
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.

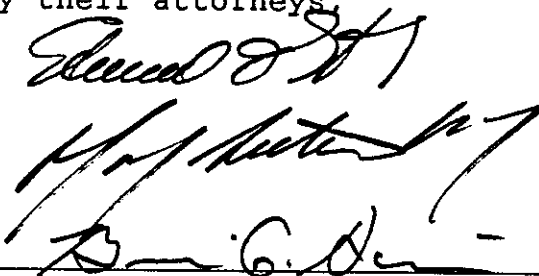
Because the bill is discriminatory in nature and would tax a constitutionally protected activity, i.e., the retention of counsel, it can only withstand scrutiny if it is "necessary to serve a compelling state interest and is narrowly drawn to achieve that end." Arkansas Writers' Project, at 231. House 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.

62C:39. Appeal from refusal for abatement.

Section 39. Any person aggrieved by the refusal of the commissioner to abate a tax, in whole or in part, may appeal therefrom, within sixty days after the date of notice of the decision of the commissioner or within six months after the time when the application for abatement is deemed to be denied as provided by section six of chapter fifty-eight A, as follows:

(a) appeals from the decision of the commissioner as to the value of an asset of the estate for purposes of chapter sixty-five C shall be made by filing a petition with the clerk of the appellate tax board;

(b) appeals from the decision of the commissioner as to all other matters arising under chapter sixty-five C shall be made by filing a petition with either the clerk of the appellate tax board or the probate court having jurisdiction of the estate of the decedent;

(c) appeals from the commissioner's refusal to abate any other tax shall be made by filing a petition with the clerk of the appellate tax board. If, on hearing, the board or the court, whichever the case may be, finds that the person making the appeal was entitled to an abatement, it shall make such abatement as it sees fit. If a tax so abated has been paid, the state treasurer, upon presentation to him of the notice of the decision of the board, or the court, shall repay to the petitioner the amount of the abatement and interest computed in accordance with section forty.

62C:49A. Certification of compliance with tax laws as prerequisite to obtaining license or governmental contract.

Section 49A. (a) Any person applying to any department, board, commission, division, authority, district or other agency of the commonwealth or any subdivision of the commonwealth, including a city, town or district, for a right or license to conduct a profession, trade or business, or for the renewal of such right or license, shall certify upon such application, under penalties of perjury, that he has complied with all laws of the commonwealth relating to taxes. Such right or license shall not be issued or renewed unless such certification is made.

(b) No contract or other agreement for the purposes of providing goods, services or real estate space to any of the foregoing agencies shall be entered into, renewed or extended with any person unless such person certifies in writing, under penalties of perjury, that he had complied with all laws of the commonwealth relating to taxes.

(c) Any such agency, which has been notified by the commissioner pursuant to section forty-seven A that a person who holds a license or certificate of authority issued by such agency or who has agreed to furnish goods, services or real estate space to such agency has neglected or refused to file any returns or to pay any tax required under this chapter and that such person has not filed in good faith a pending application for abatement of such tax or a pending petition before the appellate tax board contesting such tax, shall refuse to reissue, renew or extend such license, certificate of authority, contract or agreement until the agency receives a certificate issued by the commissioner that the person is in good standing with respect to any and all returns due and taxes payable to the commissioner as of the date of issuance of said certificate, including all returns and taxes referenced in the initial notification.

62C:66. Bonds of licensees and registrants subject to chapters 64A—64C and 64E—64J.

Section 66. The commissioner may require any person required to be licensed or registered by any provision of chapters sixty-four A to sixty-four C, inclusive, or chapters sixty-four E to sixty-four J, inclusive, or subject to taxation under section twenty-one of chapter one hundred and thirty-eight, to file with him a bond, satisfactory to the commissioner, in such amount as the commissioner may determine, with a surety company authorized to transact business in the commonwealth as surety, to secure the payment of any tax, including any interest or penalty thereon, due or which may become due from such person under said chapters: provided, however, that the amount of such bond required from a vendor under chapter sixty-four H or sixty-four I shall not exceed the amount which the commissioner shall determine to be such vendor's average tax liability for a six month period.

In lieu of a surety bond a licensee or registrant may deposit with the state treasurer bonds or other negotiable obligations of the commonwealth or of the United States of such aggregate face amount as the commissioner may from time to time deem necessary adequately to secure payment of the taxes, including any interest or penalty thereon, imposed under said chapters; provided, that bonds need not be accepted by the state treasurer unless in registered form and of denominations satisfactory to him. In case of such deposit of bonds or other negotiable obligations, the state treasurer shall, while in possession thereof, remit to such person as aforesaid, or persons entitled thereto, the interest accruing and payable thereon; and, if the taxes imposed under said chapters and all interest and penalties shall be paid in full and if the person is no longer a licensee or registrant under said chapters, the state treasurer shall return such bonds or obligations to the persons entitled thereto. If the tax together with all interest and penalties shall not be paid, the state treasurer may sell all or any part of such bonds or obligations to satisfy the amount due the commonwealth and shall return to the persons entitled thereto any excess left in his hands, provided, however, that the person is no longer a licensee or registrant under said chapters.

62C:67. Licenses and registration certificates of taxpayers under chapters 64A, 64C and 64E—64J.

Section 67. Each vendor, as defined in chapter sixty-four H or sixty-four I, and each operator as defined in chapter sixty-four G who desires to obtain a certificate of registration as required by those chapters, and each person who desires to obtain a license as a distributor, unclassified importer, or unclassified exporter, as defined in chapter sixty-four A, as a manufacturer, wholesaler, vending machine operator, unclassified acquirer, transportation company, or retailer, as defined in chapter sixty-four C, as a user-seller, supplier, or user of special fuels, as defined in chapter sixty-four E, or as a motor carrier, as defined in chapter sixty-four F or as a user-seller or supplier of aircraft fuel as defined in chapter sixty-four J shall file with the commissioner an application in such form as the commissioner prescribes, giving such information as the commissioner requires: provided, however, that in the instance of an application for a wholesaler's license, as defined in chapter sixty-four C, the commissioner shall require, in addition to such other information as may be deemed necessary, the filing of affidavits from three licensed manufacturers, as defined in said chapter sixty-four C, stating that the manufacturer will supply the wholesaler if the applicant is granted a license.

In the instance of an application for a license as a manufacturer, wholesaler, vending machine operator, unclassified acquirer, transportation company, or retailer, as defined in chapter sixty-four C, the commissioner shall investigate the prior activities of the applicant. If the commissioner determines that said applicant has been convicted of any violation of the provisions of chapter sixty-four C or any other pertinent violation of law, he may deny the application; provided, however, that the commissioner shall grant or deny a license to said applicant within ninety days from the date of application; and provided further, that if the commissioner fails to act within such time period, the application shall be deemed denied.

