COMMONWEALTH OF MASSCHUSETTS

APPEALS COURT

Docket No. 2024-P-0793

Suffolk, ss.

ESTATE OF CAROLINE WALSH

Appellant,

VS.

COMMISSIONER OF REVENUE

Appellee.

Appellants' Brief

January 20, 2025

Respectfully Submitted
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Statement of the Issues

This brief presents several points of argument. The substantive questions of law raised are:

1) Whether the Seventh and Eighth Amendments are incorporated and binding against the States.
2) Whether the imposition of a fine, and interest, which are greater than 200% of the underlying tax owed violate the Excessive Fine clauses of the Eighth Amendment and Article 26.
3) Whether the right to a civil jury trial under the Seventh Amendment and Article 15 apply so as to leave the structure of the Appellate Tax Board unconstitutional.
4) Whether, under separation of powers, there is in Massachusetts, as in the federal system, a right to an individual adjudication by a judicial officer.
5) Whether the Board incorrectly weighed the evidence, by using evidence not presented to justify negative inference, by failing to credit uncontradicted evidence, and by failing to parse the time periods challenged.
6) Whether the 25% statutory cap on tax penalties applies to the interest on the penalties as well since the statute provides that the interest "shall" be included within the penalty in G. L. c. 62C §32(c).

7) Whether the Board erred in failing to strike testimony and documents of which the Estate was given no notice, effectively ambushing the litigant, contrary to notice provisions in the rules and constitution.

Statement of the Case

The Estate tax return was filed on October 8, 2019 with a request for abatement. The abatement request was rejected by telephone as the return had to be audited first. The Commissioner of Revenue sent a notice of assessment, dated March 18, 2021, for $224,645.21 in taxes owed. The Commissioner credited the 2019 payment of the same amount, but also assessed $258,001.91 in penalties and interest being about 210% of the tax owed.

Following a resubmission of the request for an abatement, the Commissioner rejected the abatement by letter dated July 18, 2022. On or about September 15, 2022, the Appellant timely filed with the Appellate Tax Board, appealing the decision of the Commissioner. The Commissioner filed an answer on February 21, 2023. The Board held a hearing and took evidence on July 26, 2023.

At the hearing, over objection, the Board took testimony from a surprise witness in the form of Heather Dennehy, who had been subpoenaed by the Commissioner without notice to the Appellant. The executor, John Walsh, also testified. The Commissioner filed a post-hearing brief on September 22, 2023. The Appellant filed a post-hearing brief on November 12, 2023 along with a motion to

strike testimony and documents. The Board ruled for the Commissioner on December 15, 2023, ruling on the merits of the appeal and the motion to strike. The Appellant filed its request for written rulings of law and findings of fact on December 20, 2023. The Board promulgated its Rulings of Law and Findings of Fact on June 26, 2024. The next day, on June 27, 2024, the Appellant's Notice of Appeal was docketed.

Statement of Facts

Caroline H. Walsh died on January 28, 2012. RA 5.[1] Her only son, John Walsh, was appointed as executor of the estate on July 18, 2012. RA 5. The Appellate Tax Board found that the estate tax return was due on October 28, 2012. RA 5. Mr. Walsh retained an accountant, Ed Sherman CPA, to handle the income tax and estate tax, state and federal, for the Estate. RA 6. After a couple of meetings, "things fell by the wayside" for close to a year. RA 6. Mr. Sherman died suddenly on July 7, 2013. RA 6. It took Mr. Walsh a few months to retrieve the paper files from Mr. Sherman's widow. RA 6. Mr. Walsh took the files across the hall to his regular accountant, Carmine Mastrogiovanni CPA. RA 6.

According to records produced by Mr. Mastrogiovanni's office[2], the Estate's files were received and reviewed in December 2013. RA 7. The following month,

[1] Hereinafter, references to the record appendix are abbreviated "RA XX."
[2] The records were taken subject to a motion to strike which was later denied.

Mr. Mastrogiovanni's office sent Mr. Walsh, on January 6, 2013, a list of items needed for the returns. RA 7. An undated and handwritten note from Mr. Mastrogiovanni's office stated that he could not complete the returns and that "I have been waiting too long for this info and need everything A.S.A.P or I will be forced to let it go until after tax season 2015." RA 7. Mr. Walsh submitted a package of information including most, but not all, of the requested information on February 6, 2015, with a short apology for the delay. RA 7. On May 19, 2015, Mr. Mastrogiovanni sent Mr. Walsh a list of additional items needed to complete both the estate tax return and the personal income tax returns. RA 7. The May 2015 communication asked for document with haste. RA 7. Mr. Mastrogiovanni retired, or became semi-retired, in 2016. RA 7. His partner, Heather Denehy CPA, took over. RA 7.

Mr. Walsh testified that he was in communication with Ms. Denehy throughout 2016 and 2017, every few months, seeking to complete the estate tax return. An email from Ms. Denehy was sent to Mr. Walsh on October 16, 2017, entitled "open items" and asked for a number of documents. RA 7-8. The Appellate Tax Board found that some of the requested documents were the same that Mr. Mastrogiovanni had asked for in 2017. RA 8.

Mr. Walsh did admit to an extensive delay given difficulties in obtaining an accurate valuation of the estate property. RA 47-48. "It literally took me years to

find an appraisal on the items in the house that I thought was high enough to be fair to the Commonwealth." RA 49-50. Mr. Walsh testified about the difficulties of the appraisal in depth:

> Q. How was that problematic for you?
>
> A. My mother, like I, was an only child. And her house we joking referred to for decades as a museum because she collected furniture from family members and lines of the family that had died out. And my mother since I was a young child about taking care of things in the house, not breaking them, and told how valuable she believed they were.
>
> Q. What, if any kind of professional assistance to assess the values did you obtain?
>
> A. I had a number of appraisers come and look at the things in the house. And there were probably two items in the house that were my benchmark for disregarding the opinion of the appraisers.
>
> Again, I'm working from the mantra that the tax return had to be correct, you know, that cheating on the tax was a loser because they were all going to be audited.
>
> And my mother had a punch bowl, a very ornate china [p]unch bowl with a gold rim around it. An when it came to her, I think from her cousin Angeline when she died, it might not have been her, that it was worth in the neighborhood of 15 to $20,000.
>
> My grandmother also had a Seth Thomas clock from civil war vintage. My mother sent it out to a clockmaker who spent a year and half rebuilding it for about $15,000.
>
> So when people came and told me that the punch bowl was worth 500 or a thousand bucks and the clock was worth two or $3,000, I didn't want to be involved in that because I didn't know how far off they would be on all the other stuff in the house that I had been told through my lifetime was of great value…
>
> Q. How many appraisals did you end up with in ballpark terms.
>
> A. Four or five.

RA 48-50. Mr. Walsh also testified, uncontradicted, that from January to April 2018, he was compelled to take FMLA leave from his job. RA 8. He had to leave his job

and stay in Florida with his daughter who was having severe health complications with her pregnancy, given a preexisting genetic condition. RA 8, 62.

A sufficiently accurate appraisal was obtained in the latter part of 2018. RA 8. Ms. Denehy produced an estate tax return in October 2018. RA 8. Mr. Walsh that there were some "glaring" errors in the return produced by Ms. Denehy, although years after the event he could not cite exact errors. RA 8-9, 59-60, 123.

Mr. Walsh hired another accountant, Michael Dicorato CPA, to produce a return. RA 9. A final estate tax return was filed, seven years late, on October 9, 2019. RA 5. With the October 2019 return, the Estate submitted a check for $224,654. RA 5. The check covered the underlying tax obligation as reflected on the return. RA 5. An application for abatement of penalties and interest was also submitted. RA 5.

On March 18, 2021, the Commissioner of Revenue ("Commissioner") issued a notice of Assessment, imposing statutory penalties of $112,327.10 and interest of $145,674.60 for the untimely filing of the estate tax return. RA 5, 17, 19. Three months later, on July 18, 2022, the Commissioner denied the Estate's request for an abatement. RA 5. September 15, 2022, the Estate filed a timely petition with the Appellate Tax Board. RA 5-6.

As a factual matter, the Appellate Tax Board did not lend great weight to the reasons offered for delay. RA 9-10. The Board weighed, the absence of evidence,

such as the failure of the estate to offer the Denehy return to compare to the Dicorato return, the failure to offer the rejected appraisals. RA 9-10. The Board did not doubt some of the facts offered, such as the death of Mr. Sherman, but did not give it as much weight as the Appellant. RA 9-10. Ultimately, the Board made the finding that some of the proffered reasons were "self-serving statements" by Mr. Walsh that were not corroborated. RA 10.

Summary of the Argument

The Appellate Tax Board is unconstitutionally structured. As it exists, it violates the separation of powers by having adjudicators who are not constitutionally independent. Further it deprives citizens, in tax cases, of their rights to a civil jury trial and a judicial officer. This violation the separation of powers, of Article 30, and the civil jury trial rights of Article 15 and the Seventh Amendment.

The fine imposed here is unconstitutional as an excessive fine, in violation of both Article 26 and the Eighth Amendment. Even if the fine were constitutional, the Appellate Tax Board incorrectly interpreted the statutory cap on penalties as not including interest.

The Board also made some evidentiary errors which justify reversal, including allowing ambush witnesses without notice and failing to weigh the evidence appropriately, such as failing to credit uncontradicted testimony.

Argument

I. The Constitutional Issues are Preserved

An administrative agency is not empowered to adjudicate constitutional issues. "The power delegated by the Legislature to an agency does not include the inherent authority to decide whether a particular statute or regulation that the agency is charged with enforcing is constitutional." Doe No. 10800 v. Sex Offender Registry Bd., 459 Mass. 603, 238 (2011). *See also* Duarte v. Commissioner of Revenue, 451 Mass. 399, 413-414 (2008); Weinberger v. Salfi, 422 U.S. 749, 765 (1975) (constitutionality of statutory requirement is beyond jurisdiction of administrative agency to determine). "Accordingly, the board does not have the authority to determine the constitutionality of the regulations that it must employ to reach a final classification decision." Doe No. 10800, at 628. See School Comm. of Springfield v. Board of Educ., 362 Mass. 417, 431 (1972) (administrative agencies do not resolve conflicts that may arise between statutory and constitutional provisions).

"It is for the courts, not administrative agencies to decide the constitutionality of statutes. Moreover, the determination of the constitutionality of a statute as applied can be one of the most difficult and sensitive tasks performed by the judiciary." Maher v. Quincy District Ct., 67 Mass. App. Ct. 612, 619 (2006). In sum, there is no exhaustion requirement for the presentation of constitutional claims to an

administrative agency,[3] Maher at 618, because it would be an empty letter to present claims to a forum which cannot determine them. Maher, at 618 ("there are exceptions to exhaustion requirements for challenges to the constitutionality of administrative statutes, particularly those that present pure questions of constitutional law or do not require expert fact finding by administrative agencies."); Hartford Acc. & Indem. Co. v. Commissioner of Ins., 407 Mass. 23, 28-29 (1990) (challenge to the constitutionality of an insurance statute need not be presented to an administrative agency); Liability Investigative Fund Effort, Inc. v. Medical Malpractice Joint Underwriting Assn., 409 Mass. 734, 747 (1991) (no exhaustion requirement for a constitutional challenge, particularly where there was no specialized fact finding required).

