2021 Municipal Law Seminar
WORKSHOP A
Local Tax Administration and Assessment

DISCUSSION SUMMARY
(Prepared For Informational and Training Purposes Only)

This summary of the informal discussion presented at Workshop A is provided for educational and training purposes. It does not constitute legal advice or represent Department of Revenue opinion or policy, except to the extent it reflects statements contained in a public written statement of the Department of Revenue.

For information concerning the amended Clause 45 exemption please see the "Ask DLS: Effective Exemption/PILOT Dates for Recent Solar Legislation" section of the September 2, 2021 Edition of *City and Town* and Bulletin 2021-3. Additionally, for information concerning applications to abate a locally assessed tax or charge pursuant to G.L. c. 58, § 8 please see IGR 2020-10.

1. Case Study Hypothetical A:

Brad and Elise Berry own two properties in the Town of Wandsworth, Massachusetts. One parcel is 1 acre in size and improved with a house lot. The second parcel, 5 acres in size, was vacant until the summer of 2021 when the Berry's began installing a large solar power generating plant. Completed by early fall, the solar-power system was capable of producing 400kWh of electricity on average. 5kWh were needed to supply the Berry's two parcels. For the remaining 395kWh generated, the Berry's entered into a Power Purchase Agreement (PPA) with the East Coast Mall in Clovelly, MA in December of 2021. A quarterly payment to the Berry's would cover the cost of the net power generated for the mall.

Questions and Answers:

a. On what date would the eligibility of the solar-power system for exemption be tested?

The date the solar-power system would be eligible for exemption is January 1, 2022.

b. Does the Berry's power-generating facility qualify for exemption?

No, pursuant to G.L. c. 59, § 5, cl. 45, the Berry's power-generating facility does not qualify for exemption.

c. Assume the power generating system was in place as of January 1, 2021, and the assessors had determined that it qualified for exemption under the ATB precedent in the KTT decision for Fiscal Year 2022. Is that determination still effective for Fiscal Year 2023?

No. To be grandfathered, a prior determination of exempt status under Clause 45th is effective only if the solar power system generates no more than 150% of the electricity needs of the parcel on which it is situated. 395kWh are much more than 150% of the power needs of the parcel on which the solar power system is situated.

d. What is the first fiscal year for which the Berry's could enter into a payment in lieu of taxes (PILOT) agreement with the town?

The first fiscal year they can enter into a PILOT agreement with the town would be fiscal year 2023.

e. What steps must the assessors take to determine whether a PILOT agreement is in the town's best interests?

Assessors need to develop an estimate of the fair cash value of the solar or wind-generating personal property and estimate a stream of periodic (quarterly or semi-annually) payments based on that putative value, over the life of the PILOT agreement. The assessors' estimate of fair cash value and the stream of payments in lieu of taxes should be compared to the value and payment stream of the proposed PILOT agreement. The proposed value and payment stream should not markedly differ from the amounts the assessors estimate will be collected in property taxes over the relevant time period.

f. The town manager negotiates a PILOT to take effect for FY 24 but does not consult the assessors. He ballparks a payment amount of $6000 each quarter but lacks appraisal information to support that payment amount. He presents the agreement to town meeting for approval. A town meeting member inquires of the assessors present at town meeting if the agreement is in the town's financial interest.

Assume the assessors say they can't supply an answer to the question about the town's financial interest, but town meeting adopts the agreement anyway. Is the PILOT agreement valid?

The agreed-upon payment stream cannot be compared to an objective measurement of fair cash value and payments in lieu of taxes if these estimates are not developed by the assessors before the agreement is entered into. Assessors are the only local officials qualified to develop an estimate of fair cash value.

In what ways is the agreement infirm?

