COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT.

No. SJC-12034

SUFFOLK COUNTY

VERIZON NEW ENGLAND INC. & RCN BECOCOM LLC
Petitioners-Appellants.

v.

BOARD OF ASSESSORS OF THE CITY OF BOSTON,

Respondent-Appellee,

ON APPEAL FROM A DECISION OF THE
APPELLATE TAX BOARD

Brief of the Amici Curiae, Massachusetts Municipal Association, Massachusetts Association of Assessing Officers, and Massachusetts Municipal Lawyers Association

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Kenneth W. Gurge, Esq.
BBO No. 548109
Law Office of Kenneth W. Gurge
800 Pacific Avenue, Suite 410
Leominster, MA 01453
(978) 840-0095
Email: KWGURGE@aol.com
Attorney for Amici Curiae

Dated: March 21, 2016

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INTRODUCTION

Pursuant to this Court's Amicus Announcement of February 23, 2016, and Rule 17 of the Massachusetts Rules of Appellate Procedure, as amended, 426 Mass. 1602 (1998), the Massachusetts Association of Assessing Officers ("MAAO"), the Massachusetts Municipal Association ("MMA"), and the Massachusetts Municipal Lawyers Association ("MMLA") (collectively, the "Amici"), submit this amici curiae brief in support of the position of the Respondent-Appellee, the Board of Assessors of the City of Boston, and to aid the Court in its disposition of this appeal.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Where art. 112 of the amendments to the Massachusetts Constitution modified Pt. II, c. 1, § 1, art. 4, of the Massachusetts Constitution to allow for the creation of different classes of real property, and where a municipality may tax the different classes of real property at different rates, whether the statutory provision that implements the amendment, G.L. c. 40, § 56, results in the imposition of disproportionate taxes on personal property and is, therefore, unconstitutional.

STATEMENT OF INTERESTS OF AMICI CURIAE

The MAAO is a Massachusetts non-profit organization established in 1890 and incorporated in 1980 to promote the efficient and uniform administration of local tax laws and to provide methods for encouraging the development of desirable tax laws and to discourage the adoption of harmful measures relating to taxation or to the duties of local taxing officials. The membership of the MAAO comprises Assessing Officers, members of the Boards of Assessors and their staffs from cities and towns across the Commonwealth. Its members play a critical role in assuring that local property tax policy, as expressed through legislation or regulation, is implemented to achieve the desired objectives.

The MMA is a nonprofit, nonpartisan association that provides advocacy, training, publications, research and other services to Massachusetts cities and towns. As a statewide organization, the MMA brings Massachusetts municipalities and municipal officials together to establish unified policies, to advocate such policies, and to ensure the effective delivery of municipal services to community residents. The MMA is governed by a 35-member Board of Directors

(the "Board") composed of municipal officials from across the Commonwealth—mayors, selectmen, councilors, municipal managers and finance committee members—who are elected by their peers to represent the interests of Massachusetts communities. Throughout the year, the MMA sponsors numerous conferences and workshops on a variety of subjects and issues of importance to municipalities and municipal officials. Among its areas of concern are municipal finance, property tax assessment, and tax classification.

The Massachusetts Municipal Lawyers Association ("MMLA"), formerly known as the City Solicitors and Town Counsel Association, is the oldest and largest bar association dedicated to the practice of municipal law in the Commonwealth of Massachusetts. The members of the MMLA include attorneys and their assistants who represent municipal governments as city solicitor, town counsel, town attorney, or corporation counsel. Members of the MMLA also include attorneys who represent or advise cities, towns, and other governmental agencies in other capacities. MMLA's mission is to promote better local government through the advancement of municipal law.

The core of the Taxpayers' appeal is G.L. c. 40, § 56, which offers municipalities the election of allocating the annual tax levy by shifting a portion of it to the Commercial and Industrial classes of real estate and Personal Property (collectively, "CIP") to the benefit of owners of Residential and Open-Space[1] real estate, as defined in G.L. c. 59, § 2A. Before the Appellate Tax Board, the Taxpayers challenged the constitutionality of § 56 as applied to their personal property because art. 112 of the Amendments to the Massachusetts Constitution ("art. 112") does not mention personal property. Therefore, they argued that the Legislature was not authorized to act regarding personal property with the result that Part II, c. 1, § 1, art. 4, of the Constitution of the Commonwealth ("art. 4") must retain the traditional proportionality requirement as to their property which, even under classification, can only be taxed at one hundred percent of its value and no more. E.g., Brief of the Appellants ("TP Br.") at 27, 40. The Appellate Tax Board rejected that claim.

