

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

DAR No. _____
(Appeals Court No. 2026-P-1391)

COMMISSIONER OF REVENUE,
Appellant/Cross-Appellee,

v.

SMITHFIELD PACKAGED MEATS CORP. & COMBINED AFFILIATES,
Appellee/Cross-Appellant.

ON APPLICATION FOR DIRECT APPELLATE REVIEW OF A FINAL DECISION
OF THE APPELLATE TAX BOARD

**COMMISSIONER OF REVENUE'S UNOPPOSED
APPLICATION FOR DIRECT APPELLATE REVIEW**

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October 15, 2026

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REQUEST FOR DIRECT APPELLATE REVIEW

This case presents a compelling matter for direct appellate review. In the decision below, the Appellate Tax Board ("Board") struck down a statutory and regulatory rule that has governed the apportionment of corporate income taxes in Massachusetts since 2009. That decision is incorrect: it rests on the mistaken premise that the invalidated rule "frustrates the objectives" of a 1959 federal preemption statute. Worse, the decision conflicts with every case that has considered this question in the numerous other states that use the same apportionment rule. In addition to placing Massachusetts out of step with those jurisdictions, the Board's decision will have significant financial consequences for the Commonwealth, affecting both past and future tax filings. Accordingly, the Court should grant this application. Smithfield has indicated that it does not oppose the application.

STATEMENT OF PRIOR PROCEEDINGS

Appellee, Smithfield Packaged Meats Corporation ("SPMC") and several of its corporate affiliates (collectively, "Smithfield"), filed Massachusetts corporate excise returns for tax years 2015 through 2017 (the "Years at Issue") as part of a "combined reporting group." Appendix (App.) 039. SPMC was designated as the principal reporting corporation for the group. App. 050. Other members of the group included Smithfield Fresh Meats Sales Corp. ("Fresh Meats Sales"), Smithfield Packaged Meats Sales Corp.

("Packaged Meats Sales"), and Smithfield Packaged Meats Corp., f/k/a John Morrell & Co. ("Morrell"). App. 060.

On April 22, 2019, the Commissioner of Revenue commenced an audit of Smithfield's returns for the Years at Issue and issued a Notice of Assessment. App. 055-056. Smithfield filed an application for abatement challenging the assessment in its entirety. App. 056. The Commissioner granted the application in part, and Smithfield appealed to the Board. App. 056. The parties submitted the case without oral argument pursuant to Rule 1.31 of the Board's Rules of Practice and Procedure, 831 CMR 1.31. App. 053. As relevant here, the parties disputed the Commissioner's application of the so-called "Finnigan rule" to Smithfield for tax year 2017. App. 054. Mandated by G.L. c. 63, § 32B(d)(2)(iv) and 830 CMR 63.32.2(7)(b), the rule requires a combined reporting group to include all Massachusetts sales in its reported income - including sales by members of the group who are not otherwise taxable in Massachusetts.

The Board ruled in favor of Smithfield on this issue, holding that the application of the Finnigan rule violated a federal statute, Public Law 86-272, and therefore violated the Supremacy Clause of the United States Constitution.¹ App. 064. Although

¹ The Board ruled in favor of the Commissioner on several other issues, including whether the assessments were timely; whether the Commissioner properly classified certain members of the Smithfield combined reporting group as "manufacturers"; and

Smithfield had not sought a refund of the tax attributable to the Finnigan adjustment as reported on its return, the Board's disposition awarded relief exceeding both the amount of the challenged assessment and the relief Smithfield requested. App. 040 and 052.

STATEMENT OF THE FACTS

A. The Commonwealth adopts the Finnigan rule to govern the apportionment of sales for combined reporting groups.

Massachusetts taxes the income of corporations doing business in the Commonwealth by using a method of tax reporting known as "combined reporting." See generally G.L. c. 63, § 32B. Under this method, a group of affiliated corporate entities engaged in a "unitary business" will submit a "combined report" detailing the group's total income. *Id.* § 32B(a). The individual corporate members of the group that are taxable in Massachusetts then calculate the share of the group's income that is attributable to (or "apportioned" to) Massachusetts by applying an apportionment percentage. *Id.* § 32B(d)(2)(iii). For most corporations before tax year 2025, that percentage consisted of three factors: the property, payroll, and sales of the individual member corporation in Massachusetts divided by the property, payroll, and sales of the entire group everywhere. *Id.* For manufacturing corporations

whether the Commissioner properly assessed underpayment penalties. Those issues may be the subject of Smithfield's cross-appeal. See *infra*, at 12.

before tax year 2025, and for all corporations since then, the apportionment percentage consists of a single factor: the individual member corporation's Massachusetts sales divided by the entire group's sales everywhere. See G.L. c. 63, § 38(1) and St. 2023, c. 50. The resulting percentage is multiplied by the group's taxable income to determine the amount of the combined group's taxable income to be apportioned to Massachusetts.

The Legislature adopted this combined reporting framework for tax years beginning on or after January 1, 2009. See St. 2008, c. 173, *An Act Relative to Tax Fairness and Business Competitiveness*. In doing so, the Legislature directed the Commissioner to promulgate regulations implementing the combined reporting requirements and coordinating their application with the other provisions of the corporate excise statute. G.L. c. 63, § 32B(f). Pursuant to that statutory mandate, the Commissioner promulgated 830 CMR 63.32B.2, *Combined Reporting*, on May 29, 2009.

This appeal concerns a statute and its implementing regulation, G.L. c. 63, § 32B(d)(2)(ii) and 830 CMR 63.32B.2(7)(b), that govern the in-state sales of corporate members of a combined reporting group who are not otherwise taxable in Massachusetts. Such "nontaxable" members include corporations that are protected from Massachusetts taxes by a federal statute, Public Law 86-272.²

² Public Law 86-272 provides, in relevant part, that a state may not tax "the income derived within such State by any person

Under G.L. c. 63, § 32B(d)(2)(ii) and 830 CMR 63.32B.2(7)(b), the Massachusetts receipts of each nontaxable member of a combined group are reallocated to - and thus included within - the numerator of the apportionment percentage of the group's taxable members. The requirement to make these allocations is commonly referred to as the "Finnigan rule."³ Twenty-one states other than Massachusetts also use the Finnigan rule.

B. Smithfield applies the Finnigan rule in its 2017 tax returns, but changes tack during the audit and before the Board.

Smithfield Foods, Inc., is the parent company of the members of the Smithfield combined reporting group and of multiple vertically integrated subsidiaries. App. 055. During the Years at Issue, Smithfield Foods, Inc., through its various subsidiaries, including the members of the Smithfield combined group, had three principal domestic business lines: (1) hog production; (2) fresh pork products, and (3) packaged meats. *Id.* The hog production

from interstate commerce if that person's "only business activities within such State" consist of "the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State."

³ The "Finnigan" rule and its main alternative, the "Joyce rule," refer to the names of two California State Board of Equalization decisions. See *Matter of Finnigan Corp.*, 1988 Cal. Tax LEXIS 28 (1988) and *Matter of Joyce, Inc.*, 1966 Cal. Tax LEXIS 18 (1966). Where the Finnigan rule requires that taxable group members include in their apportionment percentage any in-state sales made by the nontaxable members of the combined group, the Joyce rule does not. Only 11 states apply the Joyce rule.

segment, conducted principally through SPMC, produced hogs at company-owned farms, none of which were in Massachusetts. *Id.* The fresh pork segment, conducted principally through Fresh Meats Sales, produced and sold a wide variety of fresh unprocessed pork cuts. App. 060. Finally, the packaged meats segment, conducted principally through Packaged Meats Sales, produced and sold a variety of value-added products including sausage, hot dogs, deli meats, and specialty products, such as pepperoni. App. 041. The packaged meats segment operated plants across the United States, including one located in Springfield, Massachusetts. App. 041. All of the products manufactured by Smithfield Farmland Corp. and SPMC were sold to either Fresh Meats Sales or Packaged Meats Sales. App. 042.

During the 2016 and 2017 tax years, Packaged Meats Sales was responsible for the distribution and sales of the manufactured products produced by other affiliates of Smithfield Foods, Inc. App. 042. Packaged Meats Sales purchased the manufactured products from the affiliates and resold them to restaurants, wholesalers, and retailers throughout the United States. *Id.* For each of the Years at Issue, Fresh Meats Sales was responsible for the distribution and sales of Smithfield Farmland Corp.'s products, which it resold to restaurants, wholesalers, and retailers throughout the United States. App. 044.

Fresh Meats Sales was not subject to Massachusetts tax in 2017 because its activities fell within the realm of activities protected from tax by Public Law 86-272. As discussed above (see *supra*, note 2), that statute generally prohibits a state from imposing a net income tax on an out-of-state person whose activities within the state are limited to soliciting orders for sales of tangible personal property, provided the orders are approved or rejected outside the state and filled by shipment or delivery from outside the state. 15 U.S.C. § 381.

Pursuant to the Finnigan rule, therefore, SPMC allocated Fresh Meat Sales' Massachusetts receipts to two taxable members of the combined group, Packaged Meats Sales and Morrell, for the 2017 tax year. App. 062. In other words, consistent with the relevant statute and regulation, Smithfield placed the Massachusetts sales of Fresh Meats Sales in the numerator of the Smithfield combined group's taxable members for apportionment purposes.

Despite applying the Finnigan rule in its 2017 return, Smithfield argued during its audit that the Finnigan adjustment resulted in distorted apportionment for tax year 2017 and improperly frustrated the objectives of Public Law 86-272. App. 034. As discussed above, the Board agreed, invalidating the application of the Finnigan rule because it concluded that it was preempted. App. 084.

STATEMENT OF THE ISSUES

The Commissioner's appeal presents the question of whether the Board erred in invalidating the Finnigan rule as applied to Packaged Meat Sales, a member of the Smithfield Combined Group whose activities were otherwise protected from state net income tax under Public Law 86-272.

The Commissioner's appeal also raises two additional issues: (1) whether the Board exceeded its authority when it invalidated a state tax statute and the implementing regulation on constitutional grounds, and (2) whether the Board improperly granted an abatement that exceeded both the tax assessment and Smithfield's requested relief.

All of these issues were raised and properly preserved before the Board.⁴

ARGUMENT ON THE ISSUES

1. The Finnigan rule does not violate Public Law 86-272.

The Board's decision pertaining to the Finnigan rule warrants reversal because it improperly conflates the imposition of tax with the determination as to the proper apportionment to be applied

⁴ As noted above (see *supra*, note 1), the Board ruled for the Commissioner on several issues, and Smithfield has cross-appealed. The issues in Smithfield's cross-appeal may include (1) whether the Commissioner properly classified two members of the combined group as "manufacturing corporations"; (2) whether the Commissioner's assessment for tax year 2015 was timely; and (3) whether the Commissioner properly assessed underpayment penalties under G.L. c. 62C, § 35A.

to a combined group's unitary business income. More specifically, the Board improperly evaluated a federal preemption statute that prevents the imposition of a net income tax on a corporation under certain circumstances. The Board failed to apply the plain text of the federal statute but instead incorrectly asked whether the application of an apportionment statute - not a taxing statute - frustrates the intent of the federal law. App. 063. This analysis was a clear error of law.

The question at issue is whether Public Law 86-272 prohibits a state from considering a nontaxable member's in-state sales when determining the taxable members' apportionable share of a combined group's income. The Board answered that question by assuming that the inclusion of those sales in the apportionment numerator of a related taxable member of the same combined group results in the taxation of the nontaxable member's income. App. 088. That conclusion, however, is incorrect, as a straightforward matter of statutory construction. Indeed, several other state courts have considered the same issue and reached the opposite conclusion from the one the Board reached here. See *Ariz. Dept't of Revenue v. Cent. Newspapers, Inc.*, 222 Ariz. 626 (2009); *Matter of Disney Enters., Inc. v. Tax Appeals Trib. of the State of New York*, 10 N.Y. 3d 392 (2008); and *Citicorp N. Am. v. Franchise Tax Bd.*, 83 Cal. App. 4th 1403 (2000).

The Legislature expressly required each taxable member of a combined group to include in the numerator of its apportionment percentage a proportionate share of the Massachusetts sales of nontaxable members. G.L. c. 63, § 32B(d)(2)(ii) and (iv). The challenged regulation implements that statutory command. 830 CMR 63.32B.2(7)(b). The resulting Finnigan rule determines the portion of the combined group's unitary business income that is attributable to Massachusetts and taxable to members that are subject to the Commonwealth's taxing jurisdiction. That inclusion is intended to bring about a fair apportionment with respect to the determination of the Massachusetts' taxable income of the taxable members of the combined group. The Board's finding that the Finnigan rule had the effect of increasing the tax of the combined group on the facts in question was the result of the operation of the modified apportionment formula. That result does not establish that Massachusetts imposed a prohibited tax on Fresh Meat Sales.

The Board's notion is that a federal preemption statute should be construed broadly to prevent a state from accomplishing indirectly what the statute forbids directly. App. 088. This logic is not correct, see *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (discussing the presumption against preemption), but, in any event, the challenged apportionment rule in this case does not effectively tax the Public Law 86-272-protected corporation. By

way of comparison, in *Shell Oil Co. v. Iowa Department of Revenue*, 488 U.S. 19 (1988), the U.S. Supreme Court rejected the claim that including Outer Continental Shelf income in a pre-apportioned state tax base for purposes of an apportionment calculation resulted in directly taxing such income - a tax that was preempted as a matter of federal law. Although it involved a different federal preemption statute, *Shell Oil* provides an example as to why merely including tax attributes in a state income tax apportionment computation does not result in direct taxation of those attributes.

Neither of the two decisions on which the Board relied support its conclusion. The first, *Stanislaus Food Products Co. v. Direction, Div. of Taxation*, 2021 N.J. Tax Unpub. LEXIS 14 (2021), an unpublished decision of the New Jersey Tax Court, pertained to an alternative minimum tax that was directly imposed on Public Law 86-272 entities. The case did not address the materially distinct question presented here: whether a nontaxable affiliate's sales may be considered in the apportionment computation applied to the unitary business income of other taxable members of the combined group. The second, *Frick v. Pennsylvania*, 268 U.S. 473 (1925), addressed the limitations imposed by the Due Process Clause of the Fourteenth Amendment on a state's authority to levy inheritance and transfer taxes on property situated beyond its borders. That decision likewise does not consider whether Public Law 86-272

precludes the inclusion of a protected affiliate's sales in the apportionment percentage used to determine the apportionable unitary business income of the taxable members of a combined group. The Board's reliance on these distinguishable decisions therefore fails to support its preemption determination.

2. The Board exceeded its statutory authority by invalidating the statute and regulation pertaining to the Finnigan rule and by granting an abatement greater than the challenged assessment.

In addition to being wrong on the merits, the Board's invalidation of the Legislature's prescribed apportionment rule and the Commissioner's implementing regulation on constitutional grounds exceeded the Board's authority. As an administrative agency, the Board possesses only those powers conferred by statute; it has no inherent authority to strike down a state law or regulation as facially invalid. *See Duarte v. Commissioner of Revenue*, 451 Mass. 399, 408-409 (2008). Although the Board may adjudicate a constitutional challenge to a statute or regulation as applied in a particular case, that authority does not permit it to convert an abatement proceeding into a vehicle to invalidate the applicable state tax law more generally. *See DeMoranville v. Commissioner of Revenue*, 457 Mass. 30, 35-36. (2010).

The Board's characterization of its ruling as limited to the statute and regulation as "applied under the circumstances of this appeal" (App. 079) does not resolve that jurisdictional defect.

The scope of the ruling must be determined by its reasoning and necessary consequences, rather than its stated label. Here, the Board's conclusion that Public Law 86-272 precludes the inclusion of a protected affiliates' Massachusetts receipts in the apportionment percentage of taxable group members (App. 090-091) attacks the operation of the Finnigan rule as a general matter. The Board's reasoning identified no circumstance particular to Smithfield that would distinguish this case from other applications of the same rule. Therefore, the decision overstepped the Board's permissible statutory role.

The Board also exceeded its remedial authority by granting an abatement greater than both the assessment under review and the relief sought by Smithfield. General Laws c. 62C, § 39 authorizes the Board to grant an abatement upon finding that the appellant was entitled to the requested relief; it does not confer unrestricted power for the Board to award refunds beyond the tax liability that is being challenged. See *Commissioner of Revenue v. A.W. Chesterton Co.*, 406 Mass. 466, 467-469 (1990). Consistent with that limitation, *RHI Holdings, Inc. v. Commissioner of Revenue*, 51 Mass. App. Ct. 681, 683-688 (2001), concludes that an appeal concerning a deficiency assessment does not permit recovery of previously self-assessed taxes outside a timely abatement claim. By awarding relief beyond the Commissioner's assessment and

Smithfield's specific request for relief, the Board enlarged the proceeding beyond its statutory bounds.

REASONS TO GRANT DIRECT APPELLATE REVIEW

Direct appellate review is warranted for at least three distinct reasons.

