
COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

SJC-5425
A-81

IN THE MATTER OF THE REQUEST
BY THE GOVERNOR
FOR AN ADVISORY OPINION
RESPECTING HOUSE BILL 5858
ENTITLED
"AN ACT ESTABLISHING THE ECONOMIC
STABILITY AND RECOVERY COMPACT"

BRIEF OF
BOSTON BAR ASSOCIATION
AND
MASSACHUSETTS BAR ASSOCIATION
Amici Curiae

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STATEMENT OF THE CASE

On July 7, 1990, the Massachusetts General Court passed House Bill 5858, "An Act Establishing The Economic Stability and Recovery Compact." That legislation would impose a tax upon certain services rendered by lawyers (among others) and consumed within the Commonwealth. On July 9, 1990, the Governor of Massachusetts, noting that "grave doubts have been raised concerning the constitutionality" of the bill, submitted to this Court the following important question of law: "Is it permissible under the Massachusetts and United States Constitutions for the Commonwealth to impose an excise upon sales of services as proposed by House 5858?" By the express provision of Article 2 of Chapter 3, as amended, of the Constitution of the Commonwealth, this Court must now render its opinion upon this question. In that regard, the Court has requested that the Massachusetts Bar Association and the Boston Bar Association file briefs as amici curiae. This brief is filed pursuant to that request, and addresses only those issues raised by House Bill 5858's proposed taxation of legal services.

STATEMENT OF THE ISSUE PRESENTED

Is it permissible under the constitutions of Massachusetts and the United States for the Commonwealth to impose an excise upon the sale of legal services, as proposed by House Bill 5858?

STATEMENT OF FACTS

House Bill 5858 grafts on the Commonwealth's existing structure of sales and use tax an excise on certain defined

services. House Bill 5858, § 42. This proposed augmentation of the scope of the Commonwealth's existing sales tax is accomplished by amending the definition of "sale" in section 1 of chapter 64H of the General Laws to include not only transfers of tangible personal property, but also transfers of services. "Services" are defined generally by the bill as "a commodity consisting of activities engaged in by a person for another person for a consideration. . ." House Bill 5858, § 42. Notwithstanding this sweeping language, only certain specifically defined "activities" fall within the act's definition of "services". Among these are "legal . . . services provided to businesses." Id. The bill would exempt sales of legal services to a single client up to \$20,000 in the aggregate in a calendar year. Id., § 51. Legal services "used outside the commonwealth" would also be exempt from the tax. Id., § 50.

Under House Bill 5858, all attorneys practicing in the Commonwealth - as well as those practicing elsewhere with a nexus to Massachusetts who provide services used in the Commonwealth - would become "vendors" within the meaning of the tax code. Id. § 52. As such, attorneys would be required to collect the tax which House Bill 5858 would impose from the purchasers of their services, and to pay all amounts so collected to the Department of Revenue. G.L. c. 64H, §§ 2 and 3(a). Attorneys also would be required to file sales tax returns with the Department of Revenue. G.L. c. 62C, § 16(h).

In order to do business as vendors under the sales tax, attorneys, like all other vendors, would require a certificate of registration issued by the Commissioner. G.L. c. 64H, § 7. Like all other vendors, attorneys would be subject to audit by the Department of Revenue. G.L. c. 62C, § 24. If, upon audit, the Department were to determine that the full amount of any tax owed upon the sale of legal services had not been paid, the Department could assess the additional tax, plus interest and applicable penalties, upon the attorney/vendor. G.L. c. 62C, §§ 26(b), 32 and 33. The attorney then could apply to the Commissioner for abatement of any sales taxes so assessed. G.L. c. 62C, § 37. Appeals from the refusal of the Commissioner to abate any tax upon the sale of legal services then could be taken by the attorney to the Appellate Tax Board. G.L. c. 62C, § 39(c).

ARGUMENT

- I. It Is Not Permissible Under The Massachusetts Constitution For The Commonwealth To Impose An Excise Upon The Sale Of Legal Services As Proposed By House Bill 5858.
 - A. As Applied To Legal Services, House Bill 5858 Violates Article 30 Of The Massachusetts Declaration Of Rights.
 1. House Bill 5858 Unconstitutionally Invades The Exclusive Province Of The Judiciary To Regulate The Practice Of Law And Attorney Conduct Under Article 30.

The power to regulate the practice of law and the conduct of attorneys in this Commonwealth is unique to the judicial branch of government. In re Proposed Amendment to Supreme

Judicial Court Rule 4:02(1), Action No. SJC-4018, p. 5 (May 12, 1986); District Attorney for the Plymouth Dist. v. Board of Selectmen of Middleborough, 395 Mass. 629, 633 (1985); Marino v. Tagaris, 395 Mass. 397, 401 (1985); Opinion of the Justices to the Senate, 375 Mass. 795, 813 (1978); Matter of Keenan, 313 Mass. 186, 196 (1943). Although the legislative and executive branches may enact laws that specify "minimum" qualifications "in aid of the judicial department in reaching a proper selection of those qualified for admission as attorneys to practice in the courts," this Court consistently has ruled that "[n]o statute can control the judicial department in the performance of its duty to decide who shall enjoy the privilege of practicing law." Matter of Keenan, 313 Mass. at 196 (quoting Opinion of the Justices to the Senate, 279 Mass. 607, 611 (1932)). See also Opinion of the Justices to the Senate, 375 Mass. at 813 (legislative and executive branches have limited power to enact legislation establishing "complementary standards" for attorney conduct). This result is mandated by Article 30 of the Massachusetts Declaration of Rights, which preserves the doctrine of separation of powers between the executive, legislative and judicial departments of our state government. Opinion of the Justices to the Senate, 375 Mass. at 813.

House Bill 5858 would undermine this traditional control of the judicial department over the practice of law and the conduct

of attorneys in this Commonwealth. The bill purports to empower the Commissioner of Revenue, a member of the executive department, to regulate and restrict the capacity of attorneys to practice their profession based, in part, upon their conduct and the conduct of their colleagues. That power derives from the legal structure of the tax code, which operates as follows.

Section 42 of House Bill 5858 would revise the definition of the term "vendor" for tax purposes to include "a retailer or other person selling tangible property or services of a kind the gross receipts from the retail sale of which are required to be included in the measure of the tax imposed by this chapter." Thus, attorneys would become "vendors" under the bill. Section 7 of chapter 64H of the General Laws, which remains unchanged by House Bill 5858, further mandates that:

[n]o person shall do business in this commonwealth as a vendor unless a registration shall have been issued to him for each place of business in accordance with section sixty-seven of chapter sixty-two C.

Section 67 of chapter 62C provides that such certificates of registration are available, upon application, from the Commissioner of Revenue. Certificates are issued for a specific term of not less than three years and are subject to periodic renewal. Id. Section 67 also establishes certain criteria that the Commissioner of Revenue is to employ in making his or her determination as to whether a particular applicant qualifies for the issuance of a certificate of registration. The Commissioner

specifically is empowered, in part, to deny an applicant a certificate of registration on the grounds that: (i) any tax payable by the applicant has not been paid; (ii) the applicant has been convicted of a crime under chapter 62C within one year prior to the filing of the application; or (iii) any officer, director, partner or employee of the applicant with responsibility for paying over tax proceeds has been convicted under chapter 62C within one year prior to the filing of the application. G.L. c. 62C, §§ 67[4], 67[6] and 67[7].