II. The Seventh and Eighth Amendments are, and ought to be, incorporated and binding upon the States.

The adoption of the 13th, 14th, and 15th Amendments sharply changed the face of liberty in the United States. McDonald v. City of Chicago, 561 U.S. 742; 130 S. Ct. 3020, 3028 (2010) ("The constitutional Amendments adopted in the aftermath of the Civil War fundamentally altered our country's federal system.").

"The Court eventually incorporated almost all of the provisions of the Bill of Rights. Only a handful of the Bill of Rights protections remain unincorporated"

[3] In any event the excessive fine argument was presented to, and rejected by, the Board. RA 18-19

McDonald, at 3034-3035. According to the McDonald Court, the Seventh Amendment right to a civil jury trial and the Eighth Amendment prohibition on excessive fines are 2 of the 4 express provisions not yet incorporated against the States. McDonald, at 3035, n13. Then the Supreme Court decided Timbs v. Indiana, 139 S. Ct. 682 (2019), decisively holding "The Excessive Fines Clause is therefore incorporated by the Due Process Clause of the Fourteenth Amendment." Id., at 687.

The McDonald court specifically cast doubt on the continuing validity of the prior caselaw where it had ruled against incorporation of provisions of the Bill of Rights. McDonald, at 3046 n.30 ("As noted above, see n. 13, supra, cases that predate the era of selective incorporation held that the Grand Jury Clause of the Fifth Amendment and the Seventh Amendment's civil jury requirement do not apply to the States").

III. Whether Applying the Eighth Amendment or Article 26, both the State and Federal Constitutions prohibit the imposition of excessive fines.

The Eighth Amendment to the Federal Constitution prohibits, amongst other things, the imposition of excessive fines. U.S. Const. Amendment VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). A decade before the federal Bill of Rights was proposed in 1791, the Massachusetts Constitution of 1780 included a similar provision. Specifically, Article 26 of the Declaration of Rights provides "No magistrate or court

of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments." Mass. Constitution (1780) Pt. 1, Art. 26.

Though both provisions have been given only limited attention by case law, they clearly extend to afford the Estate relief in this case. *See* United States v. Bajakajian, 524 U.S. 321, 327 (1998) (Supreme Court notes it has had "little occasion" to interpret the excessive fines clause of the 8th Amendment).[4] Contrary to the Appellate Tax Board's finding below, RA 13-14, there is no doubt that a tax penalty is a "fine" within the constitutional meaning of the excessive fine clauses.[5] United States v. Schwarzbaum, 114 F.4th 1319 (11th Cir. 2024) (holding that tax penalty is a fine under the 8th Amendment). *See also* Bajakajian, 524 U.S. at 327 (fine clause applies to "payment[s] to a sovereign as punishment for some offense"). A payment is a constitutional fine so long as "it can only be explained as serving in part to punish." Austin v. United States, 509 U.S. 602, 610 (1993). *See also* Kokesh

[4] In fact, in August 2024, the Supreme Judicial Court announced that it was soliciting *amicus* briefs in what will be its first ever substantive interpretation of Article 26's excessive fines provision. Gregory Raftery v. State Bd. Of Retirement, SJC 13646 (Blue Brief filed; Red Brief pending).

[5] It appears that the case the Appellate Tax Board relied on has been overruled by Bajakajian, which distinguished an earlier case holding something remedial, by stating "[t]he additional fact that such a remedial forfeiture also 'serves to reimburse the Government for investigation and enforcement expenses,' is essentially meaningless, because even a clearly punitive criminal fine or forfeiture could be said in some measure to reimburse for criminal enforcement and investigation." 524 U.S. at 343 n.19.

v. SEC, 581 U.S. 455, 467 (2017) ("modern statutory forfeiture is a 'fine' for Eighth Amendment purposes if it constitutes punishment even in part").

In both the Eighth Amendment and Article 26, proportionality is a *sine qua non* of an excessive fine. After all, to be prohibited the fine must be "excessive" compared to something else. The roots of the protection against excessive fines are truly ancient. §14 of the Magna Carta makes specific provision regarding fines[6] not being so high as to put man out of either house or business.

> A Freeman shall not be amerced for a small Fault, but after that manner of his Fault, and for a great Fault, after the greatness thereof, saving to him his Contenement; and a Merchant likewise, saving to him his Merchandise; and any other's Villein than ours shall likewise be amerced, saving his Wainage, if he fall into our mercy. And none of the said Amercements shall be assessed but by the oath of honest and lawful Men of the Vicinage. Earls and Barons shall not be amerced but by their peers, and after the manner of their Offence. No Man of the Church shall be amerced after the quantity of his Spiritual Benefice, but after his Lay Tenement, and after the quantity of his Offence.

Magna Carta, §14, *as reprinted in* Steve Sheppard, 2 The Selected Writings of Sir Edward Coke at 812 (2003)[7]. Thomas Cooley, Chief Justice of Michigan, writing in

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[6] The term used in Magna Carta is Amercements. The Supreme Court in interpreting the Eighth Amendment's fine clause also turned to Magna Carta's provision on amercements. Kelco, 492 U.S. 257, 269-271 (1989). "Amercements were payments to the Crown, and were required of individuals who were 'in the King's mercy' because of some act offensive to the Crown." Kelco, at 269. Amercments were "the most common criminal sanction in 13th-Century England." Id.

[7] "Contenenment" was a term of art signifying property held in freehold, basically land and house. Steve Sheppard, 2 The Selected Writings of Sir Edward Coke at 813 (2003). Commenting upon the savings for a merchant's goods, Lord Coke wrote

one of the seminal American legal treatises of the 19th Century found the spirit of Magna Carta to animate the Eighth Amendment.

> Within such bounds as may be proscribed by law, the question of what fine shall be imposed is one addressed to the discretion of the court. But it is a discretion to be judicially exercised; and there may be cases in which a punishment, though not beyond any limit fixed by statute is nonetheless so clearly excessive as to be erroneous in law. A fine should have some reference to the party's ability to pay it. By Magna Carta a freeman was not to be amerced for a small fault, but according to the degree of fault, and for a great crime in proportion to the heinousness of it, *saving to him his contenement;* and after the same manner a merchant, *saving to him his merchandise...*The merciful spirit of these provisions addresses itself to the criminal courts of the American States through the provisions of their constitutions.

Thomas Cooley, *Treatise on Constitutional Limitations*, at 471 (7th Ed. 1907). In substance, dating back to Magna Carta (1215) a fine may not deprive a man of his house, a merchant of his goods, and even a lowly servant of the necessary tools of his trade. Couched in ancient terms, this important protection meant that fines (1) could never be issues for truly minor offences and (2) that fine could never be so large as to jeopardize a man's place in society. It could not stop him working, deprive him of his goods, or render him homeless. Even "great" offenses were subject to

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"For trade and traffique is the livelihood of a Merchant, and the life of the Commonwealth, wherein the King and every subject hath interest, for the Merchant is the good bayliffe of the Realme to export and vent the native commodities of the Realme, and to import and bring in the necessary commodities for the defence and benefit of the Realme." Steve Sheppard, 2 The Selected Writings of Sir Edward Coke at 814 (2003). Wainage is a Saxon term derived from a wheeled cart necessary for serfs to perform their labors such as moving manure. *Id.*

this limitation. In discussing the Magna Carta's amercment clause in relation to the Eighth Amendment's excessive fine clause, the Supreme Court noted the reach of the limits imposed upon the King by the clause:

> The Amercments Clause of Magna Carta limited these abuses in four ways: by requiring that one be amerced only for some genuine harm to the Crown; by requiring that the amount of the amercement be proportioned to the wrong; by requiring the amercement not be so large as to deprive him of his livelihood; and by requiring that the amount of the amercement be fixed by one's peers, sworn to amerce only in a proportionate amount.

Browning-Ferris Industries v. Kelco Disposal, 492 U.S. 257, 271 (1989). The peers judging the amount are, of course, a reference to a civil jury trial, *see infra*.

Nor were the provisions of *Magna Carta* a forgotten relic by the time the Framers were writing at the end of the 18th Century. The English Bill of Rights, one of the legal settlements to the Glorious Revolution of 1688, provided almost identically to the Eighth Amendment. 1 Will. & Mary, Sess.2 c.2 [1688] ("That excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted.").

"The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." United States v. Bajakajian, 524 U.S. 321, 334 (1998). Proportionality is a multi-faceted inquiry which touches the nature of the offense, the facts of the case, the character

of the defendant, and the harm caused by the offense. See Also BMW of North America v. Gore, 517 U.S. 559 (1996) (holding that under US Constitution penalties may not be excessive and disproportionate in relation to the harm inflicted and the reprehensibility of the conduct at issue, including punitive damages assessed by a jury). In this case, the Commissioner seeks to assess, for delay, a penalty which is larger than the tax owed. This is akin to assessing an outrageously high penalty for the minutiae of a paperwork error. Cf. Gore, 517 U.S. at 575, n.23 ("The flagrancy of the misconduct is thought to be the primary consideration in determining the amount of punitive damages.") (quotation marks omitted). There are no aggravating factors in this case like those pointed to in the Gore case such as violence, trickery, or deceit.

As to the Federal argument Bajakajian, 524 U.S. 321 at 333-335, lights the way in determining whether a fine is excessive. Adopting a "grossly disproportionate" standard for the Eighth Amendment's Fine Clause, Bajakajian determined that a man carrying $357,144 in undisclosed cash in excess of the $10,000 reporting threshold could not constitutionally be made to forfeit the whole amount of currency. In particular, to guide its proportionality analysis, the Court looked at four facts, (1) the comparison of the fine to the offense, (2) the particular facts, (3) the character of the defendant, and (4) the harm caused by the defense.

One of these criteria involved looking at similar statutory penalties. Applying that analysis here shows the grossly disproportionate effect of the fines.

- G.L.c. 59 §91-evading property tax-fine not less than $1000 or more than $5000.
- G. L. c. 59 §91—false listing of personal property—fine not more than $1000.
- G.L. c. 60 §101—failing to turn over documents to tax collector—fine not more than $500.
- G.L.c. 62C §73(c)—failing to provide records or supplying false information—individual fine of not more than $25,000
- G.L.c. 62C §73(c)—failure to file tax return—individual fine of not more than $25,000
- G.L.c. 62C §73(g)—false tax return—individual fine of not more than $10,000
- G.L.c. 62C §73(c)—evading tax—individual fine of not more than $25,000
- G.L.c. 62C §75—false corporate income tax return---fine not less than $500 and not more than $5000.
- G.L.c. 62C §77—fiduciary fail to report income—fine not less than $25 and not more than $500.
- G.L.c. 65C §26—evading estate tax—fine not more than $5000.
- G.L.c. 65C §27—failure to file estate tax return—fine not more than $1000
- G.L.c. 65C §27—failure to pay estate tax—fine not more than $1000.
- G.L.c. 65C §28—concealing goods to avoid estate tax—fine not more than $1000.