First, this appeal presents a new and substantial question of federal constitutional law. As discussed above, the central issue in the Commissioner's appeal is whether a federal statute preempts the Commissioner's application of a longstanding apportionment rule mandated by the Legislature. The Board's resolution of that question expressly rests on the Supremacy Clause - and thus presents "questions concerning the Constitution of the United States." Mass. R. App. P. 11(a)(2). As those questions have not previously been resolved by a court of the Commonwealth, they are also "questions of first impression" in this jurisdiction. *Id.* R. 11(a)(1).

Second, the Board's decision has ramifications far beyond this case. Although the Board described its ruling as applicable only to this appeal, it identified no case-specific defect in the Commissioner's assessment. Instead, the Board held *as a matter of law* that the Commissioner may not apply the Finnigan rule to a corporation protected by Public Law 86-272. Those corporations are commonplace. Therefore, the Board's reasoning provides a basis for numerous other entities to seek refunds going back to 2009 (when

the Legislature enacted the current combined-reporting regime), so long as the relevant tax year is an open year under the applicable statute of limitations. The Board's reasoning could also prevent the application of the Finnigan adjustment to the taxpayer and other combined groups going forward. If left to stand, therefore, the Board's decision will diminish corporate income-tax revenue in similar situations in future years.

Third, the decision, if left to stand, would further create uncertainty in the interstate taxation system. As discussed above, 21 other states have similarly adopted the Finnigan rule. The rule has been upheld by judicial decisions in three of those states. *See Ariz. Dept't of Revenue*, 222 Ariz. 626 (2009); *Matter of Disney Enters., Inc.*, 10 N.Y. 3d 392 (2008); and *Citicorp N. Am.*, 83 Cal. App. 4th 1403 (2000). Despite those other state holdings, the Board's decision will create confusion as to the appropriate analysis in numerous other states.

The issue's statewide significance, the Board's rejection of directly relevant appellate authority, and the need for a definitive resolution of the Commonwealth's taxing authority - as well as the significant potential multistate implications - strongly support review by this Court.

CONCLUSION

For the foregoing reasons, the Commissioner respectfully requests that the Court grant direct appellate review.

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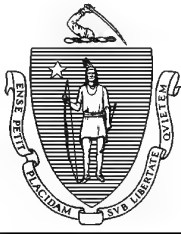
APPENDIX

Appellate Tax Board:

Docket Entries.....	App. 22
Petition Under Formal Procedure.....	App. 27
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Decision and Order Under Rule 33.....	App. 49
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Smithfield Packaged Meats Corp. and Combined Affiliates v. COR

Docket# : **C344811--DOR**

Status : **Appeals Court - Pending**

Appellant(s)

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Subject Property

Property Assessment

, MA

DEPARTMENT OF REVENUE County

\$0.00

Schedule

08/01/2024

11:30AM

Motion Hearing

Board Members / Stenographers / Clerks

Board Member :

Stenographer :

Clerk :

Patricia A. Metzger

None Assigned

None Assigned

View Chronology

Date

Action

03/11/2022

Docket Number Assigned; Clerk Notifies

03/11/2022

Entry Fee Paid

03/11/2022	Petition Filed
03/29/2022	Certificate of Service
03/29/2022	Notice to Commissioner of Revenue
04/12/2022	Certificate of Service
04/13/2022	Appellee Answer filed.
04/13/2022	Appellee Appearance of Celine E. de la Foscade-Condon, Esq. filed.
01/20/2023	Hearing Scheduled - 04/05/2023
02/03/2023	Parties request to convert 4/5/2023 Hearing Date to a Status Conference
02/03/2023	Status Conference - converted to SC from Hearing - agreed to by the parties
04/05/2023	Hearing
04/05/2023	Status Conference
04/05/2023	Status Conference Scheduled for 06/20/2023.
04/18/2023	Appellants Motion for Pro Hac Vice - Brent Beissel
04/25/2023	Order Issued: Appellants' unopposed Motion for Admission Pro Vice is allowed without a hearing. The appellants' unopposed Motion for Admission Pro Vice, filed April 13, 2023, is allowed without a hearing. Attorney Brent K. Beissel, Esq. is hereby granted leave to appear and practice before the Board on behalf of the appellants in the above-captioned appeal.
06/09/2023	Appellee's First Request for Production of Documents filed.
06/09/2023	Appellee's First Set of Interrogatories filed.
06/20/2023	Status Conference
08/04/2023	Appellant's Responses to Appellee's First Set of Interrogatories filed.
10/03/2023	Hearing Scheduled - cont. to 10/3/23 status conf.
10/03/2023	Status Conference
12/21/2023	Agreed Statement of Facts - filed by parties
12/21/2023	Brief filed - by appellant
12/21/2023	Brief filed - by appellee
02/07/2024	Reply Brief filed - by appellant
02/07/2024	Reply Brief filed - by appellee

05/30/2024	Order Issued: the following documents are entered into the evidentiary record of this appeal.. See Memo The Board orders that the following documents are entered into the evidentiary record of this appeal: • - a Consent Extending the Time for Assessment of Taxes on Form A-37, signed by the appellant on 4/30/2019 and the appellee on 6/12/2019, extending the time for assessment for the taxable periods 1/1/2015 to 12/31/2017 until 3/31/2020; • - a Consent Extending the Time for Assessment of Taxes on Form A-37, signed by the appellant on 12/19/2019 and the appellee on 12/20/2019, extending the time for assessment for the taxable periods 1/1/2015 to 12/31/2017 until 6/30/2020; and • - a Consent Extending the Time for Assessment of Taxes on Form A-37, signed by the appellant on 3/6/2020 and the appellee on 3/19/2019, extending the time for assessment for the taxable periods 1/1/2015 to 12/31/2017 until 9/30/2020. The Board also notes that the evidentiary record reflects discrepancies regarding the tax periods at issue among, inter alia, the Statement of Agreed Facts, Notice of Assessment, and the above Consents.¹ Accordingly, the Board orders that a hearing be 1 For example, the initial paragraph of the Statement of Agreed Facts states that the “facts and documents pertain to the tax years ended January 3, 2016 (the ‘2015 Tax Year’), January 1, 2017 (the ‘2016 Tax Year’) and December 31, 2017 (the ‘2017 Tax Year’),” but the Notice of Assessment relates to tax periods ended December 31, 2015, December 31, 2016, and December 31, 2017. Additionally, the Consents correlate to calendar years, while the tax years at issue in these matters appear to follow a 52/53-week fiscal year. See Statement of Agreed Facts (initial paragraph); Statement of Agreed Facts, Exhibit 12 (2015 Form 10-K, page 3). Specifically, the taxpayer’s 2015 fiscal year began on December 29, 2014 (a date prior to the taxable periods listed on the Consents) and ended on January 3, 2016. held to determine the tax periods at issue as well as the timeliness and validity of the contested assessments. The parties may provide testimony and/or documentation to address these issues. Accordingly, the Board will contact the parties to schedule a hearing.
07/31/2024	Board's Own Motion Regarding Jurisdiction - 08/01/2024
08/01/2024	Minutes of Proceeding
09/16/2024	Appellant's Supplemental Brief (Jurisdictional Issue) - filed
09/16/2024	Commissioner of Revenue’s Supplemental Brief (Jurisdictional Issue) - filed
10/01/2024	Appellant's Reply Brief (Jurisdictional Issue) - filed
10/01/2024	Commissioner of Revenue's Reply Brief (Jurisdictional Issue) - filed

10/22/2024

Order Issued: Decision and Order Under Rule 33. See Memo. At issue in this appeal is the Commissioner's assessment of the corporate excise and an understatement penalty pursuant to G.L. c. 62C, § 35A ("35A penalty") against the appellant ("Smithfield Combined Group") for the tax years ended January 3, 2016, January 1, 2017, and December 31, 2017 ("tax years at issue"). Based upon the Statement of Agreed Facts and accompanying exhibits, testimony at the hearing regarding the timeliness and validity of the contested assessments, and the several Briefs submitted by the parties, the Appellate Tax Board ("Board") finds and rules that it has jurisdiction to hear and decide this appeal with respect to the tax years at issue.

Based on the foregoing, the Board further finds and rules as follows:

1.

For the tax year ended January 3, 2016, Smithfield Farmland Sales Corp., later known as Smithfield Fresh Meats Sales Corp. ("Fresh Meat Sales"), was properly classified as a manufacturing corporation pursuant to G.L. c. 63, § 38 (a "\$ 38 manufacturer"), applying the provisions set forth in 830 CMR 63.32B.2(7)(g)2.a; and for the tax year ended January 1, 2017, Smithfield Packaged Meats Sales Corp. ("Packaged Meats Sales") and Fresh Meats Sales were properly classified as § 38 manufacturers.

2

2.

The Commissioner properly assessed a § 35A penalty for each of the tax years ended January 3, 2016, and January 1, 2017.

3.

Packaged Meats Sales was a § 38 manufacturer for the tax year ended December 31, 2017 ("2017 tax year").

4.

None of the sales made by Fresh Meats Sales for the 2017 tax year were properly reallocated to Smithfield Packaged Meats Corp. (the principal reporting corporation) and Packaged Meats Sales for purposes of determining the total Massachusetts receipts includible in the numerator of their respective Massachusetts sales apportionment factors. The "Finnigan" adjustment (referred to by the appellant as the Reallocation Rule) required under G.L. c. 63, § 32B(d)(2)(iv) and 830 CMR 63.32B.2(7)(b) violates the Supremacy Clause of the U.S. Constitution (Article VI, clause 2) as applied to the appellant.

5.

The Commissioner properly assessed a § 35A penalty for the 2017 tax year with respect to any deficiency resulting from the failure of the appellant to treat Packaged Meats Sales as § 38 manufacturer.

Accordingly, the decisions are for the appellee with respect to the corporate excise and § 35A penalty assessed against the Smithfield Combined Group for each of the tax years ended January 3, 2016, and January 1, 2017.

.

In accordance with Rule 33 of the Rules of Practice and Procedure of the Board (831 CMR 1.33) ("Rule 33"), the Board orders the parties (i) to determine the abatement amount or the refund amount, as the case may be, for the 2017 tax year based upon the tax liability of the Smithfield Combined Group for the 2017 tax year determined without the application of the "Finnigan" adjustment, but with the inclusion of Packaged Meats Sales as a § 38 manufacturer, and (ii) to provide all necessary documentation to support the basis for such determination.

In accordance with Rule 33, the parties shall, if they agree on an abatement amount or a refund amount, file with the Clerk a computation showing such amount. If the parties do not agree upon such amount, either party may file with the Clerk a computation showing their proposed abatement amount or proposed refund amount.

Based on the parties' joint or separate computation(s) of the abatement amount or the refund amount, or after a hearing on the parties' computation(s), the Board will determine the correct abatement amount or the correct refund amount for the 2017 tax year, and enter a final decision with respect to the 2017 year.

3

The parties are directed to comply with this Rule 33 Order within thirty (30) days of the date of its issuance.

10/24/2024

Request for Findings of Fact and Report filed - Appellee.

10/30/2024

Joint Rule 33 Computation - filed by the parties

11/01/2024	Request for Findings of Fact and Report filed - Appellant
11/07/2024	Decision for Appellant- Abatement is granted in the amount of \$239,719, plus statutory interest. See Memo. The decision is for the appellant. On the basis of the parties' Joint Submission in Accordance with Appellate Tax Board Rule 33, dated October 30, 2024, an abatement is granted for the tax year ending December 31, 2017 in the amount of \$239,719, plus statutory interest.
07/22/2026	Findings Promulgated - 7/22/2026
09/15/2026	Notice of Appeal filed by Appellee.
09/16/2026	Record Assembled & Delivered to MA Appeals Court.
09/21/2026	Notice of Appeal filed by Appellant.

THE COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

SMITHFIELD PACKAGED MEATS CORP. AND)
COMBINED AFFILIATES)

Appellant,)

v.)

COMMISSIONER OF REVENUE,)

Appellee.)

DOCKET NO.

PETITION UNDER FORMAL PROCEDURE

I. Introduction

1. This is an appeal pursuant to G.L. c. 58A, § 6, and G.L. c. 62C, § 39(c), from a refusal by the Commissioner of Revenue (the “Appellee”) to grant an application for abatement of corporate excise tax for Smithfield Packaged Meats Corporation (“SPMC”) and Combined Affiliates (collectively “Appellant” or the “Smithfield Group”) for the tax years ending December 31, 2015 through December 31, 2017 (the “Tax Years”).

II. Prior Proceedings

2. Appellant timely filed a combined Massachusetts corporate excise tax (“Tax”) return on Form 355U for each of the Tax Years.

3. Subsequently, Appellee commenced an audit of Appellant, and on August 10, 2020, Appellee issued a Notice of Assessment of additional Tax, interest, and penalties to Appellant for the Tax Years.

4. On August 13, 2020, Appellant timely filed an Application for Abatement contesting the assessment and requested a hearing before Appellee's Office of Appeals.

5. On December 10, 2020, the Office of Appeals conducted a hearing.

6. The Office of Appeals issued a letter of determination dated February 9, 2022 granting a partial abatement, but upholding the remainder of the assessment.

7. Appellee issued a Notice of Abatement Determination dated February 10, 2022, giving Appellant notice that Appellee had granted a partial abatement and denied the remainder of requested abatement.

III. Statements of Fact and Contentions of Law

Appellant is aggrieved by Appellee's refusal to grant the requested abatement in full, based on the foregoing and on the following statements of fact and contentions of law.

The Sales Corporations were improperly required to compute their apportionment percentages using the single-sales factor formula applicable to manufacturing corporations.

8. Appellee incorrectly classified two members of the Smithfield Group, as manufacturing corporations for purposes of G.L. c. 63, § 38: Smithfield Farmland Sales Corporation ("SFS") (for the 2015 and 2016 Tax Years); and Smithfield Packaged Meats Sales Corporation ("SPMS") (for the 2016 and 2017 Tax Years). Collectively, SFS and SPMS are referred to herein as the "Sales Corporations".

9. The only function of the Sales Corporations was to provide sales and distribution services to other entities in the Smithfield Group. The Sales Corporations did not produce or

process any of the products that they sold. The Sales Corporations did not own any manufacturing equipment and none of the payroll of the Sales Corporations was attributable to employees working in manufacturing operations. In addition, none of the receipts of the Sales Corporations resulted from the sale of goods manufactured by the Sales Corporations.

10. Pursuant to G.L. c. 63, § 38(1)(2), a “manufacturing corporation” must apportion its income to Massachusetts using a single sales factor apportionment formula. A manufacturing corporation is defined in G.L. c. 63, § 38(1)(1) as a corporation that is “engaged in manufacturing,” which means being “engaged, in substantial part, in transforming raw or finished physical materials by hand or machinery, and through human skill and knowledge into a new product possessing a new name, nature, and adapted to a new use.”

11. Neither of the Sales Corporations met the definition of a “manufacturing corporation” under the plain language of the corporate excise tax statute, because neither of the Sales Corporation was engaged in substantial part in “transforming raw or finished physical materials by hand or machinery” into a “new product”. Furthermore, neither of the Sales Corporations performed activities or functions that constituted an essential and integral part of the manufacturing process.

12. Appellee’s basis for the reclassification of the Sales Corporations is a provision in the combined reporting regulations (830 CMR 63.32B.2(7)(g)2.a., referred to herein as the “Combination Provision”), which purports to give Appellee the authority to combine the activities of multiple members of a combined group for purposes of determining whether the members are classified as manufacturers.

13. The plain language of the combined reporting statute provides that “each taxable member shall determine its apportionment percentage based on its specific apportionment formula pursuant to this chapter.” G.L. c. 63, § 32B(d)(2)(i). Thus, each corporation included in the combined report must determine the formula to be used to determine its apportionment percentage based on its own activities.

14. Appellee’s authority to promulgate regulations under G.L. c. 62C, § 3 is limited to regulations “not inconsistent with law”. The Combination Provision would require Appellee to determine the apportionment percentages of the Sales Corporations in a manner inconsistent with the corporate excise tax statute. Under the statute, a member of a combined group that is not a manufacturing corporation under G.L. c. 63, § 38(1) or otherwise required to use an industry-specific apportionment formula, is required to compute its apportionment percentage based on the three-factor formula set forth at G.L. c. 63, §38(c). The Combination Provision, to the extent that it would require a corporation that does not qualify as a manufacturing corporation based on its own activities, to compute their apportionment percentage using a single-sales factor apportionment formula, is inconsistent with G.L. c. 63, § 32B(d)(2)(i) and, thus, invalid.

15. Based on the foregoing, Appellee’s reclassification of the Sales Corporations as manufacturing corporations for purposes of G.L. c. 63, § 38 must be reversed, and the Sales Corporations must be permitted to use the three-factor apportionment formula for business corporations mandated by G.L. c. 63, § 38(c).

The application of single-sales factor apportionment to the Sales Corporations violated the Commerce Clause of the U.S. Constitution.

16. Neither of the Sales Corporations engaged in any manufacturing activities in Massachusetts.

17. 830 CMR 63.38.1(10)(b)(1) provides that a corporation's manufacturing status is determined "regardless of whether, or to what extent, it conducts activities in Massachusetts," and 830 CMR 63.38.1(10)(b)(3) provides that in determining whether a corporation is a manufacturer for Massachusetts apportionment purposes includes consideration of receipts, payroll and property outside of Massachusetts.

