

HOUSE No. 2861

The Commonwealth of Massachusetts

PRESENTED BY:

Josh S. Cutler

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

An Act to level the playing field for Massachusetts small and medium sized businesses.

PETITION OF:

NAME:	DISTRICT/ADDRESS:	DATE ADDED:
<i>Josh S. Cutler</i>	<i>6th Plymouth</i>	<i>2/16/2021</i>

HOUSE No. 2861

By Mr. Cutler of Pembroke, a petition (accompanied by bill, House, No. 2861) of Josh S. Cutler relative to the taxation of certain businesses. Revenue.

[SIMILAR MATTER FILED IN PREVIOUS SESSION
SEE HOUSE, NO. 3788 OF 2019-2020.]

The Commonwealth of Massachusetts

**In the One Hundred and Ninety-Second General Court
(2021-2022)**

An Act to level the playing field for Massachusetts small and medium sized businesses.

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

1 SECTION 1. Chapter 63 of the General Laws is hereby amended by striking out section
2 32B and inserting in place thereof the following section:-

3 Section 32B. (a) For the purposes of this section the following words shall, unless the
4 context clearly appears otherwise, have the following meanings:-

5 “Affiliated group”, an affiliated group as defined in section 1504 of the Code except that
6 it shall include all corporations incorporated in the United States or formed under the laws of the
7 United States, any state, the District of Columbia or any territory or possession of the United
8 States that are commonly owned, directly or indirectly, by any member of such affiliated group
9 and other commonly owned corporations as described in this section.

10 “Combined group’s gross receipts or sales”, the aggregate of receipts or sales derived
11 from a unitary business.

12 “Combined group’s taxable income”, the aggregate taxable net income or loss subject to
13 apportionment and derived from a unitary business or the aggregate taxable net income or loss
14 from an affiliated group pursuant to an election under paragraph (2) of subsection (g), in either
15 case reported on a combined report in accordance with this section, of every taxable member and
16 non-taxable member of the combined group.

17 “Common ownership”, more than 50 per cent of the voting control of each member of the
18 group is directly or indirectly owned by a common owner or owners, either corporate or non-
19 corporate, whether or not the owner or owners are members of the combined group. A group of
20 corporations under common ownership may be engaged in 1 or more unitary businesses.

21 “Commonly owned”, more than 50 per cent of the voting control of such member is
22 directly or indirectly owned by a common owner or owners, either corporate or non-corporate.

23 “Non-taxable member”, a member of the combined group that is not subject to tax under
24 section 2, 2B, 32D or 39.

25 “Taxable member”, a member of the combined group that is subject to tax under section
26 2, 2B, 32D or 39.

27 “Unitary business”, the activities of a group of 2 or more corporations under common
28 ownership that are sufficiently interdependent, integrated or interrelated through their activities
29 so as to provide mutual benefit and produce a significant sharing or exchange of value among

30 them or a significant flow of value between the separate parts. The term unitary business shall be
31 construed to the broadest extent permitted under the United States Constitution.

32 (b) Notwithstanding any other provision of this chapter, a corporation subject to tax under
33 this chapter and engaged in a unitary business with 1 or more corporations subject to
34 combination within the meaning of this section shall, under regulations adopted by the
35 commissioner, calculate its taxable net income derived from this unitary business as its share,
36 attributable to the commonwealth, of the apportionable income or loss of the combined group
37 engaged in the unitary business, determined in accordance with a combined report.

38 In computing the apportionable income or loss of the combined group and of each
39 member thereof, items of income, deductions and receipts from transactions between or among
40 members of the combined group, including but not limited to the payment of dividends, shall be
41 eliminated, subject to regulations as may be adopted pursuant to subsection (g).

42 (c) Any business conducted by a partnership shall be treated as the business of the
43 partners, whether the partnership interest is directly held or indirectly held through a series of
44 partnerships, to the extent of the partner's distributive share of the partnership's income,
45 regardless of the magnitude of the partner's ownership interest or its distributive share of
46 partnership income. A business conducted directly or indirectly by 1 corporation is unitary with
47 that portion of a business conducted by another, commonly owned corporation through its direct
48 or indirect interest in a partnership if the activities conducted by the former corporation and the
49 partnership is a unitary business regardless of the magnitude of the partner's ownership interest
50 or its distributive or any other share of partnership income.

51 (d)(1) Corporations that are subject to combination within the meaning of this section
52 shall include an entity of the kind that is subject to tax or would be subject to tax if doing
53 business in the state under section 2, 2B, 32D or 39 as well as an entity described in sections 20
54 to 29E, inclusive, in any case in which the entity does not qualify for treatment as a life insurance
55 company as defined in section 816 of the Code or an insurance company subject to tax imposed
56 by section 831 of the Code.

