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**INDEPENDENT STATE AUDITOR'S REPORT
ON CERTAIN
ACTIVITIES OF THE APPELLATE TAX BOARD**

**OFFICIAL AUDIT
REPORT**

MAY 9, 2001

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As authorized by Chapter 11, Section 12, of the Massachusetts General Laws, the Office of the State Auditor conducted a performance audit of the Appellate Tax Board (ATB) for the period July 1, 1997 through June 30, 1999.

Authorized under Chapter 58A, Section 1, of the General Laws, as amended in January 1999, the ATB is a quasi-judicial agency that is exclusively devoted to hearing and deciding cases on appeal from decisions made by any local or state taxing authority. The ATB consists of five Commissioners and is organizationally placed in the Executive Office for Administration and Finance (A&F) for administrative purposes, but is not subject to its control in the conduct of its adjudicatory function.

The purpose of the ATB is to hear taxpayer (appellant) appeals for abatements of property taxes, personal taxes, and motor vehicle excise taxes that have been denied by local Boards of Assessors (appellee). It also hears appeals from taxpayers denied abatements of income, estate, sales, use, and other taxes by the Commissioner of Revenue (DOR) (appellee). The ATB was created by the Legislature in 1929 to relieve the Superior Court of the large volume of tax appeals, and to provide taxpayers with a less expensive and faster means of appeal than was provided by the court system.

Although all decisions of the ATB are binding on both the appellant and appellee, under specific rules of Chapter 58A, Section 13, of the General Laws, certain decisions may be appealed to the Massachusetts Appeals Court or to the Supreme Judicial Court (SJC).

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guidelines covering policies and procedures to further implement the provisions of CMR 1.00. The guidelines, as a minimum, should include basic issues describing the extent of documentation needed in support of the appellant's and appellee's positions, including a description of the appeal process and the time factors governing the submission process. We did note, however, that in October, 1999, ATB issued written procedures and prepared a standardized form to cover certain appeals of DOR abatement denials identified as small claims procedures, which were part of the January 1999 amendment of Chapter 58A. These procedures and the new form should facilitate and standardize these filings. The absence of guidelines and directives for other types of appeals, however, does not allow taxpayers, local government entities, and other interested parties the essential information needed to support their appeals case.

3. The Adjudicatory Activities of the ATB are Not Subject to Oversight by Any Agency or Judicial Body of the Commonwealth: Although the ATB reports to the Executive Office for Administration and Finance (A&F) for administrative purposes, A&F does not execute any functional control over the ATB's adjudicatory activities. Specifically, Section 1 of Chapter 58A states the ATB is not subject to A&F's control in the conduct of its adjudicatory affairs. Further, no other agency or judicial body is empowered to review ATB's operational activities other than for the limited number of cases appealed to the Massachusetts Appeals Court or to the SJC. We recommend that ATB, in concert with A&F, consider initiating legislative action that would place ATB under either the Supreme Judicial Court or the Massachusetts Appeals Court. Without such oversight and management controls there is inadequate assurance that the ATB decision appeals process and decisions made and regulations issued are in compliance with the provisions of the Massachusetts General Laws, sound administrative practices, and that there is adequate accountability in its process. 20
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INTRODUCTION

Background

The Appellate Tax Board (ATB), which is authorized under Chapter 58A, Section 1, of the Massachusetts General Laws, is a quasi-judicial agency that is devoted exclusively to hearing and deciding cases on appeal from decisions made by any local or state taxing authority. The ATB is organizationally placed in the Executive Office for Administration and Finance (A&F) for administrative purposes, but is not subject to its control in the conduct of its adjudicatory function. The ATB consists of five Commissioners appointed by the Governor with the consent of the Governor's Council. The Commissioners are appointed for six-year terms from March 1 in the year of appointment, with no more than three persons eligible to be appointed from the same political party. The General Laws do not require any specific educational or professional experience, background, or other qualifications for the members of the ATB.

The purpose of the ATB is to hear appeals of taxpayers (appellants) who have been denied abatements of property taxes, personal taxes, and motor vehicle excise taxes by any of the 351 city and town Boards of Assessors (appellees). These represent about 85% of the appeals to the ATB. The ATB also hears appeals from taxpayers that were denied abatements of income, estate, sales, use, and other taxes by the Commissioner of the Department of Revenue (DOR).

The ATB was created by the Legislature in 1929 to relieve the Superior Court of the large volume of tax appeals and to provide taxpayers with a less expensive and faster means of appeal than was provided by the court system.

Chapter 58A was amended on January 15, 1999, with an effective date of January 1, 1999. This amendment included several significant changes. Primarily, it amended the appeal process to provide for a new type of appeal known as the small claims procedure for appeals from DOR decisions where the amount disputed ranges up to \$5,000. Thus, there are now three types of appeal procedures which include formal, informal and small claims. Prior to this, all appeals from DOR decisions were required to be filed

under the formal procedure. The amendment also significantly increased the authority of a single ATB Commissioner to hear and individually decide cases with a dollar value of up to \$1 million. Lastly, the amendment established a new performance evaluation system and provided for the removal of a Commissioner who demonstrated an inability to perform his/her duties or had committed malfeasance in office or for other good causes. All three amendments are described in detail in Audit Result No. 1 of this report.

During the two-year period of our review, the ATB heard and decided 1,950 cases, which included a number of cases filed before fiscal year 1998. The types of cases include the following:

	<u>Fiscal Year 1998</u>	<u>Fiscal Year 1999</u>	<u>Total</u>
Formal	720	326	1046
Informal	<u>444</u>	<u>460</u>	<u>904</u>
Total Decisions	1,164	786	1,950
Appeals from:			
Boards of Assessors	<u>927</u>	<u>707</u>	<u>1,634</u>
DOR	<u>237</u>	<u>79</u>	<u>316</u>
Written Decisions	78	54	132*

* No small claims procedure decisions were reported by the ATB nor were any included in our audit as the implementing instructions were not issued until after the close of fiscal year 1999.

