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INEQUALITY IN REAL PROPERTY TAX REVIEW

ADOLPH KOEPPEL*

I. INTRODUCTION

A taxpayer in New York State may judicially challenge a real property assessment on any of the grounds provided by statute—illegality, overvaluation, and inequality. Although these grounds are stated in the alternative, except in the rare instance where the assessing body values real property at its fair market value, no taxpayer may successfully challenge his assessment without resolving the issue of inequality.

It is not practicably feasible to reassess real property within any taxing unit on an annual basis. Couple this with rising sales prices since the end of World War II and one finds that real property assessments are invariably lower than the fair market value of any particular parcel of real estate. While the difference between assessed value and fair market value may increase with each passing year neither value by itself is germane to a challenge of a property assessment. The significant number in such a challenge is the rate of assessment which is the ratio of the assessed value to the fair market value. The taxpayer must establish such a ratio during the trial. Once a finding of ratio is made by the court, it is then multiplied by the fair market value of the property as found by the trial court to arrive at the judicially correct assessed value of the real property.

This article will discuss various aspects of inequality in real property tax proceedings. Special attention will be given to the appropriate statutes, particularly section 720.3 of the RPTL as amended in 1969, a review of the judicial process in inequality proceedings, and a prognosis for inequality trials in New York.

II. STATUTORY BACKGROUND

The New York State Legislature is vested with power to “provide for supervision, review and equalization for purposes of taxation.” The only limitation is that “assessments shall in no case exceed full value,” a proscription which the Legislature endorsed by providing that “all real property in each assessing unit shall be assessed at the full value thereof.” As evidenced by the continued enactment of RPTL section 720.3 and its predecessors, the courts have historically accepted a uniform percentage of market value as being the legal equivalent of full value.

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1. REAL PROPERTY TAX LAW § 706 (McKinney 1960) [hereinafter cited as RPTL].
2. N.Y. CONST. art. 16, § 2.
3. Id.
4. RPTL § 306.

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Section 720.3 of the RPTL provides the sole method of proof on the trial of inequality of assessments and limits the evidence that can be introduced.

The parties shall mutually agree on the parcels to be appraised and the number of witnesses to be heard with respect to such issue.

This presupposes that both sides have selected parcels that each one wishes to be appraised for these purposes. An attempt is to be made by the parties to mutually agree as to a total combined list of parcels which shall then be appraised by both sides. The taxpayer will, of course, select substantial properties with low ratios of assessed value to market value. The respondent's list will rationally contain similar properties with high ratios. Needless to say, mutual agreement seems to be a vain expectation, and the law provides:

In the event the parties fail to agree on such parcels or on the number of witnesses, upon application of either party the court or referee shall select the parcels to be appraised without reference to their assessed values, or shall determine the number of witnesses, or both, as the case may be. ... 6

In People ex rel. Strong v. Hart, 216 N.Y. 513, 111 N.E. 56 (1916), the Court of Appeals laid down the rule. The taxpayer pointed to what is now section 502(3) of the Real Property Tax Law, which reads:

The assessment roll shall contain a column for the entry with respect to each separately assessed parcel of the assessed valuation of the land exclusive of any improvements, followed by a column for the entry of the total assessed valuation. Only the total assessment, however, shall be subject to judicial review provided by article seven of this chapter. N.Y. REAL PROP. TAX LAW § 502(3) (McKinney 1960).

He urged that he be allowed to introduce evidence of land values of property of like character (see discussion of stratification in text, p. 579 infra) to compare with the value of his land.

The Court of Appeals held:

Here we find provision made for two items in the assessment roll relating to real property, the one embracing the land alone; the other embracing the land and the buildings on it. There is nothing in either provision indicating on the part of the legislature to the effect that, when a comparison thereafter comes to be made in court in order to ascertain whether equality in the assessment has been observed, such comparison will be confined to one of these items instead of being permitted as to both. In my opinion, the law leaves the property owner claiming to be aggrieved by inequality in the assessment of his real property at liberty to attack the assessment by comparing the gross valuation placed upon his property with the gross valuation of other similar property upon the assessment roll; and he is also at liberty to compare the assessed valuation placed upon his land alone with the values placed upon the land only in the case of other properties of like character and situation. I can find no restriction in the law which forbids the aggrieved taxpayer from resorting to either method. People ex rel. Strong v. Hart, Id. at 520, 111 N.E. at 58 (emphasis added).

The Strong case appears to have been totally overlooked by practitioners in the past. Currently, attorneys for the Empire State Building are attacking its assessment by the Tax Commissioners of the City of New York. The Strong rationale is being tested in this trial.
Failure to agree casts the burden on the court (or referee) to make the selection of the parcels. Customarily the court will select an equal number of parcels at random from each side's list to make a combined list.

The appraisal of parcels of real property is expensive, since they must be made in accordance with the acceptable standards of valuation utilized in the courts in valuation proceedings. All three of the traditional valuation methods, summation approach, market data, and income approach must be considered in each appraisal. The economics of the main valuation proceeding will usually limit the number of parcels on each list and this in turn will determine the number of parcels selected by the court. The statute does not preclude the court from making an independent selection without reference to either list; however, practical considerations aside, there is no reported case where such a judicial prerogative has been exercised.

After the parcels have been selected each of the parties will have them appraised by his witnesses and the results must be filed with both the court and the other party. The statutory directive is noteworthy mainly because it provided for exchange of appraisals in a valuation proceeding long before such methods became standard procedure in condemnation and tax review trials.

At this point the formal trial begins.

The parties shall be limited in their proof on the trial of such issue to such parcels and witnesses, except that in any event, whether or not parcels are selected as hereinabove provided, evidence may be given by either party as to (1) actual sales of real property within the assessing unit that occurred during the year in which the assessment under review was made and (2) the state equalization rate established for the roll containing the assessment under review.

The language in italics was provided by the 1969 amendments. Prior to this and could have a great impact on tax assessment trials in the future.

