

Telecommuters Assigned to the NY Location of Their Employer but Working Outside NY Due to the Pandemic May Be Taxed Twice

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After a year of New York taxpayers having to deal with COVID-19 and getting some additional time to file, income tax returns for the year 2020 (not on extension) are being reviewed. Upon reviewing tax returns, the New York State Department of Taxation & Finance (Department) has sent notices to nonresidents who usually work from the NY office of their employers and who allocated income to the location where they worked remotely (outside NY) during the past year, asking them about the allocation of wages subject to New York personal income tax. The inquiries are based upon the Department's position that compensation for employees who regularly work at the New York office of their employer is subject to NY income tax and is New York source income as provided in the "Convenience of the Employer Test," citing [TSB-M-06\(5\)I:\(5/06\):New York Tax Treatment of Nonresidents and Part-Year Residents Application of the Convenience of the Employer Test to Telecommuters and Others: tsbm065i \(ny.gov\)](#).

A simple statement of that policy is on the Department's website [[Frequently Asked Questions about Filing Requirements, Residency, and Telecommuting for New York State Personal Income Tax \(ny.gov\)](#)] and states:

If you are a nonresident whose primary office is in New York State, your days telecommuting during the pandemic are considered days worked in the state unless your employer has established a bona fide employer office at your telecommuting location. There are a [number of factors](#) that determine whether your employer has established a bona fide employer office at your telecommuting location. In general, unless your employer specifically acted to establish a bona fide employer office at your telecommuting location, you will continue to owe New York State income tax on income earned while telecommuting.

The notices inform taxpayers that their returns have been selected for a desk audit to examine whether the taxpayer's alternate work location qualifies as a bona fide office of the employer. That

determination requires analyzing the primary, secondary, and other factors listed in TSB-M-06(5)I.

These audits can arise in two ways: 1) a nonresident who normally works in an office in NY who worked from home or elsewhere during the pandemic and allocated income to the location where the work was performed, or 2) a New York resident who worked outside NY in a state that imposes tax based on the location where they worked, who claims a credit for taxes paid to that other state, which credit the Department may disallow based on its position that the income is NY source income.

Analyzing what had been a long-standing policy starts with Tax Law §§ 633 & 638 that imposes tax on New York source income of a nonresident or part-year resident. The Regulations (20 NYCRR §138.1) define what is NY source income for wage earners stating:

income derived from New York State sources includes that proportion of his total compensation for services rendered as an employee which the total number of working days employed within New York State bears to the total number of working days employed both within and without New York State. The items of gain, loss and deduction (other than deductions entering into the New York itemized deduction) of the employee attributable to his employment, derived from or connected with New York State sources must be based upon the performance of services which of necessity, as distinguished from convenience, are similarly determined. However, any allowance claimed for days worked outside New York State, obligate the employee to out-of-state duties in the service of his employer.

The New York State Tax Appeals Tribunal has upheld the Department's interpretation of the convenience of the employer test quoting the Court of Appeals:

a nonresident who performs services in New York or has an office in New York is allowed to avoid New York State tax liability for services performed outside the State only if they are performed of necessity in the service of the employer. Where the out-of-State services are performed for the employee's convenience they generate New York State tax liability. Citing *Matter of Speno v. Gallman*, 360 NYS2d 855, at 857-858.

Neither the previous cases, the statute, nor the regulations deal with an instance where the governor's executive orders closed businesses and offices. Those orders seem to demonstrate the necessity for the services to be performed at an alternative location.

New York is one of the few states (Arkansas, Connecticut, Delaware, Nebraska, New Jersey, and Pennsylvania are the others) that had a 'Convenience of the Employer' policy prior to the pandemic and Massachusetts adopted an emergency regulation (830 CMR 62.5A.3) putting that policy into effect for the duration of the pandemic. In response, New Hampshire, a state without an income tax, brought suit in the U.S. Supreme Court claiming that Massachusetts' taxation of NH residents who had worked in MA pre-pandemic but worked from home in NH during the pandemic is unconstitutional. (The U.S. Solicitor General filed papers in the case of *New Hampshire v. Massachusetts* (Docket No. 220154), saying the Court should not take the case.) In addition, over the years federal legislation has been introduced to limit states' ability to tax nonresident telecommuting

(Multi-State Worker Tax Fairness Act of 2020; H.R. 4085; S. 2347). The prospect for the Supreme Court or Congress taking action in this area is unclear.

For some, the amounts in issue may not be significant enough to justify contesting the audit, and for others their home states may allow a credit for the additional tax paid to New York. However, many taxpayers will be faced with paying state tax twice on the same income, a result that is inconsistent with constitutional requirements of having state taxes fairly apportioned and reasonably related to the services provided by the taxing state. In view of those principles, it is difficult to see how NY can impose income tax on nonresidents who, under executive orders of the governor, could not have spent any time working in NY from March through December 2020.

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