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Massachusetts Department of Revenue  
Division of Local Services

Current Developments  
in  
Municipal Law



2007

Appellate Tax Board Decisions

Book 2A

Henry Dormitzer, Commissioner  
Robert G. Nunes, Deputy Commissioner

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# Appellate Tax Board Decisions

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COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

**CFM BUCKLEY/NORTH, LLC** v. **BOARD OF ASSESSORS OF  
THE TOWN OF GREENFIELD**  
Docket Nos. F267442, F267443,  
F272460 and F272461

**LONGMEADOW OF TAUNTON, LLC** v. **BOARD OF ASSESSORS OF  
THE CITY OF TAUNTON**  
Docket Nos. F272568 and F272569

**JOHN ADAMS NURSING HOME, LLC** v. **BOARD OF ASSESSORS OF  
THE CITY OF QUINCY**  
Docket Nos. F280611, F280612,  
F272566 and F272567

**ATB 2007-220**

Promulgated:  
March 20, 2007

These are related appeals under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 59, §§ 64 and 65, from the refusal of the appellees to grant exemptions and abate taxes on certain real estate in the Town of Greenfield and the Cities of Taunton and Quincy, assessed to the appellants under G.L. c. 59, §§ 11 and 38 for fiscal years 2003, 2004 and 2005.

In each of these appeals, the Appellate Tax Board ("Board") allowed the appellee's Motion for Judgment on the Pleadings<sup>1</sup> and entered a decision for the appellee.

These findings of fact and report are made pursuant to requests by the appellants under G.L. c. 58A, § 13 and 831 CMR 1.32.

*Daniel E. Will, Esq.* for the appellants.

*David J. Martel, Esq.* for the appellees, Board of Assessors of Greenfield and Taunton

*Robert Quinn, Esq.* for the appellee, Board of Assessors of Quincy.

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<sup>1</sup> In Docket Nos. F267442, F267443, F272460 and F272461, the appellee Assessors of Greenfield filed a Motion to Dismiss, which the Board treated as a Motion for Judgment on the Pleadings.

## **FINDINGS OF FACT AND REPORT**

These appeals all raise the single legal issue of whether a limited liability company ("LLC") may qualify for the charitable exemption under G.L. c. 59, § 5, cl. 3. The relevant facts necessary for resolution of this issue are essentially identical and are not in dispute. On the basis of the undisputed facts contained in the pleadings, the Board made the following findings of fact.

### **I. APPELLANTS**

At all material times, appellants CFM Buckley/North, LLC ("Buckley"), Longmeadow of Taunton, LLC ("Longmeadow"), and John Adams Nursing Home, LLC ("John Adams") (together, "appellants") each operated a facility that provided skilled nursing home care exclusively to indigent elderly and infirm patients covered by Medicaid and/or Medicare. They each provided these services on a non-profit basis, with no impermissible financial benefits flowing to investors.

The appellants are Delaware LLCs. Each of the LLCs has as its sole member ElderTrust of Florida, Inc. ("ElderTrust"). ElderTrust and the LLCs share officers and directors. ElderTrust is a Tennessee corporation that has as its purpose the ownership and operation of elderly care facilities, including nursing homes. It is organized for charitable purposes and is a 501(c)(3) corporation.

As LLCs, appellants are governed by "Certificates of Formation," which set forth their charitable purposes and limitations on their activities. Each of their Certificates of Formation provides that the LLC "shall serve only such purposes and functions and shall engage only in such activities as are consistent with . . . the charitable purposes and objectives of its sole member."

In addition, under Delaware law, the LLCs operate under an "Operating Agreement" which provides that ElderTrust, the sole member of the LLCs, "shall have full and complete authority, power, and discretion to manage and control the business affairs, and properties of [the LLCs], to make all decisions regarding those matters and to perform any and all acts or activities customary to the management of [the LLCs'] business."

## II. JURISDICTION

### A. BUCKLEY APPEALS

On January 1, 2002 and January 1, 2003, Buckley owned the land and buildings located at 95 Laurel Street in the Town of Greenfield ("Buckley property"). Buckley operated a skilled nursing home on the Buckley property known as "The Buckley Nursing Home." Buckley also owned as of January 1, 2002 and January 1, 2003 personal property located at the Buckley property that it used in connection with the operation of the Buckley Nursing Home.

For fiscal year 2003, the appellee Board of Assessors of the Town of Greenfield ("Greenfield Assessors") valued the Buckley property at \$3,679,200 and assessed a real estate tax of \$96,489.86. The Greenfield Assessors valued the personal property located at the Buckley Nursing Home at \$21,410 and assessed a personal property tax of \$454.11. The taxes were timely paid without incurring interest.

Buckley timely filed applications for abatement of the fiscal year 2003 real and personal property taxes on February 3, 2003.<sup>2</sup> The Greenfield Assessors denied the applications on March 19, 2003 and Buckley timely filed its fiscal year 2003 appeals with this Board on May 12, 2003.

For fiscal year 2004, the Greenfield Assessors valued the Buckley property at \$3,679,200 and assessed a real estate tax of \$96,489.86. The Greenfield Assessors valued the personal property located at the Buckley Nursing Home at \$21,410 and assessed a personal property tax of \$454.11. The taxes were timely paid without incurring interest.

Buckley timely filed applications for abatement of the fiscal year 2004 real and personal property taxes on January 29, 2004. The Greenfield Assessors denied the applications on February 4, 2004 and Buckley timely filed

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<sup>2</sup> G.L. c. 59, § 59 requires that applications for abatement be filed: "on or before the last day for payment, without incurring interest in accordance with the provisions of chapter fifty-seven or section fifty-seven C, of the first installment of the actual tax bill issued upon the establishment of the tax rate for the fiscal year to which the tax relates." According to G.L. c. 59, § 57C, the applicable payment section for this appeal, the last day for payment is February 1<sup>st</sup>. However, in 2003, February 1<sup>st</sup> fell on a Saturday. When the last day of a filing period falls on a Saturday, Sunday, or legal holiday, the filing is still considered timely if it is made on the following business day. See G.L. c. 4, § 9; *Barrett v. Assessors of Needham, ATB Findings of Fact and Report 2004-614, 615, n. 2*. Accordingly, the Board found that the appellant timely filed his application for abatement on Monday, February 3, 2003.

its fiscal year 2004 appeals with this Board on May 3, 2004.

**B. LONGMEADOW APPEALS**

On January 1, 2003, Longmeadow owned the land and buildings located at 68 Dean Street in the City of Taunton ("Longmeadow property"). Longmeadow operated a skilled nursing home on the Longmeadow property known as "Longmeadow of Taunton." Longmeadow also owned as of January 1, 2003 personal property located at the Longmeadow property that it used in connection with the operation of Longmeadow of Taunton.

For fiscal year 2004, the appellee Board of Assessors of the City of Taunton ("Taunton Assessors") valued Longmeadow of Taunton at \$3,725,900 and assessed a real estate tax of \$73,176.68. The Taunton Assessors valued the personal property located at Longmeadow of Taunton at \$79,525 and assessed a personal property tax of \$454.11. The taxes were timely paid without incurring interest.

Longmeadow timely filed applications for abatement of the fiscal year 2004 real and personal property taxes on January 29, 2004. The Taunton Assessors denied the applications on March 4, 2004 and Longmeadow timely filed its fiscal year 2004 appeals with this Board on May 11, 2004.

**C. JOHN ADAMS APPEALS**

On January 1, 2003 and January 1, 2004, John Adams owned the land and buildings located at 211 Franklin Street in the City of Quincy ("John Adams property"). John Adams operated a skilled nursing home on the John Adams property known as "The John Adams Nursing Home." John Adams also owned as of January 1, 2003 and January 1, 2004 personal property located at the John Adams property that it used in connection with the operation of the John Adams Nursing Home.

For fiscal year 2004, the appellee Board of Assessors of the City of Quincy ("Quincy Assessors") valued the John Adams property at \$1,952,000 and assessed a real estate tax of \$51,200.95. The Quincy Assessors valued the personal property located at the John Adams Nursing Home at \$38,230 and assessed a personal property tax of \$1,002.77. The taxes were timely paid without incurring interest.

John Adams timely filed applications for abatement of the fiscal year 2004 real and personal property taxes on

January 29, 2004. The applications were deemed denied by inaction of the Quincy Assessors on April 29, 2004 and John Adams timely filed its fiscal year 2004 appeals with this Board on May 11, 2004.

For fiscal year 2005, the Quincy Assessors valued the John Adams property at \$2,199,400 and assessed a real estate tax of \$49,090.61. The Quincy Assessors valued the personal property located at the John Adams Nursing Home at \$36,580 and assessed a personal property tax of \$816.47. The taxes were timely paid without incurring interest.

John Adams timely filed applications for abatement of the fiscal year 2005 real and personal property taxes on January 31, 2005. The applications were deemed denied by inaction of the Quincy Assessors and John Adams timely filed its fiscal year 2005 appeals with this Board on June 20, 2005.

On the basis of the foregoing, the Board found and ruled that it had jurisdiction to hear and decide all of the foregoing appeals filed by Buckley, Longmeadow, and John Adams.

### **III. BOARD'S DECISIONS**

Each of the appellants sought abatement of the real and personal property taxes at issue on the grounds that it was a "charitable organization" for purposes of G.L. c. 59, § 5, cl. 3 whose real and personal property ought to be exempt from tax. The appellee assessors each filed dispositive motions arguing that, as a matter of law, LLCs are not entitled to the charitable exemption under G.L. c. 59, § 5, cl. 3. For the reasons explained in the following Opinion, the Board allowed the appellees' motions and issued decisions for the appellees in these appeals.

### **OPINION**

Pursuant to Rule 22 of the Board's Rules of Practice and Procedure, 831 CMR 1.22, "[i]ssues sufficient in themselves to determine the decision of the Board or to narrow the scope of the hearing may be separately heard and disposed of in the discretion of the Board." In the present appeals, the Taunton and Quincy Assessors filed Motions for Judgment on the Pleadings, while the Town of Greenfield filed a Motion to Dismiss. Despite the different captions, the basis of these motions was the same: the moving party argued that it was entitled to a decision in its favor because, as a matter of law, an LLC

cannot qualify for the charitable exemption under G.L. c. 59, § 5, cl. 3.

Where the pleadings raise no genuine issues of material fact and a party is entitled to judgment as a matter of law, the Board may decide the appeal under 831 CMR 1.22. See, e.g., **Brownell v. Commissioner of Revenue**, ATB Findings of Fact and Reports 2003-324. Accordingly, because the present appeals raised no issue of material fact but only issues of law, the Board ruled that resolution of these appeals pursuant to 831 CMR 1.22 was appropriate.

G.L. c. 59, § 5, cl. 3 provides that personal and real property owned by or held in trust for a "charitable organization" is exempt from property tax.<sup>3</sup> For purposes of Clause 3, a charitable organization is a "(1) literary, benevolent, charitable or scientific institution or temperance society incorporated in the commonwealth, and (2) a trust for literary, benevolent, charitable, scientific or temperance purposes."

In **Mary C. Wheeler School, Inc. v. Assessors of Seekonk**, 368 Mass. 344 (1975) the court ruled that, under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, foreign corporations could not be denied the Clause 3 exemption solely on the basis of their state of incorporation. Accordingly, the fact that the LLCs were created under Delaware law does not disqualify them from the Clause 3 exemption.

However, Clause 3 explicitly requires that the organization be "incorporated." Pursuant to G.L. c. 156C, § 2(5), LLCs are defined as "**unincorporated** organizations formed under [c. 156C] and having 1 or more members." (emphasis added). In a similar context, the Board was affirmed in its decision to deny an LLC a property tax exemption under G.L. c. 59, c. 5, clause 16, which, like Clause 5, exempts property owned by a corporation. See **RCN-BecoCom, LLC v. Commissioner of Revenue**, 443 Mass. 198, 207 (2005) ("The Board determined, and we agree, that § 5, Sixteenth, is not ambiguous. By its plain language, it applies to corporations, not limited liability companies."). The court agreed with the Board that RCN's "voluntary election to do business in Massachusetts as a

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<sup>3</sup> The charitable organization that owns the real estate, or another charitable organization, must also occupy the real estate in furtherance of the charitable purposes of the owner or occupant. This requirement is not at issue in these appeals.

limited liability company render[ed] itself ineligible for the corporate exemption." **Id.**

Appellants attempted to distinguish **RCN** on a number of grounds. First, they point to the fact that **RCN** analyzed Clause 16 in the context of for-profit corporations, not the Clause 3 exemption for charitable organizations at issue in these appeals. However, "[a] word used in one part of a statute in a definite sense should be given the same meaning elsewhere in the statute, barring some plain contrary indication." **Connolly v. Division of Public Employee Retirement Administration, et al.**, 415 Mass. 800, 802-03 (1993). Moreover, courts and this Board routinely cite Clause 3 cases for issues arising under Clause 16 and vice versa. For example, in deciding a case involving the manufacturing exemption under Clause 16, the court cited and quoted a case dealing with the Clause 3 exemption for the proposition, equally applicable to the present appeals, that "[a]n exemption is a matter of special favor or grace and is to be recognized only where the property falls clearly and unmistakably within the express words of a legislative command." **Southeastern Sand & Gravel, Inc. v. Commissioner of Revenue**, 384 Mass. 794, 796 (1981) (quoting **Children's Hospital Medical Center v. Assessors of Boston**, 353 Mass. 35, 43 (1967)).

Appellants also argued that the "functional test" used by courts to determine whether an entity qualifies for a charitable exemption under Clause 3 requires that the substance of appellants' activities, and not appellants' organizational form, should determine their qualification for the exemption. In particular, appellants cite **H-C Health Services, Inc. v. Assessors of Hadley**, 42 Mass. App. Ct. 596 (1997), where a taxpayer organized as a business corporation under G.L. c. 156B, and not as a non-profit corporation under G.L. c. 180, was granted a Clause 3 exemption. The court ruled that:

Nowhere does the statute provide that, in order to qualify as a charitable organization, the taxpayer must be incorporated under c. 180. Further, the ATB found, as we have said, that the corporate documents, and the actual operation of the appellees, were such as to qualify the appellees as "charitable organizations." . . . Nowhere is there any intimation in [**Assessors of Boston v. Vincent Club**, 351 Mass. 10, 12 (1996)] that what matters is the chapter of the General Laws under which the taxpayer was organized . . . It is substance, not form, that counts.

**H-C Health Services**, 42 Mass. App. Ct. at 598-99. However, although Clause 3 does not require incorporation under G.L. c. 180, it does specifically require that the charitable organization be "incorporated." Accordingly, while the form of corporation may not control the issue of qualification under Clause 3, the plain terms of the statute require that the organization be incorporated.

The "functional test" cited by appellants and recognized by the Appeals Court in **H-C Health Services** and another case cited by appellants, **Brown, Rudnick, Freed & Gesmer v. Assessors of Boston**, 389 Mass. 289 (1983), is generally applied by the courts to determine whether a corporation, which claims to be a charitable organization, qualifies for the Clause 3 exemption. For example, in **Brown, Rudnick**, the court observed that:

When . . . a corporation has claimed an exemption as a charitable institution under [Clause 3], we have refused to allow form to control. Instead, we have looked to the declared purpose of and the actual work performed by the corporation to determine whether it was in fact operated for charitable purposes.

*Id.* at 303. While it is true that courts will look to the work a corporation actually performs in determining whether it is in fact a "charitable organization" for purposes of Clause 3, that does not mean that the organization's work is the only relevant criteria. If it were, real estate owned and occupied by partnerships or individuals for charitable purposes would be exempt from local taxation, a result clearly not contemplated by the statute. Rather, the Legislature has determined that only real estate owned by "incorporated" organizations or trusts are eligible for the Clause 3 exemption. Because appellants cannot show "clearly and unequivocally that [they] come[] within the terms of the exemption," the Board ruled that LLCs do not qualify for the Clause 3 exemption. *Id.* at 303-304, (quoting **Boston Symphony Orchestra, Inc. v. Assessors of Boston**, 294 Mass. 248, 257 (1936)).

The remaining arguments raised by appellants require little discussion. Appellants argue that **RCN** is distinguishable because the result depended on the fact that LLCs do not meet the Clause 16 requirement of "a corporation subject to taxation under chapter sixty-three," a requirement that is absent from Clause 3. However,

although taxability under G.L. c. 63 was a basis for the Court's ruling in **RCN** ("RCN, as a limited liability company, is not a corporation subject to taxation under G.L. c. 63. Therefore, the exemption provided by [Clause 16], does not apply"), it was not the only basis; the court also focused on the plain language of Clause 16 to rule that LLCs were not entitled to the exemption. ("The board determined, and we agree, that [Clause 16] is not ambiguous. By its plain language, it applies to corporations, not limited liability companies."). **RCN**, 443 Mass. at 206-207. Accordingly, the absence of the G.L. c. 63 taxability requirement in Clause 3 does not save the appellant from the **RCN** court's ruling that an LLC cannot qualify for exemption that applies to corporations.

Moreover, even assuming that **RCN** is distinguishable, appellants are still confronted with the plain words of Clause 3 requiring a charitable organization to be "incorporated" and the principle of strict construction of exemption statutes. **Children's Hospital**, 353 Mass. at 43. Accordingly, although **RCN** supports the denial of exemption in these appeals, it is the unambiguous language of Clause 3 that compels the conclusion that LLCs do not qualify for a charitable exemption.

Appellants' also argued that because LLCs were not introduced into Massachusetts law until 1995, some ten years after the last amendment to Clause 3, the Legislature did not intend to exclude LLCs from the exemption. The issue is not, however, what the Legislature intended to exclude but what it intended to include. For example, partnerships, which share some of the flow-through attributes and other similarity with LLCs, have been recognized in Massachusetts since at least 1922, and they are clearly not within the reach of the exemption. The Legislature has determined that not every organization or entity, but only corporations and trusts, qualify for the charitable exemption. It is not the role of the Board to extend the reach of the exemption to include other entities. If the Legislature determines that LLCs are sufficiently similar to corporations to warrant exemption under Clause 3, it is free to amend the statute.

Finally, appellants' argument that, although the LLCs own the property at issue, they really held the property in trust for their sole member, is unavailing. There is no indication that a trust relationship was intended. Rather, appellants chose this form of ownership for whatever benefits they thought they could achieve; they must,

however, live with the burdens of that ownership. See e.g., **RCN**, 443 Mass. at 207.

On the basis of the foregoing, the Board ruled that LLCs do not qualify for the charitable exemption under Clause 3.

Accordingly, the Board issued decisions for the appellees in these appeals.

**THE APPELLATE TAX BOARD**

By: \_\_\_\_\_  
Thomas W. Hammond, Jr., Chairman

A true copy,

Attest: \_\_\_\_\_  
Assistant Clerk of the Board

**COMMONWEALTH OF MASSACHUSETTS**

**APPELLATE TAX BOARD**

**DANDY REALTY, LLC**

**v. BOARD OF ASSESSORS OF  
THE TOWN OF CUMMINGTON**

Docket Nos. F279049 & F279050

Promulgated:  
November 22, 2006

**ATB 2007-853**

These are appeals under the formal procedure, pursuant to G.L. c. 58A, § 7 and G.L. c. 61, § 3, from the refusal of the appellee to abate withdrawal penalty taxes<sup>4</sup> assessed against the appellant, under G.L. c. 61, § 7, for the ten-year period from fiscal year 1995 through and including fiscal year 2004.

Commissioner Egan heard these appeals. Former Chairman Foley, Commissioners Scharaffa, Gorton, and Rose joined her in the decisions for the appellant.

These findings of fact and report are made at the request of the appellee pursuant to G.L. c. 58A, § 13 and 831 CMR 1.32.

*Patrick J. Melnick, Esq.* for the appellant.  
*David J. Martel, Esq.* for the appellee.

**FINDINGS OF FACT AND REPORT**

In these appeals, the appellant claimed that withdrawal penalty taxes assessed by the Board of Assessors of the Town of Cummington ("assessors"), under G.L. c. 61, § 7, were improper.<sup>5</sup> In two other related appeals, which the Board dismissed for lack of jurisdiction,<sup>6</sup> the appellant

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<sup>4</sup> The Board of Assessors of the Town of Cummington incorrectly referred to these taxes as a "Rollback Penalty Tax." To avoid confusion, the decisions in these appeals also referred to the taxes as "rollback penalty taxes."

<sup>5</sup> The withdrawal penalty tax under § 7 requires payment of the difference, plus interest, between taxes actually paid on property classified as forest land and what the tax would have been in the absence of chapter 61 classification and favorable valuation. The penalty will range from a minimum of five years or the number of years the property has been classified as forest land under chapter 61, whichever period is longer, to a maximum of ten years.

<sup>6</sup> The appellant failed to timely file its applications for abatement with the assessors. Accordingly, the Board was obliged to dismiss the

claimed that, for fiscal year 2005, his two properties, consisting of 227 acres located at Cole Street and 19.20 acres<sup>7</sup> located at Trouble Street in Cummington ("subject properties"), should have been classified and more favorably assessed as forest land under c. 61.<sup>8</sup> The salient evidence and the Appellate Tax Board ("Board")'s findings of fact are as follows.

The real estate tax bills for fiscal year 2005 for the subject properties did not value and assess them as forest land under c. 61, as in previous years, but instead valued and taxed them as residential property. On March 4, 2005, the assessors also assessed withdrawal penalty taxes against the appellant under § 7 of c. 61. On March 15, 2005, the appellant timely applied for abatement of the withdrawal penalty taxes. The assessors denied the appellant's application on May 21, 2005, and on May 25, 2005, the appellant seasonably filed its appeals with this Board. On the basis of these facts, the Board found and ruled that it had jurisdiction to hear and decide the appeals relating to the withdrawal penalty taxes assessed against the appellant as a result of the assessors' purported removal of the subject properties from classification as forest land under c. 61. See G.L. c. 61, § 3 and **ADDA Realty Trust v. Assessors of the Town of Berlin**, ATB Findings of Facts and Reports 2000-621, 634 ("In reviewing the provisions of Chapter 61, the Board ruled that it has jurisdiction over withdrawal penalty tax appeals under § 3.").

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appellant's appeals on jurisdictional grounds, never reaching the merits of the appellant's claims. See **General Dynamics Corp. v. Assessors of Quincy**, 388 Mass. 24, 40 (1983) ("Failure to file a timely application for abatement is a jurisdictional bar to the granting of an application for abatement"); **New Bedford Gas & Edison Light Co. v. Assessors of Dartmouth**, 368 Mass. 745, 747-49 (1975) ("Adherence to the schedule of application . . . is an essential prerequisite to effective application for abatement of taxes and to prosecution of appeal from refusal to abate taxes."); **A P East, Inc. v. Assessors of Westborough**, 40 Mass. App. Ct. 901 (1996) (rescript) ("It is one of the more familiar principles of Massachusetts law that, the applications having been filed beyond the statutory period, the board lacked jurisdiction over the taxpayer's appeals."), *further app. rev. den.*, 422 Mass. 1108 (1996).