In Wien v. Tax Commissioners, Special Term, New York County, (New York Law Journal p. 16, col. 3, Dec. 17, 1968), the taxpayer sought an order "directing that they may limit their proposed selection of parcels to be appraised under section 720(3) of the Real Property Tax Law . . . . to parcels wherein the land is of like character to the land under review and may limit their appraisals thereof to land values only." Id. at 16. See note 52 infra for New York City statutory authorization for such a procedure. The taxpayer was not seeking the selection of the sample parcels under section 720(3) at this time, but cited Strong v. Hart as authority for their request. Special Term denied the motion and referred it to the trial court with these words:

... If petitioners desire to limit themselves to land values alone, based upon their understanding of the controlling law, so be it. Their action certainly will not limit respondent to a consideration of land values alone (either with respect to the same parcels selected by petitioners or others), absent agreement on the question, certainly will not limit the trial court in its final selection of sample parcels, if the absence of agreement on parcels requires a judicial selection . . . . Id. at 16.

8. Id.

Before any testimony is given by either party as to the value of such parcels, each party shall simultaneously file with the court or referee, on a date fixed by the court or referee, a written statement of tabulation of the appraised values placed upon such parcels by the witnesses of the respective parties, and each party shall serve on the other at the same time a copy of such statement or tabulation of values stated by his witnesses.
time, the statute suggested that the selected parcel method of proof was mandatory (in absence of any agreement to the contrary) in every case but that either party could introduce evidence as to actual sales and the equalization rate.

Section 720 and its predecessors have long permitted evidence as to actual sales in addition to that offered by the selected parcel method. The 1969 amendment represents the latest step in the debate between the Legislature, which favors admission of the equalization rate, and Judge Fuld who opposes admission. The controversy was first scored in 1951 when the equalization rate was introduced into evidence at an inequality trial. In People ex rel. Yaras v. Kinnaw, the Court of Appeals rejected its introduction stating:

While there is a certain superficial resemblance between 'inequality' and 'equalization'—for both have reference to the relation between assessed values and full values of property—a county or state equalization rate serves a function entirely distinct from that to be served by the ratio fixed in inequality cases, and an equalization rate has no bearing upon the issue presented in such cases. The assessed valuation of a parcel is 'unequal' if the assessment has been made 'at a higher proportionate valuation than the assessment of other property on the same roll by the same officers.' ... On the other hand, the 'purpose' sought to be achieved through equalization ... 'whether the valuations in one tax district bear a just relation to the valuations in all the tax districts in the county' and the adjustment of the equalization rates where necessary to establish such 'just relation.' ... When the equalization rates are properly adjusted, the tax imposed on each of the tax districts is justly proportioned to the value of the taxable property within its limits. ... If the rates are not incorrect in this regard, rough justice is accomplished, for their purpose is to serve as a base for the allocation of tax burdens, and benefits, amongst the towns and tax districts. But such rates would be misleading in an equality case since they do not purport to reflect the ratio of assessments to value within the tax district itself.¹⁰

At the time Yaras was decided, state equalization rates had very limited uses and were notoriously inadequate. The primary use as indicated by the court was for the apportionment of taxes in joint districts. For this purpose, the relationship of rates to current market values was not important so long as rates were related to a uniform standard. Relative equity could be achieved even if such a standard were not reasonably current.

Only small amounts of state aid were apportioned on the basis of equalization rates and local taxing and borrowing powers were based on the assessed valuation of taxable real property. Since the state had no significant interest in equalization rates, little effort was expended on their establishment. It was well

known during this period that the state rates were not based on scientific studies and that they were substantially out of date.

When a constitutional amendment which related local taxing and borrowing power to the full value of taxable real property was approved in 1949, the State Board of Equalization and Assessment was created by the Legislature for the principal purpose of developing accurate equalization rates based on uniform and current period price levels for all localities in the state. The Board established the first equalization rates based on its statewide statistical studies in 1954. Since that time, state equalization rates have been established annually on the basis of substantial data obtained from periodic statistical surveys and uniform period price levels throughout the state.

In 1961 the Legislature amended section 720.3 to permit the introduction of the equalization rate in inequality trials. Six years later, a taxpayer chose to rely solely on the equalization rate ignoring the selected parcel method altogether. The Court of Appeals unanimously held that the equalization rate standing alone was insufficient evidence to sustain a finding of inequality of a particular assessment.\(^{11}\) It seems, therefore, that the 1969 amendment is intended to override this decision making it clear that the selected parcel method of proof is not mandated and that either of the alternative methods can be used as evidence by itself.

The issues in an inequality trial can be reduced if the respondent will by agreement stipulate the ratio which petitioner sets forth in his demand.\(^{12}\) Even if agreement as to ratio cannot be obtained by this method, the taxpayer should still avail himself of the provisions of section 716 of the RPTL just prior to the inequality trial since the municipality can be charged with the reasonable expenses of the inequality trial where it fails to admit the ratio claimed by the taxpayer and the taxpayer is successful upon this issue at the trial.\(^{13}\) This is a standard practice but the taxpayer must choose carefully the ratio he deems applicable. This can only be effective where he has previously made a thorough analysis of his and the respondent’s selected parcels.

### III. THE TRIAL OF INEQUALITY—METHODS OF PROOF

Section 720 of the RPTL sets forth the three methods of proof of inequality which may be used in an assessment trial. Each of these has singular characteristics.

#### A. The Selected Parcel Method

This method is known judicially as the “rough equality” method and by its critics as the “lottery” method.

[T]he idea of the statute appears to be that a sufficiently approximate arithmetical mean can be established by pooling a number

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\(^{12}\) RPTL § 716.1.

\(^{13}\) RPTL § 716.2.
of parcels (so selected) and comparing the aggregate of their assessed valuations with the aggregate of their full values. . . . [W]e cannot say that such a process is inadequate for practical attainment of the rough equality which is all that has heretofore been possible under any system of taxation. . . . 14

To arrive at pure ratio would be an impossibility since such a computation would require an appraisal or sale of each parcel on the assessment roll on the taxable status date. The theory of parcel selection is that the parcels represent a reasonable sample of the entire roll however statistically inaccurate. Using the selected parcels, the ratio is then computed in the following manner: the total appraised values serve as the denominator and the total assessed values serve as the numerator. This mathematical calculation, known as the “dollar ratio” formula, has been judicially sanctioned despite claims that the proper method would be to calculate each quotient separately and then take the mean as the ratio. The latter method would appear to be more equitable, and is mathematically more precise, but has been rejected by the courts. 15

The selected parcel method has serious disadvantages for the taxpayer. Taxpayers have long been frustrated in their attempts to prove ratio because of the high cost of the necessary appraisals and the selected parcel method's built-in advantages on the side of the municipality. 16 Unfortunately even the most astute taxpayer cannot overcome these advantages.

