The board used "a 10% factor for return on investment and depreciation." Based on the $200 1970 tax rate (disregarding, as do we in further discussion in this opinion, the slightly higher rate in 1971), the board "allowed a tax factor of 20%." Although the board acknowledged the assessors' argument that the factor should be six per cent (30% of 20%), the board rejected that argument without explanation. The board then arrived at a fair cash value in both years of $514,800 by dividing the net income ($154,450) before any allowance for depreciation, return on investment or taxes, by the combined factor for depreciation, return on investment and taxes (.10 + .20 = .30). This fair cash value was reduced

The sole question arising on appeal was whether the Appellate Tax Board had committed an error of law in using a tax factor based on full fair cash value and not on 30% thereof in its formula for capitalization of earnings. The Supreme Judicial Court made the point strongly that in the Commonwealth:

> Assessors have a constitutional and statutory duty to tax property at its full and fair cash value. *Bettigole v. Assessors of Springfield,* 343 Mass. 223, 230-232 (1961). G.L. c. 59, §§ 38, 52. See *Leto v. Assessors of Wilmington,* 348 Mass. 144, 146 (1964); *Shoppers' World, Inc. v. Assessors of Framingham,* 348 Mass. 366, 372 (1965). The effective tax rate should, therefore, always be the actual tax rate. Clearly, the apparent general practice in Lynn in 1970 and 1971 to assess substantially all property at thirty per cent of its fair cash value was improper under the law of the Commonwealth.[22]

Notwithstanding the impropriety of what they found the assessors had done, the Court granted the assessors' request for reversal and remanded the case, stating that the Appellate Tax Board had committed an error of law when it failed to reflect the actual tax (based on 30% of fair cash value) which would be payable as a result of its decision.

The Court, however, tried to soften its decision when it stated: "We wish to make it clear nevertheless that a board of assessors which has flagrantly failed to comply with its constitutional and statutory duty to assess all property at its full and fair cash value may expect to receive an unsympathetic reception in this court."[23] Moreover, the Court noted that on remand the Appellate Tax Board might find the facts to be even more favorable to taxpayer Shop-Lease than it had found earlier. Nonetheless, it is submitted that the impact of the Court's decision is strongly and inappropriately in favor of the assessors.

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by the board, "[u]sing the 30% ratio agreed to by both parties," producing an assessed value of $154,440. Abatements were accordingly granted.

The board's decision in effect provides an allowance for local real estate taxes of $102,960 (20% of the fair cash value found by it [$154,800]). However, on the basis of the assessed value established by the board's decision ($154,440) the actual 1970 local real estate tax to be paid is only $30,888 (20% of $154,440). Thus that portion of the net income available for depreciation, return on investment and taxes which will be available for other than taxes will be approximately $123,500, rather than $51,480 (10% of the fair cash value found by the board). Such a return would support a higher fair cash value of the property than that found by the board.

Id. at 108-09, 307 N.E.2d at 312. The Court assumed that the "failure of the board to arrive at $154,450 (instead of $154,440) after first dividing, then multiplying, $154,450 by .3 . . . was a typographical error or was caused by roundings." Id. at 109 n.2, 307 N.E.2d at 312 n.2.

[22] Id. at 109, 307 N.E.2d at 312.

[23] Id. at 110, 307 N.E.2d at 312.

Only Justice Reardon in dissent seemed to understand the full impact of the majority's decision, including the majority's tacit approval of the assessors' violations of such statutes as (1) section 38 of chapter 59 by assessing at other than full fair cash value, (2) section 52 of chapter 59 by falsely certifying to the correctness of their valuation lists, and (3) section 29 of chapter 41 by swearing to accurate valuations.[24] Justice Reardon stated:

> Notwithstanding its criticism of the assessment practices, in its decision the court effectively ratifies the lawless conduct of the assessors and even rewards it by requiring the board to make that illegality part of its valuation calculations .... The party seeking relief from this court is not a taxpayer suffering under an illegal system but rather the assessors who are the authors of the illegality. Adding insult to injury, the assessors insist that the board should have fully assimilated this illegal method of assessment into its valuation. In these circumstances the assessors have no good cause to bemoan any unjust treatment.
>
> ... The assessors in effect are asking this court to take a thoroughly illegal system and to adjudicate proportionality within its unlawful context. To do so is to pervert the functions of the court. The result is also prejudicial to the efforts of those assessors in cities and towns of the Commonwealth where an effort is made to comply with the law. See, e.g., G.L. c. 58, §§ 9-10C, 18C ....
>
> If the assessors are truly concerned with equity among the taxpayers of Lynn, they have a simple remedy at hand: that is to obey the law. I would not give them the relief they have sought.[25]

In December 1974, subsequent to the conclusion of the Survey year, the Court decided *Town of Sudbury v. Commissioner of Corporations & Taxation,*[26] which will likely have a far-reaching effect on the taxation of all property, both real and personal, in the Commonwealth.

