COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

JAMES J. REAGAN, JR. & IRENE M. REAGAN	**v.**	**COMMISSIONER OF REVENUE**

Docket No. C332548 — Promulgated: August 18, 2021

This is an appeal filed under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 62C, § 39(c) from the refusal of the Commissioner of Revenue ("Commissioner" or "appellee"), to abate personal income taxes and interest assessed against James J. Reagan, Jr. ("Mr. Reagan") and Irene M. Reagan (together, the "appellants") for the tax period ending December 31, 2012 ("tax year at issue").

The parties submitted the appeal to the Appellate Tax Board ("Board") for decision based on a Statement of Agreed Facts and briefs in accordance with 831 CMR 1.31. Chairman Hammond was joined in the decision for the appellee by Commissioners Good, Elliott, Metzer, and DeFrancisco.

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

Richard L. Jones, Esq., *Joseph X. Donovan,* Esq., *Ryan M. Rosenblatt,* Esq., and *Caroline A. Kupiec,* Esq. for the appellants.

Michael P. Clifford, Esq., *Daniel A. Shapiro,* Esq., and *Andrew P. O'Meara,* Esq. for the appellee.

FINDINGS OF FACT AND REPORT

This appeal concerns the appellants' distributive share of gain from the sale of real properties that were the subject of three urban redevelopment projects undertaken pursuant to Chapter 121A of the Massachusetts General Laws ("Chapter 121A"). The parties agreed that the two issues before the Board were: (i) whether the appellants' distributive share of such gain was exempt from taxation pursuant to Chapter 121A, and (ii) if not exempt, and therefore subject to Massachusetts income tax under G.L. c. 62 ("Chapter 62"), whether - in calculating the amount of taxable gain - the bases of the project properties sold should be increased by the amount of depreciation deductions allowed and taken for federal income tax purposes, but not sought, allowed, or taken for Massachusetts income tax purposes.

Based on the record before it, the Board made the following findings of fact.

I. Introduction and Jurisdiction

At the beginning of the tax year at issue, Newbury Realty Trust, of which Mr. Reagan was the sole beneficiary, held a minority interest as a limited partner in three Massachusetts limited partnerships — St. James Company ("St. James"), Blackstone Company ("Blackstone"), and Kenmore Abbey Limited Partnership ("Kenmore Abbey") (collectively, the "121A Partnerships"), each of which owned an urban redevelopment project undertaken pursuant to Chapter 121A (the "121A Projects"). Newbury Realty Trust was a nominee trust disregarded for both federal and Massachusetts income tax purposes, and hence Mr. Reagan was treated as the direct owner of these limited partnership interests.

During 2012, the 121A Partnerships sold at a gain, to unrelated buyers, the real properties that were the subject of their respective Chapter 121A Projects (the "121A Properties"). Each partnership issued a 2012 federal Schedule K-1 (Form 1065), Partner's Share of Income, Deductions, Credits, etc., to Newbury Realty Trust, that reflected net gain under Section 1231 of the Internal Revenue Code ("Section 1231" and "Code," respectively) totaling (for the three partnerships) $2,497,539.[1] Each partnership also issued a 2012 Schedule 3K-1, Partner's Massachusetts Information, to Newbury Realty Trust, reporting no Massachusetts net income for the year. The Supporting Statements attached to each Schedule 3K-1 indicated that income or loss

[1] These Schedules also reported a total net rental loss, which the appellants did not deduct on their 2012 Massachusetts Resident Income Tax Return, and which is not at issue in this appeal.

from a Section 121A entity was not taxable in Massachusetts, and that the reporting partnership qualified as a Chapter 121A entity.

On their Form 1040, U.S. Individual Income Tax Return, for the tax year at issue, the appellants reported aggregate net Section 1231 gain of $2,685,089 and additional net long-term capital gain of $540 — a total net long-term gain of $2,685,629. On the Schedule D, Long-Term Capital Gains and Losses, included with their 2012 Form 1, Massachusetts Resident Income Tax Return ("Return"), the appellants reported a federal difference of $2,498,838, which reduced the net long-term capital gain of $2,685,629 carried over from their federal Form 1040 by that difference and, accordingly, the amount taxable in Massachusetts. Of this federal difference, a total of $2,497,539 was attributable to the 121A Partnerships, and the balance ($1,299) was attributable to two other partnerships that sold Chapter 121A urban redevelopment project properties during 2012.

The Commissioner selected the Return for audit and issued a Notice of Intent to Assess dated January 18, 2016, reflecting a proposed assessment based on taxation of the total federal difference. The Commissioner, citing **DOR Letter Ruling** 94-7, concluded that gain associated with the sale of the 121A Properties was subject to tax under Chapter 62 and would be under G.L. c. 63 ("Chapter 63"). A Notice of Assessment reflecting an income tax assessment of $131,189 plus interest was issued to the appellants by the Commissioner on March 5, 2016.

The appellants timely filed an application for abatement on Form CA-6, disputing the assessed amounts relating to the disposition of the 121A Properties.[2]

Following a hearing conducted by the Department of Revenue on June 15, 2016, the Commissioner issued a Letter of Determination dated March 9, 2017, concluding that the appellants' distributive share of gain from the sale of the 121A Properties was subject to tax under the provisions of Chapter 62, and that a basis adjustment was not required under the statute. By Notice of Abatement Determination dated March 9, 2017, the appellants were informed of the denial of their abatement application. The appellants timely filed a Petition under Formal Procedure with the Board on May 4, 2017.

Based on the foregoing, the Board found and ruled that it had jurisdiction to hear and decide this appeal.

[This space intentionally left blank.]

[2] The appellants' distributive share of gain attributable to the disposition of urban redevelopment properties owned by two other Chapter 121A entities was not separately disputed, though the Commissioner's assessment included a tax attributable to that gain. Neither is the share separately addressed in these Findings of Fact and Report.

II. The 121A Projects

Newbury Realty Trust invested in three urban redevelopment projects undertaken by the 121A Partnerships. The 121A Partnerships in which the trust invested held no assets and conducted no activities unrelated to their respective 121A Projects. As required by Chapter 121A, each partnership entered into: (i) a contract with the City of Boston pursuant to Chapter 121A, § 6A ("Section 6A Contract") setting forth the rules, regulations, and standards prescribed for their respective 121A Projects, and a provision for certain annual payments in lieu of real and personal property taxes; and (ii) a regulatory agreement with the Boston Redevelopment Authority ("BRA")(currently known as the Boston Planning and Development Agency) pursuant to Chapter 121A, § 18C ("Section 18C Regulatory Agreement"), addressing, *inter alia*, project financing, investment return, and the excise imposed under Chapter 121A, § 10 ("121A Excise").