The Commissioner further is empowered by the terms of section 68 of chapter 62C to revoke or suspend a vendor's certificate of registration, in part, on the grounds that: (i) the registrant has been convicted at any time of a crime under chapter 62C; or (ii) the registrant "has otherwise wilfully failed to comply with any provision of the tax laws of the commonwealth or regulations thereunder." G.L. c. 62C, §§ 68[4] and 68[5].

These provisions of House Bill 5858 thus would effectively grant to the Commissioner of Revenue the means to directly regulate and restrict the ability of attorneys to "do business," i.e., engage in the practice of law, in this Commonwealth based upon their conduct. The Commissioner will have the power to suspend or revoke immediately an attorney's certificate of registration or, for that matter, an entire law firm's certificate of registration (which certificate is essential to the

registrant's ability to continue to offer legal services) if, in the opinion of the Commissioner, such attorney or a partner or employee of the firm who has responsibility for the payment of taxes, has willfully violated any provision of state or local tax laws.¹ G.L. c. 62C, § 68. Moreover, the Commissioner of Revenue will be entitled hereafter to promulgate additional rules and regulations, pursuant to his or her powers under section 3 of chapter 62C, further regulating and restricting the professional conduct of attorneys so as to ensure compliance with the tax laws.

The direct supervision of attorney conduct by the Commissioner of Revenue that will inevitably result from the enactment of House Bill 5858 effectively nullifies the separation of powers doctrine embodied in Article 30 of the Massachusetts Declaration of Rights insofar as it pertains to the heretofore exclusive power of the judicial branch to

¹/ The intrusive effect of House Bill 5858 upon the judiciary's unique power to regulate the legal profession is not diminished by the fact that disciplinary actions instituted by the Commissioner of Revenue under G.L. c. 62C, §§ 66 and 68, ultimately would be subject to review by the Appeals Court on appeal from the Appellate Tax Board. G.L. c. 58A, § 13. In such an event, it would be the legislative and/or executive departments, not the judiciary, that establish the substantive rules of conduct upon which such an action would be predicated. That outcome would be equally unconstitutional because it still would constitute an improper deferral to the legislative and executive departments for a definition of what professional conduct shall be "unacceptable" for attorneys. See In re Proposed Amendment to Supreme Judicial Court Rule 4:02(1), at p. 3 (separation of powers doctrine precludes application of G.L. c. 62C, § 49A, prescribing oath of compliance with tax laws, to attorneys).

regulate the practice of law and the conduct of attorneys in the Commonwealth. See, e.g., In re Proposed Amendment to Supreme Judicial Court Rule 4:02(1), at 5.² Although certain cases have recognized the power of the executive and legislative branches to enact "complementary" laws as a means to to "aid" the judiciary in its supervision of the legal profession, see, e.g., Opinion of the Justices to the Senate, 375 Mass. at 813, never before has this Court permitted the legislative and executive branches of government to independently prescribe and implement disciplinary rules which directly relate to and bear upon the fitness and ability of individual attorneys to engage in the practice of law. The establishment of such a regulatory scheme by House Bill 5858 thus constitutes an unconstitutional

2/ In In re Proposed Amendment to Supreme Judicial Court Rule 4:02(1), the Supreme Judicial Court rejected a prior attempt by the Commissioner of Revenue to link an attorney's compliance with the tax laws to his or her fitness and ability to practice law in this Commonwealth. Specifically, the Commissioner petitioned the Court to adopt a disciplinary rule requiring each attorney, upon initial registration with the Board of Bar Overseers and upon annual renewal of that registration, to certify that he had "filed all state tax returns and paid all state taxes for which the attorney is liable." Id. at 1. This Court rejected that petition, reiterating that "[t]his Court's rules concerning registration of attorneys focus on the regulation and discipline of attorneys, functions unique to our area of constitutional authority." Id. at 5. The Court further stated that the rule proposed by the Commissioner was unnecessary as "this Court already [has] established a policy of imposing substantial discipline on attorneys who, after conviction and opportunity for appeal, [have] been found guilty of willfully violating State or Federal revenue laws." Id. 4. Accordingly, the Commissioner had neither the right nor the need to address the issue of tax compliance by means of rules of conduct for the legal profession. That reasoning is equally applicable to the provisions of House Bill 5858.

usurpation of this Court's traditional and constitutional responsibilities. As applied to legal services, therefore, the bill violates Article 30 of the Massachusetts Declaration of Rights.

2. House Bill 5858 Unconstitutionally Infringes Upon The Supreme Judicial Court's Exclusive Powers Under Article 30 By Imposing Administrative Responsibilities Upon The Legal Profession That Conflict With The Ethical Obligations Embodied In Supreme Judicial Court Rule 3:07

House Bill 5858 would impose obligations upon attorneys with regard to the calculation and collection of the tax upon legal services. House Bill 5858, § 42. As vendors of taxable services, attorneys would be required to keep "suitable records of taxable charges and such other books, papers, records and data as the commissioner may require to determine the amount of tax due under the provisions of [Chapters 64H and 64I] . . . [w]hich records shall be open to inspection and examination at any reasonable time by the Commissioner." G.L. c. 62C, § 25.

House Bill 5858 further would create a presumption that

all gross receipts of a vendor from the sale of services . . . are from sales subject to tax until the contrary is established. . . . The burden of proving that a sale of services . . . is exempt under this chapter shall be upon such vendor unless he takes from the purchaser a certificate to the effect that the service or property will be used in an exempt manner.

House Bill 5858, § 53.

These administrative responsibilities which House Bill 5858 would impose upon attorneys impermissibly conflict with the ethical obligations of lawyers under the disciplinary rules and canons promulgated by this Court in the exercise of its powers under Article 30 of the Massachusetts Declaration of Rights. Specifically, every lawyer presently is obliged to preserve client confidences and secrets pursuant to Supreme Judicial Court Rule 3:07, DR 4-101. Client confidences and secrets include not only information protected by the attorney-client privilege, but also "other information gained in the professional relationship that the client has requested to be held inviolate or disclosure of which would likely be detrimental to the client." Id. Acting pursuant to the powers granted by House Bill 5858, however, the Commissioner of Revenue will be entitled to inspect an attorney's books and records at any time so as to determine whether a particular transaction is taxable as well as to verify the proper amount of tax due. G.L. c. 62C, § 25. Such inspection procedures create a genuine risk that client secrets and confidences necessarily will be disclosed, intentionally or otherwise, in the name of tax enforcement.³

3/ The fact that tax information is to be treated by the Department of Revenue as confidential under G.L. c. 62C, § 21, does not make the attorney's act of disclosure to that Department any less revealing of a client's confidences and secrets. Moreover, the confidentiality provisions of G.L. c. 62C, § 21, expressly do not apply "in proceedings to determine or collect the tax." G.L. c. 62C, § 21(a).