<sup>7</sup> There is some evidence in the record indicating that this parcel may consist of 20.20 acres. For purposes of these appeals, the exact acreage is immaterial.

<sup>8</sup> Under G.L. c. 61, § 3, land, which is classified as forest land under chapter 61, is assessed at only five percent of its fair market value or at ten dollars per acre, whichever is greater.

Since January 1989, the Oleksak family has owned both of the subject properties.<sup>9</sup> In August 1993, pursuant to c. 61, the Massachusetts Department of Environmental Management ("DEM"), acting through the state forester, approved a forest management plan for the subject properties and certified the subject properties' management under the plan from January 1, 1994 to December 31, 2003.<sup>10</sup> The then-owners of the subject property filed the certification by the state forester with the assessors in accordance with c. 61. In April 2003, the subject properties were transferred to Dandy Realty, LLC ("Dandy Realty"), the appellant in this appeal. Daniel A. Oleksak, a licensed forester, was, at all relevant times, the manager of Dandy Realty. In July 2003, DEM, acting through the state forester, approved a new forest management plan and recertified the subject properties effective January 1, 2004 to December 31, 2013. This recertification was also filed with the assessors. Accordingly, the Board found that, at all relevant times, the subject properties were continuously managed, and certified to be operating, under approved forest management plans in accordance with c. 61.

Notwithstanding this continuous certification, on or about November 25, 2003, the assessors purportedly sent a letter by certified mail, return receipt requested, to the state forester, addressed to an Amherst, Massachusetts post office box, "requesting the removal of the [subject properties] from Chapter 61 classification." Representatives of the state forester claimed that the original letter was never received, although a faxed version was placed in a file at some point. The assessors did not offer into evidence any receipts of certified mailing or delivery and did not demonstrate that they marked the face of the envelope to indicate that it contained an appeal under c. 61. On behalf of the appellant, Mr. Oleksak asserted that Dandy Realty never received a copy of such a letter and was first apprised of the purported removal of the subject properties from classification as forest land under c. 61 upon its receipt of the fiscal year 2005 tax bills. In addition, Mr. Oleksak testified that Dandy Realty never voluntarily or otherwise withdrew the subject properties from classification as forest land under c. 61.

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<sup>9</sup> The evidence indicates that the Oleksak family has owned the 227-acre Cole Street parcel since 1937.

<sup>10</sup> The evidence also indicates that at least the Cole Street property has been managed under a forest management plan and so certified since 1982.

The Board took judicial notice of 304 CMR 8.08(2), a regulation promulgated by the state forester through DEM pursuant to the authority granted under G.L. c. 61, § 2. This regulation, at all relevant times, provided:

In the case of an appeal [relating to the classification of property as forest land under G.L. c. 61] brought by the assessors, the assessors shall, on or before December 1, submit such appeal in writing to the Commissioner of the Department [of Environmental Management], mailed by certified mail to 100 Cambridge Street, Boston, MA 02202, in an envelope clearly marked on its face "APPEAL UNDER CHAPTER 61", with a copy to the affected owner, setting forth the reasons for such appeal.

On the basis of the foregoing facts, regulation, and its subsidiary findings of fact, the Board further found that the assessors failed to forward their appeal to the proper address, failed to clearly mark the front of the envelope with the information requested by regulation, and apparently failed to comply with the regulatory requirement for a certified mailing. The Board also found that the appellant did not receive a copy of the appeal letter. Representatives from the state forester testified, and the Board found, that a panel was never convened to hear the assessors' purported appeal of the subject properties' classification as forest land under c. 61 and, accordingly, a "final determination" under c. 61, § 2 was never made. As far as the state forester was concerned, the subject properties continued to be classified, at all relevant times, as forest land under c. 61. In addition, the Board found that the appellant never voluntarily or otherwise withdrew the subject properties from classification as forest land under c. 61.

On August 17, 2004, the assessors unilaterally voted to "remove" the subject properties from classification as forest land under c. 61 for fiscal year 2005. The assessors contended that the appellant had not adhered to the forest cutting plan and the subject properties must, therefore, be declassified. In their testimony before the Board, the state forester's representatives disagreed with the assessors' contention and stated that the appellant, and its predecessors in title to the subject properties, were, at all relevant times, in compliance with the approved management plans and any deviations from the plan

by the appellant, or its predecessors in title, were acceptable adaptations to the then-existing circumstances or exigencies. The state forester's representatives further stated that they have regularly inspected the subject properties and, since the subject properties' initial classification, had not at any time removed them from classification as forest land under c. 61. In addition, the state forester's representatives testified that the appellant and the subject properties were in compliance with the relevant forest management or cutting plan.

Accordingly, the Board found that, at all relevant times, the subject properties were properly classified as forest land under c. 61 and the assessors' purported removal of the subject properties from such classification was a nullity. As explained more fully in its Opinion below, the Board found that the assessors did not follow the necessary prerequisites for removal under § 2 of c. 61. The Board also found that it was the assessors who, by purportedly removing the subject properties from classification, without complying with § 2, had acted in derogation of c. 61.

On this basis, the Board found that the appellant did not voluntarily or otherwise withdraw the subject properties or any part thereof from classification as forest land under c. 61. The Board further found that there was never a "final determination" by the state forester, this Board, or any court concluding that the subject properties should be withdrawn from classification as forest land under c. 61. Accordingly, the Board found that the assessors should not have assessed the appellant a withdrawal penalty tax under c. 61, § 7, which requires, as a condition precedent to the assessment of a withdrawal penalty tax, either a voluntary withdrawal from classification as forest land under c. 61 by the owner of the classified property or a properly constituted "final determination" by the state forester, this Board, or any court that the property should be withdrawn from classification. Since neither of these alternative conditions precedent occurred in these appeals, and the assessors' action of purportedly "removing" the subject properties from classification as forest land under c. 61 was, therefore, a nullity, the Board decided these appeals for the appellant and abated the withdrawal penalty tax in full.

## OPINION

The sole issue raised by these appeals is whether a withdrawal penalty tax is appropriate under the circumstances present in these appeals. The assessors argued that the assessment of a withdrawal penalty tax was proper here because the appellant deviated from the applicable forest cutting plan thereby necessitating the subject properties' removal from classification as forest land under c. 61, which the assessors contended they accomplished for fiscal year 2005 through their unilateral action. The Board decided that, under circumstances present in these appeals, the assessment of a withdrawal penalty tax was improper.

G.L. c. 61, § 2, provides, in pertinent part, that: When in judgment of the assessors, land which is classified as forest land . . . is not being managed under a program, or is being used for purposes incompatible with forest production . . . the assessors may, on or before December first in any year file an appeal in writing mailed by certified mail to the state forester requesting . . . removal of [classified] land from such classification. Such appeal shall state the reasons for such request. A copy of the appeal shall be mailed by the assessors by certified mail to the owner of the land. The state forester may initiate . . . a proceeding to remove land from classification . . . [as well]. The state forester . . . may withdraw all or part of the land from classification . . . imposing such terms and conditions as he deems reasonable to carry out the purpose of this chapter, and shall notify the assessors and the owner of his decision no later than March first of the following year.

Section 2 further provides that the owner or the assessors may appeal from the state forester's decision to a three-member panel convened by the state forester. Petitions appealing the panel's decision may be directed to the appropriate superior court or this Board. Importantly, classified land "shall not be withdrawn from classification until the final determination of such petition," and the state forester may adopt regulations to carry out the provisions of c. 61.

In the present appeals, the Board found and ruled that the assessors failed to comply with the provisions of c. 61, § 2, or the regulation promulgated thereunder, when they purportedly removed the subject properties from classification as forest land under G.L. c. 61. The Board found, *inter alia*, that the assessors' appeal notice was defective in several respects, a three-member panel was never assembled by the state forester to act on the assessors' purported appeal, and a "final determination" was never rendered in accordance with the requirements of c. 61, § 2. In addition, the Board found that the appellant never voluntarily or otherwise withdrew the subject properties from classification as forest land under c. 61. On this basis, the Board found and ruled that the assessors' unilateral action purportedly removing the subject properties from classification as forest land under c. 61 was clearly *ultra vires* and, therefore, a nullity.

G.L. c. 61, § 7, provides, in pertinent part, that "[w]hen the owner of classified land withdraws such land or any part thereof from classification, or upon a final determination that said land should be withdrawn from classification, he shall pay to the city or town a withdrawal penalty tax." The Board found that the appellant did not voluntarily or otherwise withdraw the subject properties from certification as forest land under c. 61, and a "final determination" that the subject properties should be withdrawn from classification as forest land under c. 61 was never reached or even properly initiated. The Board ruled that a plain reading of c. 61, § 7 requires the conclusion that one of these two alternative conditions precedent must occur if a withdrawal penalty tax is to be assessed. See **Commissioner of Revenue v. Cargill, Inc.**, 429 Mass. 79, 82 (1999) ("'[W]e are constrained to follow' the plain language of a statute when its 'language is plain and unambiguous' and its application would not lead to an 'absurd result,' or contravene the Legislature's clear intent.") (quoting **White v. Boston**, 428 Mass. 250, 253 (1998)); **Commonwealth v. One 1987 Mercury Cougar Auto.**, 413 Mass. 534, 537 (1992) ("It is a well-established canon of construction that, where the statutory language is clear, the courts must impart to the language its plain and ordinary meaning."). The Board found that neither of the alternative conditions precedent occurred here. Accordingly, the Board ruled that the assessment of the withdrawal penalty taxes in these appeals was not appropriate and should, therefore, be abated.

For these reasons, the Board decided these appeals for the appellant and abated the withdrawal penalty taxes in full.

**APPELLATE TAX BOARD**

By: \_\_\_\_\_  
Thomas W. Hammond, Jr., Chairman

A true copy,

Attest: \_\_\_\_\_  
Assistant Clerk of the Board

**COMMONWEALTH OF MASSACHUSETTS**

**APPELLATE TAX BOARD**

**DURACELL, INC.**

**v.**

**COMMISSIONER OF REVENUE**

Docket No. C266416

Promulgated:

August 28, 2007

**ATB 2007-903**

This is an appeal under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 62C, § 39, from the refusal of the Commissioner of Revenue ("Commissioner" or "appellee") to abate sales and use tax for the quarterly taxable periods ended June 30, 1996 through December 31, 1998 ("periods at issue").

Chairman Hammond heard the appeal and was joined in the decision for the appellant by Commissioners Scharaffa, Egan, and Rose.

These findings of fact and report are made at the request of the appellant Duracell, Inc. ("Duracell" or "appellant") pursuant to G.L. c. 58A, § 13 and 831 CMR 1.32.

*John S. Brown, Esq. and Donald-Bruce Abrams, Esq.* for the appellant.

*Timothy R. Stille, Esq. and Frances Donovan, Esq.* for the appellee.

**FINDINGS OF FACT AND REPORT**

On the basis of an agreed statement of facts as well as testimony and exhibits entered into evidence at the hearing of this appeal, the Appellate Tax Board ("Board") made the following findings of fact.

During the periods at issue, Duracell was a Delaware corporation engaged in the development, manufacturing, marketing and sale of batteries in the United States and abroad. Substantially all of Duracell's receipts were derived from the sale of batteries that it manufactured. Duracell had manufacturing factories located in Georgia, North Carolina, South Carolina and Tennessee. Additionally, Duracell had a facility in Needham, Massachusetts ("Needham facility"). The principal activity taking place at the Needham facility was the research and

development of new and improved batteries and battery manufacturing technologies ("battery R&D"). Duracell had no other facilities in Massachusetts during the periods at issue.

The Needham facility consisted of two buildings, which together encompassed approximately 132,000 square feet. During the periods at issue, approximately 260 people were employed at the Needham facility, including chemical and electrical engineers, lab technicians, assembly workers, and a small administrative staff.

Ms. Leslie Pinnell, Duracell's Director of the Portable Power Research Group and Site Leader for the Needham facility, described the battery R&D process at the Needham facility in her testimony, which the Board found credible. Ms. Pinnell stated that a battery is an electrochemical system consisting of two materials paired against each other to create a voltage. Each battery consists of an anode and a cathode, along with other components, bathed in a chemical solution and housed in a nickel-plated stainless steel can. The actual chemical components of a battery vary depending on the type. For example, an alkaline battery contains a zinc anode and a manganese dioxide cathode, while a lithium battery contains a lithium anode and a manganese dioxide cathode.

Ms. Pinnell testified that battery R&D at the Needham facility focused on the development, improvement and enhancement of battery products to suit the needs of new devices and technologies in which batteries are used by consumers. A focus in recent years, for example, has been on the removal of environmentally harmful materials from the battery. The improvements and changes to battery design flowing from the battery R&D resulted in significant changes in Duracell's products. Major, newsworthy changes in the materials or design of Duracell's various battery products occurred about every year or two, while more minor changes and improvements occurred on a continuous basis. Part of the battery R&D conducted at the Needham facility involved the extensive testing of newly developed products, including intense repeated use of the batteries in a device, setting the batteries on fire, driving nails through them, and other types of abuse designed to test the real-world tolerance of the products. Additionally, research and development activity at the Needham facility was conducted to improve processes used in the manufacture of the batteries.

The battery R&D conducted at the Needham facility generally started with an idea that had been generated internally or suggested by external product manufacturers

with a particular need. From the idea phase, component materials of a proposed battery would be tested individually, and then placed into a unit to be tested. The next stage of development was the prototype stage, where approximately ten to twenty of the new batteries would be manufactured so that they could be tested for performance standards. Following the prototype stage, the production would be scaled up such that several hundred batteries would be produced, and five or six experimental groups and a control group would have an opportunity to explore the optimum design and build of the product. Finally, a run of thousands of the proposed new product would be created, to ensure that they could be readily manufactured in bulk in a manner compatible with Duracell's high-speed manufacturing process.

To that end, Ms. Pinnell testified that the Needham facility had each piece of equipment that any of Duracell's manufacturing plants would have, in order to simulate each step of the manufacturing process. Ms. Pinnell estimated that during the periods at issue, the Needham facility produced about 300,000 cells.<sup>11</sup> Some of the batteries produced at the Needham facility were sent to Duracell's other manufacturing facilities, while others were sent to equipment manufacturers for testing and evaluation of the batteries in their products. The thousands of batteries produced at the Needham facility were virtually indistinguishable from the final products that could be purchased in a store, with the exception that at times they did not bear a label. However, none of the batteries produced at the Needham facility was sold commercially.

While battery R&D was the principal activity taking place at the Needham facility, Duracell did not sell any of its research and development services to unrelated third-parties, nor did it receive any direct receipts from unrelated third-parties for activities taking place at the Needham facility. Rather, more than two-thirds of the income recorded in the financial records that Duracell maintained for the Needham facility was derived from the charge-out of battery R&D services to affiliated entities. Those records also showed that virtually all of the expenses associated with the Needham facility were research and development expenses.

Duracell filed sales and use tax returns for each of the quarterly periods at issue. Consents extending the time for assessment of taxes for the periods at issue were

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<sup>11</sup> "Cell" is a technical term. Ms. Pinnell explained that a battery is actually two cells put together.

executed by the Commissioner and Duracell. The Commissioner issued a Notice of Intention to Assess dated November 6, 2000, proposing additional assessments for the periods at issue. The Commissioner issued a revised Notice of Intention to Assess, also dated November 6, 2000, also proposing additional assessments for the periods at issue. By Notice of Assessment dated September 19, 2001, the Commissioner gave Duracell notice of his assessment of \$730,942 in sales and use tax for the periods at issue, along with interest and penalties. On November 8, 2001, Duracell applied for an abatement on form CA-6. By Notice of Determination dated September 26, 2002, the Commissioner denied Duracell's abatement request. On October 22, 2002, Duracell filed its Petition with the Board. On the basis of these facts, the Board found and ruled that it had jurisdiction to hear this appeal.

The tax in dispute in this appeal arises from the appellee's determination that the purchases of certain materials and machinery used in battery R&D at the Needham facility were subject to sales tax because they did not qualify for exemption under G.L. c. 64(H), §§ 6(r) or 6(s) ("§ 6(r) and § 6(s)"). The issue presented in this appeal is whether the appellant qualified as either a research and development corporation or a manufacturing corporation for the periods at issue, under G.L. c. 63, § 42B ("§ 42B") such that the exemptions under § 6(r) and § 6(s) applied to its purchases. Although the appellant also raised a constitutional issue, the Board found and ruled for the reasons discussed in the following Opinion, that the appellant qualified as both a research and development corporation and a manufacturing corporation under § 42B, and, therefore, did not reach the constitutional issue.

Accordingly, the Board issued a decision for the appellant in this appeal, granting an abatement of \$730,942 in tax together with penalties and interest.

#### **OPINION**

Section 42B sets forth the criteria for qualification as a foreign manufacturing or research and development corporation, and is the counterpart for foreign corporations to G.L. c. 63, § 38C, which provides the criteria for qualification as a domestic manufacturing or research and development corporation. Qualification under either statute affords corporations certain tax benefits, including eligibility for the sales and use tax exemptions under § 6(r) and § 6(s) at issue in this appeal. Section

6(r) exempts from the sales and use tax "sales of materials, tools and fuel, or any substitute therefor...used directly and exclusively in... research and development by a manufacturing corporation or a research and development corporation within the meaning of [§ 38C or § 42B]." Section 6(s) similarly exempts from the sales and use tax "sales of machinery, or replacement parts thereof, used directly and exclusively in... research and development by a manufacturing corporation or a research and development corporation within the meaning of [§ 38C or § 42B]." Because the parties agree that the purchases at issue were used directly and exclusively in research and development, the only issue is whether Duracell qualified as a research and development corporation or a manufacturing corporation under § 42B.

**I. Duracell Qualified as a Research and Development Corporation Under § 42B**

As in effect during the periods at issue § 42B defined a research and development corporation as:

"one whose principal activity herein is research and development and which derives more than two-thirds of its receipts assignable to the commonwealth from such activity and derives more than one third of its receipts assignable to the commonwealth from research and development of tangible personal property capable of being manufactured in this commonwealth."

It was stipulated by the parties that Duracell's principal activity in Massachusetts during the periods at issue was battery R&D, and this stipulation was supported by the evidence of record. The Board therefore found and ruled that Duracell satisfied that requirement of the statute. The parties also stipulated that all of the products that Duracell manufactured as a result of its battery R&D at the Needham facility were capable of being manufactured in Massachusetts, and this stipulation was also supported by the evidence of record. The Board therefore found and ruled that if Duracell had receipts assignable to the commonwealth, then more than one-third of them derived from tangible personal property capable of being manufactured in Massachusetts. Accordingly, the only issues remaining are whether Duracell had receipts for the purposes of the

statute, and if so, whether more than two-thirds of those receipts assignable to the commonwealth were from research and development activity.

The appellee argued that because the Needham facility did not engage in the commercial sale of batteries and did not sell battery R&D services to any unrelated party, it had no receipts for the purposes of the statute. The appellee further argued that because essentially all of Duracell's receipts in general derive from the sale of batteries, Duracell could not possibly meet the two-thirds test imposed by the statute. Duracell, on the other hand, argued that because its only activity in Massachusetts was battery R&D, by necessity all of its receipts assignable to Massachusetts derived from research and development.

As an initial matter, it is worth noting that the parties stipulated that significantly more than two-thirds of the income recorded on the books of the Needham facility as a division of Duracell stemmed from the charge-out of research and development services to affiliated entities. The appellee therefore conceded that the Needham facility had income, and that more than two-thirds of it derived from its battery R&D activities. However, the Board still had to rule on whether the income included on the books and records constituted "receipts" for the purposes of the statute.

The determination of this issue turns on the definition of the term "receipts" for the purposes of § 42B, which is not defined in the statute or by regulation. Because the statute itself did not define the term, the Board must consider "the natural import of words according to the ordinary and approved usage of the language when applied to the subject matter of the act," as reflective of the Legislature's intent. ***Boston & Me. R.R. v. Billerica***, 262 Mass. 439, 444 (1928). See also, G.L. c. 4, § 6, cl. 3.

According to Webster's Dictionary of the English language, "receipts" are "something received, e.g. goods, money." WEBSTER'S DICTIONARY OF THE ENGLISH LANGUAGE 832 (1989). Black's Law Dictionary defines receipts as "something received; INCOME." BLACK'S LAW DICTIONARY 1296 (8<sup>th</sup> Ed. 2004) (capitals in original). Taken together, these definitions of the term "receipts" reveal that, in ordinary usage, the term is quite broad and could be used interchangeably with the term income. Interestingly, however, the Legislature chose not to use the term "income," which is defined for various tax purposes and arguably more narrow than the term "receipts," see e.g. ***Commonwealth v. General Electric Company***, 412 Pa. 123, 131 (1963), citing MERTENS, LAW OF FEDERAL INCOME TAXATION, Vol. 1, § 5.10 (1942) ("'Gross receipts' and 'gross income' are not synonymous, the former being broader.")

The Board found no support in the record for the Commissioner's position that receipts must be derived from an unrelated party, nor any reason to graft such a requirement into the plain language of the statute. Moreover, a broad construction of the term is consistent with the legislative intent of the statute and the construction of the language of the statute as established by case law. The legislative intent of § 42B was to promote investment in certain commercial activities in Massachusetts, including research and development activity, in order to foster employment and other economic opportunities for the commonwealth's citizens. The Supreme Judicial Court has recognized in numerous cases addressing the language of both § 38C and § 42B that "the words 'engaged in manufacturing' are not to be given a narrow or restrictive meaning' and that 'the statute should be construed, if reasonably possible, to effectuate the legislative intent [of fostering industrial expansion].'" **Houghton Mifflin v. Commissioner of Revenue**, 423 Mass. 42, 47, (1996) (transformation of art, ideas, information and photographs into computer disks was manufacturing), quoting **Joseph T. Rossi Corp. v. State Tax Comm'n**, 369 Mass. 178, 181 (1975) (sawmill operation which debarked and cut timber into lumber was manufacturing); **Assessors of Boston v. Commissioner of Corps. & Taxation**, 323 Mass. 730, 741 (1949) (scouring of wool was an essential and integral part of the manufacturing of textiles). See also **William F. Sullivan & Co., Inc. v. Commissioner of Revenue**, 413 Mass. 576, 581 (1992) (scrap metal processing was manufacturing). While most of those cases have addressed specifically the terms "engaged in manufacturing," the term "receipts" from research and development is encompassed in the same statute, and therefore the legislative intent is identical and demands a broad construction of the language. Taking into consideration the legislative intent of the statute in light of the facts of the instant case, the Board found and ruled that the activities at the Needham facility were exactly the type of activities that the Legislature intended to favor with the relevant exemptions. The evidence of record showed that some 260 employees were working at the Needham facility, which occupied over 132,000 square feet of space. Rather than a phantom or insignificant presence, Duracell's operations at the Needham facility were significant and provided meaningful employment opportunities for the residents of the commonwealth.