Commencing with the 1970 tax year, the trial courts must take a new look at the selected parcel method. It seems clear that should both parties agree to use this method, the ratio trial and findings will be no different from that which would have occurred prior to the 1969 amendment. No one can be sure what will happen, however, where one side (usually the taxpayer) elects to avoid the selected parcel method and relies instead on one or both of the permissive methods—actual sales and/or the state equalization rate. Clearly the taxpayer may now follow such a course safely as far as the burden of proof is concerned, but he cannot prevent the municipality from requesting the court to make a selection of parcels to be appraised.

16. The advantages which the municipality has are: (1) It may load up its list with the largest parcels in the district making it economically impossible for the taxpayer to appraise ten such parcels; for example, in New York City, the respondent could place the Empire State Building, Chrysler Building and the Pan Am Building on its list. (2) It could list parcels whose ratios are in excess of 100% while the taxpayer would never find parcels at or below zero. Parcels assessed at 100% or more over fair market value are common in any given assessment roll, e.g., old estates (white elephants) and old buildings in slum and ghetto areas, where property values have dropped almost to zero over the years. (3) It may add to its list all large new construction, which is generally assessed at or above the state equalization rate.
B. The Permissive Method of Introducing the State Equalization Rate

Is the 1969 amendment to section 720.3, which now permits the introduction of the state equalization rate "whether or not parcels are selected as hereinabove provided," a legislative direction to the courts to give substantial weight to this evidence in the inequality inquiry?

Despite the earlier judicial criticism of the state equalization rate and the apparent finality of its rejection when used alone, it may now be viewed as a superior indicator of ratio when compared to the rough results obtained by use of the selected parcel method. The state equalization rate is a collection of sales and appraisal data gathered and preserved by the State Board of Equalization over a period of some seven years for each taxing district within the state. It does not contain, however, an analysis of sales and appraisals which took place solely during the year under review, since the primary use of the state equalization rate is prospective.17

In Tilson v. Town of Huntington,18 the cover letter from the State Board of Equalization indicated that the state rate for the Town of Huntington for 1963 was seventeen percent "based upon the simple average of 1959 and 1961 market price level." The accompanying data (introduced in evidence in that case) contained five tables which indicated the depth of analysis and the considerable detail involved, all of which supports the contention that the ratio so determined is much more accurate than the "rough" estimate obtained with the selected parcel method.19

17. But see RPTL §§ 1250-52 mandating current ratios for each year and applicable solely to the City of New York.
19. Table No. 1 broke down the assessment roll by classes of property indicating the total assessment and market value for each class sampled and the ratio of each class. The largest classes were sampled until 80% of the assessment roll had been exhausted. Market values shown for the 1963 rate included only data reflecting 1959 and 1961 price levels.

Table No. 2 indicated the method by which adjustments were made between 1959 and 1961 composite market value ratios based on alleged changes in level of assessments.

Table No. 3 gave 1961 ratios based upon actual sales and appraisal samplings. Where the sales data were available for a class, they were merged with the appraisal data; otherwise the ratio was determined for the class on appraisal data only.

Table No. 4 listed appraisals included in the computation. These appraisals were randomly selected and values were as of 1961. They were then compared to 1960 assessments to obtain a ratio.

Table No. 5 listed the sales that were included in the computation of the rate. Additional data were introduced in evidence which demonstrated that:

(1) The parcels selected at random are selected specifically within a class.
(2) A sample is so selected that the average assessed value of the sample does not deviate more than 20% from the average of the assessments for the entire class. A larger deviation causes rejection of the sample and another sample is then selected.
(3) In gathering the material, the local assessor meets with the state's appraiser and comments upon the various properties.
(4) All sales which are not bona fide open market transactions are eliminated.
(5) If there are less than five sales in a class, the sales are not listed in the computation. The Board then adjusts the rate computed by use of the 1959 and 1961 data against the 1958 and 1960 assessments and takes into account alleged increases made by the local assessor in old assessments. The ratio is adjusted for changes in level of assessments on rolls completed subsequent to the one used for selecting samples.

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In recent years, an increasing number of taxpayers have been confronted by municipalities which have been willing to stipulate ratio only at a percentage in excess of the state equalization rate. This continues to be the practice even in jurisdictions where a trial court has made a finding of ratio lower than the state equalization rate in a particular case.\(^\text{20}\)

C. The Permissive Method of Introducing Actual Sales

The statute permits the introduction in evidence of "actual sales of real property within the assessing unit that occurred during the year in which the assessment under review was made."\(^\text{21}\) Even in the tax years when the selected parcel method was mandatory, actual sales data, if properly documented and with a properly laid foundation for their introduction, was the more accurate method for determining ratio.

The selected parcel method calls for appraisals by expert witnesses, and therefore are merely the informed and educated guesses at what a parcel of land would sell for in the open market on a given date. What better evidence of fair market value could there be than from an arms-length, open market sale of such a parcel?

In practice, actual sales are often the basis for selecting the sample parcels to be appraised by the selected parcel method. The appraiser, in that event, does not stray too far from this sales price. The courts, in valuation cases, have long and repeatedly held that the "price realized on a sale of land made under ordinary circumstances is evidence of the value of the property at the time of the sale and of its value at a time near the sale, provided conditions remain the same. . . ."\(^\text{22}\)

Accordingly, it has been held that actual sales which occurred within the assessing unit in the year under review are entitled to substantial weight,\(^\text{23}\) although they may be disregarded in the discretion of the trial court.

\(^{20}\) Prior to 1960, the Board of Assessors of Nassau County was offering to stipulate the ratio with individual taxpayers at 40%. From 1962 to 1964, largely as a result of Mid Island, supra note 5, the Board of Assessors then agreed to stipulate the ratio with taxpayers at 38%. From 1965 to date, the Board has agreed to stipulate to 33 1/3% as the ratio. Taxpayers' attorneys are pointing to a state equalization rate for the three towns in Nassau County at 29 and 30%, and have recently requested that such a percentage be stipulated for 1970. The actual ratio (in the post World War II period of rising sales prices) has been moving downward each year; however, the state equalization rate is always higher than current ratio since it weighs and averages previous years ratios for any given later year.

