

STATE-LAW, 2007 MA H 4904 , Enacted, (July 3, 2008)
2007 MA H 4904 , Enacted

Massachusetts

Changes in Bill text reflected as:

~~Text Deleted~~

Text Added

~~Text Vetoed~~

SUMMARY: Relates to improving tax fairness and business competitiveness.-SAME__AS:

Current Legislative Status

06/30/2008 INTRODUCED.

06/30/2008 New Draft for a part of H 4672.

06/30/2008 To HOUSE Committee on STEERING, POLICY AND SCHEDULING.

06/30/2008 From HOUSE Committee on STEERING, POLICY AND SCHEDULING. Reported for consideration by HOUSE.

06/30/2008 In HOUSE. Placed on the Orders of the Day.

07/01/2008 CONFERENCE Committee Report adopted by HOUSE.

07/01/2008 CONFERENCE Committee Report adopted by SENATE.

07/01/2008 Passed Both Houses.

07/01/2008 In HOUSE. Emergency Preamble adopted.

07/01/2008 In SENATE. Emergency Preamble adopted.

07/01/2008 *****To GOVERNOR.

07/03/2008 Signed by GOVERNOR.

07/03/2008 Chapter No. 173-2008

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Enacted

July 3, 2008

Report

HOUSE  No. 4904

Chapter 173.

THE COMMONWEALTH OF MASSACHUSETTS

In the Year Two Thousand and Eight.

AN ACT RELATIVE TO TAX FAIRNESS AND BUSINESS COMPETITIVENESS.

Whereas, The deferred operation of this act would tend to defeat its purpose, which is to authorize forthwith changes in the rate and administration of the corporate excise, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.

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

SECTIONS NOT PERTAINING TO THE FILM INCENTIVE HAVE BEEN OMITTED

SECTION 82. Said chapter 63 is hereby further amended by striking out section 38T, as most recently amended by section 10 of chapter 63 of the acts of 2007, and inserting in place thereof the following section:-

Section 38X. (a) As used in this section the following words shall, unless the context clearly requires otherwise, have the following meanings:-

"Commissioner", the commissioner of revenue.

"Motion picture", a feature-length film, a video, a digital media project, a television series defined as a season not to exceed 27 episodes, or a commercial made in the commonwealth, in whole or in part, for theatrical or television viewing or as a television pilot. The term "motion picture" shall not include a production featuring news, current events, weather and financial market reports, talk show, game show, sporting events, awards show or other gala event, a production whose sole purpose is fundraising, a long-form production that primarily markets a product or service, a production containing obscene material or performances.

"Motion picture production company", a company including its subsidiaries engaged in the business of producing motion pictures, videos, television series, or commercials intended for a theatrical release or for television viewing. The term "motion picture production company" shall not mean or include any company which is more than 25 per cent owned, affiliated, or controlled, by any company or person which is in default on a loan made by the commonwealth or a loan guaranteed by the commonwealth.

"Massachusetts production expense", a production expense for the motion picture clearly and demonstrably incurred in the commonwealth.

"Principal photography", the phase of production during which the motion picture is actually filmed. The term shall not include preproduction or postproduction.

"Production expense" or "production cost", preproduction, production and postproduction expenditures directly incurred in the production of a motion picture. The term shall include wages and salaries paid to individuals employed in the production of the motion picture; the costs of set construction and operation, editing and related services, photography, sound synchronization, lighting, wardrobe, make-up and accessories; film processing, transfer, sound mixing, special and visual effects; music; location fees and the cost of purchase or rental of facilities and equipment or any other production expense as may be determined by the department of revenue to be an eligible production expense. The term shall not include costs incurred in marketing or advertising a motion picture, any costs related to the transfer of tax credits or any amounts paid to persons or businesses as a result of their participation in profits from the exploitation of the production.

"Secretary", the secretary of economic development.

(b) A taxpayer engaged in the making of a motion picture shall be allowed a credit against the taxes imposed by this chapter for the employment of persons within the commonwealth in connection with the filming or production of 1 or more motion pictures in the commonwealth within any consecutive 12 month period. The credit shall be equal to 25 per cent of the total aggregate payroll paid by a motion picture production company that constitutes Massachusetts source income, when total production costs incurred in the commonwealth equal or exceed \$50,000 during the taxable year. For purposes of this subsection, the term "total aggregate payroll" shall not include the salary of any employee whose salary is equal to or greater than \$1,000,000.

(c) A taxpayer shall be allowed an additional credit against the taxes imposed by this chapter equal to 25 per cent of all Massachusetts production expenses, not including the payroll expenses used to claim a credit pursuant to subsection (b), where the motion picture is also eligible for a credit pursuant to subsection (b) and either Massachusetts production expenses exceed 50 per cent of the total production expenses for a motion picture or at least 50 per cent of the total principal photography days of the film take place in the commonwealth.

