This is an appeal under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 62C, § 39, from the refusal of the Commissioner of Revenue ("Commissioner" or "appellee") to abate sales and use tax for the quarterly taxable periods ended June 30, 1996 through December 31, 1998 ("periods at issue").

Chairman Hammond heard the appeal and was joined in the decision for the appellant by Commissioners Scharaffa, Egan, and Rose.

These findings of fact and report are made at the request of the appellant Duracell, Inc. ("Duracell" or "appellant") pursuant to G.L. c. 58A, § 13 and 831 CMR 1.32.

John S. Brown, Esq. and Donald-Bruce Abrams, Esq. for the appellant.

Timothy R. Stille, Esq. and Frances Donovan, Esq. for the appellee.
FINDINGS OF FACT AND REPORT

On the basis of an agreed statement of facts as well as testimony and exhibits entered into evidence at the hearing of this appeal, the Appellate Tax Board ("Board") made the following findings of fact.

During the periods at issue, Duracell was a Delaware corporation engaged in the development, manufacturing, marketing and sale of batteries in the United States and abroad. Substantially all of Duracell’s receipts were derived from the sale of batteries that it manufactured. Duracell had manufacturing factories located in Georgia, North Carolina, South Carolina and Tennessee. Additionally, Duracell had a facility in Needham, Massachusetts ("Needham facility"). The principal activity taking place at the Needham facility was the research and development of new and improved batteries and battery manufacturing technologies ("battery R&D"). Duracell had no other facilities in Massachusetts during the periods at issue.

The Needham facility consisted of two buildings, which together encompassed approximately 132,000 square feet. During the periods at issue, approximately 260 people were employed at the Needham facility, including chemical and electrical engineers, lab technicians, assembly workers,
and a small administrative staff.

Ms. Leslie Pinnell, Duracell’s Director of the Portable Power Research Group and Site Leader for the Needham facility, described the battery R&D process at the Needham facility in her testimony, which the Board found credible. Ms. Pinnell stated that a battery is an electrochemical system consisting of two materials paired against each other to create a voltage. Each battery consists of an anode and a cathode, along with other components, bathed in a chemical solution and housed in a nickel-plated stainless steel can. The actual chemical components of a battery vary depending on the type. For example, an alkaline battery contains a zinc anode and a manganese dioxide cathode, while a lithium battery contains a lithium anode and a manganese dioxide cathode.

Ms. Pinnell testified that battery R&D at the Needham facility focused on the development, improvement and enhancement of battery products to suit the needs of new devices and technologies in which batteries are used by consumers. A focus in recent years, for example, has been on the removal of environmentally harmful materials from the battery. The improvements and changes to battery design flowing from the battery R&D resulted in significant changes in Duracell’s products. Major, newsworthy changes in the
materials or design of Duracell’s various battery products occurred about every year or two, while more minor changes and improvements occurred on a continuous basis. Part of the battery R&D conducted at the Needham facility involved the extensive testing of newly developed products, including intense repeated use of the batteries in a device, setting the batteries on fire, driving nails through them, and other types of abuse designed to test the real-world tolerance of the products. Additionally, research and development activity at the Needham facility was conducted to improve processes used in the manufacture of the batteries.

The battery R&D conducted at the Needham facility generally started with an idea that had been generated internally or suggested by external product manufacturers with a particular need. From the idea phase, component materials of a proposed battery would be tested individually, and then placed into a unit to be tested. The next stage of development was the prototype stage, where approximately ten to twenty of the new batteries would be manufactured so that they could be tested for performance standards. Following the prototype stage, the production would be scaled up such that several hundred batteries would be produced, and five or six experimental
groups and a control group would have an opportunity to explore the optimum design and build of the product. Finally, a run of thousands of the proposed new product would be created, to ensure that they could be readily manufactured in bulk in a manner compatible with Duracell’s high-speed manufacturing process.

