Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS

No. SJC-13287

JAMES J. REAGAN, JR. AND IRENE M. REAGAN,
Plaintiffs-Appellants,

v.

COMMISSIONER OF REVENUE,
Defendant-Appellee.

On Appeal From A Decision Of The Appellate Tax Board

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PLAINTIFFS-APPELLANTS FOR REVERSAL

NEW ENGLAND LEGAL FOUNDATION

By its attorneys,

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BATEMAN & SLADE, INC. STONEHAM, MASSACHUSETTS

CORPORATE DISCLOSURE STATEMENT

Amicus curiae New England Legal Foundation ("NELF") states, pursuant to S.J.C. Rule 1:21, that it is a 26 U.S.C. §501(c)(3) nonprofit, public interest law foundation, incorporated in Massachusetts in 1977, with its headquarters in Boston. NELF does not issue stock or any other form of securities and does not have any parent corporation. NELF is governed by a self-perpetuating Board of Directors, the members of which serve solely in their personal capacities.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

RULES:

OTHER AUTHORITIES:

ISSUE PRESENTED

Amicus curiae New England Legal Foundation (NELF) addresses the question presented by this Court in its amicus announcement of May 16, 2022: "Whether the commissioner may impose Massachusetts income tax on capital gain from the sale of an urban redevelopment project undertaken pursuant to G. L. c. 121A."

INTEREST OF AMICUS CURIAE

NELF is a nonprofit, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston. NELF's membership consists of corporations, law firms, individuals, and others who believe in its mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters include a cross-section of large and small businesses and other organizations from all parts of the Commonwealth, New England, and the United States.

NELF has appeared regularly as amicus curiae before this Court in cases involving statutes and administrative regulations that affect the rights of

taxpayers in the Commonwealth.[1] This is such a case, and NELF believes that its brief will assist the Court in deciding the legal issues presented here.[2]

ARGUMENT

I. The Commissioner May Not Impose An Income Tax On The Capital Gain From The Sale Of An Urban Redevelopment Project Undertaken Pursuant To G.L. c. 121A

A. The Plain Language Of The Statute Exempts Income Tax On The Capital Gain From The Sale Of A Chapter 121A Project

The specific issue in this case turns on the interpretation of the following statutory language:

> Individuals, and associations of persons organized in the commonwealth in the form of joint ventures, partnerships, limited partnerships or trusts … may undertake projects under this chapter … **which project shall be exempt from taxation, betterments, excises and special assessments**, provided that such persons

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[1] *See, e.g., Oracle USA, Inc. v. Comm'r of Revenue*, 487 Mass. 518 (2021); *Citrix Sys., Inc. v. Comm'r of Revenue*, 484 Mass. 87 (2020); *Worldwide TechServices, LLC v. Comm'r of Revenue*, 479 Mass. 20 (2018); *Denver St. LLC v. Town of Saugus*, 462 Mass. 651 (2012).

[2] Pursuant to Mass. R. App. P. 17(a)(1)(5), NELF states that neither the plaintiff-appellant, nor its counsel, nor any individual or entity other than amicus, has authored this brief in whole or in part, or has made any monetary contribution to its preparation or submission. Pursuant to Mass. R. App. P. 17(c)(5)(D), NELF also states that neither amicus nor its counsel has ever represented any party to this appeal in another proceeding involving similar issues, or was a party or represented a party in a proceeding or legal transaction that is at issue in this appeal.

> or associations, with respect to any such project undertaken or acquired by them, shall:
>
> …
>
> (f) agree by regulatory agreement … that **in consideration of exemption** from taxation of real and personal property and from betterments and special assessments and **from the payment of any tax, excise or assessment to or for the commonwealth or any of its political subdivisions on account of a project,** they will pay the excises with respect to a project which a corporation would be bound to pay…

G.L. c. 121A, §18C (emphasis added).

