THE CITY OF PROVIDENCE

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

RESOLUTION OF THE CITY COUNCIL

No. 275

Approved May 10, 1991

WHEREAS, The City of Providence has an estimated 175 billboards within its limits, and

WHEREAS, One billboard (two faced monopole) can earn in excess of One Hundred Forty-Four Thousand Dollars ($144,000.00) annually, and

WHEREAS, The City of Providence only collects an estimated Seven Thousand Nine Hundred ($7,900.00) Dollars in taxes from all the billboards in the City, and

WHEREAS, Cities in the United States have found the billboards in their jurisdiction have been vastly undervalued, and

WHEREAS, The City of Jacksonville, Florida, ordered billboard companies to pay $2.3 Million in back taxes, and

WHEREAS, The average assessed value the billboard industry puts on its sign is less than $800.00, and

WHEREAS, The billboard industry values their signs at more than Thirty Thousand ($30,000.00) Dollars for one sign when Rhode Island attempts to remove one,

NOW, THEREFORE, BE IT RESOLVED, That the City Assessor should immediately undertake an inventory of all billboards in the City,

BE IT FURTHER RESOLVED, That the City Assessor's Office, in conjunction with the City Solicitor should investigate to determine if the billboard industry has undervalued their billboards and whether the billboard industry owes back taxes to the City of Providence, and

BE IT FURTHER RESOLVED, That the City Assessor should investigate how other cities tax billboards and report back to the City Council as the best means to tax billboards, and

BE IT FURTHER RESOLVED, That the City Assessor should report back to the City Council on the aforementioned issues within Thirty (30) days.

IN CITY COUNCIL
MAY 2 1991
READ AND PASSED
PRES.
CLERK

APPROVED
May 10 1991
MAYOR

IN CITY COUNCIL

APR _ 4 1991

FIRST READING

REFERRED TO COMMITTEE ON FINANCE

Rose M. Mendoza CLERK

THE COMMITTEE ON

FINANCE

Recommends The Continued

Rose M. Mendoza Clerk

April 22, 1991

THE COMMITTEE ON

FINANCE

Approves Passage of

The Within Resolution

Rose M. Mendoza Clerk Chairman

April 29, 1991

Councilman Fenton and Councilwoman Young

Executive Office, City of Providence, Rhode Island

VINCENT A. CIANCI, JR.
MAYOR

May 10, 1991

To the Honorable City Council:

I wish to inform you that I have signed the Council resolution calling for a study of the valuation of commercial billboards in the City of Providence. In addition, I am pleased to announce that the City Assessor has decided to institute a new method of assessment -- for the fiscal year beginning July 1, 1992 -- which we believe will result in higher assessments of billboards and greater tax revenue for the city.

I have attached for your review a memo on this subject by Frederick W. Stolle Jr., Special Counsel in the Law Department. This memo makes clear that the City has no legal right to collect additional back taxes from the owners of billboards. However, as Mr. Stolle notes, the Tax Assessor's office has been reviewing its assessments for billboards based on recent condemnation cases affecting billboards. In certain cases, the courts have been awarding condemnation payments to billboard owners which are considerably higher than the values that have been assigned to these billboards for assessment purposes. Although we were already working on the issue when Councilman Fenton raised it, I wish to commend Councilman Fenton and other members of the Finance Committee for raising this issue in the public forum.

As the memo indicates, the City Assessor intends to institute a "cost less depreciation" method of assessment for billboards for the assessment of December 31, 1991. We believe this will result in higher assessments and tax yield for the city in fiscal 1993. Unfortunately, the process of instituting the new assessment is very time-consuming, and we cannot utilize the new method for the fiscal year that begins on July 1, 1991.

Again, I would like to thank members of the City Council, and particularly Councilman Fenton, for their participation in developing a new policy that will benefit the people of Providence. The administration will periodically update the Finance Committee on our progress in implementing the new assessment procedure for billboards.

Vincent A. Cianci Jr.

VINCENT A. CIANCI JR.
Mayor

CITY HALL

THE CITY COUNCIL
OF THE
CITY OF PROVIDENCE, RHODE ISLAND

February 28, 1991

Mr. Theodore Littler
Assessor
City Hall
Providence, Rhode Island 02903

Dear Mr. Littler:

Through my research I have learned that the billboard industry is not paying it's fair share of taxes to the City of Providence. Specifically, dual faced billboards along Route 95 that can earn as much as $150,000 annually in income only pay the City of Providence an average of less than $50.00. According to the information which your office provided to me, the average billboard is assessed at a value of approximately $800. It is my understanding that the billboard industry claims their billboards have a much higher value on the occasions in which the state has tried to remove a sign. The industry has claimed that a single billboard has a value greater than $25,000.

Certainly, these figures are alarming and should be investigated. My hope is that you will investigate these discrepancies and review the following:

1. How billboards are assessed and taxed?
2. Has the industry been truthful in filling out tax reports to the City?
3. Does the billboard industry owe the city any back taxes or penalties?
4. Are all billboards being taxed?

I strongly recommend the Assessors office dedicate resources to examining this issue. Potentially, hundreds of thousands of dollars of tax revenue are not being collected by the City of Providence.

I hope you will contact me as soon as possible to discuss this important matter.

Sincerely,

Joshua N. Fenton

Joshua N. Fenton
Councilman - Ward 3

JNF/r
CC Mayor Vincent A. Cianci, Jr.
Councilman David G. Dillon

City of Providence

Rhode Island

Department of City Clerk

MEMORANDUM

DATE: April 24, 1991

TO: Theodore C. Littler, City Assessor

SUBJECT: ACCOMPANYING RESOLUTION

CONSIDERED BY: Councilman David G. Dillon, Chairman - Committee on Finance

DISPOSITION:

Chairman Dillon requests your attendance at the next scheduled meeting of the above named Committee to be held Monday, April 29, 1991 at 4:30 o'clock P.M. in Committee Room "A", City Clerk's Department.

The Committee requests your opinion on the Resolution relative to taxing billboards.

Rosemary Meehan

City Clerk

IRVING BROUSKY
CITY SOLICITOR

VINCENT A. CIANCI, JR.
MAYOR

Department of Law

"Building Pride In Providence"

M E M O R A N D U M

TO: The Honorable James A. Petrosinelli

FROM: Frederick W. Stolle, Jr., Special Counsel

DATE: May 8, 1991

RE: RESOLUTION APPROVED MAY 2, 1991 REQUESTING THAT, INTER ALIA,..."THE CITY SOLICITOR SHOULD INVESTIGATE TO DETERMINE IF THE BILLBOARD INDUSTRY HAS UNDERVALUED THEIR BILLBOARDS AND WHETHER THE BILLBOARD INDUSTRY OWES BACK TAXES TO THE CITY OF PROVIDENCE..."

I. ISSUE: Has the billboard industry undervalued its billboards for tax assessment purposes?

The City Council is empowered to levy property taxes by and through R.I.G.L. Section 44-5-1. See Exhibit I. The taxing power of the City of Providence is strictly construed under the legislation as passed by the General Assembly. Maggiacomo v. DiVincenzo, 410 A.2d 1332 (1980); see Exhibit II.

Under R.I.G.L. Section 44-5-12, the tax assessor is required to assess all property liable to taxation at its full and fair cash value. See Exhibit III. Said valuation is certified as the "tax roll" by the assessor not later than the 15th day of June. See Exhibit IV, R.I.G.L. Section 44-5-2. It is upon the basis of the certified tax roll that the City Council levies property tax.

In order to assist the tax assessor in creating the tax roll, the General Assembly enacted R.I.G.L. Section 44-5-16, see Exhibit V, which requires each taxpayer to submit an accounting of his or her ratable property under oath. Said accounting takes the form of the so-called "Annual Return," see Exhibit VI, which is to be sworn to as a true and full account and valuation of all the ratable estate owned by the taxpayer. In the event that the taxpayer fails to make such an accounting, the legislative scheme denies such taxpayer any remedy in the event of overtaxation.

In terms of the account, the tax assessor is not bound by same; and the assessor is empowered to assess a taxpayer's ratable estate at what he or she deems its full and fair cash value.

R.I.G.L. Section 44-5-7; see Exhibit VII. In assessing property, the tax assessor is not bound by any particular formula, but he is exercising his sound discretion. Rosen v. Restrepo,, 380 A.2d 960 (1977), see Exhibit VIII.

Therefore, in appraising value, a number of approaches may be employed. For example, three approaches to real estate value are: comparable sales, income/expense and cost less depreciation. In the area of tangible property, three possible approaches are: cost less depreciation, industry schedules of value and salvage value. Depending on the approach, and certain assumptions made, the value of certain property may greatly vary.

In terms of billboards, a view of certain accounts reveals that the tax assessor's office employed the "State of Indiana Approved Schedule for Validation of Outdoor Advertising Signs." Such schedule is a broad-based compilation of value as employed by the State of Indiana. In adopting such schedule, the tax assessor was exercising his discretion. This approach may not result in the highest value assigned to billboards, but it is a rationale approach.

In recent times, certain condemnation proceedings have revealed that the "cost less depreciation" formula may result in a higher value which is more accurate than industry schedules. It is the position of the tax assessor of the City of Providence that such approach shall be employed for the assessment on December 31, 1991 after review.

Thus, it can be seen that the industry has suggested value in light of a certain schedule that has been acceptable by the assessor. It cannot be said that the industry "undervalued" its property, but it can be said that a different value formula may result in higher assessments and that such "cost less depreciation" approach will be employed in future assessments.

II. ISSUE: Does the billboard industry owe back taxes to the City of Providence?

As can be gleaned from the foregoing, the law of the State of Rhode Island provides that the tax assessor shall make an assessment of property at its full and fair value. The issue presented presupposes that the so-called "billboard industry" created false value for its signage and tricked the tax assessor. Such presupposition fails to understand the respective roles of the taxpayer and the tax assessor as discussed above.

In terms of the issue of back taxes generally, R.I.G.L. Section 44-5-33 permits assessment against real estate which has been omitted or taxed erroneously or illegally assessed for a period within six (6) years. See Exhibit IX. No such comparable legislation exists for tangible property under current law.

Insofar as the General Assembly is silent as to the assessment of back taxes for tangible property, the tax assessor has no power to make such assessment.

Respectfully submitted,

FREDERICK W. STOLLE, JR.
Office of the City Solicitor

FWS:cmr

Exhibit (1)

44-5-1. Powers of town electors to levy — Date of assessment of valuations. — The electors of any town qualified to vote on any proposition to impose a tax or for the expenditure of money, when legally assembled, may levy a tax for the purposes authorized by law, on the ratable property of the town, either in a sum certain, or in a sum not less than a certain sum and not more than a certain sum. The tax shall be apportioned upon the assessed valuations as determined by the assessors of the town as of the thirty-first day of December in each year at twelve (12) o'clock midnight, the date being known as the date of assessment of town valuations.