By way of illustration, such a dilemma might arise under the Commonwealth's tax enforcement structure where a Massachusetts attorney advises an out-of-state business that has measurable but limited contacts with the Commonwealth that its operations properly are not subject to the Massachusetts corporate excise tax. If it is assumed that the attorney thereupon receives an exempt use certificate from the client, the lawyer would not collect or pay over a sales tax on the services rendered to that client, even if the amount charged was in excess of \$20,000, on the basis that the legal services were rendered to an out-of-state business and therefore "used outside the Commonwealth." House Bill 5858, § 50.

The Department of Revenue thereafter would have the right to audit the client's Massachusetts counsel and request further information regarding the specific nature of the legal services rendered to the client in order to evaluate for itself the validity of the claimed use exemption. If the attorney were to provide the requested information to the Department of Revenue, however, such action would constitute an impermissible disclosure of client confidences or secrets, i.e., the client's concern regarding its potential liability to the Massachusetts corporate excise tax, and an apparent violation of DR 4-101. See Opinion of the Justices to the Senate, 375 Mass. 795, 814 n. 15 (1978) (attorneys' disclosure of names, addresses and nature of legal services rendered to clients pursuant to

political ethics statute would constitute a potential violation of DR 4-101). The conflict is compounded by the fact that disclosure of the information sought would target the client in the eyes of the Department of Revenue as a business whose Massachusetts operations potentially are subject to taxation by the Commonwealth.

It is not enough to suggest with respect to the ethical problems posed for attorneys by House Bill 5858 that, in the event of such a conflict, the legal profession's Canons of Conduct and Disciplinary Rules will prevail. The Department of Revenue is not bound by this Court's canons and rules and can be expected to issue summonses, pursuant to its powers under section 70 of chapter 62C, seeking the disclosure of whatever information the Department deems necessary to enforce the tax laws. Such disputes are likely to be numerous and the litigation which will inevitably ensue will further burden the already overburdened courts of this Commonwealth. Moreover, enforcement of the provisions of House Bill 5858 against attorneys will, of necessity, routinely require the disclosure of confidential information regarding the nature of legal services rendered in particular transactions because the Department of Revenue will

have no other means available to verify whether those services were "used in the Commonwealth" for exemption purposes.⁴

B. As Applied To Legal Services, House Bill 5858 Violates Article 11 Of The Declaration Of Rights Of The Massachusetts Constitution.

Article 11 of the Declaration of Rights of the Constitution of Massachusetts provides as follows:

Every subject of the Commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely and without any denial; promptly, and without delay; conformably to the laws.

The assistance of competent legal counsel is a necessary predicate to any litigant's ability to "obtain right and justice," regardless whether the litigant is a "business" within the meaning of section 42 of House Bill 5858; regardless whether the matter in which such justice is sought is civil or criminal in nature; and regardless whether such matter is pending in the

^{4/} In addition, the prospect that House Bill 5858 will obligate attorneys to reveal client confidences and secrets to the Department of Revenue will inevitably chill clients' willingness to consult their attorneys and, ultimately, undermine public confidence in our legal system. This Court previously has exercised its authority under Article 30 to intervene when it appears that some practice threatens to undermine public confidence in the administration of justice. See, e.g., Marino v. Tagaris, 395 Mass. 397 (1985) (reversing judgment confirming fee arbitration award which had potential to adversely affect public perception of the courts). Similar action is warranted in this case in order to avoid the detrimental effects that House Bill 5858 will have upon the integrity of the Massachusetts legal system.

courts of the Commonwealth or those of the United States which are holden within the Commonwealth.⁵ See, e.g., Powell v. Alabama, 287 U.S. 45, 68-69 (1932). Indeed, the assistance of counsel in the representation of a corporate party in judicial proceedings other than small claims matters is not merely a practical necessity; it is a procedural requirement. Varney Enterprises, Inc. v. WMF, Inc., 402 Mass. 79, 81-82 (1988); In re Las Colinas Dev. Corp., 585 F.2d 7, 13 (1st Cir. 1978), cert. denied, 440 U.S. 931 (1979). By enacting House Bill 5858, the General Court seeks to impose a tax upon the provision of these services to all subjects of the Commonwealth (as well as subjects of other states) who are engaged in business, without which services those parties cannot "obtain right and justice."

The guaranty of free access to justice embodied in Article 11 of the Declaration of Rights also is found in the constitutions of most other states. 16D C.J.S. Constitutional Law § 1433 (1990). See also State v. Basinow, 117 N.H. 176, 177, 371 A.2d 458, 459 (1977). Although these free access guarantees have not been construed so as to preclude legislatively enacted fees pertaining to the initiation of judicial

^{5/} Those federal courts which are holden within the Commonwealth include the United States Bankruptcy Court for the District of Massachusetts, the United States District Court for the District of Massachusetts, and the United States Court of Appeals for the First Circuit. Upon the face of House Bill 5858, all legal services rendered to businesses being represented in any proceeding pending in any of these fora are at least arguably subject to the excise tax which the bill would impose.

proceedings where the proceeds of such fees help defray the expenses of the courts, see, e.g., Cook v. Municipal Court of Pine Bluff, 287 Ark. 382, 699 S.W.2d 741 (1985), they have been applied "against the imposition of unreasonable charges for the use of the courts . . ." 16D C.J.S. at § 1433, p. 696. See also Lemoine v. Martineau, 342 A.2d 616, 620 (R.I. 1975) ("one of the purposes of [the] constitutional mandate [of free access to justice] was to prevent the sovereign from selling justice by the imposing of fees on the litigants . . ."). The application of these principles is illustrated by the decision of the Supreme Court of Missouri in Harrison v. Monroe County, 716 S.W.2d 263 (Mo. 1986).⁶ That case involved a statute which approved additional compensation for certain county officers, funded by the assessment of additional court costs in the amount of \$4.00

^{6/} The Supreme Judicial Court of Massachusetts never has had occasion to consider whether a legislatively enacted filing fee or other generally applicable charge upon the right to obtain judicial redress is violative of the free access guarantee in the Massachusetts Declaration of Rights. In Old Colony R.R. Co. v. Assessors of Boston, 309 Mass. 439 (1941), the Court did consider whether a taxpayer appealing to the Appellate Tax Board from an adverse determination upon an application for abatement of a tax assessed upon parcels of real estate could be required to pay some portion of the tax being contested as a prerequisite to pursuing his administrative appeal. The Court held that such a requirement did not offend the free access guaranty of the Massachusetts Constitution, ruling that "a citizen, contending his assessment is excessive, has no right superior to the demand for payment to withhold the entire tax until he can secure an adjudication of the amount due." Id. 443 (citation omitted). The facts of Old Colony thus are readily distinguishable from the case at bar, and the reasoning of that decision has no application to a generally applicable charge upon services rendered in the litigation process.

in civil cases. In ruling that the statute violated the free access guaranty of the Missouri Constitution,⁷ the Supreme Court held that "the constitutional proscription against the sale of justice extends to guarantee access to the courts without a requirement of payment of unreasonable charges." Id. 267 (citations omitted). In considering the decisive issue of whether the charges at issue were "reasonable," the court focused upon the use to which the statute provided that the funds so collected would be put. Observing that those funds were collected to enhance the compensation of officials of the executive department of the government, the court held that the costs imposed by the statute bore "no reasonable relationship to the expenses of the administration of justice . . ." and, consequently, that "the fees imposed in civil cases by [the statute at issue] are unreasonable impediments to access to justice in violation of [the free access guaranty of the Missouri Constitution]." Id.