18. These provisions, as applied to the Sales Corporations, in conjunction with the Combination Provision, violate the Commerce Clause of the United States Constitution. U.S. Const., art. I, § 8, cl. 3.

19. The Dormant Commerce Clause of the United States Constitution "prohibits economic protectionism -- that is, 'regulatory measures designed to benefit in-state economic interest by burdening out-of-state competitors.'" *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330 (1996) (quoting *Associated Industries of Missouri v Lohman*, 511 U.S. 541, 647 (1994)).

20. The single-sales factor apportionment formula for manufacturing corporations is discriminatory, as applied to corporations, like the Sales Corporations, that conduct no manufacturing activities in Massachusetts. The single-sales factor formula results in an increased tax burden for such a corporation as compared with other similarly situated corporations that

purchase and resell manufactured products in Massachusetts, based merely on the corporation's affiliation with a multistate manufacturing corporation.

SPMS was not a manufacturing corporation for the 2017 Tax Year under the Combination Provision, because it was not engaged in substantial manufacturing on a combined basis with SPMC.

21. For the 2017 Tax Year, over 47% of the Massachusetts sales that SPMS reported for apportionment purposes were receipts of Smithfield Fresh Meats Sales Corporation, formerly known as Smithfield Farmland Sales ("SFMS") that were reattributed to SPMS pursuant to G.L. c. 63, § 32B(d)(2)(iv) (the "Reattribution Rule").

22. Under the Reattribution Rule, the Massachusetts receipts of a member of a Massachusetts combined group that is not subject to the income-based portion of the Tax are reattributed to the taxable members of the combined group.

23. SFMS was a corporation primarily engaged in the sale of fresh meat products that were not value-added agricultural products within the meaning of G.L. c. 63, § 38(l)(1).

24. SFMS was not subject to the income-based portion of the Tax for the 2017 Tax Year because its activities in Massachusetts in that year were limited to the solicitation of orders for sales of tangible personal property. Thus, for the 2017 Tax Year, Massachusetts was prohibited from taxing the income of SFMS under P.L. 86-272. 15 U.S.C. § 381.

25. If the activities of SFMS are attributed to SPMS for apportionment purposes under the Reattribution Rule, then they must also be attributed to SPMS for purposes of determining its status as a manufacturing corporation under G.L. c. § 38(l). If the sales of SFMS attributed to

SPMS for apportionment purposes are treated as SPMS sales, then the combined activities of SPMS and SPMC would not satisfy the tests for substantial manufacturing during the 2017 Tax Year.

The Application of the Combination Provision Together With the Reattribution Rule Resulted in a Distorted Apportionment for SPMS for the 2017 Tax Year.

26. Under the Commerce Clause of the U.S. Constitution, a state tax on interstate business activity must be fairly apportioned. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

27. A tax is not fairly apportioned if it uses an apportionment formula that produces an apportionment “out of all appropriate proportion” to the taxpayer’s activities in the taxing state. *Hans Rees' Sons, Inc. v. North Carolina ex rel. Maxwell*, 283 U.S. 123, 135 (1931).

28. The combined application of the Reattribution Rule and the Combination Provision to SPMS for the 2017 Tax Year results in a violation of the fair apportionment requirement, because it results in an apportionment percentage for SPMS that is more than 184% of what it would have been on a stand-alone basis.

The Application of the Combination Provision to SPMS, Together With the Reattribution of Sales to SPMS under the Reattribution Rule for the 2017 Tax Year, Violated the Supremacy Clause of the U.S. Constitution

29. SFMS was not subject to the income-based portion of the Tax for the 2017 Tax Year, because its activities in Massachusetts were limited to the solicitation of orders for sales of tangible personal property and, thus, protected by P.L. 86-272. 15 U.S.C. § 381; 830 CMR 63.39.1(4)(e).

30. The application of the Combination Provision together with the reattribution of the Massachusetts sales of SFMS to SPMS under the Reattribution Rule resulted in a higher Tax liability for the Smithfield Group for the 2017 Tax Year than would have resulted if SFMS had not claimed the protection of P.L. 86-272.

31. The application of the Combination Provision, together with the reattribution of the Massachusetts sales of SFMS to SPMS under the reattribution rule, violated the Supremacy Clause of the U.S. Constitution (U.S. Const., art. VI, cl. 2), because it penalized Appellant for claiming the protection of P.L. 86-272 for SFMS, thus denying Appellant a benefit intended by Congress. *See Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (state laws may not “stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”).

The Section 35A Penalties Assessed by Appellee were Inapplicable

32. The assessment against Appellant includes of the 20% underpayment penalty under G.L. c. 62C, § 35A (the “35A Penalty”) for each of the Tax Years.

33. Under G.L. c. 62C, § 35A(a), the 35A Penalty may be applied to “an underpayment of tax required to be shown on a return”

34. Under G.L. c. 62C, § 35A(b), the 35A Penalty applies if the underpayment is attributable to “negligence or disregard of the tax laws of the commonwealth” or “any substantial understatement” of tax liability. For this purpose, an “understatement” means the excess of the amount of tax “required to be shown on the return” over the amount actually shown on the return.

35. Appellant was not negligent and did not disregard Massachusetts law in preparing or filing its Tax returns for the Tax Years. In particular, Appellant correctly determined its Tax on its Tax Returns for the Tax Years, because: (i) the Sales Corporations were not classified as manufacturing corporations; (ii) the Combination Provision does not apply to the Sales Corporations, because the Combination Provision is inconsistent with the corporate excise tax statute and, thus invalid; (iii) the Combination Provision as applied to the Sales Corporations constituted a violation of the Commerce Clause of the U.S. Constitution; (iv) the application of the Combination Provision together with the Reattribution Rule for the 2017 Tax Year resulted in a distorted apportionment in violation of the Clause of the U.S. Constitution; and (v) the application of the Combination Provision together with the Reattribution Rule penalized Appellant for claiming the protection of P.L. 86-272 for SFMS in violation of the Supremacy Clause of the U.S. Constitution.

36. Once the incorrect adjustments by the auditor are reversed, Appellant would have no additional Tax liability for any of the Tax Years and, as a consequence, Appellant would not have underreported any Tax “required to be shown on the return,” for any of the Tax Years.

37. Therefore, Appellant is aggrieved by Appellee's refusal to grant abatement of the 35A Penalty, because there was no "understatement" by Appellant for any of the Tax Years.

IV. Conclusion

38. Appellant is aggrieved by the determinations made by Appellee as set forth herein and by Appellee's refusal to grant a full abatement of tax, interest and penalties and prays: (a) that a hearing be held on this petition; (b) for abatement of \$304,903 of Tax, \$60,981 of penalties, and all underpayment interest accruing for the Tax Years; and (c) for such other relief, including, without limitation, additional abatements of Tax, as may be fitting and proper.

39. Appellant reserves its right, pursuant to 831 CMR 1.14, to amend this Petition and to present additional facts and legal arguments upon which the relief requested can be granted.

40. The address and telephone number of the Appellant are as follows:

Ken Wright
Senior State Tax Manager
Smithfield Foods
112 Commerce Street
Smithfield, VA 23430
Telephone Number: (757) 357-8194

41. Service of papers in connection with this appeal may be made on Appellant's counsel:

Michael A. Jacobs
Reed Smith LLP
Three Logan Square
Suite 3100
1717 Arch Street
Philadelphia, PA 19103
Telephone Number: (215) 851-8868

Respectfully submitted,

Smithfield Packaged Meats Corp. and
Combined Affiliates

By its attorney,



Michael A. Jacobs BBO# 639513
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Three Logan Square
Suite 3100
1717 Arch Street
Philadelphia, PA 19103
(215) 851-8868

Dated: March 10, 2022

THE COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

SMITHFIELD PACKAGED MEATS CORP. AND	)	
COMBINED AFFILIATES,	)	
	)	
Appellant,	)	
	)	
v.	)	Docket No. C344811
	)	
COMMISSIONER OF REVENUE,	)	
	)	
Appellee.	)	
	)	

STATEMENT OF AGREED FACTS

The Appellant, Smithfield Packaged Meats Corporation and Combined Affiliates (“**SPMC**” or the “**Taxpayer**”), and the Appellee, the Commissioner of Revenue (the “**Commissioner**”), pursuant to Rule 23 of the Rules of Practice and Procedure of the Appellate Tax Board (the “**Board**”), hereby stipulate and agree that the facts set forth below are true and that the attached documents are authentic for purposes of this appeal only. The Taxpayer and the Commissioner hereby waive any objection to duplicates in lieu of originals of such documents. In so stipulating, the Taxpayer and the Commissioner expressly reserve their rights to contest the materiality or relevance of any fact or document stipulated herein and to introduce other evidence at the hearing of these appeals but waive all other objections to the admissibility of the stipulated facts and documents. Unless the context indicates otherwise, each of the following facts and documents pertain to the tax years ended January 3, 2016 (the “**2015 Tax Year**”), January 1, 2017 (the “**2016 Tax Year**”) and December 31, 2017 (the “**2017 Tax Year**”, and together with the 2015 Tax Year and the 2016 Tax Year, the “**Tax Years at Issue**”).

PRIOR PROCEEDINGS

1. The Taxpayer filed its annual Massachusetts corporate excise tax returns for the Tax Years at Issue on Form 355U as part of a combined reporting group (the “**Smithfield Combined Group**”), in which SPMC was identified as the principal reporting corporation. For the 2015 Tax Year and the 2016 Tax Year, SPMC was identified under its former name, John Morrell and Company. Copies of those returns are attached as **Exhibits 1 through 3**.

2. The 2015 return was filed on October 13, 2016, the 2016 return was filed on October 12, 2017, and the 2017 return was filed on November 13, 2018. See GeniSys printouts indicating dates of filing attached as **Exhibit 4**.

3. On April 22, 2019, the Commissioner commenced an audit of the Taxpayer’s corporate excise returns for the Tax Years at Issue. A copy of the Notice of Selection for Audit is attached as **Exhibit 5**.

4. On June 25, 2020, the Commissioner issued to the Taxpayer a Notice of Intent to Assess for all Tax Years at Issue. A copy of the Notice of Intent to Assess is attached as **Exhibit 6**.

5. On August 10, 2020, the Commissioner issued a Notice of Assessment to the Taxpayer for the Tax Years at Issue. A copy of the Notice of Assessment is attached as **Exhibit 7**.

6. On August 12, 2020, the Taxpayer filed an Application for Abatement for the Tax Years at Issue contesting all of the tax, penalty and interest assessed in the Notice of Assessment. A copy of the Application for Abatement is attached as **Exhibit 8**.

7. On December 10, 2020, the Commissioner’s Office of Appeals conducted a telephonic hearing. See **Exhibit 8**.

8. By a Letter of Determination dated February 9, 2022, the Commissioner's Office of Appeals granted the Taxpayer a partial abatement. A copy of the Letter of Determination is attached as **Exhibit 9**.

9. By Notice of Abatement Determination dated February 10, 2022, the Commissioner reduced the assessed tax and penalty. A copy of the Notice of Abatement Determination is attached as **Exhibit 10**.

10. After the partial abatement, the remaining unpaid balances of tax, penalties and interest are the following :

Tax Year	Tax	Interest (as of October 17, 2023)	Penalty	TOTAL
2015	\$79,172.00	\$44,252.17	\$15,834.00	\$139,258.17
2016	\$13,481.00	\$6,545.85	\$2,696.00	\$22,722.85
2017	\$212,253.00	\$86,627.65	\$42,451.00	\$341,331.65
TOTAL	\$304,906.00	\$137,425.67	\$60,981.00	\$503,312.67

See GeniSys printouts dated August 31, 2023 attached as **Exhibit 11**.

11. On March 11, 2022, the Taxpayer filed a petition under formal procedure with the Board, initiating this appeal.

GENERAL OVERVIEW OF THE TAXPAYER'S BUSINESS

12. The Taxpayer traces its history back to 1936 when Joseph W. Luter Sr. and his son, Joseph W. Luter Jr., opened the Smithfield Packing Company in Smithfield, Virginia. See Forms 10-K attached as **Exhibits 12-13**.

13. The Taxpayer remains headquartered in Smithfield, Virginia. Id.

14. Smithfield Foods, Inc. is the parent company of the members of the Smithfield Combined Group and of multiple vertically integrated subsidiaries. It is a multi-billion global food company and one of the world's largest pork processors and hog producers. In the United States, the company is also the leader in numerous packaged meats categories with popular brands including Smithfield®, Eckrich®, Nathan's Famous®, Farmland®, Armour®, John Morrell®, Cook's®, Kretschmar®, Gwaltney®, Curly's®, Margherita®, Carando®, Healthy Ones®, Krakus®, Morliny®, and Berlinki®. Id.

15. During the Tax Years at Issue, Smithfield Foods, Inc., through its various subsidiaries, including the members of the Smithfield Combined Group, had three principal domestic business lines: (1) hog production; (2) fresh pork products; and (3) packaged meats. Id.

16. The hog production segment, conducted principally through Murphy-Brown LLC, a disregarded single member limited liability company owned by SPMC, produced hogs at company-owned farms, none of which were in Massachusetts. See Exhibit 14 (Response to Interrogatory Number 4) and **Exhibits 12-13**.

17. The fresh pork segment, conducted principally through Smithfield Farmland Corporation ("**SFC**") and Smithfield Fresh Meats Sales Corporation, formerly known as Smithfield Farmland Sales Corporation ("**Fresh Meats Sales**"), produced and sold a wide variety of fresh, unprocessed pork cuts. See Exhibit 14 (Response to Interrogatory Numbers 11 and 12).

18. The packaged meats segment, conducted principally through SPMC and Smithfield Packaged Meats Sales Corporation ("**Packaged Meats Sales**"), produced and sold a variety of value-added products including sausage, hot dogs, deli meats, and specialty products, such as pepperoni.

The packaged meats segment operated plants across the United States, including one located in Springfield, Massachusetts. See Exhibit 14 (Response to Interrogatories Numbers 5 and 6).

19. All of the products manufactured by SFC and SPMC were either sold to Fresh Meats Sales or Packaged Meats Sales. See Exhibit 8.

20. The terms that applied to the sale transactions between SFC and Fresh Meats Sales were governed by an intercompany agreement. See Exhibit 18.

21. The terms that applied to the sale transactions between SPMC and Packaged Meats Sales were governed by an intercompany agreement. See Exhibit 19.

Facts regarding Packaged Meats Sales' Activity and Apportionment

22. During the 2016 Tax Year and the 2017 Tax Year, Packaged Meats Sales was responsible for the distribution and sales of the value-added pork products produced by other affiliates of Smithfield Foods, Inc., including SPMC. Packaged Meats Sales purchased the value-added products from the affiliates and resold them to restaurants, wholesalers, and retailers throughout the United States.¹ See Exhibit 14 (Response to Interrogatory Number 5).

23. During the 2016 and 2017 Tax Years, Packaged Meats Sales did not engage in any activities that directly involved the transformation of raw or finished materials into products possessing a new name or nature and adapted to a new use. See Exhibit 14 (Response to Interrogatory Number 7).

¹ For the year 2015, Packaged Meats Sales was not included as a taxable member. See 2015 Massachusetts return attached as **Exhibit 1**.

24. During the 2016 and 2017 Tax Years, the receipts of Packaged Meats Sales were derived from the sale of products manufactured by affiliated members of the Smithfield Combined Group. See Exhibit 14 (Response to Interrogatory Number 10).

25. During the 2016 and 2017 Tax Years, none of the payroll of Packaged Meats Sales was paid to employees working in manufacturing operations. See Exhibit 14 (Response to Interrogatory Number 7).

26. During the 2016 and 2017 Tax Years, none of the tangible property of Packaged Meats Sales was used in manufacturing. See Exhibit 14 (Response to Interrogatory Number 8).

27. In his audit of the Taxpayer's returns for the 2016 and 2017 Tax Years, the Commissioner reclassified Packaged Meats Sales as a Section 38 Manufacturer. As a result, the Commissioner calculated Packaged Meats Sales' income apportionment percentage for the 2016 and 2017 Tax Years using the single-sales factor. See Audit Workpapers attached as **Exhibit 15**.

28. The Commissioner relied on a provision in the combined reporting regulation (830 CMR 63.32B.2(7)(g)2.a.) (the "**Combination Provision**") as authority for making the adjustments described in paragraph 24. The Commissioner relied on the Combination Provision to combine the activities of SPMC and Packaged Meats Sales for purposes of determining the apportionment formula of Packaged Meats Sales. See Exhibit 9.

29. As a result of the adjustments described in paragraph 24 the Commissioner adjusted the income apportionment percentage originally reported by Packaged Meats Sales for the 2016 and 2017 Tax Years as follows:

Tax Year	Income Apportionment Percentage as Reported	Income Apportionment Percentage as Adjusted	Increase
2016	0.003504	0.006668	0.003164
2017	0.006316	0.012273	0.005960

See Exhibit 15.

Facts regarding Fresh Meats Sales' Activity and Apportionment

30. For each of the Tax Years at Issue, SFC produced primarily fresh, unprocessed, pork cuts. See Exhibits 12-13.

31. For each of the Tax Years at Issue, Fresh Meats Sales was responsible for the distribution and sales of SFC's products: Fresh Meats Sales purchased pork cuts from SFC and resold them to restaurants, wholesalers, and retailers throughout the United States. See Exhibit 14 (Response to Interrogatories 11 and 12).