History of Section.
G.L. 1896, ch. 46, § 1; G.L. 1909, ch. 58, § 1; P.L. 1919, ch. 1735, § 1; G.L. 1923, ch. 60, § 1; P.L. 1932, ch. 1944, § 2; G.L. 1938, ch. 31, § 1; P.L. 1949, ch. 2330, § 2; G.L. 1956, § 44-5-1; P.L. 1960, ch. 52, § 27 (unconstit.); P.L. 1961, ch. 3, § 1; P.L. 1969, ch. 178, § 1.

Reenactments. The 1988 Reenactment (P.L. 1988, ch. 84, § 1) substituted "The tax" for "Said tax" and "the date" for "said date" in the last sentence.

Cross References. Judicial order assessing tax to pay judgment against town, § 45-15-7.

Notice of town meeting to make tax, § 45-3-12.

Power of town to tax property, § 45-2-2.

Comparative Legislation. Local levy and assessment:

Conn. Gen. Stat., §§ 12-40 et seq., 12-122 et seq.

Mass. Ann. Laws ch. 59, § 2 et seq.

NOTES TO DECISIONS

ANALYSIS

1. Levy.
2. Period covered by tax.
3. Time of assessment.
4. Property taxed.
5. Apportionment of tax.

1. Levy.
The word "levy" is not used in the same sense throughout the statutes. Parker v. MacCue, 54 R.I. 270, 172 A. 725 (1934); Kettelle v. MacCue, 54 R.I. 276, 172 A. 728 (1934).

The qualified electors levy a tax when they vote to impose it. Parker v. MacCue, 54 R.I. 270, 172 A. 725 (1934); Kettelle v. MacCue, 54 R.I. 276, 172 A. 728 (1934).

2. Period Covered by Tax.
This statute does not define the period that a tax is intended to cover or fix a definite fiscal year for the cities or towns. Industrial Trust Co. v. Wilson, 58 R.I. 378, 192 A. 821 (1937).

3. Time of Assessment.
Before the 1919 amendment, cities and towns could order the time tax should be assessed. Industrial Trust Co. v. Wilson, 58 R.I. 378, 192 A. 821 (1937).

4. Property Taxed.
Failure of vote for tax to mention the property on which tax was based did not invalidate tax since this section provided that tax should be on the ratable property. Mowry v. Mowry, 20 R.I. 74, 37 A. 306 (1897).

5. Apportionment of Tax.
Taxes assessed by towns with different fiscal periods would not be apportioned between deceased life tenant and remaindermen where life tenant died before assessment date, but would be charged entirely to remaindermen. Industrial Trust Co. v. Wilson, 58 R.I. 378, 192 A. 821 (1937).

Collateral References. Additional tax levy necessitated by failure of some property owners to pay their proportions of original levy, power to make, 79 A.L.R. 1157.

Declaratory judgment proceedings to determine validity and application of levy, 132 A.L.R. 1134; 11 A.L.R.2d 359.

Prohibition to prevent levy of tax, 115 A.L.R. 20; 159 A.L.R. 627.

Quo warranto to test regularity of proceedings under valid statute, 109 A.L.R. 327.

Surplus, treatment of, in making tax levy under budget, 126 A.L.R. 891.

Uncollected taxes for previous years as de-

Exhibit (2)

Edward L. MAGGIACOMO et ux.

v.

Armando DiVINCENZO, Tax Assessor of the City of Cranston.

Nos. 78-297-Appeal, 78-387-Appeal.

Supreme Court of Rhode Island.

Jan. 23, 1980.

City tax assessor appealed from judgment of the Superior Court, Providence and Bristol Counties, Murray, J., which granted summary relief to taxpayers in a suit challenging his assessment of real estate and personal property taxes. The Supreme Court, Kelleher, J., held that city tax assessor exceeded his authority when he set tax rate at amount, if fully collected, that would yield revenue above maximum levy authorized by city council.

Appeal denied and dismissed; judgment affirmed.

1. Statutes ⇐217.2

In construing statutes, task of Supreme Court is to glean legislative intent from consideration of legislation in its entirety.

2. Statutes ⇐245

Taxing statutes are to be strictly construed with doubts resolved in favor of taxpayer.

3. Taxation ⇐309

Term "assessment" may be used in narrow sense to mean value placed upon property for purpose of taxation of official appointed for that purpose, or in its broader sense to include within its context all those steps involved in imposition of tax on property.

See publication Words and Phrases for other judicial constructions and definitions.

4. Taxation ⇐493.4

Within context of statute allowing any person aggrieved by assessment of taxes to seek redress in superior court, term "assessment" refers to entire plan or statutory scheme for imposition and collection of taxes, including calculation of the rate. Gen. Laws 1956, § 44-5-26.

5. Municipal Corporations ⇐958

Under city charter, city council and not the assessor has authority to levy a tax and fix its amount.

6. Municipal Corporations ⇐971(1)

City tax assessor exceeded his authority when he set tax rate at amount, if fully collected, that would yield revenue above maximum levy authorized by city council.

7. Municipal Corporations ⇐958

Statute which stipulates that tax administrator be notified of pendency of proceedings to determine constitutionality or construction of any tax statute or of assessment of any tax applies only to challenges being made concerning taxes due to state, and does not apply to field of municipal taxation. Gen.Laws 1956, § 44-1-13.

Joseph T. Feeley, Providence, for plaintiffs.

Jeremiah S. Jeremiah, Jr., City Sol., Cranston, John D. Biafore, Asst. City Sol., Providence, for defendant.

OPINION

KELLEHER, Justice.

Armando DiVincenzo is the tax assessor for the city of Cranston. He is before us on a consolidated appeal that revolves around certain actions taken by him as assessor during the years 1977 and 1978. His conduct during 1977 was challenged by a class action commenced by the plaintiffs, Edward and Ingeborg Maggiacomo, on their own behalf and that of all taxpayers similarly situated. When DiVincenzo repeated in 1978 what he had done in 1977, the plaintiffs instituted a second class action. However, they abandoned the class-action aspects of this particular suit and ultimately sought relief solely for themselves. Subsequently, the plaintiffs' motion for a summary judgment in each suit was granted. Hereinafter, we shall refer to the plaintiffs as "the taxpayers" and the defendant, DiVincenzo, as "the assessor."

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The factual background giving rise to this controversy is undisputed. On May 16, 1977, the Cranston City Council, acting pursuant to the powers granted it by G.L. 1956 (1970 Reenactment) § 44–5–1 and sec. 6.11 of the Cranston City Charter, adopted a resolution that levied a tax on all ratable real estate and tangible personal property located within the city. This resolution authorized the assessor to set a tax rate that could generate revenues of not less than $24,775,928.48 and not more than $25,000,000. Once the resolution passed, the assessor set a tax rate of $67 per $1,000 of assessed valuation. The potential tax revenue that might be realized by this rate would have exceeded the council's $25,000,000 maximum by $915,417.06.

A year later history repeated itself. The city council by its resolution of May 15, 1978, directed the assessor to fix a tax rate that could generate revenue of at least $28,798,173.95 but no more than $28,850,000. Ever vigilant in his duties and true to his custom, the assessor fixed a rate that might have generated approximately $1,250,000 more than the $28,850,000 maximum established by the council.

In Superior Court the assessor conceded that, in setting the tax rate, he had factored into his calculations a "collection ratio" that made allowance for anticipated uncollectible taxes. He further revealed that without a cushion for the uncollectibles, the 1977 rate would have been $64.59 instead of $67 per $1,000 of assessed valuation. The 1978 tax rate was set at $76.95 per $1,000 of assessed valuation, whereas if the assessor had deleted the "collection ratio" factor, the rate would have been reduced by $3.25. The assessor admitted that ever since assuming office, he had set a tax rate that contained an allowance for the uncollectible taxes. He justified this practice by arguing that even though he lacked the power to levy a tax, he had the duty to set a rate high enough to guarantee that the tax collector would receive an amount at least equal to the minimum sum authorized by each levy.

The taxpayers, on the other hand, claim that when the assessor set a rate which could yield a return in excess of the maximum specified in the levy, he was usurping the power of the council, specifically, its power to levy a tax. The various justices of the Superior Court who considered the taxpayers' motions for summary judgment found this argument most persuasive. The assessor is now before us attempting to point out where the trial justices erred.

The taxpayers sought relief from the inclusion of the cushion for uncollectibles by filing a petition in compliance with the terms of G.L. 1956 (1970 Reenactment) § 44–5–26, that in its pertinent part allows "[a]ny person aggrieved on any ground whatsoever by any assessment of taxes against him in any city or town * * *" to seek redress in the Superior Court. Before us the assessor, as he did in the Superior Court, focuses his attention on that portion of § 44–5–26 which speaks about "any assessment of taxes." According to the assessor, when the Legislature alluded to the "assessment of taxes," it was affording judicial relief only to those who were complaining about the valuation placed on their property by the assessor. The taxpayers, on the other hand, take the position that "assessment of taxes" encompasses within it the entire statutory method of imposing municipal taxes, including the assessor's duty to set a rate that will comply with the council's mandate.

[1, 2] At the outset, we acknowledge the earlier pronouncements of this court regarding statutory construction. Based upon these guidelines, our task is to glean the legislative intent from a consideration of this legislation in its entirety. *Narragansett Electric Co. v. Harsch*, 117 R.I. 395, 402, 368 A.2d 1194, 1199 (1977), *citing Mason v. Bowerman Bros., Inc.*, 95 R.I. 425, 431, 187 A.2d 772, 776 (1963). Furthermore, we are mindful of this court's mandate that "taxing statutes are to be strictly construed" with doubts resolved in favor of the taxpayer. *Van Alen v. Stein*, R.I., 376 A.2d 1383, 1389 (1977); *Potowomut Golf Club, Inc. v. Norberg*, 114 R.I. 589, 592, 337 A.2d 226, 227 (1975).

[3] Turning now to chapter 5 of title 44, we find that the words "assess" and "as-

sessment" are used somewhat imprecisely.[1] In addition, there is general recognition that the term "assessment" may be used in a narrow sense to mean the value placed upon property for the purpose of taxation by an official appointed for that purpose, or in its broader sense to include within its context all those steps involved in the imposition of a tax on property. *Philadelphia, Baltimore and Washington R. R. v. Mayor and Council*, 30 Del.Ch. 213, 221, 57 A.2d 759, 764 (1948); *Commercial National Bank v. Board of County Commissioners*, 201 Kan. 280, 284–85, 440 P.2d 634, 637–38 (1968); *State ex rel. Halferty v. Kansas City Power & Light Co.*, 346 Mo. 1069, 1078, 145 S.W.2d 116, 120–21 (1940); *Moore v. Johnson Service Co.*, W.Va., 219 S.E.2d 315, 319–20, 322 (1975); *Prentice v. Ashland County*, 56 Wis. 345, 347, 14 N.W. 297, 298 (1882). Furthermore, we are still impressed by the relevance of Professor Cooley's sagacious observation: "Assessment proper includes valuation but valuation alone is not the assessment but instead only its most important element." 3 Cooley, *The Law of Taxation* § 1044 at 2114 (4th ed. 1924).