\(^{21}\) RPTL § 720.3. This same provision has remained in the statute and its predecessors for almost 90 years.


\(^{23}\) See People ex rel. Yaras v. Kinnaw, 303 N.Y. 224, 101 N.E.2d 274 (1951), where, in addition to the selected parcel method, the parties by stipulation submitted a list of selected sales setting forth and totaling in each instance the aggregate sales prices, the aggregate assessments and the resultant ratios. The ratio of the taxpayer's sales was 40% and that of the city 91.7%. The average of both lists was 65%. The referee's finding of 72.4% (based primarily on the selected parcel method) was upheld by the Court of Appeals reversing the Appellate Division ruling that 83% (the state equalization rate)
where the sales data was "fragmentary and in some instances lacked positive authentication."24

D. Selection of Actual Sales by Random Number Sampling

Prior to the 1969 amendment, taxpayers in Mid Island Shopping Plaza v. Podeyn25 and Tilsac v. Town of Huntington26 attempted to establish ratio by introducing evidence of actual sales selected by utilizing a table of random numbers. This method results in high statistical accuracy by using a relatively small number of sales to sample a much larger group of sales.27 In each case, the taxpayer urged Special Term that such a procedure most efficiently and accurately reflected the roll under review. Both of these cases were tried and decided when the selected parcel method was still mandatory, but the rationale of these cases should be just as applicable to post 1969 amendment cases. Mid Island has gone through the appellate courts. Tilsac has just left Special Term and requires a more detailed analysis since the evidentiary pattern there developed was unique.

In 1960, the owners of the Mid Island Shopping Plaza, a large regional shopping center in Nassau County, prepared for their tax review trial against the assessors of Nassau County.28 The economics of the proposed ratio trial should be controlling. In Seneca Hotel Corp. v. Assessors of the City of Geneva, 13 A.D.2d 896 (1961), aff'd 10 N.Y.2d 1031, 275 N.Y.S.2d 48, 180 N.E.2d 435 (1962), all sales which took place during the year under review were introduced but not appraised, value being computed by utilizing the documentary stamps attached to the deeds. The ratio of the sales was 55.5%—that of the selected parcel method 71%. The Appellate Division approved the referee's adoption of 71% because it was entitled to greater weight in view of the "expert valuation of the selected parcels."

27. Harold Wattel of Hofstra University, the expert for the taxpayer in Tilsac, described sampling by means of random numbers.

[Sampling is a statistical technique which refers to selecting from a large population or large universe or a greater number of events . . . Sampling refers to plucking from that universe a limited number of cases or limited number of items.

In the field of statistics, the term probability sampling now refers to a technique by which any member of that universe has the same likelihood of falling into your sample as any other unit on that universe. In other words, there is no bias against any one item in that universe from getting into or out of that sample. . . In order that bias not be introduced, the statistician usually refers to a series of numbers that have been randomly generated. And using these numbers and applying a number system to the elements in the universe, he then plucks out the elements on the basis of his random number system.

This is equivalent to having balls in a cage numbered zero to nine and then closing your eyes and sticking your hand in and plucking one out, recording that number. Throwing it back in and starting all over again, so that every one of those ten balls numbered zero to nine has an equal chance of coming out every time you stick your hand in.

Record of trial at 395-97, March 18, 1966.

28. In New York, Nassau County is unique in that it is the only non-urban county which has a County Board of Assessors. Effective January 1, 1970, Tompkins County established a Review Board charged with the responsibility of adopting a county wide assessment roll and eliminating all such town, city and village rolls within the county. In all
plagued them as it had all taxpayers before. The Mid Island owners combined with the owners of two other regional shopping centers in Nassau County, Roosevelt Field and Green Acres, to finance the substantial cost of the inequality trial. Conceding to themselves that the selected parcel method would avail them little or nothing due to the built-in edge favoring the municipality, they decided to use random sampling to test the entire roll by introducing evidence of actual sales throughout the assessing unit on a mammoth scale.

Special Term, confronted with the statute's reference to the actual sales method, made these interesting findings.

The petitioner has presented 530 transactions chosen blindly and at random. This far exceeds any number of properties which could have been selected by the parties and appraised by the experts for both sides, using the first [mandatory] method set forth in section 293 of the Tax Law (now 720(3) Real Property Tax Law). The result here achieved, within the margin of allowable error, seems at least as valid as any which might be achieved by that method.

This scientific approach to the problem has certain distinct advantages over the alternate [mandatory] procedure authorized by the statute. In the latter, opinion evidence of appraisers as to the true value of the parcels of real estate selected may vary greatly.

Petitioner's method of obtaining a sampling of recorded sales, utilizes a statistical procedure now universally recognized and applied in many fields of industry, commerce, science and research. The use of tables of random numbers reduces to a minimum the possibility of human error and inclination in the selection of samples. Moreover, the great number of samples which may be considered by the use of this method reduces the significance of any abnormalities which possibly may have been present in some of the transactions by averaging them out.

It is obvious that Special Term was intrigued by this innovative method of introducing actual sales.

In affirming, the Appellate Division held that actual sales (without limit as to the amount) may be introduced in evidence in inequality trials and these sales may have nothing whatever to do with the parcels selected under the mandatory method. The Court of Appeals also affirmed saying "[i]n view of the

other New York counties, the assessing unit is the town. The cities and villages within the town either adopt the town roll or maintain their own.

29. The fair market values of each of these regional shopping centers ranged between $10,000,000 and $20,000,000. In Mid Island, a ratio demand of 36% or less was served and denied pursuant to RPTL § 716. The County offered to concede a ratio of 40%. At the successful conclusion of the ratio trial with a finding of 35.88%, the county paid some $25,000 to Mid Island pursuant to the provisions of § 716.2 as "reasonable" expenses incurred in making such proof. The actual costs claimed by the taxpayer exceeded $50,000.

30. There were several thousand sales that occurred in Nassau County for the year under review. The sample taken was 530. In this case, the only proof of inequality offered by either party was the introduction of these sales by the taxpayer, with the added stipulation agreed to by the County that the "sales prices established by the documentary stamps on the deeds may be used as evidence of the sales prices."