32. For each of the Tax Years at Issue, Fresh Meats Sales did not engage in any activities that, by hand or machinery, transformed the pork cuts purchased from the affiliates into a new product possessing a new name, nature, and adapted to a new use. See Exhibit 14 (Responses to Interrogatories 11 and 15).

33. For each of the Tax Years at Issue, none of the receipts of Fresh Meats Sales were derived from the sale of products manufactured by Fresh Meats Sales. See Exhibit 14 (Response to Interrogatory 15).

34. For each of the Tax Years at Issue, the receipts of Fresh Meats Sales were derived from the sale of products produced by affiliated members of the Smithfield Combined Group. Id.

35. For each of the Tax Years at Issue, none of the payroll of Fresh Meats Sales was paid to employees working in manufacturing operations. See Exhibit 14 (Response to Interrogatory Number 12).

36. For each of the Tax Years at Issue, none of the tangible property of Fresh Meats Sales was used in manufacturing. See Exhibit 14 (Response to Interrogatory 13).

37. In his audit of the 2015 and 2016 Returns, the Commissioner reclassified Fresh Meats Sales as a Section 38 Manufacturer. As a result, the Commissioner calculated Fresh Meats Sales' income apportionment percentage for the 2015 and 2016 Tax Years using the single sales factor. The Commissioner relied upon the Combination Provision to make these adjustments. See Exhibit 9 and **Exhibit 15**.

38. As a result of the adjustments described in paragraph 35 the Commissioner increased the income apportionment percentage originally reported by Fresh Meats Sales for the 2015 and 2016 Tax Years as follows:

Tax Year	Income Apportionment Percentage as Reported	Income Apportionment Percentage as Adjusted	Increase
2015	0.003623	0.007182	0.003559
2016	0.003954	0.007845	0.003891

See Exhibit 15.

Facts regarding the Assignment of Fresh Meats Sales' Massachusetts sales for the 2017 Tax

Year

39. On the Massachusetts corporate excise tax return filed by the Smithfield Combined Group for the 2017 Tax Year (the "2017 Return"), Fresh Meats Sales was included as a nontaxable member. On the 2017 Return, SPMC assigned Fresh Meats Sales' Massachusetts receipts, totaling \$85,708,777, to SPMC and Packaged Meats Sales pursuant to 830 CMR 63.32B.2(7)(b) (the "Finnigan Rule"). See Exhibit 3.

40. During the 2017 Tax Year, Fresh Meats Sales had no employees permanently based in Massachusetts and no real or tangible personal property located in Massachusetts. During the 2017 Tax Year, Fresh Meats Sales employees were engaged exclusively in the solicitation for order of pork products. These orders were accepted or rejected at locations outside of Massachusetts and, if approved, filled by shipment or delivery from points outside of Massachusetts. See Exhibit 14 (Response to Interrogatory 16).

41. If Fresh Meats Sales had been treated as a taxable member of the Smithfield Combined Group for the 2017 Tax Year, its Massachusetts sales factor would have been 0.006296 and its Massachusetts income apportionment percentage would have been 0.003148. See Exhibit 3 and Exhibit 15.

42. If Fresh Meats Sales had been treated as a taxable member of the Smithfield Combined Group for the 2017 Tax Year, SPMC's Massachusetts sales factor would have been 0.000556 and its Massachusetts income apportionment percentage would have been 0.000556. Id.

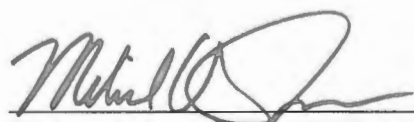
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43. If Fresh Meats Sales had been treated as a taxable member of the Smithfield Combined Group for the 2017 Tax Year, Packaged Meats Sales' Massachusetts sales factor would have been 0.006475 and its Massachusetts income apportionment percentage would have been 0.003414 (assuming Fresh Meats Sales was not a Section 38 Manufacturer) and 0.006475 (assuming Fresh Meats Sales was a Section 38 Manufacturer). Id.

Respectfully Submitted,

SMITHFIELD PACKAGED MEATS
CORPORATION
By its attorneys,

GEOFFREY E. SNYDER
COMMISSIONER OF REVENUE
By his attorneys,


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Dated: October 18, 2023

Dated: October 17, 2023

EXHIBITS

A. JURISDICTIONAL DOCUMENTS

- Exh. 1: Form 355U for 2015 Tax Year
- Exh. 2: Form 355U for 2016 Tax Year
- Exh. 3: Form 355U for 2017 Tax Year
- Exh. 4: GeniSys printout indicating dates Massachusetts returns were filed
- Exh. 5: Notice of Selection for Audit dated April 22, 2019
- Exh. 6: Notice of Intent to Assess dated June 25, 2020
- Exh. 7: Notice of Assessment dated August 10, 2020
- Exh. 8: Form ABT – Application for Abatement
- Exh. 9: Letter of Determination dated February 9, 2022
- Exh. 10: Notice of Abatement Determination dated February 10, 2022
- Exh. 11: GeniSys printouts indicating remaining unpaid balance

B. MISCELLANEOUS DOCUMENTS

- Exh. 12: 2015 Form 10-K for Smithfield Foods, Inc.
- Exh. 13: 2016 Form 10-K for Smithfield Foods, Inc.²
- Exh. 14: Appellant's Responses to Appellee's First Set of Interrogatories
- Exh. 15: Audit Workpapers
- Exh. 16: Simplified Organizational Charts
- Exh. 17: Separate Company Massachusetts Sales Apportionment
- Exh. 18: Intercompany Distribution Agreement between SFC and Smithfield Farmland Sales Corporation, effective as of April 28, 2014.
- Exh. 19: Intercompany Distribution Agreement between John Morrell & Co. and Packaged Meats Sales, effective January 4, 2016.

² Smithfield Foods, Inc. no longer filed public filings with the United States Securities and Exchange Commission after 2016.



THE COMMONWEALTH OF MASSACHUSETTS

Appellate Tax Board

*100 Cambridge Street, Suite 200
Boston, Massachusetts 02114*

Docket No. C344811

**SMITHFIELD PACKAGED MEATS CORP. and COMBINED AFFILIATES,
Appellant.**

v.

**COMMISSIONER OF REVENUE,
Appellee.**

DECISION AND ORDER UNDER RULE 33

At issue in this appeal is the Commissioner's assessment of the corporate excise and an understatement penalty pursuant to G.L. c. 62C, § 35A ("35A penalty") against the appellant ("Smithfield Combined Group") for the tax years ended January 3, 2016, January 1, 2017, and December 31, 2017 ("tax years at issue").

Based upon the Statement of Agreed Facts and accompanying exhibits, testimony at the hearing regarding the timeliness and validity of the contested assessments, and the several Briefs submitted by the parties, the Appellate Tax Board ("Board") finds and rules that it has jurisdiction to hear and decide this appeal with respect to the tax years at issue.

Based on the foregoing, the Board further finds and rules as follows:

1. For the tax year ended January 3, 2016, Smithfield Farmland Sales Corp., later known as Smithfield Fresh Meats Sales Corp. ("Fresh Meat Sales"), was properly classified as a manufacturing corporation pursuant to G.L. c. 63, § 38 (a "§ 38 manufacturer"), applying the provisions set forth in 830 CMR 63.32B.2(7)(g)2.a; and for the tax year ended January 1, 2017, Smithfield Packaged Meats Sales Corp. ("Packaged Meats Sales") and Fresh Meats Sales were properly classified as § 38 manufacturers.

2. The Commissioner properly assessed a § 35A penalty for each of the tax years ended January 3, 2016, and January 1, 2017.
3. Packaged Meats Sales was a § 38 manufacturer for the tax year ended December 31, 2017 ("2017 tax year").
4. None of the sales made by Fresh Meats Sales for the 2017 tax year were properly reallocated to Smithfield Packaged Meats Corp. (the principal reporting corporation) and Packaged Meats Sales for purposes of determining the total Massachusetts receipts includible in the numerator of their respective Massachusetts sales apportionment factors. The "Finnigan" adjustment (referred to by the appellant as the Reallocation Rule) required under G.L. c. 63, § 32B(d)(2)(iv) and 830 CMR 63.32B.2(7)(b) violates the Supremacy Clause of the U.S. Constitution (Article VI, clause 2) as applied to the appellant.
5. The Commissioner properly assessed a § 35A penalty for the 2017 tax year with respect to any deficiency resulting from the failure of the appellant to treat Packaged Meats Sales as § 38 manufacturer.

Accordingly, the decisions are for the appellee with respect to the corporate excise and § 35A penalty assessed against the Smithfield Combined Group for each of the tax years ended January 3, 2016, and January 1, 2017.

In accordance with Rule 33 of the Rules of Practice and Procedure of the Board (831 CMR 1.33) ("Rule 33"), the Board orders the parties (i) to determine the abatement amount or the refund amount, as the case may be, for the 2017 tax year based upon the tax liability of the Smithfield Combined Group for the 2017 tax year determined without the application of the "Finnigan" adjustment, but with the inclusion of Packaged Meats Sales as a § 38 manufacturer, and (ii) to provide all necessary documentation to support the basis for such determination.

In accordance with Rule 33, the parties shall, if they agree on an abatement amount or a refund amount, file with the Clerk a computation showing such amount. If the parties do not agree upon such amount, either party may file with the Clerk a computation showing their proposed abatement amount or proposed refund amount.

Based on the parties' joint or separate computation(s) of the abatement amount or the refund amount, or after a hearing on the parties' computation(s), the Board will determine the correct abatement amount or the correct refund amount for the 2017 tax year, and enter a final decision with respect to the 2017 year.

The parties are directed to comply with this Rule 33 Order within thirty (30) days of the date of its issuance.

ORDERED ACCORDINGLY

APPELLATE TAX BOARD

/s/ Mark J. DeFrancisco Chairman

/s/ Patricia M. Good Commissioner

/s/ Steven G. Elliott Commissioner

/s/ Patricia Ann Metzger Commissioner

/s/ Nicholas D. Bernier Commissioner

Attest: /s/ William J. Doherty
Clerk of the Board

Date: October 22, 2024



THE COMMONWEALTH OF MASSACHUSETTS
Appellate Tax Board

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Docket No. C344811

SMITHFIELD PACKAGED MEATS CORP. AND COMBINED AFFILIATES,
Appellant.

v.

COMMISSIONER OF REVENUE,
Appellee.

DECISION

The decision is for the appellant. On the basis of the parties' Joint Submission in Accordance with Appellate Tax Board Rule 33, dated October 30, 2024, an abatement is granted for the tax year ending December 31, 2017 in the amount of \$239,719, plus statutory interest.

APPELLATE TAX BOARD

/s/ Mark J. DeFrancisco Chairman

/s/ Patricia M. Good Commissioner

/s/ Steven G. Elliott Commissioner

/s/ Patricia Ann Metzger Commissioner

/s/ Nicholas D. Bernier Commissioner

Attest: /s/ William J. Doherty
William J. Doherty, Clerk

Date: November 7, 2024

NOTICE: Pursuant to G.L. c. 58A, § 13 and 831 CMR 1.34, either party may request findings of fact and report within ten days of this Decision and may also appeal this Decision in accordance with the Massachusetts Rules of Appellate Procedure and 831 CMR 1.35.

COMMONWEALTH OF MASSACHUSETTS
APPELLATE TAX BOARD

**SMITHFIELD PACKAGED
MEATS CORP. AND
COMBINED AFFILIATES**

v. COMMISSIONER OF REVENUE

Docket No. C344811

Promulgated:
July 22, 2026

This is an appeal filed by Smithfield Packaged Meats Corp. and Combined Affiliates (“Combined Group” or “appellant”) under the formal procedure pursuant to G.L. c. 62C, § 39(c) from the refusal of the Commissioner of Revenue (“Commissioner” or “appellee”) to abate corporate excise, penalties, and interest assessed against the appellant for the tax years ended January 3, 2016 (“tax year 2015”), January 1, 2017 (“tax year 2016”), and December 31, 2017 (“tax year 2017”) (collectively, “tax years at issue”).

The parties submitted the appeal to the Appellate Tax Board (“Board”) for decision without a hearing based on a Statement of Agreed Facts with Exhibits and Briefs in accordance with 831 CMR 1.31.¹ Subsequently on its own motion, the Board held a hearing relating to procedural aspects of the contested assessment. Copies of three Consents Extending the Time for Assessment of Taxes on Forms A-37 signed by the parties (“Consents”), as well as Supplemental Briefs, were entered into the evidentiary record of the appeal. There were two witnesses at the hearing: Kenneth Wright, State Tax Senior Director of Smithfield Foods, Inc., Director of State Tax when the subject audit

¹ This citation is to the regulation in effect prior to January 5, 2024.

began, and Michael Johnson, former Bureau Chief of the Department of Revenue's Multistate Audit Bureau.

Chairman DeFrancisco and Commissioners Good, Elliott, Metzger, and Bernier joined in a decision in part for the appellant and in part for the appellee, which is described in detail below.

These findings of fact and report are made at the requests of the appellant and the appellee pursuant to G.L. c. 58A, § 13 and 831 CMR 1.34.²

Michael A. Jacobs, Esq. and Brent K. Biessel, Esq. for the appellant.

Celine E. de la Foscade-Condon, Esq. and Jodi Meade, Esq. for the appellee.

FINDINGS OF FACT AND REPORT

The substantive issues presented in this appeal are the propriety of: (i) classification by the Commissioner of certain members of the Combined Group as manufacturing corporations within the meaning of G.L. c. 63, § 38(I)(1) (each a “§ 38 manufacturer”) during the tax years at issue; (ii) for the tax year 2017, reallocation by the Commissioner to the taxable members of the Combined Group of receipts from Massachusetts sales made by a member of the Combined Group that was not taxable in Massachusetts in light of P.L. 86-272;³ and (iii) assessment of an underpayment penalty pursuant to G.L. c. 62C, § 35A (“§ 35A”) for each of the tax years at issue.

² This citation is to the regulation in effect on and after January 5, 2024.

³ 15 U.S.C. § 381-384.

On the basis of the evidence of record, the Board made the following findings of fact and rulings of law.

I. Structural Overview of the Appellant

For each of the tax years at issue, the appellant filed Form 355U, Excise for Taxpayers Subject to Combined Reporting (“Form 355U”).⁴ The principal reporting corporation of the Combined Group was John Morrell and Co., later known as Smithfield Packaged Meats Corp. (“Morrell”). Smithfield Foods, Inc. was the parent company of the members of the Combined Group and of multiple vertically integrated subsidiaries which, during the tax years at issue, had three principal domestic business lines: hog production, fresh pork products, and packaged meats.

Morrell produced a variety of value-added products, such as hot dogs and deli meats. Through a disregarded, single-member limited liability company, it also produced hogs at company-owned farms, none of which was located in Massachusetts. The packaged meat segment operated plants across the United States, including one in Springfield, Massachusetts. The parties agreed that Morrell was a § 38 manufacturer.

II. Jurisdiction

A. Notices and Appeals

By Notice of Selection for Audit dated April 22, 2019, issued to “Smithfield Packaged Meats Corp.,” the Commissioner notified the appellant that its Massachusetts corporate combined excise returns for the periods commencing January 1, 2015, and ending December 31, 2017, had been selected for verification and audit. By Notice of Intent to Assess dated June 25, 2020, the Commissioner indicated his intent to assess

⁴ The appellant referenced a calendar year rather than the dates of the tax years at issue as defined above in its Forms 355U, including the tax year 2015.

tax of \$402,170 for these periods, together with penalties and interest. Tax, penalties, and interest were subsequently assessed by Notice of Assessment dated August 10, 2020, indicating a total amount due of \$563,624.91, comprised of the following: for the “Period End Date” December 31, 2015 – tax of \$103,260, penalty of \$20,652, and interest of \$29,362.02 (a total of \$153,274.02); for the “Period End Date” December 31, 2016 – tax of \$71,984, penalty of \$14,397, and interest of \$16,011.54 (a total of \$102,392.54); and for the “Period End Date” December 31, 2017 – tax of \$226,926, penalty of \$45,385, and interest of \$35,647.35 (a total of \$307,958.35).

The appellant filed a Massachusetts Form ABT, Application for Abatement (“Form ABT”), on August 12, 2020, contesting the tax, penalties, and interest indicated in the Notice of Assessment for the periods ending on December 31, 2015, 2016, and 2017. Following a telephonic hearing on December 10, 2020, the Commissioner’s Office of Appeals granted a partial abatement by Letter of Determination dated February 9, 2022. By Notice of Abatement Determination dated February 10, 2022, the assessed tax and penalties for the periods commencing January 1, 2015, and ending December 31, 2017, were reduced by \$116,717, resulting in a total amount due of \$503,312.67, comprised of the following (including interest calculated as of October 17, 2023): for the tax year 2015 – tax of \$79,172, penalty of \$15,834, and interest of \$44,252.17 (a total of \$139,258.17); for the tax year 2016 – tax of \$13,481, penalty of \$2,696, and interest of \$6,545.85 (a total of \$22,722.85); and for the tax year 2017 – tax of \$212,253, penalty of \$42,451, and interest of \$86,627.65 (a total of \$341,331.65).