The Town of Sudbury and certain of its officials filed a bill in equity in the county court for declaratory and injunctive relief against the Commissioner of Corporations and Taxation and the State Tax Commission, claiming that the Commissioner had failed to enforce the constitutional and statutory duty of assessors to tax property at its full fair cash value. A single justice of the Supreme Judicial Court referred the case to a master and thereafter confirmed the master's report and reported the case to the full Supreme Judicial Court without decision.[27]

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[24] Id. at 112, 307 N.E.2d at 314 (dissenting opinion).
[25] Id. at 113-15, 307 N.E.2d at 314-15 (dissenting opinion).
[26] 1974 Mass. Adv. Sh. 2405, 321 N.E.2d 641.
[27] Id. at 2406, 321 N.E.2d at 644.

The master had found that prior to *Bettigole* most real estate in the Commonwealth had been assessed at figures well below full fair cash value. Since 1966 more than one-half of the 351 cities and towns in the Commonwealth had gone through a revaluation process. The other cities and towns continued to assess at ratios well below full fair cash value and to assess different classifications of real property at different percentages of their value. Furthermore, revaluations, when done, had usually been done only once, and such revaluations were often out-of-date even before they were put into effect.[28]

In every even-numbered year the Commission established equalized valuations of taxable property for each city and town. The master found that for 1972 the assessment ratios, *i.e.,* the ratios of local assessed value to estimated full fair market value, ranged from 19% to 100%. Those cities and towns which had revalued their property tended to come much closer to full fair cash value than those cities and towns which had not revalued. Sudbury was one of the towns which was found to have assessed its property at or near its full fair cash value.[29]

Although the 1974 equalized valuations were found to be improved in quality, the master found that there was no assurance that the 1974 equalized valuations approximated full fair cash value since equalized valuations are largely based on the ratio of assessments to sales for each of four classifications of real estate, *i.e.,* commercial, industrial, residential and vacant land. These ratios were found by the master to be lacking in precision in several respects. First, sales data failed to supply enough information to insure that only arm's length sales were used. Second, frequency of sales varied with the types of property. Third, appraisers were expected to come up with appraisals in far less time than was required. The master cited a number of other varied reasons.[30]

Nonetheless, equalized valuations established by the Commission were found to be of substantial importance to each of the cities and towns within the Commonwealth since they play an important role in determining amounts to be distributed to each city and town as school aid, highway funds and lottery funds, and in apportioning the burden of county and other taxes. On the whole, the master found that those cities and towns which had revalued received far less in the way of state funds than they would have received if they had not revalued.[31]

Perhaps the most important part of the master's extensive findings was the conclusion that illegal assessments have been the rule and not the exception within a large part of the Commonwealth. As the Court

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[28] Id. at 2407, 321 N.E.2d at 644.
[29] Id. at 2408, 321 N.E.2d at 644.
[30] Id. at 2410-12, 321 N.E.2d at 645.
[31] Id. at 2409-10, 321 N.E.2d at 644-45.

noted: "We have no doubt that many assessors have taken the oath and subscribed the statutory statement in the belief, or even on the advice of counsel, that it was to be understood in an Aesopian or Pickwickian sense."[32]

The Commissioner is conferred by statute with full power of direction over the actions of assessors in the various cities and towns in the Commonwealth.[33] Furthermore, he has a statutory duty to prosecute assessors for any violations of their duties,[34] as well as to direct them to adopt methods which will insure the proper execution of their duties.[35] Nevertheless, the master's findings showed that although the Commission has attempted to establish equalized valuations at fair cash value, as required of it by statute, it has not been able to achieve acceptable uniformity or equalized valuations within an acceptable range of full fair cash value.[36] The Commission's task of equalization is made even more difficult by the fact that assessors in various cities and towns engage in fractional valuation. The end result is that those cities and towns whose assessors act lawfully are discriminated against in favor of those cities and towns whose assessors illegally value on a fraction of full fair cash value.