There is no merit to the distinction raised by the appellee that the Needham facility derived its income from charge-outs to affiliates for battery R&D services, while Duracell in general derived receipts from the commercial sale of batteries. The plain language of the statute focuses solely on the activities within Massachusetts and receipts assignable thereto. The parties stipulated that almost all of the expenses recorded on the books of the

Needham facility related to its battery R&D operations. For the Needham facility to continue to operate, it must have had income or receipts. As research and development was its principal activity, it follows that those receipts were from research and development activity. Since the principal activity of the Needham facility was battery R&D, and since that location was Duracell's only location in Massachusetts, the Board found and ruled that more than two-thirds of its receipts assignable to the commonwealth were derived from research and development activities in the commonwealth. Accordingly, the Board found and ruled that Duracell qualified as a research and development corporation under § 42B.

## **II. Duracell Qualified as a Manufacturing Corporation Under § 42B**

While § 42B provides an explicit definition of a research and development corporation, it provides no definition for a manufacturing corporation. Rather, that definition has been developed by decades of case law. The Supreme Judicial Court has defined manufacturing as "change wrought through the application of forces directed by the human mind, which results in the transformation of some preexisting substance or element into something different, with a new name, nature or use." **First Data Corp. v. State Tax Commission**, 371 Mass. 444, 447 (1976), quoting **Boston & Me. R.R. v. Billerica**, 262 Mass. 439, 444-45 (1928). The Commissioner's regulation adopts a similar definition, providing that "manufacturing is the process of substantially transforming raw or finished materials by hand or machinery, and through human skill and knowledge, into a product possessing a new name, nature and adapted to a new use." 830 CMR 58.2.1(6)(b). Manufacturing need not lead to the creation of a finished product, but "ordinarily involves the production of products in standardized sizes and qualities and multiple quantities." 830 CMR 58.2.1(6)(a)(5). The definition of manufacturing has also been developed through negative implication, that is, through the articulation of activities that do not constitute manufacturing. **Electronics Corporation of America v. Commissioner of Revenue**, Mass. ATB Findings of Fact and Reports 1995-202 (design and creation of prototypes is not manufacturing); **York Steak House Sys., Inc. v. Commissioner of Revenue** 393 Mass. 424, 424-425 (1984) (conversion of frozen steak into cooked steak is not manufacturing).

Applying those legal precedents to the facts of the instant case, it is clear that the activities performed at

the Needham facility constituted manufacturing. There can be no doubt that the placement of the various raw elements, including zinc, lithium, and alkaline, along with chemical solutions and other components, into specialized stainless steel containers so as to create a functioning battery unit amounts to "the transformation of some preexisting substance or element into something different, with a new name, nature or use." **First Data Corp.** at 447. Moreover, the scale of production at the Needham facility was consistent with manufacturing activity. According to Ms. Pinnell, the battery R&D process began with an idea or proposal for a new product, and was followed by "component materials of a proposed battery" being tested individually, and then "placed into a cell to be tested." That stage of the process was then followed by what Ms. Pinnell described as "the prototype stage," where approximately ten to twenty of the batteries would be constructed and tested for performance. After the prototype stage, hundreds of batteries were produced so that they could be tested for quality and performance by numerous groups, and finally, a run of thousands of the batteries would be generated to ensure that they could be readily produced in bulk at one of Duracell's out-of-state factories. At this point, the batteries were virtually identical to the products that could be purchased in a retail store. Ms. Pinnell estimated that the Needham facility generated approximately 100,000 cells annually.

While the appellee argued that the activities at the Needham facility were confined only to the production of prototypes, the evidence of record contradicted this assertion. A prototype is "a working model of the requisite specifications. It is not produced, and does not constitute a tangible part of what is produced, for the ultimate consumer." **Electronics Corp. of America** at 212. The record reflects that Duracell often sent the items produced at the Needham facility to equipment manufacturers for trial use in their products. Further, by generating hundreds of thousands of batteries virtually identical to the finished product found in stores, production at the Needham facility transcended the prototype stage. The Board found and ruled that there was a clear distinction between the prototype stage and the subsequent production of thousands of batteries, the latter falling in line with the "production of products... in multiple quantities" referred to in the Commissioner's own manufacturing regulation. See 830 CMR 58.2.1(6)(b)(5).

The appellee similarly argued that because Duracell operated no factories in Massachusetts during the periods at issue and because its principal activity in Massachusetts was battery R&D, it could not possibly have been a corporation engaged in manufacturing in Massachusetts. Those arguments not only ignore the appellee's own regulation, but misconstrue the applicable case law. 830 CMR 58.2.1(6)(b)(1) states "It is not required that manufacturing take place in an industrial plant, factory, or mill." The evidence of record reflects that the Needham facility had each piece of equipment that any of Duracell's manufacturing plants would have, in order to simulate each step of the manufacture process. The Needham facility was therefore equipped to and did in fact engage in manufacturing activity. Furthermore, that the items produced at the Needham facility were by and large used for Duracell's internal purposes rather than commercial sale is irrelevant. It has long been established that "one can manufacture goods for his own consumption as well as for sale." **Boston & Me. R.R.** at 448.

Moreover, research and development activities and manufacturing activities are not mutually exclusive, as the appellee seems to have suggested. While the Board has recognized that § 42B itself distinguishes between manufacturing and research and development corporations, the plain language of the statute makes that distinction with respect only to exemption from local taxation. As the Board noted in **Electronics Corp. of America**:

"Section 42B, itself, distinguishes between manufacturing and research and development corporations. The statute provides, in pertinent part that 'nothing in this section shall be construed to provide an exemption from local taxation of the machinery of corporation deemed to be a foreign research and development corporation which is not deemed to be a foreign manufacturing corporation.'"

**Id.** at 212-13. That same statutory language, while seemingly enunciating a distinction, simultaneously recognizes that it is possible for one corporation to be *both* a research and development corporation and manufacturing corporation. Though the Board ultimately held in **Electronics Corp. of America** that the taxpayer's creation of prototypes was "more in the nature of research and development," than manufacturing, the Board was careful to limit its conclusions only to "the facts in this appeal." **Id.** at 212. In the instant case, the Board found and ruled that in the course of its battery R&D, the activities at the Needham facility transcended the creation of mere prototypes

and amounted to the manufacture of tangible personal property for the purposes of § 42B.

Lastly, to qualify as a manufacturing corporation, a taxpayer must demonstrate that its activities are not only of the appropriate nature, but of a certain degree. The Supreme Judicial Court has said that the "Legislature did not intend to confer a windfall tax exemption on nonmanufacturing corporations that engage in manufacturing 'which is merely trivial or incidental to its principle business.'" *Assessors of Boston* at 631. Accordingly, the manufacturing component of the business must be substantial. See *Fernandes Supermarkets, Inc. v. State Tax Commission*, 371 Mass. 318, 322 (1976), citing *Assessors of Boston* at 746. The Commissioner's manufacturing regulation provides four mathematical tests for quantifying what is "substantial" manufacturing; however, a corporation can still show "through other relevant criteria" that its manufacturing is substantial even if it does not satisfy any of those tests. 830 CMR 58.2.1(6)(a)(2). The parties have stipulated that, taking into consideration its activities both within and without Massachusetts, Duracell engaged in substantial manufacturing and satisfied at least three of those mathematical tests. Moreover, the evidence of record establishes that the manufacturing activities of the Needham facility were in no way "merely trivial or incidental" to Duracell's business. Rather, the fruits of the battery R&D from Needham facility were incorporated into Duracell's entire product line on a continuous basis, such that almost every component of Duracell's batteries changed materially over time. Furthermore, the Needham facility engaged in exactly the same type of battery production, using the exact same equipment, that Duracell used in its out-of-state manufacturing plants, to create hundreds of thousands of batteries virtually identical to those available commercially. Duracell was clearly not a "nonmanufacturing corporation" whose manufacturing activities were "merely trivial or incidental to its principal business purpose," and that fact remains true even when the inquiry is narrowed to the Needham facility. The Board therefore found and ruled that Duracell was engaged in substantial manufacturing and qualified as a manufacturing corporation under § 42B.

### **III. The Activities Conducted at the Needham Facility were an Essential and Integral Part of Duracell's Overall Manufacturing Operations**

Over the many decades that the Supreme Judicial Court has addressed the question of what it means to be "engaged in manufacturing," the court has consistently recognized that, in order to effectuate the legislative intent of fostering the expansion of industry in Massachusetts, the phrase "should not be given a narrow or restrictive meaning." *William F. Sullivan & Co., Inc. v. Commissioner*

*of Revenue*, 413 Mass. 576, 579 (1992), citing **Joseph T. Rossi Corp.** at 181. The court has therefore held that "processes which themselves do not produce a finished product... should still be deemed 'manufacturing'... so long as they constitute an essential and integral part of a total manufacturing process." *Id.* at 579-80, citing **Assessors of Boston** at 741 and **Joseph T. Rossi Corp.** at 181-82. Therefore, even if the activities of the Needham facility alone did not constitute manufacturing, the appellant could still qualify for the exemptions if it engaged in activity at the Needham facility which constituted an essential and integral part of the manufacturing process.

Determinations as to what constitutes an essential and integral part of the manufacturing process must be made on a case-by-case basis. *Id.* at 581. "To constitute an essential and integral part of the total manufacturing process and to qualify for the exemption, the process under study must effect [a] kind of change and [cause a certain] degree of refinement to the source material." *Id.* While the quarrying and crushing of rock into smaller components did not transform the materials into a substantially different product and was therefore not an essential and integral part of the manufacturing process, the scouring of raw waste wool into wool ready to be spun into thread, cloth or rugs constituted enough of a refinement of the raw materials to be an essential and integral part of the manufacturing process. **Tilcon-Warren Quarries, Inc. v. Commissioner of Revenue**, 392 Mass. 670, 673 (1984); **Assessors of Boston** at 748. Further, the court has held that the testing of products can be an essential and integral part of the manufacturing process in and of itself, so long as it is a necessary part of bringing the products to market. **Associated Testing Laboratories, Inc. v. Commissioner of Revenue**, 429 Mass. 628, 630 (1999). This is true regardless of whether the testing occurs in the same location as or is performed by the same entity performing the rest of the manufacturing. *Id.* at 631. In arriving at these conclusions, the court has looked at the "multiplicity of the processes" involved in manufacturing the products at issue and whether the process in question has effected sufficient refinement to the raw materials. **William F. Sullivan & Co.** at 580, citing **Assessors of Boston** at 736-37. In **William F. Sullivan & Co.**, the taxpayer received some 50,000 tons of scrap metal annually, often in the form of appliances, plumbing fixtures, auto parts, pipes and boilers. *Id.* at 577. The metal was then separated by type, either by hand or electromagnetic force, dismantled and cut into various sizes, cubed, and cut into pieces to be sold. *Id.* at 577-78. The court found that the process in question produced a sufficient degree of change and refinement to the raw materials at issue. *Id.* at 581.

In addition, the Commissioner's manufacturing regulation states, in pertinent part, that a process which

is a "practical and necessary step in the production of a finished article for sale," should be considered an essential and integral part of the manufacturing process. 830 CMR 58.2.1(6)(b)(7). Applying this body of authority to the facts of the instant case, the Board found and ruled that the activities conducted at the Needham facility constituted an essential and integral part of Duracell's overall manufacturing activities.

The Board found that placement of the various raw elements, including zinc, lithium, and alkaline, along with chemical solutions and other components, into specialized stainless steel containers so as to create a functioning battery unit, worked a substantial degree of refinement to the raw materials involved in the ultimate battery products. As the parties stipulated and as Ms. Pinnell testified, the fruits of the battery R&D conducted at the Needham facility were ultimately incorporated into Duracell's entire product line. The improvements and changes to battery design flowing from the battery R&D resulted in significant changes in Duracell's products. Major, newsworthy changes in the materials or design of Duracell's various battery products occurred about every year or two, while more minor changes and improvements occurred on a continuous basis. Further, the battery R&D conducted at the Needham facility altered and enhanced the actual manufacturing process undertaken by Duracell at its other locations. In addition, the record shows that extensive testing was performed on all new products developed at the Needham facility to ensure their suitability for consumer use. Given the extensive nature of the testing, the substantial refinements to the raw materials and the direct and continuous impact on Duracell's entire product line and the way in which it manufactured its products, the Board found that the activities of the Needham facility were essential and integral to Duracell's overall manufacturing activities.

Accordingly, the Board found and ruled that Duracell qualified as a manufacturing corporation under § 42B.

#### **IV. The Constitutionality of § 38C and §42B Need Not Be Addressed**

The appellant raised one additional issue: whether § 38C and § 42B unconstitutionally discriminate against interstate commerce by treating foreign corporations more restrictively than domestic corporations. However, "it is fundamental that issues of statutory interpretation should be resolved prior to reaching any constitutional issue," and a court should "not decide constitutional questions unless they must necessarily be reached." See **1010 Memorial Drive Tenants Corporation v. Fire Chief of Cambridge**, 424 Mass. 661, 663 (1997), citing **Commonwealth v.**

**Paasche**, 391 Mass. 18, 21 (1984). Although it is well-established that the Board has jurisdiction to address constitutional issues, (See **Robert Mullins v. Commissioner of Revenue**, Mass. ATB Findings of Fact and Reports 1997-973, citing **New York Times Co. v. Commissioner of Revenue**, 427 Mass. 399 (1997); **Commissioner of Revenue v. Barnett G. Lonstein**, 406 Mass. 92 (1989)), the appellant is entitled to an abatement based on the Board's interpretation of the applicable statute. Therefore, the Board made no findings of fact or rulings of law as to the constitutionality of § 38C and §42B.

**V. Conclusion**

For the reasons discussed in the above Opinion, the Board found and ruled that the appellant qualified as a research and development corporation and a manufacturing corporation for the purposes of §42B, and that its purchases were exempt under G.L. c. 64H, § (6)(r) and § (6)(s). The appellee's assessment of sales and use tax on those purchases was therefore improper. Accordingly, the Board issued a decision in favor of the appellant, and granted an abatement in the amount of \$730,942 in tax together with penalties and interest.

**THE APPELLATE TAX BOARD**

By: \_\_\_\_\_  
**Thomas W. Hammond, Jr., Chairman**

A true copy,

Attest: \_\_\_\_\_  
**Assistant Clerk of the Board**

**COMMONWEALTH OF MASSACHUSETTS**

**APPELLATE TAX BOARD**

**HOLYOKE HOSPITAL, INC. v. BOARD OF ASSESSORS OF THE CITY OF CHICOPEE**

Docket No. F277574

Promulgated:  
February 1, 2007

**ATB 2007-59**

This is an appeal under the formal procedure pursuant to G.L. c. 59, §§ 64 and 65, from the refusal of the appellee to abate taxes on certain real estate in the City of Chicopee assessed under G.L. c. 59, §38 for the fiscal year 2005.

Commissioner Gorton heard the appeal and was joined in the decision for the appellee by former Chairman Foley and Commissioners Scharaffa, Egan, and Rose.

These findings of fact and report are made pursuant to a request by the appellant under G.L. c. 58A, § 13 and 831 CMR 1.32.

*Richard T. O'Connor, Esq., for the appellant.*  
*Laura McCarthy, Assessor, for the appellee.*

**FINDINGS OF FACT AND REPORT**

On July 1, 2004, appellant Holyoke Hospital, Inc. ("Hospital" or "appellant") owned a two-acre parcel of real estate in the City of Chicopee situated at 260-262 New Ludlow Road. The site was improved with a medical office building, styled the "Chicopee Medical Center." According to information supplied to the City of Chicopee, the Hospital leased two spaces in the Chicopee Medical Center to Western Massachusetts Physician Associates, Inc. ("Associates"), a group medical practice organized as a non-profit corporation under G.L. c. 180. The larger space leased to Associates, which is 4000 square feet, is used for "non-profit healthcare services," and is situated at 262 New Ludlow Road. The smaller space, which is 857 square feet, is used for administrative purposes, and is situated at 260 New Ludlow Road.

For fiscal year 2005, the Board of Assessors of the City of Chicopee ("appellee") valued the space leased to Associates at the Chicopee Medical Center at \$812,400, and assessed a tax thereon at the rate of \$32.49 per \$1000. The

tax assessment totaled \$26,394.88. The taxes were timely paid.

On December 28, 2004, the appellant timely filed an application for abatement. The appellant asserted that "[t]he property is owned by a Massachusetts non-profit corporation, and is used solely for the provision of medical services by the owner or by its non-profit affiliate, Western Massachusetts Physician Associates. This property should be tax exempt." The appellee denied abatement on January 18, 2005, and written notice was furnished to the appellant on January 21, 2005. The instant appeal followed with the filing of the Petition Under Formal Procedure on April 13, 2005. The foregoing facts establish the Appellate Tax Board ("Board")'s jurisdiction over this appeal.

Appellant's case at trial consisted of the (unreported) testimony of Dr. Phillip Eisengart, a Group Practice Administrator for the appellant. Offered into evidence were the Articles of Organization of Associates, and a determination letter from the Internal Revenue Service recognizing Associates' status as a tax-exempt entity under IRC 501(c)(3). Laura McCarthy testified for the appellee.

The purposes of the corporation Associates, as set forth in the Articles, are as follows:

This Corporation is organized and shall be operated as a non-profit medical group practice exclusively for the benefit of Holyoke Hospital, Inc. (the "Hospital") and MassWest Services, Inc. ("MassWEST"), and in furtherance thereof the Corporation shall:

- A. treat Medicare and Medicaid patients and all other patients without regard for their ability to pay for such treatment;
- B. provide medical services to patients at the Hospital and in the Hospital's service area and cooperate with the Hospital and MassWEST to meet the medical needs of patients located within the Hospital's service area;
- C. participate in the Hospital's educational programs for its staff and the community served by the Hospital; and
- D. otherwise carry out the Hospital's and MassWEST's charitable purposes.

Moreover, the Articles contained the following provision:

No part of the income, net profits or net earnings of the corporation shall inure to the benefit of, or be distributable to, its members, directors, officers, or other persons...; provided that the Corporation shall be authorized and empowered to pay reasonable compensation for services rendered to it and to make payments and distributions in furtherance of its corporate purposes.

Despite Associate's express purpose of benefiting the Hospital and MassWEST Medical Services, Inc. and advancing the "charitable purposes" of these entities, appellant supplied no information at trial to substantiate these assertedly charitable activities. The incorporation by reference of the unexplained "charitable" purposes of other non-profit corporations in the Associates' Articles of Organization left the Board with insufficient information to make findings about the ultimate purposes of Associates.

Testimony indicated that the space at Chicopee Medical Center leased to Associates was used in part by the medical group practice to provide medical laboratory services, including services to patients of the Hospital on referral by physicians at the Hospital. Associates generally charged a fee for its services. Scant information was given about the operations of Associates during the year at issue. Appellant did not identify its officers and directors, nor the physicians employed on its staff. No details about compensation of physicians in the practice group were provided. Nor was there appreciable evidence about the patients served by Associates. The appellant's witness could not testify to the extent to which Associates provided services to Medicaid patients or patients without the ability to pay, in keeping with the purposes declared in the Articles. There was no evidentiary basis for a finding that Associates provided the benefits of promoting health to a large and indefinite class of the public.

Ms. McCarthy, testifying as an Assessor, said that the offices of Associates were not conveniently accessible to public transportation, limiting the number of patients able to utilize its services. She also indicated that Associates conducted no outreach nor made any other efforts to apprise the community that it provided services without regard to ability to pay. In her observation, Associates operated on a fee-for-service basis as a group medical practice.

Based on the foregoing evidence, the Board was unable to draw inferences or reach the necessary conclusions to

find that Associates was organized or operated for charitable purposes. While the Articles contain a provision prohibiting private inurement from the income of Associates, no information was supplied as to whether physicians providing services through Associates served on its board or otherwise exerted control over its finances during the year at issue. Appellant failed to prove that payment of salaries was not a device for distributing profits to insiders, or did not benefit primarily the physicians themselves. The Board further ruled that the 501(c)(3) determination letter from the Internal Revenue Service, without more, did not establish that Associates fits the criteria for exemption provided in G.L. c. 59, § 5, Third. There was no basis for any finding that Associates served a sufficiently large and indefinite class of beneficiaries to qualify it as a charitable organization. Adequate evidence supporting a decision that Associates qualified for a property tax exemption was altogether absent on the record before the Board.

Because appellant failed to carry its burden of proof to establish that it was entitled to an exemption under G.L. c. 59, § 5, Third, the Board decided the instant appeal in favor of the appellee.

#### OPINION

The sole question presented was whether Associates qualified for "exempt" status under G.L. c. 59, § 5, Third. All real property in the Commonwealth is subject to taxation "unless expressly exempt". G.L. c.59, § 2. "Exemptions are to be strictly construed against the taxpayer." **Jewish Geriatric Services, Inc. v. Board of Assessors of Longmeadow**, 61 Mass. App. Ct. 73, 77 (2004).

"To qualify for the exemption, taxpayer organizations bear the burden of establishing 'clearly and unequivocally' [citation omitted] that they are 'literary, benevolent, charitable or scientific institution[s] or temperance societ[ies] incorporated in the Commonwealth.'" **Id.**, quoting **Western Mass. Lifecare Corp. v. Assessors of Springfield**, 434 Mass. 96, 101 (2001). "' Exemption from taxation is a matter of special favor or grace. It will be recognized only where the property falls clearly and unmistakably within the express words of a legislative command.'" **Mahony v. Board of Assessors of Watertown**, 362 Mass. 206, 215 (1972) (citations omitted.) Accord **Sturdy Memorial Foundation, Inc. v. Board of Assessors of North Attleborough**, 47 Mass. App. Ct. 519, 523 (1999).

"The mere fact that the real estate in question is owned by the hospital which is a 'charitable organization' within the meaning of such words as used in G.L. c. 59, § 5, Third, does not exempt [the subject premises] from taxation. There must be more." See **Milton Hospital and Convalescent Home v. Board of Assessors of Milton**, 360 Mass. 63, 67 (1971). Here the status relevant for exemption purposes is that of the entity occupying the subject premises, Associates. See **Town of Milton v. Ladd**, 348 Mass. 762, 765 (1965) ("[T]he statute focuses on the occupation and use rather than the record title as determinative of whether particular real estate should be exempt."). Neither non-profit status nor federal recognition of exemption under the Internal Revenue Code suffices for proof of exempt status under G.L. c. 59, §5, Third. See **Jewish Geriatric Services**, 61 Mass. App. Ct. at 77. See also **Kings Daughters and Sons Home v. Assessors of Wrentham**, ATB Findings of Fact and Reports 2002-427, 453.

The organization proposed for exemption must demonstrate that in "actual operation it is a public charity." **Western Massachusetts Lifecare**, 434 Mass. at 102, quoting **Jacob's Pillow Dance Festival, Inc. v. Assessors of Becket**, 320 Mass. 311, 313 (1946). A classic definition of charitable purposes sufficient for property tax exemption holds that:

A charity, in the legal sense, ... [is] a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government.