All licenses, other than licenses for manufacturers, wholesalers, vending machine operators, unclassified acquirers, transportation companies and retailers as defined in chapter sixty-four C, shall expire on the thirty-first day of December each year. Licenses for said manufacturers, wholesalers, vending machine operators, unclassified acquirers and transportation companies shall expire on the thirtieth day of June each year. Licenses for said retailers shall expire on the thirtieth day of June of each even year.

Registration certificates may be issued for a specified term of not less than three years, subject to renewal without the payment of any additional fee and in accordance with regulations issued by the commissioner. Whether or not such certificates are issued for a specified term, they shall be subject to suspension or revocation as provided in this section. Existing registration certificates may be made subject to renewal or reissuance for a specified term in accordance with regulations issued by the commissioner.

Registration certificates shall be issued for each place of business. Licenses for said manufacturers, wholesalers, vending machine operators, unclassified acquirers and retailers shall be issued for each place of business. Licenses for users of special fuels shall be issued for each vehicle propelled by special fuels. In addition to the license issued to a motor carrier, licenses shall be issued for each motor vehicle which the motor carrier desires to operate or cause to be operated upon the highways of the commonwealth which is propelled by fuel or special fuels purchased or acquired outside the commonwealth.

The fee for each registration shall be determined annually by the commissioner of administration under the provision of section three B of chapter seven.

The fees for licenses and each renewal thereof shall be determined annually by the commissioner of administration under the provision of section three B of chapter seven in the following categories: distributors; unclassified importers; unclassified exporters; manufacturers; wholesalers; vending machine operators; unclassified acquirers; transportation companies; retailers; user-sellers; suppliers; users of special fuels; motor carriers or their vehicles; except that in case of a manufacturer, wholesaler, or vending machine operator who maintains more than one place of business the fee for each additional place of business shall be one-half of the above determined fee. No fee, nor part of any fee, shall be refunded by reason of relinquishment, suspension or revocation of a license.

In the event that the holder of a license, or registration certificate removes his business to another location within the commonwealth, the license or registration certificate with respect to the former place of business shall, without the payment of an additional fee, be reissued for the new location for the balance of the unexpired term.

Registrations and licenses shall not be assignable and shall be displayed conspicuously by the holder thereof in the manner prescribed by the commissioner.

As a condition precedent to granting a license to a distributor, unclassified importer, or unclassified exporter the commissioner shall require the applicant to furnish a bond pursuant to section sixty-six.

An application for a registration or license may be denied by the commissioner for any one of the following reasons:

- (1) The registration, license or permit of the applicant has been previously cancelled for cause by the commissioner;
- (2) In the opinion of the commissioner, such application is filed by a person as a subterfuge for the real person in interest whose registration or license has previously been cancelled for cause by the commissioner;

(3) The applicant fails to pay the prescribed fee or to file such bond as the commissioner requires pursuant to section sixty-six:

(4) Any tax payable under this chapter has been finally determined to be due from the applicant and has not been paid in full;

(5) Any tax payable under this chapter has been finally determined to be due from an officer, director, partner or employee of the applicant in his capacity as a person under a duty to collect and pay over a tax on behalf of the applicant or another person and has not been paid in full;

(6) The applicant has been convicted of a crime provided for in this chapter within one year from the date on which such application is filed;

(7) An officer, director, partner or employee of the applicant, which officer, director, partner or employee is a person under a duty to collect and pay over a tax on behalf of the applicant has in his capacity as a person under a duty to collect and pay over a tax on behalf of the applicant or another person been convicted of a crime provided for in this chapter within one year from the date on which such application is filed; or

(8) A shareholder owning more than fifty per cent of the voting stock of the applicant where the applicant is a corporation who owned more than fifty per cent of the voting stock of another corporation at the time any tax payable under this chapter has been finally determined to be due and where such tax has not been paid in full, or at the time such other person was convicted of a crime provided for in this chapter within one year from the date on which such application is filed.

Any person aggrieved by the refusal of the commissioner to grant a registration or license may within sixty days of the date of notice of

such refusal appeal to the appellate tax board, whose decision shall be final.

62C:68. Suspension or revocation of license or registration: appeal: reissuance of registration.

Section 68. The commissioner may suspend or revoke any license or registration issued pursuant to section sixty-seven for any one of the following reasons:—

(1) The licensee or registrant willfully fails to file any return or report required by this chapter:

(2) The licensee or registrant willfully files, causes to be filed, gives or causes to be given a return, report, certificate or affidavit required under this chapter, or under the provisions of the applicable tax, which is false;

(3) The licensee or registrant willfully fails to collect, truthfully account for or pay over any tax under the provisions of this chapter:

(4) The licensee or registrant has been convicted of a crime provided for by this chapter:

(5) The licensee or registrant has otherwise willfully failed to comply with any provision of the tax laws of the commonwealth or regulations thereunder; or

(6) The licensee or registrant has ceased to act in the capacity for which the license or registration was issued.

Any person aggrieved by such suspension or revocation may appeal therefrom to the appellate tax board within ten days after written notice of the decision has been mailed or delivered to him. The appellant shall at the time of taking an appeal file with said board a surety company bond running to the commonwealth, with a surety company authorized to do business in the commonwealth as surety, in such sum as said board shall fix, conditioned to prosecute the appeal to effect and to comply with the orders and decrees of said board in the premises. Such appeals shall be preferred cases to be heard, unless cause appears to the contrary, in priority to other cases. During the pendency of any such appeal the decision of the commissioner so appealed from shall, unless otherwise ordered by said board, be inoperative. Said board may grant such relief as may be equitable. If the appeal shall have been taken without probable cause, the board may tax double or triple costs, as the case shall demand; and, upon all such appeals which may be denied, costs may be taxed against the appellant at the discretion of the board; provided, that no costs shall be taxed against the commonwealth.

A person whose registration has been suspended or revoked shall pay to the commissioner a fee of twenty dollars for the reissuance of a registration. The commissioner shall not issue a new registration after the suspension or revocation of a registration unless he is satisfied that the former holder of the registration will comply with the provisions of this chapter and with all pertinent rules and regulations made thereunder.

CHAPTER 70.

SCHOOL FUNDS AND STATE AID FOR PUBLIC SCHOOLS.