The exemption is plainly broad and unlimited. On its face, it applies to any tax payment to the commonwealth, including payment of any income tax due to a capital gain on account of the sale of a chapter 121A project. There is nothing in the statute that places income from capital gains from urban redevelopment projects out of the reach of its exemption. "When a statute is clear and unambiguous, the plain meaning of the language must be given effect." *Construction Industries of Massachusetts v. Comm'r of Labor & Industries*, 406 Mass. 162, 168 (1989). *See also Pyle v. School Comm.*, 423 Mass. 283, 285 (1996) ("Where the language of a statute is clear and unambiguous, it is conclusive as to legislative intent.")

The Commissioner's reading of the tax exemption is stilted and not justified by the express terms of the statute. The Commissioner argues that capital gains income from the sale or transfer of a project is not included in the "project's" exemption from taxation. In doing so, the Commissioner makes a number of errors.

First, the Commissioner conflates Section 10 with Section 18C(f). Section 18C(f) is a completely separate section from Section 10 which grants urban renewal corporations tax exemptions on the "project." Section 10 corporations by law cannot engage in any activities aside from urban renewal projects. In contrast, Section 18C partnerships may pursue other activities in addition to urban renewal projects. Clearly a partnership may have other activities and assets that would not be part of the project, and thus income from these would not be exempt (as opposed to income from the project itself). Here, there is no dispute that the partnerships that owned the projects were operating solely as urban redevelopment projects, with no other business activities. Moreover, the introductory language to Section 18C simply reaffirms the general principle that projects themselves are

exempt from taxation, but then requires that the entities covered by Section 18C be exempt from state taxes "on account of the project."[3]

Second, the Commissioner attempts to read out the specific language in section 18C(f) that taxes to the commonwealth are exempt from taxation "on account of a project." This omission is inconsistent with this Court's objective when interpreting statutes: "We accord the words of the statute their ordinary meanings, however, with due regard to the statute's purposes." *Pyle*, 423 Mass. at 286. This Court therefore cannot read out the specific exemption from state taxation of income earned "on account of a project."

Third, the Commissioner then adopts an unjustifiably narrow reading of "on account of a project." The Commissioner misinterprets *O'Gilvie v. United States*, 519 U.S. 79, 83 (1996), as ascribing a

[3] There is no "conflict" between the two exemption provisions because they apply to different types of entities. But, even if there were such a conflict, the specific exemption "on account of a project" would trump the more general exemption. *See, e.g., Commonwealth v. Russ R.*, 433 Mass. 515, 521 (2001) (internal citations omitted) (noting the statutory construction maxim that "the specific governs the general.")

narrow meaning to the phrase "on account of." There, the Supreme Court examined whether a tort plaintiff's punitive damages were excluded from gross income because they constituted damages "on account of personal injuries…" under the IRS code. *Id.* The Court held that punitive damages were not "on account of personal injuries" but rather were designed to punish the defendant. In so holding, the Court did not read "on account of" narrowly, but simply applied a "meaning consistent with the dictionary definition. *See, e.g.*, Webster's Third New International Dictionary 13 (1981) ("for the sake of: by reason of: because of")." *O'Gilvie*, 519 U.S. at 83.

The more recent case of *Rousey v. Jacoway*, 544 U.S. 320, 326 (2005) reveals that the Supreme Court has not applied a "narrow" reading of the phrase "on account of." In *Rousey*, 544 U.S. at 326, the Court examined a Bankruptcy Code provision that allowed a bankruptcy petitioner to exempt from his bankruptcy estate an IRA payment made "on account of illness, disability, death, age, or length of service." The Court noted: "We have interpreted the phrase 'on account of' elsewhere within the Bankruptcy Code to mean 'because of,' thereby requiring a causal

connection between the term that the phrase 'on account of' modifies and the factor specified in the statute at issue." *Id.* Citing to two dictionaries, the Court found that the "common understanding" of the phrase "on account of" meant "by reason of" or "because of." *Id.* The Court found that there was no reason to presume Congress "deviated from the term's ordinary meaning." *Id.* The Court went on to find that the IRA payments were in fact exempted from the bankruptcy estate as they were made "on account of" age. *Id.* at 335.