[4] Parenthetically, we would point out that the word "valuation" never appears in the pertinent portion of § 44–5–26 and that the word "assessment" is used in juxtaposition to "taxes." Having in mind that the term "assessment" as used in our taxing statutes carries with it a variety of meanings and noting also the statutory language before us, to wit, "[a]ny person aggrieved on any ground whatsoever by any assessment of taxes * * *," we have no hesitancy in holding that within the context of § 44–5–26 the term "assessment" refers to the entire plan or statutory scheme for the imposition and collection of taxes, including the calculation of the rate.

We turn next to the assessor's contention that his application of a collection ratio to the levy ordered by the city council neither violated any express or implied rule of law nor represented an arbitrary abuse of discretion. On the contrary, he contends with great vigor that his rate-setting activities were necessarily implied from sec. 6.11 of the Cranston City Charter.[2] We think otherwise.

The obvious purpose of sec. 6.11 is to effectuate the collection of tax revenue needed to satisfy the financial demands that are delineated in the city's operating budget. The assessor is obligated to set a rate that will bring in the minimum but in no event exceed the maximum amount called for in the levy resolution. The assessor's concern for the uncollectibles is commendable, but Cranston's charter specifically provides for this concern. Section 6.02 requires the assessor to provide the director of finance with an estimate of the funds to be realized from taxation, "taking into account the probable rate of tax delinquency and other factors affecting tax collection" so that the director may prepare a preliminary estimate of the cost of municipal operations "in the ensuing fiscal year."[3] Section 6.03 requires the major, with the assistance of the director of finance and other city officials, to submit to the city council not later than April 1 of each year an operating budget that includes "and estimate of receipts for the ensuing fiscal year from taxes * * *." Section 6.09 authorizes the council to modify the proposed budget in any way it sees fit but then specifically provides: "If the action of the

1. *See, e. g.*, G.L. 1956 (1970 Reenactment) § 44–5–1 (assessment of valuations); § 44–5–11 and § 44–5–13 (assess valuations); § 44–5–16 (assessment on real property); § 44–5–22 (assessing the tax); § 44–5–23, § 44–5–24, and § 44–5–26 (assessment of taxes).

2. Cranston, R.I., City Charter, § 6.11 (1962), provides in pertinent part that

> "the council shall adopt and cause to be delivered to the city assessor a resolution levying and ordering the assessment and collection of a tax on ratable real estate and tangible personal property *at such a rate to be fixed by the city assessor* as provided by law *as will* * * * *amount in the aggregate to a minimum and maximum to be set forth in the resolution. The minimum shall be equal to the receipts from taxes on property as estimated in the operating budget as adopted and the maximum shall be as determined by the council.*" (Emphasis added.)

3. Cranston operates on a fiscal year which begins on July 1 and ends on the following June 30.

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council results in raising the total of authorized expenditures above the total of estimated receipts the council must provide by ordinance an equivalent in increased receipts."

[5] A review of Cranston's charter clearly shows that the assessor's concern for the uncollectibles is to be made known and accounted for before the budget is submitted to and approved by the council. It is the council, acting pursuant to sec. 6.11, and not the assessor, which has the authority to levy a tax and fix its amount.

While this court has never decided the exact parameters of the assessor's duty vis-à-vis the levy, numerous other jurisdictions have held that the tax assessor has no right to increase the amount levied. In Massachusetts, for instance, where assessors since 1785 have been permitted by statute [4] to add a 5 percent overlay to the amount voted, the Supreme Judicial Court held that "assessing more than five per cent, above the sums voted by the town to be raised, makes the assessment illegal and void * * *." *Libby v. Burnham*, 15 Mass. 144, 147 (1818). In *Cone v. Forest*, 126 Mass. 97, 97–98 (1879), the amount levied was $1,800.11. The 5 percent permitted by statute would have allowed an additional $90. Instead, assessors added $115.16, and the court held that the $25.16 in excess of the statutory limit was illegal.

In *State v. Bentley*, 23 N.J.L. 532 (1852), the assessor added to the amount authorized $998.71 for contingencies. The New Jersey Supreme Court explained that the assessor "did this in the exercise of what he considered a discretion vested in him by established custom" and because "these additional amounts were necessary to cover losses which were to be anticipated in collecting the taxes * * *." The court, however, found "[t]his proceeding on the part of the assessor was illegal" and stated unequivocally that "[t]he law vests in assessors no such authority. * * * Assessors and collectors are the mere instruments to execute the mandates which emanate from these [levying] bodies. The taxing power in every case may, and must, be relied on to provide for contingencies of this kind. The power assumed in this case by the assessor is of too arbitrary and dangerous a character to be countenanced for a moment * *." *Id.* at 545. *E. g., Huse v. Merriam*, 2 Me. 375 (1823); *Taft v. Barrett*, 58 N.H. 447 (1878); *State v. Flavell and Fredericks*, 24 N.J.L. 370 (1854); *St. Louis & S. F. R. R. v. Thompson*, 35 Okl. 138, 128 P. 685 (1912).

[6] On the basis of the foregoing discussion, we find no persuasive authority either in our reading of the General Laws, the Cranston City Charter, or pertinent case law that would permit the assessor to add an amount to the levy for future uncollectible taxes. We conclude, therefore, that the assessor exceeded his authority when he set the tax rate at an amount, if fully collected, that would yield revenue above the maximum levy authorized by the city council.

[7] A final but brief comment is directed to the assessor's argument that the Superior Court was barred from considering the taxpayers' motions for summary judgment because they failed to notify Rhode Island's tax administrator of the pendency of these suits. Concededly, § 44-1-13 stipulates that whenever "the constitutionality or construction of any tax statute or the validity of the assessment of any tax is in question, the court before which such proceeding is pending shall not proceed * *" until the administrator has been notified of the pendency of the controversy so that the "administrator may appear and be heard with reference thereto." We would point out that this statute, when it is looked at in conjunction with the other portions of chap-

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ter 1 of title 44, is relevant only when the challenge being made concerns a tax that may be due the state. It has no applicability to the field of municipal taxation.

Accordingly, in each case the defendant's appeal is denied and dismissed, and the judgment appealed from is affirmed.

STATE

v.

Rose SMALL.

No. 78-109-C.A.

Supreme Court of Rhode Island.

Feb. 1, 1980.

Defendant was convicted before the Superior Court, Providence and Bristol Counties, Needham, J., of simple assault, and she appealed. The Supreme Court, Weisberger, J., held that: (1) even if it had been properly requested defendant would not have been entitled to a jury instruction on the "defense of a third person" justification, and (2) sentence of three months of incarceration for physically attacking a police officer during a shootout was not without justification and was not grossly disparate from sentences generally imposed for similar offenses.

Affirmed and remitted.

Bevilacqua, C. J., did not participate.

1. Criminal Law ⇐1038.2

Defendant who, in moving for a new trial after her conviction, asserted for first time that her assault on officer was justified as an act in defense of a third person could not claim on appeal that trial justice's failure to give an instruction on this justification was erroneous. Super.R.Crim.P., Rule 30.

2. Assault and Battery ⇐67

Even if an arrest is unlawful, the arrest may not be resisted forcibly. Gen. Laws 1956, § 12-7-10.

3. Assault and Battery ⇐68

Where one officer was in uniform, a second officer, although in plain clothes, identified himself as a member of police and ordered defendant's husband arrested, and husband then initiated exchange of gunfire, the defendant, who was convicted of simple assault, was not authorized to enter the struggle to resist on side of her husband. Gen.Laws 1956, § 12-7-10.

4. Criminal Law ⇐1147

Role of the Supreme Court in reviewing sentences is an extremely limited one; the court will interfere with the discretion of the trial court only when the sentence is without justification and grossly disparate from sentences generally imposed for similar offenses.

5. Assault and Battery ⇐100
Criminal Law ⇐1206(2)

Sentence of three months of incarceration for physically attacking a police officer during a shootout was not without justification and was not grossly disparate from sentences generally imposed for similar offenses, even though defendant had no prior criminal record.

6. Criminal Law ⇐1208(1)

It is not excessive per se to impose a prison sentence on a first offender.

7. Criminal Law ⇐986(3)

Where sentence obviously avoids any suspicion under relevant standard, it would not significantly advance cause of enhanced justice in sentencing to require a statement of reasons as a sine qua non of the validity of the sentence.

Dennis J. Roberts, II, Atty. Gen., Maureen E. McKenna, Sp. Asst. Atty. Gen., for plaintiff.

Joseph A. Bevilacqua, Jr., Providence, for defendant.

Edward L. MAGGIACOMO et ux.

v.

Armando DiVINCENZO, Tax Assessor of the City of Cranston.

Nos. 78-297-Appeal, 78-387-Appeal.

Supreme Court of Rhode Island.

Jan. 23, 1980.

City tax assessor appealed from judgment of the Superior Court, Providence and Bristol Counties, Murray, J., which granted summary relief to taxpayers in a suit challenging his assessment of real estate and personal property taxes. The Supreme Court, Kelleher, J., held that city tax assessor exceeded his authority when he set tax rate at amount, if fully collected, that would yield revenue above maximum levy authorized by city council.

Appeal denied and dismissed; judgment affirmed.

1. Statutes ⇐217.2

In construing statutes, task of Supreme Court is to glean legislative intent from consideration of legislation in its entirety.

2. Statutes ⇐245

Taxing statutes are to be strictly construed with doubts resolved in favor of taxpayer.

3. Taxation ⇐309

Term "assessment" may be used in narrow sense to mean value placed upon property for purpose of taxation of official appointed for that purpose, or in its broader sense to include within its context all those steps involved in imposition of tax on property.

See publication Words and Phrases for other judicial constructions and definitions.

4. Taxation ⇐493.4

Within context of statute allowing any person aggrieved by assessment of taxes to seek redress in superior court, term "assessment" refers to entire plan or statutory scheme for imposition and collection of taxes, including calculation of the rate. Gen. Laws 1956, § 44-5-26.

5. Municipal Corporations ⇐958

Under city charter, city council and not the assessor has authority to levy a tax and fix its amount.

6. Municipal Corporations ⇐971(1)

City tax assessor exceeded his authority when he set tax rate at amount, if fully collected, that would yield revenue above maximum levy authorized by city council.

