SENATE . . . . . No. 2390

Senate, May 24, 2023 -- Text of amendment (825) (offered by Senator Fattman) to the Ways and Means amendment (Senate, No. 3) to the House Bill making appropriations for the fiscal year 2024 for the maintenance of the departments, boards, commissions, institutions, and certain activities of the Commonwealth, for interest, sinking fund, and serial bond requirements, and for certain permanent improvements.

The Commonwealth of Massachusetts

In the One Hundred and Ninety-Third General Court
(2023-2024)

by inserting after section ___ the following section:-

"SECTION 1. Section 2A of chapter 63 of the General Laws, as appearing in the 2020 Official Edition, is hereby amended by striking out subsection (b) and by inserting in place thereof the following subsection:-

(b) If a financial institution has income from business activity which is taxable both within and without this commonwealth, its net income shall be apportioned to the commonwealth by multiplying its net income by the apportionment percentage. The apportionment percentage is determined by adding 25 percent of the property factor plus 25 percent of the payroll factor plus 50 percent of the receipts factor. If 1 of the factors is missing the percentages set forth in the preceding sentence shall be increased proportionately such that the sum of the percentages by which the 2 remaining factors are multiplied under this subsection is one. If 2 factors are missing, the remaining factor is the apportionment percentage. If all 3 factors are missing, the whole of the financial institution’s net income shall be taxable under

Section 2. A factor is missing if both its numerator and denominator are 0, but it is not missing merely because its numerator is 0.

SECTION 2. Said subsection (b) of said section 2A of said chapter 63, as so appearing, is hereby further amended by striking out the words “25 percent of the property factor plus 25 percent of the payroll factor plus 50”, inserted by section 8, and inserting in place thereof the following words:- 16.5 percent of the property factor plus 16.5 percent of the payroll factor plus 67.

SECTION 3. Said subsection (b) of said section 2A of said chapter 63, as so appearing, is hereby further amended by striking out the words, “16.5 percent of the property factor plus 16.5 percent of the payroll factor plus 67”, inserted by section 9, and inserting in place thereof the following words:- 8.25 percent of the property factor plus 8.25 percent of the payroll factor plus 83.5.

SECTION 4. Said section 2A of said chapter 63, as so appearing, is hereby amended by striking out subsections (b) and (c) and inserting in place thereof the following 2 subsections:-

(b) If the financial institution has income from business activity which is taxable both within and without this commonwealth, its net income shall be apportioned to this commonwealth by multiplying its net income by its receipts factor. If the receipts factor is missing, the whole of the financial institution’s net income shall be taxable under section 2. The receipts factor is missing if both its numerator and denominator are 0, but it is not missing merely because its numerator is 0.

(c) The receipts shall be computed according to the method of accounting, cash or accrual basis, used by the taxpayer for federal income tax purposes for the taxable year.

SECTION 5. Said section 2A of said chapter 63, as so appearing, is hereby further amended by striking out subsections (e), (f) and (g) and inserting in place thereof the following subsection:-

(e) If the provisions of subsections (a) to (d), inclusive, are not reasonably adapted to approximate the net income derived from business carried on within the commonwealth, a financial institution may apply to the commissioner, or the commissioner may require the financial institution, to have its income derived from business carried on within this commonwealth determined by a method other than that set forth in subsections (a) to (d), inclusive. Such application shall be made by attaching to its duly-filed return a statement of the reasons why the financial institution believes that the provisions of this section are not reasonably adapted to approximate its net income derived from business carried on within this commonwealth and a description of the method sought by it. A financial institution which so applies shall, upon receipt of a request therefor from the commissioner, file with the commissioner, under oath of its treasurer, a statement of such additional information as the commissioner may require.

If, after such application by the financial institution, or after the commissioner's own review, the commissioner determines that the provisions of subsections (a) to (d), inclusive, are not reasonably adapted to approximate the financial institution's net income derived from business carried on within the commonwealth, the commissioner shall by reasonable methods determine the amount of net income derived from business activity carried on within the commonwealth. The amount thus determined shall be the net income taxable under section two and the foregoing determination shall be in lieu of the determination required by subsections (a) to (d), inclusive. If an alternative method is used by the commissioner hereunder, the

commissioner, in his discretion, with respect to the two next succeeding taxable years, may require similar information from such financial institution if it shall appear that the provisions of subsections (a) to (d), inclusive, are not reasonably adapted to approximate for the applicable year the financial institution's net income derived from business carried on within this commonwealth and may again by reasonable methods determine such income.

