

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

GREENERY SECURITIES
CORPORATION

v. COMMISSIONER OR REVENUE

Docket No. F223436

Promulgated:
January 26, 2001

This is an appeal under the formal procedure pursuant to G.L. c. 62C, § 39, from the refusal of the Appellee Commissioner of Revenue ("Commissioner") to abate corporate excises assessed against Greenerly Securities Corporation for the fiscal years ending September 30, 1988, September 30, 1989 and September 30, 1990.

Commissioner Scharaffa heard this appeal and was joined in the decision for the Appellant by Chairman Burns, Commissioner Gorton, former Chairman Gurge and former Commissioner Lomans.

These findings of fact and report are promulgated at the request of the Appellee, pursuant to G.L. c. 58A, §13 and 831 CMR 1.32.

Jonathan B. Dubitzky, Esq. and Katherine J. Ross, Esq. for the Appellant.

Philip S. Olsen, Esq. and Michael Fatale, Esq. for the Appellee.

FINDINGS OF FACT AND REPORT

Based on the testimony, agreed statement of facts, and exhibits entered into evidence at the hearing of this appeal, the Appellate Tax Board ("Board") made the following findings of fact.

The Appellant, Greenery Securities Corporation ("Greenery Securities") was incorporated on October 31, 1985, under the laws of Delaware. During the tax years ending September 30, 1988, September 30, 1989 and September 30, 1990 ("tax years at issue"), Greenery Securities was a wholly-owned subsidiary of Greenery Rehabilitation Group, Inc. ("the Greenery Group.")

During the relevant period, the Greenery Group was a publicly-traded, widely-held Delaware corporation, with its shares listed on the New York Stock Exchange. It was principally engaged in operating nursing homes and other home care facilities, directly or through its wholly-owned subsidiaries.

On or about November 18, 1985, Greenery Securities was qualified to do business in Massachusetts. On November 3, 1986, the Appellee Commissioner of Revenue ("Commissioner") granted Greenery Securities security corporation status under the provisions of G.L. c. 63,

§ 38B. At that time, Greenery Securities' assets consisted of a variety of investments that included preferred stock, tax-exempt obligations, demand notes and repurchase agreements with daily and weekly maturities. Approximately \$34 million of Greenery Securities' assets were short-term investments, giving it considerable liquidity. At all times relevant to this appeal, Greenery Securities had no employees, owned no tangible assets, and neither held itself out to the public as a lending institution nor was regulated as such.

Health and Rehabilitation Properties Trust ("HRPT") was a publicly-held Maryland real estate investment trust, organized in 1986. During the tax years at issue, it was listed on the New York Stock Exchange. HRPT was originally organized for the purpose of providing financing, through mortgage loans and sale/leaseback transactions, to unrelated health care facilities, including nursing homes and retirement facilities, throughout the United States.

In December, 1986, in connection with HRPT's initial public offering, the Greenery Group purchased 9.9 percent of HRPT's outstanding common shares of stock. Subsequently, the Greenery Group transferred these shares to Greenery Securities. HRPT completed a second public offering on November 19, 1987, and the Greenery Group

purchased enough additional shares to retain its 9.9 percent interest. Again, the Greenery Group subsequently transferred these shares to Greenery Securities.¹

Prior to and throughout the tax years at issue, HRPT was involved in various business dealings, including various financing arrangements, with the Greenery Group and its subsidiaries. Two individuals also served on the board of directors of both the Greenery Group and HRPT during the relevant period.²

During the tax years at issue, Pelino Campea served as chief financial officer for all Greenery Group entities, in addition to serving as treasurer for Greenery Securities. He was directly and principally responsible for Greenery Security's investment decisions. Mr. Campea testified that during the relevant time period, a Greenery Group priority

¹ On or about November 21, 1989, Greenery Securities transferred its entire ownership interest, 9.9 percent of HRPT's common shares, to the Greenery Group as a dividend. On or about November 29, 1989, the Greenery Group transferred this 9.9 percent interest in HRPT's common shares to HRPT Advisors, Inc., in exchange for cash and a promissory note. HRPT Advisors, Inc., a Delaware corporation, was formed to provide management services and investment advice to HRPT.