7. Municipal Corporations ⇐958

Statute which stipulates that tax administrator be notified of pendency of proceedings to determine constitutionality or construction of any tax statute or of assessment of any tax applies only to challenges being made concerning taxes due to state, and does not apply to field of municipal taxation. Gen.Laws 1956, § 44-1-13.

Joseph T. Feeley, Providence, for plaintiffs.

Jeremiah S. Jeremiah, Jr., City Sol., Cranston, John D. Biafore, Asst. City Sol., Providence, for defendant.

OPINION

KELLEHER, Justice.

Armando DiVincenzo is the tax assessor for the city of Cranston. He is before us on a consolidated appeal that revolves around certain actions taken by him as assessor during the years 1977 and 1978. His conduct during 1977 was challenged by a class action commenced by the plaintiffs, Edward and Ingeborg Maggiacomo, on their own behalf and that of all taxpayers similarly situated. When DiVincenzo repeated in 1978 what he had done in 1977, the plaintiffs instituted a second class action. However, they abandoned the class-action aspects of this particular suit and ultimately sought relief solely for themselves. Subsequently, the plaintiffs' motion for a summary judgment in each suit was granted. Hereinafter, we shall refer to the plaintiffs as "the taxpayers" and the defendant, DiVincenzo, as "the assessor."

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The factual background giving rise to this controversy is undisputed. On May 16, 1977, the Cranston City Council, acting pursuant to the powers granted it by G.L. 1956 (1970 Reenactment) § 44–5–1 and sec. 6.11 of the Cranston City Charter, adopted a resolution that levied a tax on all ratable real estate and tangible personal property located within the city. This resolution authorized the assessor to set a tax rate that could generate revenues of not less than $24,775,928.48 and not more than $25,000,000. Once the resolution passed, the assessor set a tax rate of $67 per $1,000 of assessed valuation. The potential tax revenue that might be realized by this rate would have exceeded the council's $25,000,000 maximum by $915,417.06.

A year later history repeated itself. The city council by its resolution of May 15, 1978, directed the assessor to fix a tax rate that could generate revenue of at least $28,798,173.95 but no more than $28,850,000. Ever vigilant in his duties and true to his custom, the assessor fixed a rate that might have generated approximately $1,250,000 more than the $28,850,000 maximum established by the council.

In Superior Court the assessor conceded that, in setting the tax rate, he had factored into his calculations a "collection ratio" that made allowance for anticipated uncollectible taxes. He further revealed that without a cushion for the uncollectibles, the 1977 rate would have been $64.59 instead of $67 per $1,000 of assessed valuation. The 1978 tax rate was set at $76.95 per $1,000 of assessed valuation, whereas if the assessor had deleted the "collection ratio" factor, the rate would have been reduced by $3.25. The assessor admitted that ever since assuming office, he had set a tax rate that contained an allowance for the uncollectible taxes. He justified this practice by arguing that even though he lacked the power to levy a tax, he had the duty to set a rate high enough to guarantee that the tax collector would receive an amount at least equal to the minimum sum authorized by each levy.

The taxpayers, on the other hand, claim that when the assessor set a rate which could yield a return in excess of the maximum specified in the levy, he was usurping the power of the council, specifically, its power to levy a tax. The various justices of the Superior Court who considered the taxpayers' motions for summary judgment found this argument most persuasive. The assessor is now before us attempting to point out where the trial justices erred.

The taxpayers sought relief from the inclusion of the cushion for uncollectibles by filing a petition in compliance with the terms of G.L. 1956 (1970 Reenactment) § 44–5–26, that in its pertinent part allows "[a]ny person aggrieved on any ground whatsoever by any assessment of taxes against him in any city or town * * *" to seek redress in the Superior Court. Before us the assessor, as he did in the Superior Court, focuses his attention on that portion of § 44–5–26 which speaks about "any assessment of taxes." According to the assessor, when the Legislature alluded to the "assessment of taxes," it was affording judicial relief only to those who were complaining about the valuation placed on their property by the assessor. The taxpayers, on the other hand, take the position that "assessment of taxes" encompasses within it the entire statutory method of imposing municipal taxes, including the assessor's duty to set a rate that will comply with the council's mandate.

[1, 2] At the outset, we acknowledge the earlier pronouncements of this court regarding statutory construction. Based upon these guidelines, our task is to glean the legislative intent from a consideration of this legislation in its entirety. *Narragansett Electric Co. v. Harsch*, 117 R.I. 395, 402, 368 A.2d 1194, 1199 (1977), *citing Mason v. Bowerman Bros., Inc.*, 95 R.I. 425, 431, 187 A.2d 772, 776 (1963). Furthermore, we are mindful of this court's mandate that "taxing statutes are to be strictly construed" with doubts resolved in favor of the taxpayer. *Van Alen v. Stein*, R.I., 376 A.2d 1383, 1389 (1977); *Potowomut Golf Club, Inc. v. Norberg*, 114 R.I. 589, 592, 337 A.2d 226, 227 (1975).

[3] Turning now to chapter 5 of title 44, we find that the words "assess" and "as-

sessment" are used somewhat imprecisely.[1] In addition, there is general recognition that the term "assessment" may be used in a narrow sense to mean the value placed upon property for the purpose of taxation by an official appointed for that purpose, or in its broader sense to include within its context all those steps involved in the imposition of a tax on property. *Philadelphia, Baltimore and Washington R. R. v. Mayor and Council*, 30 Del.Ch. 213, 221, 57 A.2d 759, 764 (1948); *Commercial National Bank v. Board of County Commissioners*, 201 Kan. 280, 284–85, 440 P.2d 634, 637–38 (1968); *State ex rel. Halferty v. Kansas City Power & Light Co.*, 346 Mo. 1069, 1078, 145 S.W.2d 116, 120–21 (1940); *Moore v. Johnson Service Co.*, W.Va., 219 S.E.2d 315, 319–20, 322 (1975); *Prentice v. Ashland County*, 56 Wis. 345, 347, 14 N.W. 297, 298 (1882). Furthermore, we are still impressed by the relevance of Professor Cooley's sagacious observation: "Assessment proper includes valuation but valuation alone is not the assessment but instead only its most important element." 3 Cooley, *The Law of Taxation* § 1044 at 2114 (4th ed. 1924).

[4] Parenthetically, we would point out that the word "valuation" never appears in the pertinent portion of § 44–5–26 and that the word "assessment" is used in juxtaposition to "taxes." Having in mind that the term "assessment" as used in our taxing statutes carries with it a variety of meanings and noting also the statutory language before us, to wit, "[a]ny person aggrieved on any ground whatsoever by any assessment of taxes * * *," we have no hesitancy in holding that within the context of § 44–5–26 the term "assessment" refers to the entire plan or statutory scheme for the imposition and collection of taxes, including the calculation of the rate.

We turn next to the assessor's contention that his application of a collection ratio to the levy ordered by the city council neither violated any express or implied rule of law nor represented an arbitrary abuse of discretion. On the contrary, he contends with great vigor that his rate-setting activities were necessarily implied from sec. 6.11 of the Cranston City Charter.[2] We think otherwise.

The obvious purpose of sec. 6.11 is to effectuate the collection of tax revenue needed to satisfy the financial demands that are delineated in the city's operating budget. The assessor is obligated to set a rate that will bring in the minimum but in no event exceed the maximum amount called for in the levy resolution. The assessor's concern for the uncollectibles is commendable, but Cranston's charter specifically provides for this concern. Section 6.02 requires the assessor to provide the director of finance with an estimate of the funds to be realized from taxation, "taking into account the probable rate of tax delinquency and other factors affecting tax collection" so that the director may prepare a preliminary estimate of the cost of municipal operations "in the ensuing fiscal year."[3] Section 6.03 requires the major, with the assistance of the director of finance and other city officials, to submit to the city council not later than April 1 of each year an operating budget that includes "and estimate of receipts for the ensuing fiscal year from taxes * * *." Section 6.09 authorizes the council to modify the proposed budget in any way it sees fit but then specifically provides: "If the action of the

1. *See, e. g.* G.L. 1956 (1970 Reenactment) § 44–5–1 (assessment of valuations); § 44–5–11 and § 44–5–13 (assess valuations); § 44–5–16 (assessment on real property); § 44–5–22 (assessing the tax); § 44–5–23, § 44–5–24, and § 44–5–26 (assessment of taxes).

2. Cranston, R.I., City Charter, § 6.11 (1962), provides in pertinent part that

> "the council shall adopt and cause to be delivered to the city assessor a resolution levying and ordering the assessment and collection of a tax on ratable real estate and tangible personal property *at such a rate to be fixed by the city assessor* as provided by law *as will* * * * *amount in the aggregate to a minimum and maximum to be set forth in the resolution. The minimum shall be equal to the receipts from taxes on property as estimated in the operating budget as adopted and the maximum shall be as determined by the council.*" (Emphasis added.)

3. Cranston operates on a fiscal year which begins on July 1 and ends on the following June 30.

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[5] A review of Cranston's charter clearly shows that the assessor's concern for the uncollectibles is to be made known and accounted for before the budget is submitted to and approved by the council. It is the council, acting pursuant to sec. 6.11, and not the assessor, which has the authority to levy a tax and fix its amount.

While this court has never decided the exact parameters of the assessor's duty vis-à-vis the levy, numerous other jurisdictions have held that the tax assessor has no right to increase the amount levied. In Massachusetts, for instance, where assessors since 1785 have been permitted by statute[4] to add a 5 percent overlay to the amount voted, the Supreme Judicial Court held that "assessing more than five per cent, above the sums voted by the town to be raised, makes the assessment illegal and void * * *." *Libby v. Burnham*, 15 Mass. 144, 147 (1818). In *Cone v. Forest*, 126 Mass. 97, 97–98 (1879), the amount levied was $1,800.11. The 5 percent permitted by statute would have allowed an additional $90. Instead, assessors added $115.16, and the court held that the $25.16 in excess of the statutory limit was illegal.

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STATE

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Affirmed and remitted.

Bevilacqua, C. J., did not participate.

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Dennis J. Roberts, II, Atty. Gen., Maureen E. McKenna, Sp. Asst. Atty. Gen., for plaintiff.

Joseph A. Bevilacqua, Jr., Providence, for defendant.

Exhibit (3)

(c) The amount levied by a city or town may exceed the five and one-half percent (5.5%) increase as specified in subsection (a) of this section if the city or town qualifies under one or more of the following provisions:

(1) The city or town forecasts or experiences a loss in total nonproperty tax revenues and the loss is certified by the department of administration.

(2) The city or town experiences or anticipates an emergency situation which causes or will cause the levy to exceed five and one-half percent (5.5%). In the event of an emergency or an anticipated emergency, the city or town shall notify the auditor general who shall certify the existence or anticipated existence of the emergency.