The appellant timely filed a Petition Under Formal Procedure with the Board on March 11, 2022, appealing the refusal of the Commissioner to grant an abatement of

corporate excise “for the tax years ending December 31, 2015 through December 31, 2017.”

B. Timeliness and Validity of the Contested Assessments

Upon review of the jurisdictional documents of record, the Board noted a disparity between the Statement of Agreed Facts and the Commissioner’s assessments with respect to the tax years at issue. More specifically, for the tax years 2015 through 2017, the Combined Group reported on a 52-53-week fiscal year basis for both federal income tax and Massachusetts corporate excise purposes. See G.L. c. 63, § 30(6). The Statement of Agreed Facts states that (i) the tax year 2015 ended on January 3, 2016; (ii) the tax year 2016 ended on January 1, 2017; and (iii) the tax year 2017 ended on December 31, 2017. The Smithfield Foods, Inc. Form 10-K for the twelve months ended January 3, 2016, filed with the federal Securities and Exchange Commission, indicates that the tax year 2015 began on December 29, 2014.

Entries in the Commissioner’s GeniSys system reflect the Commissioner’s treatment of the appellant from the outset as a calendar year taxpayer. Consistent with this treatment, the Commissioner’s Notice of Intent to Assess and Notice of Assessment, as well as the appellant’s Form ABT and Petition Under Formal Procedure, indicate deficiency assessments for calendar year tax periods. Also, the Commissioner prepared, and the appellant signed, three Consents on Form A-37 extending the time for assessment “for the taxable period(s) 1/1/2015–12/31/2017.” The first Consent - signed by the appellant on April 30, 2019, and by the appellee on June 12, 2019 – extended the time for assessment to on or before March 31, 2020. The second Consent - signed by the appellant on December 19, 2019, and by the appellee on December 20, 2019 – extended

the time for assessment to on or before June 30, 2020. The final Consent - signed by the appellant on March 6, 2020, and by the appellee on March 19, 2020 – extended the time for assessment to on or before September 30, 2020. See G.L. c. 62C, § 27.

The Consents did not become operative with respect to the tax years 2016 and 2017 because deficiencies for those years were assessed on August 10, 2020, in each case before the respective assessment due dates for those years. However, the Consents were required to extend the assessment due date of October 13, 2019, for the tax year 2015, as the assessment was made on August 10, 2020. See G.L. c. 62C, §26 and § 27.

Seeking clarification, the Board held a hearing to review the disparities and determine their potential impact on the validity of the contested assessments. During the hearing, the Commissioner contended that the contested assessments were timely and otherwise valid. The appellant did not contest the validity of the assessments for the tax years 2016 and 2017. The appellant, however, maintained that for the tax year 2015, the assessment was made beyond the statute of limitations and hence was invalid, emphasizing that the Consents extending the statute of limitations referenced a period beginning on January 1, 2015, and ending on December 31, 2017, and thus did not include the entirety of the tax year 2015, which began on December 29, 2014.

During the hearing at the Board, the State Tax Senior Director of Smithfield Foods, Inc. credibly testified that, as a matter of practice, December 31 dates were often used by 52-53-week fiscal year filers, and that the appellant was not misled during the course of the audit as to the tax periods at issue. He further testified that (i) he understood from the Notice of Selection for Audit that the Department of Revenue was going to audit for the

year ending January 3, 2016, and the other two fiscal years, and (ii) he understood that the Notice of Intent to Assess, the Notice of Assessment, and the Consents referenced the 52-53-week fiscal years. Also, the former Bureau Chief of the Department of Revenue's Multistate Audit Bureau credibly testified that the Commissioner had determined that the statute (G.L. c. 63, § 30(12)) authorized calendar-year references for the actual tax years at issue and that the Department of Revenue's Audit Workbench system in place at the time could not accommodate 52-53-week tax years.

For the reasons set forth in the Opinion below, the Board found and ruled that the contested assessments for the tax years at issue were valid.

III. Commissioner's Application of the "Combination Provision"

Pursuant to G.L. c. 63, § 32B ("§ 32B"), corporations engaged in a unitary business must file a combined report, and each member of the unitary group must calculate its taxable net income derived from the unitary business determined under regulations adopted by the Commissioner, addressing the computation of the member's share, attributable to the Commonwealth, of the apportionable income or loss of the combined group. In computing the apportionable income or loss of the combined group and of each member of the group, items of income, deductions, and receipts from transactions between or among members of the combined group must be eliminated, subject to regulations as may be adopted by the Commissioner. *Id.* A tax on each member's apportioned share of the taxable net income of the unitary group is separately computed and reported on the combined report. *Id.*

The statute directs the Commissioner to adopt regulations that implement combined reporting and coordinate it with the other provisions of Chapter 63 dealing with

the taxation of corporations. *Id.* The regulations must include rules that address, in relevant part, the elimination of intercompany transactions, including the elimination or deferral of income, expenses, apportionment factors, or other tax items associated with those transactions. *Id.*

Pursuant to this statutory authority, the Commissioner promulgated what the parties refer to as the “Combination Provision” at 830 CMR 63.32B.2(7)(g)2.a, which addresses how a member of a unitary group is required to determine its own apportionment formula when, although itself not a manufacturer, it sells to a third party outside the unitary group a product that it buys from another member of the group that itself engages in manufacturing. The Combination Provision provides, in relevant part, that if a combined group member making a sale to a purchaser that is not a member of the group previously acquired the sold property from another combined group member, the activities of both the member producing the property and the member making the sale to the nonmember must be considered jointly for purposes of determining the appropriate apportionment formula of the member making the sale. *Id.*

For the tax year 2015, the Combined Group included, as a member taxable in Massachusetts (“taxable member”), Smithfield Farmland Sales Corp., later known as Smithfield Fresh Meats Sales Corp. (“Fresh Meats Sales”), a subsidiary of Smithfield Farmland Corp. (“Farmland”) and also an affiliate of Morrell. Farmland, which was a member of the Combined Group not taxable in Massachusetts (“non-taxable member”) for all of the tax years at issue, processed a wide variety of fresh, unprocessed pork cuts. Fresh Meats Sales sold products produced by affiliated members of the Combined Group. Farmland sold its pork cuts to Fresh Meats Sales.

On audit, the Commissioner applied the Combination Provision, aggregating the activities of Fresh Meats Sales with those of Farmland and reclassifying Fresh Meats Sales as a § 38 manufacturer, having found Fresh Meats Sales to be engaged in substantial manufacturing activities after: (i) combining the property, payroll, and sales receipts of both entities; (ii) eliminating any intercompany transactions between them; and (iii) treating the receipts derived by Fresh Meats Sales from property manufactured by Farmland as manufacturing receipts.

For the tax year 2016, the Combined Group included one other taxable member – Smithfield Packaged Meats Sales Corp., a subsidiary of Morrell (“Packaged Meats Sales”). Packaged Meats Sales sold products produced by affiliated members of the Combined Group. Morrell sold its value-added products to Packaged Meats Sales. On audit, the Commissioner reclassified Packaged Meats Sales as a § 38 manufacturer, applying the Combination Provision to aggregate the activities of Morrell and Packaged Meats Sales. The Commissioner again reclassified Fresh Meats Sales as a § 38 manufacturer for the tax year 2016 applying the Combination Provision.

For the tax year 2017, the taxable members of the Combined Group included only Morrell and Packaged Meats Sales. On audit, the Commissioner again reclassified Packaged Meats Sales as a § 38 manufacturer, for the same reasons as for the tax year 2016.

The Board found and ruled that the Commissioner’s application of the Combination Provision was proper and: (i) for the tax year 2015, Fresh Meats Sales was properly classified as a § 38 manufacturer; (ii) for the tax year 2016, Packaged Meats Sales and

Fresh Meats Sales were properly classified as § 38 manufacturers; and (iii) for the tax year 2017, Packaged Meats Sales was properly classified as a § 38 manufacturer.

IV. The “Reallocation Rule”

For the tax year 2017, Fresh Meats Sales ceased to be a taxable member of the Combined Group due to the application of P.L. 86-272 because: (i) it had no employees permanently based in, and no real or personal property located in, Massachusetts; and (ii) its employees were engaged exclusively in the solicitation of orders for pork products, which were accepted or rejected at locations outside of the Commonwealth and, if approved, were filled by shipments or delivery from points outside of Massachusetts.

However, because Fresh Meats Sales derived receipts from sales to purchasers in Massachusetts, the appellant initially filed its Form 355U for the tax year 2017 reflecting the application of the so-called “Finnigan” adjustment, which is described in 830 CMR 63.32B.2(7)(b)(the “Reallocation Rule”).

Under the Reallocation Rule, Massachusetts may assign sales to Massachusetts (the state of destination) for apportionment purposes where at least one member of a unitary group is taxable in Massachusetts, but where the actual seller is not. *Id.* Applying the Reallocation Rule, the appellant initially assigned to taxable members of the Combined Group, Massachusetts sales receipts derived by Fresh Meats Sales totaling \$85,708,777, an amount equal to approximately 47 percent of the Massachusetts sales reported by the appellant for apportionment purposes on its composite Schedule U-MSI, Member’s Apportioned Share of Group Income. Of this amount, the appellant apportioned \$78,932,063 to Packaged Meats Sales and the balance to Morrell. The apportioned total derived from sales made by Fresh Meats Sales during 2017 that would otherwise have

been includible in the numerator of the sales factor of Fresh Meats Sales had it been a taxable member of the Combined Group for the year. As a result, the numerator of the Massachusetts sales factor applied to the combined group taxable income by each taxable member of the Combined Group increased; the denominator remained unchanged, as did the combined group taxable income to which the apportionment factors were applied.

Although the appellant applied the Reallocation Rule in its original 2017 Form 355U, on audit the appellant argued that the “Finnigan” adjustment resulted in distorted apportionment for the tax year 2017 and improperly frustrated the objectives of P.L. 86-272 in violation of the Supremacy Clause of the U.S. Constitution.

The appellant continued to dispute application of the Reallocation Rule on appeal to the Board emphasizing that, given Morrell’s classification as a § 38 manufacturer and viewing Packaged Meats Sales and Fresh Meats Sales as § 38 manufacturers for the tax year 2017, the increase in the Combined Group’s Massachusetts excise caused by an application of the Reallocation Rule equaled the tax that Fresh Meats Sales would have incurred had it been a taxable member of the Combined Group and treated as a § 38 manufacturer. In fact, the Statement of Agreed Facts indicates that if Fresh Meats Sales had been treated as a taxable member of the Combined Group for the tax year 2017, and if all taxable members were determined to be § 38 manufacturers, (A) Fresh Meats Sales’ Massachusetts sales factor would have been 0.006296, (B) Morrell’s Massachusetts sales factor would have been 0.000556, and (C) Packaged Meats Sales’ Massachusetts sales factor would have been 0.006475; and their respective apportionment percentages, based only on sales, would have been the same. On audit, the Commissioner computed

Massachusetts sales factors of 0.001054 and 0.012273 for Morrell and Packaged Meats Sales, respectively – a total of 0.013327, the sum of the three individual Massachusetts sales factors agreed upon by the parties.⁵

For the reasons set forth in the Opinion below, the Board found and ruled that inclusion of a pro-rata portion of the Massachusetts sales of Fresh Meats Sales in the numerator of the sales apportionment factors of each of the taxable members of the Combined Group violated the Supremacy Clause of the U.S. Constitution, and was therefore improper.

V. Underpayment Penalties

A. Background

Pursuant to § 35A, the Commissioner assessed an underpayment penalty (“§ 35A penalty”) for each of the tax years at issue. The appellant incorporated the “Finnigan” adjustment when computing the Combined Group’s tax liability on its Form 355U for the tax year 2017. However, the appellant – though aware of the Combination Provision – did not apply it for any of the tax years at issue, as a result of which the Commissioner determined that the appellant’s reported tax liability was understated.

The Summary of Tax Due provided to the appellant at the completion of the audit included § 35A penalties, based on underpayments of 22.73 percent for the tax year 2015, 28.75 percent for the tax year 2016, and 42.40 percent for the tax year 2017. Following the administrative appeal referenced above, investment tax credits were allowed for each year, reducing the deficiencies by \$24,088, \$58,503, and \$14,673,

⁵ If Fresh Meats Sales were not treated as a § 38 manufacturer, the Statement of Agreed Facts indicates that its apportionment percentage would have been lower (0.003148), causing the impact of the “Finnigan” adjustment to be an increase in the tax liability of the Combined Group.

respectively. As a result, the underpayments determined by the Commissioner ultimately fell to 18.41 percent for the tax year 2015, 7.03 percent for the tax year 2016, and 40.78 percent for the tax year 2017.

The appellant disputed the assessment of § 35A penalties, asserting variously that there was no underpayment of tax for any of the tax years at issue, and that the appellant acted in good faith, was not negligent, and did not disregard the tax laws of the Commonwealth because its position was supported by substantial authority. Though aware it acted in contravention of the Combination Provision, the appellant did not attach a disclosure statement to its Forms 355U or otherwise disclose the position it had taken.

B. Application of § 35A to the Tax Years at issue

Consistent with the findings of the Board regarding the Combination Provision, the tax year 2015 involved a substantial understatement of tax liability. At the conclusion of the audit proceedings, the underpayment was 18.41 percent – more than 10 percent of the tax determined by the Commissioner to be due.

The tax year 2016 involved an underpayment of tax liability, but it was not a substantial understatement within the meaning of § 35A. Following the administrative appeal, the understatement for the tax year 2016 was reduced to 7.03 percent – less than 10 percent of the tax determined by the Commissioner to be due.

For the reasons discussed in the Opinion below, the Board found and ruled that the Commissioner properly imposed § 35A penalties for the tax years 2015 and 2016.

While the Commissioner assessed a § 35A penalty for the tax year 2017, as discussed below, the Board found and ruled that there was no underpayment for the tax year 2017.

VI. The Board's Decision

Based on the foregoing, and for the reasons more fully set forth in the Opinion below, the Board found and ruled that: (i) for the tax year 2015, Fresh Meats Sales was properly classified as a § 38 manufacturer; for the tax year 2016, Packaged Meats Sales and Fresh Meats Sales were properly classified as § 38 manufacturers; and for the tax year 2017, Packaged Meats Sales was properly classified as a § 38 manufacturer; (ii) none of the sales made by Fresh Meats Sales for the tax year 2017 were properly reallocated to Morrell and Packaged Meats Sales for purposes of determining the total Massachusetts sales includible in the numerator of their respective sales apportionment factors; and (iii) § 35A penalties were properly assessed for the tax years 2015 and 2016, but not for the tax year 2017.

Accordingly, decisions were rendered for the appellee with respect to the corporate excise and the § 35A penalties assessed against the appellant for each of the tax years 2015 and 2016.

Regarding the tax year 2017, the Board, pursuant to Rule 33 of its Rules of Practice and Procedure (831 CMR 1.33) ("Rule 33"), ordered the parties to determine the amount to be abated based upon the tax liability of the appellant for the tax year 2017 determined without the application of the "Finnigan" adjustment, but with the inclusion of Packaged Meats Sales as a § 38 manufacturer.

On the basis of the calculation submitted by the parties pursuant to the Rule 33 Order, the Board (i) granted an abatement in the amount of \$239,719 for the tax year 2017, and (ii) found and ruled that a § 35A penalty was not properly assessed for that year because there was no underpayment.

OPINION

I. Timeliness and Validity of the Contested Assessments

Though the Board found and ruled, and the parties agreed, that the assessments for the tax years 2016 and 2017 were valid, a disagreement remained with respect to the assessment for the tax year 2015. This disagreement focused on the timeliness of the assessment, which was undermined, in the appellant's view, by Consents that were rendered invalid because they did not include the entirety of the tax year 2015.

The appellant maintained that, for the tax year 2015, the assessment was made beyond the statute of limitations, noting strict judicial adherence to statutory time periods. *See, e.g., Nissan Motor Corp. v. Commissioner of Revenue*, 407 Mass. 153 (1990). Without regard to whether the Notice of Intent to Assess and the Notice of Assessment were in valid form, the appellant argued that the Consents were incorrect in their description of the tax year 2015, unambiguous on their face, and therefore could not operate to extend the statutory deadline for assessing additional tax for the tax year 2015.

The Board, however, viewed the understanding of the parties to be dispositive. *See, e.g., Robert & Ardis James Foundation v. Meyers*, 474 Mass. 181, 188 (2015). Both parties knew from the outset the tax periods to which the audit and assessment applied. Yes, the 2015 tax year at issue diverged slightly from the calendar year identified by the Commissioner, but this divergence did not alter the parties' full understanding of the tax periods that were the subject of examination, extension for assessment by virtue of the Consents, and the assessment itself.