(d) The tax credit shall be taken against the taxes imposed under this chapter and shall, at the election of the taxpayer, be refundable to the extent provided for in section 32E. Any amount of the tax credit that exceeds the tax due for a taxable year may be carried forward by the taxpayer to any of the 5 subsequent taxable years.

(e)(1) All or any portion of tax credits issued in accordance with the provisions of this section may be transferred, sold or assigned to other taxpayers with tax liabilities under this chapter or chapter 62. Any tax credit that is transferred, sold or assigned and taken against taxes imposed by this chapter or said chapter 62 shall not be refundable. Any amount of the tax credit that exceeds the tax due for a taxable year may be carried forward by the transferee, buyer or assignee to any of the 5 subsequent taxable years from which a certificate is initially issued by the department of revenue.

(2) An owner, transferee or assignee desiring to make a transfer, sale or assignment shall submit to the commissioner a statement which describes the amount of tax credit for which the transfer, sale or assignment of tax credit is eligible. The owner, transferee or assignee shall provide to the commissioner such information as the commissioner may require for the proper allocation of the credit. The commissioner shall provide to the taxpayer a certificate of eligibility to transfer, sell or assign the tax credits. The commissioner shall not issue a certificate to a taxpayer that has an outstanding tax obligation with the commonwealth in connection with any motion picture for any prior taxable year. A tax credit shall not be transferred, sold or assigned without a certificate.

(f) The commissioner, in consultation with the secretary, shall promulgate regulations necessary for the administration of this subsection.

SECTION 83. Said chapter 63 is hereby further amended by striking out section 38T, inserted by section 28 of chapter 163 of the acts of 2005, and inserting in place thereof the following section:-

Section 38Y. (a) Every business corporation which is exempt from taxation under section 501 of the Code shall be subject to tax under section 39 on its unrelated business taxable income, as defined in section 512 of the Code. The property or net worth of those corporations shall not be subject to tax under this chapter, and the minimum excise under section 39 shall not apply. If a corporation has unrelated business taxable income that is taxable both within and without the commonwealth, it may apportion its net income to the commonwealth under section 38, but its apportionment factors shall be determined by reference only to the unrelated business

activity of the corporation. The credits allowed under this chapter shall be determined only with respect to the unrelated business activity of the corporation.

(b) An entity that is exempt from taxation under section 501 of the Code shall not be considered to be a business corporation for purposes of chapter 59.

SECTION 84. Said chapter 63, as appearing in the 2006 Official Edition, is hereby further amended by striking out section 39 and inserting in place thereof the following section:-

Section 39. Except as otherwise provided in this section, every business corporation, organized under the laws of the commonwealth, or exercising its charter or other means of legal authority, or qualified to do business or actually doing business in the commonwealth, or owning or using any part or all of its capital, plant or any other property in the commonwealth, shall pay, on account of each taxable year, the excise provided in subsection (a) or (b), whichever is greater, except that an insurance mutual holding company established under chapter 175 or under the equivalent law of another state shall pay, on account of each taxable year, only the excise provided in clause (2) of subsection (a) or subsection (b), whichever is greater.

Without limitation, the excise levied in this section is due and payable on any 1 or all of the following alternative incidents:-

(1) The authority or qualification to carry on or do business in this state or the actual doing of business within the commonwealth. The term "doing business" as used herein shall mean and include each and every act, power, right, privilege, or immunity exercised or enjoyed in the commonwealth, as an incident to or by virtue of the powers and privileges acquired by the nature of those organizations, as well as, the buying, selling or procuring of services or property.

(2) The exercising or continuance of a business corporation's charter or other means of legal authority within the commonwealth.

(3) The owning or using any part or all of its capital, plant or other property in the commonwealth.

It is the purpose of this section to require the payment of this excise to the commonwealth by a business corporation for the enjoyment under the protection of the laws of the commonwealth, of the powers, rights, privileges and immunities derived by reason of its existence and operation.

In the case of a business corporation whose taxable year is a period of less than 12 calendar months, the portion of the amount determined under clause (1) of subsection (a) shall be multiplied by a fraction whose numerator is the number of months included in the taxable year and whose denominator is 12.