To ensure that the above statistics were not an anomaly, we reviewed similar workload numbers for fiscal years 1996 and 1997. Our review noted that for those two years, the ATB had decided 2,397 cases and had written only 123 decisions, or 5.1% of the total cases. Therefore, over a four year period, the number of cases heard by the ATB and written decisions requested and issued included the following:

<u>Fiscal Year Period</u>	<u>Total Decisions</u>	<u>Written Decisions</u>	<u>Undocumented Decisions</u>
1996-1997	2,397	123	2,274
1998-1999	<u>1,950</u>	<u>132</u>	<u>1,818</u>
	<u>4,347</u>	<u>255</u>	<u>4,092</u>

The 255 written decisions represent about 5.9% of the decisions issued. The balance of 4,092, or 94.1% represented cases in which decisions were not documented.

The ATB promulgates its own regulations under 831 Code of Massachusetts Regulations (CMR) 1.00, Appellate Tax Board Rules of Practice and Procedure. This regulation supplements Chapter 58A of the General Laws and describes in general terms how appeals are brought to the ATB, how evidence is presented, how decisions are made, who can practice before it, and the costs for filing an appeal.

Boards of Assessors are required to value property in accordance with state law and under detailed specific regulations issued by the DOR. All property in a city or town must be revalued at least once every three years. Once a revaluation is completed it must be certified by the DOR. The certification process involves a review of the revaluation methodology and a review of the resultant values. The DOR has the authority to mandate changes if it determines the valuation process or resultant values are flawed. The ATB, however, is not required to consider the DOR's rulings with respect to property valuations in its decision making process.

The ATB also issues an annual report to the Legislature that includes suggestions and recommendations for amendments to existing ATB laws and cites the number of cases heard before the ATB, the number of cases disposed of during the preceding fiscal year, and other statistical data. These reports reflect the results of significant efforts made by the current ATB Chairman, her immediate predecessor, and individual Commissioners to reduce the backlog of pending cases. We noted that as of July 1, 1997, the ATB had a backlog of pending cases totaling 15,339. An additional 15,355 cases were received during fiscal years 1998 and 1999. ATB's actions during fiscal years 1998 and 1999 included the withdrawal, settlement or dismissal of 18,428 cases without a hearing, and the issuance of decisions in 1,950 cases after holding a hearing. The backlog of pending cases subsequently totaled 10,316 as of June 30, 1999.

Audit Scope, Objectives, and Methodology

In accordance with Chapter 11, Section 12, of the General Laws, the Office of the State Auditor conducted a performance audit of the ATB for the period July 1, 1997 through June 30, 1999. Our audit was conducted in accordance with applicable generally accepted government auditing standards and encompassed a review of applicable laws and regulations, as required.

The objectives of our audit were to determine whether (1) the ATB is adhering to the appeals process defined in Chapter 58A of the General Laws and 831 CMR 1.00; (2) the ATB has issued clear, comprehensive, and consistent instructions regarding the documentation to be submitted by appellants and appellees when an appeal is sought; (3) cases filed with the ATB are accepted, scheduled, heard, and decided within the time frame allowed by law; and (4) the ATB's decisions are supported by documentation that clearly establishes the rationale for its decisions.

To accomplish our objectives, we interviewed the current Chairman of the ATB, her immediate predecessor and several ATB Commissioners and employees, including the chief clerk, several assistant clerks, and the office manager. Using random sampling audit techniques, we selected and reviewed cases filed at the ATB under its Massachusetts Docket and Reporting System. We also attended a weekly ATB full board meeting, which is held to review the evidence presented for hearings held during that week and to discuss other cases pending board decisions.

AUDIT RESULTS

1. The ATB Does Not Maintain Records To Support More Than 94% of Its Decisions

Our review disclosed that the ATB does not maintain records in its official case files to support its rationale in over 94% of its decisions. The results of our tests confirmed ATB's own statistical data which disclosed that for the four year period July 1, 1995 to June 30, 1999, 4,092 of 4,347 decisions rendered, or more than 94%, were classified as undocumented decisions. Further, none of the case files contained any documentary evidence submitted to the ATB by either the appellant or appellee which was considered in the decision making process, since all such documents are returned to the respective parties after a decision is rendered. The only document in each case file which refers to the ATB's decision was a one page "Decision" statement (Exhibit C), which identifies basic information such as the names of the parties, the case number and the ATB's decision either for the appellant (taxpayer) or the appellee (government entity). In most cases, but not all, we also found a document titled "Minutes of Proceedings" which listed the types of documents submitted by the appellant and the appellee in support of their position. In some cases, a copy of the "Minutes of Proceedings" was not found in the files, and in other cases, the document, although present in the files, did not list the documents submitted by both parties (Exhibit A). Neither the Decision statements nor the Minutes provided any rationale for the decisions rendered.

The inadequate maintenance of a recordkeeping system is contrary to the provisions of Massachusetts General Laws, various court decisions and basic sound administrative practices. As a consequence, neither the taxpayer nor the cities/towns are provided with any information, or have access to any information, concerning the basis in which a decision was rendered, including the corrective action needed to ensure that valuations of comparative properties are proper. In addition, any meaningful reviews of undocumented decisions by interested entities including court officials, law enforcement officials, or other outside parties would be a difficult task, if even possible.

In accordance with Chapter 58A, of the Massachusetts General Laws, as amended in January 1999, appeals filed by taxpayers with the ATB may be filed under formal, informal, or small claims procedures as follows:

- Chapter 58A, Section 7, of the General Laws sets forth the requirements of filing taxpayer appeals under the formal procedure. Under the formal procedure, documents must be filed that specify the facts, cite the reasons for the appeal and the contentions of law, and certain rules of pleading, practice, and evidence that must be followed.
- Section 7A of Chapter 58A of the General Laws sets forth the requirements of filing appeals of the Board of Assessors abatement denials under the informal procedure, and Section 7B (added to Chapter 58A in January 1999), cites the requirements of filing appeals from DOR decisions under the small claims procedure. Both the informal and small claims procedures simplify the proceedings and reduce the cost of filing, as they only require that a statement be filed with the ATB and do not require that strict rules of pleading, practice, and evidence be adhered to.
- Appeals filed under both the informal and small claims procedures may be heard under the formal procedures if requested by a Board of Assessors or DOR.