² These individuals were Gerard Martin and Barry Portnoy. On transactions between HRPT and the Greenery Group, or any of its subsidiaries, Mr. Martin and Mr. Portnoy abstained from Greenery Group board vote. Similarly, these two individuals abstained from all HRPT board actions involving the Greenery Group and its subsidiaries. Further, all existing and future business relationships between HRPT and the Greenery Group, Continuing Health and HRPT Advisors, and any of their affiliates, had to be approved by a majority vote of the Independent Trustees of HRPT.

was continued corporate expansion. In light of this objective, Greenery Securities' investment strategy involved protecting its capital, while maximizing return on that capital and maintaining liquidity at all times. Greenery Securities, therefore, sought short-term investment opportunities that provided the best combination of high return and low risk. Mr. Campea further testified that Greenery Securities' investments during the relevant time period were therefore almost exclusively short-term, between six months and one year, with its portfolio consisting primarily of tax-exempt obligations, demand notes, repurchase agreements with daily and weekly maturities, and other short-term obligations.

The Greenery Group, familiar with HRPT's operations and credit-worthiness, became aware of HRPT's desire to issue short-term debt instruments. In light of Greenery Securities' excess liquidity and its need for attractive short-term investments, the Greenery Group acquired a \$14.5 million promissory note, executed by HRPT on December 28, 1987. The note bore an interest rate of 10 percent, with interest payable monthly. The note's stated maturity was the earlier of September 30, 1988, consummation of a public equity offering, or the consummation of long-term debt financing. The note was

secured pursuant to a collateral assignment of HRPT's portfolio of mortgage loan receivables. On December 30, 1987, Greenery Securities advanced the funds, pursuant to the note, to HRPT. HRPT, in turn, made payments of principal and interest on the note directly to Greenery Securities. HRPT repaid the note, in full, prior to September 30, 1988.

Similarly, on March 31, 1989, the Greenery Group acquired a second \$5 million note, executed by HRPT. This note bore an interest rate of one percent less than the prime rate in effect during the term of the note, with interest payable monthly. The note matured on the holder's demand and was unsecured. Greenery Securities advanced the funds, pursuant to this note, to HRPT. HRPT, in turn, made payments of principal and interest on the note directly to Greenery Securities. This note was paid off by September 30, 1989.

On September 27, 1989, the Greenery Group acquired a third demand note, executed by HRPT, in the amount of \$20 million. This note bore an interest rate equal to the prime rate in effect during the term of the note, with interest payable monthly. The note's stated maturity date was March 31, 1990, and was secured pursuant to a collateral assignment of mortgage loan receivables. On

September 27, 1989, Greenery Securities advanced the funds, pursuant to the note, to HRPT. HRPT, in turn, made payments of principal and interest on the note directly to Greenery Securities. This note was repaid on or about December 3, 1989.

As testified to by Pelino Campea, each decision to invest in the above-described three notes satisfied Greenery Securities' financial objectives: maintaining liquidity while minimizing risk and maximizing return. Further, Mr. Campea testified that Greenery Securities, through these investments, gained neither the right to manage nor the right to control HRPT. The Board found Mr. Campea's testimony to be credible and consistent with the documentary evidence and the parties' Agreed Statement of Facts.

John Wilkins, found by this Board to be an expert witness in the field of investment, testified that investment companies and mutual funds do commonly purchase debt instruments for short-term investment, like the three notes at issue. He testified that such notes are typically referred to as commercial paper. He further testified that the commercial paper market enables corporations to bypass the commercial lending system, and thereby receive money more rapidly and without the detail required by a bank

lending authority. He testified that commercial paper can include a demand feature, as with two of the notes at issue, in order to allow the investor greater flexibility. The Board also heard uncontroverted testimony that the interest rate on the notes at issue was more favorable than Greenery Securities could have expected to receive on other short term investments at that time and the Board so found.³

Greenery Securities consistently reported the HRPT debt instruments as assets on its tax returns and financial statements. Interest income from these debt instruments was also reported on Greenery Securities' tax returns.

For each of the tax years at issue, Greenery Securities retained its classification as a security corporation under Section 38B. In reliance on this classification, it timely filed its Massachusetts corporate excise returns and determined and timely paid the corporate excise shown as due.