To that end, Ms. Pinnell testified that the Needham facility had each piece of equipment that any of Duracell’s manufacturing plants would have, in order to simulate each step of the manufacturing process. Ms. Pinnell estimated that during the periods at issue, the Needham facility produced about 300,000 cells.1 Some of the batteries produced at the Needham facility were sent to Duracell’s other manufacturing facilities, while others were sent to equipment manufacturers for testing and evaluation of the batteries in their products. The thousands of batteries produced at the Needham facility were virtually indistinguishable from the final products that could be purchased in a store, with the exception that at times they did not bear a label. However, none of the batteries produced at the Needham facility was sold commercially.

While battery R&D was the principal activity taking place at the Needham facility, Duracell did not sell any of

1 “Cell” is a technical term. Ms. Pinnell explained that a battery is actually two cells put together.
its research and development services to unrelated third-parties, nor did it receive any direct receipts from unrelated third-parties for activities taking place at the Needham facility. Rather, more than two-thirds of the income recorded in the financial records that Duracell maintained for the Needham facility was derived from the charge-out of battery R&D services to affiliated entities. Those records also showed that virtually all of the expenses associated with the Needham facility were research and development expenses.

Duracell filed sales and use tax returns for each of the quarterly periods at issue. Consents extending the time for assessment of taxes for the periods at issue were executed by the Commissioner and Duracell. The Commissioner issued a Notice of Intention to Assess dated November 6, 2000, proposing additional assessments for the periods at issue. The Commissioner issued a revised Notice of Intention to Assess, also dated November 6, 2000, also proposing additional assessments for the periods at issue. By Notice of Assessment dated September 19, 2001, the Commissioner gave Duracell notice of his assessment of $730,942 in sales and use tax for the periods at issue, along with interest and penalties. On November 8, 2001, Duracell applied for an abatement on form CA-6. By Notice
of Determination dated September 26, 2002, the Commissioner denied Duracell’s abatement request. On October 22, 2002, Duracell filed its Petition with the Board. On the basis of these facts, the Board found and ruled that it had jurisdiction to hear this appeal.

The tax in dispute in this appeal arises from the appellee’s determination that the purchases of certain materials and machinery used in battery R&D at the Needham facility were subject to sales tax because they did not qualify for exemption under G.L. c. 64(H), §§ 6(r) or 6(s) (“§ 6(r) and § 6(s)”). The issue presented in this appeal is whether the appellant qualified as either a research and development corporation or a manufacturing corporation for the periods at issue, under G.L. c. 63, § 42B (“§ 42B”) such that the exemptions under § 6(r) and § 6(s) applied to its purchases. Although the appellant also raised a constitutional issue, the Board found and ruled for the reasons discussed in the following Opinion, that the appellant qualified as both a research and development corporation and a manufacturing corporation under § 42B, and, therefore, did not reach the constitutional issue.
Accordingly, the Board issued a decision for the appellant in this appeal, granting an abatement of $730,942 in tax together with penalties and interest.

**OPINION**

Section 42B sets forth the criteria for qualification as a foreign manufacturing or research and development corporation, and is the counterpart for foreign corporations to G.L. c. 63, § 38C, which provides the criteria for qualification as a domestic manufacturing or research and development corporation. Qualification under either statute affords corporations certain tax benefits, including eligibility for the sales and use tax exemptions under § 6(r) and § 6(s) at issue in this appeal. Section 6(r) exempts from the sales and use tax “sales of materials, tools and fuel, or any substitute therefor...used directly and exclusively in... research and development by a manufacturing corporation or a research and development corporation within the meaning of [§ 38C or § 42B].” Section 6(s) similarly exempts from the sales and use tax “sales of machinery, or replacement parts thereof, used directly and exclusively in... research and development by a manufacturing corporation or a research and development corporation within the meaning of [§ 38C or § 42B]."
Because the parties agree that the purchases at issue were used directly and exclusively in research and development, the only issue is whether Duracell qualified as a research and development corporation or a manufacturing corporation under § 42B.