Without a basis corresponding to fair cash value and periodic payments that would arise from fair cash value, the agreed amounts lack support in appraisal methodology. If the divergence winds up being too great, the agreed value could violate the requirement that taxes be proportional and consonant with taxation according to fair cash value, objectively measured, imposed by the Massachusetts Constitution and G.L. c. 59, § 38. If there is no appraisal basis to support the agreed-upon value and payments, the town may lack the information needed to satisfy a certification review.

g. Ten taxpayers contend that the payments do not correspond to what would be due in property taxes and amount to an illegal tax expenditure. They take a deposition of the principal assessor who is asked for her opinion as to whether the payments reflect full and fair cash value.

If the assessors did not prepare an objective estimate of fair cash value which correlates with the stream of payments under the agreement, they lack a record basis to answer the question.

The assessors, after the fact, develop an estimate of full and fair cash value and compare the payment amounts agreed to in the PILOT. They determine that the PILOT payments represent a fraction of the amount that would be due if the facility had been assessed at full and fair cash value. The assessors are then questioned about the accuracy of the agreed valuation in connection with their quinquennial certification process by their representative from the Bureau of Local Assessment.

There is no advantage for the assessors in acquiescing to an arbitrarily selected value and payment stream. Again, the lack of a record basis supporting the agreed amounts leaves the assessors flat-footed in the certification process.

2. Case Study Hypothetical B1:

Jim and Barb Carlisle of Saltburn, MA read the ATB's opinion in the KTT decision and were deeply moved by the taxpayer-owner's vision of land use, foregoing commercial development and instead dedicating the land to benefit the environment. In late 2020 they decided that they would not start construction on the six-acre parcel they acquired about a year earlier. They followed the path laid out in the KTT decision. They formed a new corporation, KTT Two, deeded 5 acres of the parcel to the corporation, and contributed the capital needed to install a solar power generating facility. (One acre was placed under conservation restriction.) The plant was fully complete and operational before the December 2021 holidays.
Since the taxpayers in the KTT had gotten a tax exemption for dedicating their commercial/industrial property to a solar power use, the Carlisle's opted for a solar facility capable of producing 800 kWh of electricity, more than they needed for

property they directly and indirectly owned. They only used about 3 kWh for their real estate in Saltburn.

Questions and Answers:

a. Once the project was underway, Jim and Barb consulted an experienced tax lawyer, briefed her on their plans and sought her help in getting a tax exemption as in KTT. Assuming the lawyer is ethical, what would we expect her to tell the Carlisle's about a tax exemption for a commercial/industrial scale solar-powered system?

Their facility does not qualify for exemption under amended Clause 45th because it produces more than 125% of the power needs of properties the taxpayer owns in the town. They use 3 kWh for their Saltburn real estate but produce 800kWh.

b. Make no assumption as to the lawyer's ethics. The tax lawyer suggested that a payment in lieu of taxes (PILOT) agreement might be a more advantageous option for taxable personal property. The tax lawyer, who has represented solar power developers before, knows that shrewd entrepreneurs have sometimes gotten a discount in the payments intended to replace property taxes (usually by by-passing the assessors). Given this intention of shorting the municipality on revenue, the strategic path lay in approaching the Saltburn Town Manager and offering a quarterly payment in an eye-popping number nevertheless lower than what would be due in property taxes. What steps can assessors take to protect municipal revenue in these circumstances?

The assessors need to be in the loop as a PILOT agreement is being negotiated. They must be proactively engaged. Their participation is essential to developing an agreement that satisfies the constitutional and statutory requirements. The assessors should be prepared to generate estimates of fair cash value for the renewable energy property and the payment amounts that flow from fair cash value.

c. The Assessors found out that the Town Manager was negotiating with solar power producers when an item appeared in the Saltburn Crier. They had not been consulted, but quickly stepped forward. What information is most important for the Town Manager to receive?

The assessors need to inform those involved in PILOT negotiations about their fair cash value estimate and a corresponding payment stream. Valuations cannot be pulled from thin air.

d. The Town Manager asks the assessors about Proposition 2 1/2 and new growth, given that Saltburn has brushed close to its levy limit in the past. What information should the assessors provide?

PILOT agreements entered into under authority of the amended Clause 45th yield values do not count in computing the tax base and are not recognized as new growth until the agreement runs its course.