(3) A city or town forecasts or experiences debt services expenditures which are more than one hundred five and one-half percent (105.5%) of the prior year's debt service expenditures and which are the result of bonded debt issued in a manner consistent with general law or special act. In the event of the debt service increase, the city or town shall notify the department of administration which shall certify the debt service increase above one hundred five and one-half percent (105.5%) of the prior year's debt service. No action approving or disapproving exceeding a levy cap under the provisions of this section shall affect the requirement to pay obligations as described in subsection (d) of this section.

(4) Any levy pursuant to subsection (c) of this section in excess of the five and one-half percent (5.5%) shall be approved by a majority vote of the governing body of the city or town or in the case of a city or town having a financial town meeting, the majority of the electors present and voting at the town financial meeting shall approve the excess levy.

(d) Nothing contained herein shall constrain the payment of present or future obligations as prescribed by § 45-12-1, as amended, and all taxable property in each city or town shall be subject to taxation without limitation as to rate or amount to pay general obligation bonds or notes of the city or town except as otherwise specifically provided by law or charter.

History of Section.
P.L. 1985, ch. 182, § 8; P.L. 1986, ch. 5, § 1; P.L. 1986, ch. 13, § 1; P.L. 1987, ch. 118, art. 7, § 6; P.L. 1989, ch. 126, art. 46, § 1.

Compiler's Notes. In 1989, the law revision officer of the joint committee on legislative services, pursuant to 43-2-2.1, substituted "office of municipal affairs" for "division of local government assistance" in two places in subsection (b).

44-5-12. Assessment at full and fair cash value. — All property liable to taxation shall be assessed at its full and fair cash value, or at a uniform percentage thereof, not to exceed one hundred percent (100%), to be determined by the assessors in each town or city: provided, however, that in assessing real estate which is classified as farm land, forest, or open space land in accordance with chapter 27 of this title the assessors shall consider no factors in

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Municipalities shall make available to every land owner whose property is taxed under the provisions of this section a document which may be signed before a notary public containing language to the effect that they are aware of the additional taxes imposed by the provisions of § 44-5-39 in the event that they use land classified as farm forest, or open space land for another purpose.

History of Section.
G.L. 1896, ch. 46, § 3; G.L. 1909, ch. 58, § 3; G.L. 1923, ch. 60, § 3; G.L. 1938, ch. 31, § 3; G.L. 1956, § 44-5-12; P.L. 1965, ch. 115, § 1; P.L. 1968, ch. 288, § 2; P.L. 1988, ch. 84, § 95; P.L. 1990, ch. 225, § 1.

Compiler's Notes. In 1990, the compiler inserted a comma following "forest" near the end of the second paragraph.

NOTES TO DECISIONS

Analysis

3. Uniform application.
5. Restitution for illegal or void assessment.

3. Uniform Application.

Where the plaintiffs prove, not only that not all of the business tangible personal property in the city is assessed by the assessor, but that this is true also of household tangible personal property, the assessments on the business personalty of the plaintiffs are violative both of the equal protection clause of the United States Constitution, and the guarantee of R.I. Const., art. 1, § 2, requiring that the burdens of the state be fairly distributed among its citizens, but absent proof by the plaintiffs to demonstrate that the assessor intentionally sought to commit fraud or injury or selectively to discriminate against particular businesses, the trial justice properly may determine that the assessment is illegal rather than void. Oster v. Tellier, 544 A.2d 128 (R.I. 1988).

5. Restitution for Illegal or Void Assessment.

If a tax is determined to be void, an entire rebate is appropriate, but if the tax assessment is determined to be illegal, then the excessive tax paid is subject to a remittance. Where the trial justice properly concluded that assessments were not void, the trial justice appropriately denied the plaintiffs a rebate of the entire tax paid. Oster v. Tellier, 544 A.2d 128 (R.I. 1988).

Where the alternative relief sought by the plaintiffs is that recovery be allowed for the excess tax that was paid because not all classes of property liable to taxation were assessed at a single, uniform percentage of full and fair cash value, but the plaintiffs do not prove what portion of the tax paid constitutes an illegal or disproportionate tax, the plaintiffs are not entitled to a rebate of the entire tax. Oster v. Tellier, 544 A.2d 128 (R.I. 1988).

44-5-13.2. Assessment and taxation of new real estate construction in South Kingstown. — (A) Completed new construction of real estate in South Kingstown completed after any assessment date shall be liable for the payment of municipal taxes from the date the certificate of occupancy is issued or the date on which such new construction is first used for the purpose for which same was constructed, whichever is the earlier, prorated for the assessment year in which the new construction is completed. Said prorated tax shall be computed on the basis of the rate of tax applicable with respect to such property, including the applicable rate of tax in any tax district in which such property is subject to tax following completion of such new construction, on the date such property becomes liable for such prorated tax in accordance with this section.

Exhibit (1)

NOTES TO DECISIONS

1. Limitations on compensation.

Collector who filed bond required by vote at annual meeting was limited to salary voted for at same meeting, where he made no protest, even though he had been paid commission in prior year. Wood v. School Dist. No. 5, 28 R.I. 299, 67 A. 65 (1907).

Limitation on compensation passed at the same meeting where collector was elected was a condition on the election and was accepted by the collector qualifying. Barber v. Adams, 33 R.I. 481, 83 A. 262 (1912).

Limitation on compensation made some time after election of collector and after he had qualified by filing bond did not bind the collector. Barber v. Adams, 37 R.I. 323, 92 A. 757 (1915).

44-2-2. Appropriations for tax officials' association. — The general assembly may annually appropriate such sum as it may deem necessary, out of any money in the treasury not otherwise appropriated, to be expended under the supervision of the director of the department of administration to defray the expenses of the meetings and the publications and other expenses of the Rhode Island tax officials' association; and the state controller is hereby authorized and directed to draw his or her orders upon the general treasurer for the payment of the sum as may be appropriated, or so much thereof as may be from time to time required, upon receipt by the controller of proper vouchers approved by the director of administration.

History of Section.

P.L. 1915, ch. 1231, § 1; P.L. 1922, ch. 2161, § 1; G.L. 1923, ch. 416, § 47; G.L. 1938, ch. 632, § 9; impl. am. P.L. 1939, ch. 660, §§ 65, 70; impl. am. P.L. 1951, ch. 2727, art. 1, § 3; G.L. 1956, § 44-2-2; P.L. 1965, ch. 68, § 3; P.L. 1985, ch. 181, art. 61, § 17.

Reenactments. The 1988 Reenactment (P.L. 1988, ch. 84, § 1) substituted "the sum" for "such sum" near the end of the section and made minor capitalization changes.

44-2-3. Penalty for violations or neglect of duty by tax officials. — Every officer who shall neglect or refuse to perform any duty imposed on the officer in this title, or who shall not comply with the provisions thereof, or who shall in any wise knowingly violate any provisions thereof, shall be imprisoned not exceeding one year or be fined not exceeding five hundred dollars ($500), which fine, in case it be a state tax, shall be paid into the state treasury, or if a town tax, into the town treasury, or if a fire corporation tax, into the fire corporation treasury.

History of Section.

G.L. 1896, ch. 50, § 2; G.L. 1909, ch. 62, § 2; G.L. 1923, ch. 64, § 2; G.L. 1938, ch. 49, § 1; G.L. 1956, § 44-2-3.

Reenactments. The 1988 Reenactment (P.L. 1988, ch. 84, § 1) made a minor stylistic change.

Collateral References. Personal liability of tax collector of state or its subdivision for illegal taxes collected. 14 A.L.R.2d 383.

Exhibit (5)

Reenactments. The 1988 Reenactment (P.L. 1988, ch. 84, § 1) made several substitutions for the words "such" and "same" throughout the section.

Effective Dates. Section 3 of P.L. 1987, ch. 401 provides that the amendment of this section by that Act (which added the provision concerning the City of Cranston) shall take effect upon passage (July 1, 1987) and shall be retroactive to December 31, 1986.

NOTES TO DECISIONS

ANALYSIS

1. Notice mandatory.
2. Form of notice.
3. Accounts brought in before assessment date.
4. —Failure to fix time of assessment.
5. Sufficiency of account.
6. Failure to file for relief of assessment.

1. Notice Mandatory.

Proceedings for the assessment of a tax are quasi judicial and notice is essential to validity of an assessment. McTwiggan v. Hunter, 18 R.I. 776, 30 A. 962, aff'd, 19 R.I. 265, 33 A. 5 (1895).

Tax collector must prove that assessors posted public notices in compliance with the statute to show legality of assessment. Taft v. Ballou, 23 R.I. 213, 49 A. 895 (1901).

2. Form of Notice.

This section does not require separate notices to bring in accounts and to announce the assessors' meeting but rather requires that one notice serve both purposes. McTwiggan v. Hunter, 19 R.I. 265, 33 A. 5 (1895).

Notice stating time and place of meeting for receiving accounts and the penalty for refusing or neglecting to present accounts at such time would be construed as requiring persons liable to bring in accounts. Kettelle v. Warwick & Coventry Water Co., 23 R.I. 114, 49 A. 492 (1901).

3. Accounts Brought In Before Assessment Date.

Notice which required accounts to be brought in during a period before the assessment date was defective since taxpayers were deprived of chance to be heard on value of their property on assessment date. Matteson v. Warwick & Coventry Water Co., 28 R.I. 570, 68 A. 577 (1908).

Notice requiring accounts to be filed during a period a part of which was before the assessment time was defective, but where no taxpayers filed before the assessment time or objected to the defect, the illegality was waived. Greenough v. Board of Canvassers, 34 R.I. 84, 82 A. 411 (1912).

4. —Failure to Fix Time of Assessment.

Where notice fixed no time for valuation, the assessment would be deemed to have been made on the day following the last date on which the taxpayers were required to file their account; hence, the filing of account was prior to date of valuation and assessment was invalid. Horgan v. Taylor, 36 R.I. 232, 89 A. 1058 (1914).

5. Sufficiency of Account.

See notes to § 44-5-16.

6. Failure to File for Relief of Assessment.

Where a taxpayer failed to file a petition in superior court for relief from assessment or account of ratable property as required by statute, he could not raise a defense that the assessment was illegal and void in an action to recover the tax. Murray v. Rockaway Blvd. Wrecking & Lumber Co., 108 R.I. 607, 277 A.2d 922 (1971).

44-5-16. Oath to account brought in — Remedies after failure to bring in account. — (a) Every person bringing in any account shall make oath before some notary public or other person authorized to administer oaths in the place where the oath is administered that the account by that person exhibited contains, to the best of his or her knowledge and belief, a true and full account and valuation of all the ratable estate owned or possessed by him or her; and whoever neglects or refuses to bring in the account, if overtaxed, shall have no remedy therefor, except as provided in §§ 44-4-14, 44-4-15, 44-5-26 to 44-5-31, inclusive, and 44-9-19 to 44-9-24, inclusive. In case a taxpayer shall, because of illness or absence from the state, be unable to make oath to his or her account as aforesaid within the time prescribed by law, the taxpayer may, in writing,

appoint an agent to make oath to his or her account within the time prescribed by the assessors and the agent shall at the time of making the oath append his or her written appointment to the account, and for all purposes in connection with the account the taxpayer shall be deemed to have personally made the oath.