SECTION 6. Subsection (c) of section 38 of said chapter 63, as so appearing, is hereby amended by striking out in lines 46 to 48, inclusive, the words "a fraction, the numerator of which is the property factor plus the payroll factor plus twice times the sales factor, and the denominator of which is four", and inserting in place thereof the following words:- a fraction which is the sum of: 18.75 per cent multiplied by the payroll factor, plus 18.75 per cent multiplied by the property factor, plus 62.5 per cent multiplied by the sales factor.

SECTION 7. Said subsection (c) of said section 38 of said chapter 63, as so appearing, is hereby further amended by striking out the words, "18.75 per cent multiplied by the payroll factor, plus 18.75 per cent multiplied by the property factor, plus 62.5", inserted by section 6, and inserting in place thereof the following words:- 12.5 per cent multiplied by the payroll factor, plus 12.5 per cent multiplied by the property factor, plus 75.

SECTION 8. Said subsection (c) of said section 38 of said chapter 63, as so appearing, is hereby further amended by striking out the words, "12.5 per cent multiplied by the payroll factor, plus 12.5 per cent multiplied by the property factor, plus 75", inserted by section 7, and inserting in place thereof the following words:- 6.25 per cent multiplied by the payroll factor, plus 6.25 per cent multiplied by the property factor, plus 87.5.

SECTION 9. Said section 38 of said chapter 63, as so appearing, is hereby further amended by striking out subsection (g) and inserting in place thereof the following subsection:-

(g) If one of the factors is missing, the percentages set forth in subsection (c) shall be increased proportionately such that the sum of the percentages by which the 2 remaining factors are multiplied under this subsection is 1. If 2 factors are missing, the remaining factor is the apportionment percentage. If all 3 factors are missing, the whole of the taxpayer's net income shall be its taxable net income. A factor is missing if both its numerator and denominator are 0, or if it is otherwise determined to be insignificant in producing income.

SECTION 10. Said chapter 63, as so appearing, is hereby further amended by striking out section 38 and inserting in place thereof the following section:-

Section 38. The commissioner shall determine the part of the net income of a business corporation derived from business carried on within the commonwealth as follows:

(a) Net income as defined in section 30 adjusted as follows shall constitute taxable net income:

(1) 95 percent of dividends, exclusive of distributions in liquidation, included therein shall be deducted other than dividends from or on account of the ownership of:

(i) shares in a corporate trust, as defined in section 1 of chapter 62, to the extent such dividends represent tax-free earnings and profits, as defined in section 8 of chapter 62, as in effect on December 31, 2008,

(ii) deemed distributions and actual distributions, except actual distributions out of previously taxed income, from a DISC which is not a wholly owned DISC, or

(iii) any class of stock, if the corporation owns less than 15 per cent of the voting stock of the corporation paying such dividend.

(2) Long-term capital gains realized and long-term capital losses sustained from the sale or exchange of intangible property affected under the provisions of the Federal Internal Revenue Code, as amended, and in effect for taxable years ended on or before December 31, 1962, shall not be included in any part therein.

(b) If the corporation does not have income from business activity which is taxable in another state, the whole of its taxable net income, determined under the provisions of subsection (a), shall be allocated to this commonwealth. For purposes of this section, a corporation is taxable in another state if (1) in that state such corporation is subject to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business, or a corporate stock tax, or (2) that state has jurisdiction to subject such corporation to a net income tax regardless of whether, in fact, the state does or does not. Notwithstanding any other provision of this section, the portion of the taxable net income of a corporation that a non-domiciliary state is prohibited from taxing under the Constitution of the United States shall be allocated in full to the commonwealth if the commercial domicile of the corporation is in the commonwealth.

(c) If a corporation has income from business activity which is taxable both within and without this commonwealth, its taxable net income, as determined under the provisions of subsection (a), shall be apportioned to this commonwealth by multiplying such taxable net income by the sales factor.

(d) The sales factor is a fraction, the numerator of which is the total sales of the corporation in the commonwealth during the taxable year, and the denominator of which is the total sales of the corporation everywhere during the taxable year.

As used in this subsection, unless specifically stated otherwise, ‘‘sales’’ shall mean all gross receipts of the corporation, including deemed receipts from transactions treated as sales or exchanges under the Code, except interest, dividends and gross receipts from the maturity, redemption, sale, exchange or other disposition of securities; provided, however, that ‘‘sales’’ shall not include gross receipts from transactions or activities to the extent that a non-domiciliary state would be prohibited from taxing the income from such transactions or activities under the Constitution of the United States.