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[1] There is no question involving Open Space real estate before the Court in this appeal because there was no property classed as such within Boston for the fiscal year at issue.

The concerns of the Amici in this appeal are twofold. First, going forward, a ruling favoring the Taxpayers would impose an immediate and irreversible shift of the total tax levy to Residential class property owners in contravention of the purpose of art. 112. Second, such a shift would lead to substantial abatements becoming due to the Taxpayers and other personal property owners, leading to significant negative effects upon local property tax administration and financial harm to municipalities across the Commonwealth.

The Amici submit this brief to inform the Court of the experience of potentially affected municipalities in administering the statutory scheme in question to aid the Court in its ruling, and to urge the Court to affirm the decision of the Appellate Tax Board.

STATEMENT OF THE CASE AND FACTS

The Amici adopt the Statements of the Case and Facts from the Brief of the Respondent-Appellee Board of Assessors of the City of Boston.

ARGUMENT

Events leading up to the advent of local property taxation by usage classification in Massachusetts have

been chronicled at length in this Court's decisions as collected in the parties' briefs and need not be detailed here. Suffice it that following approval and ratification by the people in 1978 of art. 112 of the amendments, revising the proportional taxation mandate of Pt. II, c. 1, § 1, art. 4 of the constitution to allow a "split-rate" system of taxation, and after an advisory opinion of the Justices of this Court approving proposed legislation to implement that system, Opinion of the Justices, 378 Mass. 802 (1979), the Legislature passed St. 1979, c. 797, the "Classification Act."[2] Over the 35 years since, the boards of assessors in nearly a third of the Commonwealth's municipalities have come to rely upon that duly-enacted statutory framework in the allocation of the annual property tax levy, operating under the direction and guidance of the Commissioner of Revenue acting through the Commission's Division of Local services.

The outcome of the Taxpayers' appeal, if adverse to those municipalities which elected to employ split tax rates, stands to abruptly and permanently shift a

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[2] Codified at G.L. c. 40, § 56, G.L. c.58, § 1A, and G.L. c. 59, § 2A.

greater proportion of the total tax levy to residential taxpayers and potentially cause significant financial hardship to certain of those cities and towns. For the reasons that follow, the decision of the Appellate Tax Board must be affirmed.

I. A Reversal of the Decision of the Appellate Tax Board Would Cause an Immediate and Irreversible Increase to the Tax Burdens of Owners of Residential Class Realty, Contrary to the Purpose of Art. 112.

A primary concern of the Amici were the decision of the Appellate Tax Board to be reversed is that, for a number of municipalities, the percentage of the total Personal Property levy to be abated would, in future years, necessarily be shifted to Residential property owners and constitute a permanent increase in the proportionate tax burden of that class.

In any municipality which has adopted split rates and is at or near the maximum classification limits (i.e., at the maximum CIP shift factor or at the Minimum Residential Factor), the reduction in personal property taxes resulting from a requirement that personal property be taxed at the overall rate would lead to a shift of those taxes onto the Residential class. They cannot be absorbed by the Commercial and Industrial class properties because the ceiling of the

maximum CIP shift factor cannot be exceeded, or because the residential share cannot fall below the floor set by the Minimum Residential Factor.

For fiscal year 2016, 110 municipalities had adopted split tax rates. Of those, 47 were at or near the maximum classification limits.[3] Those 47 accounted for 44 percent of the Commonwealth's personal property value and approximately half of all personal property tax revenue. Had the CIP rate shift not been applicable to personal property, which would then have been taxed at the overall rate in those municipalities, $148,204,423 in taxes would need to have been shifted to the residential class.

For example, for fiscal year 2016, the City of Boston had the highest tax levy among Massachusetts municipalities, totaling $1,961,476,603. Boston employed the maximum CIP Shift Factor and the Minimum Residential Factor. Had Boston been required to tax personal property at the overall rate of $15.33 instead of the $26.81 classified CIP rate, $61,848,194—or 3.15 percent of its total levy—would

[3] Maximum classification limit data is based on fiscal year 2015 information as fiscal year 2016 statistics were not uniformly available. There would be little material difference from fiscal years 2015 to 2016 in this regard.

have to have been absorbed by the residential class. That would have produced an increase of the residential levy of eight percent.