3. Case Study Hypothetical B2:

The following information applies to questions a, b, and c below. The Saltburn assessors prepare an estimate of the fair cash value of the solar power system and find that the proposed PILOT payments are not consistent with fair cash value. They distribute their valuation estimates and proposed payment amounts in a memo to the Town Manager and the Selectboard. At a subsequent Selectboard meeting, the assessors are challenged on their valuation estimates by a friend of the Carlisle's, who is an assessor but not an appraiser in nearby Poppingham. He argues for net book value.

Questions and Answers:

a. Is net book value the automatic right answer to questions about full and fair cash value for solar power generating personal property?

No. Utility personal property is no longer valued according to net book value alone. Given changes in the regulatory climate for utilities, special circumstances warrant an appraisal approach which blends net book value with replacement cost new less depreciation.

b. What valuation methodology should be used to develop the town's estimates of full and fair cash value?

Personal property in general is valued according to the cost approach. In the context of utility company personal property there is new emphasis on replacement or reproduction cost new less depreciation. An appraiser assigned the task of valuing the solar or wind-power generating equipment would look at the three distinct approaches to value. The appraiser can choose among the methodologies, but the ATB and/or court will make the ultimate decision in the course of litigation. The ATB relies heavily on the recommendations of the Appraisal Institute in selecting valuation methodologies.

c. How much latitude does the town have to negotiate above and below the amount of tax payments which are roughly approximate to the projected payment stream consistent with fair cash value?

Agreed values and payment streams are supposed to be "rough approximations" of fair cash value. The very nature of estimating payment streams stretching 20 years into the future entails a level of uncertainty. There may be a little flexibility in setting amounts, but the town should not give a discount from fair cash value. Nor should a taxpayer be expected to agree to a higher payment level than fair cash value would indicate.

4. Case Study Hypothetical C:

Clarissa Myer and Jane Tate are co-owners of a small cranberry farm in Locksley, MA. They own a total of 30 acres, 29 of which are classified as agricultural and horticultural land under Chapter 61A. A house lot comprises 1 acre. They became interested in environmental issues, particularly climate change, and wondered whether they could make the farm eco-friendlier by powering it with solar energy generated on-site. They hit on the idea of installing solar power-generating panels alongside and across cranberry bogs. In 2021, they installed solar panels capable of generating an aggregate of 200 kWh, which supplied the energy requirements of the 30 acres with some to spare. Roughly they used 160 of the 200-kWh generated for their property in Locksley. The rest of the power, to the extent they exceeded their own power needs, was sold to the grid through a net metering agreement.

Please see DLS' "CHAPTERLANDS FREQUENTLY ASKED QUESTIONS (FAQS)" for information concerning the impact of placing solar or wind facilities upon classified land.

Questions and Answers:

a. Clarissa and Jane wanted to know the tax consequences of their proposed solar power installation and called up the local assessors in Locksley. Was the solar generating equipment they intended to install going to subject them to a rollback tax?

Not necessarily. G.L. c. 61A, § 2A treats the simultaneous farming and solar power generation operations on the same land as an eligible 61A use.

b. Would their solar panels be taxed under Chapter 61A as the farm (29 acres less structures) had been taxed as before?

That is conceivable if they engage in farming and solar power generating uses simultaneously on the same plot of 61A classified land. A key question is whether the solar power system would qualify for exemption under amended Clause 45th.

c. Is it physically possible to combine two land uses—solar power generation and growing cranberries such that both uses are productive at the same time?

A dual use of classified land—to site solar power systems and cranberry bogs together—was the subject of a case decided by the Land Court. The Court allowed the landowner, a cranberry farmer, to build solar power generating equipment on the same land. As such, that's a plausible dual use which would fit neatly into § 2A. Another possible permissible dual use scenario involves raised solar panels on a 5-acre site or larger where simultaneously sheep grazed underneath the panels. There are other plausible dual uses.

d. Does the solar personal property qualify for exemption under amended Clause 45?