(e) Sales of tangible personal property are in the commonwealth for purposes of this section if:

(1) the property is delivered or shipped to a purchaser within the commonwealth regardless of the f.o.b. point or other conditions of the sale; or (2) the corporation is not taxable in the state of the purchaser and the property was not sold by an agent or agencies chiefly situated at, connected with or sent out from premises for the transaction of business owned or rented by the corporation outside the commonwealth. ‘‘Purchaser’’, as used in clauses (1) and (2) shall include the United States government.

(f) Sales, other than sales of tangible personal property, are in the commonwealth for purposes of this section if the corporation’s market for the sale is in the commonwealth. The corporation’s market for a sale is in the commonwealth and the sale is thus assigned to the commonwealth for the purpose of this section:

(1) in the case of sale, rental, lease or license of real property, if and to the extent the property is located in the commonwealth;

(2) in the case of rental, lease or license of tangible personal property, if and to the extent the property is located in the commonwealth;

(3) in the case of sale of a service, if and to the extent the service is delivered to a location in the commonwealth;

(4) in the case of lease or license of intangible property, including a sale or exchange of such property where the receipts from the sale or exchange derive from payments that are contingent on the productivity, use or disposition of the property, if and to the extent the intangible property is used in the commonwealth; and

(5) in the case of the sale of intangible property, other than as provided in clause (4), where the property sold is a contract right, government license or similar intangible property that authorizes the holder to conduct a business activity in a specific geographic area, if and to the extent that the intangible property is used in or otherwise associated with the commonwealth; provided, however, that any sale of intangible property, not otherwise described in this clause or clause (4), shall be excluded from the numerator and the denominator of the sales factor.

(g) If the numerator and denominator of the sales factor are zero or if the sales factor is otherwise determined to be insignificant in producing income, the taxpayer shall determine its sales factor by:

(1) adding to its sales any interest, dividends and gross receipts from the maturity, redemption, sale, exchange or other disposition of securities, and applying the sourcing

provisions for receipts under section 2A to the total adjusted sales amount, as if the taxpayer were a financial institution for purposes of that section; or

(2) if, notwithstanding the adjustments in subsection (g)(1), the numerator and denominator of the sales factor remains zero or if the factor is otherwise determined to be insignificant in producing income, the whole of the taxpayer's net income shall be taxable net income allocated to the commonwealth, provided that the alternative apportionment provisions of subsection (e) of section 2A shall be applicable, as if the taxpayer were a financial institution for purposes of that section.

(h) For the purposes of this section:

(1) in the case of sales, other than sales of tangible personal property, if the state or states to which sales should be assigned cannot be determined, it shall be reasonably approximated;

(2) in the case of sales other than sales of tangible personal property if the taxpayer is not taxable in a state to which a sale is assigned, or if the state or states to which such sales should be assigned cannot be determined or reasonably approximated, such sale shall be excluded from the numerator and denominator of the sales factor;

(3) the corporation shall be considered to be taxable in the state of the purchaser if tangible personal property is delivered or shipped to a purchaser in a foreign country;

(4) sales of tangible personal property to the United States government or any agency or instrumentality thereof for purposes of resale to a foreign government or any agency or instrumentality thereof are not sales made in the commonwealth;

(5) in the case of sale, exchange or other disposition of a capital asset, as defined in paragraph (m) of section 1 of chapter 62, used in a taxpayer's trade or business, including a deemed sale or exchange of such asset, ''sales'' shall be measured by the gain from the transaction;

(6) ''security'' shall mean any interest or instrument commonly treated as a security as well as other instruments which are customarily sold in the open market or on a recognized exchange, including, but not limited to, transferable shares of a beneficial interest in any corporation or other entity, bonds, debentures, notes and other evidences of indebtedness, accounts receivable and notes receivable, cash and cash equivalents including foreign currencies and repurchase and futures contracts;

(7) in the case of a sale or deemed sale of a business, the term ''sales'' shall not include receipts from the sale of the business ''goodwill'' or similar intangible value, including, without limitation, ''going concern value'' and ''workforce in place''; and

(8) in the case of a business deriving receipts from operating a gaming establishment or otherwise deriving receipts from conducting a wagering business or activity, income-producing activity shall be considered to be performed in the commonwealth to the extent that the location of wagering transactions or activities that generated the receipts is in the commonwealth.