The appellant's own State Tax Senior Director credibly testified that the appellant was not misled during the course of the audit as to the tax periods at issue. He also

testified that (i) he understood from the Notice of Selection for Audit that the Department of Revenue was going to audit for the year ending January 3, 2016, and the other two fiscal years, and (ii) he understood that the Notice of Intent to Assess, the Notice of Assessment, and the Consents referenced the 52-53-week fiscal years. Also, the former Bureau Chief of the Department of Revenue's Multistate Audit Bureau testified that while the Department of Revenue's Audit Workbench system in place at the time could not accommodate 52-53-week tax years, the Commissioner had determined that statutory authority (G.L. c. 63, § 30(12)) authorized the Department of Revenue's use of calendar-year references for the actual tax years at issue.

Notably, the appellant identified calendar years in its Forms 355U, its Form ABT, and its petition to the Board, indicating that it viewed technical precision of the manner in which the tax years at issue were identified to be of little or no consequence. What mattered most was that the parties both understood and agreed to the periods to which the audit, its attendant notices, and the Consents applied – and that understanding was made plain by the evidence of record.

Neither party was misled or prejudiced by the Commissioner's drafting convention in the Consents, which the appellant executed without objection. Thus, the Board found no basis on which to conclude that the assessment for the tax year 2015 was invalid because it was made beyond the statute of limitations. The three fully and timely executed Consents extending the statute of limitations accomplished their intended purpose, as did the Notice of Intent to Assess and the Notice of Assessment that placed the taxpayer on notice of the tax deficiency assessment for each of the tax years at issue.

Accordingly, the Board found and ruled that the contested assessment with respect to each of the tax years was valid.

II. The Combination Provision

As previously noted, under G.L. c. 63, § 32B, corporations engaged in a unitary business are required to file a combined report in Massachusetts, indicating the taxable net income of the group derived from the group's business attributable to the Commonwealth and each corporation's share of the apportionable income or loss of the group. G.L. c. 63, § 32B(a). The term "unitary business" is defined to mean:

the activities of a group of 2 or more corporations under common ownership that are sufficiently interdependent, integrated or interrelated through their activities so as to provide mutual benefit and produce a significant sharing or exchange of value among them or a significant flow of value between the separate parts.

G.L. c. 63, § 32B(b)(1).

Although part of a unitary group, each taxable member determines its apportionment percentage based on its own statutorily prescribed apportionment formula. G.L. c. 63, § 32B(d)(2)(i). In general terms, each taxable member of a unitary group must: (i) compute the numerator of its apportionment factors pursuant to the statutory apportionment provisions applicable to that member; and (ii) calculate its apportionment factor denominators by determining and aggregating the apportionment factor denominators of every member of the group, regardless of whether any particular member is taxable in the commonwealth. G.L. c. 63, § 32B(d)(2)(ii), (iii). A tax on each member's apportioned share of the taxable net income of the unitary group is separately computed and reported on the combined report. G.L. c. 63, § 32B(d)(3), (4).

Each member of a unitary group determined to be a § 38 manufacturer, as in the present appeal, is required to use a single sales factor apportionment formula, representing its share of the sales receipts of the unitary group assigned to Massachusetts.⁶ The statute defines a § 38 manufacturer as a corporation:

engaged, in substantial part, in transforming raw or finished physical materials by hand or machinery, and through human skill and knowledge, into a new product possessing a new name, nature and adapted to a new use[.]

and states that “[a]ny operation manufacturing, in substantial part, value-added agricultural products shall be considered a manufacturing corporation.” G.L. c. 63, § 38(l)(1) (“§ 38(l)(1)”). The corporation’s manufacturing activities must satisfy any one of the following five substantiality tests:

(i) 25 percent or more of its gross receipts must derive from the sale of manufactured goods that it manufactures;

(ii) 25 percent or more of its payroll must be paid to employees working in its manufacturing operations and 15 percent or more of its gross receipts must be derived from the sale of manufactured goods that it manufactures;

(iii) 25 percent or more of its tangible property must be used in its manufacturing operations and 15 percent or more of its gross receipts must be derived from the sale of manufactured goods that it manufactures;

(iv) 25 percent or more of its tangible property must be used in its manufacturing operations; or

(v) the corporation’s manufacturing activities must be deemed substantial under relevant regulations promulgated by the commissioner.

Id.

⁶ Effective January 1, 2025, G.L. c. 63, § 38 was rewritten to require that all corporations subject to the corporate excise determine their taxable net income apportionable to Massachusetts by applying only a single sales factor apportionment formula. See 2023 Mass. Acts 50, §§ 31, 47. Hence, application of the Combination Provision during the tax years at issue, which resulted in the contested assessments, would be of no consequence under current law.

A group member that did not qualify as a § 38 manufacturer was required to determine its apportionable percentage of the unitary group's taxable net income by applying a three factor apportionment fraction based on the portion of the group member's real and tangible property owned or rented and used in Massachusetts ("the property factor"), its compensation paid for employee services deemed to be performed in Massachusetts ("the payroll factor"), and its sales receipts assigned to Massachusetts ("the sales factor"). G.L. c. 63, § 38(d)-(f). The numerator of a group member's three-factor apportionment fraction was the property factor plus the payroll factor plus twice the sales factor, and the denominator was four. G.L. c. 63, § 38(c).

In determining the net income of a unitary group subject to taxation in any year, the statute mandates elimination of intercompany transactions occurring during the year, and the deferral of any income attendant thereto, subject to regulations that may be promulgated by the Commissioner. Chapter 63, § 32B(f) ("§ 32B(f)") directs the Commissioner to:

adopt regulations to implement [§ 32B] and to coordinate the application of [§ 32B] with the other provisions of [Chapter 63]. The regulations shall include rules to address without limitation . . . (i) the elimination of intercompany transactions, including but not limited to the payments of dividends, between or among combined group members, and the elimination or deferral of income, expenses, apportionment factors or other tax items associated with those transactions and including any exceptions to such eliminations or deferrals under rules analogous to those under section 1502 of the [U.S. Internal Revenue] Code

Pursuant to this authority, the Commissioner promulgated a regulation addressing the treatment of receipts from intercompany transactions between or among unitary group members. The regulation provides that income from an intercompany transaction between members of the same combined group that relates to the unitary business of the

group must be deferred, and when the object of the transaction is disposed of by the buying member to an unrelated third party, the deferred income must be restored to the income of the seller and apportioned as income earned immediately before the event. 830 CMR 63.32B.2(6)(c)5. See also 830 CMR 63.31N.1(c)1., 2. When the object of the transaction leaves the combined group, the buying member realizes apportionable income as well. See 830 CMR 63.32B.2(7)(g)1., 2.

Recognizing the “distortion of applicable apportionment formulas in the case of intra-group sales” (830 CMR 63.32B.2(7)(g)2.), the Commissioner promulgated the Combination Provision, addressing the computation of the apportionment formula to be applied by a member of a unitary group that sells a product to a third party that it previously bought, in an intra-company transaction, from a member of the group that produced the product. The regulation provides that when a combined group member sells, to an unrelated third party, a product that it previously purchased from another member of the combined group that produced the product, the activities of both the member producing the product and the member making the sale to the nonmember must be considered jointly for purposes of determining the appropriate apportionment formula of the member making the sale. 830 CMR 63.32B.2(7)(g)2.a. The following example illustrates the basic rule:

[W]here a combined group member (A) manufactures property and sells all of the manufactured property, directly or indirectly, to member (B), which, in turn, resells the property to a purchaser that is not a member of the combined group, both the activities of A and the activities of B must be considered jointly to determine whether B must use the single sales factor apportionment formula applicable to manufacturers or the three-factor apportionment formula applicable to non-manufacturers. In this example, both A and B are considered to be engaged in manufacturing and the joint property, payroll, and receipts of A and B will be considered to determine whether the manufacturing activity attributed to B is substantial. For

purposes of this determination, B's receipts from the sales of property manufactured by A are considered to be manufacturing receipts. If the activities of A and B considered jointly involve substantial manufacturing, as provided under M.G.L. c. 63, § 38, then B must use a single sales factor apportionment formula.

830 CMR 63.32B.2(7)(g)2.a. Another example deals with a manufacturer without nexus in Massachusetts, that sells to another group member with nexus in Massachusetts. The example concludes that, here too, the member that resells the manufactured product to a purchaser who is not a member of the combined group must use a single sales factor apportionment formula determined based upon the facts in the second example. 830 CMR 63.32B.2(7)(g)2.b., *Example 3*.

In the present appeal, the appellant disputed the validity of the Combination Provision that the Commissioner applied to aggregate the activities of Fresh Meats Sales with those of Farmland for the tax years 2015 and 2016, and to aggregate the activities of Packaged Meats Sales with those of Morrell for the tax years 2016 and 2017, allowing the Commissioner to characterize both Fresh Meats Sales and Packaged Meats Sales as § 38 manufacturers required to use single sales factor apportionment to determine their respective shares of the Combined Group's income for those years.

The parties agreed that the members of the Combined Group that produced value-added products or pork cuts were engaged in manufacturing, but the appellant maintained that the selling members of the Combined Group – Fresh Meats Sales and Packaged Meats Sales – that were not engaged in any manufacturing activities could not be deemed to be so engaged by application of the Combination Provision.

The Board was mindful of Massachusetts case law that addresses the deference given to regulations promulgated by the Commissioner pursuant to a valid regulatory

grant of authority. The Supreme Judicial Court has stated that a court “must apply all rational presumptions in favor of the validity of . . . administrative action and not declare it void unless its provisions cannot by any reasonable construction be interpreted in harmony with the legislative mandate.” **Purity Supreme, Inc. v. Attorney General**, 380 Mass. 762, 776 (1980); see also **White Dove, Inc. v. Director of Div. of Marine Fisheries**, 380 Mass. 471, 477 (1980) (“no more need be discerned than some rational relation between the regulation and the empowering statute”); **Zoning Board of Appeals of Wellesley v. Housing Appeals Committee**, 385 Mass. 651, 654 (1982). Later cases are to the same effect where a statute expressly grants broad regulatory authority, including **Cliff House Nursing Home, Inc. v. Rate Setting Commission**, 16 Mass. App. Ct. 300, 303 (1983) (finding a regulation promulgated by an agency with specific and general authority to make regulations to be valid if it has a reasonable relation to the goal advanced by the statute), and **Massachusetts Federation of Teachers, AFT, AFL-CIO v. Board of Education**, 436 Mass. 763, 774 (2002) (giving deference where the Legislature had delegated to an administrative agency broad authority to implement a statutory provision, particularly where the focus of the statutory enactment was reform).

However, the Commissioner may not rely on a limited grant of regulatory authority to adopt substantive provisions of law not contemplated by the statute. See **Polaroid Corp. v. Commissioner of Revenue**, 393 Mass. 490 (1984), which addresses the Commissioner’s attempt to require a unitary business approach to determining a corporation’s taxable net income apportioned to Massachusetts absent express statutory authority for the approach. Notably, the statutory provision relevant to the matter before the Board differs in one pivotal respect from the statutory language that the Supreme

Judicial Court found to be deficient in the **Polaroid** case. Lacking there was language analogous to that found in § 32B(f), which gives the Commissioner the express authority to promulgate regulations: (i) implementing § 32B and coordinating the application of § 32B with the other provisions of Chapter 63; and (ii) addressing the elimination of intercompany transactions, including the elimination or deferral of income or apportionment factors associated with such transactions.

In this appeal, the Commissioner maintained that as a policy matter, “[i]ntercompany transactions between Massachusetts group members are disregarded and therefore the activities of a Massachusetts sales company selling the products manufactured by a related entity logically should be jointly considered for purposes of determining the appropriate apportionment formula of the member making the sale.” Absent the Combination Provision, the Massachusetts corporate excise could be artificially reduced and would be open to manipulation.

The Commissioner found support for the Combination Provision in authorities that have recognized the validity of the unitary method of reporting. He cited the decision of the U.S. Supreme Court in **Mobil Oil Corp. v. Commissioner of Taxes**, 445 U.S. 425, 441 (1980), where the Court indicated that unitary businesses should be taxed on the basis of economic activity, not the form of investment. The Commissioner also cited the decision of the New York Court of Appeals in **Matter of Disney Enterprises, Inc. v. Tax Appeals Tribunal of the State of New York**, 10 N.Y. 3d 392, 408 (Ct. App. 2008), noting the Court’s view that to exclude in the apportionment formula the receipts of entities whose in-state income might be the result of synergistic relationships with their sister

companies would permit corporate groups to avoid taxes by moving income to such entities from other members of the group.

The issue before the Board differs in certain respects from those addressed by these court decisions. The question at hand relates to whether a state can combine the activities of separate entities, thus requiring a member of a unitary group to use a single sales factor apportionment formula that on a stand-alone basis would not have applied – when under the state’s approach to combined reporting each group member is required to apply its own apportionment formula and tax rate.

While it is true that as a general matter each member of a combined group must separately determine its tax liability by applying its own apportionment factor or factors and rate to its share of the taxable net income of the group – *i.e.*, each group member must determine its tax liability on a stand-alone basis, this overlooks the fact that the Commissioner was given explicit authority to promulgate regulations that address the elimination of intercompany transactions. G.L. c. 63, § 32B(f). This authority is not limited just to the elimination and deferral of income when, for example, a manufacturer sells its manufactured products to a unitary group member (a sales company) that later sells them to unrelated parties. The authority extends to the elimination or deferral of apportionment factors associated with intercompany transactions. *Id.* This is a broad grant of regulatory authority that gives the Commissioner the discretion to address the appropriate apportionment methodology after an intercompany transaction between unitary group members (one a manufacturer and the other a sales entity) has been eliminated.

The Board found and ruled that the Commissioner’s promulgation of the Combination Provision was within not only the express authority granted under G.L. c.

63, § 32B, but also within the more general authority given to the Commissioner pursuant to G.L. c. 62C, § 3 to prescribe regulations “to carry into effect the provisions of [Chapter 63, which] when reasonably designed to carry out the intent and purposes of said provisions, shall be prima facie evidence of their proper interpretation.” See *also* G.L. c. 14, § 6(1).

It is due to the operation of the statutory provision directing the elimination of intercompany transactions that receipts from a manufacturer’s sale of its manufactured products to another unitary group member are required to be excluded in determining the numerator and the denominator of the manufacturer’s own apportionment percentage to be applied to the unitary group’s combined group taxable income in the year of sale. But, it is not unreasonable to ascribe to the purchasing entity the apportionment attributes of the manufacturer for purposes of determining the purchasing entity’s share of the unitary group’s combined income for a year in which the purchasing entity sells to unrelated parties the manufactured products it bought from the manufacturer, treating the receipts from those sales as sales attributable to manufacturing activities as they would have been had the manufacturer made the sales directly to unrelated parties.

The statute gives the Commissioner the power to do so – through the exercise of broad regulatory authority. G.L. c. 63, § 32B(f). This is nothing like the Commissioner’s efforts by regulation to require combined reporting without express statutory authority to do so – the situation addressed in the ***Polaroid*** case.

The appellant also argued that the Combination Provision contravened the statutory provision directing that manufacturing corporation status be determined on a single-corporation basis. The regulation, however, simply coordinates the combined

reporting provisions of § 32B with those provisions of § 38(l)(1) defining a § 38 manufacturer. The regulation does not apply the substantiality tests in § 38(l)(1) on a combined basis – each member of a combined group must still separately determine whether its “manufacturing activities” are substantial. Before the substantiality tests are applied at the selling entity level, the regulation simply (i) assigns the manufacturer’s apportionment factors to the selling entity, (ii) deems the selling entity to have engaged in manufacturing, and (iii) treats the selling entity’s receipts from the sale of property manufactured by the manufacturer as manufacturing receipts. This is for a limited purpose – *i.e.*, to determine whether the selling entity should be treated as a § 38 manufacturer.

Based on the foregoing, the Board found and ruled that the Combination Provision appropriately applied the statutory mandate to develop regulations implementing § 32B, coordinating the application of § 32B with other provisions in Chapter 63, and addressing the elimination of intercompany transactions, including but not limited to the elimination or deferral of income or apportionment factors associated with those transactions. Accordingly, the Board ruled that (i) for the tax year 2015, Fresh Meats Sales was properly classified as a § 38 manufacturer; (ii) for the tax year 2016, Packaged Meats Sales and Fresh Meats Sales were properly classified as § 38 manufacturers; and (iii) for the tax year 2017, Packaged Meats Sales was properly classified as a § 38 manufacturer.

III. The “Reallocation Rule”

Each taxable member of a unitary group is required to increase the numerator of its sales apportionment factor by its proportionate share of the aggregate Massachusetts sales of nontaxable members of the group. The statute provides that:

Each taxable member of the group shall include in its sales factor numerator a portion of the aggregate Massachusetts sales of nontaxable members

based on a ratio, the numerator of which is such taxable member's Massachusetts sales taking into account its applicable sales factor provisions and the denominator of which is the aggregate Massachusetts sales of all the taxable members of the group taking into account their respective sales factor provisions. For purposes of determining whether sales are in the commonwealth and included in the numerator of the sales factor, a taxpayer is considered taxable in any state in which any member of its combined group is subject to tax.

G.L. c. 63, § 32B(d)(2)(iv); *see also* G.L. c. 63, § 32B(d)(2)(ii).