The 200-kWh capacity of the solar generating system equal exactly 125% of the 160-kWh electricity needed by the taxpayers' farm.

e. Clarissa and Jane decided that the horticultural and energy generation uses could not proceed side by side. They carved out from the 29 acres devoted to horticultural use 5 acres on which to site the solar generating property. Is a rollback tax owed on the acre they removed from classified horticultural use?

Yes, but as explained before, the personal property meets the qualifications for exemption under amended Clause 45th.

f. Are the taxpayers eligible to classify the remaining farm acreage for horticultural use and continue the preferential taxation under Chapter 61A?

The facts don't suggest otherwise. 24 acres is sufficient for classification for horticultural use under 61A:2.

g. Clarissa and Jane decide to increase the capacity of their solar generating equipment to 1 mW. Would they qualify for the amended Clause 45th exemption in these circumstances?

This change entails a generating capacity for the solar power system well in excess of 125% of the power requirements of the farm. The larger solar facility would not qualify for the amended Clause 45th exemption.

h. The taxpayers propose a PILOT agreement to town officials for the acre devoted to solar power generation. Are they eligible to include in the agreement personal property only or real property in addition to the personal property?

Since the taxpayers own both the land and the solar power system, they could include both the real estate and the personal property in the PILOT agreement, if Locksley agreed to one.

5. Case Study Hypothetical D:

How do the five fact patterns below square with the criteria of G.L. c. 58, § 8 and Informational Guideline Release 2020-10?

Questions and Answers:

a. Assistant Assessor included in his calculations a lump sum amount for the personal property holdings of a restaurant and then separately input each specific piece of personal property in arriving at an assessment. Restaurant timely paid the tax but failed to file an abatement applicating contesting the overassessment.

This assessment amounts to double taxation. The relevant personal property was counted twice. Double taxation is a persuasive basis for granting abatement authority despite the taxpayer's failure to file an abatement application.

b. A new homeowner did not review her property tax bill until after the abatement deadline had passed. Her property tax payments are escrowed by her mortgagee. It took an increase in the amount of escrow required to cover her property tax to get her attention. Reviewing the property record card, she saw that she was charged for a finished attic that the subject property did not have. An 8 of 58 request is made, and the explanation given for her failure to file for abatement on a timely basis is that her mortgage company paid her property taxes.

Absent any other relevant facts, a failure to review your tax bill and take timely action to file for abatement under G.L. c. 59, § 59 is ordinarily fatal to a request for abatement authority under G.L. c. 58, § 8. Taxpayers do not get a pass because their tax bills are paid by the mortgagee.

c. A taxpayer always paid his actual tax bill well ahead of the February 1st deadline. He did not file for abatement. An assistant assessor later discovered that the square footage of his real property improvement was overstated. The $5200 property tax bill was $200 too high. The owner insists that the assessors file an application for authority to abate under G.L. c. 58, § 8.

Again, here, a taxpayer who has failed to file a timely abatement application under G.L. c. 59, § 59. In this case, the taxpayer did not even discover the error himself. The taxpayer might have a stronger case for reinstated abatement authority had the over taxation been "egregious" or a substantial percentage of the base tax amount. Here, the gentleman was over taxed by a factor of 4%. That percentage falls well short of egregious over taxation. We see that a failure to file under G.L. c. 59, § 59 undermines a request for reinstated abatement authority.

d. An assistant assessor inspected a property including a 500 sq. ft. patio behind the house. She erroneously added a zero to the correct sq. footage and the taxpayer ended up being assessed for a 5000 sq. ft. patio. Her tax obligation was overstated by a factor of 50%. However, she paid in full. If we assume that the taxpayer failed to file a timely abatement application, does she qualify for relief under G.L. c. 58, § 8?

