

**ATTORNEY GENERAL
DEPARTMENT OF JUSTICE**

33 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301-6397

GORDON J. MACDONALD
ATTORNEY GENERAL



JANE E. YOUNG
DEPUTY ATTORNEY GENERAL

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VIA ELECTRONIC MAIL (RulesandRegs@dor.state.ma.us)

Massachusetts Department of Revenue
Rulings and Regulations Bureau
Post Office Box 9566
Boston, Massachusetts 02114-9566

Re: Comments on Proposed Regulation 830 CMR 62.5A.3

Dear Commissioner Snyder:

In my capacity as the chief legal officer of the State of New Hampshire, I submit the following comments with respect to proposed 830 CMR 62.5A.3, published by the Massachusetts Department of Revenue on July 21, 2020 (the "Emergency Income Tax Rule"). The Emergency Income Tax Rule would impose a retroactive change in how Massachusetts taxes income of nonresidents earned for work performed outside of the Commonwealth. When compared to the current rules, the Emergency Income Tax Rule would result in an immediate income tax increase for New Hampshire residents required to work from a location within New Hampshire due to the COVID-19 pandemic.

Governor Sununu has directed a comprehensive review of the Emergency Income Tax Rule – and any similar actions by other states – to determine if New Hampshire residents are being subject to improper taxation. That review is ongoing. Nevertheless, it is clear that the Emergency Income Tax Rule implicates not only the interests of New Hampshire residents, but also the State of New Hampshire's fundamental interests as a sovereign. Our early review raises significant concerns regarding the legality of the Emergency Income Tax Rule. Accordingly, for the reasons discussed below, I respectfully request that the Massachusetts Department of Revenue rescind or modify the Emergency Income Tax Rule to eliminate the unfair, unexpected, retrospective, and extraterritorial income tax increase on New Hampshire's residents as well as the infringement on the sovereign jurisdiction of the State of New Hampshire.

A. Background

Prior to the Emergency Income Tax Rule, a nonresident was taxed only on his or her Massachusetts-source income. Under existing tax regulations, a nonresident was only taxed on

the portion of her income determined by the number of days spent working in Massachusetts (the “Daily Allocation Rule”). So, if a New Hampshire resident worked a total of 240 days, with 80 at an office located in Boston and the rest from her home in New Hampshire, the current rule would only treat one-third of her total income as Massachusetts source income subject to Massachusetts tax (80 days in Massachusetts, divided by 240 total working days).

The Emergency Income Tax Rule purports to replace the Daily Allocation Rule with a rule that deems income attributable to work done outside of Massachusetts to be Massachusetts source income, and therefore subject to Massachusetts income tax. By its terms, the proposed Rule applies only to “compensation received for services performed by a non-resident who, immediately prior to the Massachusetts COVID-19 state of emergency was an employee engaged in performing such services in Massachusetts, and who is performing services from a location outside Massachusetts due to a Pandemic-Related Circumstance.”

The Emergency Income Tax Rule “is effective through the earlier of December 31, 2020, or 90 days after the date on which the Governor of the Commonwealth gives notice that the state of emergency declared in Executive Order 591 is no longer in effect.” While the Rule itself is silent on when it becomes effective, TIR 20-10 indicates that it “supersedes” TIR 20-5, which was issued on April 21, 2020, and applied the Emergency Income Tax Rule retrospective to March 10, 2020. It therefore appears that the Emergency Income Tax Rule is intended to apply retrospectively to March 10, 2020.

Accordingly, under this Emergency Income Tax Rule, if the New Hampshire resident described above is required to work from her home in New Hampshire for the entire period from March 2020 to December 31, 2020 “due to a Pandemic-Related Circumstance,” then her entire income for that period would be treated as Massachusetts source and subject to Massachusetts tax. In contrast, if she decides to work from home for reasons other than “a Pandemic-Related Circumstance,” the existing Daily Allocation Rule would apply and she would owe no Massachusetts income tax on such non-Massachusetts source income. In other words, the Emergency Income Tax Rule imposes a retrospective, extraterritorial tax penalty on New Hampshire residents who comply with important government orders and employer instructions by staying in their New Hampshire homes in order to protect the public health.

B. The Proposed Rule Should Be Rescinded or Modified

New Hampshire residents have important legal interests in the Emergency Income Tax Rule in their capacities as individual taxpayers. Indeed, as noted above, individuals who reside in New Hampshire and who, in order to protect the public health, work remotely within New Hampshire are now subject to Massachusetts income taxes that they would not have been subject to under the Daily Allocation Rule.

However, the implications of the Emergency Income Tax Rule are not limited solely to private interests. The Emergency Income Tax Rule infringes upon the State of New Hampshire's fundamental interests as a sovereign. New Hampshire, exercising its constitutional taxing power, has rejected more traditional corporate and personal income and sales tax systems in favor of a low-rate, economically-neutral, easier-to-administer business activity tax system. This was an intentional policy choice designed to attract and encourage economic development and jobs within New Hampshire. And New Hampshire's rejection of an individual earned income tax has been longstanding, consistent, express, clear, and bipartisan.