**Boston Chamber of Commerce v. Assessors of Boston**, 315 Mass. 712, 716 (1944), quoting **Jackson v. Phillips**, 14 Allen 539, 556 (1867). Criteria dispositive of exempt status include "whether the organization serves 'a sufficiently large or indefinite class so that the community is benefited by its operations' [cites omitted] and whether the purported charity lessens a burden that would otherwise be assumed by the government." **Jewish Geriatric Services**, 61 Mass. App. Ct. at 78, quoting **Western Massachusetts Lifecare**, 434 Mass. at 105-06. On the other hand, the Supreme Judicial Court has held that

"selection requirements, financial or otherwise, that limit the potential beneficiaries of a purported charity will defeat the claim for exemption." **Western Massachusetts Lifecare**, 434 Mass. at 104.

"[T]he promotion of health whether through the provision of health care or through medical education and research, is today generally seen as a charitable purpose." **Harvard Community Health Plan, Inc. v. Board of Assessors of Cambridge**, 384 Mass. 536, 543 (1981). However, the benefits of such efforts must be available to a large enough segment of the public. See generally **Massachusetts Medical Society v. Assessors of Boston**, 340 Mass. 327, 333 (1960). Moreover, benefit to the wider public must be the predominant, not an incidental, use of the property proposed for exemption. See **Marshfield Rod & Gun Club, Inc. v. Board of Assessors of Marshfield**, ATB Findings of Fact and Reports 1998-1130, 1137. Accord **Cumington School of the Arts, Inc. v. Board of Assessors of Cumington**, 373 Mass. 597, 602-603 (1977). Benefits from the promotion of health which are too confined in scope do not support a claim of exemption. Cf. **Marshfield Rod & Gun Club**, ATB Findings of Fact and Reports at 1136; **Boston Chamber of Commerce**, 315 Mass. at 718-19. See also **Massachusetts Medical Society**, 340 Mass. at 332 ("If the dominant purpose of its work is to benefit ... a limited class of persons it will not be ... classed [as charitable,] even though the public will derive an incidental benefit from such work.").

In **Harvard Community Health Plan**, 384 Mass. at 544, a claim of exemption was upheld on the strength of the showing that the taxpayer "provides substantial medical services, at a lower than average cost, to a large number of persons who are drawn from all walks of life in the greater Boston area." In **Massachusetts Medical Society**, the Court denied exemption though the taxpayer arguably benefited the public and promoted health by "improving the knowledge and skills of the medical profession." 340 Mass. at 333. The Court reasoned that while, "a more enlightened medical profession benefits the public ... this indirect benefit is not sufficient to bring the society within the class traditionally recognized as charities." **Id.**

Furthermore, charitable exemption requires "an absolute prohibition against private inurement 'where, for example, the physicians 'employed' by it serve on its board or otherwise exert control over its finances ... [or] if the payment of salaries is a mere device for securing to the beneficial owners the profits which may accrue'." **Sturdy**

**Memorial**, 47 Mass. App. Ct. at 522 (citation omitted.) In the same case on remand, **Sturdy Memorial Foundation, Inc. v. Board of Assessors of North Attleborough**, ATB Findings of Fact and Report 2002-161, 171-72 ("**Sturdy Memorial II**"), the Board found that taxpayer ineligible for exemption because of the generosity of its compensation packages for physicians, and the limited class of patients it served. The Board ruled that "the need for appointments, the turning away of non-established patients, and the lack of free or reduced-cost care actually contradicted" the claim that 75% of its patients were "'undifferentiated.'" **Id.**

Against the background of this applicable law, appellant's showing falls woefully short. The Board was supplied with no information as to the governance of Associates, its compensation to the physicians it employed, the patients it served, or the wider benefits of its allegedly charitable activities. Appellant's presentation stands in sharp contrast to the detailed showings made by the taxpayers in **Harvard Community Health Plan** and **Sturdy Memorial I** and **II**. Whether, on a fuller development of the relevant facts, Associates is closer in actual operation to Harvard Community Health Plan and thus exempt, or more similar to Sturdy Memorial Foundation and not exempt, cannot be determined.

"As has been held, '[b]urdens of proof are meaningful elements of legal analysis, and occasionally, where the evidentiary record is wanting, the burden of proof will determine the outcome of [an action.]'" **Horvitz v. Commissioner of Revenue**, ATB Findings of Fact and Reports 2002-252, 255 (citation omitted.) The absence of the evidence appellant needed to establish its right to an abatement on grounds of exemption determined of the outcome of this case. Because appellant failed to carry its burden of proof, the Board decided the case in favor of the appellee.

**THE APPELLATE TAX BOARD**

By: \_\_\_\_\_  
**Thomas W. Hammond, Jr., Chairman**

**A true copy,**

Attest: \_\_\_\_\_  
**Assistant Clerk of the Board**

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

HEIDI HUNTING and JAIME CARO v. BOARD OF ASSESSORS OF  
THE TOWN OF CONCORD

Docket No. F282710

Promulgated:  
September 25, 2006

**ATB 2006-697**

This is an appeal under the formal procedure, pursuant to G.L. c. 58A, § 7 and G.L. c. 59, §§ 64 and 65, from the refusal of the appellee to abate taxes on certain real estate in the Town of Concord owned by and assessed to the appellants under G.L. c. 59, §§ 11 and 38, for fiscal year 2005.

Commissioner Rose heard this appeal. He was joined in the original decision for the appellee by Commissioners Scharaffa, Gorton, and Egan. Upon further review and on its own motion, the Board issued an amended decision, which is promulgated simultaneously with these findings, dismissing this appeal for lack of jurisdiction and deciding it for the appellee. Chairman Hammond and Commissioners Scharaffa, Egan, and Mulhern joined Commissioner Rose in the amended decision.

These findings of fact and report are made pursuant to a request by the appellants under G.L. c. 58A, § 13 and 831 CMR 1.32.

*Heidi Hunting and Jaime Caro, pro se, for the appellants.*

*Evelyn W. Masson, assessor, for the appellee.*

**FINDINGS OF FACT AND REPORT**

On January 1, 2004, Heidi Hunting and Jaime Caro (together, "appellants"), were the assessed owners of a parcel of real estate located at 39 Bypass Road in the Town of Concord ("subject property"). The subject property contains approximately 14.30 acres of land and is improved with a single-family home. For fiscal year 2005, the Board of Assessors of Concord ("assessors") valued the subject

property at \$2,166,000 and assessed a tax thereon, at the rate of \$9.80 per thousand, in the amount of \$21,226.80.<sup>12</sup>

On or about December 30, 2004, Concord's Collector of Taxes sent out the town's actual real estate tax notices. In accordance with G.L. c. 59, § 57C, the appellants paid the tax without incurring interest. On January 31, 2005, the appellants timely filed their application for abatement with the assessors.<sup>13</sup> On or about April 14, 2005, the appellants granted the assessors an extension, until July 31, 2005, to act on their application, and on June 16, 2005, the assessors denied it. As discussed more fully in the Opinion below, the appellants, therefore, had until September 16, 2005 to file their appeal with the Appellate Tax Board ("Board"). More than three months after the denial, on September 22, 2005, the assessors reconsidered their original denial and abated the subject property's value by \$16,800 to \$2,149,200.<sup>14</sup> On December 19, 2005, the appellants filed their petition with this Board alleging that the subject property was still overvalued by the assessors.

On the basis of these facts, the Board found and ruled that it did not have jurisdiction over this appeal. The Board, therefore, dismissed this appeal for lack of jurisdiction and decided it for the appellee.

### OPINION

G. L. c. 59, § 65, provides in pertinent part:

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<sup>12</sup> This amount does not include the Community Preservation Fund surcharge.

<sup>13</sup> General Laws c. 59, § 59 requires that applications for abatement be filed: "[O]n or before the last day for payment, without incurring interest in accordance with the provisions of chapter fifty-seven or section fifty-seven C, of the first installment of the actual tax bill issued upon the establishment of the tax rate for the fiscal year to which the tax relates." According to G.L. c. 59, § 57C, the applicable payment section here, the last day for payment is February 1<sup>st</sup>. Accordingly, the Board found that the appellants timely filed their application for abatement on January 31, 2005.

<sup>14</sup> The assessors have the statutory authority to settle an abatement claim in full for up to three months following its denial. G.L. c. 58A, § 6 provides in pertinent part that "during the period allowed for taking an appeal [to the Appellate Tax Board from the denial of an application for abatement], the assessors may, by agreement with the applicant, abate the tax in whole or in part in final settlement of said application." In the present appeal, it appears that the assessors' September 22, 2005 abatement falls outside the strictures of § 6.

A person aggrieved as aforesaid with respect to a tax on property in any municipality may, subject to the same conditions provided for an appeal under section sixty-four, appeal to the appellate tax board by filing a petition with such board within three months after the date of the assessors' decision on an application for abatement as provided in section sixty-three, or within three months after the time when the application for abatement is deemed to be denied as provided in section sixty-four. Such appeal shall be heard and determined by said board in the manner provided by chapter fifty-eight A.

In the present appeal, the Board found that "the assessors' decision on [the appellants'] application for abatement" occurred on June 16, 2005. The Board further found that "three months after the date of the assessors' decision on [the appellants'] application for abatement" was September 16, 2005. The Board, therefore, found that September 16, 2005 was the last day for the appellants to timely file their appeal with this Board in accordance with the statutory requirements of § 65. The assessors' September 22, 2005 reconsideration of their original denial did not change the appellants' September 16, 2005 due date for filing their appeal with this Board.<sup>15</sup> Because the appellants did not file their appeal with the Board until December 19, 2005, the Board found and ruled that the appellants' appeal did not meet the § 65 three-month filing deadline and accordingly, was not timely.

The Board has only that jurisdiction conferred on it by statute. ***Stilson v. Assessors of Gloucester***, 385 Mass. 724, 732 (1982). "Since the remedy of abatement is created by statute, the [B]oard lacks jurisdiction over the subject matter of proceedings that are commenced at a later time or prosecuted in a different manner from that prescribed by statute." ***Nature Church v. Assessors of Belchertown***,

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<sup>15</sup> Indeed, the assessors' reconsideration, which was not within the time period for filing an appeal with this Board and was not in full settlement of the appellants' claim, does not appear consonant with the requirements of G.L. c. 58A, § 6. See footnote 3, *supra*.

384 Mass. 811, 812 (1981) (citing *Assessors of Boston v. Suffolk Law School*, 295 Mass. 489, 495 (1936)). Adherence to the statutory prerequisites is essential "to prosecution of appeal from refusals to abate taxes." *New Bedford Gas & Edison Light Co. v. Assessors of Dartmouth*, 368 Mass. 745, 747 (1975). "[A] statutory prerequisite to jurisdiction cannot be waived by any act of the assessors." *Assessors of Boston v. Suffolk Law School*, 295 Mass. at 494; *Old Colony R. Co. v. Assessors of Quincy*, 305 Mass. 509, 511-12 (1940). As a matter of policy, even if substantial hardship to an owner exists, equitable principles do not supersede jurisdictional requirements of administrative bodies. *Garrity v. Assessors of Belmont*, 43 Mass. App. Ct. 911, 912 (1997). Like the assessors, the Board also may not waive jurisdictional requirements. *Id.* Accordingly, the time limit provided for filing the petition is jurisdictional and a failure to comply with it must result in dismissal of the appeal. *Doherty v. Assessors of Northborough*, ATB Findings of Fact and Reports 1990-372, 373 (citing *Cheney v. Inhabitants of Dover*, 205 Mass. 501 (1910); *Assessors of Boston v. Suffolk Law School*, 295 Mass. 489 (1936)); see also *Berkshire Gas Co. v. Assessors of Williamstown*, 361 Mass. 873 (1972) (rescript).

On this basis, the Board decided this appeal for the appellee for lack of jurisdiction.

**APPELLATE TAX BOARD**

By: \_\_\_\_\_  
Thomas W. Hammond, Chairman

A true copy,

Attest: \_\_\_\_\_  
Assistant Clerk of the Board

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

DAVID B. JENKINS; ELAINE M. WYNN; v. BOARD OF ASSESSORS OF  
MICHAEL FOLEY; JOHN POTTER; THE TOWN OF BOURNE  
RICHARD PHILLIPS et al, TRUSTEES;  
STANLEY REED MORTON, JR., TRUSTEE;  
JOHN REEN, et al; STUART O. CHASE;  
JOHN J. BRINE et al; JOAN B. BAKER;  
JAMES C. MOONEY et al, TRUSTEES;  
MADLYN B. COYNE; CHARLES W.  
SULLIVAN, JR., TRUSTEE; JOHN E.  
SWEENEY; EMILY HARDON et al,  
TRUSTEES; MARSHALL SLOANE et al;  
CHARLES D. HOWELL et al, TRUSTEES;  
PETER S. GREGORY; WILLIAM W. SCOTT

Docket Nos.F270820 thru F270824,  
F270826 thru F270831  
F270833 thru F270839  
F270953 thru F270955  
F272337, F272896 thru F272900  
F272907 thru F272917

Promulgated:  
July 13, 2007

**ATB 2007-651**

These are consolidated appeals filed under the formal procedure pursuant to G.L. c. 59, §§ 64 and 65, from the refusal of the appellee to abate taxes on real estate located in the Town of Bourne, owned by and assessed to the appellants under G.L. c. 59, §§ 11 and 38, for fiscal years 2003 and 2004.

Commissioner Egan heard the appeals and was joined by Commissioners Scharaffa, Gorton and Rose in the decisions for the appellee.

These findings of fact and report are made pursuant to a request by the appellants under G.L. c. 58A, § 13 and 831 CMR 1.32.

*Anthony M. Ambriano, Esq.* for the appellants.

*Robert S. Troy, Esq.,* for the appellee.

### FINDINGS OF FACT AND REPORT

Because all of the above captioned appeals raised the single issue of disproportionate assessment of residential properties located in the Wings Neck area of Bourne, the Appellate Tax Board ("Board") issued an Order consolidating these appeals for hearing. On the basis of the testimony and evidence introduced at the hearing of these appeals, the Board made the following findings of fact.

Wings Neck is a 400-acre peninsula, which extends into Buzzards Bay at the western entrance to the Cape Cod Canal. The neighborhood is located in an R-80 zoning district, which requires a minimum lot size of 80,000 square feet. The area is home to mostly summer residents. For the fiscal years at issue, the assessors valued the properties and assessed taxes as follows:

#### Fiscal Year 2003

Docket	Address	Assessed Value	Tax Rate (per \$1000)	Tax Assessed
270820	174 North Road (Gregory)	\$3,128,200.00	\$ 8.06	\$25,213.29
270821	480 Wings Neck Road (Baker)	\$2,052,400.00	\$ 8.06	\$16,542.34
270822	420 Wings Neck Road (Brine)	\$1,989,400.00	\$ 8.06	\$16,034.56
270823	448 Wings Neck Road (Coyne)	\$1,939,600.00	\$ 8.06	\$15,633.18
270824	363 Wings Neck Road (Howell)	\$ 736,900.00	\$ 8.06	\$ 5,939.41
270826	0 Bassetts Island (Chase)	\$1,541,150.00	\$ 8.06	\$12,421.67
270827	0 South Road (Howell)	\$1,869,700.00	\$ 8.06	\$15,069.78
270828	209 South Road (Mooney)	\$2,007,200.00	\$ 8.06	\$16,178.03
270829	43 South Road (Morton)	\$2,389,400.00	\$ 8.06	\$19,258.56
270830	51 South Road (Phillips)	\$1,966,000.00	\$ 8.06	\$15,848.96
270831	147 South Road (Reen)	\$2,576,800.00	\$ 8.06	\$20,769.01
270833	293 Wings Neck Road (Sloane)	\$ 367,600.00	\$ 8.06	\$ 2,962.86
270834	115 South Road (Sloane)	\$2,355,600.00	\$ 8.06	\$18,986.14
270835	71 North Road (Sullivan)	\$ 889,900.00	\$ 8.06	\$ 7,172.52
270836	221 South Road (Jenkins)	\$1,869,700.00	\$ 8.06	\$15,069.78
270837	196 North Road (Sweeney)	\$ 793,900.00	\$ 8.06	\$ 6,398.83
270838	198 North Road (Sweeney)	\$1,882,800.00	\$ 8.06	\$15,175.37
270839	461 Wings Neck Road (Wynn)	\$2,401,900.00	\$ 8.06	\$19,359.31
270953	200 North Road (Foley)	\$2,346,300.00	\$ 8.06	\$18,911.18
270954	333 Wings Neck Road (Hardon)	\$ 683,300.00	\$ 8.06	\$ 5,507.40
270955	321 Wings Neck Road (Hardon)	\$ 677,500.00	\$ 8.06	\$ 5,460.65

### Fiscal Year 2004

Docket	Address	Assessed Value	Tax Rate (per \$1000)	Tax Assessed
272337	147 South Road (Reen)	\$ 2,946,000.00	\$ 7.37	\$21,712.02
272896	363 Wings Neck Road (Howell)	\$ 825,900.00	\$ 7.37	\$ 6,086.88
272897	0 South Road (Howell)	\$ 608,700.00	\$ 7.37	\$ 4,486.11
272898	221 South Road (Jenkins)	\$ 1,855,800.00	\$ 7.37	\$13,677.24
272899	209 South Road (Mooney)	\$ 1,877,300.00	\$ 7.37	\$13,385.70
272900	43 South Road (Morton)	\$ 2,647,000.00	\$ 7.37	\$19,508.39
272907	115 South Road (Sloane)	\$ 2,578,000.00	\$ 7.37	\$18,999.86
272908	293 Wings Neck Road (Sloane)	\$ 387,700.00	\$ 7.37	\$ 2,857.34
272909	55 South Road (Scott)	\$ 1,914,300.00	\$ 7.37	\$14,108.39
272910	321 Wings Neck Road (Hardon)	\$ 714,600.00	\$ 7.37	\$ 5,266.60
272911	51 South Road (Phillips)	\$ 2,059,200.00	\$ 7.37	\$15,176.30
272912	174 North Road (Gregory)	\$ 3,066,400.00	\$ 7.37	\$22,599.36
272913	200 North Road (Foley)	\$ 2,369,300.00	\$ 7.37	\$17,461.74
272914	448 Wings Neck Road (Coyne)	\$ 1,875,500.00	\$ 7.37	\$13,822.43
272915	0 Bassetts Island (Chase)	\$ 1,116,800.00	\$ 7.37	\$ 8,230.81
272916	420 Wings Neck Road (Brine)	\$ 1,924,800.00	\$ 7.37	\$14,185.77
272917	480 Wings Neck Road (Baker)	\$ 1,989,200.00	\$ 7.37	\$14,660.40

On December 31, 2002, and December 31, 2003, the Town of Bourne Collector of Taxes sent out the town's actual real estate tax bills for fiscal year 2003 and 2004, respectively. The appellants timely paid the taxes due. For the fiscal years at issue, in accordance with c. 59, § 59, appellants timely filed their applications for abatement with the assessors and their petitions with the Appellate Tax Board ("Board"). Based on these facts, the Board found that it had jurisdiction over the subject appeals.

The appellants' witness, Paul Hartel, is a Massachusetts licensed appraiser and the Board qualified him as an expert in the area of real estate valuation. The appellants did not argue that their properties were over assessed in relation to their fair market values or in relation to other properties located in Wings Neck. Instead, Mr. Hartel presented a claim that the subject properties were "disproportionately assessed" as compared to properties located in Scraggy Neck, an area he deemed to be comparable to that of the subject properties. Mr. Hartel, having chosen Scraggy Neck as a reliable statistical sample, presented an analysis which compared the land value assessments of properties in Wings Neck to the land value assessments of purportedly comparable properties in Scraggy Neck.

Mr. Hartel described Wings Neck as situated on a peninsula extending into Buzzard's Bay located in the Pocasset section of Bourne. He testified that the secluded area is home to mostly summer residents and that common areas are controlled by a separate homeowners' association. According to the town zoning requirements, the minimum size for a buildable lot in Wings Neck is 80,000 square feet. Approximately five miles to the south is Scraggy Neck located in the Cataumet section of Bourne. Mr. Hartel testified that Scraggy Neck is a gated community. According to town zoning requirements, the minimum legal lot size in Scraggy Neck is 40,000 square feet.

According to Mr. Hartel, during fiscal years 1999 through 2002, assessments for properties in Wings Neck and Scraggy Neck were statistically equal. He suggested that in 2003, however, a disparity emerged resulting in the disproportionate assessment of the subject properties in Wings Neck as evidenced by the fact that their land assessments exceed by approximately forty-five percent the land assessment of the properties in Scraggy Neck. In an attempt to prove what he termed disproportionate assessment, Mr. Hartel relied on three sets of assessment comparisons between lots on Wings Neck and lots on Scraggy Neck. Based on his analysis, Mr. Hartel concluded that the Wings Neck properties' fiscal year 2003 assessments exceeded the Scraggy Neck assessments. He opined that the disparity was due to a faulty land curve used by the assessors which flattened out at 40,000 square feet, thereby assigning the same dollar value for each incremental square foot of land greater than 40,000 square feet. The result, according to Mr. Hartel, was that Wings Neck properties were disproportionately assessed relative to the "peer group" of Scraggy Neck properties.

Mr. Hartel noted that for fiscal year 2004, the assessors implemented a new land curve, which extended to 80,000 square feet, to cure the prior year's error. He argued, however, that the assessors' increase of the Wings Neck neighborhood "N" factor resulted in erroneous values attributed to the subject properties. According to Mr. Hartel, the adjustment resulted in the Wings Neck properties once again being disproportionately assessed as compared to Scraggy Neck. Mr. Hartel suggested that the Wings Neck "N" factor adjustment was unwarranted because there was "no indication of a market premium for Wings Neck" properties.

In his testimony, Mr. Hartel acknowledged that the two neighborhoods are located in different zoning districts, Wings Neck is zoned R-80 and Scraggy Neck is zoned R-40. Therefore, a buildable lot in Wings Neck is required to have twice the land area of a buildable lot in Scraggy Neck, resulting in a much less densely populated neighborhood on Wings Neck. There are other differences between the two neighborhoods, including zoning setbacks and the fact that property owners on Wings Neck are permitted to have more than one residential dwelling on a buildable lot whereas Scraggy Neck property owners are allowed only one residential dwelling. Despite these considerable differences, however, Mr. Hartel chose to use Scraggy Neck as the control feature in his analysis to prove that the subject properties located on Wings Neck were disproportionately assessed.

Mr. Hartel offered no evidence to prove that the subject properties were overvalued relative to the properties' respective fair market values, nor did he offer evidence to show that the subject properties were disproportionately assessed *vis a vis* other properties in Wings Neck, which were not the subject of these appeals.

In support of their assessments, the assessors relied on the testimony of Ms. Donna Barakouskas, Principal Assessor for the town of Bourne. At trial, Ms. Barakouskas conceded that in early January 2002 the assessors discovered that the land curve used for the fiscal year 2003 assessments was erroneous. Upon making this discovery, she noted, corrections were immediately made for fiscal year 2004. Moreover, based on a review of sales data for the town of Bourne, the assessors determined that the fiscal year 2003 Wings Neck land and overall assessments were supported by market data and that no abatements were warranted.