The 121A Project undertaken by St. James was the subject of a Section 6A Contract with the City of Boston dated April 25, 1975,[3] and separate Section 18C Regulatory Agreements with the BRA dated December 26, 1974 and April 1975. By deed dated April 10, 1975, St. James acquired the property located at 11

[3] A document dated February 16, 2012, approved by the BRA in connection with the transfer of the 121A Project, indicates that St. James and the City subsequently entered into a Section 6A Contract dated December 21, 1983, superseding the original contract.

East Newton Street in the South End district of the City of Boston, the site of an abandoned and structurally unsound eight-story building, which it redeveloped and rehabilitated into 193 dwelling units devoted to elderly housing. The 121A Project was approved for a term of forty years. Pursuant to the Section 6A Contract, St. James agreed to make certain payments to the City — in addition to the 121A Excise — determined, after completion of project construction, with reference to project income. Pursuant to both Section 18C Regulatory Agreements, the cumulative annual return on investment was limited to 6 percent, and payment of the required 121A Excise was also indicated in the agreements.

According to the 2012 Schedule 3K-1 issued by St. James to Newbury Realty Trust, the trust held a 7.408 percent interest as limited partner in profit, loss, and capital.

The 121A Project undertaken by Blackstone was the subject of a Section 6A Contract with the City of Boston dated December 30, 1976, and a separate Section 18C Regulatory Agreement. By deed dated February 24, 1977, Blackstone acquired the property at 33 Blossom Street in the West End section of the City of Boston, the site of a former school, where it constructed and maintained 145 residential rental units of Section 8 affordable housing, elderly housing, and handicapped-designated housing. The 121A Project was approved for a term of forty years. Pursuant to the Section 6A Contract, Blackstone agreed to make certain payments to the City of Boston — in addition to the annual 121A Excise payable to the Commonwealth — determined, after two initial years, with reference to project income. Pursuant to the Section 18C Regulatory Agreement, the cumulative annual return on investment was limited to 8 percent, and payment of the 121A Excise was also indicated in the agreement.

According to the 2012 Schedule 3K-1 issued by Blackstone to Newbury Realty Trust, the trust held a 2 percent interest as limited partner in profit, loss, and capital.

The 121A Project undertaken by Kenmore Abbey was the subject of a Section 6A Contract with the City of Boston dated December 21, 1983, and a separate Section 18C Regulatory Agreement with the BRA dated October 18, 1982. By deed dated December 6, 1982, Kenmore Abbey acquired the property located at 488-496 Commonwealth Avenue and 10 Kenmore Street in Boston, the site of two former hotels. Kenmore Abbey redeveloped and rehabilitated the property into 199 residential rental units of Section 8 housing for the elderly and disabled, and approximately 12,000 square feet of commercial space. The 121A Project was approved for a term of forty years. Pursuant to the Section 6A Contract, Kenmore Abbey agreed to make certain payments to the City — in addition to the annual 121A Excise payable to the Commonwealth — determined, after project completion, with reference to project income. Pursuant to the Section 18C Regulatory Agreement, the cumulative annual return on investment was limited to 8 percent, and payment of the required 121A Excise was also indicated in the agreement.

According to the 2012 Schedule 3K-1 issued by Kenmore Abbey to Newbury Realty Trust, the trust held a 2.76 percent interest as limited partner in profit, loss, and capital.

The Section 6A Contract that Blackstone entered into with the City of Boston, as well as specified sections of the Section 6A Contract between the City and Kenmore Abbey, including the obligation to pay the 121A Excise, were terminable at the option of the partnership or assignable to the transferee if the 121A Projects were transferred to a different entity pursuant to Chapter 121A, § 11. According to its terms, the Section 6A Contract between the City of Boston and St. James Company terminated if the subject project was transferred to a different entity pursuant to G.L. c. 121A, § 11.[4] In the event of such a termination, each contract released the partnership from all obligations under the contract and under Chapter 121A. The contracts with Blackstone Company and Kenmore Abbey also expressly divested the partnerships of "all powers, rights and

[4] The Section 6A Contract between the City and St. James Company also terminated when the partnership's obligations under the Section 18C Regulatory Agreement between St. James Company and the BRA terminated.

privileges” conferred by the contracts and Chapter 121A in the event of their termination.

Both of the Section 18C Regulatory Agreements between St. James and the BRA stated that, upon a transfer of the subject project to a different entity pursuant to Chapter 121A, § 11, the agreement would terminate. The Section 18C Regulatory Agreement between Kenmore Abbey and the BRA stated that, upon a transfer of the subject project to a different entity pursuant to Chapter 121A, § 11, the agreement would, at the option of the BRA, terminate and be replaced by a new Section 18C Regulatory Agreement with the transferee. Each of these Section 18C Regulatory Agreements also provided that if the partnership carried out its obligations and duties imposed by Chapter 121A during the forty-year project term, neither the project nor the partnership would thereafter be subject to the obligations of, or enjoy the rights and privileges under, Chapter 121A, or be subject to the terms, conditions, and obligations of the agreement.

III. Sale of the 121A Properties

As previously noted, during the tax year at issue, each of the 121A Partnerships sold each of their respective 121A Properties at a gain, to unrelated buyers, pursuant to Chapter 121A, §§ 11 and 18C. The sale price was subject neither to approval nor oversight by the BRA or any other governmental entity, nor to any statutory or contractual limitation between the 121A Partnerships and the City of Boston. However, in connection with each sale, an application was submitted to the BRA requesting permission to transfer the 121A Project to the new owner. The approval of both the City of Boston and the BRA to each sale was obtained.

The 121A Partnerships sold their respective 121A Properties to Franklin Preservation Associates Limited Partnership, Blackstone Preservation Associates Limited Partnership, and Kenmore Abbey Preservations Associates Limited Partnership, respectively. Deeds of transfer were recorded on June 22, 2012.

Incident to the sale transactions, the buyers entered into First Amended and Restated Contracts with the City of Boston, which by their terms amended, restated, and superseded the original Section 6A Contracts between the 121A Partnerships and the City. In addition, the buyers of the project real properties transferred by Kenmore Abbey and Blackstone entered into new Section 18C Regulatory Agreements with the BRA, both indicating that the original Section 18C Regulatory Agreements were superseded. The buyer of the 121A Property transferred by St. James also entered into a new Section 18C Regulatory Agreement with the BRA.