The most applicable and analogous criminal statutes, all of which provide small fines, although some provide for imprisonment, are listed about. The conduct at issue here is regarded by the Legislature as small, a misdemeanor. The penalty assessed here, more than $100,000 in taxes plus a staggering amount of interest are well in excess of similar punishment for similar conduct.

The Massachusetts Declaration of Rights Article 26 Excessive Fines Clause has not received extensive treatment in the cases, but it appears to follow a similar analysis to the 8th Amendment's Clause and the 14th Amendment's Due Process Clause which prohibits disproportionate penalties. Sturtevant v. Commonwealth, 158 Mass. 598, 600 (1893); Commonwealth v. Hitchings, 5 Gray (71 Mass.) 482, 486 (1855) (penalties which are too severe or disproportionate may contravene Article 26); McDonald v. Commonwealth, 173 Mass. 322, 328 (1899) (noting similarity of analysis between 8th Amendment and Article 26); Opinion of the Justices, 378 Mass. 822, 829-833 (1979) (scholarly exposition on Article 26's cruel and unusual punishment provision noting disproportional punishments draw court censure). Here there are no allegations of venality, chicanery, deceit or trickery, disreputable conduct or shameful or reprehensible actions.

In any event, the Commissioner seeks to assess a total exactation that is more than 210% of the owed tax. For a small deviation from expected conduct, this is an egregiously high penalty: this is not a case where the delinquent taxpayer was tracked down and assessed a penalty, the estate filed, albeit late, and paid when the return was filed. Indeed "reasonable cause" is the relief valve for such incidents and the Commissioner's unwillingness to use it is problematic.

The Court faced a similar issue in the case of Peabody Police Lieutenant Edward Bettencourt. Bettencourt was convicted of illegally accessing civil service

promotional exam scores. The Public Employee Retirement Administration Commission (PERAC) sought forfeiture of Bettencourt's pension pursuant to G.L. c. 32, §15 (4). The court found the statutory forfeiture to be an unconstitutional excessive fine and ordered that "his retirement allowance cannot be forfeited pursuant to the statute's terms." Public Employee Retirement Administration Commission v. Bettencourt, 474 Mass. 60, 78 (2016).

> [W]here a court determines that imposition of a statutorily mandated forfeiture would violate the Eighth Amendment's excessive fines clause, it is likely within the court's authority to determine a level or amount of forfeiture or fine that would be constitutionally permissible - whether the statutory forfeiture is criminal or, as here, civil in nature. (parenthetical omitted).

Public Employee Retirement Administration Commission v. Bettencourt, at 76. Thus, even if the Commissioner is correct about the interpretation of the statutes, it would be unconstitutional as applied to the Estate of Caroline Walsh

IV. The Right to a Civil Jury Trial, under the Seventh Amendment and Article 15.

a. Colonial Antecedents

The deprivation of the civil jury trial right ranks as one of the great sins which caused the American Revolution. The article 15 Jury right was held most sacred by the colonists. It was at base one of the reasons for the American revolution. The Declaration of Independence specifically decries colonists being deprived of the right to jury trials.

The colonists complained most bitterly before the Revolution about the crown depriving them of their jury trial right including the civil jury trial. This is best exemplified in The case of the Liberty, a schooner belonging to John Hancock. In the year 1768 to 1769, British troops landed to permanently occupy the town of Boston, following the Stamp Act Riots. The Crown also tightened up on the enforcement of longstanding Navigation Acts. It was hoped that increased enforcement in addition to new taxes would bring in revenue to support the crown's expenses defending the French and Indian wars. To assist in the collection of customs and taxes the crown made use of writs that the colonists objected to such as the writs of assistance. The crown also dramatically expanded the revenue and criminal jurisdiction of the Admiralty courts. Amongst many other things, this was ominous to the colonists because it involved the use of a court sitting in equity with no jury. As a matter of fact, to make the Admiralty courts more efficient a super Admiralty court was erected in Halifax. The powers of the customs officers to search the seas was by the same law dramatically expanded. The Halifax super admiralty court would sit without a jury.

The colonial outrage contemporary to the revolution is best seen in the case of Sewall v. Hancock in November 1768. John Adams undertook to defend John Hancock in "politically the most important case until the Boston massacre trials" Hiller Zobel, 2 The Legal Papers of John Adams, at 173. This case produced a great

deal of outrage among legal commentators, but was also prominently tried in the Press of the times. This case dramatically informed the colonists understanding and opinion of courts that sat without a jury, specifically the Admiralty courts. The case was followed so closely in the press that arguments by defense counsel John Adams were frequently published in the Boston papers. In Sewall v. Hancock, the Crown impounded the ship Liberty based on a report of the smuggling of Madeira wine from Spain without paying tax. The commissioners of customs moved to seize the sloop Liberty and in doing so created a riot such that the commissioners required the assistance of the Royal Marines to enforce their order and secondly for months afterwards the collectors' families fled to the Fort at castle William for fear for their safety. The action itself was led by Jonathan Sewall, then the attorney general of the colony, in the name of the collector of customs. The Sloop Liberty was immediately declared forfeit. The action between Seawall and Hancock was an attempt to impose personal consequences upon Hancock. It is also worth noting that the outrageously high bail which the Admiralty court set for Hancock and his ship captain is part of the root of the 8th amendment and article 26. John Adams railed against the revenue acts and the Admiralty court specifically because of their lack of a jury trial.

Adams argued "here the contrast that stares us in the face! The parliament in one clause guarding the people of the realm and securing to them the benefit of a trial by the law of the land and by the next clause depriving all Americans of that

privilege. What shall we say to this distinction? Is there not in this clause a brand of infamy of degradation and disgrace fixed upon every American is he not below the rank of an Englishman is it not directly a repeal of the Magna Carta as far as America is concerned…" Hiller Zobel, 2 legal papers of John Adams at 200. Quoting Lord Coke, Adams continued:

> This 29th chapter of Magna Carta has for many centuries been esteemed by Englishmen as one of the noblest monuments, one of the firmest bulwarks of their liberty -- and we know very well the feelings and reflections of Englishmen, whenever this chapter has been infringed upon even in parliament. One proof of them has been given us by Lord Coke in his exposition of this chapter 2 institutes 51 quote against 'this ancient and fundamental law in the face thereof I find an act of parliament made that as well as justices of assize as justice of the peace without any finding or presentment of 12 men upon bare information for the king before the maid should have full power and authority by their discretions. ' Lord Coke after mentioning the repeal of the statute and the fate of Hempson and Dudley concludes with a reflection which if properly attended might be sufficient to make even parliament tremble. 'The ill success of this statute and the fearful end of these two oppressors should deter others from committing the like and should admonish parliaments that instead of this ordinary and precious trial *per legem terrae* they bring not in absolute impartial trials by discretion' these are the reflections of an Englishman upon the statute which gave to the justices of the size and peace the trial of penalties and forfeitures which by the 29th chapter of Magna Carta ought to be tried by jury. The statute [at issue in Adam's case takes] From Mr. Hancock this precious trial *per legum tarare* and gives it to a single judge, however respectable the judge may be, it is a hardship and severity which distinguishes my client from the rest of the Englishman and renders the statute extremely penal."

Hiller Zobel, 2 Legal papers of John Adams at 200-201. The local press itself was highly excited by the case. The *Journal Of The Times* records that on

January 7, 1769, the Court of Vice Admiralty sat again in Boston to hear this case, Sewall v. Hancock.

> This day the court of Vice Admiralty sat, the doors were ordered to be shut when several further interrogations we're filed: in examining and re examining witnesses the method in some of its circumstances appeared so extraordinary to a gentleman who attended as council that he could not help observing an open court to the proceedings he thought were more alarming than any that had appeared in the world since the abolition of the court of the star chamber. It is certainly a matter of great importance to America that this court should be kept within its constitutional bounds. Can it be a question whether its jurisdiction ought to be found upon transactions upon the sea is as in England; this seems to be favored even by the acts of 4th Geo 3 by which fines and forfeitures may be recovered in common law courts as well as an Admiralty: if so one would think the business now before this court which concerns matters done on land ought to be tried by the law of the land and the subject would then have the benefit of the inestimable English institution a jury… expected that the true state of this extraordinary trial being the first of its kind in America will published to the world…

O.M. Dickerson, ed. *Journal of the Times*, 46. And for January 28, 1769, the press report continues:

> Court of Admiralty again set for examination of witnesses respecting Mr. Hancock's vessel; A court is managed in America abhorrent to the English constitution; What power is vested in a judge! His decree may be said final as in most cases an appeal from it cannot be pursued without involving the appellant and enormous charges in the highest perplexities; How great a grievance it is the judge who decides upon unlimited sums; Is appointed during pleasures and not good behaviors; His place therefore depends upon the favor of a master, perhaps a subserviency to the views of the designing governor; The pay of former judges was a Commission on condemnations; it was viewed in the light of a bribe; The grievance has been redressed by substituting a greater; The present judge's salaries are to be paid out of fines and forfeitures,

> and is 6 times more than an average than thou hast been received by all former judges throughout the continent.

O.M. Dickerson, ed. *Journal of the Times*, 56-57. The case against Hancock ended inconclusively, being dropped when the Vice Admiralty Court was reconstituted and Judge Auchmuty appointed to different office. The common law courts did seek their revenge, with the Suffolk grand jury indicting the informer for perjury, but the Crown attorneys declined to prosecute their former client and entered a nolle prosecui.

The furor over the right to a jury trial, during Hancock's case, in 1768-1769, was well remembered. The following year, when sailors were to be tried criminally by the admiralty court for resisting impressment by force of arms and killing a Lieutenant of the Royal Navy, the admiralty court resolved, even against statute, to give the sailors a jury trial. 3 Hutchinson's History of Massachusetts, at 231-232.

The colonists continued to buck against the admiralty court sitting in judgment of persons and property without a jury. The Sons of Liberty cried at length for the right to a jury. "[A]nd the people were taught, that, although pirates had been tried by a special court of admiralty, in this and other colonies, for fourscore years together, they had, nevertheless, been all this time deprived of the rights of Englishmen, a trial by jury, and brought upon trial before a court consisting wholly of crown officers, and many of them employed in the colonies for unconstitutional and oppressive purposes." 3 Hutchinson's History of Mass. At 421-422.

And so, the colonists demanded their right to a jury trial. The Stamp Act Congress, in its 1765 resolutions, demanded the right to a jury trial. The resolution of October 1765 contains "…declarations of our humble opinion, respecting the most essential rights and liberties Of the colonists, and of the grievances under which they labour, by reason of several late Acts of Parliament…[¶8] That trial by jury is the inherent and invaluable right of every British subject in these colonies." *Stamp Act Congress Resolutions*—Reprinted in Hutchinson 3 *History of Massachusetts*, as appendix F, at 479-480. The Stamp Act Congress also petitioned the House of Lords in a Memorial, "That your memorialists humbly conceive one of the most essential rights of those colonies, which they have ever, till lately, uninterruptedly enjoyed, to be trial by jury." *Stamp Act Congress Memorial to House of Lords*—Reprinted in Hutchinson 3 *History of Massachusetts*, as Appendix H, at 483.