One example from the Court's opinion will illustrate the "fairyland" within which assessors have often been valuing property in the Commonwealth:

> The work sheets for Boston, for instance, show a composite assessment/sales ratio of 38%. But the 1973 median ratios for sales of residential property in different districts in the city ranged from 16% for Charlestown to 40% for Roxbury, with a composite residential ratio of 27.8%. Thus from data including the facts that the median sale in Charlestown brought about six times the assessed value and the median sale in Roxbury brought about two and one-half times the assessed value, computation produces the conclusion that residential assessed values throughout the city should be equalized at a little less than four times assessed value. The process has lost contact with reality. If, as often happens, property with a low rate of turnover is assessed lower than property with a high rate of turnover, the result is a serious understatement of equalized value.[37]

Based on the master's findings, the Supreme Judicial Court granted plaintiffs declaratory relief. The Court found that an actual con-

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[32] Id. at 2413, 321 N.E.2d at 646.
[33] G.L. c. 58, § 1.
[34] Id.
[35] Id. § 4.
[36] 1974 Mass. Adv. Sh. at 2418-19, 321 N.E.2d at 647.
[37] Id. at 2420, 321 N.E.2d at 648.

troversy had arisen with regard to the powers and duties of defendants with respect to taxation of property at full fair cash value.[38] Further, plaintiffs had shown a probable loss of revenue which was sufficient to give them a significant economic interest in the controversy. Therefore, a declaratory decree was found appropriate.[39]

The Court refused, however, to grant plaintiffs injunctive relief.[40] Citing earlier cases, the Court noted that it had traditionally refused injunctive relief unless (1) clear proof was shown of deliberate and substantial violation of the constitutional and statutory requirements of proportional property tax valuations; (2) plaintiffs could show themselves to be adversely affected both directly and significantly; (3) relief by normal abatement procedures or by an action at law would be seriously inadequate; or (4) equitable relief is shown to be particularly practicable and appropriate.[41] Without passing on the question of whether plaintiffs had shown that these conditions for injunctive relief were present, the Court chose to reserve injunctive relief for the present time on the ground that the master had in effect found that "the commissioner and the commission stand ready to do their duties if they are told what they are, and what their powers are to carry out their duties."[42]

Therefore, the Court remanded the case to the county court, and entered the following interlocutory decree:

> (1) the commissioner has the power and the duty to direct local assessors to take such action as will tend to produce uniformity throughout the Commonwealth in valuation and assessments; (2) the commission has the power and the duty to direct city and town officers to furnish such returns and statements relative to the amount and value of taxable property in the city or town as it deems necessary to enable it to determine and establish for each city and town an equalized valuation which shall be the fair cash value of all property in such city or town subject to local taxation as of January 1 in each even-numbered year; and (3) the functions of the commissioner and the commission in these respects are to command and not merely to advise or educate, and it is the legal duty of the assessors to obey their lawful commands. The decree is further to provide that jurisdiction of the case is retained pending further order of a single justice, that the commissioner and the commission are to make a report of progress to the single justice within six months after the entry of the interlocutory

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[38] Id. at 2423, 321 N.E.2d at 649.
[39] Id.
[40] Id. at 2422, 321 N.E.2d at 648.
[41] Id. at 2421-22, 321 N.E.2d at 648.
[42] Id. at 2422, 321 N.E.2d at 648.

decree, and that the single justice will thereafter make such interlocutory or final decree as is appropriate.[43]

It is still far too early to assess the impact which the Court's decision in *Town of Sudbury* will have on taxation of property throughout the Commonwealth. Perhaps the only point on which all seem to agree is that this decision will likely revolutionize property tax practices throughout the Commonwealth. Furthermore, it is important to note that the Court's decision calls into question not only the taxation of all real property in all the cities and towns of the Commonwealth, but also the taxation of all personal property therein.

§15.10. Methods of valuation of a nursing home. In *Schlaiker v. Board of Assessors of Great Barrington,*[1] the Supreme Judicial Court affirmed the decision of the Appellate Tax Board upholding the refusal of the board of assessors of Great Barrington to grant an abatement of real estate taxes on a nursing home. The Court held that the Board correctly found that the nursing home owners had not carried their burden of proving that the property had been overassessed through the assessors' use of the "reproduction costs less depreciation" method of valuation rather than the "capitalization of income" method used by the owners.[2] The Board had found no credible or persuasive evidence that taxpayers' property had a lower value than that assessed, and the decision of the Board was held to be final as to findings of fact.[3] Since the burden of proof was on the taxpayers to make out their right as a matter of law to abatement of a tax, it was proper for the Board to presume that the valuation made by the assessors was valid unless taxpayers sustained the burden of proving the contrary, which they failed to do.

§15.11. Valuation of property whose value decreased subsequent to January 1. *Sarris v. Board of Assessors of Swampscott*[1] was a relatively straightforward case, albeit one in which considerable sympathy must be felt for the taxpayer. Taxpayer had filed a petition with the Appellate Tax Board challenging the denial by the board of assessors of Swampscott of his application for abatement of 1970 real estate taxes. Taxpayer's home had been damaged by fire on January 14, 1970, and he argued that this fact should be taken into account in the assessors' valuation as of the past January 1. The Appellate Tax Board and the Massachusetts Appeals Court both recognized that the applicable statute[2] speaks in terms of an assessment as of January first, that taxes

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[43] Id. at 2424-25, 321 N.E.2d at 649.