The cash sale proceeds that each Chapter 121A Partnership received, net of debts, expenses, reserves, and any required agency payments, were distributed to their respective partners. As a result of the sales, St. James, Blackstone, and Kenmore Abbey allocated $1,314,537, $588,863, and $594,139, respectively, of net Section 1231 gain to Newbury Realty Trust, for a total net Section 1231 gain of $2,497,539.

IV. Conclusion

Based on the record in its entirety, as well as applicable legal authority, the Board ruled that gain from the disposition of the 121A Properties was not sheltered from income taxation under the provisions of Chapter 121A. The Board further found and ruled that the adjusted bases of the 121A Properties sold by the 121A Partnerships during the tax year at issue were the same for both Massachusetts and federal income tax purposes. The Board therefore found and ruled that the appellants' distributive share of net Section 1231 gain realized by the 121A Partnerships in 2012, as reported on the federal Schedules K-1 issued to Newbury Realty Trust for that year, was taxable in full in Massachusetts under Chapter 62.

Accordingly, the Board entered a decision for the appellee in this appeal.

[This space intentionally left blank.]

OPINION

I. The Exemption Issue

Chapter 121A, enacted in 1945 and later amended, is designed to "stimulate the investment of private capital in blighted open, decadent or sub-standard areas, and in the construction, *maintenance and operation* in such areas of needed decent, safe and sanitary residential, commercial, industrial, institutional, and recreational buildings." Chapter 121A, § 2, as most recently amended by 1953 Mass. Acts c. 647, § 1 (adding "maintenance and operation" language) and 1960 Mass. Acts c. 652, § 2 (emphasis added). *See* ***Prudential Insurance Co. v. Boston***, 369 Mass. 542, 543 (1976); ***Boston Edison Co. v. Boston Redevelopment Authority***, 374 Mass. 37, 45 (1977); *see also* ***Opinion of the Justices to the House of Representatives***, 334 Mass. 760 (1956)("***1956 Opinion of the Justices***"); ***Opinion of the Justices to the Senate and House of Representatives***, 341 Mass. 760, 778-80 (1960)("***1960 Opinion of the Justices***").

Urban redevelopment corporations and, as the result of a later-adopted statutory amendment,[5] limited partnerships and other persons described in Chapter 121A, § 18C, may undertake an approved urban redevelopment "project." The term "project" is defined to mean:

[5] *See* 1965 Mass. Acts c. 859, § 1, approved January 4, 1966.

> any undertaking consisting of the construction in a blighted open, decadent or sub-standard area of decent, safe and sanitary residential, commercial, industrial, institutional, recreational or governmental buildings and such appurtenant or incidental facilities as shall be in the public interest, and the *operation and maintenance* of such buildings and facilities after construction . . . .

Chapter 121A, § 1 (emphasis added). Only a limited number of incidental activities are treated as part of a "project" – specifically, in general terms, the acquisition and assembly of land, land clearance, the acquisition of other land or structures necessary for the redevelopment of a blighted area, and the installation or construction of public ways, public utilities, and site improvements. ***Id.***

Because Chapter 121A urban redevelopment projects serve public purposes, they "are subsidized by grants of tax concessions." *See* ***Boston Edison Co.***, 374 Mass. at 50; *see also* ***DeMarco v. Commissioner of Revenue***, Mass. ATB Findings of Fact and Reports 1997-677, 681. The statute exempts a "project" undertaken by a limited partnership "from taxation, betterments, excises and special assessments" for an exemption period ("Exemption Period") of up to forty years,[6] provided that the partnership agrees in a regulatory agreement that:

[6] As originally enacted, the exemption period was forty years. By legislation enacted in 1975, the basic exemption period was reduced to fifteen years, with the ability to extend it to up to forty years, and an automatic twenty-five-year extension was provided for certain subsidized low or moderate housing projects. *See* 1975 Mass. Acts c. 827, § 7.

> in consideration of exemption from taxation of real and personal property and from betterments and special assessments and from the payment of any tax, excise or assessment to or for the commonwealth or any of its political subdivisions *on account of* a project, [it] will pay the excises with respect to a project which a corporation would be bound to pay under the formulae and provisions set forth in [G.L. c. 121A, § 10]. . .

Chapter 121A, § 18C (emphasis added).[7]

Under Chapter 121A, § 10, an urban redevelopment corporation, and hence a limited partnership that undertakes a Chapter 121A project, is required to pay an annual 121A Excise, in addition to certain other excises not relevant to this appeal — specifically, an amount equal to a minimum defined amount or, if greater:

> five per cent of its gross income in [the] preceding calendar year, from all sources, [plus] ten dollars per thousand upon the . . . fair cash value as of January first in the year in which the excise becomes payable of all real and tangible personal property of such corporation . . . which is exempted by this section from taxation under chapter fifty-nine . . .

Chapter 121A, § 10. The 121A Excise is collected by the Commissioner on behalf of the city or town in which the project

[7] This language parallels that in Chapter 121A, §10, as amended by 1956 Mass. Acts c. 640, § 4, which provides that a Chapter 121A urban redevelopment corporation and all of its real and personal property "shall be exempt from taxation and from betterments and special assessments; and . . . shall not be required to pay any tax, excise or assessment to or for the commonwealth or any of its political subdivisions," apart from certain excises and agreed-upon payments for public improvements benefiting their project. The Commissioner has ruled that purchases by urban redevelopment corporations are not exempt from sales or use taxes pursuant to this provision. **DOR Letter Ruling** 95-5. See the discussion of the 1956 change in the statute, *infra*.

is located.[8] *See* ***DeMarco***, Mass. ATB Findings of Fact and Reports at 1997-681-82. Gross income ("Rental Income") is defined to mean:

> payments actually made by persons for the right to reside in or occupy any portion or all of the project and shall not be deemed to include any payments made by any governmental unit to or on behalf of such corporation or to or on behalf of any tenant of such corporation which are in addition to such payments actually made by such tenant.