I. Duracell Qualified as a Research and Development Corporation Under § 42B

As in effect during the periods at issue § 42B defined a research and development corporation as:

“one whose principal activity herein is research and development and which derives more than two-thirds of its receipts assignable to the commonwealth from such activity and derives more than one third of its receipts assignable to the commonwealth from research and development of tangible personal property capable of being manufactured in this commonwealth.”

It was stipulated by the parties that Duracell’s principal activity in Massachusetts during the periods at issue was battery R&D, and this stipulation was supported by the evidence of record. The Board therefore found and ruled that Duracell satisfied that requirement of the statute. The parties also stipulated that all of the products that Duracell manufactured as a result of its battery R&D at the Needham facility were capable of being manufactured in Massachusetts, and this stipulation was also supported by the evidence of record. The Board therefore found and
ruled that if Duracell had receipts assignable to the commonwealth, then more than one-third of them derived from tangible personal property capable of being manufactured in Massachusetts. Accordingly, the only issues remaining are whether Duracell had receipts for the purposes of the statute, and if so, whether more than two-thirds of those receipts assignable to the commonwealth were from research and development activity.

The appellee argued that because the Needham facility did not engage in the commercial sale of batteries and did not sell battery R&D services to any unrelated party, it had no receipts for the purposes of the statute. The appellee further argued that because essentially all of Duracell’s receipts in general derive from the sale of batteries, Duracell could not possibly meet the two-thirds test imposed by the statute. Duracell, on the other hand, argued that because its only activity in Massachusetts was battery R&D, by necessity all of its receipts assignable to Massachusetts derived from research and development.

As an initial matter, it is worth noting that the parties stipulated that significantly more than two-thirds of the income recorded on the books of the Needham facility as a division of Duracell stemmed from the charge-out of research and development services to affiliated entities.
The appellee therefore conceded that the Needham facility had income, and that more than two-thirds of it derived from its battery R&D activities. However, the Board still had to rule on whether the income included on the books and records constituted “receipts” for the purposes of the statute.

The determination of this issue turns on the definition of the term “receipts” for the purposes of § 42B, which is not defined in the statute or by regulation. Because the statute itself did not define the term, the Board must consider “the natural import of words according to the ordinary and approved usage of the language when applied to the subject matter of the act,” as reflective of the Legislature’s intent. *Boston & Me. R.R. v. Billerica*, 262 Mass. 439, 444 (1928). See also, G.L. c. 4, § 6, cl. 3.

According to Webster’s Dictionary of the English language, “receipts” are “something received, e.g. goods, money.” *Webster’s Dictionary of the English Language* 832 (1989). Black’s Law Dictionary defines receipts as “something received; INCOME.” *Black’s Law Dictionary* 1296 (8th Ed. 2004) (capitals in original). Taken together, these definitions of the term “receipts” reveal that, in ordinary usage, the term is quite broad and could be used interchangeably with the term income. Interestingly, however, the Legislature chose not to use the term “income,” which is defined for various tax purposes and arguably more narrow than the term

ATB 2007-913
“receipts,” see e.g. Commonwealth v. General Electric Company, 412 Pa. 123, 131 (1963), citing MERTENS, LAW OF FEDERAL INCOME TAXATION, Vol. 1, § 5.10 (1942) (“‘Gross receipts’ and ‘gross income’ are not synonymous, the former being broader.”)

The Board found no support in the record for the Commissioner’s position that receipts must be derived from an unrelated party, nor any reason to graft such a requirement into the plain language of the statute. Moreover, a broad construction of the term is consistent with the legislative intent of the statute and the construction of the language of the statute as established by case law. The legislative intent of § 42B was to promote investment in certain commercial activities in Massachusetts, including research and development activity, in order to foster employment and other economic opportunities for the commonwealth’s citizens. The Supreme Judicial Court has recognized in numerous cases addressing the language of both § 38C and § 42B that “‘the words ‘engaged in manufacturing’ are not to be given a narrow or restrictive meaning’ and that ‘the statute should be construed, if reasonably possible, to effectuate the legislative intent [of fostering industrial expansion].’”

