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ISSUE HIGHLIGHTS

Upcoming Meeting

p. 2

Telecommuting

p. 7

Reporting Crypto

p. 10

The Longest Tax Season Ever

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Telecommuting: New York Brings the Taxes Home

By Yvonne R. Cort



What was once cutting edge is now routine, and an increase in remote working and telecommuting is probably here to stay. For those workers who live in another state and commute to New York, or those who have moved – or plan to move - out of New York, the question posed to the tax professional is: am I obligated to pay tax to New York when I’m hardly ever there?

It’s a reasonable question. It is not uncommon for a taxing jurisdiction to look at the physical location of the employee at the time the services were rendered. As a result, a nonresident employee who works from home might pay tax to the state where he or she lives, rather than where his or her employer’s office is located.

The New York telecommuting rule is more restrictive and more complicated. New York evaluates whether the nonresident employee working at home is doing so for convenience or from necessity. In applying the convenience/necessity test, the State considers whether the employer has established a bona fide employer office at the nonresident’s telecommuting location. If not, then in general, the income is considered New York source income.

New York State issued guidance, which can be found on the NYS Dept of Taxation and Finance website [here](#), directly addressing nonresidents who are telecommuting from outside the State, due to the pandemic. There was no discussion of the [government lockdown](#) or “convenience”. If the nonresident’s primary office is located in New York State, then the days spent telecommuting are treated as days worked in New York. However, if the taxpayer can show that the employer has established a bona fide employer office at the taxpayer’s home or the place from which he or she is telecommuting, then the income earned would not be subject to New York State income tax. In other words, the usual telecommuting rules apply even when remote working is due to the pandemic.

Pursuant to the State’s tax memorandum from 2006, [TSB-M-06\(5\)](#) , referenced in the State tax guidance, the taxpayer must meet numerous factors in order for his or her home to qualify as a bona fide employer office. The test is detailed and fact sensitive; and the requirements are not easily satisfied.

As an indication of the State’s strong enforcement of the telecommuting rule for 2020 income, there has been anecdotal reporting of increased audits and requests for information related to filed 2020 nonresident income tax returns, where the nonresident works for a NYS employer.

There is an exception, which is often overlooked. The convenience/necessity rule applies to nonresidents who perform services both in and outside of New York State. A nonresident who performs personal services wholly outside of New York State is not subject to NYS tax on that compensation, even if the employer is a resident individual, partnership or corporation. 20 CRR-NY 132.4 (b).

There is a glimmer of hope for telecommuting taxpayers. The State of New Hampshire has brought a [lawsuit](#) against Massachusetts in the U. S. Supreme Court, asserting that Massachusetts is unconstitutionally exceeding its authority, by taxing New Hampshire residents who work from home for Massachusetts employers. If the Supreme Court agrees to hear the case, and its decision is in favor of New Hampshire, there likely will be repercussions for New York’s telecommuting rule.

Until then, due to the difficulty of meeting New York’s telecommuting requirements, most nonresident taxpayers should be prepared to continue to pay New York State tax while working from home for a New York employer.

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