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 appellee Commissioner of Revenue ("appellee" or "Commissioner") to grant an abatement of corporate excise assessed to the appellant, Christmas Tree Shops, Inc. ("appellant" or "CTS") under G.L. c. 63, § 32 for the taxable years ending December 31, 1999, December 31, 2000, and December 31, 2001 (collectively, the "years at issue").

This appeal was submitted on stipulated facts and briefs pursuant to 831 CMR § 1.31. Chairman Hammond and Commissioners Scharaffa, Egan, Rose, and Mulhern joined in the decision for the appellant.

These findings of fact and report are made on the Board’s own motion pursuant to G.L. c. 58A, § 13 and 831 CMR § 1.32 and are issued simultaneously with the decision in this appeal.
Philip S. Olsen, Esq. and Natasha Varyani, Esq., for the appellant.

Diane M. McCarron, Esq., for the appellee.

FINDINGS OF FACT AND REPORT

At all material times, CTS was an S corporation organized under the laws of the Commonwealth of Massachusetts, with its headquarters located in South Yarmouth, Massachusetts. During the tax years at issue, CTS was operated as a closely held discount variety retail business with 23 stores located in Massachusetts, New York, Connecticut, New Hampshire, Rhode Island, and Maine.

CTS filed Massachusetts corporate excise returns for the tax years at issue. The returns were selected for examination by the New England Audit Bureau of the Massachusetts Department of Revenue. Following the audit, the Commissioner issued a Notice of Intention to Assess (“NIA”) on April 28, 2004, proposing the assessment of additional corporate excise for the tax years at issue. A Notice of Assessment (“NOA”) was issued on January 26, 2005, assessing a corporate excise deficiency in the amount of $58,216 tax plus interest. For the 2001 tax year, the Commissioner imposed penalties as well.
On March 29, 2005, CTS timely filed a Form CA-6, Application for Abatement, seeking abatement of the additional assessment of tax, interest, and penalties. The Commissioner issued a Notice of Abatement Determination dated April 20, 2005 denying CTS’s request for abatement of the deficiency assessment. CTS filed its appeal with the Appellate Tax Board (“Board”) on May 23, 2005. On the basis of the foregoing facts, the Board found and ruled that it had jurisdiction over this appeal.

The sole issue presented was whether the book value of certain real estate situated in the Town of Middleborough (“subject property”) was includable in the non-income measure of CTS’s corporate excise for the tax years at issue. See G.L. c. 63, § 30(7). Under the provisions of § 30(7), if real estate is subject to local taxation, then it is properly excluded from the non-income measure of the corporate excise.

The subject property was subject to a Tax Increment Financing (“TIF”) Agreement entered into between CTS and the Town of Middleborough on December 18, 1995 (“subject TIF agreement”), pursuant to G.L. c. 40, § 59 (the “TIF enabling statute”). CTS excluded the full book value of the subject property from the tangible property tax base reported on its corporate excise tax returns. On audit, the
Commissioner determined that the subject property was not subject to local taxation due to the subject TIF agreement and adjusted the non-income measure of the corporate excise by including the book value of the real estate, resulting in the disputed assessment.

The TIF enabling statute provides a mechanism whereby municipalities may adopt “tax increment financing exemptions from property taxes . . . for any parcel of real property which is located in the TIF zone and for which an agreement has been executed with the owner thereof.” G.L. c. 40, § 59(iii). TIF zones are designated by the affected municipalities “provided, however, that each area so designated is wholly within an area designated by the director of economic development . . . as presenting exceptional opportunities for increased economic development”. G.L. c. 40, § 59(i).

TIF agreements authorized by the TIF enabling statute operate to reduce or eliminate incremental taxation associated with improvements to real property provided that “all construction and construction-related activity, public and private, contemplated for such TIF zone as of the date of the adoption of the TIF plan” is “describe[d] in detail” within the four corners of the agreement. See G.L. c. 40, § 59(ii). The TIF agreement must “specify the level of such
exemptions expressed as an exemption percentage, not to exceed one hundred percent, to be used in calculating the exemption under clause fifty-first of said section five of said chapter fifty-nine.” G.L. c. 40, § 59(iii). Exemptions are required to be calculated “using an adjustment factor for each fiscal year of the specified term equal to the product of the inflation factors for each fiscal year since the parcel first became eligible for such exemption.” Id. The result is that a portion of the increased property value attributable to the incentivized economic development, represented by the “exemption percentage,” is disregarded in the determination of the amount of property tax owing on a parcel subject to a TIF agreement.