Under the Emergency Income Tax Rule, an individual who has chosen to reside in New Hampshire and who works exclusively within New Hampshire may nonetheless be subject to an individual income tax imposed extraterritorially by a separate sovereign. This is incompatible with New Hampshire's unique sovereign policy choices. It also raises several significant legal concerns.

First, the statute governing the Commonwealth's taxation of nonresidents expressly limits that authority "solely . . . to items of gross income from sources within the commonwealth." M.G.L. c. 62 § 5A(a). Consistent with this limited authority, the Commissioner of the Massachusetts Department of Revenue is authorized to adopt regulations "providing for the method of determining the items and amounts of Massachusetts gross income derived from sources within the commonwealth by a non-resident, based upon the method set forth in section thirty-eight of chapter sixty-three or upon any other reasonable method." M.G.L. c. 62, § 5A(b). The proposed Emergency Income Tax Rule is inconsistent with this clear statutory authority because it provides for the taxation of nonresident income earned outside of Massachusetts. In contrast, the existing Daily Allocation Rule is consistent with the statutory authority because it requires an allocation method that is reasonably directed to distinguish between income from sources within the Commonwealth and from non-Massachusetts sources. Because the proposed rule exceeds statutory authority, the Massachusetts Department of Revenue should rescind it and leave in place the existing Daily Allocation Rule.

Second, the Emergency Income Tax Rule is, by its terms, unclear and overbroad. The proposed rule purports to convert "*all* compensation received for services performed by a non-resident" to taxable Massachusetts-source income for any nonresident (1) "who, immediately prior to the Massachusetts COVID-19 state of emergency was an employee engaged in performing such services in Massachusetts," and (2) "who is performing services from a location outside Massachusetts due to a Pandemic-Related Circumstance." While the definition of "Pandemic-Related Circumstance" gives some general examples of circumstances to which the Emergency Income Tax Rule might apply, it also includes the catchall "*any other work arrangement* in which an employee who performed services at a location in Massachusetts prior to the Massachusetts COVID-10 state of emergency performs such services from a location outside Massachusetts during a period in which [the Emergency Income Tax Rule] is in effect." Prop. Rule 830 CMR 62.5A.3(2) (emphasis added). This catchall clause swallows the rule, subjecting

any person who begins working remotely outside of Massachusetts while the Emergency Income Tax Rule is in effect to Massachusetts income tax regardless of reason for the remote-working arrangement. Accordingly, the clause should be deleted. Even with this deletion, however, the terms of the proposed regulation remain unclear and confusing (e.g., it does not identify what type of activity constitutes performance within Massachusetts “immediately prior” to the emergency or what “performing such services in Massachusetts” means). Further, the removal of the aforementioned clause would not eliminate the constitutional concerns addressed below.

Third, the Emergency Income Tax Rule raises constitutional concerns. Under the Due Process Clause and the Commerce Clause, a state is empowered to impose tax on its residents on income from all sources, but to tax nonresidents only on income derived from sources within the state. *See Shaffer v. Carter*, 252 U.S. 37, 52 (1920). The limitation on the power of a state to tax nonresidents on income earned when they work outside the taxing state reflects the fundamental due process requirement that “the taxing power exerted by the state bears fiscal relation to protection, opportunities, and benefits given by the state.” *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940). And the Emergency Income Tax Rule also raises significant Commerce Clause concerns because it results in double taxation and “inherently discriminates against interstate commerce without regard to the tax policies of other States.” *Comptroller of Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1802 (2015). Attempts by states to extend their income tax regimes extraterritorially to earnings by nonresidents from sources outside the state are, in the words of a leading treatise on state taxation, “vulnerable to constitutional attack under the Due Process Clause and the Commerce Clause.” J. Hellerstein & W. Hellerstein, *State Taxation*, ¶ 20.05[4][e][i] (challenging New York’s assertion of a “convenience of the employer” rule that treats income earned by nonresidents working at home as taxable New York source income).

Fourth, the Emergency Income Tax Rule contravenes principles of comity that the State of New Hampshire believes are vital to observe, especially during these very challenging times. Since the outset of the COVID-19 pandemic, states have worked cooperatively to protect public health and to provide relief from unprecedented economic threats to citizens, workers, families, and children. Individuals and businesses have taken extraordinary steps to promote and protect public health and safety, including a drastic increase in remote working. This increase is not a matter of convenience, but rather a concerted civic effort. In addition, state governments have worked hard to provide economic support to citizens and businesses during this period of substantial economic uncertainty. The Emergency Income Tax Rule undermines that effort by imposing a retroactive, extraterritorial income tax on individuals who are doing their civic duty to protect the broader public health at a time when they can least afford an unexpected new cost. This sudden reversal of policy fails to respect the important governmental interests of a neighboring sovereign.

C. Conclusion

For the reasons set forth above, I request, in my capacity as chief legal officer of the State of New Hampshire, that the Massachusetts Department of Revenue rescind or modify the proposed Emergency Income Tax Rule such that the Daily Allocation Rule continues to apply in all circumstances to New Hampshire citizens. This course of action would avoid the significant legal concerns identified above.

Thank you for the opportunity to present these comments on an issue very important to the State of New Hampshire and its people.

Sincerely,



Gordon J. MacDonald
Attorney General

cc: Attorney General Maura Healey

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