31. 25 Misc. 2d at 972, 204 N.Y.S.2d at 16, 17.

method adopted and acquiesced in by the parties in trying this proceeding, we
neither reach nor consider the construction of § 720(3) of the Real Property
Tax Law. . . .”33 Something new was surely added here. Where the selected
parcel method was not used, actual sales, randomly selected or otherwise, were
permitted to govern the issue of inequality.

In 1967, *Tilsac v. Town of Huntington*34 posed a unique question to the
court. In an inequality proceeding in which the selected parcel method, the
random sampling of hundreds of actual sales and the state equalization rate
are all utilized, should not the court give the greatest weight to the most ac-
ccurate sampling of the roll—the random sampling method of actual sales?
While it barely brooks of argument that a sampling group of five hundred sales
or appraisals will more accurately reflect a much larger population than ten or
twenty such similar sales or appraisals, the court found that the taxpayer had
not sustained the burden of proof on the issue of inequality and thus made no
finding nor gave any hint of the answer to the question posed.

In *Tilsac*, the taxpayer laid its plan of attack perhaps too carefully. It was
aware that the state equalization rate was seventeen percent, the selected parcel
method was loaded against it and the ratio obtained in this manner would
surely be higher than the state rate, and it was sure (from results of test
studies) that pure ratio was between twelve percent and fifteen percent. Armed
with the *Mid Island* approach of random selection of sales, it sought to deter-
mine the ratio from some 6,600 sales in 1963 by nine hundred samples,35
simultaneously urging upon the court the superiority of this method and that it
be granted the greatest weight on the issue of inequality.

As expected, the ratio derived from the selected parcels was about 22.5
percent and the state equalization rate was seventeen percent. Neither result
was helpful to the taxpayer. The proof adduced by random selection of all the
sales which took place in 1963 produced a ratio which ranged from 12.85 percent
to 13.35 percent as the taxpayer suspected. However, the court found fault
with the random selection procedure in many respects and rejected this proof of
inequality.

Before actual sales are introduced into evidence, the data must be carefully
authenticated and documented. When working with a single or small group of
sales, the appraiser, before accepting them, must determine that the sale was
bona fide, arms-length, between unrelated parties and that the federal docu-
mentary stamps affixed to the deeds do represent the equity paid over and above
existing mortgages. Once a copy of the deed and any mortgages are obtained,
the balance of the authentication is accomplished by communication with one
of the parties to the transaction or in most cases with the attorney for one of

33. 10 N.Y.2d at 967, 180 N.E.2d at 63, 224 N.Y.S.2d at 283.
34. Supra note 26.
35. Later, an additional 900 samples were selected so that the sampling procedure
ultimately produced some 1800 actual bona fide sales which occurred in 1963.
the parties to confirm such items as names, size of lots, and sales prices. Where available, a copy of the contract and closing statement is obtained.

A large number of sales (530 or 1,800) makes such authentication financially infeasible and economically suicidal; resort must be had to other practical solutions. In Mid Island, by sampling actual conveyances in the County Clerk's office which were keyed prior to sampling, the taxpayer compiled some 340 sales that were recorded during the fiscal period May 1, 1956 through April 30, 1957, and compared them with their assessed valuations on May 1, 1957. In addition, the taxpayer produced for the court every sale in the county during the same fiscal period in which the consideration was reported to be $75,000 or more—another 190 sales—for a total of 530 sales. The respondent stipulated that documentary stamps on the deeds might be used as evidence of sales price.

In Tilsac, the taxpayer, sampling by random numbers, presented two separate lists, each consisting of 900 sales, all of which occurred in calendar year 1963. The sales prices in one sample were compared with the assessment on June 1, 1962, and in the other list to the assessment for these parcels made on June 1, 1963. There was no concession from the respondent that the documentary stamps plus the existing mortgages could be used as evidence of the sales price. Special Term did not rule on the use of documentary stamps as evidence of value, although the taxpayer's expert witness established that such stamps proved to be accurate indicators of sales prices in 99 percent of the cases he had met with in over forty years of such experience.

36. These are the actual number of sales introduced in Mid Island and Tilsac.

37. RPTL § 720.3 permits "... evidence as to actual sales of real property within the assessing unit that occurred during the year in which the assessment under review was made. ..." What is "the year" referred to in the statute? The Legislature gives no further guidance and no court has ruled upon this issue.

38. However, since the last 55 cents of the documentary stamps affixed to a single deed might represent a range of $1.00 to $500 of actual consideration paid, each list was amended by reducing the indicated sale price by a compromise sum of $250 to fairly compensate for this variable factor.

39. 26 U.S.C. § 4361, prior to its repeal on January 1, 1968, required that the grantor of real property pay a tax upon the conveyance of real property equal to $.55 for each $500 or part of such sum paid as consideration for the conveyance. Where property is sold subject to an existing mortgage, the portion of the sales price represented by such mortgage is not taxable. During the years of the existence of this tax, the stamps annexed to a deed plus the existing mortgages have become a standard acceptable measuring device to determine sales prices. Although the use of documentary stamps has long been accepted as evidence of sales price when such a sale is used as a "comparable" sale in a valuation proceeding, its acceptance under the inequality statute has not yet been definitely ruled upon in New York. In Staten Island Edison v. Moore, 6 Misc. 2d 1031, 164 N.Y.S.2d 772 (1955), rev'd 6 A.D.2d 369, 177 N.Y.S.2d 129 (1958), retried 37 Misc. 2d 198, 238 N.Y.S.2d 443 (1961), aff'd, 12 N.Y.2d 846 (1962), the taxpayer during the first trial introduced 5,000 sales, the prices ascribed to each being determined from the documentary stamps plus the existing encumbrances. The appellate division made no comment on this form of proof but reversed on other grounds. At the new trial, a new referee completely ignored this sales data. The affirmances by the appellate courts were made solely to end a seven-year controversy and no ruling was made upon the use of stamps as proof of sales prices. The New York County Surrogate held in In re McGeehin's Will, 134 Misc. 334, 235 N.Y.S. 477 (1929) that "... from the fact that it bears United States Internal Revenue stamps of $1.50, a
Despite the accuracy of random sampling, Special Term rejected the method as a proof of inequality. The court's reasons appear to demonstrate a lack of mathematical knowledge as well as a possible misapplication of the law. Special Term objected in one instance to the fact that two sales of obviously improved plots (out of 1800 sales) were compared with assessments of unimproved land. The ratios thus obtained were inordinately low. This type of error would, however, be balanced out by similar comparisons in which property assessed as improved had the improvement destroyed or demolished at the time of the sale. The court was also concerned that the taxpayer did not see fit to inform it of the nature of any sale.