Under all three procedures, the ATB accepts documentation in support of the appellant's and the appellee's position and, unless the case is dismissed for specific reasons, a hearing is held at which the evidence is presented and reviewed.

Under the January 1999 amendment to Chapter 58A, the authority of a single Commissioner to hold a hearing and make a decision was significantly increased. Formerly, under Section 1 of this Chapter, a single Commissioner could decide a case on property with an assessed value up to \$100,000. Under the amendment, Section 1A now permits a single Commissioner to make a decision on cases filed on property with an assessed value of up to \$750,000 under the formal procedure and up to \$1,000,000 under the informal procedure. It also allows a single Commissioner to hold a hearing on appeals filed by taxpayers on DOR decisions where the tax amount in dispute ranges up to \$5,000. As a result, individual commissioners now have the authority to hear and unilaterally decide cases with a valuation 10 times as much as before. Since the 831 CMR 1.00 revision which retroactively implemented this process was not issued until October 15, 1999, we did not attempt to review the impact of this amendment during our audit. However, we believe that the significant increase in the values of property which may be decided

by a single Commissioner is of concern due to the inadequacy of the ATB's documentation of its decisions.

As determined by the ATB Chairman, one or more Commissioners may be assigned to hold the hearing. Decision statements on individual cases heard by a single Commissioner are signed solely by that Commissioner. All cases other than those decided by a single Commissioner are discussed and are decided at a non-public meeting held each week with a majority or all of the Commissioners present. As part of our audit, we attended a weekly board meeting that the ATB Commissioners use as a forum to discuss and deliberate each case before a final decision is rendered. Nine cases were reviewed and decided at the meeting we attended. We noted that while discussing cases, various Commissioners verbally referred to personal notes. These notes, however, were not made part of the case or meeting records. In our discussion with applicable officials, we were advised that supporting documents may or may not be presented to the other Commissioners for their review. During the course of the meeting, we observed that no documents were presented in support of the nine cases reviewed and resolved by the Commissioners. We further observed that once a case is discussed and agreed on by three or more Commissioners, the other Commissioners not concurring with the decision do not sign the Decision Statement or otherwise state reasons for their disagreement. Our observations also noted that no written records of matters discussed or the ATB's rationale for its decisions were made during the course of the meeting. We were advised by responsible officials that this is a normal practice.

The Chief Counsel of the ATB informed us that the meetings are held in Executive Session and that the ATB is exempt from Chapter 30A, Section 11A ½ of the General Laws, which addresses the provisions of the Open Meeting Law. The ATB Chief Counsel further stated that, "keeping the meeting closed with no minutes maintained allows for complete freedom of expression of ideas. . . if minutes were maintained the minutes themselves could be discoverable by the public." We noted that although the cited law does not specifically require the recording of minutes during the meetings, it does not otherwise prohibit the preparation of a record which identifies the basis of and the rationale used by the Commissioners in their decision process.

For appeals from local Board of Assessors abatement denials under both the formal and informal procedures, the Decision statement reflects the basic facts to include the names of the appellant and appellee, the address of the property, the ATB case (docket) number, the fiscal year, the total value of the property as assessed by the city/town, and the total assessed taxes. The Decision statement also reflects the total fair cash value of the property as determined by the ATB, the total amount of the over-valuation, and the total taxes to be abated where the appellant's position is upheld. For appeals from DOR denials under the formal procedure, the Decision statement reflects only the names of the appellant and appellee, the ATB docket number, and a statement as to whether the decision is for the appellant or appellee. None of the Decision statements provided any information as to the basis or the rationale for the ATB's decision.

Under the formal procedure either party may, for an additional fee, request a written decision that explains the rationale of the ATB's decision. If such a request is not made, the only information provided to either party is the Decision statement. Under the informal procedure the only information provided to either party is the Decision statement. However, under Section 7B of amended Chapter 58A, the ATB is required to provide to both parties "a brief written summary of the reasons" for its decision for filings under the small claims procedure. As a consequence, under both the formal and small claims procedure, the appellant and the appellee will always be provided or have an opportunity to obtain a written rationale for the ATB's decision, but will not be provided any information for decisions under the informal procedure.

During our audit, we randomly selected and reviewed 133 case control records covering cases disposed of by the ATB in fiscal years 1998 and 1999. The purpose of our preliminary review was to obtain an understanding of the ATB's computerized case control system and to determine the disposition of a representative sampling of cases. The 133 cases included 72 cases filed under the formal procedure, and 51 cases filed under the informal procedure from appeals of decisions of Boards of Assessors, and 10 cases filed under the formal procedure from DOR decisions.

Of the 133 cases, we found 46 had been dismissed because of a lack of prosecution, jurisdiction, or compliance, and the remaining 87 cases were heard by the ATB. Of the cases heard, decisions were made for the appellant in 45 cases and the appellee in 42 cases. From the 133 cases we then selected 34 cases for a comprehensive review of individual case file contents. These included 17 formal and 14 informal appeals from local Boards of Assessors' decisions, and 3 formal appeals from DOR decisions. Our review disclosed that hearings were held or not held as follows:

<u>Hearings Held</u>	<u>Assessor Appeals</u>		<u>DOR</u>	<u>Total</u>
	<u>Formal</u>	<u>Informal</u>	<u>Appeals</u> <u>Formal</u>	
Written Decisions Requested	2	N/A	2	4
No Record of Decision Rationale	<u>14</u>	<u>12</u>	<u>0</u>	<u>26</u>
	16	12	2	30
<u>Hearings Not Held</u>				
Cases Dismissed	<u>1</u>	<u>2</u>	<u>1</u>	<u>4</u>
Total	<u>17</u>	<u>14</u>	<u>3</u>	<u>34</u>

The results of our review noted:

- The original copy of the appeal document filed with the ATB was included in each of the 34 case files.
- A document identified as "Minutes of Proceedings" was included in some but not all of the case files reviewed. This document, although titled as "Minutes", did not identify any matters discussed at the hearing or any rationale for the ATB's decision. This document identified the parties, the ATB case docket number, a listing of the documents submitted by the appellant and appellee to support their position, and other general information. Our review of the 30 cases where hearings were held disclosed that this document was not prepared for the two DOR cases and was not in the files for 15 of the 28 cases where decisions of the Board of Assessors were being appealed. In addition, in the 13 cases where this document was included, we found that in five cases there was no listing of evidence submitted in support of the position of one of the two parties.
- In all 34 case files, a document identified as a Decision statement was included. The Decision statement regarding the four case files in which appeals were dismissed identified the reason for the dismissal (See Exhibit B). The Decision statement in the other 30 cases did not identify the basis for, or the rationale for, the decision made.
- A written decision which explains the ATB's rationale for its decision was in the files covering the four formal cases in which a written decision was requested. The other 26 files contained nothing to support the basis or rationale for the decision.