For fiscal year 2016, the cities of Cambridge, Waltham, and Everett were among those—like Boston—at or near the maximum classification limits. Cambridge and Waltham would have experienced similar shifts from their personal property levies to their residential tax bases, which would have increased by 7.5 and 8.5 percent respectively. In Everett, where personal property accounted for 14 percent of the total levy, the shift from personal property to residential real estate would have been even greater: 15.3 percent.

Going forward, while those cities would likely experience the greatest shifts of the total levy from the personal property class to the residential class were the Appellate Tax Board's decision to be reversed, the remaining 43 at or near the maximum classification limits would all encounter shifts that necessarily would be absorbed in whole or in large part by the residential class. All of the 110 municipalities with split tax rates would encounter such shifts to a lesser extent.

In the past, when residents were facing unanticipated and unusually large year-to-year increases in the tax rates applicable to the residential class, the Legislature has stepped in to advance the voter's preference for favoring residential taxpayers as embodied in art. 112.

During the late 1980s, for example, the market value of residential properties increased more rapidly relative to the values of properties in the CIP classes. This divergence of values, coupled with the fixed 65-percent minimum residential factor,[4] caused abrupt shifts of the tax burden, requiring the residential class to bear a greater share of the total tax levy than it had in prior years. The Legislature responded by enacting St. 1988, c. 200, an emergency law to provide immediate "property tax relief to the owners of residential property," which raised the maximum permitted shift to the CIP classes to 175

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[4] Originally, the 1979 legislation provided for a minimum residential factor of 65 percent and limited the shift to the CIP class to 150 percent. G.L. c. 58, § 1A, as appearing in St. 1979, c. 797, § 3. These percentages refer to what each class would bear under a uniform, single tax rate. In other words, the maximum shift to CIP could be no more than 50 percent greater than the share that these classes would bear with a single tax rate; the residential class would also bear at least 65 percent of the levy it would otherwise bear with a single rate.

percent and reduced the minimum residential factor to not less than 50 percent.

Chapter 200 was effective in the short term, but by 2004 residential properties were again appreciating at a greater rate than CIP properties. For municipalities already at or near the 175 percent maximum permitted shift of the total levy to the CIP classes, this condition would have necessarily led to residential class properties absorbing a greater share of the total. The Legislature response was the adoption of St. 2004, c. 3, which increased temporarily the cap on the allowable shift of the tax borne by the CIP classes to 200 percent and reduced the minimum residential factor to 45 percent of the amounts those classes would otherwise bear under a single tax rate. Id., § 1(a).[5]

The Legislature has thus acted in the past to ensure that any imminent excessive increases in Residential class tax rates were moderated to the extent feasible so as to preserve the intent of the citizens in their ratification of art. 112. But those were temporary measures to counter transitory

[5] These interim changes were phased out over fiscal years 2005 through 2008. St. 2004, § 3(a)(i)-(v).

conditions. Here, a decision on Constitutional grounds in the Taxpayers' favor will in the affected municipalities permanently erase to a material degree the advantageous tax treatment now afforded to Residential real estate. Were that to occur, the Amici submit that the Legislature's fashioning of a remedy that would both mitigate Residential class owners' tax burdens and pass Constitutional muster is highly unlikely.

II. The Immediate and Long-Term Effects of the Abrupt and Unanticipated Extraordinary Tax Abatements Ensuing From a Decision Favoring the Taxpayers Will Jeopardize the Financial Stability of Affected Municipalities.

Annual municipal tax levies are set, generally, pursuant to G.L. c. 59, § 23. One of the items making up the levy is an allowance for abatements and exemptions of real and personal property taxes for a fiscal year, or the overlay account, a reserve established as a percentage of the levy based on historical levels of abatement refunds. G.L. c. 59, §§ 25, 70A. See Department of Revenue, Informational Guideline Release No. 11-101 (June, 2011). If an overlay reserve is underestimated it can fall into deficit; on the other hand, there may be a reserve

balance that can be released as overlay surplus which is available for appropriation "for any lawful purpose." G.L. c. 59, § 25. Any such amount not appropriated by the end of the fiscal year is added to the general fund, increasing the municipality's "free cash."

A grave concern of the Amici is the enormous drain on certain municipalities' finances that would occur were the Appellate Tax Board's decision to be reversed and the Taxpayers, and others with appeals pending asserting the same constitutional challenge, were to become entitled to abatements. In some cities and towns, the abatements would dwarf the overlay accounts as maintained in the ordinary course with immediate and lasting effects.