[T]he vexing factor is that the court was not advised of the nature of any given sale. Thus a 100-acre farm, as farmland, will be assessed as acreage at a much lower amount than would the same farm broken down into building plots and filed as a map for development purposes. So that the mere indication by documentary stamps in an exhibit that the purchase price of a parcel was $200,000.00 and the assessment only $5,000.00 (a 2½% rate) is not too helpful to the court. Nor is it necessarily an indication that the assessor had erred in fixing the original assessment. ... This type of transaction repeats itself throughout all assessment rolls. The assessor can be wrong or right and his judgment may or may not be success-

presumption is created that he received approximately $3,000. ...

New Jersey, in a statute dealing specifically with real property valuation proceedings, has provided:

In any proceeding before the board where deeds or other instruments of conveyance do not state the true consideration or sales price of the property which is the subject of appeal, the United States documentary stamps attached, if any, to such deeds or instruments shall be admitted as prima facie evidence of the true consideration or sales price of the said property.


In Borough of Carteret v. Division of Tax Appeals, 40 N.J. Super. 439, 123 A.2d 549 (1956), the county assessor computed prices of transactions by utilizing the revenue stamps affixed to the deeds. This use was upheld since their prima facie evidence as such price was not successfully rebutted by the townships attacking the method.

The Ohio Supreme Court's acceptance of this evidence as a valid basis for determining sales prices in The State ex rel. The Park Investment Co. v. Board of Tax Appeals, 175 Ohio St. 410, 195 N.E.2d 908 (1964) was finalized by the Supreme Court of the United States when the Court denied certiorari. 379 U.S. 818 (1965). Earlier Ohio decisions had declared this prima facie evidence of sales price to be a rebuttable presumption. Ohio Turnpike Commission v. Ellis, 164 Ohio St. 377, 131 N.E.2d 397 (1955); Park Investment Company v. Board of Revision of Cuyahoga County, 115 Ohio App. 523, 179 N.E.2d 786 (1962).

Wisconsin had held documentary stamps to be a rebuttable presumption of actual consideration paid. Flynn v. Palmer, 270 Wisc. 43, 70 N.W.2d 231 (1955).


40. In compiling the sample, the taxpayer, when confronted with this situation, in most instances went to the next succeeding tax roll to find an assessment that more nearly "matched" the sale.

fully attacked in a tax review proceeding. Merely to suggest that there are assessments on the roll that are too high or too low or grounded in bad assessment practice is to state the obvious. Special Term should have decided whether the sampling of the roll by sales selected at random would or would not accurately reflect that roll. The roll itself might be good, bad or indifferent, but it is the only roll any court has to work with. To saddle a random sampling procedure with the inequities of the entire roll would appear to cast an unfair burden on the taxpayer and would be no less applicable to the “rough” selected parcel method.

Special Term’s rejection of the random sampling procedure sharply raises the issue of stratification and of the taxpayer’s failure to demonstrate that the 1,800 sales introduced in evidence ran the gamut, as it were, of the entire roll.

In its motion to the trial court for an order selecting the parcels to be appraised, the taxpayer requested that all 900 sales on its sampling list be selected. In the motion papers, the taxpayer described the Huntington tax roll as non-homogeneous but claimed assuredly that a dozen or two dozen pre-selected parcels have no chance of accurately reflecting such a roll. Taxpayer rationally contended that the random sampling method utilizing 900 sales would present a more accurate picture of the roll because of its inherent diversity.

At the trial, Special Term held that this lack of homogeneity rendered the random sampling by the taxpayer defective. (Statisticians would be universally befuddled by this statement.) The court buttressed this finding with specific examples, all of which dealt with the taxpayer’s failure to stratify:

(a) No attempt was made to produce sales (if any were made) of commercial properties valued at more than $50,000 into which tax category petitioner falls.
(b) Only 35 sales out of the 1,800 were at prices in excess of $50,000


It always happens upon every assessment roll that some pieces of property are assessed at a higher rate of valuation than others, and out of proportion to other property. . . . Some property may be assessed at a higher rate than his, and some at a lower rate; but if upon the whole the average rate of assessment is no lower than his, and if his assessment is not at a higher rate than assessments generally, he is not aggrieved within the meaning of the statute.

43. Stratification is the backbone of the compilation of the state equalization rate. Various classes of property on the roll are sampled by sale and appraisal in each year.

44. This application was denied and each party was directed to submit a list of parcels in accordance with the selected parcel method.

45. The Huntington tax roll in 1960 contained 47,118 parcels split up into seventeen different use categories. One and two-family houses represented 70.24% of the total assessed valuation. Some 10,000 parcels were vacant residential land and 160 parcels were classified as estates, both classes representing 8% of the total assessed valuation. 1774 parcels were zoned commercial and valued at under $50,000 each for 8.81% of the roll. There were only nineteen commercial parcels valued over $50,000 representing 1.61% of the assessment roll. The other 12% of the roll consisted of farms, vacant rural land, apartments, industrial utilities and miscellaneous.
and many of these might have been farm acreage sold for development purposes.
(c) Not one of the 1,800 odd sales has been identified in any way as a shopping center or as a large commercial venture.
(d) Almost 20% of one 900 sample consisted of sales of vacant or semi-vacant land carrying assessments of less than $1,000. "Such a circumstance throws the random sampling statistics out of kilter for the obvious reason that almost twenty percent of one sampling is of property not of the same or similar nature as the subject property.

