

HOUSE No. 3028

By Mr. Marzilli of Arlington, petition of J. James Marzilli, Jr., relative to non-business income in the taxation of certain corporations. Revenue.

The Commonwealth of Massachusetts

In the Year Two Thousand and Seven.

AN ACT CHANGING THE TREATMENT OF NON BUSINESS INCOME.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 SECTION 1. Section 38 of Chapter 63 of General Laws, as
2 appearing in the 2002 Official Edition, is hereby amended by
3 striking out subsection (c) and inserting after subsection (b) the
4 following:—

5 (c) If a corporation, other than a manufacturing corporation as
6 described in subsection (1) or a mutual fund service corporation to
7 the extent of its mutual fund sales as described in subsection (in),
8 has income from business activity which is taxable both within and
9 without this Commonwealth, its taxable net income, as determined
10 under the provisions of subsection (a), shall be apportioned or allo-
11 cated to this Commonwealth as follows:—

12 (1) All taxable net income which is apportionable under the Con-
13 stitution of the United States shall be apportioned by multiplying
14 said taxable net income by a fraction, the numerator of which is the
15 property factor plus the payroll factor plus twice times the sales
16 factor, and the denominator of which is four.

17 (2) All other taxable net income shall be allocated to this Com-
18 monwealth.

1 SECTION 2. Said Section 38 is further amended by striking out
2 subsections (k), (l), and (m) and inserting in place thereof the
3 following:—

4 (l)(1) As used in this section, the following words shall, unless the
5 context otherwise requires, have the following meaning:—

6 “Manufacturing corporation”, a domestic or foreign corporation
7 that is engaged in manufacturing. In order to be engaged in manufac-
8 turing, the corporation must be engaged, in substantial part, in trans-
9 forming raw or finished physical materials by hand or machinery,
10 and through human skill and knowledge, into a new product pos-
11 sessed a new name, nature and adapted to a new use.

12 A domestic or foreign manufacturing corporation’s activities will
13 be considered to be substantial if any one of the following five tests
14 are met:—

15 1. twenty-five percent or more of its gross receipts are derived
16 from the sale of manufactured goods that it manufactures;

17 2. twenty-five percent or more of its payroll is paid to employees
18 working in its manufacturing operations and fifteen percent or more
19 of its gross receipts are derived from the sale of manufactured goods
20 that it manufactures;

21 3. twenty-five percent or more of its tangible property is used in
22 its manufacturing operations and fifteen percent or more of its gross
23 receipts are derived from the sale of manufactured goods that it man-
24 ufactures;

25 4. thirty-five percent or more of its tangible property is used in its
26 manufacturing operations; or

27 5. the corporation’s manufacturing activities are deemed substan-
28 tial under relevant regulations promulgated by the commissioner.

29 In determining whether a process constitutes manufacturing, the
30 commissioner will examine the facts and circumstances of each case.

31 (2) If a manufacturing corporation, as defined in paragraph (1),
32 has income from business activity which is taxable both within and
33 without this Commonwealth, its taxable net income, determined
34 under the provisions of subsection (a), shall be apportioned or allo-
35 cated to this Commonwealth as follows:—

36 (1) All taxable net income which is apportionable under the Con-
37 stitution of the United States shall be apportioned by multiplying
38 said taxable net income by one hundred percent of the sales factor.

39 (2) All other taxable net income shall be allocated to this Com-
40 monwealth.

41 (3) Each manufacturing corporation with more than twenty-five
42 employees, apportioning its income in accordance with the provi-
43 sions of this subsection, as part of its tax return for each year, shall
44 submit a report, whose form and substance shall be determined by

45 the commissioner of revenue, that describes for each taxable year as
46 of the last day of such taxable year the following:— (i) the number,
47 nature, and wages of jobs added or lost in the Commonwealth and
48 worldwide from the previous taxable year; (ii) the nature and amount
49 of any change in the property factor during the taxable year; (iii) the
50 nature and amount of any change in the payroll factor in the taxable
51 year; (iv) the dollar amount of revenue foregone by the increased
52 weighting of the sales factor pursuant to this section as compared to
53 the apportionment method in effect for the first taxable year begin-
54 ning on or after January first, nineteen hundred and ninety-five; (v)
55 volume of sales in the Commonwealth and worldwide; (vi) taxable
56 income in the Commonwealth and worldwide; (vii) book value of
57 plant, land and equipment in the Commonwealth and worldwide;
58 (viii) net capital investment in the Commonwealth and worldwide;
59 (ix) net assets; (x) capacity utilization; and (xi) debts, itemized by
60 the following categories:— (a) loans; and (b) mortgages.

