



Podcast Transcript

New Hampshire v. Massachusetts: Are There Broader State Tax Implications?

Date: December 28, 2020

Host: Matt Hunsaker

Run Time: 10:42

For questions and comments contact:



Matt Hunsaker

Partner
Dallas

San Francisco
T: +1.214.210.1214 | mhunsaker@bakerlaw.com

Hunsaker: Hey there, folks. Welcome to the State Tax Show. This is Matt Hunsaker. Today we're going to finish off Season 3 strong, with an overview of New Hampshire's attempts to sue Massachusetts.

Well, I hope the holidays are treating you well, and that you're looking forward to a good new year. We here at the State Tax Show are also looking forward to a new year and closing out Season 3 of the podcast. It's only fitting that we conclude Season 3 with a COVID-related topic, and that is New Hampshire's attempts to sue Massachusetts.

Some of you may not be familiar with the lawsuit, so let me set the stage for why it exists. Back in October, Massachusetts issued a regulation called, and here's a quote, Massachusetts Source Income of Non-Residents Telecommuting Due To the COVID-19 Pandemic. What this regulation basically says is that if a non-resident worked in Massachusetts immediately before the COVID emergency but is now working outside Massachusetts due to a, quote, "pandemic-related circumstance," well then, that non-resident employee's wages and salary are treated as Massachusetts source income and subject to Massachusetts income tax withholding.

Now, you may be scratching your head and wondering if you heard that right. Trust me, you did. Massachusetts has decided that it can tax non-residents as if they were working in Massachusetts if the only reason that they're gone is due to the pandemic. Now, there are a few nuances to the regulations, such as how to

apportion your income based on days worked in Massachusetts versus days worked outside Massachusetts, because that kind of breaks down with the new rule, so basically you get to use your apportionment percentage from January through February of 2020, or alternatively, you could use your 2019 apportionment percentage, but you can't use March through December of 2020.

The regulation, when it was promulgated back in October, was only valid until the earlier of December 31, 2020 or 90 days after the Massachusetts state of emergency was no longer in effect. So, earlier this month, with December 31 rapidly approaching, Massachusetts re-adopted the emergency regulation to make it effective simply until 90 days after the pandemic.

So, you may be asking yourself, where does New Hampshire fit into all of this? Well, Massachusetts will grant a credit for taxes paid to another state, but New Hampshire does not tax wages and salaries, so its residents previously working in Massachusetts pay tax to Massachusetts but get no credit in New Hampshire, and so, if you think about it, what New Hampshire's basically arguing is, and I'll just use a quote from them, that "it's a direct attack on a defining feature of the State of New Hampshire's sovereignty [..., its] deliberate choice to reject a broad-based personal earned income tax or general sales tax." So basically, New Hampshire doesn't think that a broad-based personal earned income tax should apply to its residents, but because Massachusetts is taxing them, essentially, Massachusetts is undermining New Hampshire's policy and taking the money of its residents.

New Hampshire also said that this policy poses a health risk because the Massachusetts governor said, hey, go home to work, but for New Hampshire residents this tax policy somewhat disincentivizes that, or at least takes away the benefit of going back to New Hampshire.

Now, it's my own personal opinion that New Hampshire, or at the very least the non-resident employees, have a pretty strong argument that the policy violates the Commerce Clause and the Due Process Clause. I mean, not just some peripheral arguments, but there are some real core substantive issues with this policy.

But ultimately, that's for the courts to decide, so the question is, which courts? Well, back in October, New Hampshire filed a Brief in Support of a Motion for Leave to File a Bill of Complaint. Essentially, they asked for permission to sue Massachusetts in the Supreme Court, or in other words, for the Supreme Court to take original jurisdiction over the matter as a suit between states. Well, earlier this month, December 11, to be exact, Massachusetts filed a brief and argued that the Court's original jurisdiction is not appropriate because the aggrieved non-residents can sue in Massachusetts courts. Seems to make a little bit of sense, but the problem with this approach, according to those on New Hampshire's side, is that this is really a matter of state sovereignty, and individual taxpayers are not equipped to fight that fundamental battle, especially since many of them just simply may not have the means or will to fight it in Massachusetts courts.

So, right now, we are working through whether the U.S. Supreme Court is going to hear the case. They already rejected Arizona's case against California earlier this year. I think we talked about that. That dealt with the taxation of out-of-state LLCs by California. But I think this one has a lot more meat to it, and a lot more states are interested. In fact, last week, on December 21, ten states filed an amicus brief essentially attacking the Court's precedent of requiring a state to ask for permission to sue another state. They don't like the Court's discretion as to whether or not to hear the case, and here's a good quote from that brief. They said, "to deny the states access to this Court in interstate disputes is to deny them an important part of the consideration they received for agreeing to join the Union." So, that's some pretty strong language there. These ten states weren't the only states that filed in support of New Hampshire. The very next day, another four states filed a brief in support of the Supreme Court taking the case. These states were New Jersey, Connecticut, Hawaii and Iowa, and they argued that because they provide a credit to non-residents for taxes that those non-residents pay to other states — and this is really the typical structure that's in place in most states to avoid double taxation—because of this feature of their tax code, states that aggressively tax non-residents, and for purposes of this brief they named Arkansas, Delaware, Nebraska, New York, Pennsylvania and Massachusetts, these states are siphoning off in-state tax revenue.

So, I think this case is going to be more important, not just for this temporary Massachusetts regulation, but perhaps the more important question of whether the convenience of the employer test is valid. For those of you who aren't familiar with that test, it is the test made most famous by New York, where New York taxes income earned by an employee tied to a New York office if they perform their work outside of New York for any reason other than the convenience of the employer. So you could be tied to a New York office, live and work in another state and still be considered working in New York and have to pay New York taxes on your salaries and wages. Now, New York courts have blessed that, but I think we'd all like a fresh set of eyes on that particular method of taxing non-residents.

Now, it's not just the states that are supporting this request to hear the case. We also have a number of public policy groups, such as the National Taxpayers Union Foundation, the Tax Foundation, the Cato Institute and Americans for Tax Reform, who are also arguing that this case should be heard. So, I think there really is a groundswell of support for New Hampshire's request for leave to file this complaint, but for now we'll just have to wait and see what the court will do with it, so stay tuned for that.

As we conclude this third season of the show, I just really wanted to express my thanks to all of those who have been guests on the show, to BakerHostetler for sponsoring it, but most of all to each of you faithful listeners. Thank you so much. Your support is what keeps me going. We'll be back next Monday with Season 4. Until then, have yourselves a great New Year's.

Disclaimer: The State Tax Show podcast is produced by Baker & Hostetler LLP, and is for informational purposes only. It is intended to inform our clients and

other friends of the firm about current legal developments of general interest. Issues discussed should not be construed as legal advice, and listeners should not act upon the information contained in this podcast without professional counsel. In some jurisdictions this podcast may constitute attorney advertising. The hiring of a lawyer is an important decision that should not be based solely upon advertisements. Please visit bakerlaw.com for more information about our practices and experience.