Here the tax amount billed was 50% higher than the correct tax due and owing. The failure to file for abatement on a timely basis count against allowance of 8 of 58 authority, but 50% over taxation looks like a more egregious error. Still, there's no hard and fast threshold of over taxation which amounts to an "egregious" error. The assistant assessor's mistake in recording the area of the patio plausibly qualifies as an "obvious clerical error" justifying the abatement of a paid tax.

e. A taxpayer was away from her home while she was pursuing graduate studies in New York. Her mother lived in the property but did not speak English. An error on the actual tax bill assessed her for the next-door condominium in a two-family property which she did not own. Taxpayer did not file for abatement but explained her omission by the fact she was out-of-state in graduate school while her mother who spoke no English received the bill.

There was a failure to file a timely abatement application, but this taxpayer presents extenuating circumstances that mitigate the failure to file. She was out of state and her mother, at the condo property, could not speak English. Here the taxpayer was assessed for the second condo unit which she did not own.

6. Case Study Hypothetical E:

After she had paid her tax bill, Glenda Kraft discovered in FY 21 that she was being charged for a roof deck and two fireplaces the subject property did not have. Review of the property record card revealed that the error had persisted uncorrected for five fiscal years, since FY 16. The matter having been brought to their attention; the assessors discovered that a since-dismissed assistant had confused the subject property with a similar property that had sold in calendar 2015. Ms. Kraft is demanding a partial abatement of the excess taxes charged since FY 16 and will complain to the Governor if necessary.

Questions and Answers:

a. Is there any way for the assessors to grant the requested abatements?

There may have been an obvious clerical error justifying abatement of a paid tax, but the assessors lack authority to abate taxes where no abatement application is filed. 8 of 58 authority is the only mechanism to abate at least some of the years, but a failure to file means that the taxpayer must show mitigating circumstances that extenuate the failure to file.

b. How far back could the assessors go in processing an abatement request?

On their own authority, the assessors are unable to grant an abatement given the failures to file for abatement under G.L. c. 59, § 59.

c. If Ms. Kraft failed to file an abatement application before the FY 21 deadline, is she out of luck?

If the assessors apply for renewed authority to abate a paid tax under the 8 of 58 procedure, they must justify the failure to file convincingly. No excuses like the mortgage company pays the bill will cut it. If the 8 of 58 application was filed in FY 22, then reinstated abatement authority would only be possible for FY 21, FY 20, and FY 19. There must also be an obvious clerical error, which plausibly exists in this fact pattern.

d. What are the main hurdles to the availability of reinstated abatement authority under G.L. c. 58, § 8?

The failure to file for abatement may be difficult for this taxpayer to extenuate. She is unable to qualify for abatements for FY 16, FY 17, and FY18 because these taxes are paid and those years are ineligible under G.L. c. 58, § 8. An obvious clerical error may be the easiest hurdle to surmount.

e. Assume Ms. Kraft had not paid her FY 21 tax before February 1st but did timely file her abatement application for FY 21 in late January of 2021. She simultaneously filed for all fiscal years since FY 16, which were paid up. What are her prospects for abatement?

She would qualify for abatement for the one year covered by the G.L. c. 59, § 59 abatement application. Taxes need not be paid in order to receive an abatement under G.L. c. 59, § 59, but if the abatement were denied the taxpayer might conceivably lack a remedy in the Appellate Tax Board, depending on the amount of the tax left unpaid.

f. Let's say the assessors granted the abatement for FY 21 but denied the late-filed abatement applications for FY16-FY20. Is there any room for 8 of 58 authority from the Commissioner?

An abatement of paid tax could be authorized under 8 of 58 for FY 20 and FY 19 if the taxpayer's situation satisfies the criteria.

g. Was there an "obvious clerical error"?

An obvious clerical error is an indispensable element of an application for authority to abate a paid tax under 8 of 58. Here we have an assessor intending to update one property record card and updating an unrelated property instead. That should qualify for an "obvious clerical error" as that phrase is defined in IGR 2020-10.

h. An abatement application under G.L. c. 59, § 59 was filed for FY 21 but no earlier years. How far back can the assessors request abatement authority under 8 of 58, assuming that the taxes were timely paid during the FY 16-FY 20 period?

Three years is as far back as you can go.