(a) An amount equal to the sum of:-

(1) \$2.60 per 1,000 upon the value of: (i) its tangible property as determined to be taxable under paragraph 7 of section 30 if a tangible property corporation; or (ii) its net worth as determined to be taxable under paragraph 8 of section 30 if an intangible property corporation; and

(2)(i) For tax years beginning before January 1, 2010, 9.5 per cent of its net income determined to be taxable in accordance with this chapter; (ii) for tax years beginning on or after January 1, 2010, but before January 1, 2011, 8.75 per cent of its net income determined to be

taxable in accordance with this chapter; (iii) for tax years beginning on or after January 1, 2011, but before January 1, 2012, 8.25 per cent of its net income determined to be taxable in accordance with this chapter; or (iv) for tax years beginning on or after January 1, 2012, 8.0 per cent of its net income determined to be taxable in accordance with this chapter.

(b) \$456.

A business corporation shall not be subject to the income measure of tax under clause (2) of subsection (a) if it is engaged in the business of selling tangible personal property and taxation of that business corporation under this chapter is precluded by the constitution or laws of the United States, or would be so precluded except for the fact that the business corporation stored tangible personal property in a licensed public storage warehouse, but no portion of any warehouse which is owned or leased by a consignor or consignee of the tangible personal property shall be considered a licensed public warehouse. A business corporation exempt from the income measure of the excise under this paragraph pursuant to federal Public Law 86-272 shall be subject to the excise under clause (1) of subsection (a) or subsection (b), whichever is greater.

SECTION 85.

A business corporation shall not be subject to the income measure of tax under clause (2) of subsection (a) if it is engaged in the business of selling tangible personal property and taxation of that business corporation under this chapter is precluded by the Constitution or laws of the United States, or would be so precluded except for the fact that the business corporation stored tangible personal property in a licensed public storage warehouse, but no portion of any warehouse which is owned or leased by a consignor or consignee of the tangible personal property shall be considered a licensed public warehouse. A business corporation exempt from the income measure of the excise under this paragraph pursuant to federal Public Law 86-272 shall nevertheless be subject to the excise under clause (1) of subsection (a) or subsection (b), whichever is greater.

SECTION 85. Said chapter 63 is hereby further amended by striking out section 42B, as so appearing, and inserting in place thereof the following section:-

Section 42B. (a) Every business corporation subject to taxation under section 39 that has a usual place of business in the commonwealth, and is engaged in manufacturing in the commonwealth, or engaged in the commonwealth in research and development shall, for the purposes of this chapter, be considered to be a manufacturing corporation or a research and development corporation. Every manufacturing corporation shall be taxed in the same manner and shall have the same duties under this chapter and chapter 62C as other business corporations subject to taxation under section 39, except insofar as the determination of the excise under this chapter may be affected by reason of the exemption from local taxation of the machinery of a manufacturing corporation.

(b) A research and development corporation for the purposes of this section is a business corporation subject to tax under section 39 whose principal activity herein is research and development and which, during the taxable year, derives more than 2/3 of its receipts attributable to the commonwealth from the activity or incurs more than 2/3 of its expenditures attributable to the commonwealth allocable to the activity, but a corporation that qualifies as a research and development corporation only by reason of its expenditures shall not be entitled to the credit provided in section 31A of chapter 63 by virtue of its qualification as a research and development corporation. A corporation that is engaged in research and development and that conducts manufacturing activities shall exclude expenditures related to manufacturing from total expenditures for the purpose of assessing whether 2/3 of expenditures are allocable to research

and development, whether or not the manufacturing activities of the corporation are substantial. Receipts from research and development shall include receipts from the provision of research and development services and from royalties or fees derived from the licensing of patents, know-how or other technology developed from research and development. For purposes of this section, research and development is experimental or laboratory activity having as its ultimate goal the development of new products, the improvement of existing products, the development of new uses for existing products, or the development or improvement of methods for producing products; and does not include testing or inspection for quality control purposes, efficiency surveys, management studies, consumer surveys or other market research, advertising or promotional activities, or research in connection with literacy, historical or similar projects. Nothing in this section shall be construed to provide for an exemption from local taxation of the machinery of a corporation considered to be a research and development corporation which is not considered to be a manufacturing corporation.

(c) For purposes of this section and section 38, the development and sale of standardized computer software shall be considered a manufacturing activity, without regard to the manner of delivery of the software to the customer.

SECTION 86. Section 52 of said chapter 63, as so appearing, is hereby amended by striking out the first 4 sentences and inserting in place thereof the following 2 sentences: - If any of the provisions of this chapter imposing an excise on business corporations as defined in subsection (1) of section 30 are declared unconstitutional or inoperative by a final judgment, order or decree of the supreme court of the United States or of the supreme judicial court of the commonwealth, the portion of those provisions that was found to be unconstitutional or inoperative shall be null and void and shall become inapplicable to those corporations. In this event, the provisions of law, whether under this chapter or chapter 62, that (a) were applicable to those business corporations immediately before the enactment of the provision found to be unconstitutional or inoperative and (b) became inoperative or inapplicable in connection with the enactment of the provision found to be unconstitutional or inoperative, shall thereupon be revived and become operative and applicable in respect to those business corporations and shall be continued in full force and effect from the first day of January preceding by 6 years the first day of January of the calendar year in which the final judgment, order or decree is entered, to the same extent as if the provision found to be unconstitutional or inoperative had not been enacted.