In their long disputes with the Crown and the Royal Governors, the colonial Massachusetts legislature never ceased demanding their rights, including the jury trial right.

> Resolved, as the opinion of this house,--That the late extension of the power of courts of admiralty in America is highly dangerous and alarming; especially as the judges of the courts of common law, the alone check upon their inordinate power, do not hold their places during good behavior: and those who have falsely represented to his majesty's ministers that no dependence could be had on juries in America, and that there was a necessity of extending the power of the courts of admiralty there so far, as to deprive the subject of the inestimable privilege of a trial by jury, and to render the said courts of admiralty uncontrollable by the ancient common law of the land, are avowed

> enemies to the constitution, and manifestly intend to introduce and establish a system of insupportable tyranny in America.

Resolution of Massachusetts House of July 8, 1769 about the rights of colonists—Reprinted in Hutchinson 3 *History of Massachusetts* as Appendix O, at 501

The continuing deprivation of this right, especially in popular cases like Hancock's, outraged the colonists. In 1772, the infamous "Boston Pamphlet" a tract authored by Hancock and Adams which was adopted as a formal resolution of the Town Meeting of Boston, recited in its list of grievances "[No. 8] Britain has deprived the colonists of their right to trial by jury by prosecuting cases involving colonists' property in the vice-admiralty courts, where decisions are rendered solely by the judge." Nor was Boston alone, the Town of Sheffield Massachusetts also wrote a 1773 resolve of its Town Meeting protesting:

> *Resolved*, That the late acts of the parliament of Great Britain, for the express purpose of raising and regulating the collecting a revenue in the colonies, are unconstitutional, as thereby the just earnings of our labour and industry, without any regard to our consent, are by mere power ravished from us, and the unlimited power by said acts (and commissions) put into the hands of ministerial hirelings, and **the deprivation of our inestimable and constitutional privilege, a trial by jury, the determination of our property by a single judge paid by one part**, by money illegally taken from the other for that purpose, and the insulting difference made between British and American subjects are matters truly grievous, and clearly evince a disposition to rule us with the iron rod of power."

Sheffield Resolves (January 5, 1773) printed in the *Massachusetts Spy* (emphasis added).

The First Continental Congress, in its Declarations of Rights and Grievances, specifically listed revenue acts depriving the Americans of this jury trial right as a cause of disharmony.

> Resolved, N.C.D. That the following acts of parliament are infringements and violations of the rights of the colonists; and that the repeal of them is essentially necessary, in order to restore harmony between Great Britain and the American colonies, viz.
>
> The several acts of Geo. III. ch. 15, and ch. 34.-5 Geo. III. ch.25.-6 Geo. ch. 52.-7 Geo.III. ch. 41 and ch. 46.-8 Geo. III. ch. 22. which impose duties for the purpose of raising a revenue in America, extend the power of the admiralty courts beyond their ancient limits**, deprive the American subject of trial by jury**, authorize the judges certificate to indemnify the prosecutor from damages, that he might otherwise be liable to, requiring oppressive security from a claimant of ships and goods seized, before he shall be allowed to defend his property, and are subversive of American rights.

Declaration of Rights and Grievances, First Continental Congress (September 14, 1774). Mere weeks later, the First Continental Congress prepared their Petition to the King, in which they specifically protested the abolition of the civil jury trial right. "…by this our humble Petition, beg leave to lay our Grievances before the Throne… By several Acts of Parliament made in the fourth, fifth, sixth, seventh, and eighth years of your Majesty's Reign, Duties are imposed on us for the purpose of raising a Revenue; and the powers of Admiralty and Vice Admiralty Courts are extended beyond their ancient limits, whereby our property is taken from us without our consent; **the trial by jury, in many civil cases, is abolished**…" *Petition to the King*

(October 25, 1774) (emphasis added). John Adams, being a delegate to the First Continental Congress, was of course a signatory to the Petition to the King.

The Second Continental Congress, slowly drifting toward independence, tried at first to justify taking up arms, without separation. The right to a jury trial was cited as one of the prime reasons in the Second Congress's *Declaration of the Necessity of Taking Up Arms*:

> Parliament was influenced to adopt the pernicious project; and assuming a new power over them…statutes have been passed for extending the jurisdiction of Courts of Admiralty and Vice-Admiralty beyond their ancient limits; for depriving us of the accustomed and inestimable privilege of Trial by Jury, in cases affecting both life and property *Declaration of the Necessity of Taking Up Arms* (July 6, 1775).[8]

The deprivation of the jury trial right ranks as one of the great sins of the King George listed in the Declaration of Independence. "The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world… For depriving us in many cases, of the benefits of Trial by Jury…" *Declaration of Independence*, (7/4/1776). Injustices like the Hancock case resounded for years, and however insistently the colonists demanded their rights, they did not receive them. In fact, as protested by the First

[8] Available at the National Archives at https://founders.archives.gov/documents/Jefferson/01-01-02-0113-0005

Continental Congress, the Intolerable Acts, passed following the Boston Tea Party to punish it, sharply limited even the existing civil jury trial. A jury trial, even a civil one, was so important that it eventually caused a rebellion from the largest empire in the world.

b. Article 15 Caselaw

Article 15 of the Declaration of Rights, like the Seventh Amendment, adequately guarantees the existence of the civil jury trial right. "The right of a trial by jury is declared by part 1, art. 15 of the Constitution of the Commonwealth of Massachusetts, which provides that 'parties have a right to a trial by jury; and this method of procedure shall be held sacred.'" Northeast Line Constr. Corp. v. J.E. Guertin Co., 80 Mass. App. Ct. 646 , 649 (2011) (citation omitted).

> Article 15 of the Massachusetts Declaration of Rights preserves "the common law trial by jury in its indispensable characteristics as established and known at the time the Constitution was adopted" in 1780. Department of Rev. v. Jarvenpaa, 404 Mass. 177, 185-186 (1989), quoting from Opinion of the Justices, 237 Mass. 591, 596 (1921). See also Commonwealth v. Knowlton, 2 Mass. 530, 534-535 (1807). Oftentimes, because "new forms of actions and proceedings" are created by the Legislature, it may become necessary to consider whether "analogous civil proceedings existed at common law which required a jury trial." Commonwealth v. Mongardi, 26 Mass. App. Ct. 5, 8 (1988)

Whaley v. Nynex Information Services, 36 Mass. App. Ct. 148, 150 (1994). Thus, the Court must focus on whether the common law would have, in 1780, afforded the Estate a trial by jury over a tax matter. A similar test exists for the Seventh

Amendment. SEC v. Jarkesy, 144 S.Ct. 2117, 2132 (2024) (noting that the Seventh Amendment requires a jury trial if "is made of the stuff of the traditional actions at common law tried by the courts at Westminster in 1789.").

If the Estate was entitled to a civil jury trial, rather than having factual determinations made by a single commissioner of the Appellate Tax Board, then the application of the Appellate Tax Board's statutory scheme is, at least in this case, unconstitutional. Waltham Tele-communications v. O'Brien, 403 Mass. 747 (1989) (statute regarding cable tv providers unconstitutional for failing to provide option of Article 15 civil jury in determining eminent domain issues).

> By arts. 12 and 15 of the Declaration of Rights "trial by jury" is preserved. Trial by jury, in its essentials was matter of general knowledge and was adequately defined by the common law, which was continued as it then existed in the Commonwealth by c. 6, art. 6 of the Constitution. It was said by Chief Justice Shaw in *Commonwealth* v. *Anthes,* 5 Gray, 185, at page 229, that the mandate of the Constitution preserving trial by jury "was a provision for securing to all the great benefit of jury trial, as it was then understood and practised."… " The trial by jury preserved by our Constitution indubitably is the common law trial by jury in its indispensable characteristics as established and known at the time the Constitution was adopted."

Opinion of the Justices to the House of Repres, 237 Mass. 591, 596 (Mass. 1921).

When does the Civil Jury Trial right prohibit the delegation of a matter to an administrative agency?

> Resolving the question of entitlement to a jury trial under art. 15 involves consideration whether analogous civil proceedings existed at common law which required a jury trial…Article 15 incorporates the

> experience of its drafters, who sought to retain the ordinary forms and administration of the English common law (with which they were most familiar), while allowing future generations to create new forms of actions and proceedings which, for practical reasons, might not require, or be appropriate for, decision by a jury.

Commonwealth v. Mongardi, 26 Mass. App. Ct. 5, 8 (1988). Clearly a matter such as this, requiring a determination of credibility, is of the type which the Estate was entitled to a jury trial on.

There is no doubt that the more than two hundred thousand dollars in contention is property within the meaning of Article 15. Parker v. Simpson, 180 Mass. 334, 346(1902) (dispute between parties ordering the payment of more than $500,000 definitively a dispute over property within the meaning of Article 15). Nor does this case fit within the exemption for chancery or equitable matters, which did not require a jury in 1780, or 1791. Parker v. Simpson, 180 Mass. 334, 344-355 (1902) (A scholarly, historical discussion of the jury trial provision in art. 15, holding that there was no right to jury trial in matters falling within the jurisdiction of courts of chancery); Bucknam v. Bucknam, 176 Mass. 229, 230-231 (1900) (before 1780, matters of marriage, divorce, alimony, and support of legitimate children were heard by the Governor and Council without a trial by jury); Shirley v. Lunenburg, 11 Mass. 379, 385 (1814) (reviewing history to find "all questions relative to the settlement or removal of paupers were heard and determined by the Courts of General Sessions of the Peace, without the intervention of a jury").

Even though the Courts have sought to protect the flexibility referred to in Mongardi, it is clear that a simple change or name or form cannot deprive the Estate of its constitutional rights. Ashely v. Three Justices of the Superior Ct., 228 Mass. 63 (1917) (holding that an elective office is not property within the meaning of Article 15, but that the Legislature may not deprive persons of jury trial right by simple change of procedure, "Of course the Legislature cannot by a mere change of name or of form…deprive parties of their rights to a trial by jury. The Constitution cannot thus be trifled with."). The federal courts have held similarly in relation to the Seventh Amendment. SEC v. Jarkesy, 144 S.Ct. 2117, 2131 (2024) ("The Constitution prohibits Congress from 'withdraw[ing] from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law.'") *quoting* Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272, 284; 15 L.Ed. 372 (1856).

c. Evidence of Jury Consideration of Tax Issues.

There is plenty of evidence of jury consideration of early tax issues. In Jackoson v. Foye 1 Quincy Rep. 26, (1762) the Superior Court of Judicature (the colonial predecessor to the SJC) held that a jury determines the proper rate of tax reimbursement for 30 years. It repeated the holding again the following year. Derumple v. Clark, 1 Quincy Rep. 38 (1763).