Section	Section
1. Purpose of state assistance to public schools; designation; legislative intent.	5. Certification; estimated and final amounts.
2. Definitions.	6. Minimum amounts paid.
2A. Pupil weights; auxiliary services; number of full-time equivalent pupils.	7. Minimum expenditures.
3. Determination of amounts.	8. Excess funds; minimum expenditures; designated programs.
4. Reports; computation of amount; adjustments.	9. Massachusetts school fund.
	10. Todd fund income.
	11. Local support percentage.

70:1. Purpose of state assistance to public schools; designation; legislative intent.

Section 1. The purpose of the financial assistance provided by this chapter shall be to promote the equalization of educational opportunity in the public schools of the commonwealth, to reduce the reliance upon the local property tax in financing public schools, and to promote the equalization of the burden of the cost of school support to the respective cities, towns, regional school districts and independent vocational schools. Assistance provided under this chapter shall be designated as school aid. 1
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In furtherance of such purpose, it is hereby declared to be the legislative intent that, subject to appropriation, no city or town shall receive less in school aid in the nineteen hundred and eighty and subsequent fiscal years than was received in the nineteen hundred and seventy-nine fiscal year. 9
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For the purposes of this chapter, the agricultural schools maintained by the counties of Bristol, Essex, and Norfolk shall be deemed to be regional school districts. 14
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70:2. Definitions.

Section 2. When used in this chapter, the following words shall have the following meanings:— 1
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“Average current operating expenditure per pupil in regular day program in the commonwealth”, the sum of the total expenditures for all pupils enrolled in regular day programs in public schools in all cities, towns, regional school districts and independent vocational schools in the commonwealth during a fiscal year, as hereinafter defined, divided by the total of the sums of full-time equivalent pupils enrolled in regular day programs in all cities, towns, regional school districts and independent vocational schools during said year, as hereinafter defined. 3
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“Average direct service expenditure per pupil in regular day program in the commonwealth”, the sum of the total expenditures for all pupils enrolled in regular day programs in public schools in all cities, towns, regional school districts and independent vocational schools in the commonwealth during a fiscal year, as hereinafter defined, divided by the total of the sums of full-time equivalent pupils enrolled in regular day programs in all cities, towns, regional school districts and independent vocational schools during said year, as hereinafter defined; provided, however, that the numerator of the fraction described in this paragraph shall include expenditures for instructional services, attendance services, health services, fixed charges and food services only. Expenditures for administration, athletic and other student activities, plant operation and maintenance, capital outlays, transportation and food for food services shall not be included in the numerator of said fraction.

“Commissioner”, the commissioner of education.

“Equalized valuation per person in a city or town”, the equalized valuation of all property in a city or town subject to local taxation, as most recently reported to the general court under section ten C of chapter fifty-eight, divided by the number of persons who reside in such city or town. In the case of a regional school district, the equalized valuation per person shall be determined in the following manner: first, the equalized valuation per person of each member municipality in the regional school district shall be multiplied by the percentage of all pupils enrolled in the regional school district who are residents of that municipality; and second, the equalized valuations per person in all member municipalities as so modified shall be summed. In the case of a regional school district in which (1) the equalized valuation per person of any member municipality is more than three hundred per cent of the equalized valuation per person in the commonwealth, and (2) at least one other member municipality has an equalized valuation per person of less than sixty per cent of the equalized valuation per person in the commonwealth, and (3) all member municipalities with an equalized valuation per person of less than sixty per cent of the equalized valuation per person in the commonwealth together contribute more than fifty per cent of the total unweighted full-time equivalent pupils enrolled in regular day, special needs, vocational and transitional bilingual programs in said regional school district during the fiscal year in which school aid is to be distributed under this chapter, then solely for the purpose of computing the equalized valuation per person of said regional school district the equalized valuation per person of no member municipality shall exceed three hundred per cent of the equalized valuation per person in the commonwealth. Independent vocational schools under the jurisdiction of a board of local or district trustees for vocational

education shall be assigned the equalized valuation per person of the city or town in which they are located. 57
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“Equalized valuation per person in the commonwealth”, the equalized valuation of all property in the commonwealth subject to local taxation, as most recently reported to the general court under the provisions of section ten C of chapter fifty-eight, divided by the total number of persons who reside in the commonwealth. 59
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“Full-time equivalent pupil”, the computational unit used for the purpose of determining the number of pupils enrolled in either public school or in a program approved under chapter seventy-one B and the regulations promulgated thereunder, and educated at the full or partial expense of a city, town, regional school district or independent vocational school in each of the programs described in section two A. 64
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Such unit shall be computed as follows: 70

(1) a pupil enrolled full-time in only one such program shall be counted as one full-time equivalent pupil in that program; provided that a pupil enrolled in a kindergarten or preschool program which meets for a period of time each day no greater than one-half the minimum length for a school day as established by the board of education under section one G of chapter fifteen shall be counted as one-half of a full-time equivalent pupil in the program in which such pupil is enrolled; 71
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(2) a pupil enrolled separately in two or more said programs shall be counted as a fraction of a full-time equivalent pupil in each program with each such fraction equal to the number of hours the pupil spends in each program divided by the total number of hours the pupil spends in all programs; 79
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(3) a pupil enrolled in two or more said programs which are carried on simultaneously, and are therefore consolidated into one program, shall be counted as a full-time equivalent pupil in that one of such simultaneous programs in which the pupil is enrolled which has the highest pupil weight, as hereinafter provided in the definition of weighted full-time equivalent pupil; and 84
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(4) a pupil enrolled in a program of more than one hundred and eighty-five days duration shall be counted as one full-time equivalent pupil plus a fraction of one full-time equivalent pupil in that program, with such fraction equal to the number of days in excess of one hundred and eighty divided by one hundred and eighty. The commissioner may by regulation, under the direction of the state board, further define the computation of “full-time equivalent pupil” as he deems advisable. 90
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“Local support percentage”, the percentage determined during each fiscal year in accordance with the provisions of section eleven. 98
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“Persons who reside in a city or town”, the population of the city or town as enumerated in the most recent of the following: (1) the most recent official state census conducted by the state secretary; or (2) the most recent official federal census, adjusted by the state tax commission to conform as nearly as possible to the same definitions as used in such state census.	100 101 102 103 104 105
“Pupil”, a person who is enrolled in either public school or in an approved program under chapter seventy-one B and the regulations promulgated thereunder, and educated at the full or partial expense of a city, town, regional school district or independent vocational school where said full or partial expense represents an actual outlay or disbursement by said city, town, regional school district, or independent vocational school.	106 107 108 109 110 111 112
“Regular day program”, any public school day program not defined as special needs, vocational or transitional bilingual education under any other provision of the General Laws or regulations promulgated thereunder.	113 114 115 116
“School aid percentage”, for each city, town, regional school district and independent vocational school, the amount by which one hundred per cent exceeds the product of the local support percentage, as defined above, times the valuation percentage.	117 118 119 120
“State board”, the state board of education.	121
“Sum of weighted full-time equivalent pupils”, in a city, town, regional school district or independent vocational school, the total number of weighted full-time equivalent pupils in each program hereinafter defined in schools under the jurisdiction of a regional school district committee, a school committee of a city or town, or a board of local or district trustees for vocational education as the case may be, and the totals so derived for each program then added together to produce a single sum for all said programs in each city, town, regional school district or independent vocational school; provided, however, that any full-time equivalent pupils residing in a city or town who are receiving education in the schools of another city, town, regional school district or independent vocational school, or in a program approved under chapter seventy-one B and the regulations promulgated thereunder, on a tuition basis shall be deemed to be full-time equivalent pupils of their city, or town of residence.	122 123 124 125 126 127 128 129 130 131 132 133 134 135 136
“Total expenditures for all pupils enrolled in regular day programs in a city, town, regional district or independent vocational school”, the total amount expended by such city, town, regional school district or independent vocational school during the previous fiscal year for the support of regular day programs in public schools exclusive of expenditures for transportation, payment of regional school district assessments, food for school food services and capital outlays, after	137 138 139 140 141 142 143