61 The commissioner of revenue shall annually prepare a compre-
62 hensive report utilizing the information received in this paragraph
63 and other sources describing and evaluating the impact, if any, of the
64 utilization of the increased weighting of the sales factor upon the
65 manufacturing industry. Said report shall contain only cumulative
66 information for all manufacturing corporations submitting reports.
67 Said report shall set forth for all manufacturing corporations submit-
68 ting reports the cumulative totals worldwide and, where applicable,
69 in the Commonwealth of the items specified in clauses (i) to (xi) and
70 the changes in such aggregate totals from the previous taxable year.
71 The commissioner's report shall be filed not later than October first
72 of each year with the clerk of the senate and the clerk of the house of
73 representatives who shall forward the same to their respective com-
74 mittees on ways and means and to the joint committee on taxation.
75 Said report of the commissioner shall be a public record subject to
76 the provisions of section ten of chapter sixty-six.

77 (m)(1) As used in this subsection and in subsections (c) and (1),
78 the following words shall, unless the context otherwise requires,
79 have the following meaning:—

80 “Administration services”, include, but are not limited to, clerical,
81 fund or shareholder accounting, participant record keeping, transfer
82 agency, bookkeeping, data processing, custodial, internal auditing,
83 legal and tax services performed for a regulated investment

84 company, but only if the provider of such service or services during
85 the taxable year in which such service or services are provided also
86 provides or is affiliated with a person that provides management or
87 distribution services to any regulated investment company.

88 “Affiliate”, the meaning as set forth in 15 USC section a-
89 2(a)(3)(C), as may be amended from time to time.

90 “Base period employment level”, the number of qualified
91 employees in this Commonwealth of a mutual fund service corpora-
92 tion as of January first, nineteen hundred and ninety-six, or if the
93 mutual fund service corporation is one of the mutual fund service
94 corporations filing a combined return for the tax year ending as of
95 December thirty-first, nineteen hundred and ninety-six, the aggre-
96 gate number of all qualified employees as of January first, nineteen
97 hundred and ninety-six of all of the mutual fund service corporations
98 participating in such combined return. If a mutual fund service cor-
99 poration was not engaged in business in the Commonwealth on Jan-
100 uary first, nineteen hundred and ninety-six, the base period
101 employment level shall be the average employment level for the first
102 two taxable years during which it is engaged in business in the Com-
103 monwealth. In the event of the acquisition of a business or line of
104 business or any other corporate restructuring that increases the
105 number of qualified employees of the mutual fund service corpora-
106 tion, the base period employment level to be applied in the taxable
107 year in which the acquisition or restructuring occurs and in all subse-
108 quent taxable years shall be increased to reflect such an increase. In
109 the event of a divestiture of a line of business or other corporate
110 restructuring that decreases the number of qualified employees of
111 the mutual fund service corporation, the base period employment
112 level to be applied in the taxable year in which such divestiture or
113 other corporate restructuring occurs and in all subsequent taxable
114 years shall be recalculated to reflect such decrease only if the mutual
115 fund service corporation can demonstrate that such divestiture or
116 other corporate restructuring will not result in any reduction in the
117 number of jobs in the Commonwealth.

118 “Distribution services”, include, but are not limited to, the serv-
119 ices of advertising, servicing, marketing or selling shares of a regu-
120 lated investment company, but, in the case of advertising, servicing
121 or marketing shares, only where such service is performed by a
122 person who is, or in the case of a close end company, was, either

123 engaged in the services of selling regulated investment company
124 shares or affiliated with a person that is engaged in the service of
125 selling regulated investment company shares. In the case of an open
126 end company, such service of selling shares must be performed pur-
127 suant to a contract entered into pursuant to 15 USC section a-15(b),
128 as from time to time amended.

129 “Domicile”, presumptively the shareholder’s mailing address on
130 the records of the regulated investment company. If, however, the
131 regulated investment company or the mutual fund service corpora-
132 tion has actual knowledge that the shareholder’s primary residence
133 or principal place of business is different than the shareholder’s
134 mailing address said presumption shall not control. If the share-
135 holder of record is a company which holds the shares of the regu-
136 lated investment company as depositor for the benefit of a separate
137 account, then the shareholder shall be the contract owners or policy-
138 holders of the contracts or policies supported by the separate
139 account, and it shall be presumed that the domicile of said share-
140 holder is the contract owner’s or policyholder’s mailing address to
141 the extent that the company maintains such mailing addresses in the
142 regular course of business. If the regulated investment company or
143 the mutual fund service corporation has actual knowledge that the
144 shareholder’s principal place of business is different than the share-
145 holder’s mailing address said presumption shall not control.

146 “Employment level”, the number of qualified employees of the
147 mutual fund service corporation in the taxable year, or if the mutual
148 fund service corporation is one of the mutual fund service corpora-
149 tions filing a combined return for such taxable year, the sum of the
150 number of qualified employees of all such mutual fund service cor-
151 porations in this Commonwealth for the taxable year.