³ The Commissioner argued, without substantiation, that because the interest payable from the second and third notes at issue was tied to the prime rate, each note had a low market rate of interest, i.e. the lowest rate of interest on bank loans at any given time and place, typically offered to preferred borrowers. Interest that varies with prime, however, is a high rate of interest for short-term obligations. As noted by the "Money Rates" column in the *Wall Street Journal* of March 10, 1997, for example, the prime rate was 8.25%. At that same time, the rate for commercial paper ranged from 5.28% (for 30-44 day commercial paper) up to 5.45% (for 240-270 day commercial paper.) The rate on bank certificates of deposit ranged from 4.98% for one month CDs to 5.63 % for one year CDs. The rate on U.S. treasury bills was 5.10% for 13 week bills and 5.19% for 26 week bills, and the overnight money rate was 5.15%.

Following a field audit beginning in August, 1990, the Commissioner concluded that because of activity which he believed to be inconsistent with its status as a security corporation, Greenery Securities was not entitled to security corporation classification during the tax years at issue. The Commissioner determined that investments made by Greenery Securities in 1987 and 1989, specifically the three purchases of debt obligations from HRPT, disqualified Greenery Securities as a security corporation. On November 26, 1991, therefore, the Commissioner issued his notice of intention to assess additional excises for the tax years at issue.

Following a February 21, 1992 conference, the Commissioner issued a Letter of Determination, dated May 21, 1992, which upheld the audit adjustments and the Commissioner's revocation of Greenery Security's security corporation status.

Because of the Commissioner's revocation of security status and by Notice of Assessment dated March 14, 1993, Greenery Securities was assessed additional excise deficiencies and interest, totaling \$2,025,067.00, for the tax years at issue. On April 9, 1993, Greenery Securities timely paid all additional assessments, in full.

On or about October 20, 1993, Greenery Securities seasonably filed applications for abatement of the additional assessments for each of the tax years at issue which were deemed denied by the Commissioner's failure to timely act on the applications within six months from the date of filing. On October 3, 1994, the Appellant timely filed a petition with the Appellate Tax Board ("Board"), appealing the Commissioner's refusal to grant the abatement requested for the tax years at issue.

On the basis of the foregoing, the Board found this appeal to be in conformity with the requirements of G.L. c. 62C, §§ 37 and 39. The Board, therefore, determined that it had jurisdiction to hear and decide this matter.

On the basis of the evidence presented, and to the extent that it is a finding of fact, the Board found that all three short-term debt instruments at issue, acquired and held by Greenery Securities, were "securities" within the meaning of G.L. c. 63, § 38B. Specifically, the Board found the notes, negotiated between two publicly-traded corporations and issued by a credit-worthy corporation listed on the New York Stock Exchange, were marketable short-term securities with market rates of interest, payable currently. Further, the Board found that Greenery

Securities acquired and held these instruments for investment purposes. The fact that there may have been other benefits to these transactions -- for example, HRPT received "bridge financing" by Greenery Securities' acquisition of these short term notes until HRPT could secure long-term financing - does not undercut the essential finding that Greenery Securities purchased and held the securities in question for investment purposes.

Accordingly, for the reasons detailed in the following Opinion, the Board found and ruled that Greenery Securities was engaged exclusively in buying, selling, dealing in, or holding securities on its own behalf and not as a broker. The Board found and ruled that Greenery Securities was entitled to the favorable tax treatment accorded to security corporations under G.L. c. 63, § 38B for the tax years at issue.

The Board, therefore, granted abatements of Greenery Securities' corporate excise of \$387,853.00 for tax year ending September 30, 1988, \$441,441.00 for the tax year ending September 30, 1989, and \$457,467.00 for the tax year ending September 30, 1990.

OPINION

The question raised by the present appeal is whether, for purposes of its corporate excise, Greenery Securities is properly classified as a "security corporation" under the provisions of G.L. c. 63, § 38B. Specifically at issue is whether the three short-term debt instruments, executed by HRPT and acquired and held by Greenery Securities, constitute "securities" for purposes of G.L. c. 63, § 38B and if so, whether these instruments were held and acquired by Greenery Securities for investment purposes.