(b) No taxpayer shall be denied a right of review by means of the procedure set forth in this chapter: (1) of any assessment on his or her real property by reason of any claimed inadequacies, inaccuracies, or omissions in his or her listing of personal property, (2) nor in the case of his or her personal property by reason of any claimed inadequacies, inaccuracies, or omissions in his or her listing of real property, (3) nor in the case of real or personal property by reason of any claimed inadequacies, inaccuracies, or omissions, which are not substantial, in his or her listing of real or personal property, respectively.

History of Section.
G.L. 1896, ch. 46, § 7; G.L. 1909, ch. 58, § 7; P.L. 1915, ch. 1211, § 7; G.L. 1923, ch. 60, § 7; P.L. 1932, ch. 1945, § 2; P.L. 1935, ch. 2260, § 2; G.L. 1938, ch. 31, § 7; P.L. 1939, ch. 659, § 2; P.L. 1949, ch. 2330, § 7; G.L. 1956, § 44-5-16; P.L. 1965, ch. 61, § 1; P.L. 1968, ch. 163, § 1.

Reenactments. The 1988 Reenactment (P.L. 1988, ch. 84, § 1) added subsection designations; made several substitutions for the words "such" and "said" throughout the section; and made several minor stylistic changes in subsection (b).

NOTES TO DECISIONS

ANALYSIS

1. Legislative intent.
2. Ratable estate.
3. Sufficiency of account.
4. Description.
5. Administration of oath.
6. Corporate agents.
7. Failure to file account.
8. Valuation after failure to file account.
9. Remedies.

1. Legislative Intent.

The legislative intent is to require such sufficiency in the separation and description of the various parcels of real and personal property as to be of assistance to the assessor in assessing a tax against each such parcel. Sayles Finishing Plants, Inc. v. Toomey, 95 R.I. 471, 188 A.2d 91, appeal dismissed, 375 U.S. 9, 84 S. Ct. 56, 11 L. Ed. 2d 39 (1963).

The legislature intended by § 44-5-30 to deny relief to a taxpayer who brought an account purporting on its face to be true as required by § 44-5-15 and this section but which omitted some item of ratable property with the deliberate intent of fraudulently concealing the taxpayer's interest therein; but the legislature did not intend to penalize a taxpayer who by inadvertence, oversight or mistake neglected to include ratable property in an account in all other respects sufficient to support his petition brought under § 44-5-26. Sayles Finishing Plants, Inc. v. Toomey, 95 R.I. 471, 188 A.2d 91, appeal dismissed, 375 U.S. 9, 84 S. Ct. 56, 11 L. Ed. 2d 39 (1963).

2. Ratable Estate.

The word "ratable," as used in this section, is not equivalent to the word "taxable." In re Newport Reading Room, 21 R.I. 440, 44 A. 511 (1899).

3. Sufficiency of Account.

This statute requires an account of all of a taxpayer's ratable property whether it is taxable or not. Ewing v. Tax Assessors, 93 R.I. 372, 176 A.2d 69 (1961).

The taxpayer, whether using a form supplied by the tax assessor or one independently fashioned, was required to bring in an account contemplated by the legislature in its mandate to the court, as the tax assessor had no authority to waive the requirements of the law which must be met as a condition precedent to the jurisdiction of the court. Sayles Finishing Plants, Inc. v. Toomey, 95 R.I. 471, 188 A.2d 91, appeal dismissed, 375 U.S. 9, 84 S. Ct. 56, 11 L. Ed. 2d 39 (1963).

The taxpayer, who intended to contest whatever assessment might be placed on his

Exhibit (6)

Rev. 12/85

Annual Return to Providence, R.I. City Assessor (1)

The Law is Mandatory
A Return Must Be Filed

Statement of Valuation as of 12/31/

Assessor's use only

Please Read Enclosed Instructions Carefully

Code #

Assessor's Use Only

This Name and Mailing Address Will Be Used For Tax Bill. Please Change, If Incorrect.

I _____ Residing At: _____
Name in Full and Title (Please Print) Street
am accountable for information contained within this form.

Telephone No. _____ City, State, Zip Code

Report your industry classification number in space provided.

S.I.C.# _____ Give a description of your business operation.

Year | Tangible Asmt | Year | Tangible Asmt

Assessor's Use Only

By:

Complete One Of Three

☐ **Corporation**
Name and Address of Corporation _____
City of Providence Business Location(s) _____ Street

☐ **Co-Partnership**
List all Partners' Names _____
City of Providence Business Location(s) _____ Street

☐ **Individual**
Owner's Name _____
Doing Business As _____
City of Providence Business Location(s) _____ Street

U.S. ☐ W.S. ☐ S.S. ☐

Assessor's Use Only

SECTION 1 REAL ESTATE

If You Need Additional Space, Attach Addendum

LOCATION AND DESCRIPTION	Ass'r's Plat	Lot	CLAIMED FULL VALUE		DO NOT USE Assessed Value 19	
			Land	Impvmnts	Land	Impvmnts

SECTION 2 — TANGIBLE PERSONAL PROPERTY (Do Not Report Licensed Motor Vehicles In This Section) (2)

List total dollar value by year of acquisition for all furniture, fixtures or other equipment owned by you. ***Please be sure to list computer equipment separately in Section 3.*** **Manufacturers should not file this form, but rather should file the separate "Manufacturers" return which is available through the Assessor's Office (421-5900).** **LIST ALL LEASED/RENTED EQUIPMENT IN SECTION 5 ONLY!**

Calendar Year Purchased	Acquired New or Used	Acquisition Cost	Declare your Fair Market Value on Assessment Date	Assessor's Use Only		
				Cost	%	Value
Current Year 19 ___						
19 ___						
19 ___						
19 ___						
19 ___						
19 ___						
19 ___						
19 ___						
19 ___						
Tenth & Prior Years						
Totals						

SECTION 3 — COMPUTER EQUIPMENT *ONLY*

Please list computer equipment separately in this section by year, make, model with description of each piece owned. Attach a separate sheet if required.

Calendar Year Purchased	Acquired New or Used	Acquisition Cost	Year of Mfgr.	Make	Model	Description
19 ___						
19 ___						
19 ___						
19 ___						
19 ___						
19 ___						
19 ___						
19 ___						
19 ___						
19 ___						

SECTION 4 — INVENTORY/STOCK IN TRADE/SUPPLIES (3)

Indicate the value of the *average* quantity kept on hand during the 12 month period ending with the date of assessment (December 31), or any portion of that year when the business has not been carried on for the full 12 months. The figure shall be determined by using the *average* of the 12 monthly inventories or, if such are not available, the *average* of the last two yearly inventories. The value shall be determined by the invoice cost price or selling price, whichever is lower, plus transportation charges. If average figure is *not* in accordance with above formula, explain method used in separate letter.

FLOOR PLANNED GOODS ARE TO BE INCLUDED IN THE ABOVE VALUE

Report your average inventory $ _____

Explain your method of computation _____

(Attach Separate Listing if you Need Additional Space.) _____

Assessor's Use Only

SECTION 5 — TANGIBLE PROPERTY LEASED OR RENTED FROM OTHERS (Except Motor Vehicles)

Name & Address of Owner of Equip.	Quantity (No. of Units)	Description of Equip.	Monthly Rental or Lease Payments	Payments in addition to Rent	Does Owner Provide Maint. & Repairs	Does Contract Require You to Pay Taxes

SECTION 6 — LEASEHOLD IMPROVEMENTS

Fixtures, etc., owned by you and attached to or used in real estate owned by others.

Business Location(s) _____

_____

Calendar Year Purchased	Acquisition Cost	Declare your Fair Market Value on Assessment Date	Assessor's Use Only			
			Cost	Depr %	Fact %	Value
Current Year						
19 ___						
19 ___						
19 ___						
19 ___						
19 ___						
19 ___						
19 ___						
19 ___						
19 ___						
Tenth & Prior Years						
Totals						

SECTION 7

Tangible personal property possessed as agent, consignee or contractual representative of other person, persons, corporation, etc. (4)

Name & Address of Owner	Quantity	Description of Property	Your Declared Value	Assessor's Use Only

SECTION 8

Buildings and improvements on leased land

IS THE LEASE RECORDED YES_____ NO_____

Location _____

Property Used for _____

Date of Acquisition	Acquisition Cost	Your Declared Value	Assessor's Use Only

SECTION 9

TANGIBLE PROPERTY LEASED OR RENTED TO OTHERS

If on the date of assessment you owned any items of tangible personal property (except registered motor vehicles) which you lease or rent to others, **attach a separate schedule to this form**, and report **ALL ITEMS LISTED BELOW:**

Lessee's name and location of property; description of property; date of manufacture; date of installation or acquisition; your acquisition cost; your method of depreciation; monthly rental or lease income; dates of lease; who provides maintenance and repairs?

SECTION 10

All other tangible personal property (including household furniture, books, antiques, art treasures, etc. Section 44-3-3, Subpara. 17 and 18,but not including furniture used in offices or rented furnished apartments. List these in Section 2).

Location _____

Description _____

Claimed Full Value	Assessor's Use Only

SECTION 11

MOTOR VEHICLES AND TRAILERS

In compliance with the 1979 State law, registered motor vehicles and trailers shall be assessed an **Excise Tax** pro-rated over the number of months/days the vehicle was registered during the prior calendar year based on a listing provided by the Registry of Motor Vehicles. Excise taxes will be billed separately, taxed at the same rate established by the Assessor for other property.

SECTION 12

Sign Your Return and Notarize

I do hereby certify and declare that, to the best of my knowledge and belief, the foregoing is a true and complete list of all real estate and personal property owned by said Corporation, Co-Partnership or Individual in or ratable in said City of Providence on the said thirty-first day of December at 12 o'clock midnight. Eastern Standard Time; that the value placed against each item thereof is the full and fair-cash value thereof at said time.

_____

Signature and Date

On _____, _____ personally appeared before me and made oath that the foregoing account, by him/her signed and exhibited, contains to the best of his/her knowledge and belief, a true and full account and valuation of all the ratable estate owned or possessed by said corporation, co-partnership, or individual.

_____

Signature of Notary Public and Date

Exhibit (7)

44-5-5. Determination of date on which taxes due — Penalties on delinquencies. — The electors in a financial town meeting of any town qualified to vote on any proposition to impose a tax or for the expenditure of money, or the city council of a city, shall determine the date on which taxes shall be due and payable and the date on which they shall be subject to a penalty, unless otherwise provided by law, and all taxes remaining unpaid on the date specified shall carry until collected a penalty at a rate determined by the electors or city council.