The Commissioner's combined reporting regulations provide, in the section titled "Determination of Factor Numerators; Sales Factor 'Finnigan Adjustment,' " that:

The numerator of the apportionment factor or factors that apply to each taxable member of a combined group shall include the property, payroll, and sales/receipts, as applicable, of such member as sourced to Massachusetts Where a combined group includes one or more taxable members and one or more nontaxable members, the sales/receipts factor numerator(s) of the taxable member or members are increased in the following manner:

1. The total amount of sales or receipts sourced to Massachusetts under [the relevant provisions of Chapter 63] is determined for all nontaxable members;

2. Each taxable member determines a fraction, the numerator of which is the sales/receipts factor numerator of such member, determined without [certain adjustments], and the denominator of which is the sum of the sales/receipts factor numerators of all taxable members, as determined without [certain] adjustments . . . [the "Fraction"]; and

3. For each taxable member, the total Massachusetts receipts of the nontaxable members is multiplied by the Fraction, and the resulting product is added to the sales factor numerator, as otherwise determined, of the taxable member.

830 CMR 63.32B.2(7)(b) (the "Reallocation Rule").

The issue before the Board is whether the "Finnigan" adjustment applied under the circumstances of this appeal frustrated the objectives of P.L. 86-272 and hence violated the Supremacy Clause of the U.S. Constitution.

Section 101 of Title I of P.L. 86-272, as amended through P.L. 94-455, states
(emphasis added):

(a) No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after the date of the enactment of this Act, **a net income tax on the income derived within such State by any person from interstate commerce** if the only business activities within such State by or on behalf of such person during such taxable year are . . . [in relevant part]:

(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State

(b) The provisions of subsection (a) shall not apply to the imposition of a net income tax by any State, or political subdivision thereof, with respect to —

(1) any corporation which is incorporated under the laws of such State; or

(2) any individual who, under the laws of such State, is domiciled in, or a resident of, such State.

For purposes of Title I of P.L. 86-272, the term “net income tax” means any tax imposed on, or measured by, net income (P.L. 86-272, § 103), and hence the term includes the portion of the Massachusetts corporate excise determined on the basis of net income.

The Supremacy Clause of the U.S. Constitution (Article VI, Clause 2) provides that
(emphasis added):

This Constitution, and **the Laws of the United States** which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, **shall be the supreme Law of the Land**; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

To determine the separate Massachusetts corporate excise liability of each taxable member of the Combined Group for the tax year 2017, it was first necessary to determine

(i) the combined group taxable income of the Combined Group, including that of both taxable and nontaxable members of the group, and (ii) the group's total Massachusetts sales receipts. As a final step, the two taxable members of the Combined Group – Morrell and Packages Meats Sale (both § 38 manufacturers based upon the findings and rulings of the Board) were required to determine their share of the Combined Group's combined group taxable income using a single sales factor apportionment formula. Applying the "Finnigan" adjustment, the numerator of the sales apportionment fraction of each of these taxable members included not only its own Massachusetts sales receipts but also a proportionate share of the Massachusetts sales receipts of Fresh Meats Sales. Accordingly, treating both Fresh Meats Sales and Packaged Meats Sales as § 38 manufacturers, the "Finnigan" adjustment produced sales apportionment fractions for the two taxable members of the Combined Group equal to the sum of the sales apportionment fractions for each of Morrell, Packaged Meats Sales, and Fresh Meats Sales, had each been a taxable member of the Combined Group.

Put simply, the "Finnigan" adjustment had the effect of taxing in Massachusetts income fully reflective of the Massachusetts sales of Fresh Meats Sales by including in the numerator of the sales apportionment fractions used by taxable members of the Combined Group, the Massachusetts sales of a nontaxable member of the group whose income was protected from taxation by P.L. 86-272. The dispositive question is whether this was proper.

To answer this question, two subsidiary questions must be addressed. First, does P.L. 86-272 prevent a state only from *directly* taxing an out-of-state entity protected from taxation by P.L. 86-272? Second, is the "person" referenced in P.L. 86-272, the subject

of the statute, intended to include an entire unitary group, so that if one member of a unitary group is taxable in Massachusetts due to its nexus within the state, all members of the group will be deemed to have nexus – even a P.L. 86-272 protected entity?

If the answer is “yes” to either of these questions, the Board must rule that the state’s apportionment methodology is permissible under P.L. 86-272. The analysis that follows indicates that the answer to both questions is “no.”

Regarding the second question, support cannot be found in the wording of P.L. 86-272 or its legislative history for the proposition that the term “person” includes the multiple entities that make up a combined group. The statute includes no definition of the term “person,” but it notably contains no language indicating that the term is intended to refer to a group of entities rather than one. Enacted at a time when the unitary business principle had already been recognized,⁷ it speaks in terms of a “person” whose only business activities within a state are the solicitation in the state of orders of the type described therein – a unitary group *per se* does not solicit orders in a state, only an individual member of the group can.

The Senate Report (S. Rep. No. 658, 86th Cong., 1st Sess. 8 (1959)) on S. 2524 – the bill on which P.L. 86-272 was based – states tersely that the meaning of the word “person” was to be found in Title 1, Section 1 of the United States Code. While Title 1, Section 1 states that the word “person” includes “corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals,” there is

⁷ In *Allied-Signal, Inc. v. Director, Division of Taxation*, 504 U.S. 768, 779 (1992), the Supreme Court indicated that, as early as 1920, the unitary business principle had been recognized for state corporate tax purposes. The Court states that “the unitary business rule is a recognition of two imperatives: the States’ wide authority to devise formulae for an accurate assessment of a corporation’s intrastate value or income; and the necessary limit on the States’ authority to tax value or income that cannot in fairness be attributed to the taxpayer’s activities within the State.”

no indication in the Senate Report that the word “person,” appearing in the singular in the legislation, was intended to be read to include a group of corporations under the circumstances addressed by the legislation. Indeed, the exception in the law itself for “any corporation” incorporated in a particular state (see § 101(b)(1) of P.L. 86-272) reflects Congress’s focus on the activities of a single entity – not a conglomerate of entities required by state law to file a combined return. What the Senate Report does indicate is that adherence to the provisions of P.L. 86-272 was required, whatever a person’s form of legal entity.

Regarding the first question, the statute does not simply limit a state’s ability to tax an out-of-state entity by asserting taxing jurisdiction *directly* over that entity. The income earned by a P.L. 86-272 protected entity is tax exempt, without qualification. On whose tax return that income is reportable is not relevant. In fact, the Conference Report accompanying P.L. 86-272 (H. Rep. 1103, 86th Cong. 1st Sess. 3, dated September 1, 1959) expressly amends the title of the legislation to read, in relevant part: “An Act relating to the power of the States to impose *net income taxes on income derived from interstate commerce*.” (emphasis added). Moreover, by enacting P.L. 86-272, Congress rejected an earlier version of the legislation, which focused on the taxation of a person rather than on the taxation of income.⁸

⁸ House Joint Resolutions 431 and 473, 86th Cong., 1st Sess., dated June 16, 1959, and July 22, 1959, respectively, provided:

[A] person, as defined in section 1 of title 1, shall not be liable to taxation by a State or political subdivision thereof on income derived exclusively from interstate commerce when the only activity within said State is sales solicitation and where no office, warehouse, stock of goods, or other place of business is maintained therein.

In the instant case, the combined group taxable income reported on the appellant's combined return for the tax year 2017 included that of the P.L. 86-272 protected entity and, through an apportionment formula whose numerator included the Massachusetts sales receipts of Fresh Meats Sales, more income was taxable in Massachusetts than would have been the case had those sales been omitted from the numerator of each taxable member's sales apportionment fraction.

The Commissioner maintained that the Reallocation Rule is not invalid under the Supremacy Clause of the U.S. Constitution because none of the prerequisites for preemption were present, citing the decision of the Massachusetts Superior Court in ***National Private Truck Council v. Commissioner of Revenue***, 1997 Mass. Super. LEXIS 580, *aff'd*, 426 Mass. 324 (1997). In particular, the Commissioner pointed out that: (i) the text of P.L. 86-272 did not explicitly provide that all state laws to the contrary were preempted; (ii) based on the totality of the circumstances, it could not be implied that Congress had occupied the field leaving no room for state legislation; and (iii) the state regulation in question did not actually conflict with federal law because compliance with both statutes was both possible and feasible. To the contrary, however, the federal statute expressly states that no state shall have the taxing power described therein, and compliance with the Reallocation Rule, unlike what the Commissioner maintains, would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

The Commissioner also asserted that "a number of courts have defended the 'Finnigan' rule from Public Law 86-272 attacks, finding no federal law violation, as utilizing the apportionment attributes of a non-taxable entity to apportion income of other related

entities does not result in the imposition of a tax on the entity that shares these attributes.” Similarly, in this case, the Commissioner argued that Massachusetts was not taxing a nontaxable member but rather was applying an apportionment formula in the context of combined reporting that fairly reflected income attributable to Massachusetts.

In particular, the Commissioner cited and discussed two out-of-state court decisions that specifically address the meaning of P.L. 86-272 – ***Arizona Department of Revenue v. Central Newspapers, Inc.***, 222 Ariz. 626 (Ct. App. Ariz. 2009), and ***Matter of Disney Enterprises, supra***. In ***Central Newspapers***, the sole income of three members of a consolidated group derived from a partnership whose only business activities within Arizona consisted of the solicitation of sales. The Arizona Appeals Court found that receipts from those sales were not excludible from the numerator of the group’s apportionment formula because one member of the corporate group operated a newspaper in Arizona and had significant property, payroll, and sales within the state. The Appeals Court maintained that the focus of P.L. 86-272 was on jurisdiction over certain taxpayers, not the income itself, so that if one person’s activities exceeded the solicitation of orders, any barrier to apportioned state taxation of that person was removed.

In ***Matter of Disney Enterprises***, the taxpayer filed a combined report that included one of its out-of-state subsidiaries. However, it omitted the subsidiary’s gross receipts from New York destination sales from the combined group’s apportionment calculation. On audit, the New York Department of Taxation and Finance added the subsidiary’s New York sales receipts to the numerator of the combined group’s business allocation percentage, increasing its overall New York tax liability. The New York Appeals

Court ruled, *inter alia*, that thereby no New York tax was imposed on a nontaxpayer. The Appeals Court found no violation of P.L. 86-272, noting that the “person” in the matter before it was the taxpayer and not the subsidiary, and that apportionment did not amount to tax.

Importantly, the Appeals Court in ***Matter of Disney Enterprises*** found no indication in the legislative history regarding the intended scope of the term “person” in P.L. 86-272 to support the conclusion that the term “person” therein should be read to include a unitary group – though the Appeals Court ultimately reached the conclusion that it did, stating: “No authority persuades us otherwise.” Moreover, in his concurring opinion in ***Matter of Disney Enterprises***, Judge Smith correctly observed, citing ***Shell Oil Co. v. Iowa Department of Revenue***, 488 U.S. 19, 31 (1988), that including a company’s receipts in the numerator of the apportionment formula “would be to increase the tax in proportion to those receipts – and thus in substance to tax the income associated with those receipts.” The same can be said of Massachusetts’ “Finnigan” adjustment.

The Board found that neither ***Central Newspapers*** nor ***Matter of Disney Enterprises*** was persuasive. Both take positions that are not consistent with the federal statute or its legislative history. In effect, both subsume the activities of a P.L. 86-272 protected entity within the activities of a combined or consolidated reporting group as a whole – placing combined and consolidated reporting, and concepts of apportionment, ahead of the constitutional principles embedded in the Supremacy Clause of the U.S. Constitution. Apportionment principles have appropriately been found to pass muster under the Due Process, Equal Protection, and Commerce Clauses of the U.S.

Constitution – but the Supremacy Clause raises a different concern – one now before the Board.

The Commissioner cited two other cases in support of his position that the “Finnigan” adjustment was not violative of P.L. 86-272 – ***Citicorp North America, Inc. v. Franchise Tax Board***, 83 Cal. App. 4th 1403 (Ct. App. 2000), and ***Deluxe Corporation v. Franchise Tax Board***, 2001 Cal. App. Unpub. LEXIS 2789 (Ct. App. 2001). ***Citicorp*** and ***Deluxe Corporation*** viewed the issue as one of apportionment – not the taxation of the income of a nontaxable member of a unitary group, which incorrectly frames the issue where P.L. 86-272 is relevant under the circumstances of the present appeal. Both cases reflect the conclusion of the U.S. Supreme Court that appropriately crafted apportionment formula clauses do not unconstitutionally result in extraterritorial taxation. See ***Allied-Signal, Inc.***, note 7, *supra*. However, these decisions do not address the question before the Board – namely, can apportionment formulas (assuming them otherwise to be properly crafted) be applied where P.L. 86-272 is operative as in the present appeal.

On more than one occasion, the U.S. Supreme Court has indicated that a state cannot do indirectly what it is precluded from doing directly. ***Frick v. Pennsylvania***, 268 U.S. 473 (1925), cited by the appellant, is relevant to the matter before the Board, though it addresses a different constitutional provision. In ***Frick***, Pennsylvania included the value of tangible personalty having an actual situs in New York and Massachusetts in determining the “clear value” on which the Pennsylvania inheritance tax was computed. The Supreme Court of Pennsylvania agreed with Pennsylvania. On appeal to the U.S. Supreme Court, the executors maintained that the taxation of tangible personal property having an actual situs outside of Pennsylvania transcended the power of the state and

therefore contravened the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

While Pennsylvania argued that it was not taxing the transfer of the property at issue – rather, it was simply using that property as a basis for computing the tax on the combined value of the property owned by the decedent in Pennsylvania, New York, and Massachusetts, the Court responded:

Of course, this was but the equivalent of saying that it was admissible to measure the tax by a standard which took no account of the distinction between what the State had power to tax and what it had no power to tax . . . It would open the way for easily doing indirectly what is forbidden to be done directly, and would render important constitutional limitations of no avail.

Frick, 268 U.S. at 494-95.

In the present appeal, Massachusetts has done indirectly what it cannot do directly. While not directly taxing Fresh Meats Sales (such as Pennsylvania's not directly taxing the transfer of out-of-state property), Massachusetts indirectly imposed a tax on the income of Fresh Meats Sales in violation of P.L. 86-272, – apportioning the Massachusetts sales of Fresh Meats Sales to taxable members of the Combined Group while not directly taxing Fresh Meats Sales (such as Pennsylvania's taking into account out-of-state property when computing its inheritance tax, while not directly taxing the transfer of that property).

While not precedential, an unpublished decision of the Tax Court of New Jersey cited by the appellant is illustrative. In ***Stanislaus Food Products Co. v. Director, Division of Taxation***, 2021 N.J. Tax Unpub. LEXIS 14 (Tax Court of New Jersey 2021), the Tax Court addressed whether P.L. 86-272 precluded New Jersey from imposing its alternative minimum tax on income derived by an out-of-state seller of tomato products.

In 2002, New Jersey enacted a statute initially requiring all businesses to pay the greater of a corporate business tax or an alternative minimum assessment (“AMA”). During the tax years at issue in the case, a P.L. 86-272 protected corporation was allowed to choose to pay the corporate business tax, as a result of which its AMA was zero. The facts of the case indicate that, in those years, the appellant paid the corporate business tax but then, after the Director issued a deficiency assessment, filed amended returns claiming that it qualified as an exempt P.L. 86-272 entity. The Director agreed that the appellant could not be assessed the corporate business tax, but the AMA was assessed – reducing the appellant’s claimed refund. The Tax Court of New Jersey disagreed.

The Tax Court, discussing the situation leading up to the enactment of P.L. 86-272 and the conceptual framework of the Commerce Clause, held that the AMA was preempted by P.L. 86-272. Finding the issue to be a form of choice-of-law determination under the Supremacy Clause, it observed:

Congress has exercised its powers under the Commerce Clause and enacted P.L. 86-272 to set certain minimum standards below which a state cannot impose net income taxation. Once Congress acts, courts are not free to review state taxes under the dormant Commerce Clause since it is Congress, and not the courts, that has struck the balance that it deems appropriate.

. . .

When Congress has spoken, and there is tension with a state enactment, the Supremacy Clause provides the vehicle for resolving this tension.

Stanislaus Food, 2021 N.J. Tax Unpub. LEXIS at 17-19.

In summary, the answer to each of the two subsidiary questions posed above relative to the “Finnigan” adjustment is “no.” The term “person” in P.L. 86-272 does not encompass an entire unitary group, and P.L. 86-272 does not prevent a state only from

directly taxing an out-of-state entity protected from taxation by P.L. 86-272. Application of the Reallocation Rule in the present appeal has the effect of imposing a tax on the entirety of income that P.L. 86-272 states to be immune from taxation; the fact that this result was achieved indirectly rather than by direct taxation does not validate Massachusetts' action.

It is well settled that “when a federal statute unambiguously forbids the States to impose a particular kind of tax . . . , courts need not look beyond the plain language of the federal statute to determine whether a state statute that imposes such a tax is pre-empted.” ***Shell Oil***, 488 U.S. at 25 (*citing Aloha Airlines, Inc. v. Director of Taxation of Hawaii*, 464 U.S. 7, 12 (1983)). See also ***Hines v. Davidowitz***, 312 U.S. 52, 67 (1941) (if a state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,” the state law is void).⁹

The present appeal involves an attempt by Massachusetts to impose a particular kind of tax that federal law unambiguously forbids Massachusetts from imposing. To invalidate the “Finnigan” adjustment in this matter denotes “a permissibly small preclusion of State taxing power to protect interstate commerce” mandated by the Supremacy Clause of the U.S. Constitution. See ***National Private Truck Council v. Commissioner of Revenue***, 426 Mass. 324, 331 (1997).