Early post-Revolution evidence of use is to the same point. In Andover & Medford Turnpike Co. v. Gould, 8 Mass. 40, 44 (1809) the court specifically held that taxes could only be collected in the manner specified by statute, namely an action for debt before a civil jury. In Crapo v. Stetson, 8 Metcalf (49 Mass.) 393 (1844) the court upheld a jury consideration of a tax case from New Bedford, particularly where there were credibility judgments to be made about location of residence and notice to the resident of the taxes raised.

Even early federal practice approves of the use of a civil jury in the collection of taxes. Hylton v. United States, 3 Dall. (3 U.S.) 171 (1796) (affirming legal decision in the collection of carriage taxes as personal goods exempt from the constitutional restriction on direct taxes, only after both parties had waived their right to a jury).

V. There is also a right to a judicial officer, which is both structural, sounding in the separation of powers, and personal.

Both the federal and state constitutions encompass the idea of a strong and independent judiciary. Not only do they establish a judicial branch, but its independence is guaranteed through structural limitations. In both documents judges are given independence through life tenure ("good behavior") and salary guarantees. U.S. Constitution Art. 3, §1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their

Continuance in Office"); Massachusetts Constitution Pt.2, C.3, Art.1 ("All judicial officers…shall hold their offices during good behavior"). Indeed, The Massachusetts Constitution regards these judicial protections as important individual liberties necessary for the protection of citizens, embodying them in the 29th article of the Declaration of Rights.

> It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit. It is, therefore, not only the best policy, but for the security of the rights of the people, and of every citizen, that the judges of the supreme judicial court should hold their offices as long as they behave themselves well; and that they should have honorable salaries ascertained and established by standing laws.

Massachusetts Constitution, Declaration of Rights, Art. 29. In short summary, in addition to the right to a civil jury trial, there is a constitutional right of citizens to have their disputes determined before a judicial officer. This right is both (1) personal and (2) structural in that it is embodied in the separation of powers. The reason for the existence of the judiciary is to arbitrate disputes in an independent manner.

a. There is a clear and personal right to a judicial officer.

There is a right to have an adjudication conducted by a judicial officer whose independence is protected by the constitutional salary and tenure guarantees.[9] Once the concepts of non-Article III courts were established, the Supreme Court would go on to hold that a litigant had a personal right to an Article III adjudication of some kind. Stern v. Marshall, 564 U.S. 462; 131 S.Ct. 2594, 2609 (2011) ("[T]he responsibility for deciding that suit rests with Article III judges in Article III courts."). The fact that this right is personal means, that a litigant has a right to insist on it.

> [The Court has] emphasized the importance of the personal right to an Article III adjudicator…our prior discussions of Article III, §1's guarantee of an independent and impartial adjudication by the federal judiciary of matters within the judicial power of the United States intimated that this guarantee serves to protect primarily personal, rather than structural interests.

Peretez v. United States, 501 U.S. 923, 929 n.6 (1991) (citations and quotations omitted). *See also* Ex Parte Bakelite Corp., 279 U.S. 438, 460 (1929) (Article III judges may not be assigned to Article I courts). There is a clear and defined personal right to an adjudication by a judicial officer whose independence and impartiality

[9] The original distinction between Article III courts and other entities was drawn by Chief Justice John Marshall in American Insurance Co. v. Canter, 26 U.S. (1 Pet.) 511, 526 (1828). In that case, property was adjudicated the forfeiture of property in favor of a salvor in Key West, then a part of the territory of Florida, under a territorial court. The territorial court did not have life tenure guarantees and was obviously not an Article III court. The Supreme Court held that the territorial court was an Article IV court, erected under Congress's power to control the territories.

are protected by the tenure and salary guarantees. See also Schor v. Commodities Future Trading Commission, 478 U.S. 833, 851 (1986).

b. There are also important separation of powers issues presented when, as in this case, the Legislature grants judicial power without the constitutional judicial protections.

There are also important separation of powers concerns implicated in the right to a judicial officer. This is present in both the State and Federal Constitution.

> In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

Article 30 of the Declaration of Rights. The structure of the Appellate Tax Board violates the separation of powers by allowing a non-judicial entity to adjudicate the rights of private parties, like the Estate.

> An adjudication of private rights must be done by an entity whose structure respects the constitutional requirements necessary for an impartial and independent adjudicator… Article III is "an inseparable element of the constitutional system of checks and balances" that "both defines the power and protects the independence of the Judicial Branch."…it remains true that Article III imposes some basic limitations that the other branches may not transgress. Those limitations serve two related purposes. "Separation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others. Yet the dynamic between and among the branches is not the only object of the Constitution's concern. The structural principles secured by the separation of powers protect the individual as well."…
>
> Article III protects liberty not only through its role in implementing the separation of powers, but also by specifying the defining characteristics

> of Article III judges. The colonists had been subjected to judicial abuses at the hand of the Crown, and the Framers knew the main reasons why: because the King of Great Britain "made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." The Declaration of Independence ¶ 11. The Framers undertook in Article III to protect citizens subject to the judicial power of the new Federal Government from a repeat of those abuses…
>
> Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decision-making if the other branches of the Federal Government could confer the Government's "judicial Power" on entities outside Article III…The Constitution assigns that job—resolution of "the mundane as well as the glamorous, matters of common law and statute as well as constitutional law, issues of fact as well as issues of law"—to the Judiciary. Id., at 86-87, n. 39, 102 S.Ct. 2858 (plurality opinion).

Stern v. Marshall, 131 S.Ct. at 2608-2609. There would be no point in providing a third branch of government, to adjudicate disputes, unless access to it were open and its independence was structurally guaranteed. See Nash v. Califano, 613 F.2d 10, 15 (2nd Cir. 1980) ("The independent judiciary is structurally isolated from the other branches to provide a safe haven for individual liberties in times of crisis" citing to the Declaration of Independence).

This right to access the judiciary is important. It is also plenary. The judiciary not only may not be deprived of the power to adjudicate cases, it must have all tools necessary to do so. This includes the right to determine the facts and weight of evidence in the controversy. "[C]ases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions of both fact and law, necessary to the performance of

that supreme function." Crowell v. Benson, 285 U.S. 22, 60 (1932). It is an "untenable assumption that the constitutional courts may be deprived in all cases of the determination of facts upon evidence even though a constitutional right may be involved." Crowell, 285 U.S. at 60-61. This is why all administrative agency determination may require some form of judicial deference but cannot have finality. See Elgin v. Department of the Treasury, 132 S.Ct. 2126, 2138 (2012).

c. Judicial Independence is a critical virtue which must be required structurally

"[O]ur Constitution unambiguously enunciates a fundamental principle—that the 'judicial Power of the United States' must be reposed in an independent Judiciary. It commands that the independence of the Judiciary be jealously guarded…" Northern Pipeline v. Marathon Pipeline, 458 U.S. 50, 60 (1982). Judicial Independence is not only a foundational concern but is, in part, one of the primary motivations of the American Revolution. United States v. Will, 449 U.S. 200, 217-219 (1980).

The Court, in U.S. v. Will, 449 U.S. 200 (1980), traced the colonial history of judicial independences and the later revocation of it. The Court also quoted the Declaration of Independence in listing the faults of King George IIII, "He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." Will, at 219. This basic foundational attempt to remedy colonial wrongs explains the starkness of the litmus test of tenure and salary

guarantees used by the Canter and Northern Pipeline courts. See Stern, at 2609. "[A] tribunal is to be recognized as one created under Article III depends basically upon whether its establishing legislation complies with the limitations of that article; whether, in other words, its business is the federal business there specified and its judges and judgments are allowed the independence there expressly or impliedly made requisite." Glidden Co. v. Zdanok, 350 U.S. 530, 552 (1962)

d. Special Courts

As the Tudor and Stuart Monarchs developed England into a modern administrative state, they also turned to specialized courts to assist the burgeoning bureaucracy. "A number of courts challenged the King's Bench for authority in those days. Among these were the Council, the Star Chamber, the Chancery, the Admiralty, and the ecclesiastical courts." Pulliam v. Allen, 466 U.S. 522, 530 (1984) (noting necessity of judicial immunity for judicial independence). Therefore, the Colonists were eminently familiar with the benefits and disadvantages of specialized courts. When America's Revolutionary generation sought to carve out a new form of government for themselves, they also sought to prevent what they regarded as injustices of the past.

The Court of the Star Chamber "was of mixed executive and judicial character, and characteristically departed from common-law traditions. For those reasons, and because it specialized in trying 'political' defenses, the Star Chamber

has for centuries symbolized disregard of basic individual rights." Faretta v. California, 422 U.S. 806, 821 (1975). The Framers rebelled against the injustice of the deprivation of jury trial through the expansion of the Admiralty Courts, supra, but also worked to fixed other judicial injustices. In the Case of Prohibitions, 77 Eng. Rep. 1342 (K.B. 1607) the Court of the King's Bench held that the King may not usurp the functions of the judiciary, "The King in his own person cannot adjudge any case, either criminal or betwixt party and party; but it ought to be determined and adjudged in some Court of Justice, according to the law and custom of England."

> Having witnessed first-hand King George's efforts to gain influence and control over colonial judges, see Declaration of Independence ¶ 11, the framers made a considered judgment to build judicial independence into the Constitution's design. They vested the judicial power in decisionmakers with life tenure. Art. III, § 1. They placed the judicial salary beyond political control during a judge's tenure. Ibid. And they rejected any proposal that would subject judicial decisions to review by political actors… All of this served to ensure the same thing: "A fair trial in a fair tribunal."…One in which impartial judges, not those currently wielding power in the political branches, would "say what the law is" in cases coming to court.

Loper Bright Enterprise v. Raimondo, 144 S.Ct. 2244, 2284-2285 (2024) (Gorsuch, J. concurring).

The Appellate Tax Board would stand in a similar odious circumstance. Gubernatorial appointees without constitutional protections of tenure and salary, are to determine money controversies without sufficient structural independence from the prosecuting agency, the Commissioner of Revenue. "[T]his Court has repeatedly

explained that matters concerning private rights may not be removed from Article III courts…If a suit is in the nature of an action at common law, then the matter presumptively concerns private rights, and adjudication by an Article III court is mandatory." SEC v. Jarkesy, 144 S.Ct. 2117, 2123 (2024) (interpreting the 7th Amendment civil jury trial in common with the right to an Article III judicial officer). "The Constitution prohibits Congress from withdraw[ing] from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law.'" SEC v. Jarkesy, at 2131. The State Constitution holds similarly.

e. The Matters at issue clearly are judicial work

> On that basis, we have repeatedly explained that matters concerning private rights may not be removed from Article III courts. Murray's Lessee, 18 How. at 284; Granfinanciera, 492 U.S. at 51-52, 109 S.Ct. 2782; Stern, 564 U.S. at 484, 131 S.Ct. 2594. A hallmark that we have looked to in determining if a suit concerns private rights is whether it "is made of `the stuff of the traditional actions at common law tried by the courts at Westminster in 1789.'" Id., at 484, 131 S.Ct. 2594 (quoting Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 90, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982) (Rehnquist, J., concurring in judgment)). If a suit is in the nature of an action at common law, then the matter presumptively concerns private rights, and adjudication by an Article III court is mandatory. Stern, 564 U.S. at 484, 131 S.Ct. 2594.