§15.10. [1] 1974 Mass. Adv. Sh. 689, 310 N.E.2d 602.
[2] Id. at 691-92, 310 N.E.2d at 604-05.
[3] Id. at 691, 310 N.E.2d at 604, citing G.L. c. 58A, § 13.

§15.11. [1] 1974 Mass. App. Ct. Adv. Sh. 577, 315 N.E.2d 892.
[2] G.L. c. 59, § 11.

on real estate are assessed annually, and that they are not assessed for any period of time but rather as of a fixed date. Thus, the Board and the court found that even though as a result of the fire there was a temporary diminution in value of taxpayer's property following the assessment date, there was no justification for abatement from the full fair cash value established by the assessors on January 1, notwithstanding any seeming equities to the contrary.[3]

§15.12. Business corporation v. manufacturing corporation. In *Stewart In-Fra-Red Commissary of Massachusetts, Inc. v. State Tax Commission,*[1] the Appellate Tax Board held that a food distributor that produced meat and cheese sandwiches through a variety of mechanized processes constituted a "domestic manufacturing corporation" under section 2 of chapter 58 and section 38C of chapter 63 of the General Laws. Accordingly, it was exempt from local property tax on its machinery and was subject to tax thereon at the state level under the tangible property component of the corporate excise tax. The Board's opinion is valuable in that it contains a good discussion of some of the distinctions between so-called "business" and "manufacturing" corporations. Machinery used by a domestic business corporation (as defined in section 30 of chapter 63) is subject to the local ad valorem property tax.[2] Machinery used by a domestic manufacturing corporation (as defined in section 38C of chapter 63) is specifically exempted from the local property tax.[3]

§15.13. Legislation. A considerable volume of legislation was passed in the area of real and personal property taxes during the past year. One of the more important pieces of legislation was chapter 287 of the Acts of 1974, which added new clause 41A to section 5 of chapter 59 of the General Laws, to permit certain persons 65 years of age or over to postpone payment of all or a portion of their real estate taxes under specified circumstances. In order to qualify for this deferral, an individual must enter into tax deferral and recovery agreements with his board of assessors. Upon the individual's death his heirs must make up the taxes plus eight per cent interest. If his heirs fail to pay the tax and interest, the amounts are payable from the individual's estate.

A second important piece of legislation was chapter 1118 of the Acts of 1973, which added chapter 61A to the General Laws. The purpose of chapter 61A is to provide for the assessment of agricul-

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[3] 1974 Mass. App. Ct. Adv. Sh. at 577-78, 315 N.E.2d at 892-93.

§15.12. [1] Appellate Tax Board, April 1, 1974, digested in 2 CCH State Tax Rep., Mass. ¶ 200-397, at 10,315.

[2] G.L. c. 59, § 5(2).

[3] Id. § 5(3).

tural and horticultural land[1] at a value based upon the agricultural or horticultural use of the land in a manner permitted by Article XCIX of the Articles of Amendment to the Constitution of Massachusetts, which was adopted by the voters on November 7, 1972. This statutory provision sets up procedures whereby the eligibility (and loss of eligibility) of land for valuation, assessment, and taxation on this lower basis can be determined. The provisions of this statute shall apply to fiscal years ending June 30, 1975 and thereafter.

C. Personal Income Taxes

§15.14. Income from real property located outside of Massachusetts. Prior to the amendment of chapter 62 of the General Laws by chapter 555 of the Acts of 1971, it was clear that the income tax imposed by chapter 62 was an income tax of the property, not excise, tax variety. As such, the chapter 62 income tax had been held not to subject to taxation income received by a Massachusetts resident from real estate located outside Massachusetts.[1] *Ingraham v. State Tax Commission,*[2] a case of first impression, raised the issue of whether chapter 555 changed the basic nature of chapter 62 to an income tax of the excise variety, such that Massachusetts could properly tax income received by a resident from non-Massachusetts real estate. The Appellate Tax Board held in the affirmative for the State Tax Commission.

The facts in *Ingraham* were relatively straightforward. Appellant was a resident of Massachusetts who received income in 1971 in the amount of $4,530.22 from the sale of standing timber located on land in Maine and $81.10 as rental income and receipts from the sale of gravel from land also located in Maine. Appellant initially included these items in income on his return for the year 1971, which return was filed April 14, 1972. On the same date he also filed an application for abatement of that portion of the tax paid attributable to the inclusion of these items of income from the Maine real estate. This application for abatement was denied.[3]

The Appellate Tax Board's holding was based on three significant conclusions of law. First, Article XLIV of the Amendments to the Constitution of Massachusetts did not prohibit the imposition of an income tax of the excise type. Second, Article XLIV did not limit the

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§15.13. [1] As defined in G.L. c. 61A, §§ 1, 2.