- The files generally included miscellaneous documents such as transmittal letters and correspondence to the parties. These documents, however, did not contain any basis for the actual decisions rendered.

With regard to returning all documents to the respective parties after a hearing has been held, the previous chairman and the clerk of the ATB stated that the General Laws allow such evidence to be returned to the appellant and the appellee at the ATB's discretion.

Specifically, the Massachusetts General Laws, Chapter 58A, Section 13 states in part:

“. . . the originals of books, documents, records, models, diagrams and other exhibits introduced in evidence before the board may be withdrawn from the custody of the board in such manner and upon such terms as the board may in its discretion prescribe . . .”

We concur that the cited section of the law does provide for ATB, at the Board's discretion, to return the original documents to the appellants and the appellees. We believe, however, that the cited law suggests that the Board exercise discretion in what documents are to be returned and does not imply that documents which support the Board's decisions should be returned or that the Board should not make and keep copies of such documentary evidence to support their decisions.

As stated in the background section, over a four-year period appellants and appellees were informed of the reasons why the ATB supported or rejected their position in only 255 cases, or 5.9% of the 4,347 cases decided. As a result, in over 94% of the cases decided by the ATB during a four-year period, no explanation of the ATB's decision was presented to the taxpayer or to the governmental body (i.e., the public). Accordingly, neither appellants nor appellees could determine the basis for ATB's decisions and as a result could not determine whether the decisions made were reasonable or equitable. Moreover, because the ATB does not retain information regarding its decision cases, it does not allow them to refer to prior decisions that might be similar in nature to cases currently under review in order to ensure consistency of decisions made by individual Commissioners, and to demonstrate that individual Commissioners have considered the same issues and principles in arriving at their decisions. Such information would not only be instructive to the ATB for future cases, but would provide guidance to the parties involved as well as other boards of assessors. This procedure could likely be helpful in reducing the number of cases that come to the Board.

Several Court decisions have concurred with the position that the ATB is not required to issue a written decision for cases filed under the formal procedure unless requested by either party within 10 days of the decision, and are not required to issue written decisions for cases decided under the informal procedure. The Court decisions state that in the latter case, the issuance of written decisions is “discretionary” on the part of the ATB. They do not, however, mandate that written decisions should not be issued, nor do they mandate or suggest that the ATB not maintain any records supporting its actions and decisions.

For example, a 1973 case cited as a Note to Section 7a of Chapter 58A stated:

“Appellate Tax Board acting under informal procedure determining that property was over valued and ordering an abatement did not commit error in refusing timely request of assessors that Board make and report its findings of fact, since such report was discretionary with Board. Board of Assessors of Saugus v. Leo (1973) 292 N.E.2d 676, 363 Mass. 47.”

Although Chapter 58A does not specifically mandate that such records be maintained, several sections of this law either imply that such records should be maintained or assume that such records are being maintained. In this respect, Section 13 states:

“. . . All reports, findings and opinions of the board and all evidence received by the board, including a transcript of any official report of the proceedings, all pleadings, briefs and other documents filed by the parties, shall be open to the inspection of the public. . . .”

Although this section permits the public to review the ATB’s files, such a review is not possible and would serve no purpose, since the files contain only such data which has already been sent or made available to the appellant and appellee.

Further, the ATB’s practice not to retain records in support of its decisions also results in its inability to comply with certain provisions of Section 1 of Chapter 58A. In this respect, Section 1 states that the ATB Chairman shall annually prepare a written performance evaluation of each Commissioner to include “the efficiency and fairness in the conduct of hearings,” and also “the total number of proceedings of comparable matters handled, and orders and decisions issued in these matters.” Section 1 also states that “Such performance evaluation may be used as evidence of a member’s inability to perform his duties,” and further provides that “a member may be removed by the council, upon request of the governor and

upon notice and hearing, for neglect of duty, inability to perform duties, malfeasance in office, or for other good cause.” In addition, Section 1A, which refers to decisions by a single Commissioner, states that “such decision shall be signed by the single member of the board who presided at the hearing, and such case shall be attributed to said single member for tracking and evaluation purposes.”

In the absence of written records which explain the rationale for decisions made by the individual Commissioners, an objective evaluation of a Commissioner’s work would be a difficult task. Also, it would be difficult, if even possible, for a Chairman to support his/her recommendation to remove any ATB member (Commissioner) on the basis that the person had not demonstrated an ability to perform his/her duties or because of suspected malfeasance. Again, there is a direct implication that written records of decisions (e.g., the ATB’s work product) are not only required to be maintained, but are currently being maintained.

Further, as stated in the Background section, the ATB is a quasi-judicial agency which performs an adjudicatory function. State agencies which perform an adjudicatory function are responsible to adhere to the provisions of MGL Chapter 30A, the State Administrative Procedure Act (APA). The APA sets forth basic principles and requirements under which hearings are held, who may file, etc., and also sets forth standards regarding evidential matter.

The APA was enacted in 1955 and initially the ATB was required to adhere to its provisions. In 1968 the Legislature specifically exempted the ATB from adherence to the provisions of the APA. Since that time, however, there have been several Supreme Judicial Court (SJC) rulings which have stated that the ATB, even though specifically exempted from the APA, must still adhere to its general principles. For example a 1969 case cited as a Note to Section 1 of MGL, Chapter 30A stated:

“ . . . appeals from decisions of the Appellate Tax Board are no longer subject to ALM GL c30A, but the Board still remains subject to general principles relative to administrative decisions and judicial review of them. Board of Assessors v Pioneer Valley Academy, Inc. (1969) 355 Mass. 610, 246 NE2d 792.”