SEC v. Jarkesy, 144 S.Ct. 2117, 2132 (2024). As argued above, in relation to the civil jury right, the Framers in the 1780 timeframe would have understood tax matters as a jury issue for a common law court. In fact, the colonists protested the expanded tax jurisdiction, without a jury, of the Vice Admiralty courts.

The Appellate Tax Board's structure does not meet the constitutional requirements of the Judiciary, yet it undertakes to do work which is clearly judicial in nature. This is a clear violation of the separation of powers of the state constitution and the constitutional right to a judicial officer. Nor is the deprivation of this right trivial. The Appellate Tax Board's structure denies it the guarantees of independence, leaving decisions like the one here suspect. Moreover, a judicial officer who had gone through the rigors of judicial selection would not have allowed travesties like occurred in this case. Ambush by surprise witness. Denial of the right to notice of a subpoena duces tecum. Being forced to cross-examine the surprise witness without even having access, even day-of, to the documents brought in response to the subpoena duces tecum.

Nor would a judicial officer of this Commonwealth support a decision which smells too heavily of bias in favor of the government. Not knowing he needed to rebut a surprise witness, Mr. Walsh did not submit all the evidence he could have or should have. For that sin—not knowing that he would be ambushed—he had on short notice only his own testimony to offer. And the apparent penalty for the lack of clairvoyance, is that Mr. Walsh is dubbed to be unworthy of belief.

This is structurally more dubious for, as the Appellate Tax Board wrote in its Annual Report for 2021:

> The Board is a quasi-judicial agency in the executive branch but with reporting requirements to the General Court. It is devoted exclusively

> to hearing and deciding cases on appeal from any state or local taxing authority. The Board was established by the Legislature in 1929 to relieve the Superior Court of the large volume of tax appeals…

Annual Report of the Appellate Tax Board, (2021). *See Also* Commissioner of Corp. & Tax v. J.G. McCrory Co., 280 Mass. 273 (1932) (reciting the statutory scheme that the Board of Tax Appeals hears cases without a jury but having the same effect as a jury). There is no case that the Estate can find which has ever approved of the constitutionality of the Board's structure.

VI. The Board incorrectly weighted the evidence

While it is true that the Taxpayer bears the burden of proof before the Board, once some evidence is offered, the science of weighing it begins.

Generally speaking, uncontradicted testimony is supposed to be believed. "[E]vidence of a party having the burden of proof may not be disbelieved without an explicit and objectively adequate reason…If the proponent has presented the best available evidence, which is logically adequate, and is neither contradicted nor improbable, it must be credited." New Boston Garden Corp. v. Bd. Of Assessors of Boston, 383 Mass. 456, 470-471 (1981). For example, the Board erred in not crediting Mr. Walsh's uncontradicted testimony about requiring at least 5 different appraisals to obtain an accurate value.

The Board, ignoring the procedural matter where the Estate was ambushed, proceeded to punish the Estate for not anticipating ambush.[10] In part, the Board found that Mr. Walsh's testimony was not corroborated by other evidence. Testimony, even uncorroborated, is evidence. It was, mostly, the only evidence before the Board. Lack of corroboration may tend to weigh against it, but there was no contradictory evidence on large sections of Mr. Walsh's testimony. His testimony about the months required to get the paper filed back from the Widow of Mr. Sherman was not addressed at all by the Board. Nor was his testimony about needing to attend to a daughter with a genetic condition and a difficult pregnancy, so severe as to require Mr. Walsh to take FMLA from his own job, addressed. *See* New Boston Garden, at 471 (noting that a tax board was not required to believe a particular witness or use a particular valuation method, but uncontradicted data with other evidence "necessary precludes" a "reasoned finding" to the contrary).

The Board also violated the tenets of the substantial evidence test. "Disbelief of the plaintiff's statement is not affirmative evidence to the contrary." Shea v. Commissioner of Corrections, 103 Mass. App. Ct. 369, 374 (2023). "[N]onacceptance of testimony does not create substantial evidence to the contrary."

[10] It is worth the Court's notice that while the Rules of Civil Procedure do not normally require notice to the opposing party before a third-party subpoena is issued for testimony, advance notice **is** required to the opposition for the issuance of a subpoena duces tecum. The Appellate Tax Board's rules require adherence to the Civil Procedure rules especially in relation to subpoenas and discovery.

Salisbury Water Supply Co. v. DPU, 344 Mass. 716, 721 (1962). "In any event, disbelief of any particular evidence does not constitute substantial evidence to the contrary." New Boston Garden, at 472.

Mr. Walsh "has presented logically adequate and uncontradicted evidence of [cause]. The board must have a rational articulable basis in the evidence for finding [to the contrary and denying the delay to be justified] to be substantially less than the evidence has shown them to be." Id. At 473. A " finding must be set aside when the record…clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses." Id. At 475.

The Commissioner's case was almost entirely in the negative. The Commissioner did not dispute the Estate's argument that death justifies delay. Nor did the Board, or the Commissioner, address the 4 months posited to aid Mr. Walsh's daughter. The Board did not credit the evidence about the difficulty in obtaining an accurate appraiser. The Board also, contrary to the caselaw it was presented with, did not at all address the fact that seeking additional expert advice, in the form of other appraisers or further accountants is actually good business sense and reasonable cause for delay.

Notably the Board also failed to parse the matter. The Board could have credited Mr. Walsh with some reasonable delay and abate some but not all of the

penalty. This would particularly have been justified in relation to several particular periods:

- Months needed to retrieve the paper files from Mr. Sherman's grieving widow.
- 4 Months needed to attend to Mr. Walsh's daughter's medical needs.
- Approximately 2.5 years needed to get an accurate appraisal.
- A year to have Mr. Dicorato redo Ms. Denehy's work because of glaring errors.
- Delays of months internal to Mr. Mastrogiovanni's office.
- 8 Months of delay directly attributable to the Commissioner of Revenue.

The Board's decision not to credit Mr. Walsh's testimony is particularly egregious. Mr. Walsh's testimony was candid. He made several admissions against the interests of the Estate, all of which both the Commissioner and the Board quoted with great relish. It cannot be true that Mr. Walsh is not worthy of belief if he also makes testimony which damages his own case. The Board and the Commissioner highlight his testimony where he admitted (on direct not cross) that to some extent he had "dragged" Ms. Denehy along with the delays in the appraisal. He also admitted that in the year following his Mother's death, "things just kind of fell by the wayside." Either Mr. Walsh is a villain, whose statements are unworthy of belief because they are self-serving, (in which case the Board should not credit the admissions which harm the Estate's position) or he candidly and forthrightly made admissions which hurt his own cause to a great or lesser degree. There is no logic

to the Board's discredit of his testimony but willingness to pounce on admissions made.

Particularly when the Board's credit determination flies in the face of the evidence. Mr. Walsh filed. He was late, years late. But he filed. He did not forget. He did not dodge the tax. He did not outwait the liens. He filed and he paid. Thus, he is entitled to some credit for coming forward, when not being chased, to pay his share and meet his obligations. This would normally call for an inference of good faith, not the unsupported negative credibility determination which the Board gave.

The Board, also materially failed to address the significant case law presented to it in the Estate's briefing papers. Death is reasonable cause. RA 128-129 (death or serious illness of the taxpayer or a member of his immediate family is reasonable cause). Like when your accountant drops dead and it takes months to get the only original paper files back from the widow, onto whose grief common courtesy dictates no intrusion. Serious illness, like that of Mr. Walsh's daughter, also provides reasonable cause. Caselaw also suggests that it is both good business practice and reasonable cause to consult another professional if there is cause to doubt the work of a prior professional.

VII. **The Board misapplied the 25% penalty cap**.

In this case, the Appellant argues that the Board incorrectly applied the 25% penalty cap as outlined in G.L. c. 62C, §33. The statute sets a cap on penalties for

late filing and payment of taxes, limiting them to 25% of the tax owed. The penalties are compounded by interest under G.L. c. 62C §32(c), and the Appellant asserts that the interest should be included within the 25% cap. The Commissioner, however, has assessed interest separately, resulting in penalties and interest exceeding the statutory limit.

The Appellant contends that both penalties and interest should be considered together, as the statute uses the term "shall include" to indicate that interest is part of the penalty. This interpretation is supported by statutory construction principles, which require that related statutes be read together harmoniously. The Appellant also argues that the Commissioner has ignored the cap by allowing interest to accrue beyond the 25% limit, violating the statutory constraints.

Furthermore, the Appellant claims that the Commissioner waived any opposition to the penalty cap argument by failing to address it during the appeal process. The Appellant concludes that the penalties and interest should not exceed 25% of the tax owed, and the Commissioner has misapplied the penalty cap by allowing interest to accumulate beyond this limit.

Here the Appellant renews a statutory construction raised below. The Commissioner has assessed two penalties, (1) for the late filing and (2) for the late payment. These penalties are capped, by statute, to 25% of the tax due. G. L. c. 62C §33(a-b) (repeating same language twice “a penalty of one per cent of the amount

required to be shown as the tax on such return for each month or fraction thereof during which such failure continues, not exceeding, in the aggregate, twenty-five per cent of said amount.").

It is a maxim of statutory construction that statutes must be read together. Board of Ed. v. Assessor of Worcester, 268 Mass. 511, 513-514 (1975) ("Additionally, where two or more statutes relate to the same subject matter, they should be construed together so as to constitute a harmonious whole consistent with the legislative purpose"); FDA v. Brown & Williamson Tobacco, 529 U.S. 120, 133 (2000) ("A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme...and fit, if possible, all parts into an harmonious whole,") (internal quotation marks and citation omitted). Hence the penalties assessed are in excess of the statutory cap.

The Legislature acted with care in providing a cap upon late filers and late payers. The cap admits no exception. G. L. c. 62C §33. Since the penalty "shall include interest" the interest is subject to the penalty cap of 25%. Garrison v. Merced, 33 Mass. App. Ct. 116, 118 (1992) ("The distinction between words of command and words of discretion, such as "shall" and "may" have been carefully observed in our statutes."); Bay State Street Railway Co. v. City of Woburn, 232 Mass. 201, 203 (1919) ("It seems manifest that… the word 'shall' imports command and not mere admonition."). The Commissioner is only entitled to 25 months of

interest (the authorized months of the penalty) and the interest may not exceed 25% of the tax owed.

This statutory argument is heightened by the textual argument that the words "in the aggregate" must be given effect. G. L. c. 62C §33 ("[A] penalty of one per cent of the amount of such tax for each month or fraction thereof during which such failure continues, not exceeding, **in the aggregate**, twenty-five per cent of said amount.") (emphasis added). A command that the penalty has not only a cap but this it is total and complete, "aggregate" and covering the whole cannot be ignored.

The Legislature expressly tied two constraints to both penalties: 1% of the total, per month and not to exceed 25% of the whole. That is the extent of the punishment for later filers. The cap, and the time limit, operate against the interest as well as the underlying penalty. Otherwise, there would be little point in the Legislature providing both a total liability limit and a time limit, if the Commissioner could simply continue to roll clock forward and allow interest to grow.