Stratification is illegal and may not be used in the inequality trial.\textsuperscript{46} Section 306 RPTL directs that "[A]ll real property in each assessing unit shall be assessed at the full value thereof." There is no room therefore for the assessment of any single property on any basis other than at full value, which value we have shown may be made at a uniform percentage of full value. Section 720.3 of the RPTL specifically prohibits stratification by stating that "the court . . . shall select the parcels to be appraised without reference to their assessed value . . ."\textsuperscript{47} The court or referee will not know, nor are they permitted to know at the pretrial stage of the proceedings, the size of the parcel, if unimproved, and the type and size of the improvement where the property is improved.\textsuperscript{48} It is abundantly clear that stratification or classification of parcels on the roll, in the inequality process, may not lawfully be permitted under the statutes, and the case law in New York and elsewhere amplifies this point.\textsuperscript{49}

\textsuperscript{46} While conceding that the assessor may not lawfully stratify, it has been suggested that the parties to an inequality trial may jointly or severally offer up selected parcels and actual sales for the court on a classification basis. (Conference with Robert Kilmer, Executive Director, New York State Board of Equalization and Assessment February 16, 1970.)

\textsuperscript{47} Emphasis supplied.

\textsuperscript{48} A most logical inference is that, in vacant land, the larger parcel will generally be more valuable and will be assessed accordingly. The zoning of the particular parcel will of course modify this concept somewhat, \textit{i.e.}, a smaller business zoned parcel may conceivably be assessed at a higher valuation than a larger piece of farmland acreage. In improved parcels, the improvement itself will dictates the relative size of the assessment, \textit{i.e.}, a 40-story office building at many times the assessment of a one-family house.

\textsuperscript{49} Ratio must be applied uniformly to every type of taxable property. C.H.O.B. Associates, Inc. v. Nassau County Board of Assessors, 45 Misc. 2d 184 (Sup. Ct. 1964), aff'd, 22 A.D.2d 1016, 256 N.Y.S.2d 550 (1964), aff'd, 16 N.Y.2d 779, 209 N.E.2d 820, 262 N.Y.S.2d 501 (1965). In this case, the Board of Assessors was advised by a survey that vacant land in the County was being assessed at 10% and less of its fair market value, while improved parcels were being assessed at an average ratio of 33\%\frac{1}{2}. The Board, assuming that it was obligated by statute and Constitution to assess all real property equally, whether vacant or improved, and irrespective of class, raised the assessment of some 22,000 parcels of vacant land to one-third of market value. Plaintiff, taxpayer, challenged the legality of the entire roll. The determination of Special Term, validating the acts of the assessors, was affirmed on appeal. Special Term at 45 Misc. 2d 186 laid down the fundamental principles:

Section 306 [Real Property Tax Law] provides that all real property shall be assessed at full value thereof. Although full value has been held to be synonymous with market value, the courts have uniformly held that this section does not mandate assessment at 100% of full or market value. It requires merely that the assessments be at a uniform rate or percentage of full or market value for every type of property in the assessing unit. The legislature through Section 720(3) of the...
What may be most unusual in *Tilsac* is that Special Term, while rejecting randomly selected sales for failure to stratify, did exactly the same in selecting parcels. Sixteen parcels, eight from each list, were selected by the court "without reference to their assessed values." The twenty-five parcels on each list from which the court made its statutory selection were preselected by each side for total value and for low and high ratios respectively. No further distinction concerning types and classes was made by either side or by the court.50 Actually, the sixteen parcels selected there broke down into the following classes: four small commercial parcels, four large old residential estates, five vacant residential lots, two partly constructed residences and one one-family residence.

One final word on stratification. Special Term made this pertinent finding:

> While we are told that all properties should be assessed at a uniform rate it is apparent that in Huntington, the rule is more honored in the breach than in the observance.61

Thus, despite its illegality, stratification may be practically desirable in a sampling of an admitted or obviously stratified roll.62 Is it not reasonable to assume that a random sampling of some 1,800 parcels, as adduced in *Tilsac*,

Real Property Tax Law has acknowledged and apparently sanctioned this statewide practice. In Sioux City Bridge Co. v. Dakota County, 260 U.S. 441 (1923), the Supreme Court of the United States has held that all real property within a state must be assessed at full value or a uniform percentage thereof, else there will be a denial of the equal protection provision of the fourteenth amendment.

This is the general view throughout the United States, where it is held that, absent an express authorization in the state Constitution sanctioning assessments at varying rates for different classes of real property, all property must be assessed at the same rate. But see Nashville, Chattanooga & St. Louis Ry. v. Browning, 310 U.S. 362 (1940). Thus, where the state constitution directs all property to be assessed at "market value," "full value," "fair cash value" or other similar language, an equality of rate is required and classification or stratification of the assessment roll is deemed unconstitutional.


51. Id. at 438, 285 N.Y.S.2d at 540.

52. *But see* New York City Administrative Code, § 166-1.0(b) (3), which is applicable only to the City of New York, and specifically authorizes stratification and gives an election to the taxpayer on the issue of inequality.

Such [judicial] review shall be allowed only on one or more of the following grounds, which must be specified in such petition: . . . That the assessment is erroneous by reason of inequality, in that it has been made at a higher proportionate valuation than the assessment of other real property of like character in the same ward or section, or other real property on the assessment rolls of the city for the same year, specifying the instances in which such inequality exists and the extent thereof, and stating that the petitioner is or will be injured thereby. (emphasis added).

Thus in New York City at least, the taxpayer is given the choice of the comparable parcels under the selected parcel method. He may compare his property with "property of like character in the same ward or section" or other real property on the assessment roll.
would contain a built-in stratification, as it were, assuredly more so than the sixteen court-selected parcels?

Special Term compared the Tilsac parcel with a neighbor's land on the issue of inequality, a practice long interdicted by the appellate courts.

Skyline Woods, a residential community, is adjacent to the subject property. It was carved out of the same original land acquisition and was developed at about the same time as Big H [name of Tilsac's shopping center]. Being aware of this, the court looked for and found sales listings, five in number, on Exhibit 40 (taxpayer's second list of 900 sales). They are items 145, 148, 191, 244 and 440. All are improved properties. They show an aggregate assessment of $19,925—and a total sales price of $112,450. This works out to an assessment of 17.7% with respect both to dollar value and average of ratios.

This is some indication that on the argument of inequality no discrimination was practiced against the Big H.53

Having made this irrelevant and erroneous comparison, Special Term quoted with approval Wolf v. Town of Hanover54 (where the Court of Appeals gave the reasons why such a comparison is irrelevant), and in the process directly contradicted itself.