The excise which House Bill 5858 would levy upon services purchased by the litigants to which it applies amounts to an "unreasonable charge" for the provision of justice in cases to which businesses are parties. This conclusion is compelled by

^{7/} That guaranty, embodied in Art. I, § 14, of the Missouri Constitution, provides as follows: "That the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay."

two independently sufficient considerations. First, the revenue which House Bill 5858 would raise from the tax which it imposes upon legal services is unrestricted as to its use. The bill establishes no relationship whatsoever - let alone a "reasonable relationship" - between the revenues collected and the costs of administering justice in the Commonwealth. For this reason alone, House Bill 5858 is violative of Article 11 of the Declaration of Rights to the extent that it applies to the sale of legal services.

Moreover, House Bill 5858 would constitute an unreasonable impediment to the provision of justice, and thus violate Article 11, even if it provided that the revenue collected from the tax which it imposes on the sale of legal services was to be used to subsidize the administration of justice in Massachusetts. The tax imposed upon the litigation process by House Bill 5858 is not uniform. Nor are the differences in the amount of the taxpayer's liability rationally related to differences in the nature or degree of services provided by the Commonwealth to different taxpayers in connection with the administration of justice.

In this respect, the tax which House Bill 5858 would impose upon the sale of legal services is similar to the charges considered by the Supreme Court of North Dakota in Malin v. La Moure County, 27 N.D. 140, 145 N.W. 582 (1914). That case involved a statute which imposed a graduated "fee" to be paid in

probate cases in the amount of \$5.00 for each \$1,000.00 in value of a probated estate. The avowed purpose of all monies so collected was to "reimburs[e] the county for the salaries provided . . . to be paid the judges of county courts . . ." Id. 583. The Supreme Court of North Dakota nonetheless held the statute to violate the North Dakota constitution's free access guaranty.⁸ In so holding, the court acknowledged that "reasonable court charges" do not run afoul of the free access guaranty. Id. 586. However, the court opined that "a free and reasonable access to the courts and to the privileges accorded by the courts, and without unreasonable charges, was intended to be guaranteed to every one." Id. In ruling that the statute in question offended this intention, the court emphasized that charges upon a party's access to the courts would only withstand scrutiny under the constitutional free access guarantee "provided that they are uniform, are reasonable, and have a reasonable relation to the services rendered." Id. 587.⁹

⁸/ At the time of the decision in Malin, that guaranty, embodied in Art. 1, § 22, of the North Dakota Constitution, provided as follows: "All courts shall be open, and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law, and right and justice administered without sale, denial or delay." This provision presently appears in Art. 1, § 9, of the North Dakota Constitution.

⁹/ The North Dakota Supreme Court's insistence upon uniformity appears to have been a function of its view that the fee graduations enacted by the statute under review had "no

(Footnote Continued on Next Page)

House Bill 5858 fails the "uniformity" prong of this test. It seeks to impose a tax upon the provision of legal services incident to the representation of parties in judicial proceedings that will vary markedly and arbitrarily (with respect to the nature and extent of services provided by the Commonwealth) from one litigant to the next. For this independently sufficient reason, House Bill 5858 would impose an "unreasonable charge" upon the administration of justice in the Commonwealth, in violation of Article 30 of the Declaration of Rights.

For these reasons, if the free access to justice guaranty embodied in Article 11 is to have any meaning at all, House Bill 5858 must be held to run afoul of that guaranty to the extent that it imposes a tax on the sale of those legal services to which it applies.

C. As Applied To Legal Services, House Bill 5858 Violates The Excise Clause Of The Massachusetts Constitution.

As argued in the amicus curiae brief filed by the Massachusetts Taxpayers Foundation, Inc., the Massachusetts General Court lacks the constitutional authority to levy an

9/ (Footnote Continued From Previous Page)

proximate relation to the amount to be paid to the probate judge, nor to the other expenses of the court, nor to the nature or extent of the services which may become necessary in the proceedings'." Id. 585 (quoting State v. Gorman, 40 Minn. 232, 41 N.W. 948 (1889) (holding a similar Minnesota statute unconstitutional under, the free access guaranty of the Minnesota constitution)). These observations apply with equal force to the excise which House Bill 5858 seeks to levy upon the sale of legal services to businesses.

excise on the performance of services. It is well settled that the term "commodities" in the Excise Clause of the Massachusetts Constitution, Pt. 2, ch. 1, § 1, Art. 4, is not infinitely elastic. Were there no limits to the meaning of the term, the uniformity requirement of Amending Article 44 could be readily circumvented and a graduated income tax adopted by the simple device of rooting the tax in the Excise Clause. This Court's recent decisions jealously protecting the uniformity requirement of Amending Article 44 would be difficult to explain if a graduated income tax could be adopted by means of such a simple expedient. See, e.g., Massachusetts Taxpayers Foundation, Inc. v. Secretary of Administration, 398 Mass. 40 (1986); Opinion of the Justices to the House of Representatives, 383 Mass. 940 (1981). Recent attempts to amend the Constitution by ballot so as to permit a graduated income tax would be equally inexplicable.

Over the years, this Court has handed down numerous decisions defining the constitutional limits of the legislative department's excise power. While the articulated rationale for these limits has evolved over the years, it now seems well settled that the term "commodities" in the Excise Clause is limited to privileges and franchises conferred by the legislative

branch and does not extend to so-called "natural rights."¹⁰ Opinion of the Justices, 266 Mass. 590 (1929); O'Keeffe v. City of Somerville, 190 Mass. 110 (1906); Gleason v. McKay, 134 Mass. 419 (1883). The cases and decisions supporting this articulation of the limits of the General Court's excise power are ably discussed and analyzed in the brief of the Massachusetts Taxpayers Foundation and need not be repeated here. Particularly insofar as House Bill 5858 extends to legal services, however, it is relevant to observe that in no sense can either the purchase or the provision of legal services be said to be a "privilege" conferred by the General Court.

With respect to the purchase of legal services, it need only be observed, as discussed infra at 22-23, that the Constitution of the United States guarantees its citizens the right to counsel. It is hard to see how a constitutionally guaranteed right can be characterized as a privilege conferred by the legislative branch. With respect to the provision of legal services, this Court consistently has held that the power to confer and regulate the right to practice law in this Commonwealth is unique to the judiciary. In re Proposed

^{10/} To uphold the tax on legal services proposed by the General Court would abandon the distinction between "privileges" and "natural rights" so long espoused by this Court. Such a holding would require the development of a new definition of the term "commodities" which would be both broad enough to encompass the performance of services and narrow enough to exclude the earning of income. It is respectfully submitted that no definition of the term can satisfactorily accomplish both purposes.