Note: ALM GL C30A is now identified as MGL Ch. 30A, APA i.e., the State Administrative Procedure Act.

As a second example, in a 1992 case which was cited as a Note to Section 11 of MGL Ch. 30A, the SJC ruled:

“. . . When Appellate Tax Board reviews decision of the Commissioner of Revenue, it conducts de novo hearing that meets all procedural requirements of Administrative Procedures Act ALM GL c.30A S11 AP A, although Board is not “agency” under Act. *Space Bldg. Corp. v. Commissioner of Revenue* (1992) 413 Mass. 445, 597 N.E. 2d 435.”

In a third example, a 1974 case, Section 7 of Chapter 58a, the SJC ruled:

“1. Applicability of law

While specifically exempted from provisions of State Administrative Procedure Act, appellate tax board is still bound by general principles affecting administrative decisions and judicial review of them. *Schlaiker v. Board of Assessors of Great Barrington* (1974) 310 N.E. 2d 602, 365 Mass. 243.”

The APA also requires that decisions made following adjudicatory hearings must be supported by substantial evidence. Substantial evidence as defined by Section 1 of MGL Ch. 30A states:

“(6) “Substantial evidence” means such evidence as a reasonable mind might accept as adequate to support a conclusion.”

Although all decisions of the ATB are binding for both the appellant and appellee, under the formal procedure, a party dissatisfied with an ATB decision may appeal to the Massachusetts Appeals Court or to the Supreme Judicial Court (SJC) for all legitimate reasons. However, under the informal procedure, both parties waive these broad rights of appeal but may appeal for specific reasons as cited in Chapter 58A MGL Section 7A. This section states appeals may be filed “. . . upon question of law raised by the pleadings or by an agreed statement of fact or shown by the report of the Board.” Since it is the ATB’s policy not to prepare any written record in over 94% of its decisions, (both formal and informal cases), the rights of both appellants and appellees to file an appeal to either court have been partially nullified because the appealing party is not in a position to substantiate the basis for their appeals. As a consequence, because of an ATB policy decision, the statutory appeal rights of both appellants and appellees cannot be exercised in all cases.

Both of these courts have in the past overturned ATB decisions because the ATB did not present substantial evidence in support of their decisions. For example, in a 1988 case which was cited as a Note to Section 1 of Ch. 30A the SJC ruled:

“Decision of Appellate Tax Board will be disturbed only if it is not supported by substantial evidence, or is tainted by error of law. *McCabe v. Board of Assessors (1988)*, 402 Mass. 728, 525NE 2d 640.”

In a 1963 case cited in Section 11 of MGL Ch. 30A the SJC stated:

“The appellate tax board not only failed to comply with ALM GL c 30A S 11(8), . . . it disposed of the vital issue by a single sentence stating that “upon a consideration of all the evidence” it found that the fair cash value of taxpayer’s property was a stated amount, but by enshrouding its finding with a vague reference to “all the evidence”, the board disposed of the issue in such a way that both the taxpayer and the reviewing court were left without any guide to its reasons. *Leen v Board of Assessors (1963)* 345 Mass 494, 188 NE2d 460.”

In another 1963 case also in Section 11 the Court stated:

“ . . . (1) That the board’s report and subsidiary findings were not sufficient to enable the reviewing court to determine whether the decision was supported by substantial evidence and otherwise in compliance with statutory standards. . . . *Packard Mills, Inc. v State Tax Com. (1963)* 345 Mass 718, 189 NE2nd 549.

In addition to the above, it is a basic requirement that all government entities are accountable to the public for its administration of public funds, programs and functions, and to maintain records which explain what was accomplished, how it was accomplished and the basis or rationale for its decisions. As the ATB does not maintain such records for over 94% of the decisions made by it, it has not complied with normal sound business practices, with basic internal control principles, or the basic tenets of governance which demand that those who manage public programs must be able to render a full accounting of their stewardship and activities to the public.

Internal Control standards are set forth in Chapter 647 of the Acts of 1989 under the Commonwealth’s internal control law. In 1996, the Office of the State Comptroller (OSC) reissued its Internal Control Guide for Departments. This publication cites the minimum level of quality for internal controls at state agencies (which includes the ATB) for operational activities and financial operations as required by the Internal Control Act. It also provides specific guidance to establish controls over transactions and activities.

The Acts of 1989 and the Internal Control guide cite the six standards required by the Internal Control Act to be accomplished by all state agencies. Two of the standards pertinent to this issue are as follows:

- (a). “Internal control systems of the agency are to be clearly documented and readily available for examination. . . .”
- (b). “All transactions and other significant events are to be promptly recorded, clearly documented and properly classified. Documentation of a transaction or event should include the entire process or life cycle of the transaction or event including:
 - Initiation or Authorization of the transaction or event,
 - All aspects of the transaction while in process, and the
 - Final classification in a summary record.”

Each State agency is required to prepare a written Internal Control (IC) Plan to comply with provisions of the Single Audit Act and Chapter 647 of the Acts of 1989, Internal Control Act. Our review of the ATB’s IC Plan disclosed that the plan did not include any of the operational i.e., adjudicatory activities of the Board. The plan consist solely of controls over various financial and accounting matters such as payroll, cash receipts and disbursements, and procurement of goods and services. As a result, the ATB has not identified its internal controls over its adjudicatory activities, including the receipt and disposition of taxpayer appeals, to include controls over evidence submitted, hearings held, and records of hearings and decisions. The non-maintenance of any records to support its decisions has become even more critical, since under the January 1999 amendment of Chapter 58A, single Commissioners are now authorized to make decisions in cases where the value of the property may range up to \$1 million. In such cases, there is a total absence of internal controls, since only a single individual hears evidence and makes a decision, but does not make any record to support the reasons for the decision and does not retain or in many cases cite in the files any of the evidence which supported the Commissioner’s decision.