§15.14. [1] State Tax Comm'n v. Fine, 356 Mass. 51, 247 N.E.2d 701 (1969); State Tax Comm'n v. Wheatland, 343 Mass. 650, 180 N.E.2d 340 (1962); Riesman v. Commissioner of Corps. & Taxation, 326 Mass. 574, 95 N.E.2d 656 (1950).

[2] 2 CCH State Tax Rep., Mass. ¶ 200-400, at 10,317 (1974).

[3] Id. at 10,317.

application of the income tax law to the classes of income originally taxed by chapter 62. Third, the legislature, in amending section 2(a) of chapter 62 in 1971 so as to define gross income as federal gross income with certain modifications, intended to change the statute to an income tax of the excise type:[4]

> It seems to the board that since the Federal Income Tax is itself an excise, the adoption of the Federal concept of gross income is a strong indication of legislative intent to change the underlying philosophy of Chapter 62 from a classified income tax of the property tax type to a general income tax of the excise type.[5]

The *Ingraham* decision was predictable based on prior case law. In 1950 in *Riesman v. Commissioner of Corporations & Taxation,*[6] the Supreme Judicial Court definitively held that an income tax of the property tax variety could not be laid on income from realty located outside of the boundaries of Massachusetts:

> The income tax being a property tax, the Commonwealth cannot assess such a tax upon real estate for whose benefit and advantage it has not afforded and cannot afford security and protection. It cannot lay what has uniformly been classified by this court as a property tax upon realty located outside the boundaries of the Commonwealth.[7]

In 1962 in *State Tax Commission v. Wheatland,*[8] which involved a factual situation much like that in *Ingraham,* the Court found no legislative intent under the then existing statute to impose a tax upon rental income[9] derived either within or outside Massachusetts.[10] Based on the doctrine of strict construction of tax statutes, and in order to avoid constitutional doubts, the Court held that the Massachusetts statute "should be construed as not taxing the proceeds of the sale of timber located in Maine."[11] Thus, *Wheatland* can be viewed as a retreat from *Riesman* in the sense that it was decided on the basis of statutory interpretation and not on a constitutional basis. In *Ingraham* the Board distinguished *Wheatland* on the ground that section 3 of chapter 555 of the Acts of 1971 clearly subjected to taxation rental income derived from real estate in Massachusetts.

The most recent in this line of cases, *State Tax Commission v. Fine,*[12]

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[4] Id. at 10,317-19.
[5] Id. at 10,318.
[6] 326 Mass. 574, 95 N.E.2d 656 (1950).
[7] Id. at 577, 95 N.E.2d at 659.
[8] 343 Mass. 650, 180 N.E.2d 340 (1962).
[9] The privilege of severing from the land a substantial part of its value was determined to be analogous to rent payments.
[10] 343 Mass. at 653, 180 N.E.2d at 342.
[11] Id.
[12] 356 Mass. 51, 247 N.E.2d 701 (1969).

involved the taxation of dividends paid by a foreign trust to a Massachusetts holder of its transferable shares. The dividends were the result of "royalties" received by the trust from a lessee for the privilege of taking iron ore and other minerals from Minnesota land owned by the trust. Relying on cases such as *Wheatland,* the Court held that such income was not subject to tax in Massachusetts.[13] The Court went on to say that it would have been a different case if the legislature had expressly intended to tax such income:

> We assume, without deciding, that within art. 44 of the Amendments to the Constitution of the Commonwealth a statute might be devised (a) which clearly was not intended to have the effect of a property tax upon the land outside Massachusetts from which was derived the income sought to be taxed and (b) which would bring the Massachusetts income tax . . . within the scope of the decisions in the Supreme Court of the United States . . . as dealing with income taxes of the excise type.[14]

The Board in *Ingraham* decided the question assumed in *Fine* and determined that through chapter 555 of the Acts of 1971, the legislature had devised such a statute. In reaching this conclusion, the Board cited affirmatively the *1971 Annual Survey of Massachusetts Law,* in which while discussing the scope of the 1971 legislative amendments, it was stated:

> The new statute should end once and for all the dispute between the court and the legislature over whether or not the personal income tax is a property tax. Short of an express legislative declaration that the new law is to be construed as a true income tax, the legislature has done as much as possible to enact a tax having all the characteristics of an income tax.[15]

The *Ingraham* decision has been appealed to the Supreme Judicial Court.