Amendment to Supreme Judicial Court Rule 4:02(1), Action No. SJC-4018, p. 5 (May 12, 1986); District Attorney for the Plymouth Dist. v. Board of Selectmen of Middleborough, 395 Mass. 629, 633 (1985); Marino v. Tagaris, 395 Mass. 397, 401 (1985); Opinion of the Justices to the Senate, 375 Mass. 795, 813 (1978); Matter of Keenan, 313 Mass. 186, 196 (1943). Because it is well settled that the practice of law is not a privilege or franchise conferred by the legislative branch, that activity cannot be considered a "commodity" within the meaning of the Excise Clause. Consequently, to the extent that House Bill 5858 seeks to impose a tax upon the sale of legal services, the bill violates the Excise Clause of the Massachusetts Constitution.

II. It Is Not Permissible Under The Fifth, Sixth and Fourteenth Amendments Of The United States Constitution For The Commonwealth To Impose An Excise Upon The Sale Of Legal Services As Proposed By House Bill 5858.

The United States Constitution guarantees to all parties in both criminal and civil proceedings the right to retain counsel. Powell v. Alabama, 287 U.S. 45, 68-69 (1932). This constitutional right extends to certain administrative proceedings as well. Goldberg v. Kelly, 397 U.S. 254, 270 (1970). A criminal defendant's right to retain counsel arises under the Sixth Amendment; a civil litigant's right to retain counsel arises under the Fifth Amendment's due process guarantee, as applicable to the states under the Fourteenth Amendment. Potashnick v. Port City Const. Co., 609 F.2d 1101, 1118 (5th Cir.), cert. denied, 449 U.S. 820 (1980).

Several Supreme Court cases have considered the issue of whether a state constitutionally can impose a tax upon the exercise of a federal constitutional right.¹¹ These cases have drawn a distinction between generally applicable taxes and those which discriminate either between constitutionally protected activity and unprotected activity, or between certain constitutionally protected activity and other protected activity. Compare Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987) and Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983), with Jimmy Swaggart Ministries v. Board of Equalization of California, ___ U.S. ___, 110 S. Ct. 688 (1990). In Minneapolis Star, the Court considered the constitutionality of a Minnesota use tax upon the cost of paper and ink products consumed in the production of a publication. The statute, as amended, exempted the first \$100,000 worth of ink and paper consumed by a publication in any calendar year from the tax. It was challenged by a Minnesota newspaper as violative of the First Amendment, as applicable to the states under the Fourteenth Amendment.

In holding this tax unconstitutional, the Court focused on the discriminatory nature of the statute as applying only to

^{11/} A tax upon the exercise of a constitutional right is of course constitutionally distinguishable from a tax upon the income obtained by one as a result of its exercise. See, e.g., Murdock v. Pennsylvania, 319 U.S. 105, 112 (1943) ("It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon.").

publications, and, indeed, only to certain publications. Because the tax was directed at the press, the Court held that it "cannot stand unless the burden [upon the exercise of rights protected by the First Amendment] is necessary to achieve an overriding governmental interest." Minneapolis Star, at 582 (citation omitted). Although acknowledging the importance of the state's interest in raising revenue, the Court nonetheless opined that that interest could have been achieved by taxing businesses generally, thus avoiding the First Amendment concerns arising from a tax directed specifically at the press. Id. 586. For this threshold reason, the statute was held to unconstitutionally burden the exercise of the petitioner's First Amendment rights.

Significantly, the Court rested its holding upon an alternative ground, ruling that

Minnesota's ink and paper tax violates the First Amendment not only because it singles out the press, but also because it targets a small group of newspapers. The effect of the \$100,000 exemption enacted in 1974 is that only a handful of publishers pay any tax at all, and even fewer pay any significant amount of tax.

Id. 591 (footnote omitted). Finding no state interest that could justify this classification, and questioning the state's proffered rationale of desiring to impose the tax only upon those publications most able to bear it, the Court held that this discriminatory sub-classification also rendered the tax unconstitutional. Id.

Similar issues were considered in Arkansas Writers' Project. That case involved a statute that taxed the sale of general interest magazines, but exempted newspapers and religious, professional, trade and sports journals. In considering the constitutionality of the statute, the Court noted that "the fundamental question is not whether the tax singles out the press as a whole, but whether it targets a small group within the press." Arkansas Writers' Project at 229. The Court held that "[i]n order to justify such differential taxation, the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." Id. 231 (citing Minneapolis Star at 591-92). The Court further found that the state's "general interest in raising revenue," while "important," did not explain the classification drawn by the statute. Id. It observed that this interest could have been achieved through the enactment of a generally applicable tax. Id. 232. Finding "no compelling justification" for the distinction drawn by the statute, the Court ruled that the state had failed to meet its "heavy burden" of justifying the tax and, consequently, that the statute was unconstitutional. Id. 234.

The principles enunciated in Minneapolis Star and Arkansas Writers' Project are directly applicable to the excise which House Bill 5858 would impose upon the sale of legal services, and require the conclusion that such an excise would

unconstitutionally burden the right to counsel guaranteed by the Fifth, Sixth and Fourteenth Amendments. As a threshold matter, it is apparent that the tax which House Bill 5858 would impose is discriminatory in at least four fundamental respects: (i) the tax does not extend to all services, but rather only to specifically targeted categories of services, of which legal services is one such category; (ii) the tax does not extend to all clients who purchase legal services, but only to "businesses"; (iii) the tax does not extend to all businesses which purchase legal services, but only to those which pay in excess of \$20,000 for such services in a given calendar year; and (iv) the tax does not extend to all businesses which purchase in excess of \$20,000 worth of legal services in a calendar year from Massachusetts counsel, but only to those which use those services within the Commonwealth. In short, it is hard to imagine an excise statute which could have been more discriminatorily drafted within the meaning of Minneapolis Star and Arkansas Writers' Project than House Bill 5858.

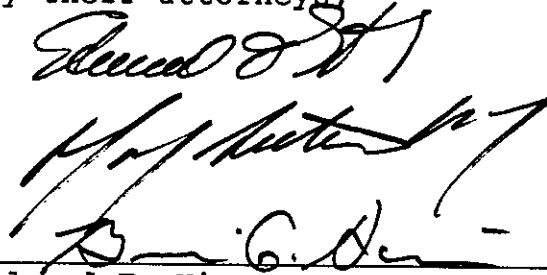
Because the bill is discriminatory in nature and would tax a constitutionally protected activity, i.e., the retention of counsel, it can only withstand scrutiny if it is "necessary to serve a compelling state interest and is narrowly drawn to achieve that end." Arkansas Writers' Project, at 231. House Bill 5858 fails this test. The Commonwealth's general interest in raising revenue, while undoubtedly important, explains

neither the distinctions which the bill draws between the services which it taxes and those it does not, nor the distinctions which are drawn between those legal services which are subject to an excise and those which are not. In the absence of a showing of some compelling state interest that would justify such differential taxation, the Commonwealth cannot carry the "heavy burden" of justifying the tax which House Bill 5858 seeks to impose upon the sale of legal services. Id. 231 and 234. Enactment of the bill consequently would violate the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

For the foregoing reasons, the Boston Bar Association and the Massachusetts Bar Association and the Boston Bar Association respectfully submit that the advisory question posed to this Court by the Governor of Massachusetts must be answered in the negative.