Similarly, here the broad exemption from paying any tax to the commonwealth "on account of a project" applies also to a capital gain. Such a gain is causally connected to the project. There could be no capital gain without investment in an urban renewal project. Because there is no ambiguity here, the Court should find that the statute says what it means and means what it says. The Commissioner is not allowed to assess an income tax on the capital gains made by investors in urban renewal projects.[4]

[4] The Commissioner argues that the sale of a project is not "on account of a project" because by definition the project is being assumed by another investor. Again, the Commissioner can make no

Finally, the Commissioner ignores the Legislature's expressly stated purpose in granting tax exemptions to urban redevelopment project investors. The purpose of tax exemptions is contained in G.L. c. 121A, §2 ("Declaration of public necessity; acquisition and regulation of private property"):

> It is hereby declared that blighted open, decadent or sub-standard areas exist in certain cities and towns in this commonwealth, and that each of such areas constitutes a serious and growing menace, injurious and inimical to the safety, health, morals and welfare of the residents of the commonwealth and the sound growth of the communities therein … that **the menace of blighted open, decadent or sub-standard areas is beyond remedy and control solely by regulatory process in the exercise of the police power and cannot be dealt with effectively by the ordinary operations of private enterprise without the aids herein provided** … and **the necessity in the public interest for the provisions hereinafter enacted is hereby declared as a matter of legislative determination.** …
>
> It is hereby further declared that in many areas throughout the commonwealth there is a shortage of decent, safe and sanitary buildings for residential, commercial, industrial, institutional, recreational, or governmental purposes; that this condition is most extreme in communities where blighted open, decadent or sub-standard areas exist; that **the aforesaid conditions cannot be corrected by the ordinary operations of private enterprise without the aids herein provided**; that **the provisions of this chapter will stimulate the investment of private**

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argument against the plain meaning of Section 18C(f) under which a sale of a project is causally connected to the project.

> **capital in blighted open, decadent or sub-standard areas** …

(Emphasis added.)

The most significant "aid" to private enterprises developing urban redevelopment projects is the express exemption from state and local taxation. The Legislature was willing to sacrifice any state taxation on account of a project in order to encourage investment in areas that were blighted and substandard. The Legislature determined that this "aid" was necessary to address a "public menace" that could not be eradicated by the Commonwealth or local governments. The Commissioner's attempt to carve out the "capital gains" of these investors so valued by the Legislature does not comport with the expressly stated legislative purpose.

This Court already has acknowledged the broad tax exemption scheme designed by the Legislature:

> [Chapter] 121A is designed to stimulate the investment of private capital in blighted open, substandard or decadent areas. G. L. c. 121A, §2. In order to encourage privately financed urban renewal, the statute provides that a project undertaken by a qualified applicant, such as an insurance company, is exempt from State and local taxation, including betterments and special assessments, for a period of forty years.

Prudential Ins. Co. v. Boston, 369 Mass. 542, 543 (1976). Imposing a capital gains tax upon an investor

in an urban renewal project discourages such investment in a situation where the Legislature specifically enacted Chapter 121A to "encourage privately financed urban renewal." *Prudential Ins. Co.*, 369 Mass. at 543.

Encouraging private enterprise to undertake (complicated and highly regulated) urban renewal projects necessarily entails an acknowledgment that such investors ultimately may hope to profitably sell such projects to other investors. An urban redevelopment project may or may not yield gains that an ordinary real estate developer anticipates. Investors in such risky projects - - like all investors - - hope to ultimately gain on the projects' disposition. Taxing a crucial portion of the investment upon sale simply is not what the Legislature intended or expressed. The Commissioner simply cannot circumvent the clear language and express purpose of Chapter 121A. The Commissioner may not impose Massachusetts income tax on a capital gain from the sale of an urban redevelopment project undertaken pursuant to G.L. c. 121A.