SECTION 87. Said section 52 of said chapter 63, as so appearing, is hereby further amended by striking out the last 3 sentences and inserting in place thereof the following 3 sentences:- Excises declared invalid by reason of the foregoing premises, which were assessed on or after the date when predecessor laws are revived, made operative or applicable or continued in force as provided in this section, shall, to the extent that those excises have been paid and are unrefunded, be credited against the taxes assessed for the same period under the laws revived and again made operative, applicable and continued in force, but if this credit exceeds the taxes due, the excess shall be refunded upon warrant of the commissioner to the state treasurer. There shall be no further or other recovery of the amounts thus credited or refunded. If any provision of this chapter other than the provisions imposing an excise shall be declared unconstitutional or inoperative, the remaining provisions shall not be affected.

SECTION 88. Subsection (1) of section 52A of said chapter 63, as so appearing, is hereby amended by striking out paragraph (a) and inserting in place thereof the following paragraph:-

(a) "Utility corporation" means every business corporation that is (i) an electric company and gas company subject to chapter 164; (ii) a water company and aqueduct company subject to chapter 165; (iii) a telephone and telegraph company subject to chapter 166; (iv) a railroad and railway company subject to chapter 160; and every business corporation qualified under section 131A of said chapter 160 to acquire, own and operate terminal facilities for steam, electric or other types of railroad; (v) a street railway subject to chapter 161; (vi) an electric railroad subject

to chapter 162; (vii) a trackless trolley company subject to chapter 163; (viii) a pipe line company engaged in the transportation or sale of natural gas within the Commonwealth; and (ix) every foreign corporation which is not subject to the above chapters but which does an electric, gas, water, aqueduct, telephone, telegraph, railroad, railway, street railway, electric railroad, trackless trolley or bus business within the Commonwealth and has, before January 1, 1952, been subject to taxation under sections 53 to 60, inclusive.

SECTION 89. Said chapter 63 is hereby further amended by inserting after section 68A the following section:-

Section 68C. In general, a business corporation as defined in section 30 is subject to an excise under section 39, as provided in that section, and as modified by section 32D in the case of S corporations and by section 38Y in the case of entities qualifying under section 501 of the Code. Notwithstanding this general rule or any other provision of this chapter, the excise under section 39 shall not apply in the case of a business corporation that is:-

(1) a financial institution, as defined in section 1, that is subject to excise under section 2 or 2B;

(2) a security corporation as defined in section 38B and subject to excise under that section;

(3) a utility corporation as defined in section 52A and subject to excise under that section;

(4) an insurance company subject to excise under sections 20 to 29E, inclusive;

(5) an urban redevelopment corporation subject to excise under section 10 of chapter 121A;

(6) a corporation described in section 10 or section 18 of chapter 157;

(7) a corporation described in section 1 of chapter 171;

(8) a corporation or other entity that qualifies as a regulated investment company under section 851 of the Code; or

(9) a business corporation otherwise expressly exempted from the excise under this chapter by any other general law.

SECTION 90. Chapter 63A of the General Laws is hereby amended by striking out section 2, as appearing in the 2006 Official Edition, and inserting in place thereof the following section:-

Section 2. Against every taxpayer there shall be levied, assessed and collected an excise at the rate of 0.57 per cent of such taxpayer's gross receipts.

SECTION 91. Section 10 of chapter 63B of the General Laws, as so appearing, is hereby amended by striking out, in line 3, the word "domestic".

SECTION 92. Section 18 of chapter 546 of the acts of 1969 is hereby repealed.

SECTION 93. Section 21 of said chapter 546 is hereby repealed.

SECTION 94. Chapter 63 of the acts of 2007 is hereby amended by striking out the section 13 and inserting in place thereof the following section:-

Section 13. Notwithstanding any general or special law to the contrary, the commissioner of revenue shall annually, not later than December 31, report in writing to the house and senate committees on ways and means on the status of the film tax credit established pursuant to section 6 of chapter 62, inserted by section 2 of chapter 158 of the acts of 2005, section 38X of chapter 63 and section 6 of chapter 64H of the General Laws. The report shall include, but not be limited to, the motion picture production activity generated by the tax credits and the net revenue impact of the tax credits.

SECTION 101. Sections 2 to 93, inclusive, shall be effective for tax years beginning on or after January 1, 2009.

SECTION 102. Section 1 and sections 94 to 100, inclusive, shall take effect upon enactment.