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Date: July 13, 1990

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ADDENDA

58A:13. Findings; decisions; opinions; reports; appeals.

Section 13. The board shall make a decision in each case heard by it and may make findings of fact and report thereon in writing; provided, that every decision granting an abatement without findings of fact and report which relates to a tax on land with one or more buildings thereon shall, if so requested by the appellee in writing at the commencement of the hearing, state separately the value of the land and of each building. Except in cases heard under the informal procedure authorized by section seven A, the board shall make such findings and report thereon if so requested by either party within ten days of a decision without findings of fact. Such report may, in the discretion of the board, contain an opinion in writing, in addition to the findings of fact and decision. If no party requests such findings and report, all parties shall be deemed, to have waived all rights of appeal to the appeals court upon questions as to the admission or exclusion of evidence, or as to whether a finding was warranted by the evidence. 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, shall be open to the inspection of the public; except that 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. The decision of the board shall be final as to findings of fact. From any decision of the board upon an appeal from a decision or determination of the commissioner, or of a board of assessors, except decisions of the board under sections twenty-five and twenty-six of chapter sixty-five, an appeal as to matters of law may be taken to the appeals court by either party to the proceedings before the board who has not waived such right of appeal. A claim of appeal shall be filed with the clerk of the board in accordance with the Massachusetts Rules of Appellate Procedure which rules shall govern such appeal. The court shall not consider any issue of law which does not appear to have been raised in the proceedings before the board. If the order grants an abatement of a tax assessed by the commissioner and the tax has been paid, the amount abated with interest computed in accordance with section thirty-three of chapter sixty-two A and if costs are ordered against the commissioner, the amount thereof, shall be paid to the taxpayer by the state treasurer. If the order grants an abatement of a tax assessed by the board of assessors of a town and the tax has been paid, the amount abated with interest at the rate of eight per cent per annum from the time when the tax was paid, and, if costs are ordered against a board of assessors, the amount thereof, shall be paid to the taxpayer by the town treasurer, and, if unpaid, execution therefor may issue against the town as in actions at law. If costs are ordered against a taxpayer execution shall issue therefor. The appeal to the appeals court under this section shall be the exclusive method of reviewing any action of the board, except action under sections twenty-five and twenty-six of chapter sixty-five. For want of prosecution of an appeal in accordance with the provisions of this section the board, or, if the appeal has been entered in the appeals court, a justice of that court, may dismiss the appeal. Upon dismissal of an appeal the decision of the board shall thereupon have full force and effect.

62C:3. Administration by commissioner: forms: regulations and rulings.

Section 3. The administration of this chapter, and of the statutes referred to in section two, is vested in the commissioner. All forms necessary and proper for the enforcement of this chapter and the statutes referred to in section two shall be prescribed and furnished by the commissioner. The commissioner may prescribe regulations and rulings, not inconsistent with law, to carry into effect the provisions of said statutes, which regulations and rulings, when reasonably designed to carry out the intent and purposes of said provisions, shall be prima facie evidence of their proper interpretation. Any regulations issued by the commissioner for the interpretation and enforcement of the provisions of chapter sixty-five C shall conform so far as the commissioner may deem practicable to the regulations relating to the estate tax laws of the United States.

62C:16. Filing of returns by taxpayers subject to chapters 64A and 64C, 64E—64J, and 138.

Section 16. (a) Every distributor and unclassified exporter, as defined in paragraphs (c) and (j) of section one of chapter sixty-four A, shall, on or before the twentieth day of each month file with the commissioner a return stating the number of gallons and the selling price of fuel sold by him in the commonwealth or exported or caused to be exported from the commonwealth during the preceding calendar month and such other information as the commissioner may deem necessary.

Every unclassified importer, as defined in paragraph (i) of section one of chapter sixty-four A, shall, on or before the twentieth day of each month file with the commissioner a return stating the number of gallons of fuel imported or caused to be imported into the commonwealth during the preceding calendar month, and such other information as the commissioner may deem necessary, including information relative to the cost of such fuel by type.

[There is no subsection (b).]

(c) Every licensee under section two of chapter sixty-four C, other than an unclassified acquirer or a retailer, shall, on or before the twentieth day of each calendar month file with the commissioner a return for each place of business maintained, stating the number of cigarettes sold by such licensee in the commonwealth during the preceding calendar month and such return shall contain or be accompanied by such further information as the commissioner shall require;

provided, that if a licensee ceases to sell cigarettes within the commonwealth he shall forthwith file with the commissioner such a return for the period ending with such cessation. Each unclassified acquirer shall, upon importation or acquisition of cigarettes into or within the commonwealth, file with the commissioner a return stating the number of cigarettes imported or acquired and such other information as the commissioner may deem necessary.

(d) All stampers, as defined in section one of chapter sixty-four C, shall file with the Commissioner, monthly reports on or before the twentieth day of each calendar month showing the number of stamps on hand at the beginning of the month, the number purchased during the month, the number on hand at the end of the month, the number affixed or otherwise disposed of during the month, and such other information as the commissioner may deem necessary.

(e) Every person licensed under chapter sixty-four E, other than a user, shall, on or before the twentieth day of each month file with the commissioner a return stating the number of gallons of special fuels sold or used by him in the commonwealth during the preceding calendar month, and such further information as the commissioner may deem necessary, including information relative to the cost and gross receipts from the purchase and sale of such fuel by type.

(f) Every person licensed under chapter sixty-four F shall, on or before the twentieth day of April, July, October and January of each year, file with the commissioner a return stating the number of gallons of fuel and special fuels used by him in the commonwealth during the preceding calendar quarter, and such further information as the commissioner may deem necessary.

(g) Every operator, as defined in section one of chapter sixty-four G, subject to taxation under chapter sixty-four G, shall file a return with the commissioner for each calendar month. The commissioner may by regulation require returns under this section to be filed on a quarterly rather than a monthly basis or on such other basis as he may determine and to have different filing periods for different groups of operators. Every such return shall be filed within twenty days after the expiration of the period covered thereby.

(h) Each vendor who has made any sale taxable under the provisions of chapter sixty-four H or sixty-four I shall file a return with the commissioner for each calendar month. The commissioner may by regulation require returns under this section to be filed on a quarterly rather than a monthly basis or on such other basis as it may determine and to have different filing periods for different groups of vendors. Every such return shall be filed within twenty days after the expiration of the period covered thereby.

(i) Every purchaser who is required to pay a tax under chapter sixty-four I shall file a return with the commissioner for each calendar month. The commissioner may by regulation require returns under this section to be filed on a quarterly rather than a monthly basis. Such returns shall show the total sales prices of all tangible personal property purchased at retail sale upon which the tax imposed has not been paid by the purchaser to vendors, the amount of tax for which the purchaser is liable, and such other information as the commissioner deems necessary for the computation and collection of the tax. Every such return shall be filed within twenty days after the expiration of the period covered thereby.