The reason why a mere comparison of the assessment of a neighbor's property is irrelevant, and why the question is solely one of comparative rate of assessment, is evident when the purpose of an inequality proceeding is borne in mind. This court long ago held that the injustice to be redressed in such a proceeding is discriminatory assessing which has the effect of compelling the taxpayer to pay more than his due share of the aggregate tax; that is, the levy on all the taxpayers in the entire district. See People ex rel. President, etc., Delaware and Hudson Canal Co. v. Ganley, 131 N.Y. 566, 30 N.E. 64; People ex rel. Warren v. Carter ... 109 N.Y. 576, 17 N.E. 222. But that grievance may not be established simply by showing an underassessment of neighbor A's property. As Judge Andrews, writing for the court in the Warren case, put it, 'If a particular piece of property (e.g. neighbor A's) on an assessment roll is undervalued, another (e.g. neighbor B's) may be correspondingly overvalued'. 109 N.Y. at pages 580-581, 17 N.E. at page 224. In such circumstances, the subject property would be bearing no greater than its due proportionate share of the total tax burden and, as indicated, the petitioner would have no cause or basis for complaint.55

Is not Special Term's comparison therefore to the neighbor (Skyline Woods) at a ratio of approximately seventeen percent (coincidentally the state equalization rate and the purported ratio used by the assessor when making the Tilsac's

55. Id. at 421-22, 126 N.E.2d at 541.
assessment in the first instance) proscribed by Judge Andrews in the Warren case.\(^5^7\)

In *Tilsac*, Special Term asserts that the “coup de grace to random sampling” was delivered when the taxpayer failed to prove that the 1,800 actual sales introduced, accurately or otherwise, reflected the actual assessment roll.\(^5^8\) Concededly the sixteen sales utilized pursuant to the selected parcel method do not reflect the actual roll. Yet this method is mandated by the legislature and is decreed to represent the roll. The legislature permits the introduction of actual sales which occurred during the year in which the assessment under review was made. Is it not manifestly unfair to place such a burden on the actual sales (here many more in number and by their very numbers, more likely to accurately represent the actual roll) when the selected parcel method is legislatively immune from such an attack? It would seem that such actual sales should be accepted as representing the roll just as effectively (if not more so) as do the selected parcels.

**IV. THE PROGNOSIS**

In most cases, the taxpayer will reject the selected parcel method and, depending on his financial status, elect to rely upon the state equalization rate or the actual sales method or both. The municipality will still opt primarily for the selected parcel method, but might in a proper case put the state equalization rate in evidence as well.

New York’s solution to the judicial determination of inequality has long been unique among the states.\(^5^9\) In the past, it has provided the courts with that “rough equality,” which has been held to be the aim of inequality trials.

Have recent decisions and the new amendment to section 720.3 of the RPTL helped the parties to narrow this “rough equality”? We have shown that:

56. In *Tilsac*, the town assessor was called by the taxpayer as a witness. Special Term commented on his method of assessment: “As to finished products, it was his custom (and allegedly good assessment procedure) to use three criteria for assessments. There were (1) the state equalization rate, (2) the value of adjoining or comparable properties, and (3) replacement costs less depreciation. If he could not fit the property comfortably into this tri-partite Procrustean bed, then he would cut the body accordingly by giving weight to two of the three indicated criteria. . . .” 55 Misc. 2d 431, 435, 285 N.Y.S.2d 533, 537 (1967).

The court’s amusing comment on the assessor’s method fails to indicate that as far as the taxpayer’s burden in such a trial is concerned, the assessor could just as well have thrown a dart into the wall to come up with a number. It is the total assessment that is under review—the number only—and how the assessor arrived at such a number is not the subject nor the proper inquiry of judicial review. It is of interest to note, however, that while the assessor considered both the cost and market approach to value (which he then clearly multiplied by the state rate of 17%), he did not include in his Procrustean bed the third approach to value, the income or economic approach. In all fairness to the assessor, the courts have really added this approach for them in many of the recent tax review decisions, wherein reductions have been granted.


58. 55 Misc. 2d 431, at 441, 285 N.Y.S.2d 533, at 541.

1. It is no longer necessary for the taxpayer to acquiesce in the selected parcel method, despite the fact that the municipality desires to travel that road.

2. The taxpayer and the municipality may introduce the state equalization rate as evidence of ratio without concurrent compliance with the selected parcel method.

3. Either side may introduce evidence of actual sales as evidence of ratio without concurrent compliance with the selected parcel method.

With this type of evidence before it, what will a hypothetical trial court of the future look for to aid its decision? It may not reject the taxpayer's proof for failure to comply with the selected parcel method. It may accept the appraisal of selected parcels by the municipality as that "rough equality," and reject the state rate and the actual sales. It may, however, reject the selected parcel results on the ground that it is too "rough" and it may accept the state equalization rate or the results from the actual sales or both. The Court of Appeals will have to tell us which method is to be accorded the greatest weight because there is no legislative directive and the earlier decisions have not resolved the question.60 The Court will probably not give up the selected parcel method gracefully. The argument over the state equalization rate, as long as Judge Fuld has a voice, may continue to rage. However, where the state equalization rate is buttressed by detailed documentation readily supplied by the State Board of Equalization, together with an expert witness, we may expect a more favorable decision from Judge Fuld on the weight to be accorded the rate.

One graceful way out for the Court, it would seem, would be over the road of actual sales, and in sales-active locales, selection of these sales may be made by means of random numbers. When justified by the economics of the valuation trial and where resort is first had to the statutory protection (where a successful taxpayer may assess the costs of the ratio trial against the municipality), it is recommended that the taxpayer emphasize the actual sales method. Research has disclosed that this method will result in a ratio that most properly reflects pure ratio.61 Where these sales are well authenticated and documented, the ratio thus obtained should be accorded substantial weight.


61. Pure ratio is a ratio well below the state equalization rate and far below the results obtained by the selected parcel method. The assessor's oath requires him to fairly assess in each year every parcel at a uniform percentage of fair or full value. The municipality should have no cause for complaint where a finding is made to square with logic and the immutable fact that ratio is dropping each year in an era of rising sales prices.