The magnitude of a particular municipality's abatement liability in the event of a decision favoring the Taxpayers would, of course, depend on how many Personal Property owners have pending applications for abatement or Board appeals, the degree to which the levy was shifted to the CIP class, and the amount of the resultant taxes at issue, but the exposure can quickly mount to unmanageable proportions. In the present appeal, for example,

involving a single fiscal year (2012), the Taxpayers are seeking an aggregate $3.6 million refund of personal property taxes they claim were overpaid. E.g., TP Br. at 10-11. That single year's exposure is compounded as the Taxpayers' challenge winds through the administrative and appellate review process; the Taxpayers presently have Appellate Tax Board appeals pending against Boston, predicated on the same grounds, for fiscal years 2013 through 2016. Boston's present exposure, then, to just two taxpayers, is on the order of $18 million—before accounting for statutory mandatory interest at the rate of eight percent. G.L. c. 58A, § 13.

For some of the municipalities affected if the decision of the Appellate Tax Board is reversed, the abatements may be manageable if the amounts are not too great and their fiscal affairs are in order. Based on information from their members, the Amici submit, however, that there are municipalities that are not on such sound financial footing that they can absorb an extraordinary level of abatements through the normal system of municipal accounting without hardship.

For example, in any given fiscal year a municipality may have exhausted its overlay account

due to an unusual level of abatement activity. In that event, the municipality can tap its free cash reserves, but applying those "rainy day" funds to abatements potentially can compromise the municipality's ability to protect essential services from cuts during periods of a weakened economy when revenue growth is down.

The Amici submit further that a large number of municipalities may have neither overlay funds nor free cash available. In that circumstance, any deficit in funds necessary to defray the balance of abatements granted in that year must be added to the total tax levy for the next succeeding fiscal year. G.L. c. 59, § 23. This is the proverbial "double whammy": not only is it necessary to raise the tax levy to pay for the prior year's abatements, but the additional funds raised would count against the municipality's Proposition 2½ limitation on year-to-year property tax increases (G.L. c. 59, § 21C), in all likelihood forcing reductions in spending for municipal programs and services.

Nearly a third of Massachusetts municipalities have rigorously adhered to the statutory scheme and Department of Revenue regulations and guidance

governing property tax classification for more than three decades without challenge to their actions or reason to suspect any constitutional infirmity. The Amici submit that at this late date avoiding the harsh consequences of a decision for the Taxpayers is not only in the best interests of the Commonwealth but is also correct as a matter of law.

III. The Legislative Implementation of the Purpose of Art. 112 Through G.L. c. 40, § 56 Satisfies the Proportionality Mandate of Art. 4 and Should not be Disturbed.

A question posed and answered in Opinion of the Justices, 378 Mass. 802 (1979), was whether it was within the Legislature's constitutional competency to enact the proposed Classification Act to allow municipalities, "within the guidelines established by said bill," to set different rates for the various property classes. "Guidelines," in this context, must be read to refer to the terms of the proposed statute and the provisions it contains for its administration. Among those provisions is G.L. c. 40, § 56, which sets the tax rates for CIP property at a uniform rate.

After a detailed review of the operation of § 56, the Justices noted this uniform treatment of personal property and real estate without elaboration. Id. at

808 & n.7. Subsequently—and presumably in reliance on the imprimatur of the 1979 Opinion—the Legislature passed c. 797.

While the parties now debate whether the 1979 Opinion actually reached the question of the constitutional soundness of the application of a uniform rate to CIP property (Boston Br. at 38-47; TP. Br. at 17, 49), the Commonwealth's boards of assessors have been and are now bound to adhere to the terms of G.L. c. 40, § 56—the guidelines—as written. The Amici submit that the Taxpayers' appeal presents no occasion to disturb that practice.

The parties concur that Constitutional proportionality in local taxation is grounded "on the fundamental notion that those having the enjoyment of the protections of government should share in its support in direct proportion to their respective property ownership." TP Br. at 22, citing Oliver v. Washington Mills, 93 Mass. 268, 275 (1865); Boston Br. at 17. Historically, this has meant contributions by taxpayers "in proportion to the property, whether real or personal, which they are respectively worth." Portland Bank v. Apthorp, 12 Mass. 252, 254 (1815).

Accord, WB & T Mortg. Co. v. Assessors of Boston, 451 Mass. 716, 722 (2008).