Specifically, she cited two sales at 37 South Road and 196/198 North Road, Wings Neck, in support of the subject properties' fiscal years 2003 and 2004 land assessments. According to property record cards, 37 South Road is a 2.5-acre lot improved with a single-family dwelling. The property sold for \$1,850,000 on May 2, 2001. For fiscal years 2003 and 2004 this property had assessed values of \$1,809,300 and \$1,862,800, respectively. The second sale is that of two contiguous parcels of real estate with a combined land area of four acres, each improved with a single-family dwelling located at 196 and 198 North Road, respectively. The properties sold under one deed dated

October 2, 2000 for \$2,500,000. The parcels combined assessments for fiscal years 2003 and 2004 were \$2,676,700 and \$2,778,900, respectively.

Relying on these sales, together with the town wide sales data, the assessors reviewed the fiscal years 2003 and 2004 property assessments for the subject properties. The assessors determined that, despite the incorrect land curve for fiscal year 2003, the subject properties' land value and overall assessments were proper and justified. Further, as Ms. Barakouskas explained, using the sales data together with the mass appraisal computer system, the assessors examined each of the properties located on Wings Neck and made the requisite adjustments.

Based on the evidence presented, the Board found that the appellants failed to prove that they were the victims of a deliberate scheme of discriminatory, disproportionate assessment. The Board found no evidence that the assessors deliberately discriminated against the appellants' properties or in favor of certain classes of property elsewhere in Bourne. The Board further found that the assessors applied a uniform standard of valuation to all properties in Bourne and that the use of an N factor for properties in Wings Neck for fiscal year 2004, which was higher than neighborhood factors used for properties located in other neighborhoods in Bourne, was justified. Further, despite the admitted error in the assessors' land curve for fiscal year 2003, relevant sales data supports the conclusion that any such error did not result in the overvaluation of the subject properties. The evidence of record amply demonstrates that the subject properties were neither disproportionately assessed nor overvalued.

Accordingly, the Board decided these appeals for the appellee.

#### OPINION

The assessors have the statutory and constitutional obligation to assess all real property at its full and fair cash value. Part 2, C. one, Section one, Article 4, of the Constitution of the Commonwealth; Article 10 of the Declaration of Rights; G.L. c. 59 §§ 38 and 52. See **Coomey v. Assessors of Sandwich**, 367 Mass. 836, 837 (1975) (citations omitted). Fair cash value is defined as the price on which a willing seller and a willing buyer will agree if both of them are fully informed and under no compulsion. **Boston Gas Company v. Assessors of Boston**, 334 Mass. 549, 566 (1956).

The Board is entitled to presume that the assessment is valid until the taxpayers sustain their burden of proving otherwise. **Schlaiker v. Board of Assessors of Great Barrington**, 365 Mass. 243, 245 (1974). Accordingly, the burden of proof is upon the taxpayers to make out their right as a matter of law to an abatement of the tax. *Id.* The taxpayers must demonstrate that the assessed valuation of their property was improper. See **Foxborough Associates v. Board of Assessors of Foxborough**, 385 Mass. 679, 691 (1982).

In appeals before this Board, taxpayers "may present persuasive evidence of overvaluation either by exposing flaws or errors in the assessors' method of valuation, or by introducing affirmative evidence of value which undermines the assessors' valuation." **General Electric Co. v. Assessors of Lynn**, 393 Mass. 591, 600 (1984), quoting **Donlon v. Assessors of Holliston**, 389 Mass. 848, 855 (1983). In the present appeals, the appellants argued that the assessors use of an erroneous land curve for fiscal year 2003 assessments and an increase in the neighborhood "N" factor for fiscal year 2004 were flaws in the assessors' valuation methodology which resulted in the subject properties being disproportionately assessed in comparison to properties located in the Scraggy Neck neighborhood of Bourne.

"If the taxpayer can demonstrate in an appeal to the Board that he has been the victim of a scheme of discriminatory, disproportionate assessment, he "may be granted an abatement . . . which will make . . . his assessment proportional to other assessments, on a basis which reaches results as close as is practicable to those which would have followed application by the assessors of the proper statutory principles."

**Coomey**, 367 Mass. at 836 (quoting **Shoppers' World, Inc. v. Assessors of Framingham**, 348 Mass. 366, 377-78 (1965)). See also **Brook Road Corporation v. Board of Assessors of Needham**, Mass. ATB Findings of Fact and Reports 2001-648, 658; **Gargano v. Assessors of Barnstable**, Mass. ATB Findings of Fact and Reports 2003-501, 531-532. The burden of proof as to the existence of a "scheme of discriminatory, disproportionate assessment" is on the taxpayers. **First National Stores, Inc. v. Assessors of Somerville**, 358 Mass. 554, 559 (1971); see also **Schlaiker**, 365 Mass. at 245.

"In order to obtain relief on the basis of disproportionate assessment, [] taxpayer[s] must show that there is an 'intentional policy or scheme of valuing properties or classes of properties at a lower percentage of fair cash value than the [taxpayers'] property.'" **Brown v. Assessors of Brookline**, 43 Mass. App. Ct. 327, 332 (1997) (quoting **Shoppers' World**, 348 Mass. at 562). If taxpayers successfully demonstrate improper assessment of such a number of properties to establish an inference that such a scheme exists, the burden of going forward to disprove such a scheme shifts to the assessors. **Shoppers' World**, 348 Mass. at 377. "The ultimate burden of persuasion, of course, will remain upon the taxpayer[s]." **First National Stores**, 358 Mass. at 562.

For these appeals, the appellants argued that the assessor's use of an erroneous land curve for fiscal year 2003 and an increased neighborhood adjustment factor for fiscal year 2004 resulted in a disproportionate assessment of their properties in comparison to properties located in Scraggy Neck. The appellants, however, offered no credible evidence to prove that there existed a deliberate scheme of disproportionate assessment.

The Board further found that the assessors adequately supported their fiscal year 2003 and 2004 assessments. In her testimony, Ms. Barakouskas acknowledged that the fiscal year 2003 land curve failed to properly value parcels greater than 40,000 square feet, such as the subject properties. She further explained, however, that upon learning of the error, the assessors reexamined the valuations of all parcels within the 80,000 square foot zoning, specifically Wings Neck, and, based upon relevant sales data, determined that the fiscal year 2003 assessments were justified.

Further, she noted that during this re-examination process the assessors made necessary adjustments to several neighborhood adjustment factors. After reviewing the relevant sales data and the assessment valuation factors, the assessors determined that the subject properties' fiscal year 2004 assessments were also warranted and justified and that the appellants' failed to prove that the subject properties' assessments exceeded their respective fair market values.

The Board found and ruled that the appellants failed to present evidence that the assessors engaged in an "intentional widespread scheme of discrimination." **Stilson v. Assessors of Gloucester**, 385 Mass. 724, 727-28 (1982). Where assessments, even if wrong, are "consistent with

honest mistake or oversight on the part of the assessors," as opposed to a "deliberate scheme of disproportionate assessment," no relief for disproportionate assessment is appropriate. **Brown v. Assessors of Brookline**, Mass. ATB Findings of Fact and Reports 1996-1, 20, *aff'd*, 43 Mass. App. Ct. 327 (1997) (quoting **Stilson**, 385 Mass. at 728).

There is simply no credible evidence of a deliberate scheme of disproportionate assessment on this record. Further, sales evidence offered by the assessors supports the conclusion that the subject assessments were correct. The appellants failed to meet their burden of proving their entitlement to an abatement.

Accordingly, the Board issued decisions for the appellee in these appeals.

**APPELLATE TAX BOARD**

By: \_\_\_\_\_

\_\_\_\_\_  
Chairman

Thomas W. Hammond, Jr.,

A true copy,

Attest: \_\_\_\_\_  
Assistant Clerk of the Board

**COMMONWEALTH OF MASSACHUSETTS**

**APPELLATE TAX BOARD**

**ONEX COMMUNICATIONS CORP. v. COMMISSIONER OF REVENUE**

Docket No. C271834

Promulgated:  
September 11, 2007

This is an appeal under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 62C, § 39 from the refusal of the appellee Commissioner of Revenue ("appellee" or "Commissioner") to grant an abatement of use tax assessed against appellant Onex Communications Corporation ("Onex") under G.L. c. 64I, § 2 for the taxable periods August 31, 1999 through September 21, 2001.

Commissioner Gorton heard this appeal. With Commissioner Gorton materially participating in the deliberations of this appeal<sup>16</sup>, Chairman Hammond and Commissioners Scharaffa, Egan, and Rose joined in the decision for the appellant.

These findings of fact and report are made on the Appellate Tax Board's own motion under G.L. c. 58A, § 13 and 831 CMR 1.32 and are promulgated simultaneously with its decision.

*William E. Halmkin, Esq., Richard L. Jones, Esq., and Kristin M. Smrtic, Esq.* for the appellant.

*Laura S. Kershner, Esq., and Timothy R. Stille, Esq.,* for the appellee.

**FINDINGS OF FACT AND REPORT**

Appellant Onex was incorporated in Delaware in May, 1999 and maintained its principal place of business at 34

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<sup>16</sup> On September 11, 2006, Commissioner Gorton was sworn as a temporary member of the Appellate Tax Board pursuant to G.L. c. 58A, § 1, his status as a member of the Board having terminated on that date with the appointment and qualification of his successor. See G.L. c. 30, § 8. That appointment was extended for an additional one-year term, commencing September 11, 2007. Commissioner Gorton's material participation in the deliberations of this appeal included, *inter alia*, drafting proposed findings of fact supplying a report on the evidence and his observations as to witness credibility. He also made oral presentations of his recommendations to the Board members.

Crosby Drive, Bedford, Massachusetts 01730. Onex specialized in application specific integrated circuits that enable switching, routing, and transmission of multiple types of voice and data traffic. In September, 2001, Onex was acquired by TranSwitch Corp. ("TranSwitch") and subsequently carried on its business under the name Opal Acquisition Corporation.

Onex made purchases totaling \$2,886,662.91 during the taxable periods spanning August 1, 1999 through September 21, 2001 ("the audit period"), for which no sales/use tax was paid. Of this amount \$163,153.00 pertained to non-exempt purchases made for marketing and administration. Onex later fully paid the sales/use tax due on non-exempt purchases through an amnesty program offered by the Department of Revenue. The remaining amount, \$2,723,510.00, pertained to purchases reflected in Onex's records as made for research and development ("R & D") purposes, for which no sales/use tax was paid. The Department of Revenue auditor adopted the breakdown of Onex's purchases shown in its corporate records for purposes of the disputed assessment.

Onex received notice by letter dated July 13, 2001 that its sales/use tax liabilities for the audit period would be examined. On or about July 27, 2001, the Commissioner issued a Notice of Failure to File ("NFF") to Onex for sales/use tax for the taxable periods August 1, 1999 through March 31, 2001. The Commissioner issued another NFF, dated May 17, 2002, for sales/use tax, adding the taxable periods April 1, 2001 through September 30, 2001.

In the fall of 2002, Onex timely filed a request for Amnesty for the Periods at Issue for its non-R & D purchases. The Commissioner approved the request by letter dated May 16, 2003. The May 16, 2003 letter indicated that the Commissioner had waived penalties for those purchases that were covered by the Amnesty application.

On or about October 16, 2002, Onex filed Use Tax Returns on Forms ST-10 for the periods at issue, for the non-R & D purchases made for marketing and administrative purposes. Onex tendered payment in the tax amount of \$8,158.00, plus interest. Onex did not pay use tax for the R & D purchases that are the subject of this appeal.

The Commissioner issued a Notice of Intent to Assess dated December 18, 2002 for the periods at issue. A Notice of Assessment followed, bearing a date of July 2, 2003. On or about July 30, 2003, Onex filed an Application for Abatement for the periods at issue. The Commissioner's

Notice of Abatement Determination denying Onex's abatement application was dated October 8, 2003. Onex filed a Petition Under Formal Procedure with the Appellate Tax Board ("Board") on December 5, 2003. On the basis of the foregoing facts, the Board found that it had jurisdiction over the instant appeal.

Three witnesses testified for Onex at the trial of this matter: Mr. Daniel Curtis, its Vice President of Administration, Treasurer and Chief Financial Officer ("CFO"); Mr. Radu Iorgulescu, an engineer who was Onex's Systems Architect and later Director of Product Line Management, who headed software design for the OMNI chip, which was Onex's flagship product; and Mr. Scott Wiley, Vice President and Controller at TranSwitch, who testified as keeper of the records for Onex. The Commissioner called no witnesses. The hearing officer found the testimony of the witnesses to be credible, consistent, and probative. The Board adopted this determination based on the information supplied by the hearing officer in support of his observations. Synthesizing the recommendations of the hearing officer, the testimony, the exhibits, and the statement of agreed facts, the Board made the following findings.

#### **Onex's Activities during the Audit Period**

Onex specialized in application specific integrated circuits ("ASIC's"). Onex was started in order to design, manufacture, and sell a then-revolutionary device for transmission of data over communications networks. Onex's flagship product was an ASIC chip-set called OMNI. The product consisted of two chips, one functioning as a "switch" and the other as a "network processor." The OMNI Switch Element (the "OSE chip") controlled the switching of electronic circuits, while the companion chip, the OMNI Transport Processor (the "TP chip"), processed data from the OSE chip. The two chips were sold as a package. The OMNI chip-set was cutting-edge technology for the telecommunications industry during the years at issue: nothing like it had existed before. The OMNI chip-set was capable of supporting 1,344 virtual circuits, with each of them supporting 32 voice channels. The product optimized telecommunications systems functionality, doing in one chip-set what would previously have required ten chips to accomplish. The innovation reduced power needs and system costs. Calling the product "iTAP" internally, Onex engineers authored and published a user-manual titled the iTap Service Processor Data Sheet.

Onex's activities during the audit period centered on taking the OMNI chip from abstract concept to production. Their work started from a blank piece of paper, according to Mr. Iorgulescu. Onex's engineers had to design both hardware and software elements to make the OMNI chip a viable product. They had to create, design, and refine hardware to house the functions of a complex telecommunications system on a single chip-set. The chip was made of silicon, a semi-conductor material. Tiny internal modules had to be interwoven, integrated, and laid out to enable the intended functionality. Hardware components included data ports, links, processors, forwarding engines, connectors, and memory. Software had to be developed to be embedded into the hardware. Mr. Iorgulescu referred to the detailed technical framework for the product as its "architecture."

Next came the "blueprint", resulting from Onex's research and development activities, which was a computer-edited design that included technical specifications of the hardware and software components. The blueprint included detailed manufacturing instructions. The blueprint was stored on computer disks. Credible testimony established that the building of the architecture and blueprint was an essential step in manufacturing the OMNI chip.

Because Onex lacked the sophisticated equipment needed to make the chip internally, it outsourced production of the OMNI chip to IBM. Onex and IBM entered into a contract under which IBM would fabricate the product, commencing July 1, 2000 and running through December 31, 2005. IBM had no input into design and was required to follow the instructions of the blueprint with exactitude. The production was carried out under Onex's direction. The contract provided that the manufactured OMNI chips were Onex's property.

Using the blueprint, IBM produced an initial run of 50-100 early production chip-sets in early 2001. These early stage chips were tested and analyzed at the Onex laboratory. Based on the findings of the analysis, the blueprint was refined. By mid-2001, Onex sent the refined blueprint to IBM. IBM proceeded to manufacture production quantities, then shipped the chips to Onex.

Just as it had outsourced production, Onex turned to a more established company to market the OMNI chip. On September 17, 1999 Onex entered into a barter contract with TranSwitch. As a "qualified vendor" with a considerable sales and marketing capability, TranSwitch could reach major telecommunications services providers more

effectively than a start-up. The barter contract obviated any need for Onex to add an appreciable marketing and sales capacity to its operation.

The barter contract called for TranSwitch to market the OMNI chip as part of its own product line. TranSwitch received a license to acquire the OMNI chip at a reduced price. The OMNI chip added a product to the TranSwitch line with enhanced functionality over any of their existing products.

In September, 2000, Onex secured its first customer, Polaris Networks of San Jose, California. Mr. Curtis described Polaris as a "beta customer," which meant that its use of the chip was considered the last step in testing the product before a formal commercial roll-out. Polaris received a preferential price of \$1000 per chip; the list price was \$1500. Onex sold Polaris 20-30 chips in 2001, 1000 in 2002, and 1400-1500 in 2003.

Given the close ties between Onex and TranSwitch, the merger proceeded seamlessly in September of 2001. The Commissioner chose to end the audit period as of the date Onex was acquired by TranSwitch. The commercial roll-out of the product occurred subsequent to the audit period in 2002.

#### **Onex Capitalization, Expenditures, and Income**

Onex received its initial capital infusion in 1999, in two, nearly simultaneous rounds of investments, which Mr. Curtis referred to as the "A and B rounds." Its first rounds of investors included Saint Paul Venture Capital, Star Ventures, Signal Lake Ventures, and another smaller investor. TranSwitch was also an investor, contributing technology Onex utilized in its activities. The "A and B rounds" of investments occurred approximately in September of 1999 and yielded \$8,000,000 to \$9,000,000. The "C round," which occurred in 2000, resulted in another \$20,000,000 of capital for the company. The "C round" included most of the existing investors in Onex and was led by a new investor named Ben Rock Associates. Progress in the development of the chip attracted the additional investment.

Onex leased 11,000 square feet of space at its Bedford facility, and later added another 7,000 square feet. At its peak, Onex had sixty-five employees. Approximately 90% of these employees were hardware and software engineers engaged in the development of the OMNI blueprint. At least 75% of Onex's floor space was dedicated to engineering activities, and approximately 20% was used for

administrative and non-engineering, non-manufacturing purposes.

Onex's personal property consisted of computer equipment and software, lab equipment, and furniture and fixtures. Mr. Curtis testified that nearly all of the computer equipment and software was used in developing the blueprint, with the exception of about 5% used for administrative and marketing purposes. Furniture and fixtures were used in rough correspondence to the staffing ratios between engineering and administrative employees.

Money not expended in pursuit of the company's activities was deposited in an interest-bearing bank account. Onex earned \$113,996 in interest in 1999; \$594,134 in 2000; and \$485,657 for 2001.

On the basis of the foregoing, the Board found that Onex was formed to take a new product from abstract concept to production and commercial sale. Onex used human skill in the form of software and hardware engineering expertise, assisted by sophisticated computer and laboratory equipment, to develop *ex nihilo* the architecture for a product with enhanced functionality for the telecommunications services industry. The product represented a significant advance in telecommunications technology at the time.

Onex developed a blueprint with intricate manufacturing instructions through which silicon could be transformed into the OMNI chip with its complex software and hardware components. During the audit period, it entered into contracts for both the production and marketing of the OMNI chip and secured its first customer. Testing and refinement of the chip-set also occurred during the audit period. Production in commercial quantities followed seamlessly from Onex's ongoing activities begun in 1999 and was unaffected by the corporate reorganization which happened in September, 2001. Because the Commissioner chose to conclude the audit at the point TranSwitch acquired Onex, the audit period was not coextensive with the overall process intended from the outset to research, develop, and manufacture the OMNI chip for sale to telecommunications services providers.

The Board concluded that Onex effectuated a significant transformation of raw ideas and engineering expertise into a technical blueprint capable of minutely directing the manufacture of the then-revolutionary OMNI chip from silicon. Initial production of the chip started during the audit period, followed by larger scale

production in 2002 after the product had been further refined.

The activities performed during the audit period constituted an essential and integral part of the overall process of manufacturing the OMNI chip. Because Onex, during the audit period, carried out essential and integral steps in the total manufacturing process which brought a new product to the marketplace, the company was "engaged in manufacturing" within the meaning of G.L. c. 63, § 42B. The purchases reflected on Onex's books and records as pertaining to "research and development" - accepted as such by the Commissioner's auditor in making the assessment - were for use "directly and exclusively ... in research and development by a manufacturing corporation ...."

Accordingly, the purchased items were exempt from use tax under G.L. c. 64I, § 7(b) and c. 64H, § 6(r) and (s). The disputed assessment was improper, and the Board accordingly ordered an abatement of tax in the amount of \$136,175, plus statutory additions.

#### OPINION

The issue in this appeal is whether Onex's R & D purchases, the amount of which is agreed upon, qualify for exemption for use tax purposes. The use tax statute, G.L. c. 64I, adopts, by and large, the exemptions made applicable in the sales tax context. See G.L. c. 64I, § 7(b). In support of its claim for an abatement, Onex relied on two exemptions which appear at G.L. c. 64H, § 6 (r) and (s).

As the Board summarized in **Lawrence-Lynch Corp. v. Commissioner of Revenue**, Mass. ATB Findings of Fact and Report 1997-883, 897-98, "[t]he § 6(r) exemption addresses materials, tools, and fuel which become an ingredient of the manufactured product, or are consumed in the manufacturing process. The § 6 (s) exemption relates to the machinery and tools which are the instruments for changing raw materials into a manufactured product." It is well-settled that "[n]o 'special burden' is placed upon the taxpayer invoking these exemptions." **Lawrence-Lynch**, Mass. ATB Findings of Fact and Report 1997 at 905. As the Supreme Judicial Court explained in **DiStefano v. Commissioner of Revenue**, 394 Mass. 315, 325 (1985), "'[t]he subsections are merely part of the statutory definition of the types of sales and uses of tangible personal property which are to be employed in measuring the excises and of those which are not so to be used.'" (Citations omitted.)

The question which most often arises under the § 6(r) and (s) exemptions is whether "the machinery assessed was used (1) directly and exclusively; (2) in an industrial plant; (3) in the actual manufacture, conversion, or processing; (4) of tangible personal property; (5) to be sold." See **Associated Testing Laboratories, Inc. v. Commissioner of Revenue**, 429 Mass. 628, 630 (1999). See also **Lawrence-Lynch**, Mass. ATB Findings of Fact and Report 1997 at 899. However, the exemptions also reach items used "directly and exclusively ... in research and development by a manufacturing corporation or a research and development corporation within the meaning of section thirty-eight C or forty-two B of chapter sixty-three." See G.L. c. 64H, § 6(r) and (s).<sup>17</sup> See also **Monsanto Co. v. Commissioner of Revenue**, Mass. ATB Findings of Fact and Report 1997-1154, 1159. As is clear upon a close reading of the statute, most of the elements of the § 6(r) and (s) exemptions addressed in **Associated Testing Laboratories**, 429 Mass. at 630, are inapplicable in determining whether research and development purchases are exempt.<sup>18</sup>

Since the Commissioner did not controvert the "research and development" character of the purchases at trial, the exemption question turned on whether Onex could be classified as either a "manufacturing corporation" or "research and development corporation" within the meaning of G.L. c. 63, § 42B, which applies to foreign corporations. All that is required for exemption under the relevant prong of G.L. c. 64H, § 6(r) and (s) is direct and exclusive use of purchased articles in research and

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<sup>17</sup> G.L. c. 64H, § 6(r) and (s), in relevant part, exempt from sales and use tax:

§ 6(r). Sales of materials, tools and fuel, or any substitute therefor ... which are consumed and used directly and exclusively in ... research and development by a manufacturing corporation or a research and development corporation within the meaning of section thirty-eight C or forty-two B of chapter sixty-three.