Chapter 121A, § 10.[9]

In addition to the 121A Excise, the sponsor of a Chapter 121A project, including a limited partnership, may be required to make direct payments to the city or town in which its project is located should gross receipts from the operation of the project exceed a defined amount (Chapter 121A, § 15, as amended by 1953 Mass. Acts c. 647, § 4), or should the sponsor, by contract, agree to make additional payments in lieu of real and personal property taxes (Chapter 121A, § 6A, added by 1960 Mass. Acts c. 652, § 5, and amended by 1975 Mass. Acts c. 827, § 4). *See* Chapter 121A, § 18C.

---

[8] Like urban redevelopment corporations, limited partnership sponsors of a Chapter 121A urban redevelopment project are annually required to file an Urban Redevelopment Excise Return, Form 121A, on which the required excise tax is reported. *See* ***DeMarco***, Mass. ATB Findings of Fact and Reports at 1997-683 n. 2. Each of the Chapter 121A Partnerships paid a 121A excise for each year it owned its urban redevelopment project.

[9] The statute as originally enacted did not define gross income. A definition was added in 1975 when the legislature authorized the creation and sale of condominium units by corporations permitted to undertake Chapter 121A projects. *See* 1975 Mass. Acts c. 827, § 7.

Although afforded tax concessions under Chapter 121A, limited partnerships must also undertake certain obligations, and agree in a regulatory agreement to a limited return on their investment. Specifically, they must agree, under the currently worded statute, not to:

> receive or accept as net income from a project any sum in excess of eight per cent of the amount invested by them in such project for each year in which they own or have owned the project, except that, if in any year they have so received a sum less than the aforesaid eight per cent, they may so receive in a subsequent year or years additional sums not exceeding, in the aggregate, such deficiency without interest.

Chapter 121A, § 18C(e).[10]

However, payments out of profits from the sale of a limited partnership's capital assets are not subject to this restriction on investment return.[11] ***Id.*** Whether profits from the sale of a limited partnership's interest in a Chapter 121A project similarly cease to be sheltered from taxation was the question put before the Board in the present appeal.

The appellants maintained that gain from the sale of the 121A Properties was exempt from taxation because Chapter 121A

---

[10] Until a 1975 amendment of the statute, approved on December 23, 1975, the return was limited to 6 percent. See 1975 Mass. Acts c. 827, § 16. By agreement with the United States Department of Housing and Urban Development or the Massachusetts Housing Finance Agency, an increase in the rate of return on investment in a residential housing project assisted by either is now also allowable. *See* 1989 Mass. Acts c. 679, § 22.

[11] Repeating a provision applicable to urban redevelopment corporations, the statute provides: "Nothing in this section shall be applicable to the payment of dividends out of the profits from the sale of the capital assets of the corporation." The Board interprets the use of the terms "dividends" and "the corporation" here to mean "distributions" and "person described in Section 18C," respectively.

exempts all project income from income taxation and only Rental Income is included in the measure of the mandated 121A Excise. Hence, according to the appellants, the gain shown on the federal Schedules K-1 issued to Newbury Realty Trust by the 121A Partnerships was not subject to income taxation under Chapter 62 or to the 121A Excise. The Board disagreed.

The Supreme Judicial Court has stated "that a statute must be interpreted according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." ***Industrial Finance Corp. v. State Tax Comm'n.***, 367 Mass. 360, 364 (1975)(quoting ***Hanlon v. Rollins***, 286 Mass. 444, 447 (1934)); *see also* ***State Tax Comm'n. v. La Touraine Coffee Co., Inc.***, 361 Mass. 773, 778 (1972)(holding that "[t]he legislative intent is to be ascertained from the statute as a whole"). With specific reference to exemptions, the Supreme Judicial Court has stated that "an exemption from taxation 'is a matter of special favor or grace,' and . . . statutes granting exemptions from taxation are therefore to be strictly construed." ***South Boston Savings Bank v. Commissioner of Revenue***, 418 Mass. 695, 698 (1994). "[A]n exemption [is] . . . to be recognized only where the property falls clearly and unmistakably within the express words of a legislative command.*" **State Tax Comm'n. v. Blinder***, 336 Mass. 698, 703 (1958). Likewise, public grants, such as those provided under Chapter 121A, are to be "construed strictly against the grantee. Nothing will be included in the grant except what is granted expressly or by clear implication." ***Prudential Insurance***, 369 Mass. at 547 (quoting ***Attorney Gen. v. Jamaica Pond Aqueduct Corp.***, 133 Mass. 361, 365-66 (1882)).

The intent of Chapter 121A is evident from the statute considered as a whole. The benefits and burdens of Chapter 121A are available or apply with respect to a specific urban redevelopment project undertaken by a limited partnership only so long as the partnership continues to operate and maintain that project. The partnership must operate and maintain the property that it develops in order to derive the tax benefits afforded owners of Chapter 121A projects. A "project" that a limited partnership no longer operates and maintains — and thus, from which it no longer has the ability to derive Rental Income from persons for the right to reside in or occupy any portion or all of the project — ceases to qualify as a "project" held by it within the meaning of the statute as to which tax benefits are provided. *See* Chapter 121A, § 1, as amended by 1953 Mass. Acts c. 647, § 1.

The historical development of Chapter 121A, as first applied only to urban redevelopment corporations, evidences this intent. Prior to 1956, the statute exempted only the real and personal property of an urban redevelopment corporation from property taxation, requiring the corporation to pay the 121A Excise instead. The statute also limited the cumulative dividends payable to shareholders, other than dividends out of profits from the sale of capital assets. *See* Chapter 121A, §§ 9, 10, as enacted by 1945 Mass. Acts, c. 654, § 1. In 1956, the Legislature expanded the tax benefits afforded Chapter 121A urban redevelopment corporations by providing that, for the Exemption Period (then forty years), such corporations and all of their real and personal property "shall be exempt from taxation and from betterments and special assessments [and] shall not be required to pay any tax, excise or assessment to or for the commonwealth or any of its political subdivisions," apart from certain excises and other sums, including agreed-upon payments for public improvements benefiting their projects. Chapter 121A, § 10, as amended by 1956 Mass. Acts c. 640, § 4.[12]

Responding to a question from the House of Representatives regarding the constitutionality of this change, the Supreme Judicial Court found the legislation to be within the competency

[12] It was not until 1960 that the legislature added Chapter 121A, § 6A, permitting Section 6A contracts and the payment pursuant thereto of a "specific or ascertainable" amount in addition to the excise prescribed by Chapter 121A, § 10. 1960 Mass. Acts c. 652, § 5.

of the General Court under the Massachusetts Constitution, stating that "the tax advantages are to continue only so long, not to exceed forty years, as the project continues to be operated [by its sponsor] under public regulation and for the public benefit." ***1956 Opinion of the Justices*** at 764. Like the exemption from both real and personal property taxation originally granted under Chapter 121A, the tax advantages with respect to Chapter 121A projects added by the 1975 legislation cease the instant that the sponsor — an urban redevelopment corporation (under the statute as originally enacted) or an entity described in Section 18C (since 1966) — sells its project to an unrelated third party buyer. Although the buyer can secure its own tax advantages, the tax advantages allowed the transferring sponsor are no longer available to shelter from taxation any gain the sponsor realizes on the sale.