If the ATB had recognized this need to include adjudicatory activities and events in its IC Plan, it would have become apparent that its policy to maintain records of its decisions for only a minimal number of cases was inappropriate and not in compliance with applicable laws, rules and regulations. Additionally, the ATB’s non-maintenance of an adequate records system is contrary to the basic principle

espoused by the OSC as to why control systems are required. Specifically, in Chapter I, Section C-1 of its Internal Control Guide the OSC states:

“1. Accountability

Our system of government today rests on an elaborate structure of interlocking relationships among all levels of government for managing public programs. Officials and employees who manage these programs must render a full account of their activities to the public. Frequently specified by law, this accountability concept is inherent in the governing process of this state.”

In our further discussions with ATB officials, we were advised that its policy decision to maintain records in support of its decisions for only those cases where a written decision was requested was made, in part, to reduce its operating costs to a minimal level. We believe that these reasons are unacceptable, and equally important, do not allow it to demonstrate that fair, equitable, arms length and impartial decisions are being made to the benefit of both the taxpayers and the governmental body.

The inadequate maintenance of a record system is also contrary to the basic principles of MGL 30A, as records reflecting substantial evidence of decisions made are not maintained and could result in the reversal of ATB’s decisions if a review was made by the Appeals Court or the SJC. In addition, the inadequate maintenance of such records is contrary to basic internal control requirements and also precludes the possibility of an adequate internal management review and an evaluation of the work of individual Commissioners. Without such records, the ATB chairman does not have access to the objective data needed to sustain a decision to remove a Commissioner from office because of suspected malfeasance. The lack of such records would also significantly impede the efforts of a law enforcement agency to investigate suspected malfeasance on the part of a Commissioner, an appellant, or an appellee.

Lastly, on January 27, 2001, the Chief Justice of the Supreme Judicial Court, in an address to the members of the Massachusetts Bar Association, stated that a committee has been formed to improve judicial accountability and evaluate the performance of trial and appellate court judges. In her closing remarks, she said that the public’s respect for the judiciary is essential, and that “The root purpose of judicial independence is not that judges be free. It is that our citizens receive . . . promptly and efficiently . . . fair and equal treatment before the law when they come to our courts”.

It is recognized that while the ATB is a quasi-judicial agency and performs an adjudicatory function, it is not, in fact, a court. Nevertheless, we believe the Chief Justice's commitment to fair and equitable treatment and judicial accountability should be taken instructively and as a message that ATB take the initiative to change its policies and procedures to ensure efficient and equitable treatment for taxpayers and government entities.

Recommendation: The ATB, in concert with A&F, should:

1. Reevaluate its record keeping procedures concerning the maintenance of records needed to support decisions on appeals filed by taxpayers. Such reevaluations should be consistent with the cited provisions of the Massachusetts General Laws.
2. As a minimum, such reevaluations should include the following:
 - Prepare and retain a written record of ATB meetings as an official record of actions taken.
 - Record in writing the rationale for all ATB decisions, place a copy in each case file, and send a copy to the appellants and appellees.
 - Retain in each case file a copy of those specific documents submitted to the ATB that directly support its decisions and ensure that there is a written record of all documentation submitted by each party.
 - Make the ATB case file available for inspection by appellants and appellees.
2. The ATB Has Not Issued Written Policies and Procedures for Use by Appellants or Appellees to Ensure that Appeal Information Submitted Is Complete and Presented in a Uniform and Standardized Format

In its implementation of Chapter 58A of the General Laws, the ATB has prepared and issued Code of Massachusetts Regulations (CMR) 1.00, which generally covers the procedures needed to meet the provisions of the ATB law. The ATB, however, has not provided appellants and appellees with sufficiently detailed guidelines covering policies and procedures for formal and informal filings to further implement the provisions of CMR 1.00. The guidelines, as a minimum, should include basic information describing the extent of documentation needed in support of the appellants' and appellees' positions, including a description of the appeal process and the time factors governing the submission process.

Our review disclosed that the ATB has not issued written policies and procedures providing specific directives and requirements that must be adhered to in filing appeals with the ATB under the formal and

informal procedures, including appeals from local Boards of Assessors and DOR decisions. Similarly, the ATB has not issued definitive instructions as to what evidential matter must be submitted by appellees to support their position. Further, the ATB has not issued written procedures to ensure that submitted appeal documentation for these two procedures is complete, is presented in a uniform and standardized format, and provides detailed information in support of an appellant's claim that an over assessment of taxes has occurred.

Our review also disclosed, however, that the ATB has issued written detailed procedures and prepared a standardized form to cover appeals of DOR decisions filed under small claims procedures which were part of the January 1999 amendment of Chapter 58A. These procedures and the new form should facilitate and standardize these filings.

In addition, the ATB does not require that information for formal and informal types of appeals be submitted on an ATB-issued form. Although forms are supplied by the ATB, they are described as "suggested" forms. Moreover, since the forms request only general information, definitive instructions to complete these forms are not included. Because the ATB does not require that the basic information brought by appellants and appellees to hearings be organized in a standardized format, both the appellants and appellees are forced to rely on their individual judgments as to what documents will best support their position.

It is a basic principle that all government agencies should provide procedural guidelines in sufficient detail to provide taxpayers and the general public with an understanding of what is required to be filed with an agency to support their position. The ATB, as an agency which adjudicates important and precedent setting tax and excise issues, should be particularly cognizant of the need for submission of complete, consistent and germane information, as this will work to their benefit as well as to the benefit of appellants and appellees.

The Department of Revenue (DOR), which oversees the Boards of Assessors in cities and towns, has issued definitive guidelines that set forth the requirements and procedures for taxpayers to file abatement requests with the Boards of Assessors. In addition, DOR requires that abatement requests be submitted

using a state-approved form known as an “Application for Abatement of Real Estate Taxes.” Similar forms are also required for abatement requests for personal property taxes and other types of abatements. The DOR has also issued detailed instructions and prescribed standard forms to be used by taxpayers who appeal the initial tax/excise levy by DOR. By establishing such guidelines and requiring the use of forms, DOR has ensured that appellants and appellees are provided a fair and clear understanding of the abatement process and that information is submitted in a uniform, standardized manner.