deducting therefrom any receipts for tuition, receipts from the federal government, the proceeds of any invested funds and grants, gifts and receipts from any other sources, to the extent that such receipts are applicable to such expenditures; provided, however, that amounts applicable to such expenditures received by (a) a city, town, regional school district or independent vocational school from the commonwealth, and (b) a regional school district from the member cities and towns of said district, shall not be so deducted. The commissioner of education may, by regulation, further define the expenditures and receipts that may be included hereunder.	144 145 146 147 148 149 150 151 152 153
“Total expenditures for all pupils enrolled in all programs in a city, town, regional school district or independent vocational school”, the total amount expended by a city, town, regional school district or independent vocational school during the previous fiscal year for the support of all programs in public schools and programs approved under chapter seventy-one B and the regulations promulgated thereunder, exclusive of expenditures for transportation, payment of regional school district assessments, food for school food services and capital outlays, after deducting therefrom any receipts for tuition, receipts from the federal government, the proceeds of any invested funds and grants, gifts, and receipts from any other sources, to the extent that such receipts are applicable to such expenditures; provided, however, that amounts applicable to such expenditures received by (a) a city, town, regional school district or independent vocational school from the commonwealth, and (b) a regional school district from the member cities and towns of said district shall not be so deducted. The commissioner of education may, by regulation, further define the expenditures and receipts that may be included hereunder.	154 155 156 157 158 159 160 161 162 163 164 165 166 167 168 169 170 171
“Valuation percentage of a city, town, regional school district or independent vocational school”, the proportion which the equalized valuation per person in a city, town, regional school district or independent vocational school bears to the equalized valuation per person in the commonwealth.	172 173 174 175 176
“Weighted full-time equivalent pupil”, a full-time equivalent pupil enrolled in any regular day, special needs, vocational or transitional bilingual education program multiplied by the pupil weight cost factor for the program or programs in which the pupil is enrolled as set forth in section two A.	177 178 179 180 181

70:2A. Pupil weights; auxiliary services; number of full-time equivalent pupils.

Section 2A. (1) A full-time equivalent pupil enrolled in a regular day program shall be assigned a pupil weight of 1.00; (2) a full-time equivalent pupil enrolled in a transitional bilingual education program in accordance with the provisions of chapter seventy-one A and the	1 2 3 4
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regulations promulgated thereunder shall be assigned a pupil weight of 1.40; (3) a full-time equivalent pupil enrolled in a regular education program with modifications, a regular education program with no more than twenty-five percent time out, a regular education program with no more than sixty per cent time out, a substantially separate program, a home and hospital program, a day program or a preschool program for children with special needs, a residential program for children with special needs, as defined in regulations promulgated under chapter seventy-one B, shall be assigned a pupil weight of 4.00; (4) a full-time equivalent pupil enrolled in a vocational education program, as defined in chapter seventy-four and regulations promulgated thereunder, but excluding therefrom pupils enrolled in evening classes of vocational education and adult evening practical arts programs, shall be assigned a pupil weight of 2.00; (5) a pupil whose family income is below poverty level, as determined by the department of education in accordance with the regulations promulgated under Title I of the Federal Elementary and Secondary Education Act of 1965, as amended, shall be counted as one additional full-time equivalent pupil in programs of auxiliary services for educationally disadvantaged pupils, and assigned a pupil weight of 0.20 to reflect the possible needs of such pupil for such auxiliary services, in addition to being counted in the regular day, special needs, vocational or transitional bilingual education program in which such pupil may be enrolled. Such auxiliary services shall seek to enable educationally disadvantaged pupils to fully benefit from regular day, special needs, vocational and bilingual education programs. Approval criteria for auxiliary services for such educationally disadvantaged pupils shall be established by the board of education.

In determining the total number of full-time equivalent pupils enrolled in regular day program in a city, town, regional school district or independent vocational school (1) all children enrolled in a private school and receiving educational services at the expense of a city or town as required under the provisions of section forty-eight and fifty-seven of chapter seventy-one or Section 613 of the Federal Education for All Handicapped Children Act of 1975 shall be counted as a fraction of a full-time equivalent pupil enrolled in a regular day program, where the numerator of said fraction is the total amount so expended during the previous fiscal year, and the denominator of which is the average current operating expenditure per pupil in a regular day program in the commonwealth during said year; (2) pupils enrolled in adult education programs and other programs under the provisions of sections nine and nine A of chapter sixty-nine or sections eighteen, nineteen, twenty-one, twenty-six A, twenty-eight, seventy-one B, seventy-five, seventy-six, and seventy-seven of chapter seventy-one and any regulations promulgated thereunder and educated at the direct expense of a city, town, regional school district or indepen-