Two specific statutory provisions, both as originally enacted, are reflective of this result. Chapter 121A, § 18C expressly recognizes that once a limited partnership, such as each of the Chapter 121A Partnerships, has "carried out [its] obligations and performed [its] duties as imposed by" Chapter 121A for the Exemption Period commencing with the date of approval of its urban redevelopment project, the limited partnership:

> shall thereafter no longer be subject to the obligations of [Chapter 121A] except as to any liability theretofore incurred nor shall [it] enjoy the rights and privileges . . . granted [by the statute].[13]

One of those foregone rights and privileges is exemption from taxation. Chapter 121A, § 16 likewise provides that once an urban redevelopment corporation "has carried out its obligations and performed its duties as imposed by" Chapter 121A for the Exemption Period commencing with the date of its organization, it shall thereafter "be free from all of the special limitations, restrictions, obligations and duties imposed upon" urban redevelopment corporations, and instead shall "be subject to all of the obligations and duties" of a Massachusetts business corporation, one of which includes the obligation to pay corporate excise taxes pursuant to Chapter 63.

These two statutory provisions unequivocally indicate that an eligible entity owning a single Chapter 121A project ceases to enjoy the benefits of, and to be subject to the burdens of, Chapter 121A once its Exemption Period ends, such that gain realized from a later sale of project property is not exempt from income or corporate excise taxation. Consistent with this express legislative intent, an eligible entity that sells a Chapter 121A urban redevelopment project at a gain to an

[13] This language is reflected in the Section 18C Regulatory Agreements that St. James and Kenmore Abbey entered into with the BRA.

unrelated third party before the end of the entity's Exemption Period realizes gain subject to tax under Chapter 62 or Chapter 63. There is no basis for concluding that the Legislature intended to provide more favorable tax treatment — in the form of exemption both from the 121A Excise, and from income or corporate excise taxation — to Chapter 121A entities that sell their projects before, rather than after, the end of their Exemption Period. *See* ***Prudential Insurance***, 369 Mass. at 543 (indicating the 121A Excise and payments allowed under Chapter 121A, § 6A to be a *quid pro quo* for the exemption from state and local taxation). Indeed, the statute has always included constraints on the early disposition of a Chapter 121A project, with respect to which the Legislature had no reason to grant tax concessions. *See*, *e.g.*, Chapter 121A, § 11, part of the original legislation (the provision relied upon by the 121A Partnerships, which authorizes transfers of projects to other urban redevelopment entities or public agencies), and Chapter 121A, § 16A, added by 1953 Mass. Acts c. 647, § 5 (dealing with actual or threatened foreclosures and lease terminations).

Although, unlike urban redevelopment corporations, limited partnerships are permitted to undertake activities in addition to the ownership and operation of an urban redevelopment project (*see* Chapter 121A, § 3, as amended by 1953 Mass. Acts c. 647, § 3, indicating that an urban redevelopment corporation cannot "undertake more than one project or engage in any other type of activity"), the tax benefits afforded urban redevelopment corporations and limited partnerships under Chapter 121A with respect to a specific Chapter 121A urban redevelopment project undertaken by them are identical.

A limited partnership is exempt from the payment of any tax "on account of" a Chapter 121A project undertaken by it. *See* Chapter 121A, § 18C(f). The Board has ruled that this exemption extends to income derived from the project. *See* ***DeMarco***, Mass. ATB Findings of Fact and Reports at 1997-683. An urban redevelopment corporation is similarly exempt from taxation "with respect to" its urban redevelopment project – being subject instead to an excise on "its corporate existence." *See* Chapter 121A, § 10, as amended by 1975 Mass. Acts c. 827, § 7 (stating that the "fifteen year period of exemption from taxation provided [for in the statute] may be extended . . . *with respect to a project* authorized under [Chapter 121A] for an additional period of time"). (emphasis added).

However, the instant an urban redevelopment corporation or a limited partnership ceases to operate and maintain a Chapter 121A project by selling project real property to an unrelated third party, the entity is divested of the opportunity to derive Rental Income with respect to, or on account of, that project. The justification for property, which had been owned and used by the entity in the performance of "functions for the public benefit," to continue to "receive favored treatment in the matter of taxation" no longer exists. *See* ***1956 Opinion of the Justices***, 334 Mass. at 763; *see also* ***1960 Opinion of the Justices***, 341 Mass. at 780 (proposed new definition of qualifying projects found to be constitutional only if each "project [was] properly found . . . to be for a public purpose"). Accordingly, any gain realized from the sale of Chapter 121A project property is no longer sheltered from taxation by Chapter 121A.

Moreover, the clear inference is that when permitting — in the 1975 legislation — the creation of residential condominium units within project areas by corporate entities authorized to undertake Chapter 121A projects, the Legislature understood that profits realized from the sale of condominium units would be subject to corporate excise taxation rather than to the 121A Excise. In connection with the statutory change, the Legislature expressly limited gross income subject to the 121A Excise to Rental Income — thus precluding the imposition of the 121A Excise on any profits from the sale of condominium units. However, while requiring those profits to be held in a guaranty fund for a period of forty years from the time the underlying project was approved, the Legislature also excluded from this obligation "all state, federal and other taxes and excises applicable to any gain derived [from the sale]" — allowing a portion of the profits derived to be used immediately to satisfy any resulting corporate excise tax, which the Legislature clearly anticipated would apply to the profits.

Concurrent with the transfers by the 121A Partnerships of their 121A Properties to unrelated third parties, the 121A Partnerships were released from the statutory and contractual provisions limiting their return on investment, and other obligations under their respective Section 6A Contracts and Section 18C Regulatory Agreements. At the same time, the Chapter 121A Partnerships forfeited the tax benefits afforded urban redevelopment entities. Their realized gains thereby became subject to tax under the provisions of Chapter 62 applicable to the taxation of partnerships and their partners. *See* **DOR Letter Ruling** 94-7 (stating that sale "proceeds are subject to tax, not under c. 121A, but under the general tax provisions of Massachusetts law (i.e. c. 62 or c. 63, as the case may be).")