The crux of the Taxpayers' argument is that art. 112 makes no reference to "the personal property estate," leaving the Legislature without authority to act with regard to it. TP Br. at 27-28. The Amici find untenable the suggestion that by approving Art. 112 the voters understood that in benefiting residential taxpayers they might be relieving owners of personal property from paying their full share of municipal expenses merely because the base measure of their relative contribution—the value of their taxable property—was in the form of personalty as opposed to realty.[6]

The Legislature's implementation of art. 112 through G.L. c. 40, § 56 avoids that unexpected result

[6] Prior to its amendment by art. 112, art. 4 did not differentiate between realty and personalty, but employed the term "estates" to describe the property for which the citizens were taxable. Contemporaneously with the adoption of the Massachusetts Constitution (and now), the term was (and is) commonly understood to mean, without differentiation, "the property or a piece or aggregation of property in lands or tenements and sometimes personalty," or "the aggregate of things owned" by a person. Webster's Third New International Dictionary 778, 1770 (2002). Accord, R. Burn, A New Law Dictionary 318 (1792). While there was, of course, a requirement of proportionality, that requirement was based solely on the value of an individual taxpayer's total taxable property—of whatever nature.

by employing only two tax rates. One, applicable to residential property, advances the goal of art. 112 that property in that class bear a reduced portion of the total tax levy. The second, applied uniformly to CIP property, ensures that owners of such property contribute to the balance of the levy in proportion to the value of their taxable estates, whether real or personal. Personal property owners do not pay a proportionately greater tax in relation to the value of their property than do owners of Commercial and Industrial real estate. The proportionality mandate of art. 4 is thus satisfied, as is the requirement of Art. 10 of the Massachusetts Declaration of Rights that they no pay more than their share.

The Amici submit, therefore, that owners of personal property, whose tax payments entitle them to the same municipal benefits and protections provided to owners of commercial and industrial real estate, should not be excused from paying their proportionate share of the total tax levy (as adjusted to accommodate the favored residential class) simply because the words "personal property" are absent from art. 112. The decision of the Appellate Tax Board should be affirmed.

CONCLUSION

For the foregoing reasons, the Amici, the Massachusetts Municipal Association, the Massachusetts Association of Assessing Officers, and the Massachusetts Municipal Lawyers Association, submit that this Court should affirm the decision of the Appellate Tax Board rejecting the Taxpayers' constitutional challenge to G.L. c. 40, § 56.

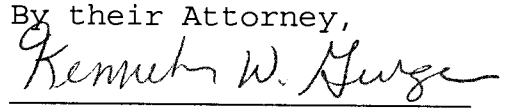
Respectfully submitted,

Massachusetts Municipal Association,

Massachusetts Association of Assessing Officers, and

Massachusetts Municipal Lawyers Association

By their Attorney,

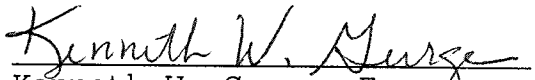


Kenneth W. Gurge, Esq.
BBO No. 548109
Law Office of Kenneth W. Gurge
800 Pacific Avenue, Suite 410
Leominster, MA 01453
(978) 840-0095
Email: KWGURGE@aol.com

Dated: March 21, 2016

MASS. R. APP. P. 16(k) CERTIFICATION OF COUNSEL

I hereby certify that the foregoing brief complies with the Massachusetts Rules of Appellate Procedure, including, but not limited to, Rules 16(a)(6), 16(b), 16(e), 16(f), 16(h), 17, 18, and 20.



Kenneth W. Gurge, Esq.
BBO No. 548109
Law Office of Kenneth W. Gurge
800 Pacific Avenue, Suite 410
Leominster, MA 01453
(978) 840-0095
Email: KWGURGE@aol.com

Dated: March 21, 2016

CERTIFICATE OF SERVICE

I, Kenneth W. Gurge, hereby certify that I caused two copies of the attached Brief of Amici Curiae to be served upon counsel for the parties and Amici Curiae, by first-class mail at the addresses listed below, on March 21, 2016.

Kenneth W. Gurge

William A. Hazel, Esquire
James F. Ring, Esquire
Chu, Ring & Hazel, LLP
241 A Street
Boston, Massachusetts 02110

Anthony M. Ambriano, Esquire
Sassoon & Cymrot, LLP
84 State Street, Suite 820
Boston, Massachusetts

Daniel J. Hammond, Esquire
Office of the Attorney General
Government Bureau
One Ashburton Place, Rm. 2014
Boston, Massachusetts 02108