The corresponding provision at G.L. c. 59, § 5, clause fifty-first, confers exemption on

the value of a parcel of real property which is included within an executed agreement under the provisions of paragraph (v) of section fifty-nine of chapter forty, together with all personal property situated on such parcel; provided, however, that taxes on property eligible for exemption under this clause shall be assessed only on that portion of the value of the property that is not exempt pursuant to

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1 G.L. c. 40, § 59(v) requires that TIF agreements include: (1) “all material representations . . .”; (2) “a detailed recitation of the tax increment exemptions and the maximum percentage of the cost of public improvements that can be recovered through betterments or special assessments . . .”; (3) “a detailed recitation of all other benefits and responsibilities” for both parties; and (4) “a provision that such agreement shall be binding upon subsequent owners of such parcel of real property”.

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the provisions of section fifty-nine of chapter forty; . . . provided, further, that the amount of the exemption under this clause for any parcel shall be the exemption percentage adopted under paragraph (iii) of said section fifty-nine of said chapter forty multiplied by the amount by which the parcel’s value exceeds the product of its assessed value for the last fiscal year before it became eligible for exemption under this clause multiplied by the adjustment factor determined in accordance with said section fifty-nine of chapter forty. Taxes on property eligible for exemption under this clause shall be assessed only on that portion of the value of the property that is not exempt hereunder.

Accordingly, G.L. c. 40, § 59 and G.L. c. 59, § 5, clause fifty-first, read together, exclude a portion of the value of property subject to a TIF agreement from local taxation, in an amount determined in part on the basis of exemption percentages set forth in the agreement and in part on an inflation factor. The property remains subject to a tax based on the remainder of the property value not exempted.

Describing the TIF mechanism as an “incentive for economic development,” the Property Tax Bureau of the Department of Revenue’s Division of Local Services issued Informational Guideline Release No. 94-201 contemporaneously with the passage of the relevant

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2 The record does not reveal the amount of the reductions in value accorded to the subject property as computed pursuant to statute and the subject TIF agreement, for the years at issue.
legislation. According to the Department of Revenue, “[t]he TIF exemption is an exemption of a percentage of the increase in a parcel’s value over the base value in the year before the exemption was granted.” IGR No. 94-201.

The subject TIF agreement was offered into evidence in this appeal. The recitals at the beginning of the document identify the parties’ respective motivations for entering into the subject TIF agreement:

WHEREAS, the Company desired to increase its warehouse and distribution capacity and to locate certain of its corporate offices at a single site; and
WHEREAS, the Town, as an inducement to attract the Company, and its attendant capital investment and employment opportunities, is willing to grant to the Company certain tax concessions; and
WHEREAS, the Company has committed to constructing its principal corporate warehouse and distribution facilities and a significant portion of its corporate offices at 64 Leona Drive (Lot 9) Middleborough, Plymouth County, Massachusetts (the “Project”).

CTS made certain commitments as part of the subject TIF agreement. First, CTS agreed to give Middleborough residents “priority . . . in its hiring of new employees for the office, warehouse, and distribution facility.” Employment opportunities were required to be posted in the Middleborough Gazette.

Second, CTS agreed to make good faith efforts to use qualified local contractors for renovation and development
of the Project and for construction of additional phases of the Project, including future repairs and renovations.

Third, CTS agreed to provide yearly reports to the Town on the number of Middleborough residents employed at the distribution facility.

Fourth, CTS agreed to locate its warehouse and distribution facility and certain corporate offices at the Project site.

Fifth, while the existing offices in South Yarmouth would be maintained, CTS agreed that any consolidation or expansion of its offices would occur at the Project site in Middleborough, except for future minor expansions and renovations at the South Yarmouth facility.

Sixth, CTS committed to developing the Project site by constructing a 1,000,000 square foot building with combined office, warehouse, and distribution uses. When finished and operational (within ten years of the date of the subject TIF agreement), the facility would employ “approximately 500-600 people.” Project completion was scheduled to occur in four phases, with approximately 150 new employees added in Phase One, and 80-100 new employees during Phases Two, Three, and Four.

Finally, CTS agreed to give the Town “at least two months [written notice]” of any sale or transfer of, or
discontinuance of operations at, the subject property. Should CTS fail to comply with the agreement, the Town would be entitled to seek revocation of the tax concessions.