152 “Jobs commitment level”, except as provided in subparagraph (b)
153 of paragraph (4), for taxable years beginning on or after January
154 first, nineteen hundred and ninety-seven, but before January first,
155 nineteen hundred and ninety-eight, an employment level of one hun-
156 dred and five percent of the base period employment level; for tax-
157 able years beginning on or after January first, nineteen hundred and
158 ninety-eight, but before January first, nineteen hundred and ninety-
159 nine, an employment level of one hundred and ten percent of the
160 base period employment level; for taxable years beginning on or
161 after January first, nineteen hundred and ninety-nine, but before Jan-

162 uary first, two thousand, an employment level of one hundred and
163 fifteen percent of the base period employment level; for taxable
164 years beginning on or after January first, two thousand, but before
165 January first, two thousand and one, an employment level of one
166 hundred and twenty percent of the base period employment level; for
167 taxable years beginning on or after January first, two thousand and
168 one, but before January first, two thousand and two, an employment
169 level of one hundred and twenty-five percent of the base period
170 employment level; for taxable years beginning on or after January
171 first, two thousand and two, but before January first, two thousand
172 and three, an employment level of one hundred and twenty-five per-
173 cent of the base period employment level. If a mutual fund service
174 corporation was not engaged in business in the Commonwealth on
175 January first, nineteen hundred and ninety-six, for all taxable years
176 beginning before January first, two thousand and three, the jobs
177 commitment level shall be the base period employment level
178 increased by five percent of the base period employment level for
179 every year after which the base period employment level is estab-
180 lished.

181 “Management services”, include, but are not necessarily limited
182 to, the rendering of investment advice directly or indirectly to a reg-
183 ulated investment company, making determinations as to when sales
184 and purchases of securities are to be made on behalf of the regulated
185 investment company, or the selling or purchasing of securities con-
186 stituting assets of a regulated investment company, and related activ-
187 ities, but only where such activity or activities are performed:— (i)
188 pursuant to a contract with the regulated investment company
189 entered into pursuant to 15 USC section a-15(a), as from time to
190 time amended; (ii) for a person that has entered into such contract
191 with the regulated investment company; or (iii) for a person that is
192 affiliated with a person that has entered into such contract with a
193 regulated investment company.

194 “Mutual fund sales”, taxable net income derived within the tax-
195 able year directly or indirectly from the rendering of management,
196 distribution or administration services to a regulated investment
197 company, including net income received directly or indirectly from
198 trustees, sponsors and participants of employee benefit plans which
199 have accounts in a regulated investment company.

200 “Mutual fund service corporation”, any corporation doing busi-
201 ness in the Commonwealth which derives more than fifty percent of
202 its gross income from the provision directly or indirectly of manage-
203 ment, distribution or administration services to or on behalf of a reg-
204 ulated investment company and from trustees, sponsors and
205 participants of employee benefit plans which have accounts in a reg-
206 ulated investment company.

207 “Number of qualified employees”, the number of qualified
208 employees who are employed by a mutual fund service corporation
209 in the Commonwealth as of the last day of a given taxable year.

210 “Number of qualified employees worldwide”, the total number of
211 qualified employees worldwide who were employed by the mutual
212 fund service corporation on a specified date.

213 “Qualified employee in this Commonwealth”, an individual
214 who:— (i) is employed by a mutual fund service corporation; (ii)
215 works on a full-time basis with a normal work week of thirty or
216 more hours; (iii) at the inception of the employment relationship
217 does not have a termination date which is either a date certain or
218 determined with reference to the completion of some specified scope
219 of work; (iv) is eligible to receive employee benefits including, but
220 not limited to, paid holidays, vacation and unemployment benefits;
221 and (v) is subject to Massachusetts income tax withholding. Three or
222 fewer individuals who collectively fulfill the requirement of clause
223 (ii) and who each meet the requirements of clauses (i), (iii), (iv) and
224 (v) shall be counted as one qualified employee for purposes of this
225 section.

226 “Qualified employee worldwide”, an individual who meets the
227 criteria in subsections (i) to (iv), inclusive, of the definition of
228 “Qualified employee in this Commonwealth.” Three or fewer indi-
229 viduals who collectively fulfill the requirement of clause (ii) of said
230 definition of “Qualified employee in this Commonwealth” and who
231 each meet the requirements of clauses (i), (iii) and

232 (iv) of said definition of “Qualified employee in this Common-
233 wealth” shall be counted as one qualified employee for purposes of
234 this section.

235 “Regulated investment company”, the meaning as set forth in
236 Section 851 of the Internal Revenue Code as amended and in effect
237 for the taxable year.

238 (2) Notwithstanding any other provision of the General Laws, any
239 mutual fund service corporation having income from mutual fund
240 sales to one or more regulated investment companies with share-
241 holders domiciled within and without this Commonwealth shall
242 apportion or allocate such income pursuant to the provisions of sub-
243 section (c).