57 A corporation is subject to combination irrespective of whether the corporation is actually
58 subject to tax under section 2, 2B, 32D or 39.

59 A corporation subject to combination includes a real estate investment trust as referenced
60 under sections 856 to 859, inclusive, of the Code and a regulated investment company as
61 referenced under sections 851 to 855, inclusive, of the Code.

62 Any corporation included in the combined group pursuant to this section that is subject to
63 tax under section 2, 2B, 32D or 39 shall determine that part of its taxable net income or loss that
64 is derived from a unitary business or from an affiliated group pursuant to an election under
65 paragraph (2) of subsection (g). Such corporation shall not be subject to any duplicate inclusion
66 of income or benefit from any duplicate deduction of loss under section 2, 2B, 32D or 39.

67 (2) A corporation subject to combination within the meaning of this section shall not
68 include an entity described in section 38B or 38Y. In addition, an entity subject to combination
69 within the meaning of this section shall not include an entity described in sections 20 to 29E,
70 inclusive, except as provided in paragraph (1) or otherwise in this chapter.

71 (3) The members of a combined group subject to tax under this chapter with any entity or
72 combination of entities whose combined group's gross receipts or sales exceeds \$1,000,000,000;

73 provided that, any member of the combined group is a corporation that is incorporated in or does
74 business in a country that does not impose an income tax, or that imposes an income tax at a rate
75 lower than 90 per cent of the United States income tax rate on the income tax base of the
76 corporation in the United States, shall determine the income apportionment percentage to be used
77 to calculate the corporations income excise pursuant to subsection (d).

78 A corporation under paragraph (3) shall be subject to tax at the following rates:- (i) for
79 each taxable year beginning on or after January 1, 2020, but before January 1, 2025, 9 per cent;
80 (ii) for each taxable year beginning on or after January 1, 2025, but before January 1, 2026, 8.5
81 per cent; (iii) for each taxable year beginning on or after January 1, 2026, but before January 1,
82 2027, 8 per cent; or (iv) for each taxable year beginning on or after January 1, 2027 and
83 thereafter, 7.5 per cent.

84 (e)(1) A corporation subject to tax under this chapter that is part of a combined group
85 shall apportion its income as follows:--

86 (i) Subject to this subsection, each taxable member shall determine its apportionment
87 percentage based on its specific apportionment formula pursuant to this chapter.

88 (ii) Each taxable member shall compute the numerator of its apportionment factors
89 pursuant to the apportionment provisions of this chapter that apply to such member. Each taxable
90 member shall add to its sales factor numerator its share of Massachusetts sales of non-taxable
91 members based on subparagraph (iv).

92 If a combined group includes 1 or more members that are financial institutions and 1 or
93 more members that are not financial institutions, the numerators of the property and sales factors
94 of the members shall be adjusted in the same manner as the denominator adjustments described

95 in subparagraph (iii) and such receipts as are added pursuant to such adjustments shall be
96 sourced as provided in section 2A.

97 (iii) Each member shall calculate its apportionment factor denominators by determining
98 the apportionment factor denominators of every member of the group based upon the
99 apportionment provisions that apply to each member and by aggregating the apportionment
100 factor denominator(s) of each member, regardless of whether any particular member is taxable in
101 the commonwealth. A member shall determine its property and payroll factor denominators by
102 including the property and payroll of all members of the group, including members of the group
103 subject to a single sales factor apportionment formula. Property and payroll of all members,
104 including members subject to single sales factor apportionment, shall be included in the property
105 and payroll denominators of members to which such property and payroll factors apply.

106 If a combined group includes 1 or more members that are financial institutions and 1 or
107 more members that are not financial institutions, the following adjustments shall apply:

108 (1) with respect to intangible property included in the property factor denominators of the
109 financial institution members, such intangible property values shall be reduced to 20 per cent of
110 the otherwise determined amounts before combination of the denominators of the group
111 members;

112 (2) receipts described in subsections (d)(i) through (d)(xi) of section 2A, taking into
113 account subsection (h) of section 2A, that would be otherwise excluded from the sales factor of
114 members that are not financial institutions shall be added to the denominators of such non-
115 financial members; and

116 (3) in the case of a sale or deemed sale of a business, receipts from the sale of the
117 business “good will” or similar intangible value, including without limitation “going concern
118 value” and “workforce in place”, shall not be included in the sales factor denominators of any
119 member.