dent vocational school, shall be counted as a fraction of a full-time 51
 equivalent pupil enrolled in a regular day program, where the numer- 52
 ator of said fraction is the total amount so expended for instructional 53
 services during the previous fiscal year after deducting therefrom 54
 any receipts for tuition, receipts from the federal government, the 55
 proceeds of any invested funds and grants, gifts and receipts from 56
 any other sources to the extent that such receipts are applicable to 57
 such expenditures provided, however, that amounts applicable to such 58
 expenditures received under this chapter as reimbursements for such 59
 expenditures shall not be so deducted, and the denominator of which 60
 is the average current operating expenditure per pupil in regular day 61
 program in the commonwealth during said year; (3) pupils enrolled in 62
 evening programs of vocational education and adult evening practical 63
 arts under chapter seventy-four and the regulations promulgated 64
 thereunder at the direct expense of a city, town, regional school 65
 district or independent vocational school shall be counted as a fraction 66
 of a full-time equivalent pupil enrolled in a regular day program 67
 where the numerator of said fraction is the total amount expended for 68
 instructional services during the previous fiscal year after deducting 69
 therefrom any receipts for tuition, receipts from the federal govern- 70
 ment, the proceeds of any invested funds and grants, gifts and 71
 receipts from any other sources to the extent that such receipts are 72
 applicable to such expenditures provided, however, that amounts 73
 applicable to such expenditures received under this chapter as reim- 74
 bursements for such expenditures shall not be so deducted, and the 75
 denominator of which is the average current operating expenditure 76
 per pupil in a regular day program in the commonwealth during said 77
 year; and (4) pupils enrolled in any program and educated at the direct 78
 expense of a city, town or regional school district who are residents of 79
 an institution and were not theretofore residents of said city, town or 80
 regional school district under the provisions of section eleven of 81
 chapter seventy-six shall be counted as a fraction of a full-time 82
 equivalent pupil enrolled in a regular day program where the numera- 83
 tor of said fraction is the total amount so expended for instructional 84
 services for said pupils during the previous fiscal year, after deduct- 85
 ing therefrom any amount recovered from the commonwealth under 86
 said section eleven, and the denominator of which is the average 87
 current operating expenditure per pupil in regular day program in the 88
 commonwealth during said year. 89

70:3. Determination of amounts.

Section 3. Subject to the limitations specified in sections six and 1
 seven, the amount of school aid to be paid to each city, town, regional 2
 school district and independent vocational school in a fiscal year under 3
 this chapter shall be determined by multiplying together: (1) the 4
 school aid percentage for such city, town, regional school district or 5

independent vocational school; (2) the average current operating expenditures per pupil in regular day program in the commonwealth during the previous fiscal year; and (3) the sum of the weighted full-time equivalent pupils in such city, town, regional school district or independent vocational school during the fiscal year in question.

70:4. Reports; computation of amount; adjustments.

Section 4. The cities, towns, regional school districts and independent vocational schools shall report to the commissioner, in such form as the commissioner may require, all information necessary to compute the amount of school aid to be paid under this chapter. Such reports shall be made in accordance with the provisions of section six of chapter seventy-two. The commissioner may request other such reports as he deems necessary and as of such dates as he may require to carry out the purposes of this section.

The information submitted under this section shall be subject to approval, verification and adjustment. The commissioner shall be responsible for the verification of such information, including but not limited to (a) the numbers of full-time equivalent pupils within each program listed in section two A reported by each city, town, regional school district and independent vocational school; (b) certification that programs in transitional bilingual education under chapter seventy-one A have been carried out in accordance with the requirements of said chapter seventy-one A, the regulations promulgated thereunder, and approved plans submitted earlier by a city, town, regional school district or independent vocational school; (c) approval and certification that expenditures under chapter seventy-one B are reasonable, that funds for special education personnel, materials and equipment, tuition, rent and consultant services were actually expended, and that such special education classes, instruction periods and other programs have met the standards and requirements prescribed by the regulations promulgated under said chapter seventy-one B; and (d) approval of vocational education programs under chapter seventy-four and regulations promulgated thereunder; (e) approval of adult education programs and other programs under sections nine and nine A of chapter sixty-nine and sections eighteen, nineteen, twenty-one, twenty-six A, twenty-eight, seventy-one B, seventy-five, seventy-six and seventy-seven of chapter seventy-one and regulations promulgated thereunder. When undertaking such verification, the commissioner shall employ a number of criteria in examining the information so reported, including but not limited to (a) the proportion which the total enrollment in each program listed in section two A reported by each city, town, regional school district and independent vocational school bears to the total enrollment in all programs so reported, and (b) the percentage change in the proportional enrollment in each program listed in section two A reported by each city, town, regional school

district and independent vocational school from the prior fiscal year. 40
 An audit of the information submitted by a city, town, regional school 41
 district and independent vocational school shall be conducted by the 42
 commissioner in each instance of significant change in the annual 43
 proportional enrollment of any program listed in section two A. 44

A city, town, regional school district or independent vocational 45
 school may submit to the commissioner amendments to such a previ- 46
 ously completed report in the event of any error in the preparation of 47
 said reports; provided, however, that no such amendment may be filed 48
 after June thirtieth of the fiscal year succeeding that in which 49
 amounts of school aid were computed and paid on the basis of the 50
 previously submitted report. 51

Any such adjustment which reduces or increases, as the case may 52
 be, the school aid to which a city, town, regional school district or 53
 independent vocational school is entitled shall be taken into account in 54
 the school aid to be paid to such city, town, regional school district or 55
 independent vocational school as soon as may be after the adjustment 56
 is made and certified to the comptroller and department of revenue. 57
 No such adjustment shall be made after June thirtieth of the second 58
 fiscal year following the fiscal year in which such amounts of aid 59
 were distributed. 60

70:5. Certification: estimated and final amounts.

Section 5. The commissioner shall certify to the comptroller and to 1
 the department of revenue no later than December thirty-first prior to 2
 the fiscal year in which the aid is to be paid the estimated amount of 3
 school aid to be paid to each city, town, regional school district and 4
 independent vocational school. Before the final distributions are made 5
 under the provisions of section eighteen A of chapter fifty-eight, the 6
 commissioner shall make a final certification to the comptroller and to 7
 said department of revenue of the full amount due the cities, towns, 8
 regional school districts and independent vocational schools. 9

70:6. Minimum amounts paid.

Section 6. The aid paid to any city or town under this chapter in 1
 the fiscal year ending June thirtieth, nineteen hundred and eighty- 2
 three shall not be less than one hundred and seven per cent of the 3
 amount due said city or town during the fiscal year ending June 4
 thirtieth, nineteen hundred and seventy-nine under the provisions of 5
 this chapter. This amount shall be termed the chapter seventy mini- 6
 mum guarantee for the fiscal year ending June thirtieth, nineteen 7
 hundred and eighty-four. 8

In the fiscal years ending June thirtieth, nineteen hundred and 9
 eighty-four to June thirtieth, nineteen hundred and ninety-three, inclu- 10
 sive, the chapter seventy minimum guarantee of any city or town 11

shall be the chapter seventy minimum guarantee of such city or town 12
 in the preceding fiscal year less an amount equal to ten per cent of 13
 the chapter seventy minimum guarantee for such city or town in the 14
 fiscal year ending June thirtieth, nineteen hundred and eighty-three. 15
 This shall not apply to any regional school district or independent 16
 vocational school. 17

The chapter seventy minimum guarantee of any regional school 18
 district or independent vocational school shall be the chapter seventy 19
 guarantee received in either of the fiscal years nineteen hundred and 20
 eighty-three or nineteen hundred and eighty-four, whichever is great- 21
 er. 22

70:7. Minimum expenditures.