§15.15. Acquisition of Massachusetts domicile upon marriage. In *Green v. Commissioner of Corporations & Taxation,*[1] the Supreme Judicial Court considered the question of whether a New Hampshire woman becomes domiciled in Massachusetts for tax purposes upon marriage to a Massachusetts resident, even though she did not move to Massachusetts until about five months later. The case arose in the context of a bill for declaratory judgment brought by the plaintiff taxpayers. Justice Braucher, speaking for the Court, rejected

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[13] Id. at 59-60, 247 N.E.2d at 707.
[14] Id. at 59, 247 N.E.2d at 707.
[15] Shaw, State and Local Taxation, 1971 Ann. Surv. Mass. Law § 3.7, at 39.

§15.15. [1] 1973 Mass. Adv. Sh. 1549, 305 N.E.2d 92.

the Commissioner's contention that the established common law rule " 'that a wife's domicile, absent some marital wrong committed by her husband, follows that of her husband' "[2] should govern for tax purposes. The Court discussed how this common law doctrine had been eroded in other contexts in Massachusetts and other jurisdictions, and refused to extend what it calls the "vanishing fiction of identity of person" into the field of taxation.[3] The Court held that Lea Green was not domiciled in Massachusetts until she moved to Massachusetts and thus the capital gain she recognized prior to that move was not subject to Massachusetts tax.[4] It should be noted that this holding was based not on constitutional interpretation, but rather on an interpretation of the Massachusetts taxing statutes. However, language in the decision should be helpful to persons attempting to make a constitutional argument in other contexts.[5]

§15.16. Taxation of interest and dividends from savings deposits. Chapter 77 of the Acts of 1974, which inserts a new section 2(b)(1)(A) of chapter 62 of the General Laws, clarifies to some degree the taxation of interest and dividends on term and time deposits in specified banks located in Massachusetts. It is now clear that savings deposits in such banks include term and time deposits having a principal amount of less than $100,000. Interest and dividends on deposits in such banks are taxable at the 5% rate rather than the 9% rate. The taxation of interest and dividends on term and time deposits having a principal amount of more than $100,000 is still unclear, but there is a strong negative inference in this statutory provision that such income is subject to tax at the 9% rate.

Unfortunately, a number of questions remain unanswered. For example, if a taxpayer has a $150,000 term deposit, is all or only 1/3 of the interest on such term deposit subject to the higher 9% rate? Can the taxpayer transform all of the interest into 5% income merely by purchasing two $75,000 term deposits rather than one $150,000 term deposit? Also, no statutory guidance is provided as to how "term and time deposits" are defined.

This provision applies to taxable years commencing after December 31, 1972.

§15.17. Employment related expenses. Chapter 848 of the Acts of 1974 amended section 3B(a) of chapter 62 of the General Laws by

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[2] Id. at 1551, 305 N.E.2d at 93, quoting Brief for Respondent.

[3] Id. at 1554, 305 N.E.2d at 95.

[4] Id. at 1555, 305 N.E.2d at 95-96.

[5] Recent decisions of the Supreme Court of the United States cast doubt on the constitutional validity . . . of fictitious rules as to residence . . . . The commissioner would have us read the word "inhabitant" to include a woman . . . who has just married an inhabitant without regard to any of the facts with respect to her habitation. We are not prepared to do so.
1973 Mass. Adv. Sh. at 1554-55, 305 N.E.2d at 95.

inserting new subparagraph (7) to provide for a deduction from Massachusetts adjusted gross income of child care expenses incurred to enable the taxpayer to be gainfully employed. The deduction is to be computed as provided in section 214 of the Internal Revenue Code.[1] Such expenses must have been paid during the tax year that is being reported.

This provision is applicable to tax years commencing after December 31, 1974, and no expenses incurred prior to January 1, 1975 shall be claimed under this provision, regardless of when paid.

D. Corporate Excise Taxes

§15.18. Security corporations. In *Industrial Finance Corp. v. State Tax Commission*,[1] the Appellate Tax Board held that a corporation engaged in the business of lending money and whose loans were evidenced by promissory notes was not entitled to the special corporate excise tax treatment afforded to "security corporations."[2] The taxpayer was in the business of loaning money. The loans were evidenced by promissory notes and typically were secured by real estate mortgages, personal property mortgages, or both. Loans ranged from about $2,000 to over $1,000,000, and were made to a variety of borrowers for personal and business uses, including construction loans.[3] The case involved the years 1963 through 1967. Taxpayer applied to the Commissioner for classification as a domestic security corporation under the provisions of section 38B of chapter 63 of the General Laws, but the request was denied.[4]

A security corporation is defined in section 38B as a domestic business corporation or foreign corporation which is engaged *exclusively* in buying, selling, dealing in or holding securities on its own behalf and not as a broker, and which either makes application to the Commissioner to be classified as a security corporation and is so classified, or has been so classified for a prior year and such classification has not

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§15.17. [1] 26 U.S.C. § 214 (1970).