The Town of Middleborough in turn “grant[ed] a tax increment financing exemption to” CTS with respect to the subject property for a period of twenty years, commencing with fiscal year 1997 (July 1, 1996) and ending with fiscal year 2016 (June 30, 2016). The agreed-upon exemption percentages applicable to the subject property, as contained on Schedule A of the Agreement, were as follows:

<table>
<thead>
<tr>
<th>YEARS</th>
<th>PERCENTAGES</th>
</tr>
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<tbody>
<tr>
<td>1-3</td>
<td>25%</td>
</tr>
<tr>
<td>4-5</td>
<td>35%</td>
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<tr>
<td>6-7</td>
<td>45%</td>
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<td>8-10</td>
<td>55%</td>
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<tr>
<td>11-13</td>
<td>45%</td>
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<tr>
<td>14-16</td>
<td>35%</td>
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<tr>
<td>17-19</td>
<td>25%</td>
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<tr>
<td>20</td>
<td>0%</td>
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For the reasons detailed in the following Opinion, the Board found and ruled that the subject property remained subject to local taxation notwithstanding the exemption of a portion of its value from local tax during the term of the TIF agreement. Because the subject property was subject to local taxation, it is excluded from the non-income...
measure of appellant’s corporate excise. The Commissioner erred in including the book value of the property in the non-income measure of the corporate excise owed by CTS for the years at issue. Accordingly, the Board granted an abatement of corporate excise in the amount of $58,216 plus statutory additions.

OPINION

The corporate excise is imposed on “every domestic corporation . . . exercising its charter, or qualified to do business or actually doing business in the commonwealth, or owning or using any part or all of its capital, plant or any other property in the commonwealth.” G.L. c. 63, § 32. The amount of the corporate excise owing is determined on the basis of corporate net income, and in addition a non-income measure which varies depending on whether the corporation is considered a “tangible property corporation” or an “intangible property corporation” as defined at G.L. c. 63, § 30(10) and (11). See G.L. c. 63, § 32 (1).

As a “tangible property corporation” for purposes of the corporate excise, appellant paid a tax measured in part on the value of its “tangible property as determined to be taxable under paragraph 7 of section thirty [of chapter
sixty-three].” G.L. c. 63, § 32(a)(1)(i). The non-income measure of appellant’s corporate excise is calculated taking into account: “the book value of such of [appellant’s] tangible property situated in the commonwealth on the last day of the taxable year as is not subject to local taxation.” G.L. c. 63, § 30(7) (emphasis added.) Accordingly, the excludability of the “book value” of the subject real property (and all personal property therein at the end of the tax year) in the total value of the corporation’s tangible property for purposes of the non-income measure of the corporate excise is a function of whether the subject property is “subject to local taxation.” See G.L. c. 63, § 30(7). See generally Springfield Sugar & Products Co. v. State Tax Commission, 381 Mass. 587, 588-89 (1980).

The Commissioner argued that the tax concessions provided for in the TIF agreement represented an exemption of the subject property from tax, and rendered the subject property “not subject to local taxation” for purposes of G.L. c. 63, § 30(7). She emphasized the references to “exemption” in G.L. c. 59, § 5, clause fifty-first, and the subject TIF agreement. The Commissioner concluded that,

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3As an S corporation, appellant paid a tax also based, in part, on its net income in accordance with the provisions of G.L. c. 63, § 32D.
“Since the property at issue here is not subject to local tax, it must be added into the Massachusetts taxable tangible property computation of the non-income measure of the corporate excise in accordance with the clear and unambiguous language of G.L. 63, § 30(7).” Commissioner’s Brief at 9.4

The Commissioner’s attempt to treat the tax concessions linked to the TIF agreement as a substantive exemption of the subject property from local taxation conflicts with the plain language of G.L. c. 59, § 5, clause fifty-first. This provision does not operate to provide a blanket exemption of the property from taxation. On the contrary, taxes are specifically required to be paid on the property: “[t]axes on property eligible for exemption under this clause shall be assessed only on that portion of the value of the property that is not exempt hereunder.” Id. The tax concessions apply only to the increase in the value of the subject property over that assessed before the TIF agreement came into effect. A portion of the value added by the sought-after economic development of an eligible site is excluded from the value