120 (iv) The Massachusetts sales of each non-taxable member shall be determined based upon
121 the apportionment rules applicable to such member and shall be aggregated. Each taxable
122 member of the group shall include in its sales factor numerator a portion of the aggregate
123 Massachusetts sales of non-taxable members based on a ratio, the numerator of which is such
124 taxable member’s Massachusetts sales taking into account its applicable sales factor provisions
125 and the denominator of which is the aggregate Massachusetts sales of all the taxable members of
126 the group taking into account their respective sales factor provisions. For purposes of
127 determining whether sales are in the commonwealth and included in the numerator of the sales
128 factor, a taxpayer is considered taxable in any state in which any member of its combined group
129 is subject to tax.

130 (v) In computing the apportionment percentage of combined group members, each
131 member shall eliminate intercompany transactions, subject to regulations as may be adopted
132 pursuant to subsection (g).

133 (2) To calculate each member’s apportioned taxable net income or loss, each member
134 shall apply its apportionment percentage, as determined under subparagraphs (i) to (v), inclusive,
135 of paragraph (1), to the combined group’s taxable income.

136 (3) Each taxable member shall multiply its apportioned taxable net income or loss by the
137 tax rate applicable to such member pursuant to this chapter.

138 (f) Every member of the combined group shall be jointly and severally liable for the tax
139 due from any taxpayer member under this chapter, including any interest and penalties, to the
140 extent permitted under the constitution of the United States.

141 (g) The commissioner shall adopt regulations to implement this section and to coordinate
142 the application of this section with the other provisions of this chapter. The regulations shall
143 include rules to address without limitation, the following:

144 (i) the elimination of intercompany transactions, including but not limited to the
145 payments of dividends, between or among combined group members, and the elimination or
146 deferral of income, expenses, apportionment factors or other tax items associated with those
147 transactions and including any exceptions to such eliminations or deferrals under rules analogous
148 to those under section 1502 of the Code;

149 (ii) the sharing within the combined group of credits that may be validly claimed by a
150 taxpayer and that are attributable to the combined group's unitary business, to the extent such
151 sharing of credits by a particular member of the combined group is consistent with the statutory
152 requirements for claiming such credits, taking into account the nature of such member's business
153 and related activities;

154 (iii) the application of any carry forwards, including the sharing of any net operating loss
155 or tax credit carry forwards that are attributable to the activities of the combined group's unitary
156 business, but the carry forward of losses, credits or other tax benefits that arise before the
157 effective date of this section shall be available only to the extent permitted by law as in effect
158 before the effective date; and

159 (iv) the relationship of sections 31I to 31K, inclusive, to this section.

160 (h)(1) A taxpayer may elect, without the consent of the commissioner, to treat as its
161 Massachusetts combined group all corporations that are members of its affiliated group. The
162 corporations referred to above shall include members of such affiliated group that are subject to
163 tax or that would be subject to tax if doing business in the state under section 2, 2B, 32D or 39.
164 Such affiliated group shall calculate Massachusetts taxable income in accordance with
165 subsection (e); provided that, all income of all group members, whether or not such income
166 would otherwise be subject to apportionment or would be allocable to a particular state in the
167 absence of an election under this subsection, shall be treated as apportionable income for
168 purposes of returns filed pursuant to an election under this subsection.

169 (2) Any such election shall be made on an original, timely filed return by any member of
170 the combined group. Any corporation entering an affiliated group subsequent to the year of
171 election shall be included in the Massachusetts combined group and is considered to have waived
172 any objection to its inclusion in the Massachusetts combined group. An election shall be binding
173 for and applicable to the taxable year for which it is made and for the next 9 taxable years. An
174 election may be revoked, or renewed for another 10 taxable years, without the consent of the
175 commissioner after it has been in effect for 10 taxable years, provided however that in the case of
176 a revocation a new election under this subsection shall not be permitted in any of the
177 immediately following 3 taxable years. The revocation or renewal shall be made on an original,
178 timely filed return for the first taxable year after the completion of a 10-year period for which an
179 election under this subsection was in place.

180 SECTION 2. The water's edge election pursuant to section 32B of chapter 63 of the
181 General Laws made before the effective date of section 1 shall be in effect for 3 years from the

182 date of the election and shall be made within the first 90 days of the first tax year the 3-year
183 period.

184 SECTION 3. Section 12 of chapter 156C, as so appearing, is hereby amended by striking
185 out subsection (d) and inserting in place thereof the following subsection:-

186 (d) The fee for the filing of the certificate of organization required by subsection (a) shall
187 be \$500. The fee for the filing of the annual report required by subsection (c) shall be \$250 for
188 any such limited liability company with a single member; or \$500 for any other such limited
189 liability company. Such fees shall be paid to the state secretary at the time the certificate of
190 organization or the annual report is filed.