Chapter 62 requires an individual resident partner to report separately on his or her Massachusetts income tax return "his distributive share of the partnership's income or loss from sources taxable under [Chapter 62] and of any item of deduction or credit." G.L. c. 62, § 17(a). The character of the items that are deemed to pass through to partners is determined as though they were realized by them directly from the same source, or incurred by them in the same manner, as the partnership. G.L. c. 62, § 17(c); *see also* ***Neese v. Commissioner of Revenue***, Mass. ATB Findings of Fact and Reports 1987-477, 488 (1987).

While partnerships to which the provisions of Chapter 121A apply are, unlike other partnerships, required to pay an annual 121A Excise, no other provision of Chapter 121A modifies the basic scheme of partnership income taxation. Hence, during the Exemption Period, project income earned by the 121A Partnerships passed through to the partnerships' respective partners and retained its tax-exempt character in their hands. *See* ***DeMarco***, Mass. ATB Findings of Fact and Reports at 1997-683 (holding that a "partner's distributive share of income earned by the Partnership *from the operation of* [its Chapter 121A] Project is not includible in the [partner's] Massachusetts gross income)(emphasis added)").

However, the instant that the 121A Partnerships ceased to be subject to the benefits and burdens of Chapter 121A, the gain realized by the partnerships when they disposed of their 121A Properties passed through to their partners without the benefit of the tax-exempt status afforded by Chapter 121A while the 121A Partnerships continued to operate and maintain their 121A Properties. Thus, Newbury Realty Trust's distributive share of this gain was not exempt from taxation under Chapter 121A;

rather it was subject to income tax under the provisions of Chapter 62.

II. The Basis Issue

Having concluded that Newbury Realty Trust's distributive share of gain realized from the sale of the 121A Properties was taxable under Chapter 62 and not exempt from income taxation by Chapter 121A, it remained for the Board to address the amount of taxable gain. As indicated previously, an individual resident partner must report on his or her Massachusetts income tax return the distributive share of partnership income from sources taxable under Chapter 62. G.L. c. 62, § 17(a). Massachusetts gross income starts with federal gross income, with certain modifications not relevant here. G.L. c. 62, § 2(a). Under the Code, gross income includes gain from the sale or other disposition of property, defined as the excess of the amount realized over the adjusted basis of the property. Code § 1001(a); *see also* Code § 61(a)(3). The amount realized by each of the 121A Partnerships from the sale of their 121A Properties was not disputed by the parties. Rather, the appellants argued that the adjusted basis reported by each of the 121A Partnerships on their federal income tax returns for the tax year at issue was understated for Massachusetts income tax purposes by the amount of depreciation taken for federal income tax purposes.

The Massachusetts adjusted basis of property acquired after December 31, 1970 is "the Massachusetts initial basis of property adjusted by applying the same adjustments as are made to the federal basis for periods after determination of the initial basis" with certain exceptions. G.L. c. 62, § 6F(c)(1), applicable to tax years beginning on or after 1987; *See also* **DOR Technical Information Release** *88*-7; ***SAHI USA, Inc. v. Commissioner of Revenue***, Mass. ATB Findings of Fact and Reports 2006-794, 815.

The Massachusetts initial basis of property acquired after December 31, 1970 — other than in a carryover basis transaction — starts with its federal basis. G.L. c. 62, § 6F(b)(2)(A). Relevant to the instant appeal, the adjustments to this federal basis required to arrive at a property's Massachusetts adjusted basis do not include "any federal adjustment resulting from provisions of the [federal] Code that were not applicable in determining Massachusetts gross income at the time such federal adjustments were made." G.L. c. 62, § 6F(c)(2)("Section 6F").

Under the Code, the basis of property is, in general, its cost reduced by adjustments described in Code § 1016, including allowable depreciation — *i.e.*, deductions for depreciation attributable to a trade or business allowed under Code § 167. Code § 1011(a), § 1012(a), § 1016(a)(2); *see also* Code § 62(a)(1). However, the appellants pointed out that because the 121A Partnerships were exempt from taxation while they operated and maintained their projects, the depreciation deductions allowed under the federal Code with respect to their Chapter 121A projects were not allowed under G.L. c. 62, which precludes taxpayers from claiming "[a]ny deduction relating or allocable to any income not included in Massachusetts gross income." G.L. c. 62, § 2(d)(1)(B)("Section 2(d)"); *see* ***DeMarco***, Mass. ATB Findings of Fact and Reports at 1997-683 (holding that "[a] corollary of the non-inclusion of Project income in partners' Massachusetts gross income is the non-deductibility of pass-through [operating] losses."); *see also* ***Kneissl v. Commissioner of Revenue***, Mass. ATB Findings of Fact and Reports 1997-687 (a companion case reaching the same conclusion).

According to the appellants, the federal depreciation deductions that they were unable to claim on their Massachusetts income tax returns due to Section 2(d), but that reduced the federal tax bases of the 121A Properties, were "not applicable in determining Massachusetts gross income at the time such federal adjustments were made," within the meaning of Section 6F. Hence, they argued, depreciation taken for federal income tax purposes was required to be added back to the bases of the 121A Partnerships in their 121A Properties for purposes of determining taxable Massachusetts gain.

As a threshold matter, as noted, taxable gain in Massachusetts is determined by reference to federal adjusted basis absent an express statutory or regulatory direction to do otherwise. Further, at the time that the depreciation deductions accrued - but were not available to the appellants - the appellants enjoyed substantial tax benefits under Chapter 121A, which ceased (as did their burdens) upon the sale of the 121A Projects. Recomputing basis by allowing an add back of depreciation deductions would confer an additional tax benefit not authorized by Chapter 121A or elsewhere.