A domestic or foreign corporation "engaged exclusively in buying, selling, dealing in, or holding securities in its own behalf and not as a broker" receives favorable excise treatment under G.L. c. 63, § 38B(a).⁴ To qualify for "security corporation" status under § 38B, a corporation must satisfy a two-pronged test: (1) the instrument held by the corporation must be a "security;" and (2) if the instrument is a security, it must be acquired and held for investment purposes by the corporation. See **State Tax Commission v. PoGM Co.**, 369 Mass. 611 (1976). Classification as a security corporation is granted only if both of these conditions are

⁴ Pursuant to G.L. c. 63, § 38B(c), a corporation taxable as a security corporation under G.L. c. 63, § 38B is not subject to the more onerous corporate excise imposed by G.L. c. 63, §30 *et seq.*.

satisfied. See also, Letter Rulings 91-3, 91-6, 91-10, and 93-7.

Further, security classification under Section 38B is granted only when the corporation is engaged exclusively in the statutorily specified investment activities.

Chatham Finance Corp. v. State Tax Commission, 362 Mass. 216 (1972); **Industrial Finance Corporation v. State Tax Commission**, 367 Mass. 360 (1975); **State Tax Commission v. PoGM Co., supra**. The term "exclusively" is narrowly construed: "[t]he fact that a major portion of [a corporation's] activities may fit the statutory definition does not satisfy the statutory requirements. **State Tax Commission v. PoGM Co.**, 362 Mass. at 612.

In determining whether a corporation qualifies as a security corporation, the statutory purpose of Section 38B must be considered. **State Tax Commission v. PoGM Co, supra**; **Industrial Finance Corporation v. State Tax Commission, supra**. ("The general and familiar rule is that a statute must be interpreted according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied, and the main object to be accomplished, to the end that the purpose of its framers

may be effectuated." **Industrial Finance Corporation**, *supra* at 364, quoting **Hanlon v. Rollins**, 286 Mass. 444, 447 (1934).)

The Massachusetts Supreme Judicial Court has examined the legislative history of Section 38B, (St. 1929, c. 359, § 1), and determined that its statutory purpose was to encourage investment companies to incorporate in Massachusetts, stating that

the essential function of these investment companies is to . . . invest in portfolio securities [enabling] stockholders who contribute to the corporate pool of capital for investment to receive the advantages of investment diversification and expert management." **Industrial Finance Corp. v. State Tax Commission**, *supra* at 365-366 (1975), quoting **Aldred Inv. Trust v. Securities and Exchange Commission**, 151 F. 2d 254, 260 (1st Cir. 1945), *cert. den.* 326 U.S. 765 (1945). See also **Mezzanine Capital Corporation v. Commissioner of Revenue**, 40 Mass. App. Ct. 56, 59.⁵

Greenery Securities' activities during the tax years at issue were consistent with the legislative intent of § 38B, as articulated in **Industrial Finance Corporation**,

⁵The original intended beneficiaries of Section 38B were investment trusts. **Industrial Finance Corporation v. State Tax Commission**, *supra*. at 365. Recent amendments to G.L. c. § 38B have broadened its applicability to regulated investment or bank holding companies under the Federal Internal Revenue Code. The **Industrial Finance Corporation** Court noted that while the bank holding company, "which exercises control and management responsibility, does not fit the definition of the investment trust, [...] nevertheless, the bank holding company is a company which invests in securities. We believe that amendments to the statute contain no indication that the Legislature intended to extend G.L. c. 63, § 38B, to corporations which do not invest in securities." *supra*. at 366.

supra. The notes at issue represent Greenery Securities' investment in HRPT, a publicly-traded, widely held and credit-worthy business. Through these short-term investments and pursuant to its financial goals, Greenery Securities was able to maximize its return on capital, maintain its liquidity and minimize risk. Accordingly, the Board ruled that at all relevant times, Greenery Securities functioned as an investment vehicle for its stockholders, who in turn received the benefit of expert management and diversification of investments.