This case is, itself, illustrative. The interest the Commissioner claims exceeds the penalties the Commissioner says must be paid. That completely ignores the statutory tether between penalties and interest established by §32. Moreover, it should *never* be the case that the interest, which Chapter 62C defines in reference to the short-term federal rate, being a mere fraction of the penalty could ever exceed either the penalty or the tax owed. The federal short-term interest rate in December

2012, one of the months for which the penalty and interest could conceivably be assessed was 5%, and for that month the estate would owe only 1% of the tax, plus 5% interest. The Commissioner has completely decoupled interest from the penalty, in an attempt to avoid the penalty cap in §33(a-b) and this is contrary to the requirement to read §32 so that (1) every word had meaning (even "shall include" and "aggregate") and (2) to be read in concert with §33's cap.

The Commissioner himself recognizes this in his regulations. See 830 CMR 62C.33.1(5)(c)(5) ("The penalty under M.G.L. c. 62C, § 33(a), ceases to accrue when any of the following events occurs:...b. the aggregate M.G.L. c. 62C, § 33(a) penalty totals 25% of the amount of tax required to be shown on the return"). 830 CMR 62C.33.1(5)(d)(5) (same). Therefore, a bill for penalties and interest which is more than 210% of the actual tax is in violation of the cap. The Commissioner has violated the penalty cap by continuing to assess interest.

VIII. The Ambush of an unnoticed subpoena duces tecum, without the exhibits provided to Counsel for the Estate at least in time to cross-examine, was unconscionable and because a manifest injustice when the Board held the failure to rebut ambush evidence against the Estate.

Here the Appellant renews an argument about an ambush witness who produced documents in response to a subpoena not disclosed to the Estate. Further, copies of the documents produced were not given to Counsel for the Estate until **after** the close of the hearing and **after** the witness had testified. This left Counsel

for the Estate cross-examining a surprise witness on documents he was not given copies of.

a. The Rules of the Board prohibit subpoena practice as done here.

The Rules of the Appellate Tax Board, codified at 831 CMR, have a specific provision dealing with subpoenas. 831 CMR 1.24. That rule provides in full as follows:

> 1.24: Subpoenas
> (1) Either party may summon witnesses or may require the production of papers in the same manner in which witnesses may be summoned and papers may be required to be produced for the purpose of trial in the courts.
> (2) Any member of the Board may summon and examine witnesses and require, by subpoena signed by the member, the production of all returns, books, papers, documents, correspondence and other evidence pertinent to the matter under inquiry, at any designated place of hearing.

831 CMR 1.24 as amended in 1273 Mass. Reg. (11/7/2014). It is undisputed that DOR issued the subpoena itself, rather than asking the Board. It is also undisputed that the DOR did not notify the Petitioner of the subpoena. Much was made, at the hearing, by the DOR that they were uncertain if the witness, Heather Dennehey CPA, would appear at all.

831 CMR 1.24(a) provides that summons by parties are done "in the same manner…for the purposes of trial in the courts." Mass. R. Civ. Pro. Rule 45 governs the issuance of subpoena for Court and provides in that an opposing party is entitled to notice, and the right to object, if the process issued is a *subpoena duces tecum*.

See Also 831 CMR 1.37(1) ("Except as herein other provided, the practice and procedure before the Board shall conform to that heretofore prevailing in equity causes in the courts of the Commonwealth…"). Whether or not the DOR knew if the witness would appear, it is clear that the Petitioner was entitled to notice of the subpoena. Considering that the parties had, at least, traded written exhibits in advance of the hearing there was no practical impediment to notice to the Petitioner. Resultingly, the failure to notify was solely a tactical decision of the DOR.

To some very large extent, this tactical decision undermines the rules governing hearings in front of administrative agencies, such as the Appellate Tax Board. Cf. G. L. c. 30A §11(a) ("Parties shall have sufficient notice of the issues involved to afford them reasonable opportunity to prepare and present evidence and argument."). Fair notice of the issues at play not only is a facet of administrative law, it is a constitutional obligation. Strasnick v. Bd. of Registration in Medicine, 408 Mass. 654, 660 (1990) ("Due process requires that, in any proceeding to be accorded finality, notice must be given that is reasonably calculated to apprise an interested party of the proceeding and to afford him an opportunity to present his case.") quoting LaPointe v. Licensing Bd. of Worcester, 389 Mass. 454, 458 (1983). Indeed, the First Circuit has held, based on constitutional case law, that an explanation of the evidence against someone is an essential requirement of due process for without it a hearing is an empty gesture. Cotnoir v. University of Maine Systems, 35 F.3d 6, 12

(1st Cir. 1994) ("he is entitled to an explanation of the substance of the employer's evidence against him so that he can present his side of the story…A reasonable official should have known that this failure to explain the evidence against an individual violated one of the basic procedural due process requirements.")

Counsel for DOR also argued that "I don't think its required, and certainly not the practice at the Board to require parties to notify the other side of the trial subpoena being sent." *Hearing Transcript* at 7 (ignoring the fact that it was a subpoena duces tecum). It would be highly anomalous for it not to be practice at the Board to comply with the Board's rules. This appears to represent a confusion between a *subpoena* and a *subpoena duces tecum*. Under the Federal Rules of Civil Procedure, parties are entitled to notice of all subpoenas by the adverse party. The Massachusetts Rules make a distinction between *subpoena duces tecum* although not using that term, and simple subpoenas for appearance at a hearing. Subpoena duces tecum, under MRCP 45(d) requires notice to the adverse side, under all circumstances.

Nor are circumstances helped by the DOR playing fast and loose. Hearing Transcript, at 7 (DOR Counsel "Again, we had no idea that these documents, that the witness was going to be providing documents."). This is a little different than the story told by Counsel for the Witness. Hearing Transcript at 8 (Counsel for Witness "But just to fill out the court's knowledge, the documents that we brought are

responses to the subpoena."). The DOR cannot really, accurately, say it had no idea the witness would appear, or would produce documents, if it served a subpoena seeking to compel that exact outcome.

The Appellate Tax Board took notice of this issue and after renewed objection commanded, "we'll let you examine the witness and with the goal of not introducing any documents but showing the witness a document to refresh her recollection." *Hearing Transcript at 50*. After testimony, the objection was renewed. *Hearing Transcript*, at 62 ("Mr. Walsh: I have no further questions. I will reiterate an objection to the testimony that we haven't seen and the ambush witness and materials that we haven't been provided yet"). The Board Chairman then ordered the production of documents to the Estate's counsel post-hearing. *Hearing Transcript*, at 62-63. A post-hearing motion to strike was filed and denied.

After the recess, Mrs. Dennehy becomes "a fact witness" for whom the documents were not shared with Counsel for Petitioner. Hearing Transcript, at 49-50, 62-63. The DOR proceeded to elicit substantive testimony from Mrs. Dennehy, as a percipient fact-based witness. It is a bait and switch to insist, over objection, on the witness's admissibility as a harmless keeper of records and then deliberately get percipient witness testimony. Where the notice given, limited though it might be, is misleading, due process requires that the Petitioner have a remedy. Foster from Gloucester v. Gloucester City Council, 10 Mass. App. Ct. 284, 289-290 (1980). See

Also Becker Transportation Co. v. DPU, 314 Mass. 522, 526 (1943) ("Notice was jurisdictional…The hearing was based upon and was limited by the notice.").

b. The use and admission of documents at the hearing, which were not shown to the Plaintiff or his Counsel, is an abuse of discretion.

The admission of evidence which is not in the possession of the opposing party, nor disclosed at the hearing is a fundamental violation of due process. Greene v. McElroy, 360 U.S. 474, 496 (1959) ("the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue."). A full and fair open proceeding requires the dictates of fairness. "Whatever actually plays a part in the decision should be known to the parties and subject to being controverted." Rothman v. Rent Control Board of Cambridge, 37 Mass. App. Ct. 217, 223 (1984). "The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played." Commonwealth v. Edgerly, 372 Mass. 337, 339-340 (1977) "State statute and constitutional principles require an agency to be reasonable and to comply with standards of 'natural justice and fair play.'" Strasnick v. Bd. of Registration in Medicine, 408 Mass. 654, 660 (1990).

To admit evidence that has been withheld by the government, without providing it, is an abuse of discretion, especially where it could have been used examining the witness who provided it. Although the exhibits were provided to Counsel after the close of the hearing, it necessarily hampered the effective cross-

examination of DOR's witness. That such evidence became critical in the Board's findings make it highly prejudicial. It is incomprehensible that experienced attorneys representing the Commonwealth admit on the record that they defy the rules of the tribunal and refuse to provide due process to those challenging their administrative determinations. Given the surprise, the lack of notice, and the ambuscade, the Petitioner is entitled to a remedy.

Conclusion

Wherefore the Appellant seeks this Honorable Court to provide a remedy for the constitutional violations, up to and including a remand to the Superior Court for a civil jury trial, or in the alternative, a remand to the Board for a new trial without tainted evidence, or a reduction of the penalty assessed.

Respectfully Submitted,

Estate of Caroline H. Walsh
By its attorney
/S/ Michael Walsh
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Certificate of Service
I, Michael Walsh, hereby certify that a copy of this brief was served upon AAG G. Gohlke by email and by first class mail on this 21st day of January 2025.
/S/ Michael Walsh

Rule 16(a) Certificate of Compliance

I, Michael Walsh hereby certify that the foregoing complies with the rules of the Court that pertain to the filing of briefs including, but not limited to Rules 16 and 20. This brief does not comply with the applicable length limit but I have received leave to file an oversize brief. The brief otherwise complies with the size and type limitation.

The brief includes 54 pages of includable material, or by word count 14996 words. The brief was completed in Microsoft Word, which was used to count words and pages. The brief is produced in Times New Roman, 14 Point, which is a proportionally spaced font calling for 1" margins under the applicable rules hereby complied with.

/S/ Michael Walsh

Addendum

THE COMMONWEALTH OF MASSACHUSETTS
Appellate Tax Board
100 Cambridge Street, Suite 200
Boston, Massachusetts 02114

Docket No. C347505

ESTATE OF CAROLINE H. WALSH,
Appellant.
v.
COMMISSIONER OF REVENUE,
Appellee.

DECISION

The decision is for the appellee.

APPELLATE TAX BOARD

/s/ Mark J. DeFrancisco Chairman

/s/ Patricia M. Good Commissioner

/s/ Steven G. Elliott Commissioner

/s/ Patricia Ann Metzer Commissioner

/s/ Nicholas D. Bernier Commissioner

Attest: /s/ William J. Doherty
Clerk of the Board

Date: December 15, 2023

NOTICE: Pursuant to G.L. c. 58A, § 13 and 831 CMR 1.32, either party may request findings of fact and report within ten days of this Decision and may also appeal this Decision in accordance with the Massachusetts Rules of Appellate Procedure and 831 CMR 1.35.

Article 15
Article XV.

In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherways used and practiced, the parties have a right to a trial by jury; and this method of procedure shall be held sacred, unless, in causes arising on the high seas, and such as relate to mariners' wages, the legislature shall hereafter find it necessary to alter it

Article 26
Article XXVI.