B. This Court Should Not Defer To The Board's Decision

This Court has set forth the standard of review when reviewing a decision of the Appellate Tax Board ("Board") as follows:

> Decisions of the board are final as to findings of fact. See G. L. c. 58A, § 13. Consequently, '[a] decision of the board will not be reversed or modified if it is based on substantial evidence and on a correct application of the law.' *Koch v. Commissioner of Revenue*, 416 Mass. 540, 555, 624 N.E.2d 91 (1993). See *Commissioner of Revenue v. Houghton Mifflin Co.*, 423 Mass. 42, 43, 666 N.E.2d 491 (1996) (when reviewing a decision of the board, 'the sole question before us is whether the board erred as a matter of law.')

Comm'r of Revenue v. Cargill, Inc., 429 Mass. 79, 81 (1999).

Here, the case was submitted to the Board upon an agreed statement of facts and therefore the only issue is whether the Board correctly applied the law. The resolution of the case involves an interpretation of Chapter 121A which is solely within this Court's province and not the Board's. In *Cargill, Inc.*, the Commissioner argued that the Board committed an error of law in determining that a corporation was entitled to take a tax credit and that the relevant statute was ambiguous. *Id.* Instead, this Court held: "we are constrained to follow the plain language of a statute

when its language is plain and unambiguous, and its application would not lead to an absurd result, or contravene the Legislature's clear intent." *Id.* at 82. The Court found that the clear language of the statute supported extending the tax credit to the corporation. *Id.* Similarly here, this Court should find that Chapter 121A specifically exempts capital gains on the sale of an urban redevelopment project from state taxation.

The Commissioner attempts to argue that this Court must defer to the Board's determination because the Board relied, *inter alia*, on DOR Letter Ruling 94-7. As an initial matter, that letter ruling does not address the specific question raised by this Court in its amici solicitation, and does not address G.L. c. 121A, §18C(f) at all. But more importantly resolution of the issue at hand requires a reading not of a tax statute but of the comprehensive urban renewal scheme set forth in Section 121A. *See* G.L. c. 62C, §3 ("[t]he commissioner may prescribe regulations and rulings, not inconsistent with law, to carry into effect the provisions of [the taxing] statutes"); *Massachusetts Mun. Wholesale Elec. Co. v. Massachusetts Energy Facilities Siting Council*, 411

Mass. 183, 194 (1991) ("[A]n administrative agency has no authority to promulgate rules or regulations that conflict with the statutes"). As set forth above, the statute and the Legislature's expressly stated purpose require this Court to find that the capital gain from the sale of a project is "on account of a project" and thus exempt from "any" taxation by the Commonwealth.

CONCLUSION

For the reasons set forth above, New England Legal Foundation respectfully requests that this Court find that the income from the sale of the urban redevelopment project under Chapter 121A is not subject to taxation by the Commonwealth. Accordingly, the Board's decision must be reversed, and the plaintiffs granted the abatement for which they applied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
Pursuant to Rule 16(k) of the
Massachusetts Rules of Appellate Procedure

I, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass. R. A. P. 16 (a)(13) (addendum);
Mass. R. A. P. 16 (e) (references to the record);
Mass. R. A. P. 18 (appendix to the briefs);
Mass. R. A. P. 20 (form and length of briefs, appendices, and other documents); and
Mass. R. A. P. 21 (redaction).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 20 because it is produced in the monospaced font courier new at size 12, 10½ characters per inch, and contains 13, total non-excluded pages prepared with Microsoft Word 2013.

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CERTIFICATE OF SERVICE

Pursuant to Mass.R.A.P. 13(d), I hereby certify, under the penalties of perjury, that on November 14, 2022, I made service of this Brief upon the attorneys of record for each party, by the Electronic Filing System on:

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