Throughout the time periods relevant to this appeal, depreciation expenses allowable under the Code were deductible for Massachusetts income tax purposes pursuant to versions of the Code as in effect from time to time incorporated at G.L. c. 62, § 1. *See* ***Insoft v. Commissioner of Revenue***, Mass. ATB Findings of Fact and Reports 1998-741, 753. Although the Code reference in Chapter 62 and the Code provision actually in effect for a particular year did not coincide in every year during the period when the 121A Projects were owned by the 121A Partnerships (*see* **DOR Technical Information Release** *88-7, Rule 12*), there was no allegation that the accumulated depreciation taken for federal income tax purposes differed from the amount of depreciation that partners in the 121A Partnerships would have been able to deduct for Massachusetts tax purposes had Section 2(d) not precluded them from doing so. *Compare* **DOR Technical Information Release** *03-25, IV* (describing a basis adjustment required for bonus depreciation allowed federally but not in Massachusetts). Further, although under the Code, a basis adjustment for depreciation claimed in excess of that permitted under the statute was not required during the time periods relevant to this appeal to the extent the excess resulted in no reduction in tax liability (*see* Code § 1016(a)(2)(B)), there was no allegation by the appellants that the depreciation reported on the 2012 federal returns of the 121A Partnerships did not reduce the federal basis of the 121A Properties transferred to the unrelated buyers. *See* ***Insoft***, Mass. ATB Findings of Fact and Reports at 1998-750. Indeed, the appellants made no arguments to this effect.

In the instant case, there was a congruence, which the appellants did not dispute, between the relevant federal and state tax provisions relating to allowable depreciation deductions during the periods when the 121A Partnerships owned their 121A Projects. *See* ***Bill DeLuca Enterprises, Inc. v. Commissioner of Revenue,*** Mass. ATB Findings of Fact and Reports 1999-252, 263, *aff'd*, 431 Mass. 314 (2000). The appellants pointed to no variation between the deductions for depreciation allowed for federal income tax purposes and those allowable under Massachusetts tax law during the relevant time periods. *See* ***SAHI***, Mass. ATB Findings of Fact and Reports at 2006-816. The partners in the 121A Partnerships were unable to offset their Massachusetts gross income by their distributable shares of depreciation deductions allowed for federal income tax purposes — not because of the unavailability of federally claimed depreciation as a deduction under Chapter 62, but because of the circumstances attendant to investors in partnerships that choose to take advantage of the provisions of Chapter 121A. Since the partners in the Chapter 121A partnerships were not taxable on annual project income, depreciation relating to that income — although ordinarily an allowable deduction under Chapter 62 — was not deductible by them due to Section 2(d).

The investors in the 121A Partnerships were similar to the taxpayer in ***Insoft,*** *supra*, a case involving the application of Section 6F, a provision relied upon by the appellants. The taxpayer in ***Insoft*** was a Florida resident who realized his distributive share of Massachusetts source income when the Massachusetts limited partnership in which he had invested sold its real estate located in various neighborhoods of Boston. The Board ruled that depreciation deductions allowed federally reduced the Massachusetts adjusted basis of the properties sold, notwithstanding that the taxpayer (i) had no Massachusetts source income, apart from his share of revenues derived by the partnership, against which to offset his distributive share of the depreciation expense deductions, and (ii) had never filed nonresident returns declaring his distributable share of these deductions. The Board stated:

> Amounts of depreciation expenses as federally determined were allowed for deduction against Massachusetts gross income . . . . While appellant did not declare the available depreciation expense deductions on Massachusetts nonresident income tax returns, this circumstance did not render depreciation expenses calculated in accordance with the Internal Revenue Code inapplicable under G.L. c. 62.

Insoft, Mass. ATB Findings of Fact and Reports at 1998-753.

Had the taxpayer in ***Insoft***, a nonresident, filed Massachusetts nonresident income tax returns, he would have been unable to take advantage of all of his share of the federally determined depreciation expenses in Massachusetts, not because they were inapplicable for Massachusetts income tax purposes, but rather because Massachusetts law imposes a tax on only the Massachusetts source net income of a non-resident and, during the relevant years, the taxpayer’s Massachusetts source income — consisting of revenues from the partnership — was insufficient to absorb all of these depreciation expenses. Similarly, the fact that the appellants were unable to declare the federally available depreciation expense deductions on their Massachusetts returns, due to Section 2(d), did not render depreciation expense deductions calculated in accordance with the Code inapplicable under Chapter 62.

A like situation was addressed in ***SAHI, supra.*** There, an upper tier limited partnership sold at a gain its interest in a lower tier Massachusetts partnership and distributed the income from that sale to its partners, including the taxpayer, a Delaware corporation. The lower tier partnership owned and operated a hotel in Boston, and hence for years prior to the sale passed depreciation deductions through to its indirect partners, including the taxpayer. However, the taxpayer derived no benefit from these depreciation deductions because it had no Massachusetts income against which to apply them.

The taxpayer argued that because, in prior years, it had been unable to use the depreciation deductions, it should be able to apply them to offset its share of the gain realized by the upper tier partnership from the sale of the lower tier partnership interest – in effect increasing the basis in its proportionate share of the lower tier partnership interest that was sold. The Board disagreed, stating that "the federally-determined depreciation deductions generated prior to the year at issue were allowable as a deduction against Massachusetts gross income, regardless of whether the appellant had claimed them." ***SAHI***, Mass. ATB Findings of Fact and Reports at 2006-819-20. In particular, like in the instant case, there was no ground for variation between the federal and the Massachusetts adjusted bases because deductions for depreciation were allowed for federal income tax purposes and were allowable under Massachusetts tax law. ***SAHI***, Mass. ATB Findings of Fact and Reports at 2006-816.

The facts presented in the instant case are also distinct from the situation addressed in ***Weston Marketing Corp. v. Commissioner of Revenue***, Mass. ATB Findings of Fact and Reports 1994-34, *aff'd*, 40 Mass. App. Ct. 1108 (1996) (Rule 1:28 Decision), involving a tax year prior to the effective date of Section 6F. The corporate taxpayer in ***Weston Marketing*** owned regulated futures contracts. Under the Code, the corporation was required to recognize any gain or loss on each contract at the close of 1981, as though the contract had been sold at its fair market value on the last day of the year – *i.e.*, each contract was "marked-to-market." The corporation was not required to mark these contracts to market on its Massachusetts corporation excise tax return. However, when the corporation sold the contracts in the following year, the gain it realized in Massachusetts included the amount of the marked-to-market losses that it had deducted in the prior year on its federal income tax return — because those losses reduced the corporation's federal basis in the futures contracts. The Board ruled that the total marked-to-market loss reduced the amount of gain subject to tax in Massachusetts, stating there was "no logical or statutory basis for recapturing that loss for Massachusetts tax purposes."