Accordingly, reconciling the unitary principles accepted by the U.S. Supreme Court with the mandate of P.L. 86-272, the Board found and ruled that inclusion of a pro-rata portion of the Massachusetts sales of Fresh Meats Sales in the numerator of the sales

⁹ In ***Hines***, because the federal government had already enacted a comprehensive scheme for registering aliens living in the U.S., the Pennsylvania Alien Registration Act of 1939 was found to be unenforceable.

apportionment fractions of each of the taxable members of the Combined Group violated the Supremacy Clause of the U.S. Constitution, and was therefore improper.

IV. Underpayment Penalties

Pursuant to § 35A, if the amount of tax required to be shown on a return for a tax period exceeds the amount reported by the taxpayer – *i.e.*, there is an “underpayment,” the Commissioner is directed to add to the tax liability a penalty equal to 20 per cent of the portion of the underpayment attributable to (i) negligence or disregard of the tax laws of the Commonwealth, or of public written statements issued by the Commissioner, and/or (ii) any substantial understatement of tax liability. G.L. c. 62C, § 35A(a), (b). A “substantial understatement” of liability will exist if it exceeds the greater of 10 percent of the tax required to be shown on the return or \$1,000. G.L. c. 62C, § 35A(c); G.L. c. 62C, § 35A(d).

The Commissioner is directed to reduce any “understatement” by the portion thereof attributable to (i) the tax treatment of any item by the taxpayer if there is or was substantial authority for the treatment, or (ii) any item if the relevant facts affecting the tax treatment of the item are adequately disclosed in the return or in a statement attached to the return, and there is a reasonable basis for the tax treatment of the item by the taxpayer. G.L. c. 62C, § 35A(d).

Technical Information Release 06-5, New Penalties under G.L. c. 62C, §§ 35A-35E, dated April 13, 2006, explains that “[s]ubmission of a written statement setting out the relevant facts including, without limitation, the basis for the challenge and identifying the tax law or public written statement being challenged will constitute adequate disclosure.”

More generally, an exception to § 35A is found in G.L. c. 62C, § 35B(a) (“§ 35B”), which provides, in relevant part, that:

[a] penalty shall not be imposed under section 35A with respect to any portion of an underpayment if it is shown that there was reasonable cause for such portion and that the taxpayer acted in good faith with respect to such portion.

Directive 12-7, Section 35A Penalty for Underpayment of Tax Required to be Shown on Return, dated December 19, 2012 (“Directive”), addresses the meaning of critical terms appearing in §§ 35A and 35B – *i.e.*, what is meant by negligence, disregard of the tax laws, substantial authority, adequate disclosure, reasonable basis, reasonable cause, and good faith. The term “negligence” is defined in the Directive to include any failure to make a reasonable attempt to comply with the laws of the Commonwealth or public written statements issued by the Department of Revenue. *See also* § 35A(c). The term “disregard” is stated in the Directive to include any careless, reckless, or intentional disregard of the Department of Revenue’s rules, regulations, or other public written statements, which may be evidenced by knowingly taking a position that is incorrect. *See also* § 35A(c).

Relative to the exceptions to the imposition of a § 35A penalty, the Directive states that “substantial authority” for the tax treatment of an item will be found only if the weight of the authorities supporting the treatment is substantial in relation to the weight of authorities supporting contrary treatment, and explains that “adequate disclosure” pertains to the relevant facts affecting the tax treatment of an item and requires that such facts be adequately disclosed in the return or in a statement submitted with the return. The Directive states that the “reasonable basis” standard is not satisfied by a return position that is merely arguable or that is merely a colorable claim. The Directive further

provides that whether a taxpayer acts with “reasonable cause and in good faith” will be determined by the Commissioner on a case-by-case basis, taking into account all pertinent facts and circumstances, the most important commonly being the extent of the taxpayer’s effort to determine and report its proper tax liability.

In the present appeal, the tax year 2015 involved a “substantial understatement” of tax liability – *i.e.*, an underpayment of more than 10 percent of the tax determined by the Commissioner to be due. Unlike 2015, the tax year 2016 involved an underpayment of tax liability that was not substantial within the meaning of § 35A.

As a threshold matter, the appellant argued that given what it viewed as a correct application of the law, there could be no underpayment; but assuming an underpayment of tax liability resulting from adverse findings at the Board, the appellant argued that no penalty should be imposed because it had substantial authority for its failure to apply the Combination Provision, it was not negligent, and it did not disregard the tax laws of the Commonwealth.

In support of its argument, the appellant cited the decision of the Supreme Judicial Court in ***Oracle USA, Inc. v. Commissioner of Revenue***, 487 Mass. 518 (2021), for its position that the provisions of a taxing statute govern where there is language in a regulation that conflicts with the plain language and policy choices of the Legislature in enacting the statute. In particular, the appellant argued that the plain language of the combined reporting statute required each corporation included in a combined group to determine its applicable apportionment formula (*i.e.*, its apportionment as a manufacturing corporation) on a stand-alone basis, while the Combination Provision impermissibly frustrated this explicit mandate. In choosing to follow the statute rather than

a conflicting regulation, the appellant merely applied the canons of statutory interpretation to resolve the conflict between the combined reporting statute and the Combination Provision.

In the Board's view, the Combination Provision is not in conflict with the statute, which gives the Commissioner the express authority by regulation to address the impact of the elimination of intercompany transactions in the context of combined returns. The Commissioner exercised this authority, in relevant part, by promulgating the Combination Provision as part of its regulation.

The appellant may well have believed that its interpretation of the law was correct and that the Combination Provision should be deemed improper at some level of adjudication. Regardless, the appellant knowingly, and to its own financial benefit, took a position on its Forms 355U in direct contravention of the Combination Provision. Aware that it had rejected the explicit terms of a regulation, the appellant chose not to disclose its position and left its discovery a mere possibility in the case of an audit.

Taken together, the facts indicate that the provisions of § 35A and relevant public written statements issued by the Commissioner offer no relief from penalties for the tax year 2015, which involved a "substantial understatement" of tax liability. The appellant took a position that directly contravened a public written statement, thereby substantially reducing its tax liability. The appellant could not reasonably have thought that the Commissioner would agree with its view, yet it chose not to disclose its rejection of a duly promulgated regulation. Such rejection constituted disregard of a public written statement, which by itself justified imposition of a § 35A penalty. Moreover, its legal argument that the Combination Provision exceeded the authority granted by the Legislature to the

Commissioner is simply that. Under relevant authority, it cannot be said to rise to the level of substantial authority. Nor was there any demonstrated reasonable cause for the appellant's position within the meaning of § 35B(a).

Though the tax year 2016 involved an underpayment of tax liability that was not substantial within the meaning of § 35A, the operative facts were the same as in 2015, inevitably leading to the conclusion that imposition of a § 35A penalty was proper

Accordingly, the Board found and ruled that § 35A penalties for the tax years 2015 and 2016 were properly imposed.

The tax year 2017 did not involve an underpayment of tax liability, taking into account the findings of the Board relating to the Reallocation Rule and the Rule 33 computation submitted by the parties. The Board therefore found and ruled that a § 35A penalty could not be sustained for the tax year 2017.

V. Summary of the Board's Findings and Rulings

The Board found and ruled that: (i) for the tax year 2015, Fresh Meats Sales was properly classified a § 38 manufacturer, for the tax year 2016, Packaged Meats Sales and Fresh Meats Sales were properly classified as § 38 manufacturers, and for the tax year 2017, Packaged Meats Sales was properly classified as a § 38 manufacturer; (ii) application of the "Finnigan" adjustment in this appeal violated the Supremacy Clause of the U.S. Constitution and therefore none of the sales made by Fresh Meats Sales for the tax year 2017 were properly reallocated to Morrell and Packaged Meats Sales and included in the numerator of their respective sales apportionment factors; and (iii) § 35A penalties were properly assessed for the tax years 2015 and 2016, but not for the tax year 2017.

Accordingly, decisions were issued for the appellee with respect to the corporate excise and the § 35A penalties assessed against the appellant for each of the tax years 2015 and 2016. Regarding the tax year 2017, the Board granted an abatement in the amount of \$239,719 based on calculations submitted by the parties pursuant to the Board's Rule 33 Order, and the § 35A penalty assessed against the appellant was not sustained.

THE APPELLATE TAX BOARD

By: 
Mark J. DeFrancisco, Chairman

A true copy,

Attest: 
Clerk of the Board

APPEALS COURT
Full Court Panel Case
Case Docket

SMITHFIELD PACKAGED MEATS CORP. AND COMBINED AFFILIATES vs.
COMMISSIONER OF REVENUE
2026-P-1391

CASE HEADER

Case Status	No briefs yet
Status Date	09/24/2026
Nature	Appellate Tax Board
Entry Date	09/24/2026
Appellant	Plaintiff
Case Type	Civil
Brief Status	Awaiting blue brief
Brief Due	11/03/2026
Arg/Submitted	
Decision Date	
Panel	
Citation	
Lower Court	Appellate Tax Board
TC Number	C344811
Lower Ct Judge	
TC Entry Date	03/11/2022
SJ Number	
FAR Number	
SIC Number	

INVOLVED PARTY

Smithfield Packaged Meats Corp. and Combined Affiliates
Plaintiff/Appellant
Awaiting red brief
Due 12/03/2026

Commissioner of Revenue
Defendant/Appellee
Awaiting blue brief
Due 11/03/2026

ATTORNEY APPEARANCE

[Michael A. Jacobs, Esquire](#)

[Celine E. de la Foscade-Condon, Esquire](#)

DOCKET ENTRIES

Entry Date	Paper	Entry Text
10/07/2026		**** Cross Appeal ****
09/24/2026	#1	Lower Court Assembly of the Record Package
09/24/2026		Notice of entry sent.
09/24/2026	#2	Letter request to enter filed for Smithfield Packaged Meats Corp. and Combined Affiliates
09/30/2026	#3	Letter to correct party designation filed for Commissioner of Revenue by Attorney Celine de la Foscade-Condon.
10/07/2026	#4	Docketing Statement filed for Smithfield Packaged Meats Corp. and Combined Affiliates by Attorney Michael Jacobs.
10/07/2026	#5	Docketing Statement filed for Commissioner of Revenue by Attorney Celine de la Foscade-Condon.
10/07/2026		RE#3: Treated as request to docket the Commissioner of Revenue's appeal, see Mass. R. A. P. 10(a)(1)(A), the request is allowed. The docket is updated to reflect that this is a cross-appeal. The Commissioner of Revenue is designated as the appellant/cross-appellee with a principal brief and appendix due on or before 11/03/2026. Smithfield Packaged Meats Corp. and Combined Affiliates is designated as appellee/cross-appellant. *Notice.

As of 10/07/2026 5:15pm

MASSACHUSETTS APPEALS COURT CIVIL DOCKETING STATEMENT

Appeals Court Docket Number 2026-P-1391

Caption used in the lower court

Plaintiff(s): Smithfield Packaged Meats Corp. and Combined Affiliates

v.

Defendant(s): Commissioner of Revenue

1. Party Information

Name(s) of the appellant(s) or cross-appellant(s) on whose behalf this statement is being filed:

Commissioner of Revenue

2. Attorney Information

Name Celine E. de la Foscade-Condon BBO# 658016

Or, check this box if you are self-represented and provide your name _____

3. Lower Court, Board or Agency Information

a. Court Department and Division Appellate Tax Board

b. Lower Court Docket Number(s) C344811

c. Specify the name and the role of each judge whose orders are at issue on appeal [not applicable for appeals directly from a board or agency]:

Judge, first and last name Not Applicable Role

Judge, first and last name Not Applicable Role

Judge, first and last name Not Applicable Role

d. Was the case or any information in the record designated as impounded in the lower court? (see Instructions Section 3) Yes ☒ No

If yes, was the entire case fully impounded? Yes No

In addition to providing the information below, parties filing a brief or record appendix that contains impounded materials must comply with Uniform Rule on Impoundment Procedure Rule 12(c), Supreme Judicial Court Rule 1:15 § 2(c), and Mass.R.A.P. 16(d), 16(m), 18 (a), and 18(g). See also Mass.R.A.P. 21. If this case or any material therein is impounded, specify which documents are impounded and the authority for impoundment, e.g. court order, statute:

Not Applicable.



4. Nature of the Case

Select the most appropriate description, or enter description: Appellate Tax Board

5. Perfection of Appeal

a. Is the appeal from a final judgment, i.e., judgment disposing of all parties and claims? ☒ Yes ☐ No

b. If no, identify the basis on which the interlocutory order is immediately appealable.

c. Docketing Date of Judgment or Interlocutory Order Appealed July 22, 2026

d. Date Notice of Appeal Filed

September 15, 2026

Please provide information regarding the following post-judgment motions that may affect the timeliness of the notice of the appeal.

Type of Motion	Check if filed		Date Served (not date filed)
Motion for Judgment (Rule 50(b)) Notwithstanding the Verdict	☐ Yes	☒ No	
Motion to Amend or Make Additional Findings (Rule 52(b))	☐ Yes	☒ No	
Motion to Alter or Amend Judgment or Motion for new Trial (Rule 59)	☐ Yes	☒ No	
Motion for Relief from Judgment (Rule 60)	☐ Yes	☒ No	
Other (specify) _____	☐ Yes	☒ No	

6. Appellate Issues

In cases other than child welfare appeals, please provide a short statement of the anticipated issues on appeal. If the appellate issue involves the interpretation of a particular statute or regulation, please provide a citation to that statute or regulation. (Note: This statement is for informational purposes only and failure to raise an issue here will not preclude an appellant from raising the issue in its brief.):

At issue are the following: (1) whether the Appellate Tax Board erred in ruling that Public Law 86-272 preempts G.L. c. 63, section 32B (d)(2)(ii) and 830 CMR 63.32B.2(7)(b); (2) whether the Board exceeded its authority by invalidating a statute and regulation on constitutional grounds; (3) whether the Commisisoner exceeded his statutory authority by applying 830 CMR 63.32B.2(7)(g)2.a to reclassify two members of a combined group as manufacturing corporation, whether neither affiliate engaged in manufacturing on a separate entity; (4) whether the Commissioner's assessment of additional corporate excise tax for the tax year beginning December 29, 2014 and ending January 3, 2016 was timely under G.L. c. 62C, section 26; and (5) whether the Commissioner properly assessed underpayment penalties under G.L. c. 62C, section 35A for the tax years ending 2016 and 2017.

7. Related Appeals

Are there any pending, past, or anticipated future appeals or original appellate proceedings that involve these parties or this case which have been entered in the Appeals Court or Supreme Judicial Court? ☐ Yes ☒ No

Do you know of any pending or anticipated appeals raising related issues? ☐ Yes ☒ No

If you answered yes to either question, provide the case name and docket number and describe below the related matter or issue:



Respectfully Submitted,

Celine E. de la Foscade-Condon

Signature

/s/ Celine E. de la Foscade-Condon

Address

Massachusetts Department of Revenue

Litigation Bureau

100 Cambridge Street, 7th Floor

Boston, Massachusetts 02114

BBO Number

658016

CERTIFICATE OF SERVICE

Pursuant to Mass.R.A.P. 13(d), I hereby certify, under the penalties of perjury, that on this date of October 7, 2026
I have made service of a copy of the Massachusetts Appeals Court Docketing Statement filed on behalf of

the Commissioner of Revenue _____, upon the attorney of record for each party, or if the party
has no attorney then I made service directly to the self-represented party, by ☐ hand delivery ☒ first class mail ☐ e-mail/e-file
to the following person(s) and at the following address(es). Note: Service may be made by e-mail only with the consent of
each party or opposing counsel:

Michael A. Jacobs, Esq.
Reed Smith LLP
Three Logan Square, Suite 3100
1717 Arch Street
Philadelphia, PA 19103
mjacobs@reedsmith.com

/s/ Celine E. de la Foscade-Condon

Signature

(617) 626-3854

Telephone

Massachusetts Department of Revenue

Litigation Bureau

100 Cambridge Street, 7th Floor

Boston, Massachusetts 02114

Address



CERTIFICATE OF SERVICE

I, Celine E. de la Foscade-Condon, hereby certify that, on this date, I electronically filed the foregoing document with the Supreme Judicial Court through eFileMA and served a copy of the same by email upon counsel of record as follows:

Michael A. Jacobs (mjacobs@reedsmith.com)

Brent K. Beissel (bbeissel@reedsmith.com)

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing application complies with the rules pertaining to applications for direct appellate review, including, but not limited to, Mass. R. App. P. 11 and 20. The application has been set in 12-point Courier New, a proportional typeface, and the argument on the issue contains 1,243 non-excluded words as calculated by the word-count feature of Microsoft Word in Microsoft 365.

/s/ Celine E. de la Foscade-Condon
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