In the instant appeal, the Commissioner argued that Greenery Securities failed to satisfy the first prong of inquiry under Section 38B, in that the three notes at issue were not "securities." Specifically, the Commissioner argued that the three notes at issue were "simple loan transactions": each note resembled bank financing, in that its rate of interest was low, its underlying debt was either unsubordinated to senior debt or secured, and the funds provided by each note were intended to provide HRPT with funds for current operations. The Commissioner further argued that because HRPT was "closely related" to the Greenery Group and Greenery Securities, through overlapping personnel and interrelated transactions, the note advances were in the nature and character of a loan.

The term "security" is not defined in G.L. c. 63, § 38B. The Board, however, may rely on definitions from "sources presumably known to the statute's enactors, such as their use in other legal contexts and dictionary definitions." **Mezzanine Capital Corporation v. Commissioner of Revenue**, 16 Mass. App. Tax Bd. Rep. 127 (Docket Nos. 204339-204341, May 13, 1994), *aff'd* 40 Mass. App. Ct. 56 (1996), quoting **Commonwealth v. Zone Book, Inc.**, 372 Mass. 366, 369 (1977). The Massachusetts Securities Act, G.L. c. 110A, §401(k), defines "security" as "any note; stock; treasury stock; bond; debenture; evidence of indebtedness."⁶ In **Mezzanine Capital Corporation, Id.** at 131, this Board relied on the definition of "security" in **New Century Dictionary of the English Language** (1929) as an "evidence of debt or of property, as a bond or a certificate of stock." The three instruments at issue, as debt instruments or notes of indebtedness, easily fit

⁶The predecessor of G.L. c. 110A, § 401(k), enacted several years before the predecessor of Section 38B, defined "security" as "any bond, stock, certificate under a voting trust agreement, treasury stock, note, debenture...evidence of indebtedness...or any certificate or instrument representing or secured by an interest in capital, assets or property of any corporation, unincorporated organization, association, trust or public corporation or body. St. 1921, c. 499, §2(c)." Federal securities statutes, including the Securities Act of 1933 and the Securities Exchange Act of 1934, define the term "security" to include "any note." "Any evidence of indebtedness" is also treated as a security. *Securities Act of 1933, §2(1), 15 U.S.C. §77b(1); Trust Indenture Act of 1939, §303(1), 15 U.S.C. § 77ccc(1); Investment Company Act of 1940, §303(1), 15 U.S.C. §80a-1(a)(36); Investment Advisers Act of 1940, §202(a)(18), 15 U.S.C. §80b-2(a)(18).*

within the definitions of "security" understood by Section 38B's enactors.

Further, the Massachusetts Supreme Judicial Court has found it "instructive" to examine the definition of "security" given by the Uniform Commercial Code,

which conveys the idea that securities . . . are salable and transferable in some recognized, although perhaps limited, commercial market. It can be said that securities are generally negotiable The word "security" denotes an investment in some private or public business enterprise. **Commonwealth v. I. Charles Baker**, 368 Mass. 58, 69-70 (1975).⁷

The Commissioner also has characterized "securities" with the following attributes:

(1) they are marketable, **United States v. Leslie Salt Co.**, 350 U.S. 383, 393-394; (2) they pay or accrue dividends or interest, **Valley Stream Teachers Federal Credit Union v. Commissioner of Banks**, 376 Mass. 845, 858, (3) they appreciate (or depreciate) in value, **id.**; (4) they confer voting rights, **id.**; and (5) they may be pledged or hypothecated, **Principe v. The McDonald's Corp.**, 463 F.Supp. 1149 (1979). *Letter Ruling 91-3*.

Every note is presumptively a security. **Reves v. Ernst & Young**, 494 U.S. 56, 65 *reh'g denied*, 494 U.S. 1092 (1990). Neither Section 38B, nor any appertaining judicial or administrative authority, suggest that a "security" may

⁷ The Court in **Dinjian v. Dinjian**, 22 Mass. App. Ct. 589, 594, n. 10 (1986) highlighted that "the touchstone [of a security] is the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others."

not be short-term. (See Letter Ruling 93-7, where a security corporation may make short-term loans of its investment assets.) The Massachusetts Supreme Judicial Court has specifically recognized that a promissory note may constitute a "security" under G.L. c. 63, § 38B, when it is "held for investment by a company whose business is investment." **Industrial Finance Corporation**, 367 Mass. at 367.⁸