4The Commissioner relied heavily on LR 03-9 to argue that the book value of the subject property should be included in the non-income measure of the corporate excise. However, that letter ruling expressly states that it does not address “whether . . . real estate which is partially exempt from local taxation under the TIF plan is included in the non-income measure of the corporate excise.” LR 03-9, n.1.
which is multiplied by the applicable municipal tax rate to fix the amount of property tax being assessed. The effect is to subtract some of the incremental value, not to exempt the property itself from taxation.\(^5\)

This narrow interpretation of the G.L. c. 59, § 5, clause fifty-first exemption, as applying only to a portion of an increased property value, rather than the property itself, accords with the well-settled rule “that statutes granting exemptions from taxation are . . . to be strictly construed.” *Macy’s East, Inc. v. Commissioner of Revenue*, 441 Mass. 797, 804 (2004) (citation omitted.) Accordingly, the subject property cannot be considered wholly exempt from tax consistent with canons of statutory construction.

Further, in the manifest legislative intent to stimulate economic development, the tax concessions available through TIF agreements under G.L. c. 40, § 59 and G.L. c. 59, § 5, clause fifty-first, parallel the favorable tax treatment accorded to corporations “engaged in manufacturing.” See G.L. c. 63, § 38C. The tax benefits made available by statute to manufacturing corporations are

\(^5\) The Commissioner acknowledged and failed to refute CTS’s position that “the ultimate effect of the TIF Agreement is that all of its tangible property is actually taxed, but it is taxed at a lower effective rate.” Commissioner’s Brief at 12.
to be construed so as to promote the economic development purposes they serve:

We have stated the broad purpose of the statute to be promotion of the general welfare by inducing new industries to locate in Massachusetts and by fostering an expansion and development of our own industries . . . . We have further stressed that the statute should be construed, if reasonably possible, to effectuate this legislative intent and purpose.


General Laws c. 40, § 59 and G.L. c. 59, § 5, clause fifty-first, serve a similar legislative purpose by encouraging economic growth in areas deemed to be much in need of it, and should likewise be construed to effectuate that legislative purpose. Cf. Assessors of Newton v. Pickwick Ltd., 351 Mass. 621, 624-26 (1967) (ruling that statute conferring exemption on property of the Massachusetts Bay Transportation Authority, to benefit the public by alleviating pressure for fare increases, also applied to lessees).

The Commissioner’s interpretation of G.L. c. 63, § 30(7), which would expand the tangible property base used to measure the corporate excise and thereby absorb a
substantial portion of the agreed-upon reduction in taxable property value, would curtail the tax incentives intended by the TIF enabling statute to boost economic development. Such an interpretation, which would simply shift some of appellant’s tax burden from the local to the state level, would hardly provide the tax incentive intended by the Legislature. As the Appeals Court has explained, “the principle of liberal construction militates against any interpretation or application that would create results inconsistent not only with the words but also with the public purposes expressed in the underlying statute.”

underlying property, furthers the statutory goal of stimulating economic growth.\textsuperscript{6}

Based on these principles of statutory construction, the Board ruled that real estate subject to TIF agreements remains “subject to local taxation” for purposes of G.L. c. 63, § 30(7), notwithstanding the exclusion of a portion of the value as improved from the computation of the property tax. Although the TIF statute operates to reduce the tax on a portion of the value of a taxpayer’s real estate, it does not provide a complete exemption for the real estate itself. Accordingly, the Board ruled that the subject real estate is “subject to tax” for purposes of G.L. c. 63, § 30(7).

On this basis, the Board determined that the Commissioner erred in including the book value of the subject property in the non-income measure of appellant’s corporate excise, and ordered the abatement of the $58,216 tax at issue, together with penalties assessed for the 2001 tax year and interest.

\textsuperscript{6}The Board also recognized that “tax statutes” like G.L. c. 63, § 30(7) “are usually construed ‘against the taxing authority, and all doubts resolved in favor of the taxpayer.’” \textit{Commissioner of Revenue v. Franchi}, 423 Mass. 817, 822 (1996)(Citations omitted.) Doubts as to whether the subject property was includible in the non-income measure of the appellant’s corporate excise under G.L. c. 63, § 30(7) were accordingly resolved in favor of CTS.
Accordingly, the Board issued a decision for the appellant in the present appeal.

APPELLATE TAX BOARD

By: 

Thomas W. Hammond, Jr., Chairman

A true copy,

Attest: 

Clerk of the Board

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