(sawmill operation which debarked and cut timber into lumber was manufacturing); Assessors of Boston v. Commissioner of Corps. & Taxation, 323 Mass. 730, 741 (1949) (scouring of wool was an essential and integral part of the manufacturing of textiles). See also William F. Sullivan & Co., Inc. v. Commissioner of Revenue, 413 Mass. 576, 581 (1992) (scrap metal processing was manufacturing). While most of those cases have addressed specifically the terms “engaged in manufacturing,” the term “receipts” from research and development is encompassed in the same statute, and therefore the legislative intent is identical and demands a broad construction of the language. Taking into consideration the legislative intent of the statute in light of the facts of the instant case, the Board found and ruled that the activities at the Needham facility were exactly the type of activities that the Legislature intended to favor with the relevant exemptions. The evidence of record showed that some 260 employees were working at the Needham facility, which occupied over 132,000 square feet of space. Rather than a phantom or insignificant presence, Duracell’s operations at the Needham facility were significant and provided meaningful employment opportunities for the residents of the commonwealth.

There is no merit to the distinction raised by the appellee that the Needham facility derived its income from charge-outs to affiliates for battery R&D services, while Duracell in general derived receipts from the commercial
sale of batteries. The plain language of the statute focuses solely on the activities within Massachusetts and receipts assignable thereto. The parties stipulated that almost all of the expenses recorded on the books of the Needham facility related to its battery R&D operations. For the Needham facility to continue to operate, it must have had income or receipts. As research and development was its principal activity, it follows that those receipts were from research and development activity. Since the principal activity of the Needham facility was battery R&D, and since that location was Duracell’s only location in Massachusetts, the Board found and ruled that more than two-thirds of its receipts assignable to the commonwealth were derived from research and development activities in the commonwealth. Accordingly, the Board found and ruled that Duracell qualified as a research and development corporation under § 42B.

II. Duracell Qualified as a Manufacturing Corporation Under § 42B

While § 42B provides an explicit definition of a research and development corporation, it provides no definition for a manufacturing corporation. Rather, that definition has been developed by decades of case law. The Supreme Judicial Court has defined manufacturing as “change wrought through the application of forces directed by the human mind, which results in the transformation of some
preexisting substance or element into something different, with a new name, nature or use.” First Data Corp. v. State Tax Commission, 371 Mass. 444, 447 (1976), quoting Boston & Me. R.R. v. Billerica, 262 Mass. 439, 444-45 (1928). The Commissioner’s regulation adopts a similar definition, providing that “manufacturing is the process of substantially transforming raw or finished materials by hand or machinery, and through human skill and knowledge, into a product possessing a new name, nature and adapted to a new use.” 830 CMR 58.2.1(6)(b). Manufacturing need not lead to the creation of a finished product, but “ordinarily involves the production of products in standardized sizes and qualities and multiple quantities.” 830 CMR 58.2.1(6)(a)(5). The definition of manufacturing has also been developed through negative implication, that is, through the articulation of activities that do not constitute manufacturing. Electronics Corporation of America v. Commissioner of Revenue, Mass. ATB Findings of Fact and Reports 1995-202 (design and creation of prototypes is not manufacturing); York Steak House Sys., Inc. v. Commissioner of Revenue 393 Mass. 424, 424-425 (1984) (conversion of frozen steak into cooked steak is not manufacturing).