Section 7. In each fiscal year, each city, town, regional school 1
 district and independent vocational school shall expend at least eighty- 2
 five per cent of the product obtained by multiplying the average 3
 direct service expenditure per pupil in regular day program in the 4
 commonwealth during the previous fiscal year by the sum of weight- 5
 ed full-time equivalent pupils in the city, town, regional school district 6
 or independent vocational school during the current fiscal year. The 7
 amount so determined shall be expended for the support of the school 8
 programs listed in section two A, exclusive of expenditures for 9
 administration, athletic and other student body activities, plan opera- 10
 tion and maintenance, transportation, payment of regional school 11
 district assessments, food for school food programs, and capital 12
 outlay; provided, however, that amounts received by a regional school 13
 district from the member cities and towns of said district which are 14
 applicable to such expenditures for such programs shall not be so 15
 deducted. 16

If a city, town, regional school district or independent vocational 17
 school fails to expend, from sources other than the amounts of aid 18
 paid under this chapter, an amount equal to the difference between (1) 19
 the amount determined in accordance with the first sentence of this 20
 section, and (2) either the total estimated amount of school aid to have 21
 been received, or the total school aid actually received by said city, 22
 town, regional school district or independent vocational school during 23
 the fiscal year in question, whichever is greater, then the commission- 24
 er shall certify to the comptroller and the department of revenue an 25
 amount equal to the school aid otherwise due to be paid under this 26
 chapter during the next fiscal year, multiplied by a fraction, the 27
 numerator of which is the actual amount expended by said city, town, 28
 regional school district or independent vocational school, from sources 29
 other than the amounts of aid paid under this chapter, and the 30
 denominator of which is the difference as set forth above. 31

The commissioner shall annually calculate, on or before January 32
 thirty-first, to the nearest tenth of one per cent, the proportion which 33
 the total amount of school aid paid under this chapter during the 34
 previous fiscal year bears to the sum of the total expenditures of all 35
 pupils, enrolled in all programs in all cities, towns, regional school 36
 districts and independent vocational schools during said previous 37
 fiscal year, until said proportion equals at least thirty-five per cent. 38
 The provisions of this section shall then apply to the expenditures of 39
 all cities, towns, regional school districts, and independent vocational 40
 schools commencing with the third fiscal year following the third 41
 consecutive fiscal year in which said percentage has equaled at least 42
 thirty-five per cent, and in every fiscal year thereafter. 43

70:8. Excess funds; minimum expenditures; designated programs.

Section 8. Notwithstanding any provision of law to the contrary, 1
 the school aid paid under this chapter to a city, town, regional school 2
 district or independent vocational school in accordance with the provi- 3
 sions of this chapter shall be deposited with the treasurer of the city, 4
 town, or regional school district, and shall be applied in the first 5
 instance, subject to the limitations specified below, to total expendi- 6
 tures for current operating costs in all programs during the fiscal 7
 year in which payments are so made. In the event that the estimated 8
 amount of school aid to be received by a city, town, regional school 9
 district or independent vocational school exceeds the amount included 10
 for such expenditures within the total school department, regional 11
 school district or independent vocational school budget approved by 12
 said city, town, regional school district or independent vocational 13
 school, after first deducting from such budgeted expenditures any 14
 other estimated receipts for tuition, receipts from the federal govern- 15
 ment, the proceeds of any invested funds and grants, gifts, and 16
 receipts from the commonwealth or any other source, to the extent 17
 that such receipts are applicable to such expenditures, such access 18
 shall be available for application to expenditures for any municipal 19
 purpose by such city or town, or used by such regional school district 20
 to reduce the operating assessments levied upon member cities and 21
 towns during the following fiscal year. In the event that the amount 22
 of such school aid actually received during the fiscal year exceeds the 23
 estimated school aid, such excess shall be added to the estimated 24
 school aid to be received during the following fiscal year and applied 25
 in said year in accordance with the provisions of this section. In the 26
 event that the amount of such school aid actually received and 27
 available during the fiscal year under the provisions of this section for 28
 such operating expenditures, plus receipts from any other sources 29
 applicable to such expenditures as defined above, exceed the total 30
 actual amount of such expenditures, such excess shall be added to the 31
 estimated school aid to be received during the following year and 32

applied in aforesaid manner. The entire amounts of such excess school aid carried over from any previous year, plus the entire estimated amount of school aid to be received by a city or town under this chapter during the fiscal year shall, however, be treated by the board of assessors as school incomes when computing the school tax rate for said fiscal year under the provisions of section twenty-three C of chapter fifty-nine. The entire estimated amount of school aid to be received by a regional school district during the fiscal year, plus any amount of such excess school aid carried over from any previous year, shall be used by said district to reduce the operating assessments levied by such district upon member cities and towns during the following year.

The commissioner shall determine the portions of the school aid received by each city, town, regional school district or independent vocational school which are allocated on account of the total number of weighted full-time equivalent pupils reported for each program listed in section two A. Not less than seventy per cent of the aforesaid portions of school aid so determined for each said program and received by each city, town, regional school district or independent vocational school under this chapter shall be expended for instructional services, attendance services, health services, fixed charges and food services in each program listed in section two A in which full-time equivalent pupils were reported by the city, town, regional school district or independent vocational school during said fiscal year.

70:9. Massachusetts school fund.

Section 9. The school fund of the commonwealth, known as the Massachusetts School Fund, with future additions shall constitute a permanent fund. The commissioner of education and the state treasurer shall continue to be commissioners to invest and manage said fund, and they shall report annually the condition and income thereof. All investments shall be made with the approval of the governor and council. The annual income thereof shall be paid to the several cities, towns, regional school districts and independent vocational schools under the provisions of section eighteen A of chapter fifty-eight, as part of the school aid required under this chapter.

70:10. Todd fund income.

Section 10. The income of the Todd Fund shall be paid to the board of trustees of state colleges, and applied by it to specific objects, in connection with state colleges, not provided by appropriation.

70:11. Local support percentage.