History of Section.
G.L. 1938, ch. 31, § 1; P.L. 1949, ch. 2330, § 2; G.L. 1956, § 44-5-5.

Reenactments. The 1988 Reenactment (P.L. 1988, ch. 84, § 1) inserted "a" preceding "financial town" near the beginning of the section, and substituted "the" for "said" near the end of the section.

Collateral References. Contest in good faith of validity of tax as affecting liability to penalty for failure to pay tax, 147 A.L.R. 142.

Disallowance of claims for "penalties" under 11 US Code § 93(j), 1 A.L.R. Fed. 657.

Doubt as to liability for, or as to person to whom to pay, tax, as affecting liability for penalties and interest, 137 A.L.R. 306.

Executor, administrator, or trustee, penalties or interest incurred by, as a charge against him personally or against the estate, 47 A.L.R.3d 507.

Judgment for taxes, provision in, as regards future penalties, 93 A.L.R. 793.

Notice to taxpayer, lack of, as affecting penalty for nonpayment of taxes when due, 102 A.L.R. 405.

Time of mailing or receipt as determinative of liability for penalty or additional amount for failure to pay tax within prescribed time, 158 A.L.R. 370.

What is "last known address" of taxpayer for purposes of mailing of notice of tax deficiency under § 6212(b) of the Internal Revenue Code of 1954 (26 USCS § 6212(b)), 58 A.L.R. Fed. 548.

44-5-6. [Repealed.]

Repealed Sections. This section (G.L., ch. 57, § 11; P.L. 1912, ch. 769, § 41; G.L. 1923, ch. 59, § 11; G.L. 1938, ch. 30, § 11; G.L. 1956, § 44-5-6; P.L. 1960, ch. 52, § 29 (unconstit.); P.L. 1961, ch. 3, § 1) was repealed by P.L. 1969, ch. 197, art. 7, § 13.

44-5-7. Provision for municipal installment payments. — Every city and town shall make provision for the payment in installments of any tax levied under the provisions of § 44-5-1 by adding to and making a part of the resolution ordering the assessment and the collection of the tax an option permitting persons assessed to pay their taxes in equal quarterly installments if they so desire, the amounts and dates for payment of the installments to be specified in the resolution; provided, however, that the city or town may provide that the option contained in the resolution shall not apply to any tax levied in an amount not in excess of fifty dollars ($50) in which case the tax shall be payable in a single installment.

History of Section.
P.L. 1934, ch. 2101, § 1; G.L. 1938, ch. 36, § 2; G.L. 1956, § 44-5-7; P.L. 1969, ch. 224, § 1; P.L. 1986, ch. 109, § 1.

Reenactments. The 1988 Reenactment (P.L. 1988, ch. 84, § 1) substituted "the" for the words "such" and "any such" throughout the section.

Collateral References. Failure of property owner to make formal election to avail himself of privilege of paying taxes in installments, 140 A.L.R. 1442.

Installments, constitutionality of statute permitting payment of taxes in, 101 A.L.R. 1335.

Exhibit (8)

Hilton ROSEN et ux.

v.

Jaime RESTREPO, Jr., Tax Assessor for the Town of Lincoln.

No. 76-130-Appeal.

Supreme Court of Rhode Island.

Oct. 27, 1977.

Town resident taxpayers brought action seeking peremptory writ of mandamus ordering defendant town tax assessor to assess shopping mall in same manner in which he assessed other ratable property in town, and defendant filed motion to dismiss. The Superior Court, Providence and Bristol Counties, Weisberger, J., granted dismissal, and plaintiffs appealed. The Supreme Court, Kelleher, J., held that: (1) plaintiffs' complaint stated claim upon which relief could be granted, and (2) plaintiffs had standing to institute suit.

Appeal sustained, judgment appealed from vacated, and case remitted for further proceedings.

Paolino, J., filed dissenting opinion in which Doris, J., joined.

1. Mandamus ⇐154(4)

Complaint filed by town resident taxpayers seeking peremptory writ of mandamus ordering defendant town tax assessor to assess shopping mall in same manner in which he assessed other ratable property in town, alleging that they would be damaged because taxes they would be required to pay would be greater than if shopping mall had been valued at same percentage of its full and fair cash value as other property, stated claim upon which relief could be granted. Rules of Civil Procedure, rule 12(b)(6); Gen.Laws 1956, § 44-5-12.

2. Mandamus ⇐23(2)

Town resident taxpayers, who in substance complained that town tax assessor, by applying a different fraction to his assessment of shopping mall than he did to other real estate parcels, violated his constitutional obligation to fairly distribute tax burden and that violation in turn, affected their pocketbooks in that it would result in increased taxes for them, had standing to bring action to obtain peremptory writ of mandamus ordering tax assessor to assess shopping mall in same manner in which he assessed other ratable property in town. Const. art. 1, § 2; Gen.Laws 1956, § 44-5-12.

3. Mandamus ⇐1

The Supreme Court would view action brought by town resident taxpayers to obtain peremptory writ of mandamus ordering defendant town tax assessor to assess shopping mall in same manner in which he assessed other ratable property in town as civil action in which plaintiffs were seeking equitable relief. Gen.Laws 1956, § 44-5-12.

4. Taxation ⇐40(8)

Although tax assessor, in determining fair market value of ratable property, is not bound by any particular formula, but rather in doing so he is exercising a discretionary act authorized by State Constitution and delegated in turn by General Assembly to various municipal assessors, once assessor has established property's fair market value, if he is assessing at less than 100 percent of value, assessor must comply with constitutional directive that burdens of state be fairly distributed among its citizens and apply same percentage factor to each piece of property being assessed; thus, for example, if assessor is assessing at 70 percent of fair market value, he has no discretion, but must apply 70 percent factor to all property within municipality. Const. art. 1, § 2; Gen.Laws 1956, § 44-5-12.

5. Pretrial Procedure ⇐624, 683, 686

For purpose of considering motion to dismiss complaint for failure to state claim upon which relief can be granted, allegations of complaint are to be taken as true and are to be viewed in light most favorable to plaintiff, and no complaint shall be dismissed unless it is clear beyond a reasonable doubt that plaintiff will be unable to prove his right to relief, that is, unless it

appears to a certainty that plaintiff will not be entitled to relief under any set of circumstances which might be proved in support of claim. Rules of Civil Procedure, rule 12(b)(6).

Oster, Fay, Groff & Prescott, George M. Prescott, Lincoln, for plaintiffs.

John Quattrocchi, III, Town Sol., Lincoln, for defendant.

OPINION

KELLEHER, Justice.

The plaintiffs, Hilton Rosen and his wife Faye, reside in and pay taxes to the town of Lincoln. They are before us on their appeal from the grant by a Superior Court justice of the defendant tax assessor's motion to dismiss this civil action, in which the Rosens are asking the Superior Court to "issue its peremptory writ of mandamus" and order the assessor to assess the "Lincoln Mall," a large shopping center complex, in the same manner in which he has assessed the other ratable property in the town.

[1, 2] The trial justice, in granting the dismissal, rested his decision on two grounds. Mandamus, he said, will not lie when the act in issue is one that involves the exercise of the actor's discretion. He also observed that the Rosens lacked standing to institute the suit because he felt that they were attempting to protect a right that was held in common with the rest of the public at large. We disagree and reverse.

[3] Within recent times, when reviewing a Superior Court mandamus proceeding, we have treated the proceeding as a civil action in which the plaintiff was seeking equitable relief. *Sarni v. Meloccaro*, 113 R.I. 630, 324 A.2d 648 (1974); *see also Granger v. Johnson*, 117 R.I. 440, 367 A.2d 1062 (1977). In fact, Super.R.Civ.P. 81(d) specifically provides that mandamus proceedings are subject to the rules. Here, the litigants, by their actions, indicated that they too considered this suit as a civil action. The plaintiffs sought admissions of facts from the assessor, who in turn had filed an answer to the complaint and an objection to the request for admissions and, finally, a motion that plaintiffs' request for mandamus be dismissed. Consequently, we will take the *Sarni* approach and view this litigation as a civil action in which plaintiffs are seeking equitable relief.

Turning to the applicable law, one finds that art. I, § 2, of the Rhode Island Constitution directs that the burdens of the state be "fairly distributed among its citizens." Conscious of this constitutional mandate, the Legislature since 1855 has declared that all property liable for taxation shall be assessed at its full and fair cash value. We have construed the term "full and fair cash value" to mean that price the property would probably bring in a transaction in a fair market between a willing seller and a willing buyer. *Allen v. Bonded Municipal Corp.*, 62 R.I. 101, 105, 4 A.2d 249, 251 (1938). The "full and fair cash value" standard remained unchanged until 1965, when the General Assembly, conscious of what was actually taking place in our municipalities,[1] amended G.L.1956, § 44-5-12, by its enactment of P.L.1965, ch. 115, § 1, so that, from 1965 on, tax assessors could assess all property liable to taxation at its full and fair cash value or at a *uniform percentage thereof.*

[4] Admittedly, in *Kargman v. Jacobs*, 113 R.I. 696, 325 A.2d 543 (1974), we acknowledged that an assessor, in determining the fair market value of ratable property, is not bound by any particular formula, but rather he or she is exercising a discretionary act which has been authorized by our state's constitution and delegated in turn by the General Assembly to the various municipal assessors. However, once the assessor has established the property's fair market value, if he or she is assessing at

1. In *Socony-Vacuum Oil Co. v. French*, 88 R.I. 6, 143 A.2d 318 (1958), both the taxpayer and the tax assessor acknowledged that property in East Providence was being assessed at 80 percent of its full and fair cash value.

less than 100 percent of value, such an official must comply with the constitutional directive of art. I, § 2, and apply the same percentage factor to each piece of property being assessed. Otherwise, we will be confronted with a type of disproportionate taxation which we have previously described as being illegal under Rhode Island law. *Merlino v. Tax Assessors*, 114 R.I. 630, 639, 337 A.2d 796, 802 (1975). Thus, for example, if the assessor is assessing at 70 percent of the fair market value, he has no discretion, but must apply the 70 percent factor to all property within the municipality.