Because the ATB has not prepared clear written procedures or required the use of standardized forms, appellants, particularly individual taxpayers who have not researched or are not able to research the requirements, may not be aware of what basic information is needed to support their case. Cities and towns with infrequent ATB filings are also required to proceed without clear directives. As a result, the absence of clear directives provides inadequate assurance that decisions which are equitable to both appellants and appellees are being made.

In addition, the ATB has not been consistent in its operating practices as more comprehensive instructions and a standardized form have been prescribed for small claims procedure filings but not for the formal and informal procedures filings.

In regard to the lack of such procedures and standardized forms, ATB officials, at the end of our on-site audit, indicated that the preparation of simplified procedures for formal and informal filings were in the planning stages.

Recommendation: the ATB should:

- Prepare simplified written procedures to be used by all parties who file an appeal with the ATB and by all responding appellees. The procedures should specify the information needed to file a timely and complete application, and identify the types of documentation essential to support the positions of appellants and appellees.
- Devise, issue, and require the submission of standardized forms for the filing of formal and informal appeals.

3. The Adjudicatory Activities of the ATB are Not Subject to Oversight by any Agency or Judicial Body of the Commonwealth

Although the ATB reports to the Executive Office for Administration and Finance (A&F) for administrative purposes, A&F does not execute any functional control over the ATB's adjudicatory activities. Specifically, Section 1 of Chapter 58A states the ATB is not subject to A&F's control in the conduct of its adjudicatory affairs. Further, no other agency or judicial body is empowered to review ATB's operational activities other than for the limited number of cases appealed to the Massachusetts Appeals Court or to the SJC.

Most state agencies that perform regulatory functions report to a higher-level organization both administratively and operationally. This organizational structure is deemed necessary to ensure that agencies in a position to regulate public matters and/or issue decisions which may result in the imposition of taxes or other revenue assessments are accomplishing their function in a fair, consistent, and equitable manner. This concept of organizational placement is basic within both governmental and commercial entities, because it provides assurance that there is an independent oversight to monitor activities or transactions in the entity. In a situation where there is no oversight of a governmental entity, there is inadequate assurance that the decisions made and regulations issued are independent, objective, supported by appropriate evidence, and that the public is fairly and appropriately served.

As described in Audit Results 1 and 2, our audit disclosed that the ATB does not maintain supporting documentation in its files with respect to the majority of cases heard, and further, does not maintain records which describe the basis of their decisions in the vast majority of cases it decides. In addition, we found that the ATB, in most cases, has not issued written procedures to support the proposed standardized forms that appellants and appellees are required to submit in support of cases filed. Further, there is no simplified explanation of file dates, appeal dates and entitlements of the parties under the law. ATB officials reiterated that they believe their rulings are not subject to public disclosure and consequently, not

necessary to retain documentation. They further indicated that its system under which individual commissioners maintain personal and private notes is sufficient to make and support the decisions made.

Therefore, although the ATB has the authority to make decisions which have a direct and significant impact on individual taxpayers, businesses, and cities and towns, it operates in a totally autonomous environment as it reports to no one, and with limited exceptions, no entity is empowered to review the results of its operations.

Recommendation: The ATB, in concert with A&F, should:

Consider the initiation of legislative action that would formally place the ATB both organizationally and functionally under the Executive Office for Administration and Finance, the Department of Revenue, the Supreme Judicial Court, the Massachusetts Appeals Court, or some other mechanism for the purpose of oversight of ATB's adjudicatory functions.

Auditee Response:

At the conclusion of our audit work, we provided a draft copy to the Board for their response. On May 2, 2001, the Board responded that, in general, they questioned our legal authority to conduct a performance audit of the Board's adjudicatory functions and requested that we withdraw the report. The Board seemingly misunderstood the type, scope, and nature of our audit. A more careful review of our enabling statute and its relevant history would have revealed to the Board that over the years, the OSA has conducted similar audits of the ATB, and as such, our enabling statute requires that our audits be conducted in accordance with governmental audit standards. These standards define the type and nature of audits to be conducted including so-called performance audits. We have provided the Board with a detailed reply.

APPELLATE TAX BOARD
MINUTES OF PROCEEDINGS

DATE: *March 25 19* DOCKET NO. _____

APPELLANT: _____ APPELLEE: _____

COUNSEL: _____ COUNSEL: _____

MEMBER PRESENT: _____

NOTE: _____

REPORTER: _____ ASSISTANT CLERK: _____

<p style="text-align: center;">Appellant's Witnesses</p> <p>1 _____</p> <p>2 _____</p> <p>3 _____</p> <p>4 _____</p> <p>5 _____</p> <p>6 _____</p> <p>7 _____</p> <p>8 _____</p> <p>9 _____</p> <p>10 _____</p>	<p style="text-align: center;">Appellee's Witnesses</p> <p>1 _____</p> <p>2 _____</p> <p>3 _____</p> <p>4 _____</p> <p>5 _____</p> <p>6 _____</p> <p>7 _____</p> <p>8 _____</p> <p>9 _____</p> <p>10 _____</p>
<p style="text-align: center;">Appellant's Exhibits</p> <p>1 Affidavit</p> <p>2 Statement Appellants FY 95 (a) 96 (a) 97 (a)</p> <p>3 Laminates FY 95 (a) 96 (a) 97 (a)</p> <p>4 _____</p> <p>5 _____</p> <p>6 _____</p> <p>7 _____</p> <p>8 _____</p> <p>9 _____</p> <p>10 _____</p> <p>11 _____</p> <p>12 _____</p> <p>13 _____</p> <p>14 _____</p> <p>15 _____</p>	<p style="text-align: center;">Appellee's Exhibits</p> <p>A _____</p> <p>B _____</p> <p>C _____</p> <p>D _____</p> <p>E _____</p> <p>F _____</p> <p>G _____</p> <p>H _____</p> <p>I _____</p> <p>J _____</p> <p>K _____</p> <p>L _____</p> <p>M _____</p> <p>N _____</p> <p>O _____</p>



THE COMMONWEALTH OF MASSACHUSETTS

Appellate Tax Board

Leverett Saltonstall Building, Government Center
100 Cambridge Street
Boston, Massachusetts 02202

(617) 727-3100
(617)727-6234 FAX

Docket No. [REDACTED]

[REDACTED]
Appellant.