Applying those legal precedents to the facts of the
instant case, it is clear that the activities performed at the Needham facility constituted manufacturing. There can be no doubt that the placement of the various raw elements, including zinc, lithium, and alkaline, along with chemical solutions and other components, into specialized stainless steel containers so as to create a functioning battery unit amounts to “the transformation of some preexisting substance or element into something different, with a new name, nature or use.” First Data Corp. at 447. Moreover, the scale of production at the Needham facility was consistent with manufacturing activity. According to Ms. Pinnell, the battery R&D process began with an idea or proposal for a new product, and was followed by “component materials of a proposed battery” being tested individually, and then “placed into a cell to be tested.” That stage of the process was then followed by what Ms. Pinnell described as “the prototype stage,” where approximately ten to twenty of the batteries would be constructed and tested for performance. After the prototype stage, hundreds of batteries were produced so that they could be tested for quality and performance by numerous groups, and finally, a run of thousands of the batteries would be generated to ensure that they could be readily produced in bulk at one of Duracell’s out-of-state factories. At this point, the
batteries were virtually identical to the products that could be purchased in a retail store. Ms. Pinnell estimated that the Needham facility generated approximately 100,000 cells annually.

While the appellee argued that the activities at the Needham facility were confined only to the production of prototypes, the evidence of record contradicted this assertion. A prototype is “a working model of the requisite specifications. It is not produced, and does not constitute a tangible part of what is produced, for the ultimate consumer.” Electronics Corp. of America at 212. The record reflects that Duracell often sent the items produced at the Needham facility to equipment manufacturers for trial use in their products. Further, by generating hundreds of thousands of batteries virtually identical to the finished product found in stores, production at the Needham facility transcended the prototype stage. The Board found and ruled that there was a clear distinction between the prototype stage and the subsequent production of thousands of batteries, the latter falling in line with the “production of products... in multiple quantities” referred to in the Commissioner’s own manufacturing regulation. See 830 CMR 58.2.1(6)(b)(5).

The appellee similarly argued that because Duracell
operated no factories in Massachusetts during the periods at issue and because its principal activity in Massachusetts was battery R&D, it could not possibly have been a corporation engaged in manufacturing in Massachusetts. Those arguments not only ignore the appellee’s own regulation, but misconstrue the applicable case law. 830 CMR 58.2.1(6)(b)(1) states “It is not required that manufacturing take place in an industrial plant, factory, or mill.” The evidence of record reflects that the Needham facility had each piece of equipment that any of Duracell’s manufacturing plants would have, in order to simulate each step of the manufacture process. The Needham facility was therefore equipped to and did in fact engage in manufacturing activity. Furthermore, that the items produced at the Needham facility were by and large used for Duracell’s internal purposes rather than commercial sale is irrelevant. It has long been established that “one can manufacture goods for his own consumption as well as for sale.” Boston & Me. R.R. at 448.

Moreover, research and development activities and manufacturing activities are not mutually exclusive, as the appellee seems to have suggested. While the Board has recognized that § 42B itself distinguishes between manufacturing and research and development corporations, the plain language of the statute makes that distinction with respect only to exemption from local taxation. As the Board
noted in *Electronics Corp. of America*:

"Section 42B, itself, distinguishes between manufacturing and research and development corporations. The statute provides, in pertinent part that ‘nothing in this section shall be construed to provide an exemption from local taxation of the machinery of corporation deemed to be a foreign research and development corporation which is not deemed to be a foreign manufacturing corporation.’"

*Id.* at 212-13. That same statutory language, while seemingly enunciating a distinction, simultaneously recognizes that it is possible for one corporation to be both a research and development corporation and manufacturing corporation. Though the Board ultimately held in *Electronics Corp. of America* that the taxpayer’s creation of prototypes was “more in the nature of research and development,” than manufacturing, the Board was careful to limit its conclusions only to “the facts in this appeal.” *Id.* at 212. In the instant case, the Board found and ruled that in the course of its battery R&D, the activities at the Needham facility transcended the creation of mere prototypes and amounted to the manufacture of tangible personal property for the purposes of § 42B.

Lastly, to qualify as a manufacturing corporation, a taxpayer must demonstrate that its activities are not only of the appropriate nature, but of a certain degree. The Supreme Judicial Court has said that the “Legislature did not intend to confer a windfall tax exemption on nonmanufacturing corporations that engage in manufacturing ‘which is merely trivial or incidental to its principle...