§15.18. [1] 2 CCH State Tax Rep., Mass. ¶200-389, at 10,300 (1974).

[2] G.L. c. 63, § 38B.

[3] The taxpayer actually described itself as a "Business Credit Agency" which engaged in "Secondary Financing." By "Secondary Financing," the taxpayer meant that it did not engage in permanent financing such as first mortgages. The financing rendered was for a relatively short period, until the borrower could arrange permanent financing such as construction loans. It should be noted that the Board makes little of this point, which might provide one way of limiting the scope of this decision.

[4] 2 CCH State Tax Rep., Mass. ¶ 200-389, at 10,300. Mass. Excise Ruling 1967-1 sets out the information required to be submitted to obtain "security corporation" classification.

been revoked.[5] Any security corporation which is not a regulated investment or bank holding company under present law is subject to an excise tax equal to the greater of 1.2% of its gross income for the taxable year[6] or $114. A security corporation is not subject to the normal excise tax imposed by sections 32 or 39 of chapter 63.[7]

The Commissioner has taken the position that in order to qualify as a security corporation a corporation cannot be engaged in business activities other than those enumerated in section 38B during any part of its taxable year. In 1972 the Supreme Judicial Court agreed with this position in *Chatham Corp. v. State Tax Commission*.[8] *Chatham* involved a corporation which had been engaged in a manufacturing operation only for the first seven days of its taxable year, after which time the operating assets were sold in a bulk sale which had been negotiated prior to the beginning of the taxable year. The Court held that the corporation did not qualify for the favorable tax treatment provided by section 38B.[9]

The basis of the Board's holding in *Industrial Finance* is far from clear. The Board spent considerable effort defining regulated investment companies (and investment companies) and concluded that taxpayer did not qualify as a regulated investment company (or an investment company) because taxpayer: (1) was not an issuer; (2) did not have shareholders who had been induced to purchase its securities by the prospect of obtaining diversification and expert management of their investments; and (3) did not hold itself out as being engaged primarily in the business of investing, reinvesting or trading in securities.[10] The definition of a security corporation surely must be broader than that of an "investment company," as so defined; otherwise, a holding company would be excluded from classification as a "security corporation."

At the conclusion of its opinion, the Board finally reached the crucial issue: whether the promissory notes which represented the loans made by taxpayer constituted "securities" for purposes of section 38B. The Board indicated that there were many definitions of "security" and that the federal Investment Company Act of 1940[11] included

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[5] G.L. c. 63, § 38B was amended in 1966, effective for 1967, and again in 1971 and 1973. These amendments did not affect the question at issue in this case. The 1966 amendments in effect created two categories of security corporations: those which were regulated investment or bank holding companies under the Internal Revenue Code and those which were not. The major difference between these two categories of security corporations is the excise tax rate imposed on them.

[6] As defined in G.L. c. 63, § 30.

[7] G.L. c. 63, § 38B(c).

[8] 1972 Mass. Adv. Sh. 1297, 285 N.E.2d 420.

[9] Id. at 1299, 285 N.E.2d at 422.

[10] 2 CCH State Tax Rep., Mass. ¶ 200-389, at 10,302-03 (1974).

[11] 15 U.S.C. § 80a (1970).

promissory notes within its definition of the term. However, the Board then fell back on the definition of investment company in the Investment Company Act of 1940, which excluded any person whose business was that of making small loans, etc. The Board also pointed to the fact that under Massachusetts real estate law, the taxpayer was acquiring title to interests in real estate where its loans were secured by real estate mortgages.[12]

It is submitted that judicial and/or legislative clarification of what constitutes a "security" for purposes of section 38B is required.[13] Little guidance is provided by the Appellate Tax Board's opinion in *Industrial Finance.* It is hoped that on appeal the Supreme Judicial Court will produce a fuller analysis of the issue here involved.

§15.19. Credit for certain corporations which increase their number of full-time employees. Chapter 791 of the Acts of 1973 adds section 31C to chapter 63 of the General Laws to provide a tax credit to a manufacturing corporation or to a business corporation engaged primarily in research and development. This tax credit is related to the increase in the number of individuals who fall within specified groups of full-time employees employed during the taxable year. The credit applies to taxable years ending on or after December 31, 1973 and before December 31, 1978.

The amount of the credit is determined by multiplying $500 by the increase in the number of certain full-time employees, namely those who immediately prior to employment received either: (1) public assistance, (2) unemployment compensation, or (3) job training in an approved program (after December 31, 1974, the number may be increased by those employees currently participating in employer subsidized programs to upgrade job skills, wages and promotional possibilities). The increase in the number of full-time employees is determined by the excess of (1) the number of full-time employees employed during the year over (2) the number of full-time employees during the corporation's year ending immediately prior to December 31, 1973, multiplied by 1.03 for taxable years ending on or after December 31, 1973 and before December 31, 1974 (other coefficients are used for subsequent years).