No magistrate or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments. [Added by Amendment 116] No provision of the Constitution, however, shall be construed as prohibiting the imposition of the punishment of death. The general court may, for the purpose of protecting the general welfare of the citizens, authorize the imposition of the punishment of death by the courts of law having jurisdiction of crimes subject to the punishment of death.

Article 29
Article XXIX.

It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit. It is, therefore, not only the best policy, but for the security of the rights of the people, and of every citizen, that the judges of the supreme judicial court should hold their offices as long as they behave themselves well; and that they should have honorable salaries ascertained and established by standing laws.

Article 30
Article XXX.

In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the

legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

Pt.2, C.3, §1
The tenure, that all commission officers shall by law have in their offices, shall be expressed in their respective commissions. All judicial officers, duly appointed, commissioned and sworn, shall hold their offices during good behavior, excepting such concerning whom there is different provision made in this constitution: provided nevertheless, the governor, with consent of the council, may remove them upon the address of both houses of the legislature
(since amended in ways not relevant to this case)

US Constitutional Provisions

Article 3, §1
The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Seventh Amendment
In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Eighth Amendment
Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Statutory Provisions

G.L.c. 30A §11(1)
Reasonable notice of the hearing shall be accorded all parties and shall include statements of the time and place of the hearing. Parties

shall have sufficient notice of the issues involved to afford them reasonable opportunity to prepare and present evidence and argument. If the issues cannot be fully stated in advance of the hearing, they shall be fully stated as soon as practicable. In all cases of delayed statement, or where subsequent amendment of the issues is necessary, sufficient time shall be allowed after full statement or amendment to afford all parties reasonable opportunity to prepare and present evidence and argument respecting the issues.

G.L.c. 59 §91
Whoever, with intent to defeat or evade any provision of law as to the assessment or payment of taxes, delivers or discloses to an assessor or assistant assessor a false or fraudulent list, return or schedule of property, as and for a true list of his estate not exempt from taxation, shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than one year.

G.L.c. 60 §101
Violation of section twelve by a person of whom demand is made thereunder shall be punished by a fine of not more than five hundred dollars.

G. L. c. 62C §50(a)
If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount, including any interest, additional amount, addition to tax, assessable penalty or forfeiture, together with any costs that may accrue in addition thereto, shall be a lien in favor of the commonwealth upon all property and rights to property, whether real or personal, belonging to such person. The lien shall also extend to property or rights to property of a trust with respect to tax amounts due from a grantor or other person treated as the owner of a portion of such trust by reason of sections 671–678 of the Code, and to property or rights to property of a disregarded entity with regard to tax amounts due from the owner of the entity, but with respect to real property and fixtures, the lien shall not be valid against a mortgagee, pledge, purchaser or judgment creditor unless the notice to be recorded pursuant to paragraph (1) of subsection (b) includes therein the names of the persons in whom the record title to the real property or fixtures stands at the time of recording the notice. The lien shall arise at the time the assessment is made or deemed to be made and shall continue

until: (1) the liability for the amount assessed or deemed to be assessed is satisfied; (2) a judgment against the taxpayer arising out of such liability is satisfied; or (3) any such liability or judgment becomes unenforceable by reason of the lapse of time within the meaning of section 6322 of the Code. The lien created in favor of the commonwealth for any unpaid tax shall remain in full force and effect for: (i) a period of 10 years after the date of assessment, deemed assessment or self-assessment of the tax; or (ii) for such longer period of time as permitted by section 6322 of the Code, in effect and as amended from time to time, and as construed or interpreted either by the regulations or other authorities promulgated under said section 6322 of the Code by the Internal Revenue Service or by any federal court or United States Tax Court decision. If, by operation of said section 6322 of the Code, a tax lien in favor of the commonwealth would extend beyond its initial or any subsequent 10–year period, the commissioner shall be authorized to refile his notice of lien. If any such refiled lien is filed within the "required refiling period", as that term is defined in section 6323(g)(3) of the Code, the lien in favor of the commonwealth shall relate back to the date of the first such lien filing. Otherwise, any such refiled lien shall be effective from the date of its filing. The commissioner of revenue shall promulgate such rulings and regulations as may be necessary for the implementation of this subsection.

G.L.c.62C §33(a-c)

(a) If any return is not filed with the commissioner on or before its due date or within any extension of time granted by him, there shall be added to and become a part of the tax, as an additional tax, a penalty of one per cent of the amount required to be shown as the tax on such return for each month or fraction thereof during which such failure continues, not exceeding, in the aggregate, twenty-five per cent of said amount.

(b) If any amount of tax is not paid to the commissioner on or before the date prescribed for payment of such tax, determined with regard to any extension of time for payment, there shall be added to the amount shown as tax on such return a penalty of one per cent of the amount of such tax for each month or fraction thereof during which

such failure continues, not exceeding, in the aggregate, twenty-five per cent of said amount.

(c) If any amount of tax required to be shown on a return is not so shown, including an assessment made pursuant to the provisions of this chapter, and such tax is not paid within thirty days following the date of the notice of the tax due, there shall be added to the amount of tax stated in such notice a penalty of one per cent of the amount of such tax for each month or fraction thereof during which such failure continues, not exceeding, in the aggregate, twenty-five per cent of said amount.

G.L.c. 62C §73(c) and (g)

(c) Any person required under this chapter or the statutes referred to in section two or by regulations made under authority thereof to pay any estimated tax or tax, make a return, keep records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and shall be fined not more than twenty-five thousand dollars or one hundred thousand dollars in the case of a corporation, or by imprisonment for not more than one year, or both, and shall be required to pay the costs of prosecution. In the case of any person with respect to whom there is a failure to pay any estimated tax, this section shall not apply to such person with respect to such failure if there is not addition to tax under chapter sixty-two B or sixty-three B with respect to such failure.

(g) Any person who willfully delivers or discloses to the commissioner any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter, shall be fined not more than ten thousand dollars or fifty thousand dollars in the case of a corporation, or by imprisonment for not more than one year, or both.

G.L.c. 62C §75

If any return required by sections eleven or thirty contains a false statement which is known or, by the exercise of reasonable care might have been known to the officer making it to be false, such officer and

the corporation shall be liable for the amount of tax thereby lost to the commonwealth, and in addition shall be punished by a fine of not less than five hundred nor more than five thousand dollars.

G.L.c. 62C §77

Any individual, partnership, association, trust, corporate trust or corporation failing without reasonable excuse to file a return, list or report, or otherwise give information, as required by section eight, shall be punished by a fine of not less than twenty-five nor more than five hundred dollars.

G.L.c. 65C §26

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be punished by a fine of not more than five thousand dollars, or by imprisonment for not more than two and one half years, or both.

G.L.c. 65C §27

Except as otherwise expressly provided in this chapter, any person required under this chapter to pay any tax, or required by this chapter or chapter sixty-two C, or regulations made under the authority of chapter fourteen and chapter sixty-two C to make a return or supply any information, who willfully fails to pay such tax or make such return or supply such information at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not more than one thousand dollars, or by imprisonment in a jail or house of correction for not more than one year, or both.

G.L.c. 65C §28

Any person who removes, deposits or conceals, or is concerned in removing, depositing, or concealing, any goods or commodities for or in respect whereof any tax is or shall be imposed, with intent to evade or defeat the assessment or collection of any tax imposed by this chapter shall be guilty of a felony and, upon conviction thereof, shall be

punished by a fine of not more than one thousand dollars or imprisonment in jail for not more than two years, or both.

Mass Rule Civ Pro.
Rule 45(d)(1)

No subpoena for the taking of a deposition shall be issued prior to the service of a notice to take the deposition. If a subpoena commands only the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then before it is served on the person to whom it is directed, a copy of the subpoena shall be served on each party. The party serving a subpoena requiring production or inspection before trial shall also serve on each party a copy of any objection to the commanded production or inspection and a notice of any production made or, alternatively, provide a copy of the production to each party. The subpoena commanding the person to whom it is directed to produce documents, electronically stored information, or tangible things, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by these rules, is subject to the provisions of **Rule 26(c)** and subdivision (b) of this rule. A subpoena upon a party which commands the production of documents, electronically stored information, or things must give the party at least 30 days for compliance after service thereof. Such subpoena shall not require compliance of a defendant within 45 days after service of the summons and complaint on that defendant. The court may allow a shorter or longer time. A person commanded to produce documents or tangible things or to permit inspection may within 10 days after the service thereof or on or before the time specified in the subpoena for compliance if such time is less than 10 days after service, serve upon the party or attorney designated in the subpoena written objection to inspecting, copying, testing, or sampling any of the materials; to inspecting the premises; or to producing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect, copy, test, or sample the materials or inspect the premises except pursuant to an order of the court from which the subpoena was issued. The party serving the subpoena may, if objection is made, move at any time upon notice to the commanded person for an order compelling production or inspection. Such an order to compel production or inspection shall

protect a person who is neither a party nor a party's officer from undue burden or expense resulting from compliance.

Mass Regulations

830 CMR 62C33.1(5)(c)(5)

Penalty Under M.G.L. c. 62C, § 33(a), for Failure to File Timely…

Limitation on Amount of Penalty. The penalty under M.G.L. c. 62C, § 33(a), ceases to accrue when any of the following events occurs:
a. the return is filed;

b. the aggregate M.G.L. c. 62C, § 33(a) penalty totals 25% of the amount of tax required to be shown on the return, less any portion of the tax that was paid on or before the due date, and less any credits against the tax which are allowable on the return; or

c. the taxpayer fails to file a return and the Commissioner makes an assessment of tax for the tax period that would have been covered by the return.

830 CMR 62C33.1(5)(d)(5)

Penalty Under M.G.L. c. 62C, § 33(b), for Failure to Pay Tax Timely…

Limitation on Amount of Penalty. The penalty under M.G.L. c. 62C, § 33(b), ceases to accrue if any of the following events occurs:

a. the taxpayer pays the full amount of tax shown on the return;
b. the aggregate M.G.L. c. 62C, § 33(b) penalty totals 25% of the amount of tax shown on the return;
c. the taxpayer and the Commissioner execute a written settlement agreement under M.G.L. c. 62C, § 37A, which provides that the M.G.L. c. 62C, § 33(b) penalty ceases to accrue; or the taxpayer and the Commissioner execute a written payment agreement which provides that the M.G.L. c. 62C, § 33(b) penalty ceases to accrue.

831 CMR 1.24 (rule of Appellate Tax Board governing subpoenas)
1.24: Subpoenas
(1) Either party may summon witnesses or may require the production of papers in the same manner in which witnesses may be summoned

and papers may be required to be produced for the purpose of trial in the courts.
(2) Any member of the Board may summon and examine witnesses and require, by subpoena signed by the member, the production of all returns, books, papers, documents, correspondence and other evidence pertinent to the matter under inquiry, at any designated place of hearing.

Since renumbered to 1.26.

831 CMR 1.37(1)
Except as herein other provided, the practice and procedure before the Board shall conform to that heretofore prevailing in equity causes in the courts of the Commonwealth…

Since repealed.