In the instant appeal, the three short-term debt instruments, issued by HRPT and acquired by Greenery Securities fit within the applicable definitions of "security." Each note bore characteristics of marketable securities, recognized under Massachusetts and federal securities law and by the Commissioner. They each were negotiated investments in a publicly-traded, credit-worthy business, listed on the New York Stock Exchange. Further, they each bore a market rate of interest for a short-term security, payable currently. As such, the three notes at issue were salable and transferable in a commercial

⁸ In **Industrial Finance Corporation**, the taxpayer failed to qualify for advantageous excise treatment under § 38B, not because it failed to hold a "security," but because the taxpayer "manifestly does not hold its promissory notes for investment in the necessary sense." **Id.** at 367.

market.⁹ Each note at issue, therefore, is a "security" under Section 38B.

The notes at issue are dissimilar to the advances described in *TIG, Inc. v. Commissioner of Revenue*, 15 Mass. App. Tax Bd. Rep. 83 (Docket Nos. 139446-139448, September 29, 1993). There, the Board found the advances not to be securities under § 38B because, as an integral part of a single business that provided mortgage insurance and related services, they:

bore none of the characteristics of securities . . . they were not marketed or traded on any recognized exchange; they did not pay interest or dividends; they did not appreciate in value; they were not evidenced by notes or any other written instruments; and they were the result of non-arm's length transactions...The advances lack virtually all of the characteristics of commercial paper.

Id. at 88. In contrast, in the instant appeal, Greenery Securities acquired written instruments of indebtedness issued by a publicly-traded corporation which provided for interest at market rates.

On this basis, the Board ruled that the three short-term notes at issue are securities under the provisions of

⁹ Section 38B does not require that a security corporation invest only in instruments traded on a security exchange. (See *Mezzanine Capital Corp. v. Commissioner of Revenue*, *supra*, where the subordinated debt instruments at issue, not traded on any exchange, were found to be securities held for investment purposes. See also Letter Rulings 93-8, 93-7 and 91-8.) Significantly, while Greenery Securities never, in fact, created a market for the notes at issue, there was no legal or practical impediment to doing so.

§38B. Their issuer, HRPT, was a large publicly-traded corporation, listed on the New York stock exchange, with a sound credit history. Each note was a negotiable debt instrument that provided for interest at market rates, to be paid currently. As negotiable obligations of a credit-worthy public corporation, these notes constituted marketable securities, and were therefore securities under § 38B.

The second prong of analysis under § 38B requires that the corporation acquire and hold its securities for investment purposes. ("A pivotal inquiry in cases arising under §38B is whether the taxpayer acquired its securities, including debt instruments, for investment." **Mezzanine Capital** 40 Mass. App. Ct. at 60.) Acquisition of security instruments for purposes other than investment is sufficient to preclude security corporation classification. The Commissioner has generally presumed that marketable securities are held for investment purposes under G.L. c. 63, § 38B. See DOR Directive 86-24 and Letter Rulings 89-2, 91-3 and 91-8.

Greenery Securities acquired the three securities at issue in the normal course of its investment business. As noted above, Greenery Securities' investment strategy during the tax years at issue involved protecting its

capital while maximizing return on that capital and maintaining liquidity at all times. The acquisition of the three short-term notes from a publicly-traded and credit-worthy corporation, all salable and transferable on a commercial market, provided the best combination of high return and low risk. Their acquisition, therefore, was consistent with and satisfied Greenery Securities' investment goals. Accordingly, the Board ruled that at all times relevant, Greenery Securities acquired and held its securities for permissible investment purposes.