The credit must be elected each year in lieu of the special deduc-

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[12] 2 CCH State Tax Rep., Mass. ¶ 200-389, at 10,303 (1974).

[13] At the present time, the State Tax Commission has total discretion in determining whether a corporation qualifies as a "security corporation." The authors understand that the State Tax Commission interprets the definition of "security corporation" very narrowly, and may even take the position that a corporation which holds exclusively stock (constituting control) in affiliated companies does not so qualify. It is submitted that such a position is incorrect since it directly contradicts the definition of a "security corporation" contained in G.L. c. 63, § 38B. The authors read § 38B to provide that a security corporation can be engaged exclusively in "holding" securities on its own behalf.

tion permitted for compensation to employees domiciled in poverty areas. The credit is in addition to the business investment credit.

§15.20. Disclosure of the contents of tax returns and the joint audit thereof. Chapter 922 of the Acts of 1973 added sections 48 and 49 to chapter 58 of the General Laws. Section 48 provides that the Commissioner of Corporations and Taxation may permit the Secretary of the Treasury of the United States or the proper tax officer of any territory, state or political subdivision to inspect any return required to be filed with the Commissioner and to furnish information concerning any item contained in such return. Such information may be disclosed only if it is used exclusively for the purpose of administering tax laws, and only if similar reciprocal privileges are granted to the Commissioner by the United States or such other taxing jurisdictions. Section 49 provides that the Commissioner may participate jointly with the Secretary of the Treasury of the United States or with the proper tax official of any territory, state, or political subdivision in the audit of any return required to be filed with the Commissioner. Also, the Commissioner may examine any tax return filed with the Internal Revenue Service or any other taxing jurisdiction to the extent that the tax of the federal government or any other such taxing jurisdiction is similar to a tax imposed in Massachusetts.

§15.21. Dividends from other corporations: Long-term capital gains and losses: Sale or exchange of intangible property. Chapter 722 of the Acts of 1974 amends section 38 of chapter 63 of the General Laws in two significant respects. First, it provides that dividends received from other corporations are taxable unless the receiving corporation owns more than 15% of the voting stock of the paying corporation. Prior to this amendment such dividends were not taxable unless they resulted from the ownership of shares in a corporate trust or were deemed or actual distributions, other than of previously taxed income from a DISC.[1] These two exceptions to the general rule that dividends from another corporation are not taxable are retained.

Second, this amendment includes in net income 100% of any long-term capital gains realized on the sale or exchange of intangible property. Prior to this amendment, taxpayers had been entitled to a deduction equal to 50% of any such gains.

This statutory provision is applicable to taxable years ending on or after December 31, 1974.

§15.22. Nominee trusts. Tax practitioners should be aware of a ruling, presently in proposed form, which the Commissioner may issue in the future with respect to nominee trusts. The proposed rul-

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§15.21. [1] A "DISC" (Domestic International Sales Corporation) is "a corporation which meets the requirements of section 992(a)(1) of the Federal Internal Revenue Code . . . ." G.L. c. 63, § 30(15).

ing takes the position that a nominee trust is a separate entity for Massachusetts tax purposes unless the trustee has no powers other than the power to hold title and to do those things, such as execution of documents, which must be done by the title-holder. If a nominee trust is treated as a separate entity, a beneficial owner would not be permitted to report his share of losses from the property on his own Massachusetts tax return. The proposed ruling requests that trustees of any trust holding title to property which produces gross income in excess of $100 file Form 2 (Fiduciary Income Tax Return). Also, if the trustees believe that the trust is not subject to tax, a statement containing all facts and circumstances upon which the claim is based should be attached to the return.

Although the ruling is only as yet a proposal, practitioners should review nominee trusts which permit the trustee to act on direction of the beneficiaries and consider amending or eliminating such trusts.

§15.23. Excise tax rate: Property measure. During the Survey year the State Tax Commission, pursuant to section 31B of chapter 63 of the General Laws, determined that the tax rate applicable to the property measure of the excise tax shall be reduced from $7.98 per $1,000 to $5.76 per $1,000 (including the 14% surtax) for taxable years ending December 31, 1973 and thereafter. Subsequent to the Survey year, the Commission further reduced the tax rate applicable to the property measure of the excise tax to $2.60 per $1,000 (including the surtax) for taxable years ending December 31, 1974 and thereafter. Both of these tax rate reductions are applicable to both the tangible and net worth measure of the excise tax for both domestic and foreign corporations.