ATB 2007-921
business.’” Assessors of Boston at 631. Accordingly, the manufacturing component of the business must be substantial. See Fernandes Supermarkets, Inc. v. State Tax Commission, 371 Mass. 318, 322 (1976), citing Assessors of Boston at 746. The Commissioner’s manufacturing regulation provides four mathematical tests for quantifying what is “substantial” manufacturing; however, a corporation can still show “through other relevant criteria” that its manufacturing is substantial even if it does not satisfy any of those tests. 830 CMR 58.2.1(6)(a)(2). The parties have stipulated that, taking into consideration its activities both within and without Massachusetts, Duracell engaged in substantial manufacturing and satisfied at least three of those mathematical tests. Moreover, the evidence of record establishes that the manufacturing activities of the Needham facility were in no way “merely trivial or incidental” to Duracell’s business. Rather, the fruits of the battery R&D from Needham facility were incorporated into Duracell’s entire product line on a continuous basis, such that almost every component of Duracell’s batteries changed materially over time. Furthermore, the Needham facility engaged in exactly the same type of battery production, using the exact same equipment, that Duracell used in its out-of-state manufacturing plants, to create hundreds of thousands of batteries virtually identical to those available commercially. Duracell was clearly not a “nonmanufacturing corporation” whose manufacturing activities were “merely
trivial or incidental to its principal business purpose,” and that fact remains true even when the inquiry is narrowed to the Needham facility. The Board therefore found and ruled that Duracell was engaged in substantial manufacturing and qualified as a manufacturing corporation under § 42B.

III. The Activities Conducted at the Needham Facility were an Essential and Integral Part of Duracell’s Overall Manufacturing Operations

Over the many decades that the Supreme Judicial Court has addressed the question of what it means to be “engaged in manufacturing,” the court has consistently recognized that, in order to effectuate the legislative intent of fostering the expansion of industry in Massachusetts, the phrase “should not be given a narrow or restrictive meaning.” William F. Sullivan & Co., Inc. v. Commissioner of Revenue, 413 Mass. 576, 579 (1992), citing Joseph T. Rossi Corp. at 181. The court has therefore held that “processes which themselves do not produce a finished product... should still be deemed ‘manufacturing’... so long as they constitute an essential and integral part of a total manufacturing process.” Id. at 579-80, citing Assessors of Boston at 741 and Joseph T. Rossi Corp. at 181-82. Therefore, even if the activities of the Needham facility alone did not constitute manufacturing, the appellant could still qualify for the exemptions if it engaged in activity at the Needham facility which constituted an essential and integral part of the manufacturing process.

Determinations as to what constitutes an essential and
integral part of the manufacturing process must be made on a case-by-case basis. Id. at 581. “To constitute an essential and integral part of the total manufacturing process and to qualify for the exemption, the process under study must effect [a] kind of change and [cause a certain] degree of refinement to the source material.” Id. While the quarrying and crushing of rock into smaller components did not transform the materials into a substantially different product and was therefore not an essential and integral part of the manufacturing process, the scouring of raw waste wool into wool ready to be spun into thread, cloth or rugs constituted enough of a refinement of the raw materials to be an essential and integral part of the manufacturing process. Tilcon-Warren Quarries, Inc. v. Commissioner of Revenue, 392 Mass. 670, 673 (1984); Assessors of Boston at 748. Further, the court has held that the testing of products can be an essential and integral part of the manufacturing process in and of itself, so long as it is a necessary part of bringing the products to market. Associated Testing Laboratories, Inc. v. Commissioner of Revenue, 429 Mass. 628, 630 (1999). This is true regardless of whether the testing occurs in the same location as or is performed by the same entity performing the rest of the manufacturing. Id. at 631. In arriving at these conclusions, the court has looked at the “multiplicity of the processes” involved in manufacturing the products at issue and whether the process in question has effected
sufficient refinement to the raw materials. *William F. Sullivan & Co.* at 580, citing *Assessors of Boston* at 736-37. In *William F. Sullivan & Co.*, the taxpayer received some 50,000 tons of scrap metal annually, often in the form of appliances, plumbing fixtures, auto parts, pipes and boilers. *Id.* at 577. The metal was then separated by type, either by hand or electromagnetic force, dismantled and cut into various sizes, cubed, and cut into pieces to be sold. *Id.* at 577-78. The court found that the process in question produced a sufficient degree of change and refinement to the raw materials at issue. *Id.* at 581.