244 Furthermore, any such mutual fund service corporation whose
245 employment level in the current taxable year is equal to or greater
246 than its jobs commitment level for such taxable year and who satis-
247 fies the requirements of paragraphs (3) and (4), or any such mutual
248 fund service corporation for which the jobs commitment level
249 requirement no longer applies shall apportion or allocate such
250 income to this Commonwealth as follows:—

251 (i) All taxable net income which is apportionable under the Con-
252 stitution of the United States shall be apportioned by multiplying
253 said taxable net income by one hundred percent of the sales factor.

254 (ii) All other taxable net income shall be allocated to this Com-
255 monwealth.

256 (3) Notwithstanding a mutual fund service corporation's failure to
257 achieve its jobs commitment level in the taxable year, the percentage
258 set forth in clause (i) of paragraph (2) of subsection (in) may be
259 applied, where the failure to achieve the jobs commitment level for
260 any taxable year is demonstrated by the mutual fund service corpora-
261 tion to be a direct result of adverse economic conditions in that tax-
262 able year.

263 (a) Adverse economic conditions can affect only one taxable year
264 except as set forth in subparagraph (b) and (c). Adverse economic
265 conditions shall exist only where during any twelve month period
266 ending during the taxable year, either:—

267 (A) the Standard & Poor's Stock Index decreases ten percent or
268 more compared to its level at the beginning of such twelve month
269 period or

270 (B) the average daily trading volume on the New York Stock
271 Exchange decreases fifteen percent or more compared to the average
272 over the preceding twelve months; or

273 (C) at any time during the taxable year, the total assets under
274 management of the mutual funds served by the mutual fund service
275 corporation decreases twelve and one-half percent or more compared
276 to such total assets under management twelve months earlier.

277 (b) If a mutual fund service corporation demonstrates that failure
278 to achieve the jobs commitment level for one taxable year was the
279 direct result of an adverse economic condition, such corporation may
280 decrease its jobs commitment level by five percent of the base
281 period employment level for all subsequent taxable years prior to the
282 first taxable year beginning on or after January first, two thousand
283 and two.

284 (c) If a mutual fund service corporation demonstrates that failure
285 to achieve the jobs commitment level for more than one taxable year
286 was the direct result of an adverse economic condition, such corpo-
287 ration may decrease its jobs commitment level by five percent of the
288 base period employment level for each taxable year in which an
289 adverse economic condition was established for all subsequent tax-
290 able years prior to the first taxable year beginning on or after Jan-
291 uary one, two thousand and two. However, for each taxable year
292 beginning on or after January first, two thousand and two, but prior
293 to the first taxable year beginning on or after January first, two thou-
294 sand and four, the jobs commitment level shall be an employment
295 level equal to the sum of:— (i) the jobs commitment level for the
296 most recent taxable year immediately prior to such year for which an
297 adverse economic condition was not established; and (ii) five per-
298 cent of the base period employment level.

299 (4) For the purposes of determining compliance with the provi-
300 sions of this subsection, each mutual fund service corporation that
301 seeks to rely on the provisions of this subsection for the taxable year
302 in question shall submit, as part of its tax return, a report, with such
303 supporting documentation as the commissioner may require, con-
304 taining the following:—

305 (i) the number, nature, and aggregate wages of the qualified
306 employees in this Commonwealth and qualified employees world-
307 wide as of the end of the taxable year and the number of jobs added
308 or lost as compared to the previous taxable year;

309 (ii) the number of the qualified employees in this Commonwealth
310 as of the last day of the taxable year sorted by place of employment;

311 (iii) the base period employment level;

312 (iv) the volume of sales attributable to this Commonwealth and
313 worldwide;

314 (v) the taxable income in this Commonwealth;

315 (vi) net assets under management in this Commonwealth and
316 worldwide; and

317 (vii) the median income of all of qualified employees in the Com-
318 monwealth and of all of its qualified employees worldwide.

319 The information provided by each individual mutual fund service
320 corporation shall be treated as confidential under the provisions of
321 section twenty-one of chapter sixty-two C. Said information shall be
322 used by the commissioner of revenue to prepare a comprehensive
323 annual report setting forth the changes in-the aggregate from the pre-
324 vious taxable year for each of the items listed above. The commis-
325 sioner's report shall 'also set forth any recommendations the
326 commissioner may have for any amendments to the provisions of
327 this section, and the reasons for any such recommendations. The
328 commissioner's report shall be filed by October first of each year
329 with the clerk of the senate and the clerk of the house of representa-
330 tives who shall forward the same to the respective, committees on
331 ways and means and the joint committee on taxation.

332 (5) The commissioner of revenue shall promulgate regulations
333 implementing the provisions of this subsection.