The return filed by a purchaser shall include the sales prices of all tangible personal property purchased at taxable retail sale during the calendar month or other period for which the return is filed and upon which the tax imposed has not been reimbursed by the purchaser to vendors.

(j) Every person licensed under chapter sixty-four J shall, on or before the twentieth day of each month file with the commissioner a return stating the number of gallons of aircraft fuel sold or used by him in the commonwealth during the preceding calendar month, and such further information as the commissioner may deem necessary, including information relative to the cost and gross receipts from the purchase and sale of such fuel.

(k) Every person subject to taxation under section twenty-one of chapter one hundred and thirty-eight shall file a return with the commissioner for each calendar month covering his sales of all alcoholic beverages or alcohol and all malt beverages imported into the commonwealth by him. Every such return shall be filed within twenty days after the expiration of the period covered thereby.

62C:21. Disclosure of tax information.

Section 21. (a) The disclosure by the commissioner, or by any deputy, assistant, clerk or assessor, or other employee of the commonwealth or of any city or town therein, to any person but the taxpayer or his representative, of any information contained in or set forth by any return or document filed with the commissioner, other than the name and address of the person filing it, except in proceedings to determine or collect the tax or for the purpose of criminal prosecution under this chapter, chapters sixty A, sixty-two to sixty-five C, inclusive, section ten of chapter one hundred and twenty-one A and section twenty-one of chapter one hundred and thirty-eight, is prohibited.

(b) Nothing herein shall be construed to prevent

(1) the disclosure of information contained in inventories filed under section twenty-two of chapter sixty-five.

(2) the inspection of returns or documents filed pursuant to section seventeen of this chapter or section twenty-two of chapter sixty-five by persons, or their representatives, likely to become charged with the payment of taxes in connection therewith;

(3) the disclosure of information contained in returns filed pursuant to subsections (a) and (j) of section sixteen and subsection (a) of section eighteen.

(4) the publication of statistics so classified as to prevent the identification of particular returns or reports and the items thereof;

(5) the disclosure of information as provided in section thirty T of chapter seven;

(6) the disclosure of information to duly authorized tax officials of the United States and of territories, states and political subdivisions thereof or to any duly authorized agent or agency of such territory, state or political subdivision thereof pursuant to the provisions of sections twenty-two and twenty-three of this chapter;

(7) the disclosure of information as to whether a vendor, as defined in chapters sixty-four H or sixty-four I, is registered pursuant to section sixty-seven of this chapter; or

(8) the disclosure as to whether any designated person has filed a return under section six of this chapter for the current or any prior year; or

(9) the disclosure to the commissioner of public welfare, upon his written request, of the fact that a specific bank or other entity paying interest income, doing business in the commonwealth has filed for any year a report under section eight with respect to interest paid by it to a designated recipient of public assistance under any program administered by the department of public welfare and of the amount of the

interest so reported, together with the identification of the account with respect to which the interest was paid.

(10) the disclosure to the director of the division of employment security, the commissioner of public welfare, or the commissioner of veterans' services of information necessary to ascertain or confirm the existence of fraud, abuse or improper payments to an applicant for or recipient of veterans' benefits.

(11) the disclosure by the commissioner at least annually of a list of all taxpayers, including but not limited to individuals, trusts, partnerships, corporations, one hundred and twenty-one A corporations and other taxable entities, that are delinquent in the payment of their tax liabilities in an amount greater than five thousand dollars for a period of six months from the time the taxes were assessed. or the disclosure to the commissioner of public welfare or his designee of information as provided in section three A of chapter one hundred and eighteen. Said list shall contain the names, address, types of taxes, month and year assessed and amounts outstanding of said delinquent taxpayers.

At least ninety days prior to said disclosure of the name of any such delinquent taxpayer, the commissioner shall mail a written notice to each such delinquent taxpayer by certified mail addressed to such delinquent taxpayer at his last or usual place of business or abode detailing the amount and nature of this delinquency and the intended disclosure of this delinquency. If the delinquent tax has not been paid sixty days after said notice, the commissioner shall disclose such tax in said list of delinquent taxpayers.

Unpaid taxes shall not be deemed to be delinquent and subject to disclosure if a written agreement for payment exists without default between the taxpayer and the commissioner; or the commissioner certifies that the tax liability is under appeal or is based wholly upon a question of law that is currently under appeal before a court or the appellate tax board in another case involving the same question.

Any unauthorized disclosure made by the commissioner in good faith effort to comply with this paragraph shall not be considered a violation of this section.

(12) the disclosure to the claimant agency of information necessary to effect a set-off for debt collection pursuant to chapter sixty-two D.

(13) the disclosure of information to the IV-D agency, as set forth in chapter one hundred and nineteen A, for the purpose of locating or identifying absent parents who are legally obligated to pay support to such agency and evaluating their ability to pay support.

(c) Any violation of this section shall be punished by a fine of not more than one thousand dollars, or by imprisonment for not more than six months, or both, and by disqualification from holding office in the commonwealth for such period, not exceeding three years, as the court determines.

62C:24. Verification of returns: inspection of stampers.

Section 24. For the purpose of verifying any return filed under this chapter, the commissioner or his duly authorized representative may at any time within three years after the date prescribed for filing the return, or the date filed, whichever is later, examine the books, papers, records and other data of the taxpayer which shall be open to such person for verification.

Stocks of unused stamps in the possession of stampers, as defined in section one of chapter sixty-four C, shall be open to inspection by the commissioner or his duly authorized representative at all reasonable times.

If the books, papers, records, and other data of the taxpayer are so voluminous as to make a complete audit thereof impractical and inefficient, the commissioner may use such statistical sample methods in conducting such audit as may be agreed to by the parties and project the audit findings derived therefrom over the entire audit period to determine the proper tax. If, after a good faith effort, the parties cannot reach such an agreement, the commissioner may utilize such statistical sample methods which he deems appropriate and which comply with the provisions of the Internal Revenue Code.

62C:25. Records to be kept by taxpayers subject to chapter 64A and 64C. 64E—64J. and 138: inspection.

Section 25. Every distributor, unclassified importer, unclassified exporter or purchaser referred to in section one of chapter sixty-four A, every stamper appointed under section thirty of chapter sixty-four C, every user-seller or supplier of special fuels, as defined in section one of chapter sixty-four E, every motor carrier required to be licensed under chapter sixty-four F, every operator required to register under chapter sixty-four G, every vendor required to register under chapter sixty-four H or sixty-four I, every user-seller or supplier of aircraft fuel, as defined in section one of chapter sixty-four J and every licensee referred to in section twenty-one of chapter one hundred and thirty-eight shall keep and preserve suitable records of taxable charges and such other books, papers, records, and data as the commissioner may require to determine the amount of the tax due under the provisions of those respective chapters. Such records shall be open to inspection and examination at any reasonable time by the commissioner or his duly authorized representative and such records shall, unless the commissioner consents in writing to an earlier destruction be preserved for three years after the date the return was filed or the date it was due, whichever occurs later, and for such further period as may be agreed upon for the assessment of any additional tax.