§ 6(s). Sales of machinery or replacement parts thereof, used directly and exclusively in ... research and development by a manufacturing corporation or a research and development corporation within the meaning of section thirty-eight C or forty-two B of chapter sixty-three.

<sup>18</sup> The Commissioner's argument that Onex was not engaged in "actual manufacture" was not relevant to the determination of manufacturing corporation status under G.L. c. 63, §§ 38C and 42B. See generally, **William F. Sullivan & Co., Inc. v. Commissioner of Revenue**, 413 Mass. 576, 579-80 (1992).

development by a qualifying corporation. Onex's claim to "research and development corporation" status rested on the version of § 42B in effect before the 2003 amendments:

A foreign research and development corporation for the purposes of this section is one whose principal activity herein is research and development and which derives more than two thirds of its receipts assignable to the commonwealth from such activity and derives more than one third of its receipts assignable to the commonwealth from the research and development of tangible personal property capable of being manufactured in this commonwealth.

G.L. c. 63, § 42B (prior to being amended by St. 2003, c. 141, § 29.)

There can be little doubt on the instant record that Onex's principal activity was research and development. However, "research and development corporation" classification also turned on a "receipts" test: more than two thirds of "receipts assignable to the commonwealth" must have derived from research and development activity, and more than one third of its "receipts assignable to the commonwealth" must have derived from the "research and development of tangible personal property capable of being manufactured in this commonwealth."<sup>19</sup>

The Commissioner opposed "research and development corporation" classification, arguing that "receipts" should be defined according to G.L. c. 64H, § 1 as "the total sales price received by a vendor as a consideration for retail sales." Onex countered that the term "receipts", not defined at G.L. c. 63, § 30, was broad enough to comprehend infusions of capital. Moreover, since its investors were motivated to support the design and manufacture of the OMNI chip, Onex argued that all the amounts it received from its investors qualified as receipts attributable to research and development activity.

The Board addressed the definition of "receipts" for purposes of § 42B in the recent case of **Duracell, Inc. v. Commissioner of Revenue**, Mass. ATB Findings of Fact and Report 2007-903. The Board held that "a broad construction of the term ["receipts"] is consistent with the legislative

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<sup>19</sup> In its present form, G.L. c. 63, § 42B grants "research and development corporation" status where 2/3 of expenditures are "allocable" to research and development activity.

intent of the statute and the construction of the language of the statute as established by case law." *Id.* at 914. The Board observed that "receipts" may be broader in scope than the term "income." *Id.* The Board rejected a definition of "receipts" so narrow as to include only income realized from sales to unrelated parties.

However, *Duracell* did not present the question of whether the statutory term "receipts" was broad enough to encompass investments of capital. Nor did the Board need to decide that question in order to resolve the instant claim, in light of the conclusion that Onex constituted a "manufacturing corporation" within the meaning of G.L. c. 63, § 42B, such that its research and development purchases qualified for exemption under G.L. c. 64H, § 6(r) and (s).

G.L. c. 63, §§ 38C and 42B confer manufacturing corporation status on domestic and foreign corporations, respectively, which are "engaged in manufacturing." Classification as a manufacturing corporation "has a significant bearing on [the company's] tax liability to the Commonwealth..." *John S. Lane & Son, Inc. v. Commissioner of Revenue*, 396 Mass. 137, 140 (1985) (Citation omitted.) G.L. c. 63, §§ 38C and 42B "provide[] no definition for a manufacturing corporation. Rather, that definition has been developed by decades of case law." *Duracell*, Mass. ATB Findings of Fact and Report 2007 at 917. "To merit the desired 'manufacturing' label ... a corporation must engage in activities properly called 'manufacturing' and 'substantial' in relation to the whole of its operations." *Noreast Fresh, Inc. v. Commissioner of Revenue*, 50 Mass. App. Ct. 352, 354 (2000). Decisions of the Supreme Judicial Court "have embraced the basic concept of manufacturing articulated in *Boston & Me. R.R. v. Billerica*, 262 Mass. 439, 444-445 (1928): "[C]hange wrought through the application of forces directed by the human mind, which results in the transformation of some preexisting substance or element into something different, with a new name, nature or use." *William F. Sullivan & Co., Inc. v. Commissioner of Revenue*, 413 Mass. 576, 579 (1992).

The Court in *William F. Sullivan & Co.* stressed "that the phrase 'engaged in manufacturing' should not be given a narrow or restricted meaning." *Id.* Rather, application of the phrase should conform to the "broad purpose of the statute to be a promotion of the general welfare by inducing new industries to locate in Massachusetts and by fostering an expansion and development of our own industries." *Joseph T. Rossi Corp. v. State Tax Commission*,

369 Mass. 178, 181 (1975). **Noreast Fresh**, 50 Mass. App. Ct. at 355-57, illustrates the broad interpretation the courts have given to the phrase "engaged in manufacturing". In that case, the taxpayer's activities in making salads and coleslaw from raw vegetables were enough to support manufacturing corporation status. See *id.*

"At bottom, the proper mode of analysis is of the 'case-by-case analogical' variety." **Noreast Fresh**, 50 Mass. App. Ct. at 355, quoting **William F. Sullivan & Co.**, 413 Mass. at 581. Two decisions of the Supreme Judicial Court have particular bearing on whether Onex qualified as a manufacturing corporation under G.L. c. 63, § 42B and therefore, G.L. c. 64H, § 6(r) and (s). First, a book publisher was accorded manufacturing corporation status in **Commissioner of Revenue v. Houghton Mifflin Co.**, 423 Mass. 42 (1996). The taxpayer's activities consisted of researching and developing ideas for books to be published, leading to the write-up and editing of a manuscript by various writers and editors. Thumbnail sketches were also generated, and with the manuscript underwent "further processing and refinement." 423 Mass. at 43. Templates were then created, and art and photographs were developed for inclusion in the ultimate product. These items were "assembled into layouts." *Id.* at 44. Proofs were produced and marked up for changes and corrections to "further refine the product." *Id.* The second proofs were converted into color proofs. Houghton then produced "CD ROM tapes which [were] then sent to independent contractors for final packaging in compact disks, or [Houghton] sen[t] the proofs (usually on computer diskettes) to independent contractors for printing and binding into conventional books." *Id.* As the Court explained, "[t]hroughout this process, [Houghton] uses, among other things, human skill and knowledge as well as various implements, materials, and machines or machinery such as computers, digital modems, printers, photocopiers, writing utensils, lighting machines, drawing equipment and materials, graphic art tools, electronic graphic equipment, electronic color collection equipment, photo-retrieval equipment, sophisticated software, and scanners." *Id.*

The Court held that in the course of these activities, "Houghton transforms ideas, art, information, and photographs, by application of human knowledge, intelligence, and skill, into computer disks, ready for use by independent printers, containing an immense amount of information in a highly organized form. We have never required that source materials be tangible." *Id.* at 48.

The Court rejected the Commissioner of Revenue's argument that "Houghton's activities to some extent resemble those of a furniture designer who produces designs used by others to build furniture, or an author who writes and sells a manuscript to a publisher." *Id.* at 49. The Court found a "reasonable basis for distinguishing Houghton's activities." *Id.* In contrast to documents generated by designers and authors, Houghton's completed computer disks and CD ROM tapes, "although having intellectual content, are valuable principally because they are physically useful in making the finished product." *Id.* The Court analogized Houghton's computer disks and CD ROM tapes to "'composition proofs'" and linotype held to be exempt in earlier cases. *Id.*, citing *Houghton Mifflin Co. v. State Tax Comm'n*, 373 Mass. 772, 773, 776 (1977) and *Courier Citizen Co. v. Commissioner of Corps. and Taxation*, 358 Mass. 563, 572-573 (1971.)

In *William F. Sullivan & Co.*, 413 Mass. at 579-80, the Court applied the doctrine that "'processes which themselves do not produce a finished product for the ultimate consumer should still be deemed 'manufacturing' for purposes of this tax exemption so long as they constitute an essential and integral part of a total manufacturing process.'" Citing *Joseph T. Rossi Corp.*, 369 Mass. at 181-82. The taxpayer was a scrap-metal processor, which purchased approximately 50,000 tons of scrap metal from roughly 1000 businesses and individuals per year. Metals were separated for processing, then "sent to either an hydraulic shear, which cuts the scrap to specified lengths, or to a baler, which compresses the scraps into cubes." *William F. Sullivan & Co.*, 413 Mass. at 578. Once processing was concluded, the scrap metal was sold to steel mills and foundries according to customer specifications.

The Court held "that Sullivan's scrap processing operation qualifies for exemption. In our view, Sullivan's operation produces a similar degree of change and refinement to the source materials as did the processes at issue in the wool scouring case and in *Rossi*." *Id.* at 581. The Court went on to elaborate on when activities which stop short of producing an end product can be considered "essential and integral" to an overall manufacturing operation:

This is not to say ... that every process comprising the first step, or a step, in the transformation of some source material into a finished product qualifies as a process which

is an essential and integral part of the total manufacturing process.... To constitute an essential and integral part of the total manufacturing process and to qualify for the exemption, the process under study must effect the kind of change and cause a correlative degree of refinement to the source material as exemplified by the taxpayers' operations in the wool scouring case, **Rossi**, and now, Sullivan's scrap processing operation. **Id.**

Analogizing to the facts of **Houghton Mifflin Co.** and **William F. Sullivan & Co.**, the Board concluded that Onex caused a sufficient degree of refinement to both intangible and tangible source materials so that its activities could be considered "an essential and integral part of the total manufacturing process" which yielded the OMNI chip. Cf. **William F. Sullivan & Co.**, 413 Mass. at 581. As in **Houghton Mifflin Co.**, Onex's engineers carried out "extensive research and development" aimed at organizing and enhancing a vast amount of sophisticated technical data. Cf. **Houghton Mifflin Co.**, 423 Mass. at 43-44. Various engineering equations, scientific data, and numeric specifications had to undergo at least as much processing and refinement as did the ideas which went into the production of the CD ROM tapes and diskettes in **Houghton Mifflin Co.**, in order to create the blueprint for manufacturing the chip. As in **Houghton Mifflin Co.**, the blueprint was stored on computer disks. The blueprint was refined and perfected in laborious operations to ensure the architecture was suitable for producing ONMI chips which performed fully as intended. A further analogy to **Houghton Mifflin Co.** lay in the fact that the blueprints were provided to an independent contractor, who, following the intricate details, fabricated the finished product, ready for sale to telecommunications industry customers. "The work [Onex did] approach[e]d, to the extent humanly possible, creation *ex nihilo*; it [was] quite different from the mere manipulation of information and electric currents" which have been held not to constitute manufacturing. **Houghton Mifflin Co.**, 423 Mass. at 49.

Moreover, the blueprint was not an abstract academic treatise or work of art. It was painstakingly developed because the architecture for the OMNI chip was an essential first step to fabricating the end product which had been envisioned from the very outset. The blueprint was "physically useful in making the finished product." **Id.**

See also **Commissioner of Revenue v. Fashion Affiliates, Inc.**, 387 Mass. 543, 546 (1982) (Process used to create markers for use in dress-making held to be within the scope of manufacturing: "The machinery is used to guide and measure a direct and immediate physical change in the material, a function that is an integral and necessary role in producing properly cut portions of the dresses being manufactured.") The development of the blueprint and the fabrication of the OMNI chip according to its intricate specifications represented a process of transformative change "'wrought through the application of forces directed by the human mind'", out of which came a new commodity with capabilities that had never existed before. **Houghton Mifflin Co.**, 423 Mass. at 46.

Given the big picture view of the manufacturing process taken in the decisions of the Supreme Judicial and Appeals Courts, the Commissioner was unconvincing in his attempt to truncate the overall operations leading up to the production of the OMNI chip. The Commissioner chose to end the audit period based on a circumstance that bore no relationship to the organic process of inventing, manufacturing, and marketing the OMNI chip. The acquisition of Onex by TranSwitch did nothing to interrupt the ongoing activity which began with raw ideas and flowed continuously according to plan to the point that the OMNI chip was commercially available. Thus, only by sub-dividing the overall manufacturing process on the basis of the extrinsic circumstance of corporate ownership was the Commissioner able to argue that Onex was not "engaged in manufacturing". Case law rejects such a balkanized analysis of the complex, multi-step processes entailed in designing and manufacturing the finished product. See generally **Courier Citizen Co. v. Commissioner of Corps. and Taxation**, 358 Mass. 563, 571-72 (1971) (Statutory language "'should not be construed to require the division into theoretically distinct stages of what is in fact continuous and indivisible.'") (Emphasis in opinion) (Citations omitted.)

Finally, the Supreme Judicial Court has held that "the Legislature did not intend to confer a windfall tax exemption on nonmanufacturing corporations that engage in manufacturing 'which is merely trivial or only incidental to its principal business.'" **Fernandes Super Markets, Inc. v. State Tax Comm'n**, 371 Mass. 318, 322 (1976) (Citation omitted.) "[T]he degree of manufacturing must be 'substantial' ... or 'important and material' ... when measured against the entire operations of the corporation." **Id.** (Citations omitted.) The research, development, design, and

manufacture of the OMNI chip was the "principal business" of Onex, if not its only activity. Cf. *id.* Where the OMNI chip was "not a mere sideline, but the heart of the corporate business", the degree of manufacturing is considered to be "substantial" for purposes of the statute. See *Noreast Fresh*, 50 Mass. App. Ct. at 358.

The Board found and ruled that the activities of Onex constituted "an essential and integral part of the total manufacturing process..." under *William F. Sullivan & Co.*, 413 Mass. at 581, and were substantial. See *Noreast Fresh*, 50 Mass. App. Ct. at 357-58. Given this finding, it follows that Onex was "engaged in manufacturing" for purposes of G.L. c. 63, § 42B.

The purchases to which the use tax assessment applied were reflected in corporate records as relating to research and development, and their character as such was accepted by the Commissioner's auditor in his review of corporate books and records. Use tax was separately paid on those purchases deemed to be "administrative" or otherwise not "research and development"-related. Accordingly, the evidence warranted the conclusion that the disputed assessment pertained to items "used directly and exclusively in ... research and development by a manufacturing corporation..." G.L. c. 64H, § 6(r) and (s).<sup>20</sup>

Because the use tax assessment at issue applied to purchases which are exempted by the sales and use tax statutes, it was improper. The Board issued a decision for the appellant, and ordered an abatement of \$136,175 tax, plus statutory additions.

**APPELLATE TAX BOARD**

By: \_\_\_\_\_  
Thomas W. Hammond, Jr., Chairman

A true copy,

Attest: \_\_\_\_\_

Clerk of the Board  
COMMONWEALTH OF MASSACHUSETTS

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<sup>20</sup> The Commissioner argued, for the first time in his reply brief, that Onex had failed to show that the items purchased were used "directly and exclusively ... in research and development..." Given the auditor's meticulous review of Onex's records and his sorting out of research and development-related purchases, the Commissioner's eleventh-hour assertion was unpersuasive. Onex was formed specifically for the research, development, and manufacturing of the OMNI chip, so it is unclear what disqualifying uses of the purchased items the Commissioner could be referring to. Moreover, uses of purchased items which are "de minimis" will not undermine their exempt character. See *Lawrence-Lynch*, ATB Findings of Fact and Report 1997 at 906, n.11.

**COMMONWEALTH OF MASSACHUSETTS**

**APPELLATE TAX BOARD**

**THE FIRST YEARS, INC.            v.            COMMISSIONER OF REVENUE**

Docket No. C267626

Promulgated:  
September 17, 2007

**ATB 2007-1004**

This is an appeal under the formal procedure pursuant to G.L. c. 58, § 2 and G.L. c. 58A, § 6 and § 7, from the refusal of the Commissioner of Revenue ("Commissioner" or "appellee") to grant the Appellant, The First Years, Inc. ("TFY" or "appellant"), classification as a manufacturing corporation for the tax year ended December 31, 2003 ("tax year at issue").

Commissioner Scharaffa heard the appeal and was joined in the decision for the appellant by Chairman Hammond and Commissioners Rose and Egan.

These findings of fact and report are made at the request of the appellee pursuant to G.L. c. 58A, § 13 and 831 CMR 1.32.

*Philip S. Olsen, Esq. and Natasha N. Varyani, Esq.* for the appellant.

*Kevin M. Daly, Esq.* for the appellee.

**FINDINGS OF FACT AND REPORT**

On the basis of a Statement of Agreed Facts and the testimony and exhibits introduced in the hearing of this appeal, the Appellate Tax Board ("Board") made the following findings of fact.

During the tax year at issue, TFY was a Massachusetts corporation with its headquarters in Avon, Massachusetts. TFY was engaged in the business of designing, manufacturing and selling a variety of children's and child-care related products, such as cups, bottles, teethers, baby monitors, breast pumps, bathtubs, and toys. TFY employed approximately 182 employees at its Avon headquarters. Subsequent to the tax year at issue but prior to the hearing of this appeal, TFY was acquired by RC2 Corporation. Kyle Nanna, marketing manager for RC2 Corporation, testified on behalf of TFY and was the sole witness to give

testimony at the hearing. The Board found her testimony to be credible.

Ms. Nanna described TFY's overall operations and product development process, which consisted of several distinct phases. Ms. Nanna testified that the employees were divided into groups by product area, i.e., bath, feeding, play, etc. Each group was headed by a New Product Manager, who, after extensive research, drafted a "concept brief" for each proposed new product. The New Product Manager then worked with a Design Manager to create a detailed sketch of the product. During this phase, the quality and safety tests to which the potential new product should be submitted were determined.

Once the entire product group approved the product, it was then presented to TFY's Product Approval Committee, ("PAC") which was comprised of senior company management. If the PAC approved of the proposed product, models of the product would be created. At this phase of development a model might be a three-dimensional tangible model or a detailed sketch of the product created through computer-assisted design ("CAD"). Models were either designed by an in-house engineer or created by a third-party designer, who worked closely with the New Product Manager during the design phase. All designers were given detailed lists with the specifications for each product as well as the tests that each product should be able to withstand. Whether created by an employee of TFY or a third-party designer, all models were owned by TFY.

Upon completion of the models, TFY conducted additional consumer research and extensive design review, as well as testing of the product. A final model was then commissioned and completed by a third-party designer, which incorporated any changes stemming from the testing or consumer research yielded from the launch of the initial models. TFY employees worked hand-in-hand with these third-parties during the creation of the final model, often working on-site with them in order to oversee the creation of the model. Upon completion, the final model was presented for review by the PAC. If the final model was approved, TFY commenced the tooling and molding process, which is the creation of the tooling and molds that actually mold raw materials into the product on the assembly line. While the tooling and molds were made by third-party contractors, they were made to the specification of TFY and were the property of TFY. After the tooling and molds were completed, the "first shots" of the products went through the production process at a

third-party manufacturer. "First shot" products were then brought back to TFY for further testing, including drop, bite, and impact tests. TFY conducted its own quality testing and at times, also contracted out to independent labs to verify the testing.

Finally, a product that had met all of the quality assurance tests and been given approval by the PAC was produced in bulk by third-party manufacturers, many of whom were located overseas. However, TFY employees closely monitored the manufacturing process, often traveling to the manufacturing location to pull samples from the production line and run quality assurance tests. Additional alterations to the product, ranging from minor changes to significant re-design, were made even at that late stage if the products did not live up to the quality assurance tests conducted by the TFY employees. Ms. Nanna testified that TFY conducted its own extensive and continuous testing and even contracted for independent testing to verify its own test results because TFY was a very safety-conscious company.

On January 31, 2003, TFY filed a Form 355Q Statement Relating to Manufacturing Activities with the Commissioner, seeking classification as a manufacturing corporation for the tax year at issue. On April 15, 2003, the Commissioner issued his list of manufacturing corporations to the local boards of assessors, and TFY was not included on that list. On May 15, 2003, TFY timely filed its Petition with the Board. On the basis of the foregoing, the Board found and ruled that it had jurisdiction to hear this appeal.

As discussed in the Opinion below and to the extent that it is a finding of fact, the Board found and ruled that TFY conducted processes which were essential and integral to the overall manufacturing process, and that therefore it was a corporation engaged in manufacturing during the tax year at issue. The Board found that the appellee's denial of manufacturing classification was improper and that the appellant was entitled to be classified as a manufacturing corporation under G.L. c. 58, § 2 for the tax year 2003, and accordingly, granted such classification to the appellant.

#### **OPINION**

The issue presented in this appeal is whether the appellant was engaged in manufacturing in Massachusetts during the tax year at issue such that it should be classified as a manufacturing corporation for the purposes of G.L. c. 63, § 38C. Classification as a manufacturing

corporation under § 38C entitles a corporation to numerous tax advantages, including the exemption of its property from local taxes (G.L. c. 59, § 5, cl. 8) eligibility for investment tax credits (G.L. c. 63, § 31A) and certain sales and use tax exemptions (G.L. c. 64H, § 6 (r) and (s)). The issue of what it means to be engaged in manufacturing is one which the Board has considered with some frequency, most recently in **Duracell, Inc. v. Commissioner of Revenue**, Mass. ATB Findings of Fact and Reports 2007-903 and **Onex Communications Corp. v. Commissioner of Revenue**, Mass. ATB Findings of Fact and Reports 2007-976. Likewise, the Supreme Judicial Court has considered the issue on numerous occasions. The Board and the court have embraced the basic definition of manufacturing articulated by the court decades ago in **Boston & Me. R.R. v. Billerica**, 262 Mass. 439 (1928), as "[c]hange wrought through the application of forces directed by the human mind, which results in the transformation of some pre-existing substance or element into something different." *Id.* at 444-445. See also **William F. Sullivan & Co., Inc. v. Commissioner of Revenue**, 413 Mass. 576, 579 (1992). In addition, the Supreme Judicial Court has consistently held that the "phrase 'engaged in manufacturing' should not be given a narrow or restrictive meaning." *Id.*, quoting **Joseph T. Rossi Corp. v. State Tax Comm'n**, 369 Mass. 178, 181 (1975). A broad construction of the phrase effectuates the

legislative intent and purpose [behind the statute] to promote the general welfare of the Commonwealth by inducing new industries to locate here and to foster the expansion and development of our own industries, so that the production of goods shall be stimulated, steady employment afforded our citizens, and a large measure of prosperity obtained.

*Id.* at 579, quoting **Assessors of Boston v. Commissioner of Corps. & Taxation**, 323 Mass. 730, 741 (1949). The court has therefore held that:

processes which do not themselves produce a finished product for the ultimate consumer should still be deemed 'manufacturing' for the purposes of this tax exemption so long as they constitute an essential and integral part of a total manufacturing process.

*Id.* at 579-80, quoting **Joseph T. Rossi Corp.** at 181-82.

Further, there is no requirement that the source materials transformed in the manufacturing process be tangible. In **Commissioner of Revenue v. Houghton Mifflin Company**, 423 Mass. 42 (1996), the Supreme Judicial Court upheld the Board's determination that the research, design, writing and artwork created and conducted by the taxpayer's employees, and subsequently placed onto computer disks as final book manuscripts to be published into books by contract publishers, amounted to manufacturing. The court stated that "Houghton transforms ideas, art, information, and photographs, by application of human knowledge, intelligence, and skill, into computer disks, ready for use by independent printers, containing an immense amount of information in a highly organized form." *Id.* at 48.