BOARD OF ASSESSORS OF THE TOWN OF [REDACTED]
Appellee.

DECISION

Decision for the appellee. Appeal dismissed for failure to file entry fee and failure to timely file the application for abatement.

This is a single member decision promulgated in accordance with G. L. c. 58A, s. 1 and 831 CMR 1.20.

APPELLATE TAX BOARD

By [Signature] Chairman.

Attest: [Signature] Clerk.

Date: SEP 4 199 [REDACTED]
(Seal)

Location: [REDACTED]
Year: 199 [REDACTED]

NOTICE: An appeal may be taken to the Appeals Court by either party to these proceedings. A claim of appeal should be filed with this Board in accordance with the Massachusetts Rules of Appellate Procedure.



The Commonwealth of Massachusetts Appellate Tax Board

Leverett Saltonstall Building, Government Center
100 Cambridge Street, Boston 02202

(617) 727-3100
(617) 727-6234 FAX

Docket No. [REDACTED]

[REDACTED]
Appellant.

BOARD OF ASSESSORS TOWN OF [REDACTED]
Appellee

DECISION

The decision is for the appellant. Abatement is granted in the amount of [REDACTED]

APPELLATE TAX BOARD

By: [Signature] Chairman.
[Signature] Member.
[Signature] Member.
[Signature] Member.
[Signature] Member.
[Signature] Member.
Attest: [Signature] Clerk.

Date: JUN 09 1999
(Seal)

BASIS OF COMPUTATION OF ABATEMENT

DOCKET NUMBER	YEAR	LOCATION	ASSESSED VALUE	TAX ASSESSED	FAIR CASH VALUE	OVER VALUATION
[REDACTED]	1999	[REDACTED]	\$494,300	\$8,961.66	\$469,600	\$24,700

NOTE: An appeal may be taken to the Massachusetts Appeals Court by either party to these proceedings. An appeal under the Informal Procedure is limited by c. 58A, s. 7A to requests of law raised by the pleadings or by an agreed statement of facts or shown by a report of the Board. A claim of appeal should be filed with this Board in accordance with the Massachusetts Rules of Appellate Procedure.

SUBSEQUENT INFORMATION

Subsequent to the close of our review, we obtained a copy of an Appeals Court opinion from a decision of the Appellate Tax Board (ATB) (Docket No. 98-P-2257 dated November 8, 2000 – May 2, 2001) from the Social Law Library, Appeals Court Slip Opinion. The case involved a decision whereby the ATB upheld the denial by the Commissioner of Revenue. The ATB ruled, based on a legal position that the Commissioner first asserted at the ATB board hearing, that the appellants were engaged in a trade or business within the Commonwealth and were therefore subject to taxation under G.L. c.62, §5A (a)(3), which considered such income as source income. The appellants contended that:

The board improperly allowed the commissioner to argue an entirely new legal position on the morning of the hearing, and that, in any event, the partnerships were not engaged in a trade or business, and accordingly the appellants are not subject to taxation under G.L. c. 62, §5A (a)(1). (4).

The Appeals Court, on May 2, 2001, reversed the ATB's decision by making the following ruling:

Upon review of the entire record, we conclude that the board's ruling that the appellants were engaged in a trade or business within the Commonwealth is neither supported by substantial evidence nor a correct application of the law.

The Appeals Court decision included the following justifications:

Although the board's ruling is final as to findings of fact, we may consider whether, as a matter of law, the board's factual findings are supported by substantial evidence. Substantial evidence is such evidence as a reasonable mind might accept as adequate to support a conclusion.

Significantly, we are not required to affirm the board merely on a finding that the record contains evidence from which a rational mind might draw the desired inference. Our determination must be made upon consideration of the entire record.

The appellants contend that, because the record discloses no factual basis on which the board could have determined that equity and good conscience required it to consider the commissioner's newly advanced legal position, G.L. c. 58A §7 prohibits the board from having done so.

The board's determination of what constitutes in various circumstances the demands of equity and good conscience will ordinarily be given considerable deference on appeal, so long as the rationale for that determination is made clear and it is based on substantial evidence. Here, however, the board has not made any findings, and the record viewed in its entirety is barren of any facts or circumstances to support its (implicit) determination that equity and good conscience require it to entertain the commissioner's newly advanced and significantly different legal position. We thus do not know what factors the board took into

consideration and, in such circumstances, deference to the board's self-described discretionary consideration of the new theory is not warranted."

The ATB board ruled that the partnerships, by investing partnership assets in notes secured by mortgages, were in the business of providing financing for private borrowers in the Commonwealth which generated source income taxable to the nonresident partners under G.L. 62, §5A(a)(1). The appellants argue that this was neither based on substantial evidence nor a correct application of law. We agree.

We discern no evidence in the record before us to support the determination that the partnerships' investment activities, done solely on their own behalf, rose to the level of a trade or business. The emphasis placed by the board and the commissioner upon the language of the partnership agreements referring to the "business" of the partnerships and requiring [name of partner] to "operate the business of the partnership" is off the mark since such language is far from dispositive as to whether the partnerships are properly treated as a business for tax purposes. The cases are plain that the lending of money, without more, does not rise to the level of a trade or business. The record is barren of evidence, let alone substantial evidence, to establish that the partnerships, were engaged in anything other than the management of the partnerships' own investments. Nothing suggests that the secured notes the partnerships took back were of short-term maturity or that such notes were purchased on a frequent, continuous, ongoing, or daily basis.

The results of the Appeals Court decision in the case described above, represents an example of the inadequate maintenance of records by ATB in its official case files to support over 94% of its decisions. (See Audit Results No. 1). Since most of the ATB cases noted in our review are not further appealed to the tax court, we strongly believe that if such appeals were made, the absence of substantial documentary evidence could also result in the reversal of several ATB decisions by the Appeals Court.

Accordingly, the ATB should adopt the recommendation in our report by maintaining adequate supporting documentation in support of all of its decisions.

_____ [emphasis added]