Weston Marketing, Mass. ATB Findings of Fact and Reports at 1994-46. "[W]hile the capital losses were allowed federally, they were never allowable in determining the taxpayer's income taxable in Massachusetts because of the differences between the calculations of taxable income under the two separate taxing schemes." ***SAHI***, Mass. ATB Findings of Fact and Reports at 2006-818.

The "underlying statutory scheme differed between federal and state" in ***Weston Marketing***. *See* ***Bill DeLuca Enterprises***, Mass. ATB Findings of Fact and Reports at 1999-263. However, where a depreciation expense deduction is afforded under both the federal and Massachusetts tax statutes, the initial basis of property taken into account for purposes of computing gain realized by a taxpayer in Massachusetts must be adjusted downward by the depreciation expense even though the taxpayer is unable to offset income subject to tax in Massachusetts by the expense due to the appellants' circumstances — and in particular where the property giving rise to the expense produces gross income exempt from annual income taxation in Massachusetts.

Finally, the appellants maintain that, under Article 44 of the Amendments to the Massachusetts Constitution, the federally taken depreciation was required to be added back to the bases of the 121A Properties sold for purposes of determining taxable Massachusetts gain in order to avoid the taxation of phantom income. The Supreme Judicial Court has held, however, that the recovery when property is sold of an amount in excess of the property’s depreciated basis constitutes income within the meaning of Article 44 — being “an increase of wealth out of which money may be taken to satisfy the pecuniary imposition laid for the support of the government.” ***Bill DeLuca Enterprises***, 431 Mass. at 325 (*citing* ***Brown v. Commissioner of Corporations and Taxation***, 242 Mass. 242, 244 (1922)); *see also* ***Bingham v. Commissioner of Corporations and Taxation***, 249 Mass. 79, 80-81 (1924).

The determination of a property’s Massachusetts adjusted basis for purposes of determining gain or loss embodies a process intended to capture, in the case of depreciable property, the “presumed diminution in asset value resulting from wear and tear,” which occurs whether or not the depreciation in value provides any tax benefits for the taxpayer. *See* ***Insoft***, Mass. ATB Findings of Fact and Reports at 1998-757. Massachusetts reduces the initial basis of property by federally allowable depreciation (*see* Code § 1016(a)(2), § 167(a)) — *i.e.*, the “exhaustion, wear and tear, [and] obsolescence” that occurs over a property’s useful life — whether or not the allowable depreciation is claimed for tax purposes, given that “[w]ear and tear do not wait on net income." *See* ***Virginian Hotel Co. v. Helvering***, 319 U.S. 523, 525 (1943); *see also* ***United States v.***

Hill, 506 U.S. 546, 557 (1993). Allowable depreciation reflects that "some erosion of fair market value is deemed to occur over the life of the asset," which if recovered on sale represents a real increase in wealth. *See* ***Insoft***, Mass. ATB Findings of Fact and Reports at 1998-754.

Accordingly, gain on the disposition of depreciated property, even if depreciation deductions were not previously claimed for Massachusetts tax purposes, is not "'fictional' or 'paper' income." ***Bill DeLuca Enterprises***, 431 Mass. at 322, 324-25.

A factual situation unlike that in the present appeal was addressed by the Board in ***T.H.E. Investment Corp. v. Commissioner of Revenue,*** Mass. ATB Findings of Fact and Reports 1986-473, where the Board found that a substantive difference in federal and Massachusetts tax provisions could not justify the taxation in Massachusetts of amounts which did not "represent real increases in wealth." ***Id.*** at 479.

In ***T.H.E. Investment***, the corporate taxpayer and its foreign subsidiary filed consolidated federal income tax returns. Thus, the subsidiary's losses were deductible on these returns, and reduced the basis of the taxpayer's stock investment in its subsidiary. To the extent there was insufficient basis to offset the losses, a negative basis adjustment was required — giving rise to a so-called "excess loss account." Because the taxpayer and its subsidiary did not file combined returns in Massachusetts, the taxpayer could not deduct the subsidiary's losses on its separate Massachusetts returns. When the subsidiary later became insolvent, the taxpayer was subject to tax federally on the subsidiary's previously deducted losses reflected in its excess loss account – *i.e.*, the Code required a "recapture" of those losses. The Board ruled that this "recaptured" income was properly excluded from the taxpayer's Massachusetts gross income because the losses comprising the excess loss account were never deductible in determining the taxpayer's income taxable in Massachusetts.

Unlike the excess losses considered in ***T.H.E. Investment***, which did not represent real accretions of wealth, the depreciation deductions taken by the 121A Partnerships for federal income tax purposes were allowable in Massachusetts as well, reflecting a diminution in the value of the 121A Properties over the period they were held, such that recovery of the federally allowed depreciation amounts in the form of gain represented real appreciation that was both constitutionally and statutorily subject to tax in Massachusetts. The appellants "did not prove that Massachusetts recognition of the federal gain impermissibly resulted in taxation of 'a mere paper profit.'" ***Insoft***, Mass. ATB Findings of Fact and Reports at 1998-758 (*citing* ***Parker Aff. Cos., Inc. v. Dep't of Revenue***, 382 Mass. 256, 264 (1981)).

A party challenging the constitutional validity of the application of a Massachusetts statutory provision bears a heavy burden; all rational presumptions in favor of validity are made. ***Insoft***, Mass. ATB Findings of Fact and Reports at 1998-758 (citing ***St. Germaine v. Pendergast***, 416 Mass. 698, 703 (1993)). In the present appeal, the appellants failed to sustain this burden.

III. Conclusion

The Board found and ruled that the gain realized by the 121A Partnerships – which ceased to be subject to the benefits and burdens of Chapter 121A when they disposed of their 121A Properties - passed through to their partners, including Newbury Realty Trust, without the benefit of the tax-exempt status afforded by Chapter 121A. The appellants' distributive share of this gain was therefore subject to tax under Chapter 62, and was not reduced by depreciation deductions allowed and taken for federal tax purposes while the 121A Partnerships operated and maintained their 121A Properties.

Thus, the appellants' distributive share of net Section 1231 gain realized by the 121A Partnerships, as reported on the federal Schedules K-1 issued to Newbury Realty Trust for the tax year at issue, was taxable in full in Massachusetts.

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

THE APPELLATE TAX BOARD

By: /S/ *Thomas W. Hammond*
Thomas W. Hammond, Jr., Chairman

A true copy,

Attest: /S/ *William J. Doherty*
Clerk of the Board