Despite these expansive interpretations, the Supreme Judicial Court has recognized that in establishing tax exemptions for manufacturing corporations, the "Legislature did not intend to confer a windfall tax exemption on nonmanufacturing corporations that engage in manufacturing 'which is merely trivial or only incidental to its principal business.'" **Fernandes Supermarkets, Inc. v. State Tax Comm'n**, 371 Mass. 318, 322 (1976), quoting **Commissioner of Corps. & Taxation v. Assessors of Boston**, 321 Mass. 90, 97 (1947). Accordingly, "the degree of manufacturing must be 'substantial,' **Commissioner of Corps.** at 97, or 'important and material,' **Assessors of Boston v. Commissioner of Corps. & Taxation**, 323 Mass. 730, 746 (1949), when measured against the entire operations of the corporation." *Id.* at 322. Applying these guidelines to the facts of the instant appeal, the Board found that the activities performed by TFY were essential and integral to the overall manufacturing process and that TFY was engaged in manufacturing to a substantial degree.

The evidence of record reflects that TFY employees were integrally involved in every step of the product creation process, from the conception of an idea for a new product through the completion of the final product offered for sale to consumers. TFY employees were responsible for proposing new products, conducting extensive background and consumer research for any proposed new product, creating and/or overseeing the creation of intricate preliminary models, establishing the regimen of tests for a proposed new product, conducting the testing of the product and overseeing independent testing of the product, overseeing the creation of the "final model," overseeing the tooling and molding process, and finally, auditing the final

product manufacturing process and conducting quality assurance tests even during this final stage. At any point in the process if the product did not satisfy quality assurance tests conducted by or on behalf of TFY, TFY re-directed the design of the product, from minor to significant changes. TFY employees were so involved in the manufacturing process that they often worked on-site at the third-party manufacturer's location during that process. The property involved in the manufacturing process belonged to TFY, including the original models and the tooling and molds used to make the final products.

Based on these facts, the Board found that the activities undertaken by TFY amounted to "the application of forces directed by the human mind, which result[ed] in the transformation of some pre-existing substance or element into something different." **Boston & Me. R.R. v. Billerica** at 444-445. Much like the taxpayer in **Houghton Mifflin**, TFY transformed "ideas, art, information and photographs, by application of human knowledge and skill, into [designs, models, molds and tooling], ready for use by independent [manufacturers], containing an immense amount of information in a highly organized form." **Houghton Mifflin** at 48.

The appellee argued in this case, as he did in **Houghton Mifflin**, that the taxpayer's activities were more like those of an author who furnishes a manuscript to be published or a furniture designer who merely produces designs used by others to build furniture. **Id.** at 49. In **Houghton Mifflin**, the Supreme Judicial Court agreed that authors or furniture designers should not be considered "manufacturers," but found a "reasonable basis for distinguishing Houghton's activities." **Id.** at 49. That basis, as the appellee pointed out in attempting to distinguish **Houghton Mifflin** from the instant appeal, was that the completed computer disks generated by Houghton were "physically useful in making the finished product." **Id.** at 49. The appellee argued that TFY produces nothing comparable to the computer disks, and therefore, cannot be considered to be engaged in manufacturing.

On the contrary, the evidence showed that among the many activities engaged in by TFY during the product creation process was the design and creation of custom tooling and molds, with the resulting tooling and molds being used directly in the actual manufacture of the final products. Although TFY contracted out the actual production of the tooling and molds, such tooling and molds were created under its oversight and to its exact

specifications, and also became the property of TFY upon completion. The tooling and molds were then sent by TFY, along with elaborate design specifications, to the contract manufacturer for use in the manufacture of the ultimate product. The Board found, as the Supreme Judicial Court held in **Houghton Mifflin**, that this was "similar to the dress cutting 'markers'... used 'directly and exclusively' in the manufacture of dresses in **Commissioner of Revenue v. Fashion Affiliates, Inc.**, 387 Mass. 543, 545-46 (1982)..." **Id.** at 49.<sup>21</sup> In **Fashion Affiliates**, the court held that the computer system whose exemption from tax was at issue was used directly and exclusively in the actual manufacture of dresses when it was used to produce dress patterns on paper markers, which were then transferred for use onto the actual fabric for the mass production of dresses. The court held that the system was used to "guide and measure a direct and immediate physical change in the material, a function that is an integral and necessary step in producing properly cut portions of the dresses being manufactured." **Id.** at 546. Similarly, the tooling and molds designed, commissioned and owned by TFY were used to guide, measure and mold the raw materials into the completed products to be sold. The Board found and ruled that this was an integral and necessary role in the manufacture of TFY's products.

Furthermore, the Supreme Judicial Court has held that the testing of products can be an essential and integral part of the manufacturing process in and of itself, so long as it is a necessary part of bringing the products to market. **Associated Testing Laboratories, Inc. v. Commissioner of Revenue**, 429 Mass. 628, 630 (1999). This is true regardless of whether the testing is performed by a different entity or at a different location than the other manufacturing activities. **Id.** at 631. The evidence of record reflects the extensive and continuous product testing performed by TFY at all stages of the product development process. TFY engaged in substantial quality assurance testing and further contracted out for additional independent testing to verify its own test results. Given that the vast majority of TFY's products were consumer products oriented for use by infants and children, product safety was of paramount importance. The Board therefore

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<sup>21</sup> The court acknowledged in **Houghton Mifflin** when discussing **Fashion Affiliates** that **Fashion Affiliates** involved a sales and use tax exemption, rather than the investment tax credit at issue in **Houghton Mifflin**. However, as in the instant appeal, which involves neither a credit nor a sales and use tax exemption but manufacturing classification, the analysis is relevant in that the ultimate question addressed by the court was what activities constituted manufacturing.

found and ruled that the testing engaged in by TFY constituted an essential and integral part of the manufacturing process.

The appellee argued that TFY's activities were more in the nature of research and development and were prerequisites to the manufacturing process rather than part of that actual process. The evidence cannot support such a finding. As discussed above, TFY's employees were involved continuously in the product creation process, from the conception of a proposed product to the quality testing of the final, manufactured products. Unlike in **Electronics Corporation of America v. Commissioner of Revenue**, Mass. ATB Findings of Fact and Reports, 1995-202, 212, where the Board found that the taxpayer's "design and creation of the prototypical products [were] not 'manufacturing,' but rather, more in the nature of research and development," and therefore, based on the facts of that appeal, "preliminary to the actual manufacturing process," TFY's activities cannot properly be labeled as merely prerequisite to the manufacturing process when they occurred throughout the entire process. Moreover, as the Board recently stated in **Duracell, Inc.**, research and development and manufacturing activities are not mutually exclusive. **Duracell, Inc.** at 921. While G.L. c. 63, § 38C makes a distinction between research and development and manufacturing, it also acknowledges that a corporation can simultaneously be engaged in both research and development and manufacturing activities, when it states, in pertinent part,

A corporation that is engaged in research and development and that conducts manufacturing activities shall exclude expenditures related to manufacturing from total expenditures for the purpose of assessing whether 2/3 of expenditures are allocable to research and development...

As noted above, the Board was careful to limit its findings in **Electronics Corporation of America** to only the facts of that appeal. Therefore, the Board found no merit in the appellee's argument that TFY's activities were more in the nature of research and development than manufacturing.

The appellee further argued that TFY's activities were limited to the "mere transmission or manipulation of knowledge or intelligence." See **First Data Corp. v. State Tax Comm'n**, 371 Mass. 444, 447-48 (1976). Again, the evidence does not support this assertion, but rather demonstrated that TFY's activities involved a physical

component beyond the mere manipulation of knowledge or intelligence. TFY designed and owned the tooling and molds used by the contract manufacturers in the manufacture of the ultimate products. The tooling and molds directly shaped and transformed the raw materials into the completed products. In addition, TFY employees conducted hands-on quality assurance testing during all phases of the manufacturing process, including pulling random products from the manufacturing plant and conducting testing. The Board found that these activities were different from those of the taxpayer in **First Data Corp.**, which operated a "commercial on-line, real-time computer time sharing system," that took certain information supplied by First Data's customers and transmitted back to the customers, via electrical impulses carried on telephone lines, that same information applied to a certain purpose, e.g., payroll data or the like. *Id.* at 445-446. TFY produced and sold hundreds of different children's and child-care related products, and its activities encompassed physical interaction with raw materials which ultimately resulted in the creation of a tangible product. Therefore, the Board found and ruled that its activities were not limited to the "mere transmission or manipulation of knowledge or intelligence."

Finally, to qualify for manufacturing classification, a corporation must show that it was engaged in manufacturing to a substantial degree, rather than manufacturing which was merely trivial or incidental to its main business. See **Fernandes Supermarkets, Inc.** at 322, citing **Commissioner of Corps. & Taxation** at 97. While the Commissioner's regulation sets forth four specific numerical tests for determining whether a corporation's manufacturing activities are substantial, the regulation also provides that a corporation can demonstrate through other criteria that its manufacturing activities were substantial. 830 CMR 58.2.1(6)(d). TFY was engaged in the business of designing, manufacturing and selling its line of children's and child-care related products, and derived all of its receipts from the sale of those products. Since its receipts depended entirely on producing and bringing its products to market, it cannot be said that the manufacturing of those products was merely incidental to TFY's principal business. Given that the relevant products were "not a mere sideline, but the heart of the corporate business", the degree of manufacturing is considered to be 'substantial' for purposes of the statute." **Onex Communications Corp.** at 1002, quoting **Noreast Fresh, Inc. v. Commissioner of Revenue**, 50 Mass. App. Ct. 352, 358

(2000). As discussed above, the Board found and ruled that the activities conducted by TFY at its Massachusetts headquarters were essential and integral to the manufacturing process. The Board therefore found and ruled that TFY was engaged in manufacturing to a substantial degree in Massachusetts.

#### **CONCLUSION**

Based on all of the foregoing, the Board found and ruled that TFY was "engaged in manufacturing" for the purposes of G.L. c. 63, § 38C during the tax year at issue, and therefore was entitled to be classified as a manufacturing corporation under G.L. c. 58, § 2 for the tax year 2003. Accordingly, the Board granted such classification to the appellant.

#### **APPELLATE TAX BOARD**

**By:** \_\_\_\_\_  
Thomas W. Hammond, Jr., Chairman

**A true copy,**

**Attest:** \_\_\_\_\_  
Clerk of the Board

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

THE SKATING CLUB OF  
BOSTON

v.

BOARD OF ASSESSORS OF  
THE CITY OF BOSTON

Docket Nos. F276938  
F277905

Promulgated:  
March 7, 2007

**ATB 20007-193**

These are appeals under the formal procedure pursuant to G.L. c. 59, §§ 64 and 65 from the refusal of the appellee to abate taxes on certain real estate in the City of Boston under G.L. c. 59, § 38 for fiscal years 2004 and 2005.

Former Chairman Foley heard the appeals and was joined in the decision for the appellee by Commissioners Scharaffa, Gorton, Egan, and Rose.

These findings of fact and report are made at the requests of the appellant and the appellee pursuant to G.L. c. 58A, § 13 and 831 CMR 1.32.

Lawrence S. Delaney, *Esq.* and Stephanie T. Siden, *Esq.*  
for the appellant.

*Laura Caltenco, Esq.* for the appellee.

**FINDINGS OF FACT AND REPORT**

On the basis of testimony and exhibits introduced at the hearing of these appeals, the Appellate Tax Board ("Board") made the following findings of fact.

On January 1, 2003, and January 1, 2004, The Skating Club of Boston ("appellant") was the assessed owner of a parcel of real estate located at 351 Western Avenue in the City of Boston<sup>22</sup> ("subject property") upon which the appellant operates a figure-skating club also known as The Skating Club of Boston ("Club"), a member club of the United States Figure Skating Association ("USFSA").

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<sup>22</sup> The subject property's mailing address, utilized by the parties in various pleadings relating to these appeals, is 1240 Soldier's Field Road, which also borders the subject property and runs approximately parallel to Western Avenue.

The subject property consists of an 83,843 square-foot parcel<sup>23</sup> improved with a 29,398 square-foot facility that resembles an aircraft hangar. The building houses a skating rink, locker rooms, a lounge/viewing area, a "rotch room,"<sup>24</sup> an office, and other areas used primarily for rink access and housing of mechanical systems. There is also commercial space, which during the relevant periods was occupied by two for-profit enterprises: the Metrowest Grille, which operated as a snack bar and caterer for the Club; and Skaters Landing LLC, a shop that sharpened and sold skates and skating apparel.<sup>25</sup>

For fiscal years 2004 and 2005 ("the years at issue"), the Board of Assessors of the City of Boston ("assessors") valued the subject property and assessed taxes thereon as follows.

Docket No.	Fiscal Year	Assessed Value	Tax Rate/\$1000	Tax Assessed
F276938	2004	\$1,804,600	\$33.08	\$59,696.17
F277905	2005	\$1,804,600	\$32.68	\$58,974.33

The appellant paid the assessed taxes without incurring interest and timely applied to the assessors for abatement of the taxes and exemption of the subject property pursuant to G.L. c. 59, § 5, Third. The appellant also timely filed "Forms 3 ABC" with attached copies of "Form PC" for the years at issue.<sup>26</sup>

<sup>23</sup> This figure is consistent with the City of Boston's records which reflect total square footage of 135,895 square feet for the subject property and the adjoining parcel, which is also owned by the appellant. The sum does not comport with an uncertified copy of a deed reflecting conveyance of a single parcel to the appellant in 1938, containing both the subject property and the adjoining parcel, and consisting of 138,800 square feet. The record before the Board does not account for this discrepancy. Based on lack of information as to events following the 1938 transfer and the updated nature of the City's records, the Board adopted the City's square footage of the subject property.

<sup>24</sup> The rotch room is a multi-purpose room used for meetings and storage. It is also available to rent for events such as birthday parties.

<sup>25</sup> The Board noted that the space occupied by these commercial enterprises would not have qualified for exemption, regardless of whether the Club had been afforded exempt status. See *Lynn Hospital v. Board of Assessors of Lynn*, 383 Mass. 14 (1981).

<sup>26</sup> The assessors contested the adequacy of the appellant's "Form PC" relating to fiscal year 2005, noting that the signature line following schedules A-1 and A-2 contains no signatures. The Form PC in question was timely filed and signed by the appellant's treasurer on the page preceding schedules A-1 and A-2, directly under the statement "(u)nder penalty of perjury, I declare that the information furnished in this report, including all attachments, is true and

The assessors denied both of the appellant's applications, and the appellant seasonably filed petitions with the Board seeking abatement of the full amount of taxes assessed based on its claim of exemption for the subject property. The pertinent filing and denial dates are set forth in the following table.

Docket No.	Fiscal Year	Abatement Application Filed	Abatement Application Denied	Appeal Filed with Board
F276938	2004	04/28/04	07/28/04	10/26/04
F277905	2005	01/18/05	04/18/05	05/03/05

On the basis of the foregoing, the Board found that it had jurisdiction over the present appeals.

The appellant was organized as a Massachusetts corporation in 1912 under G.L. c. 125, the predecessor to G.L. c. 180. In September, 2002, the appellant filed Articles of Amendment pursuant to G.L. c. 180, section 7 specifying organization "exclusively for charitable . . . purposes within the meaning of section 501(c)(3) of the Internal Revenue Code. . . ." The Amendment also provides that no part of the appellant's net earnings may inure to the benefit of, or be distributed to any private person, individual or member. Further, upon dissolution, the appellant's net assets are to be distributed for charitable purposes.

The appellant was granted Internal Revenue Code ("Code") § 501(c)(3) status on September 16, 2002. On October 8, 2002, the appellant was issued a Certificate of Exemption, Form ST-2, by the Massachusetts Department of Revenue, affording exemption from sales tax on its purchases of tangible personal property.

The appellant's Constitution, as amended May 16, 2003, states that "[t]he object of the Club shall be to foster good feeling among its members and promote interest in the art of skating." The amended Constitution also provides that "[t]he use of the property of the Club shall be restricted to the members and their guests excepting to the extent the Board of Governors may in its discretion determine that other use is necessary in order to maintain

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correct to the best of my knowledge." To the extent necessary to establish the Board's jurisdiction, the Board found that this signature constitutes "verification under oath" of the form as prescribed by G.L. c. 12, § 8F.

unimpaired the financial position of the Club." In its fiscal year 2004 Form 3 ABC, "Return of Property Held for Charitable Purposes," the appellant states that its primary purpose is to "develop amateur figure skaters to compete in regional, sectional, national, and international and Olympic competitions."

The Club operates year round, and is open to members and non-members. Its "Club Season" runs from fall through spring, and the summer season comprises the balance of the year, from June through August. The Club is open for skating approximately one hundred and thirty hours per week, from five or five-thirty in the morning to between ten-thirty and midnight each day. Days are broken down into skating sessions, typically of fifty-minutes duration, and geared toward a particular type and skill level of skating. For instance, a session may be dedicated to "ice dance," "pairs skating" or "free skating" at different skill levels. The Club regulates the number and ability of skaters on the ice at any given time to ensure their safety. Individuals who skate at the Club are required to wear figure skates, with the following exceptions: "pick-up hockey" sessions, which are scheduled late at night; certain Club-sponsored skating classes; and "Public Skate" sessions, which total approximately four hours per week.

During the Club Season, approximately twenty-five percent of weekly sessions are reserved for members only. The balance may be attended by non-members. During the summer of fiscal year 2004, the entire ice schedule was open to both members and non-members. For fiscal year 2005, four hours per week in the summer were reserved for members' use.

Mr. Naphtal, the appellant's treasurer and primary witness, testified that during the years at issue, individual member and non-member sessions during the winter totaled approximately 1,800 per week. In the summer, sessions totaled between 1,400 and 1,500 per week. He estimated that there were between 680 and 900 individual non-member skating sessions each week throughout the year. During the summer, the number of non-member sessions tended toward 700 per week, and during the winter, the number was closer to 900 per week.

The Club offers several types of memberships, primarily grouped into two categories, Regular and

Special.<sup>27</sup> The annual membership fee for Regular Memberships ranges from \$125.00 to \$395.00, accompanied by a one-time "entrance fee" of up to \$200.00. Regular members must also purchase a \$400.00 "bond," which is a refundable sum retained against the possibility of non-payment of any fees owed to the Club. Regular members must also purchase six or twelve dinners and five or ten "Ice Chips" tickets per year, depending upon the membership sub-category. Members are billed twenty dollars for each unused dinner or "Ice Chips" ticket.

Annual membership fees for Special Memberships range from \$100.00 to \$270.00, with "entrance fees" up to \$150.00. Certain Special Memberships are subject to the \$400.00 bond and require the purchase of dinners and "Ice Chips" tickets.

With the exception of several weekly "Club Sessions" and the "Public Skate" sessions, membership fees do not include skating time, for which a separate charge is made. During the years at issue, skating time cost between seven and thirteen dollars per fifty-minute session for non-members, the majority of sessions falling within the higher end of this range. Members were charged two dollars less per session than non-members. Skaters could also reserve or "contract" for ice time to ensure availability during desired sessions. Contracted sessions cost two dollars less than "walk-on," or non-contracted sessions, for both members and non-members.

Prospective members must be sponsored by two Club members and complete the Club's membership application. The application requests a variety of information including a prospective member's occupation, education, participation in social and civic organizations, knowledge of the Club, and affiliation with any other USFSA skating club.

Prior to submission of a prospective member's application, the applicant must attend at least two Friday night dinners or Club brunches and be introduced to the Club's Officers and Governors as a prospective member. While the application is considered, letters of recommendation, members' comments and other information may be submitted to the Committee on Admissions, which approves or denies the application at a meeting of the Board of Governors. Prior to action on an application, an

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<sup>27</sup> Regular memberships include: Family; Single (over 18 years); Family (non-skating); Single (non-skating); Supporting (Family); and Supporting (Single). Special memberships include: Ice Theater; Junior; Non-Resident Family; Non-Resident Single; Regular Membership for Meritorious Service; Supporting (Non-Skating); and Synchronized Skating.

applicant's name and address must be posted at the Club for at least two weeks. Mr. Naphtal testified that to his knowledge, no membership application had been declined during the ten years preceding the hearing of these appeals.

Members, *inter alia*, receive a Member Handbook ("Handbook"), which contains several sections describing the rules of the Club as well as its history and structure. One section of the Handbook, entitled "Champions," lists decades of individuals' placement in competitions commencing at the Club level and proceeding through the New England Regional Championships up to the Olympic Games and World Championships. The "History" section of the Handbook provides, in part, that "the greatest activity and contribution of the Club has been in competition. . . ."

The Club sponsors several competitive figure skating events and exhibitions including the Boston Open, a competition open to the general public which typically attracts approximately 400 participants of all skill levels from the New England area. The Club also holds an annual Basic Skills Competition in which 400 to 500 skaters compete. This competition is designed for children with a low level of skill, and is open to both members and non-members.

The Club sponsors an exhibition called Ice Chips, which includes member skaters of all levels, from beginner to Olympic, and is held at either Boston University or Northeastern University to accommodate the large audience. The Club donates the profit from the show to the Make-a-Wish Foundation and Children's Hospital Boston.

The Club's Friday night dinners are accompanied by skating exhibitions to allow skaters of various abilities to exhibit their programs in front of an audience in preparation for competition or other exhibitions, and to allow prospective members to become oriented to the Club.

The Club hosts The Skating School of Boston, a USFSA affiliated "Basic Skills Program" that provides classes at the Club to a range of students from beginners who have never skated to those who can complete advanced jumps and spins. All students must enroll in the USFSA for a fee of five dollars. The Club also offers a "US Figure Skating Basic Skills Bridge Program," which is intended to serve as a bridge between Basic Skills classes and private lessons. Skaters may take private lessons from coaches who are appointed at the discretion of the Board of Governors and

must pay coaches' fees of \$1,100.00 or \$600.00 per year depending on the frequency of lessons provided at the Club. Access to and fees for the Basic Skills and Bridge programs are not dependent upon whether an individual is a member or a non-member.

The Club also offers free ice time to the Genesis Program, which teaches handicapped children how to skate. Those who skate in the Genesis Program need not be Club members.

The Club sponsors skating tests sanctioned by the USFSA. A skater who wishes to take one of these tests must be a member of the USFSA, and pay a fee ranging from \$15.00 to \$40.00 per test. Test-takers who are not members of the Club must also pay the Club's hospitality fee of \$15.00.

In his testimony, Mr. Naphtal stated the Club's preference that all skaters who use the facility become members. Consistent with this preference, the Club's informational pamphlet, entitled "A Skating Tradition. . . The Skating Club of Boston" ("Pamphlet")<sup>28</sup> promotes various attributes of membership, and prominently states that "Membership has its benefits." In particular, the Pamphlet references social events including Friday night dinners, skating parties, anniversary and reunion dinners, and holiday gatherings.