A security corporation may acquire investment assets from a related party. In *Mezzanine Capital, supra*, this Board found the corporate taxpayer's acquisition of subordinated and high fixed-interest rate debt instruments, in a privately-negotiated transaction from issuers with whom the security corporation's parent had numerous business dealings, to be for investment purposes. Neither this Board nor the Appeals Court inferred from that circumstance any impermissible investment intent, nor adopted any *per se* rule that such dealings by affiliates automatically disqualify the investments made by the security corporation. See also Letter Ruling 91-8, where the security corporation was permitted to use its cash to finance the purchase of bonds of a target company while the

security corporation's parent tendered an offer for all of the target's common and preferred stock.¹⁰

The activities in the instant appeal are dissimilar to those found in ***State Tax Commission v. PoGm Co, supra***. There, security corporation status was denied because the corporation acquired a mortgage note in direct connection with a sale of real estate, necessary and required for the successful financing of the sale. ***State Tax Commission v. PoGM Co***, 369 Mass. at 613. In that case, the Court found that the security was not acquired and held exclusively for investment, but resulted from a collateral non-investment transaction.

In ***Industrial Finance Corporation, supra***, the taxpayer was engaged in a retail finance or credit agency business on a daily basis in return for promissory notes. 367 Mass. at 364. Accordingly, the taxpayer was found to be in the "business . . . [of] 'lending money' and not investing . . . in securities." ***Id.*** at 363. (A "high-volume, short-term daily lending business was most certainly not an intended beneficiary of the favorable provisions of § 38B." ***Mezzanine Capital Corp. v. Commissioner of Revenue,***

¹⁰ See also Letter Ruling 91-3, where a security corporation was permitted to acquire 100 percent of the shares of a subsidiary business trust and Letter Ruling 94-2, where the security corporation was permitted to own 100 percent of the stock of a subsidiary.

40 Mass. App. Ct. at 60). Greenery Securities' activities fall far short of any characterization as an active and daily lending business.

The activities in the instant appeal are also distinguishable from those in ***Edgerson, Inc. v. Commissioner***, 12 Mass. App. Tax Bd. Rep. 21 (1989). ***Edgerson*** involved unsecured loans between a closely-held security corporation and its officers and shareholders, all related persons (individual family members and family trusts.) There, this Board ruled that the promissory notes were acquired, not for investment purposes, but as an accommodation to the corporation's president and principal shareholders. No such finding is appropriate on the present record.

The record does not establish that the notes at issue were acquired by Greenery Securities for a non-investment purpose, as an accommodation to its principal, the Greenery Group. While there were dealings between Greenery Securities' parent, the Greenery Group and its affiliates, with HRPT, it has not been demonstrated that these dealings were so linked to the acquisition of the notes at issue as to preclude security corporation status. Previous business dealings in which HRPT provided mortgage or sale/leaseback financing of Greenery Group facilities were substantially

separated in time from the acquisitions of the HRPT securities at issue. None of the documentation of those financing arrangements, or evidence of any informal understanding or agreement supports the notion that HRPT provided financing in consideration of the Greenery Group or its subsidiaries standing ready to acquire its short-term obligations. In addition, each transaction between the Greenery Group and HRPT was specifically voted on by each corporation's board of directors. Accordingly, the evidence of record supports the conclusion that the notes at issue were acquired by Greenery Securities for investment purposes. Even if there were other benefits flowing to other affiliated corporations - such as the availability of "bridge financing" to HRPT -- such benefits are insufficient to deny Greenery Securities security corporation status where the evidence clearly establishes investment purposes as the motivation for Greenery Securities acquisition of the notes at issue. See, e.g., **Mezzanine Capital, supra**, and Letter Rulings 93-8, 91-8, and 91-6. The Board therefore found and ruled that Greenery Securities acquired the three short-term debt securities at issue for investment purposes.

A person who claims to be aggrieved by the refusal of the Commissioner to abate a tax in whole or in part has the

burden of establishing the right to an abatement. **Staples v. Commissioner of Corporation and Taxation**, 205 Mass. 20, 26 (1940). Based on the foregoing, the Board ruled that the Appellant, Greenery Securities, met its burden of proving that it was entitled to security corporation classification under Section 38B during the tax years at issue.

Accordingly, the Board issued a decision for the appellant in this appeal and granted an abatement of corporate excise in the amounts of \$387,853.00 for tax year ending September 30, 1988, \$441,441.00 for the tax year ending September 30, 1989, and \$457,467.00 for the tax year ending September 30, 1990.

APPELLATE TAX BOARD

By: _____
Abigail A. Burns, Chairman

A true copy,

Attest: _____
Clerk of the Board