Section 11. In determining the amount of school aid due to be paid under this chapter to each city, town, regional school district, and

independent vocational school during any fiscal year, the local support 3
percentage used in computing said school aid shall be determined so 4
that the total school aid as so computed shall be equal to the amount 5
actually appropriated for distribution as school aid under this chapter, 6
after deducting the amounts to be paid under the provisions of section 7
six. The local support percentage so determined in any fiscal year 8
shall be the same for every city, town, regional school district and 9
independent vocational school. The school aid to be distributed under 10
this chapter shall be subject to application. 11

62C:73. Tax evasion, failure to collect or pay tax. keep records or supply information; penalties.

Section 73. (a) Any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the statutes referred to in section two or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than one hundred thousand dollars or five hundred thousand dollars in the case of a corporation, or by imprisonment for not more than five years, or both, and shall be required to pay the costs of prosecution.

(b) Any person required under this chapter or the statutes referred to in section two to collect, account for, and pay over any tax to the commissioner who willfully fails to collect or truthfully account for and pay over such tax shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than ten thousand dollars, or by imprisonment for not more than five years, or both, and shall be required to pay the costs of prosecution.

(c) Any person required under this chapter or the statutes referred to in section two or by regulations made under authority thereof to pay any estimated tax or tax, make a return, keep records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and shall be fined not more than twenty-five thousand dollars or one hundred thousand dollars in the case of a corporation, or by imprisonment for not more than one year, or both, and shall be required to pay the costs of prosecution. In the case of any person with respect to whom there is a failure to pay any estimated tax, this section shall not apply to such person with respect to such failure if there is not addition to tax under chapter sixty-two B or sixty-three B with respect to such failure.

(d) In lieu of any other penalty provided by law, except the penalty provided by section eleven A of chapter sixty-two B, any person required under the provisions of section five of chapter sixty-two B to furnish a statement who willfully furnishes a false or fraudulent statement or who willfully fails to furnish a statement in the manner, at the time, and showing the information required under said section five, or regulations prescribed thereunder, shall, for each offense, be guilty of a misdemeanor and shall be fined not more than one thousand dollars, or by imprisonment for not more than one year, or both.

(e) In lieu of any other penalty provided by law, except the penalty provided by section eleven A of chapter sixty-two B, any individual required to supply information to his employer under section four of chapter sixty-two B who willfully supplies false or fraudulent information, or who willfully fails to supply information thereunder that would require an increase in the tax to be withheld under section two of chapter sixty-two B, shall be guilty of a misdemeanor and shall be fined not more than one thousand dollars, or by imprisonment for not more than one year, or both.

(f) Any person who:-

(1) Willfully makes and subscribes any return, statement, or other document, that contains or is verified by a written declaration that is made under the penalties of perjury, and that he does not believe to be true and correct as to every material matter; or

(2) Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter

arising under this chapter or the statutes referred to in section two of this chapter, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge and consent of the person authorized or required to present such return, affidavit, claim or document; or

(3) Willfully simulates or falsely or fraudulently executes or signs any bond, permit or other document required by this chapter or the statutes referred to in section two of this chapter, or by any regulation made in pursuance thereof, or willfully procures the same to be falsely or fraudulently executed or advises, aids in, or connives at such execution thereof; or

(4) Willfully removes, deposits, or conceals, or is concerned with removing, depositing, or concealing, any goods or commodities for or in respect whereof any tax is or shall be imposed, or any property upon which levy is authorized by section fifty-three, with intent to evade or defeat the assessment or collection of any tax; or

(5) Any person who, in connection with the preparation of a tax return for another, the filing of a tax return or the payment of any tax, receives money from such other person on the understanding that it is to be paid over to the commissioner to discharge, in whole or in part, such other person's tax liability and willfully fails to pay over the same to the commissioner, shall be guilty of a felony and, upon conviction thereof, shall be fined not more than one hundred thousand dollars or five hundred thousand dollars in the case of a corporation or by imprisonment for not more than three years, or both, together with the costs of prosecution.

(g) Any person who willfully delivers or discloses to the commissioner any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter, shall be fined not more than ten thousand dollars or fifty thousand dollars in the case of a corporation, or by imprisonment for not more than one year, or both.

(h) Whoever willfully corrupts or by force or threats of force, including any threatening letter or communication, endeavors to intimidate or impede an officer or employee of the commonwealth acting in an official capacity under this chapter, or in any other way corrupts or by force or threats of force, including any threatening letter or communication, obstructs or impedes, or endeavors to obstruct or impede, the due administration of this chapter, shall upon conviction thereof, be fined not more than five thousand dollars, or imprisoned not more than three years, or both, except that if the offense is committed only by threats of force, the person convicted thereof shall be fined not more than three thousand dollars or imprisoned not more than one year, or both. The term "threats of force", as used in this subsection, means threats of bodily harm to the officer or employee of the commonwealth or to a member of his family.

(i) any person who, for the purpose of evading payment of sales or use tax, willfully gives to another a certificate under the provisions of chapter sixty-four H or sixty-four I known by him to be fraudulent or false as to any material matter shall be fined not more than ten thousand dollars or imprisoned for not more than one year, or both; provided that any corporation which commits such offense shall be punished by a fine of not more than fifty thousand dollars.

IMPOSITION AND RATE OF TAX.

64H:2. Sales tax; imposition; rate; payment.

Section 2. An excise is hereby imposed upon sales at retail of tangible personal property in the commonwealth by any vendor at the rate of five per cent of the gross receipts of the vendor from all such sales of such property, except as otherwise provided in this chapter. The excise shall be paid by the vendor to the commissioner at the time provided for filing the return required by section sixteen of chapter sixty-two C.

64H:3. Payment by purchaser; collection by vendor; undetermined use: direct payment permit and certificate; sales of motor vehicles or trailers.

Section 3. (a) Except as provided in paragraphs (b) and (c) of this section, reimbursement for the tax hereby imposed shall be paid by the purchaser to the vendor, and each vendor in the commonwealth shall add to the sales price and shall collect from the purchaser the full amount of the tax imposed by this chapter, or an amount equal as nearly as possible or practicable to the average equivalent thereof; and such tax shall be a debt from the purchaser to the vendor, when so added to the sales price, and shall be recoverable at law in the same manner as other debts.