In addition, the Commissioner’s manufacturing regulation states, in pertinent part, that a process which is a “practical and necessary step in the production of a finished article for sale,” should be considered an essential and integral part of the manufacturing process. 830 CMR 58.2.1(6)(b)(7). Applying this body of authority to the facts of the instant case, the Board found and ruled that the activities conducted at the Needham facility constituted an essential and integral part of Duracell’s overall manufacturing activities.

The Board found that placement of the various raw elements, including zinc, lithium, and alkaline, along with chemical solutions and other components, into specialized stainless steel containers so as to create a functioning battery unit, worked a substantial degree of refinement to
the raw materials involved in the ultimate battery products. As the parties stipulated and as Ms. Pinnell testified, the fruits of the battery R&D conducted at the Needham facility were ultimately incorporated into Duracell’s entire product line. The improvements and changes to battery design flowing from the battery R&D resulted in significant changes in Duracell’s products. Major, newsworthy changes in the materials or design of Duracell’s various battery products occurred about every year or two, while more minor changes and improvements occurred on a continuous basis. Further, the battery R&D conducted at the Needham facility altered and enhanced the actual manufacturing process undertaken by Duracell at its other locations. In addition, the record shows that extensive testing was performed on all new products developed at the Needham facility to ensure their suitability for consumer use. Given the extensive nature of the testing, the substantial refinements to the raw materials and the direct and continuous impact on Duracell’s entire product line and the way in which it manufactured its products, the Board found that the activities of the Needham facility were essential and integral to Duracell’s overall manufacturing activities.

Accordingly, the Board found and ruled that Duracell qualified as a manufacturing corporation under § 42B.
IV. The Constitutionality of § 38C and §42B Need Not Be Addressed

The appellant raised one additional issue: whether § 38C and § 42B unconstitutionally discriminate against interstate commerce by treating foreign corporations more restrictively than domestic corporations. However, “it is fundamental that issues of statutory interpretation should be resolved prior to reaching any constitutional issue,” and a court should “not decide constitutional questions unless they must necessarily be reached.” See 1010 Memorial Drive Tenants Corporation v. Fire Chief of Cambridge, 424 Mass. 661, 663 (1997), citing Commonwealth v. Paasche, 391 Mass. 18, 21 (1984). Although it is well-established that the Board has jurisdiction to address constitutional issues, (See Robert Mullins v. Commissioner of Revenue, Mass. ATB Findings of Fact and Reports 1997-973, citing New York Times Co. v. Commissioner of Revenue, 427 Mass. 399 (1997); Commissioner of Revenue v. Barnett G. Lonstein, 406 Mass. 92 (1989)), the appellant is entitled to an abatement based on the Board’s interpretation of the applicable statute. Therefore, the Board made no findings of fact or rulings of law as to the constitutionality of § 38C and §42B.

V. Conclusion

For the reasons discussed in the above Opinion, the
Board found and ruled that the appellant qualified as a research and development corporation and a manufacturing corporation for the purposes of §42B, and that its purchases were exempt under G.L. c. 64H, § (6)(r) and § (6)(s). The appellee’s assessment of sales and use tax on those purchases was therefore improper. Accordingly, the Board issued a decision in favor of the appellant, and granted an abatement in the amount of $730,942 in tax together with penalties and interest.

THE APPELLATE TAX BOARD

By: _________________________________

Thomas W. Hammond, Jr., Chairman

A true copy,

Attest:____________________________

Assistant Clerk of the Board