So far as the standing issue is concerned, we need only refer to our holding in *Rhode Island Ophthalmological Soc'y v. Cannon*, 113 R.I. 16, 317 A.2d 124 (1974). There, after reviewing this court's past pronouncements regarding standing, we declared that this issue would now be determined by ascertaining whether the person whose standing is challenged alleges that the action in dispute will cause him or her an injury in fact, economic or otherwise. If such an allegation has been made, he or she has standing.[2]

[5] In examining plaintiffs' complaint, we employ the criteria for considering a 12(b)(6) motion which were first expressed in the seminal case of *Bragg v. Warwick Shoppers World, Inc.*, 102 R.I. 8, 227 A.2d 582 (1967). For the purpose of considering such a motion, the allegations of the complaint are to be taken as true and are to be viewed in the light most favorable to the plaintiff; no complaint shall be dismissed unless it is clear beyond a reasonable doubt that the plaintiff will be unable to prove his right to relief, that is, unless it appears to a certainty that the plaintiff will not be entitled to relief under any set of circumstances which might be proved in support of the claim. When the *Bragg* case is applied to plaintiffs' complaint, the result is obvious.

In their complaint, the Rosens indicate that the assessor has assessed or intends to assess Lincoln Mall at a percentage of its full and fair cash value which is substantially lower than that applied to other property in the town. They also allege that they will be damaged because the taxes they must pay will be greater than if the Lincoln Mall had been valued at the same percentage of its full and fair cash value as the other properties. In substance, the Rosens have complained that the assessor, by applying a different fraction to his assessment of the Mall than he did to the other real estate parcels, has violated his constitutional obligation to fairly distribute the tax burden, and this violation, in turn, affects the plaintiffs where it really hurts the most—in their pocketbooks. They have established their right to be heard.

The plaintiffs' appeal is sustained, the judgment appealed from is vacated, and the case is remitted to the Superior Court for further proceedings.

PAOLINO, Justice, dissenting with whom DORIS, Justice joins.

For the reasons that follow, I respectfully dissent. In his decision granting defendant's motion to dismiss the plaintiffs' complaint, the trial justice held that

> "the assessment of the value of * * * property for tax purposes and the application thereto of a 'uniform percentage,' is * * * an act which involves judgment and discretion."

and that:

"Therefore, mandamus would not lie." Further, he held that even if mandamus might lie, the court was bound by our decisions in *O'Brien v. Members of Bd. of Aldermen*, 18 R.I. 113, 115, 25 A. 914 (1892), and *Demers v. Shehab*, 101 R.I. 417, 224 A.2d 380 (1966), where in discussing the substantive standards applicable in determining whether mandamus should issue in a particular case, this court spoke as follows:

> "Although an action to obtain a writ of mandamus, heretofore prerogative in character, is now controlled procedurally in the superior court by Rule 81(d) of its

2. For an actual application of the *Ophthalmological* rule, see *East Greenwich Yacht Club v. Coastal Resources Management Council*, R.I., 376 A.2d 682 (1977).

Rules of Civil Procedure, the legal sufficiency of a complaint seeking such relief is still tested by the same substantive standards which have heretofore prevailed." *Demers v. Shehab, supra* at 420, 224 A.2d at 381–82.

In my judgment the trial justice was correct.

Generally mandamus will issue only where the petitioner has a clear legal right to performance of the act sought, the respondent has a clear ministerial duty to perform it without discretion to refuse, and the petitioner has no other plain and adequate remedy at law. It is not generally used to establish such a right and it is usually denied where such an alleged right is either uncertain or doubtful. *Sun Oil Co. v. Macauley*, 72 R.I. 206, 210, 49 A.2d 917, 919 (1946).

It is clear from what the court said in *Sun Oil Co. v. Macauley, supra*, that mandamus will not lie to compel a public official to perform a discretionary act. The relief sought by plaintiffs in the case at bar does not involve a ministerial act but rather the exercise of discretion delegated to tax assessors by the Legislature under § 44–5–12, which provides that tax officials must assess all real property subject to taxation "at its full and fair cash value, or at a uniform percentage thereof * * *." As the trial justice correctly noted in his decision:

> "[I]n making this argument, the plaintiff forgets or overlooks the essential nature, that in making an assessment under guidelines, it is obviously impossible to perform the function without the exercise of discretion and judgment. How much is the property worth in the first instance? What is one hundred percent of its full and fair cash value, which must be determined? Then to that determination, which is obviously one of discretion and judgment, the uniform percentage can be applied."

In discussing the question of methods used in the valuation of real estate, we spoke as follows in *Kargman v. Jacobs*, 113 R.I. 696, 704, 325 A.2d 543, 547–48 (1974):

> "The trial justice in discussing the assessor's use of the cost of reproduction standard observed that the power to tax is vested in the General Assembly, which shall provide for '* * * making new valuations of property * * * in such manner as they may deem best.' R.I. Const. art. IV, § 15. The General Assembly in turn has delegated this authority to the assessors of each municipality. Section 44–5–11. They are authorized to determine value in the same manner as the Legislature might have, in this instance, as the East Providence assessor deems best. He is given the choice as to which method of valuation he will employ.
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> * * * * * *
>
> "It is our belief that the tax assessor is not bound by any particular formula, rule or method as he seeks to ascertain the fair market value of real estate. His choice of one of the recognized methods of valuation is simply an exercise of the discretion referred to in our constitution."

Thus, it is clear from what we said in *Kargman v. Jacobs, supra*, that while an assessor may be compelled to value property pursuant to a statutory standard, mandamus will not lie to compel the assessor to use a particular method. In the case at bar the crux of plaintiffs' complaint focuses on the method used to make the valuation of the Lincoln Mall property rather than on his failure to assess property at its full and fair cash value or a uniform percentage thereof. As plaintiffs point out in their brief, if defendant tax assessor had based his assessment on the documentary stamps on the deed, a higher assessed valuation of just over $7,350,000 would have resulted, with a tax of more than $410,000 at current rates. Under the actual assessed valuation, however, the expected tax revenue from the Lincoln Mall was announced to be around $200,000. The plaintiffs' present action is based on their claim that the valuation placed on the property in question was contrary to established practices and procedures. They challenge the method of valuation used by the tax assessor and therefore

brought the instant action to compel the tax assessor to use a method of valuation they claim is preferable. To grant their request would be to compel a discretionary act. This would do violence to long-established standards governing the use of the writ. *Newman v. Mayor of Newport*, 73 R.I. 435, 436, 57 A.2d 180, 181 (1948).

Nor is there any merit to plaintiffs' claim that defendant tax assessor had no discretion to refuse to assess all property alike. As this court said many years ago in *Allen v. Bonded Mun. Corp.*, 62 R.I. 101, 105, 4 A.2d 249, 251 (1938):

> "The constitutional requirement of fairness in taxation is met if a taxing law demands that it be applied with substantial uniformity without discrimination throughout a class of property set apart for separate taxation."

The Lincoln Mall property, by its very nature, is a unique piece of property. Section 44–5–12 states:

> "All property liable to taxation shall be assessed at its full and fair cash value, or at a uniform percentage thereof, not to exceed one hundred per cent (100%), to be determined by the assessors in each town or city * * *."

There is nothing in § 44–5–12 which prescribes the method of valuation to be used by the tax assessor in assessing the Lincoln Mall or any other property in the town; nor is there any language in the statute directing the tax assessor to use the same method for all the property in the town. Rather, the statute clearly prescribes that the assessment is to be made by the tax assessor and that the value is to be determined by him on the basis of its full and fair cash value, or a uniform percentage thereof. The method of arriving at such assessment is clearly left to the discretion of the tax assessor, with the express mandate that it be at full and fair cash value or a uniform percentage thereof, not that all property be assessed by using the same method of assessment.

Thus, the trial justice was warranted in holding that the assessment of the value of property for tax purposes and the application thereto of a "uniform percentage" was an act involving the exercise of judgment and discretion, and that therefore mandamus would not lie.

Violet M. CAVANAGH

v.

Robert D. CAVANAGH.

No. 75–326–Appeal.

Supreme Court of Rhode Island.

Dec. 2, 1977.

Appeals were taken from three separate decrees of the Family Court, Alprin, J., relating to parcel of real estate owned by parties whose marriage had been declared void. The Supreme Court, Paolino, J., held that: (1) orders of state court entered while petition for removal was pending in federal court were void, even though federal court determined that removal petition was ineffective, and (2) where papers had been transmitted to Supreme Court and appeal had been docketed, Family Court had no authority to act on motion seeking sale of property and decrees it entered for sale were void.

Appeal sustained, decrees appealed from vacated and case remanded.

1. Removal of Cases ⇐97

Once removal procedure has been carried out, action in state court is automatically stayed and any proceedings there prior to federal remand order are absolutely void, despite subsequent determination that removal petition was ineffective. 28 U.S.C.A. § 1446.

Exhibit G

44-5-22. Certification of tax roll. — The tax levy shall be applied to the assessment roll and the resulting tax roll certified by the assessors to the town clerk, town treasurer, or tax collector, as the case may be, not later than the 15th day of June next succeeding. Thereafter, but in any event prior to the June 30th succeeding the certification, the assessor shall cause to be published in a newspaper of general circulation within the city or town the rate of tax and the percentage of fair market value employed in assessing the tax on manufacturer's machinery and equipment.

History of Section.
G.L., ch. 31, § 6½; P.L. 1949, ch. 2330, § 6; G.L. 1956, § 44-5-22; P.L. 1966, ch. 245, § 6; P.L. 1967, ch. 191, § 3.

Reenactments. The 1988 Reenactment (P.L. 1988, ch. 84, § 1) substituted "the certification" for "such certification" near the beginning of the second sentence and made a minor punctuation change.

44-5-23. Assessment of back taxes on real estate. — If any real estate liable to taxation in any city or town has been omitted in the assessment of any year or years and has thereby escaped taxation, or if any tax has been erroneously or illegally assessed upon any real estate liable to taxation in any city or town in any year or years, and because of the erroneous or illegal assessment the tax cannot be collected, or if paid has been recovered back, the assessor of taxes of the city or town in the next annual assessment of taxes after the omission or erroneous or illegal assessment is known to him or her shall assess or reassess, as the case may be, a tax or taxes against the person or persons who were the owner or owners of the real estate in the year or years, to the same amount to which the real estate ought to have been assessed in the year or years. The assessment shall be in addition to any assessment of taxes against the person or persons for the then current year, and shall be placed on a special tax roll and annexed to the general tax roll for the current year; provided, however, that every such assessment or reassessment shall be made within six (6) years of the date of the assessment from which the real estate was omitted or in which it was erroneously or illegally assessed as aforesaid; and further provided, that in case the real estate was held in trust at the time of the omission or erroneous or illegal assessment and the title thereto has passed from the trustee or trustees who so held the real estate in trust, then the tax or taxes shall be assessed against the person or persons who were the equitable owner or owners of the real estate at the time of the omission or erroneous or illegal assessment.

History of Section.
P.L. 1911, ch. 732, § 1; G.L. 1923, ch. 60, § 25; G.L. 1938, ch. 31, § 24; G.L. 1956, § 44-5-23.

Reenactments. The 1988 Reenactment (P.L. 1988, ch. 84, § 1) substituted "him" for "them" near the middle of the first sentence, and substituted "the" for "such" throughout the section.