The Pamphlet also highlights the Club's prominence as a source of national and international judges as well as competitors and officials. As one of several answers to the question "What makes membership in our Club so special?," the Pamphlet states that the membership owns the Club and directs how the ice-skating facilities are used.

The Pamphlet makes no mention of any potential use of the Club by non-members. Similarly, no evidence presented indicates that the Club advertised the availability of its facilities for use by the general public.

The Club offers financial assistance to members and non-members in two forms. One form is the provision of stipends to individuals who enter figure-skating competitions. Approximately seventeen percent of Club dues go toward this purpose. Since 2002, after the Club was granted Code § 501(c)(3) status, the Club has offered "hardship scholarships" to those who could not otherwise afford to utilize its facilities. The sole publication indicating the availability of these scholarships is the

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<sup>28</sup> Absent contradictory evidence in the record, the Board found that the information contained in the Pamphlet was representative of informational documents published by the Club during the relevant periods.

Club's membership application which discusses financial assistance on its last page. During the years at issue, the Club offered four such scholarships accounting for between three and four percent of Club dues.

Based on the foregoing, and to the extent it is a finding of fact, the Board found that the appellant failed to meet its burden of proving that it was a charitable organization occupying the subject property for charitable purposes as required by G.L. c. 59, § 5, Third. In particular, the appellant did not demonstrate that it operated to further a charitable purpose, provide for the benefit of an indefinite number of persons, or lessen the burdens of government.

Accordingly, and for the reasons detailed in the following Opinion, the Board denied the appellant's abatement requests for fiscal years 2004 and 2005 and issued decisions for the appellee.

#### **OPINION**

Massachusetts General Laws impose a local tax upon "[a]ll property, real and personal, situated within the commonwealth, . . . unless expressly exempt." G.L. c. 59, § 2. Section 5 of Chapter 59 specifies classes of property which "shall be exempt from taxation." The clause relevant to these appeals, G.L. c. 59, § 5, Third, exempts from taxation all "real estate owned by or held in trust for a charitable organization and occupied by it or its officers for the purposes for which it is organized. . . ."

"A corporation claiming that its property is exempt under § 5, Third, has the burden of proving that it comes within the exemption, and that it is in fact operated as a public charity." **Town of Norwood v. Norwood Civic Association**, 340 Mass. 518, 525 (1960) (citing **American Inst. For Economic Research v. Assessors of Great Barrington**, 324 Mass. 509, 512-14 (1949)). Moreover, "statutes granting exemption from taxation are strictly construed." **Animal Rescue League of Boston v. Assessors of Bourne**, 310 Mass. 330, 332 (1941). Thus, "[a] taxpayer is not entitled to an exemption unless he shows that he comes within either the express words or the necessary implication of some statute conferring this privilege upon him.'" **Milton Hospital & Convalescent Home v. Board of Assessors of Milton**, 360 Mass. 63, 67 (1971) (quoting **Animal Rescue League of Boston**, 310 Mass. at 332).

"An institution will be classed as charitable if the dominant purpose of its work is for the public good and the

work done for its members is but the means adopted for this purpose." **Massachusetts Medical Society v. Assessors of Boston**, 340 Mass. 327, 332 (1960). If, however, the dominant purpose of its work is to benefit the members, such organization will not be classified as charitable, even though the public will derive an incidental benefit. **Id.** The appellant must prove that "it is in fact so conducted that in actual operation it is a public charity" not a mere pleasure, recreation or social club or mutual benefit society. **Jacob's Pillow Dance Festival, Inc. v. Assessors of Becket**, 320 Mass. 311, 313 (1946) (citing **Little v. Newburyport**, 210 Mass. 414, 415 (1912)); see also **Rockridge Lake Shores Property Owners' Association v. Board of Assessors of Monterey**, ATB Findings of Fact and Reports 2001-581; **Marshfield Rod & Gun Club v. Assessors of Marshfield**, ATB Findings of Fact and Reports 1998-1130.

The Supreme Judicial Court has described a charity as a gift "for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government." **Boston Symphony Orchestra v. Board of Assessors of Boston**, 294 Mass. 248, 254-55 (1936) (citing **Jackson v. Phillips**, 14 Allen 539). Charity may also encompass new forms, but "the more remote the objects and methods become from the traditionally recognized objects and methods the more care must be taken to preserve sound principles and to avoid unwarranted exemptions from the burdens of government." **Boston Chamber of Commerce v. Assessors of Boston**, 315 Mass. 712, 718 (1944).

Consistent with this precedent, a charitable organization must ensure that "the persons who are to benefit are of a sufficiently large or indefinite class so that the community is benefited by its operations." **Harvard Community Health Plan, Inc. v. Assessors of Cambridge**, 384 Mass. 536, 543 (1981) (citing **Children's Hospital Medical Center v. Board of Assessors of Boston**, 353 Mass. 35, 44 (1967), **Assessors of Boston v. Garland School of Home Making**, 296 Mass. 378, 388-89 (1937), and 4 A. Scott, **Trusts** at 2897-98 (3d ed. 1967)). Another important factor to be considered is whether the operation of the organization "lessen[s] any burden government would be under any obligation to assume.'" **Western Massachusetts Lifecare Corp. v. Board of**

**Assessors of Springfield**, 434 Mass. 96, 102 2001) (quoting **Boston Chamber of Commerce**, 315 Mass. at 717).

In the present appeals, the appellant was organized as a charitable corporation pursuant to its Articles of Amendment, specifying organization "exclusively for charitable . . . purposes. . . ." and was granted Code § 501(c)(3) tax-exempt status as well as exemption from sales tax. While an organization's § 501(c)(3) status is a factor in determining whether the organization is charitable within the meaning of G.L. c. 59, § 5, Third, it is not dispositive. See, e.g., **H-C Health Services v. Board of Assessors of South Hadley**, 42 Mass. App. Ct. 596, rev. denied, 425 Mass. 1104 (1997). "The mere fact that the organization claiming exemption has been organized as a charitable corporation does not automatically mean that it is entitled to an exemption for its property. . . . Rather, the organization 'must prove that it is in fact so conducted that in actual operation it is a public charity.'" **Western Massachusetts Lifecare Corp.**, 434 Mass. at 102 (quoting **Jacob's Pillow Dance Festival, Inc.**, 320 Mass. at 313).

The appellant asserts that it does, in fact, conduct the Club's operation as a public charity. It claims that its charitable purpose is to promote figure skating, both recreationally and competitively, among the citizenry of the greater Boston area. In support of its assertion, the appellant emphasizes its accessibility to and substantial use by the general public and its significant role in assisting individuals to learn to skate, including members of the Genesis Program. The appellant also states that figure skating offers invaluable life lessons to children and adults, teaches discipline and commitment, and keeps both children and adults physically and mentally fit.

The appellant further states that though there are costs associated with membership, an applicant's inability to pay membership fees is not a bar to membership. In this regard, the Club states that it provides financial aid, in the form of hardship scholarships, to those applicants who require financial assistance.

The Board acknowledges that the appellant promotes and encourages figure skating, which is a beneficial pursuit, both physically and emotionally. Neither is there a dispute that the public has access to the Club's facilities or that the Club offers skating lessons to both members and non-members. These facts do not,

however, adequately address the central issue of whether, when the record before the Board is viewed as a whole, the appellant has demonstrated that its operation is charitable within the meaning of G.L. c. 59, § 5, Third.

As a threshold matter, the Board found the Club's Constitution, as it relates to the use of the appellant's property, is explicitly restrictive and inherently exclusionary. In pertinent part, it provides that "[t]he use of the property of the Club shall be restricted to the members and their guests excepting to the extent the Board of Governors may in its discretion determine that other use is necessary in order to maintain unimpaired the financial position of the Club." This language, which was adopted by the appellant during the years at issue, after it was granted Code § 501 (c)(3) tax exempt status, provides for public use only to ensure the Club's financial stability. The Board found and ruled that such restrictive language is inherently incompatible with the inclusionary nature of a charitable organization. Further, it substantially undermines the appellant's assertion that its corporate documents support its charitable purpose. See **Assessors of Boston v. The Vincent Club**, 351 Mass. 10, 12 (1966) (opining that an organization's classification as charitable in part "depends upon 'the language of its charter or articles of association, constitution and by-laws. . . .'" (citing **Henry B. Little v. City of Newburyport**, 210 Mass. 414, 415 (1912))).

In **Healthtrax Int'l et al. v. Board of Assessors of the Town of Hanover and South Shore YMCA**, ATB Findings of Fact and Reports 2001-366, *aff'd*, 56 Mass. App. Ct. 1116 (2002), the Board considered and affirmed the exempt status of athletic facilities operated by the South Shore Young Men's Christian Association ("SSYMCA"). Having discussed the facilities and various SSYMCA programs in substantial detail, the Board found that:

SSYMCA provided compelling evidence that it reached out to the community at large through inclusive financial aid policies, and programs tailored to a wide demographic of adults, teens, children and the disabled of all ages. SSYMCA demonstrated that, through its programs and activities at the Mill Pond facility, it emphasized its charitable purpose of strengthening the individual, family, and community through development of the mind, the body and the spirit.

*Id.* at 400.

SSYMCA's dominant purpose of developing "well balanced individuals, strong and healthy families and a strong and healthy community" was evident in numerous facets of its operation, which fostered the "balance of body, mind, and spirit" of its members. *Id.* at 380 and 383. These facets included, *inter alia*, sponsorship of child care, day camps, various supervised programs for children and young adults, family events, and education regarding "core values of caring, respect, honesty, and responsibility." *Id.* at 378.

In contrast, in the present appeals, the Board found that the appellant has demonstrated simply that it promotes the sport of figure skating, with a strong emphasis on competition from the most elementary levels through the Olympics. This emphasis is reflected in various documents and the Club's operation. For example, the Club's fiscal year 2004 Form 3 ABC states that its primary purpose is to "develop amateur figure skaters to compete in regional, sectional, national, and international and Olympic competitions." The "History" section of the Handbook provides, in part, that "the greatest activity and contribution of the Club has been in competition. . . ." Further, the Club sponsors competitions including the Boston Open and the Basic Skills Competition. Even the exhibitions accompanying the Club's Friday night member dinners are presented, in part, in anticipation of competition.

The primacy of competition is also evident in the manner in which the Club allocates financial assistance. More specifically, the vast majority of assistance provided by the Club is given in the form of stipends to those who enter figure-skating competitions. These stipends account for approximately seventeen percent of Club dues. Hardship scholarships, which support accessibility to the Club's facility and only four of which were granted during the years at issue, amount to between three and four percent of Club dues. This allocation of Club resources does not reflect an emphasis on the public good, but on the narrow pursuit of competitive figure skating. Such pursuit cannot reasonably be characterized as a gift "for the benefit of an indefinite number of persons. . . ." as contemplated by the Court in *Boston Symphony Orchestra*, 294 Mass. at 254-55.

Costs are hardly insignificant for those who use the Club's facilities with any frequency. Based on the Club's

fees for ice time, a non-member who skates one fifty-minute session per week would spend hundreds of dollars each year. Lessons, group or private, or USFSA testing would substantially increase this sum. Members incur additional fees, not only for membership, but for associated social amenities as well. Competitive skaters can easily incur thousands of dollars of expenses per year, given their requirement of significant ice time and coaching. Need based financial assistance, which may mitigate expenses, is not well publicized, and the Club's membership application contains the sole reference to such aid. Moreover, hardship scholarships were meted out quite infrequently during the years at issue.

Although charging fees for services will not necessarily preclude an organization's charitable status, (See, e.g., **New England Sanitarium v. Inhabitants of Stoneham**, 205 Mass. 335, 342 (1910)), the Supreme Judicial Court has found that providing services at a relatively low cost, thereby making services available to a broader spectrum of the community, supports a finding that an organization provides a charitable service. See **Harvard Community Health Plan**, 384 Mass. at 540. The Court's attention to the costliness of fees reflects the well-established principle that "selection requirements, financial or otherwise, that limit the potential beneficiaries of a purported charity will defeat the claim for exemption." **Western Massachusetts Lifecare**, 434 Mass. at 104 (citing **Boston Symphony Orchestra**, 294 Mass. at 255-56 (finding that the charitable exemption was properly denied where an educational organization charged substantial admission fees and gave seating preferences to season ticket holders)).

The Board did not conclude that the fees charged by the Club necessarily limit its potential beneficiaries, thereby precluding charitable classification. Regardless, the fees charged are substantial, and the appellant did not demonstrate that fees were maintained at relatively low cost, thereby enhancing accessibility to its facility. Consequently, the Board found and ruled that the fees collected by the appellant did not support its claim for exemption.

The appellant claims that the Club operates in an egalitarian manner and is freely accessible to all. The evidence presented, however, does not adequately support this characterization. The Club's informational Pamphlet emphasizes the many benefits of membership. It states that the membership owns the Club and directs how the ice

skating facilities are used, thereby implicitly promoting the Club's exclusivity. Further, it touts the social benefits associated with membership as well as skating related amenities. Moreover, the Pamphlet makes no mention of non-members' ability to use its facilities. Neither is there any indication that the Club advertises the availability of its facilities to the general public. Indeed, no evidence presented by the appellant provided insight as to how a member of the community-at-large would be apprised of the public's access to the Club. These facts are wholly consistent with Mr. Naphtal's testimony regarding the Club's preference that all who use the facility become members, and inconsistent with the nature of a charitable organization, the dominant purpose of which is for the public good and not merely to benefit its members. See **Massachusetts Medical Society**, 340 Mass. at 332.

Notwithstanding Mr. Naphtal's testimony that no applicant has been declined for membership for over a decade, the Board found that membership itself is not simply open to all as claimed by the appellant. The application process is inherently daunting, requiring sponsorship by two Club members, and submission of personal information including one's occupation, education, and participation in social and civic organizations. Prior to submission of an application, the applicant must attend at least two Friday night dinners or Club brunches and be introduced to the Club's Officers and Governors as a prospective member. While an application is considered, letters of recommendation, members' comments and other information may be submitted to the Committee on Admissions, which may approve or deny the application. Moreover, prior to action on an application, an applicant's name and address must be posted at the Club for at least two weeks. Together with the financial commitment required of members, these facts again speak to the Club's exclusivity and not its work for the public good. **Id.**

The appellant also argues that the Club lessens the burden of government by providing skating classes, offering a skating venue, and encouraging participation in the Olympics. However beneficial providing access to and promoting figure skating may be, the Board can discern no aspect of the Club's operation which "lessen[s] any burden government would be under any obligation to assume." **Western Mass Lifecare**, 434 Mass. at 105 (quoting **Boston Chamber of Commerce**, 315 Mass. at

717. Consequently, the Board finds this argument unavailing.

The appellant relies, in part, on **MCC Management Group, Inc. v. Board of Assessors of the City of New Bedford**, ATB Findings of Fact and Reports 2000-886, for the proposition that its operation lessens the burden of government. The Board ruled that this reliance was misplaced. In **MCC Management Group, Inc.**, the Board found and ruled that a skating rink and adjoining land qualified as a park within the meaning of G.L. c. 59, § 2B, and that its occupancy by the appellant, a for-profit entity which operated the rink, was necessary to the public purpose of a park. *Id.* at 905. General Laws c. 59, § 2B, in pertinent part, provides for taxation of real estate owned by the Commonwealth or any city or town if used in connection with a business conducted for profit, unless the use is reasonably necessary to the public purpose of a park. Its provisions do not relate to G.L. c. 59, § 5, Third, and the operation of a charity. The Board found and ruled, therefore, that **MCC Management Group, Inc.** is not instructive in the present appeals.

Based on the foregoing, the Board found and ruled that for the years at issue, the appellant failed to meet its burden of proving that it occupied the subject property as a charitable organization in furtherance of its charitable purposes within the meaning of G.L. c. 59, § 5, Third. Accordingly, the Board issued a decision for the appellee in these appeals.

**THE APPELLATE TAX BOARD**

By: \_\_\_\_\_  
Thomas W. Hammond, Jr., Chairman

A true copy,

Attest: \_\_\_\_\_  
Assistant Clerk of the Board

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

JOYCE and GRACEMARIE TOMASELLI

v.

BOARD OF ASSESSORS OF  
THE TOWN OF SALISBURY  
&  
DEPARTMENT OF PUBLIC  
WORKS OF THE TOWN OF  
SALISBURY

Docket No. F278864

Promulgated:  
July 17, 2007

**ATB 2007-666**

This is an appeal filed under the formal procedure, pursuant to G.L. c. 58A, § 7 from the refusal of the appellees to abate amounts shown on appellants' fiscal year 2005 tax bill for a sewer lien and a sewer betterment.

Commissioner Scharaffa heard the appeal. He was joined in the decision for the appellees by former Chairman Foley, former Commissioner Gorton, and Commissioners Egan and Rose.

These findings of fact and report are promulgated at the request of the appellants pursuant to G.L. c. 58A, § 13 and 831 CMR 1.32.

*Joyce Tomaselli and Gracemarie Tomaselli, pro se* for the appellants.

*Thomas McEnaney, Esq.*, for the appellees.

**FINDINGS OF FACT AND REPORT**

Based on the exhibits and testimony offered at the hearing of this appeal, the Appellate Tax Board ("Board") made the following findings of fact.

At all material times, Joyce and Gracemarie Tomaselli ("appellants") were the assessed owners of two parcels of real estate located at 113-115 North End Boulevard in the Town of Salisbury (collectively, the "subject property"). One parcel is vacant and the other is a mixed-use parcel that included a restaurant on the ground floor and a second-floor apartment. The appellants purchased the subject property on March 7, 1991 with the intention of operating the restaurant and living in the upstairs apartment.

There is conflicting evidence in the record as to when the appellants became aware that a sewer betterment was

assessed on the subject property. The vote to authorize sewer betterments occurred at a January 27, 1992 Special Town Meeting ("Town Meeting"). Town Meeting also voted to rescind votes taken at previous town meetings held in 1990 and 1984. Appellants testified that they received a bill for the sewer betterment sometime in March of 1992. However, the appellants filed an application for abatement of the betterment assessments on July 31, 2001, which was denied on October 17, 2001. At no time did the appellants file a timely appeal of this denial.

On April 22, 2005, the appellants filed another application for abatement of the sewer betterments, which referenced betterments in the same amounts as those raised in their July 31, 2001 application. Neither application mentioned a "sewer lien" in the amount of \$280.60, which appeared on the fiscal year 2005 tax bill for one of the parcels. The appellants' April 22, 2005 application for abatement was denied on May 9, 2005. On June 10, 2005, the appellants filed their appeal with the Board, in which they referenced both the betterments and a sewer-use charge.

The appellants raised numerous allegations in support of their claim that the betterment assessments were not valid, including that: 1) the betterment was actually a "reconstruction rehabilitation sewer project"; 2) the sewer construction was funded by the Environmental Protection Agency and, therefore, the betterment was an illegal tax; 3) the town did not hold a valid meeting to vote in favor of the project; 4) the town never recorded the betterment assessment in the Registry of Deeds.

For the reasons detailed in the following Opinion, the Board found and ruled that it had no jurisdiction over this appeal because: 1) the Board has no jurisdiction over appeals of betterment assessments; 2) any purported appeal of the betterment assessment was filed well beyond the statute of limitations; 3) although the Board has jurisdiction over appeals of sewer-use charges, there is no evidence that the appellants filed a timely appeal of the sewer-use charge with the town. Moreover, even if the appellants' April 22, 2005 abatement application could be considered a timely appeal of the sewer-use charge, the assessors produced substantial, credible evidence, including the testimony of the Town's Director of Public Works, to support a finding that the appellants' sewer-use

charge was correct. Accordingly, the Board issued a decision for the appellees in this appeal.<sup>29</sup>

#### OPINION

Chapter 80 of the General Laws governs the assessment of betterments. General Laws c. 80, § 7 provides that a "person who is aggrieved by the refusal of the board to abate [a betterment] assessment in whole or in part may within thirty days after notice of their decision appeal therefrom by filing a petition for the abatement of such assessment in the superior court for the county in which the land assessed is situated." General Laws c. 80, § 10 provides for an appeal to the county commissioners as an alternative remedy for persons aggrieved by the assessment of a betterment. There is no mention in Chapter 80 of a right to appeal betterment assessments to the Board.

In addition, G.L. c. 58A, § 6, which sets forth the Board's jurisdiction, makes no mention of appeals from betterment assessments under Chapter 80. The abatement remedy is created by statute and, therefore, the Board has only that jurisdiction conferred on it by statute. **Commissioner of Revenue v. Pat's Super Market, Inc.**, 387 Mass. 309, 311 (1982). "An administrative agency has no inherent or common law authority to do anything. An administrative board may act only to the extent it has express or implied statutory authority to do so." **Commissioner of Revenue v. Marr Scaffolding Co., Inc.**, 414 Mass. 489, 493 (1993). Accordingly, the Board ruled that it had no jurisdiction to grant an abatement of appellants' betterment assessments.

Moreover, G.L. c. 80, § 5 provides that the owner of real estate upon which a betterment has been assessed must apply to the appropriate town board for an abatement "within six months after notice of such assessment has been sent out by the collector." Based on the appellants' testimony that the betterment assessment bills were sent to them in March of 1992, both of the appellants' applications for abatement of the betterment were filed long after the expiration of the six-month period under G.L. c. 80, § 5.

Finally, with respect to the sewer lien in the amount of \$280.60 that appeared on the appellants' fiscal year 2005 tax bill, the Board has jurisdiction over timely filed appeals of sewer-use charges. See G.L. c. 83, § 16G. However, to preserve their right to appeal the sewer-use

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<sup>29</sup> In light of the Board's rulings, the appellants' Motion to Correct Transcript is moot.

charge imposed on them, the appellants had to "apply for an abatement thereof by filing a petition with the municipal board or officer having control of the sewer department within the time allowed by law for filing an application for abatement of the tax of which such charge is . . . a part." G.L. c. 83, § 16G.

There is no evidence on this record that the appellants at any time filed an appeal of the sewer-use charge shown as part of their fiscal year 2005 tax. Neither the April 22, 2005 application for abatement filed after the issuance of the fiscal year 2005 bill nor, for that matter, their July 31, 2001 application for abatement, referenced or otherwise sought to appeal the sewer-use charge. Therefore, the Board ruled that appellants failed to comply with G.L. c. 83, § 16G and that no abatement of the sewer-use charge was warranted.

In addition, even if the appellants' April 22, 2005 abatement application could be considered a timely appeal of the sewer-use charge, the assessors produced substantial, credible evidence, including the testimony of the Town's Director of Public Works, to support a finding that the appellants' sewer-use charge was correct. "The credibility of witnesses, the weight of evidence, and the inferences to be drawn from the evidence are matters for the Board." **Cumington School of the Arts, Inc. v. Assessors of Cumington**, 373 Mass. 597, 605 (1977).

Accordingly, the Board issued a decision for the appellees in this appeal.

**APPELLATE TAX BOARD**

By: \_\_\_\_\_

**Thomas W. Hammond, Jr., Chairman**

**A true copy,**

Attest: \_\_\_\_\_

**Assistant Clerk of the Board**