62C:26. Assessment of taxes.

Section 26. (a) Taxes shall be deemed to be assessed at the amount shown as the tax due upon any return filed under the provisions of this chapter and on any amendment, correction or supplement thereof, or at the amount properly due, whichever is less, and at the time when the return is filed or required to be filed, whichever occurs later.

(b) If the commissioner determines, from the verification of a return or otherwise, that the full amount of any tax has not been assessed or is not deemed to be assessed, he may, at any time within three years after the date the return was filed or the date it was required to be filed, whichever occurs later, assess the same with interest as provided in section thirty-two to the date when the deficiency assessment is required to be paid, first giving notice of his intention to the person to be assessed. Such person or his representative may confer with the commissioner or his duly authorized representative as to the proposed assessment within thirty days after the date of such notification. After the expiration of thirty days from the date of such notification, the commissioner shall assess the amount of tax remaining due the commonwealth, or any portion thereof, which he believes has not therefore been assessed.

Failure to receive the notice provided for by this paragraph shall not affect the validity of the tax.

If the commissioner audits or verifies the returns of the same tax for two or more tax periods and determines, as a result thereof, that the amounts assessed result in overpayments for some tax periods and underpayments for others, he shall offset any overpayments against any underpayments and refund any net overpayment as required by section thirty-six. An application for abatement under section thirty-seven shall not be required for overpayments resulting from assessments made pursuant to this section.

(c) In the case of an arithmetic or clerical error or other obvious error apparent upon the face of the return, the commissioner may assess a deficiency attributable to such error without giving notice of his intention to assess to the person to be assessed.

(d) In the case of a false or fraudulent return filed with intent to evade a tax or of a failure to file a return, the commissioner may make an assessment at any time, without giving notice of his intention to assess, determining the tax due according to his best information and belief.

(e) If a nonresident fails to file a return of income derived by him from sources within the commonwealth, as required by section six, the tax imposed by section five A of chapter sixty-two shall be assessed on the basis of his gross income from such sources. The commissioner shall determine such income according to his best information and belief and may assess the tax, with penalties and interest, and without allowance for deductions or exemptions.

(f) If an executor, as defined in chapter sixty-five C, omits from the gross estate items includable in such gross estate as exceed in amount twenty-five per cent of the gross estate stated in the return filed pursuant to section seventeen, the estate tax may be assessed at any time within six years after the return was filed. In determining the items omitted from the gross estate, there shall not be taken into account any item which is omitted from the gross estate in the return if such item is disclosed in the return, or in a statement attached to the return, in a manner adequate to apprise the commissioner of the nature and amount of such item.

(g) The provisions of this section shall not apply to assessments of taxes imposed by chapters sixty-five or sixty-five A.

(h) Except as otherwise provided in subsection (d), in the case of a return filed pursuant to section six or eleven, if the taxpayer omits from gross income an amount properly includible therein which is in excess of twenty-five per cent of the amount of gross income stated in the return, the tax may be assessed at any time within six years after the return was filed. For purposes of this subsection, in the case of a trade or business, the term "gross income" shall mean the total of the amounts received or accrued from the sale of goods or services, if such amounts are required to be shown on the return, prior to diminution by the cost of such sales or services. In determining the amount omitted from gross income, there shall not be taken into account any amount which is omitted from gross income stated in the return if such amount is disclosed on the return, or in a statement attached to the return, in a manner adequate to apprise the commissioner of the nature and amount of such item.

(i) Except as otherwise provided in subsection (d), in the case of a return filed pursuant to the provisions of sections twelve, fourteen or sixteen, if the return omits an amount of such tax properly includible thereon which exceeds twenty-five per cent of the amount of such tax reported thereon, the tax may be assessed at any time within six years after the return is filed. In determining the amount of tax omitted on a return, there shall not be taken into account any amount of tax which is omitted from the return if the transaction giving rise to such tax is disclosed in the return, or in a statement attached to the return, in a manner adequate to apprise the commissioner of the existence and nature of such item.

62C:32. Payment date: interest.

Section 32. Taxes shall be due and payable at the time when the tax return is required to be filed, determined without regard to any extension of time for filing the return. Taxes assessed under sections twenty-six, twenty-seven, twenty-eight and thirty shall include interest as hereinafter provided to the date when the tax so assessed, or any unpaid balance thereof, is required to be paid, which shall be the thirtieth day following the date of the notice of the tax due.

If any amount of tax is not paid to the commissioner on or before its statutory due date, there shall be added to, and become a part of, the tax interest at the rate of eighteen per cent per annum.

62C:33. Late returns: penalty; abatement.

Section 33. (a) If any return is not filed with the commissioner on or before its due date or within any extension of time granted by him, there shall be added to and become a part of the tax, as an additional tax, a penalty of one percent of the amount required to be shown as the tax on such return for each month or fraction thereof during which such failure continues, not exceeding, in the aggregate, twenty-five per cent of said amount.

(b) If any amount of tax is not paid to the commissioner on or before the date prescribed for payment of such tax, determined with

regard to any extension of time for payment, there shall be added to the amount shown as tax on such return a penalty of one-half of one per cent of the amount of such tax for each month or fraction thereof during which such failure continues, not exceeding, in the aggregate, twenty-five per cent of said amount.

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

(d) For purposes of subsection (a), the amount of tax required to be shown on the return shall be reduced by the amount of any part of the tax which is paid on or before the date prescribed for payment of the tax and by the amount of any credit against the tax which may be claimed upon the return. For purposes of subsections (b) and (c), the amount of tax shown on the return shall, for the purpose of computing the addition for any month, be reduced by the amount of any part of the tax which is paid before the beginning of such month.

(e) This section shall not apply to any failure to file a declaration of estimated tax required by chapters sixty-two B or sixty-three B or to pay any estimated tax required to be paid by said chapters.

(f) If it is shown that any failure to file a return or to pay a tax in a timely manner is due to reasonable cause and not due to willful neglect, any penalty or addition to tax under this section may be waived by the commissioner, or if such penalty or addition to tax has been assessed, it may be abated by the commissioner, in whole or in part.

62C:37. Application for abatement: hearing; notice of decision.

Section 37. Any person aggrieved by the assessment of a tax, other than a tax assessed under chapters sixty-five or sixty-five A, may apply in writing to the commissioner, on a form approved by him, for an abatement thereof at any time within three years from the last day for filing the return for such tax, determined without regard to any extension of time, within two years from the date the tax was assessed or deemed to be assessed, or within one year from the date that the tax was paid, whichever is later.

The commissioner shall, if requested, give the applicant a hearing upon his application; and if the commissioner finds that the tax is excessive in amount or illegal, he shall abate the tax, in whole or in part, accordingly. The commissioner shall give notice to the applicant of his decision upon the application.

If such person is an operator as defined in section one of chapter sixty-four G, or a vendor as defined in section one of chapter sixty-

four H or section one of chapter sixty-four I, who has collected such tax, no actual refund of money shall be made to such person until he establishes to the satisfaction of the commissioner, under such regulations as he may prescribe, that he has repaid to the purchaser the amount for which the application for refund is made.