(i) (1) As used in this subsection, the following words shall, unless the context requires otherwise, have the following meaning:

''Administration services'', include, but are not limited to, clerical, fund or shareholder accounting, participant record keeping, transfer agency, bookkeeping, data processing, custodial, internal auditing, legal and tax services performed for a regulated investment company, but only

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

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

''Distribution services'', include, but are not limited to, the services of advertising, servicing, marketing or selling shares of a regulated investment company, but, in the case of advertising, servicing or marketing shares, only where such service is performed by a person who is, or in the case of a close end company, was, either engaged in the services of selling regulated investment company shares or affiliated with a person that is engaged in the service of selling regulated investment company shares. In the case of an open end company, such service of selling shares must be performed pursuant to a contract entered into pursuant to 15 USC section a-15(b), as from time to time amended.

''Domicile'', presumptively the shareholder's mailing address on the records of the regulated investment company. If, however, the regulated investment company or the mutual fund service corporation has actual knowledge that the shareholder's primary residence or principal place of business is different than the shareholder's mailing address said presumption shall not control. If the shareholder of record is a company which holds the shares of the regulated investment company as depositor for the benefit of a separate account, then the shareholder shall be the contract owners or policyholders of the contracts or policies supported by the separate account, and it shall be presumed that the domicile of said shareholder is the contract owner's or policyholder's mailing address to the extent that the company maintains such

mailing addresses in the regular course of business. If the regulated investment company or the mutual fund service corporation has actual knowledge that the shareholder's principal place of business is different than the shareholder's mailing address said presumption shall not control.

''Management services'', include, but are not necessarily limited to, the rendering of investment advice directly or indirectly to a regulated investment company, making determinations as to when sales and purchases of securities are to be made on behalf of the regulated investment company, or the selling or purchasing of securities constituting assets of a regulated investment company, and related activities, but only where such activity or activities are performed: (i) pursuant to a contract with the regulated investment company entered into pursuant to 15 USC section a-15(a), as from time to time amended; (ii) for a person that has entered into such contract with the regulated investment company; or (iii) for a person that is affiliated with a person that has entered into such contract with a regulated investment company.

''Mutual fund sales'', taxable net income derived within the taxable year directly or indirectly from the rendering of management, distribution or administration services to a regulated investment company, including net income received directly or indirectly from trustees, sponsors and participants of employee benefit plans which have accounts in a regulated investment company.

''Regulated investment company'', the meaning as set forth in section 851 of the Internal Revenue Code as amended and in effect for the taxable year.

(2) Notwithstanding the foregoing, mutual fund sales, other than the sale of tangible personal property, shall be assigned to the commonwealth to the extent that shareholders of the regulated investment company are domiciled in the commonwealth as follows:

(a) by multiplying the taxpayer's total dollar amount of sales of such services on behalf of each regulated investment company by a fraction, the numerator of which shall be the average of the number of shares owned by the regulated investment company's shareholders domiciled in the commonwealth at the beginning of and at the end of the regulated investment company's taxable year that ends with or within the taxpayer's taxable year and the denominator of which shall be the average of the number of shares owned by the regulated investment company shareholders everywhere at the beginning of and at the end of the regulated investment company's taxable year that ends with or within the taxpayer's taxable year.

(b) A separate computation shall be made to determine the sale for each regulated investment company, the sum of which shall equal the total sales assigned to the commonwealth.

The commissioner shall adopt regulations to implement subsections (d) to (i), inclusive. Nothing in this subsection shall limit the commissioner's authority under subsection (k).

(j) If a corporation maintains an office, warehouse or other place of business in a state other than this commonwealth for the purpose of reducing its tax under this chapter, the commissioner shall, in determining the amount of taxable net income apportionable to this commonwealth, adjust any factor to properly reflect the amount which the factor ought reasonably to assign to this commonwealth.

(k) If the apportionment provisions of this section are not reasonably adapted to approximate the net income derived from business carried on within this commonwealth by any type of industry group, the commissioner may, by regulation, adopt alternative apportionment provisions to be applied to such an industry group in lieu of the foregoing provisions.

(l) In any case in which a purchasing corporation makes an election under section 338 of the Code, the target corporation shall be treated as having sold its assets for purposes of this section.

SECTION 11. Sections 1 and 6 shall take effect for the tax year beginning on January 1, 2025 and ending on December 31, 2025.

SECTION 12. Sections 2 and 7 shall take effect for the tax year beginning on January 1, 2026 and ending on December 31, 2026.

SECTION 13. Sections 3 and 8 shall take effect on January 1, 2025 and shall be effective for all tax years beginning on or after January 1, 2025.

SECTION 14. Sections 4, 5 and 10 shall take effect on January 1, 2026 and shall be effective for all tax years beginning on or after January 1, 2026."