(b) Any purchaser who acquires tangible personal property, except in connection with the construction, remodeling or repair of real estate, under such circumstances that it is impossible or impractical to determine at the time of acquisition the manner in which such tangible personal property will be used, may apply to the commissioner for a direct payment permit. If the commissioner finds that the collection of the tax will not be jeopardized, he shall issue to the purchaser a direct payment permit. Such direct payment permit shall bear an identifying registration number and shall provide that no vendor making a sale to the permit holder shall be required to collect the sales tax otherwise payable on such sale and that the permit holder shall report, on such form as the commissioner shall designate,

and pay directly to the commissioner the tax due on any tangible personal property acquired by him. The use of a direct payment permit may be subject to such conditions as the commissioner shall determine to be appropriate to insure the collection of the tax and may be revoked by the commissioner at any time if he determines that the collection of any tax due from the permit holder is in jeopardy or that the conditions to which the permit is subject have not been complied with. The acceptance in good faith by any vendor of a certificate from a permit holder to the effect that he is in possession of a valid direct payment permit shall relieve such vendor of any obligation to collect the tax from the permit holder. Such certificate shall be signed by and bear the name and address and registration number of the permit holder.

(c) The excise imposed by section two upon sales at retail of motor vehicles or trailers shall be paid by the purchaser to the registrar of motor vehicles in the manner prescribed by the commissioner. The vendor thereof shall not add the tax to the sales price and shall not collect the tax from the purchaser. The vendor thereof shall, however, furnish to the purchaser, the registrar and the commissioner a sworn statement of the sale upon a form prescribed by the commissioner, with the approval of the commission, giving such information as the commissioner may require for the determination of such tax. For the purpose of this paragraph, the term "motor vehicle" means any self-propelled vehicle designed for use and used primarily upon the highways.

64H:7. Registration required.

Section 7. No 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.

U.S. CONSTITUTION
AMENDMENT V

**AMENDMENT V—GRAND JURY INDICTMENT FOR CAPITAL
CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION;
DUE PROCESS OF LAW; JUST COMPENSATION FOR
PROPERTY**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONSTITUTION
AMENDMENT VI

**AMENDMENT VI—JURY TRIAL FOR CRIMES, AND
PROCEDURAL RIGHTS**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONSTITUTION
AMENDMENT XIV

AMENDMENT XIV—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Materials for the Due Process Clause of Section 1 are set out in this volume and the following volume. See preceding volume for materials pertaining to the Citizenship and Privileges and Immunities Clauses of that section and the volume containing the end of the Constitution for materials pertaining to the Equal Protection Clause of that section and Sections 2 to 5.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

MASSACHUSETTS CONSTITUTION
DECLARATION OF RIGHTS
ARTICLE 11

ART. XI. Remedy by recourse to the laws: obtaining of right and justice freely, completely and promptly.

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.

MASSACHUSETTS CONSTITUTION
DECLARATION OF RIGHTS
ARTICLE 30

ART. XXX. Separation of legislative, executive and judicial departments.

In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

CONSTITUTION OF MASSACHUSETTS.
Part 2, Chap. 1, Sec. 1, Art. 4

ART. IV. Power of general court to enact laws, etc.; valuation of estates.

And further, full power and authority are hereby given and granted to the said general court, from time to time, to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without; so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this commonwealth, and for the government and ordering thereof, and of the subjects of the same, and for the necessary support and defence of the government thereof; and to name and settle annually, or provide by fixed laws, for the naming and settling all civil officers within the said commonwealth; the election and constitution of whom are not hereafter in this form of government otherwise provided for; and to set forth the several duties, powers, and limits, of the several civil and military officers of this commonwealth, and the forms of such oaths or affirmations as shall be respectively administered unto them for the execution of their several offices and places, so as the same be not repugnant or contrary to this constitution; and to impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the said commonwealth; and also to impose and levy, reasonable duties and excises, upon any produce, goods, wares, merchandise, and commodities, whatsoever, brought into, produced, manufactured, or being within the same; to be issued and disposed of by warrant, under the hand of the governor of this commonwealth for the time being, with the advice and consent of the council, for the public service, in the necessary defence and support of the government of the said commonwealth, and the protection and preservation of the subjects thereof, according to such acts as are or shall be in force within the same.

And while the public charges of government, or any part thereof, shall be assessed on polls and estates, in the manner that has hitherto been practised, in order that such assessments may be made with equality, there shall be a valuation of estates within the commonwealth taken anew once in every ten years at least, and as much oftener as the general court shall order.

Amended by Amendments, Art. CXII.

For further provisions as to taxing power given to the general court, see Amendments, Arts. XLIV, XCIX and CX.

MASSACHUSETTS CONSTITUTION
ch. 3, Article 2

ART. II. Opinions of the justices of supreme judicial court.

[Each branch of the legislature, as well as the governor and council, shall have authority to require the opinions of the justices of the supreme judicial court, upon important questions of law, and upon solemn occasions.]

Annulled and superseded by Amendments, Art. LXXXV.

ART. LXXXV. Annulment of constitutional provision and adoption of new Article relating to opinions of the justices of the supreme judicial court.

Article II of Chapter III of the constitution of the commonwealth is hereby annulled and the following is adopted in place thereof:—

Article II. Each branch of the legislature, as well as the governor or the council, shall have authority to require the opinions of the justices of the supreme judicial court, upon important questions of law, and upon solemn occasions.

MASSACHUSETTS CONSTITUTION
AMENDING ARTICLE 44

ART. XLIV. Income tax.

Full power and authority are hereby given and granted to the general court impose and levy a tax on income in the manner hereinafter provided. Such tax may be at different rates upon income derived from different classes of property, but shall be levied at a uniform rate throughout the commonwealth upon incomes derived from the same class of property. The general court may tax income not derived from property at a lower rate than income derived from property, and may grant reasonable exemptions and abatements. Any class of property the income from which is taxed under the provisions of this article may be exempted from the imposition and levying of proportional and reasonable assessments, rates and taxes as at present authorized by the constitution. This article shall not be construed to limit the power of the general court to impose and levy reasonable duties and excises.

For further provision as to taxing power, see Part the Second, Chap. I, Sec. 1, Art. IV.

MISSOURI CONSTITUTION
ARTICLE I, § 14

§ 14. **Open courts—certain remedies—justice without sale, denial or delay**

Section 14. 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.

NORTH DAKOTA CONSTITUTION
ARTICLE I, § 22

Section 9. 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. Suits may be brought against the state in such manner, in such courts, and in such cases, as the legislative assembly may, by law, direct.

CANON 4
A LAWYER SHOULD PRESERVE THE CONFIDENCES
AND SECRETS OF A CLIENT

DISCIPLINARY RULES

DR 4-101 Preservation of Confidences and Secrets of a Client.

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) Except when permitted under DR 4-101 (C), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.

(2) Use a confidence or secret of his client to the disadvantage of the client.

(3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

(C) A lawyer may reveal:

(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.

(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.

(3) The intention of his client to commit a crime and the information necessary to prevent the crime.

(4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

(D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101 (C) through an employee.