

# **DOUBLE TAXATION ON THE RISE: ADDRESSING DOUBLE STATE INCOME TAX FOR REMOTE WORKERS**

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## **I. INTRODUCTION**

Imagine that Ashley started her dream job in New York a couple of years

withhold tax from nonresident employees who work from another state based on <sup>4</sup>

At first glance, it may appear that Ashley is not required to pay New me tax for the income she earned while working in California because she relocated out of necessity; however, courts have applied the <sup>5</sup>

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California will nonetheless grant Ashley a tax credit to offset the taxes she paid to New York.<sup>7</sup> However, states like California must choose between issuing a tax credit and incurring a financial loss (because the state will continue to pay for public services despite not collecting taxes from some of its residents) or not issuing the credit and subjecting those residents to double taxation.<sup>8</sup> Unlike California, other states do not grant a tax credit.<sup>9</sup> Based on their specific income tax laws, a handful of states should not be able to harm other states or their residents.

This Note compares the New York Convenience Rule to nonresident income tax rules in other states and proposes that Congress pass legislation to repeal the Convenience Rule. Part II explains the general purpose of income tax, the history of -based income rule in California, the changing nature of the workforce post-COVID-19, and highlights pending legislation that may prevent the double taxation of remote workers. Part III illustrates the harmful effects of the

II. THE DEVELOPMENT AND A

work out-of-state for an employer or business located in one of the states that

If, however, an employee works remotely from Vermont for a New York employer, Vermont considers that income as earned within Vermont and thus

Rule.<sup>29</sup>

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necessity,<sup>30</sup> are required to pay income tax. When applying the Convenience  
n interpreted broadly, while the

<sup>31</sup> Prior to May 15,

nonresidents were required to show that their occupation could not be  
performed within New York.<sup>32</sup> For example, in an advisory opinion by the

-of-state home  
<sup>37</sup> If a nonresident

while working from that office.<sup>38</sup>

er the Convenience Rule is one in which an employee performs their usual tasks from their home office.<sup>39</sup>

calls or emails.<sup>40</sup>  
counted as non-  
requirement.<sup>41</sup>

home offices will be



income tax on a nonresident who works for a California company from another state.<sup>52</sup> Therefore, unlike states that apply the Convenience Rule, a nonresident who never sets foot in California but works remotely for a California-based business tax.<sup>53</sup>

In addition, California does grant a tax credit for income earned from another state while working remotely from California.<sup>54</sup> Because California taxes any income produced within the state, a resident or nonresident who works remotely from California for a company based in a Convenience Rule state, such as New York, may be required to pay both the state income tax of California and the Convenience Rule state.<sup>55</sup> To avoid the issue of double taxation, California issues a tax credit to offset the taxes paid to other states.<sup>56</sup>

#### *D. The Convenience Rule in the COVID-19 Era*

Teleworking or working remotely is not a new phenomenon or recent trend.<sup>57</sup> For a variety of reasons, employees have been working remotely for years. The number of remote workers has drastically increased since the COVID-19 pandemic.<sup>58</sup> A Stanford Institute for Economic Policy Research study estimates that in June 2020, approximately forty-two percent of the workforce telecommuted.<sup>59</sup> Moreover, about thirty percent of those remote workers worked from a different state than before the pandemic.<sup>60</sup> In addition, a recent survey found that between fourteen to twenty-three million workers intend to relocate as a result of the ability to telecommute.<sup>61</sup>

Under the Convenience Rule, New York treats teleworkers as working remotely out of their own

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working-remotely-for-california-businesses/ [https://perma.cc/3HHJ-D6XK]; Raquel Lazar-Paley, *What is California Source Income?*, MOSKOWITZ LLP (Oct. 24, 2019), <https://moskowitzllp.com/what-is-california-source-income/> [https://perma.cc/DNC5-3LAF].

52. See Lazar-Paley, *supra* note 51.

53. Manes, *supra* note 51.

54. State of Cal. Franchise Tax. Bd., *supra* note 7.

55. See CAL. FRANCHISE TAX BD., *supra* note 50; Manes, *supra* note 51; Lazar-

<sup>62</sup> The only recognized exception for teleworkers in New York is if their duties cannot be physically performed in New York.<sup>63</sup> Even during the COVID-19 pandemic, New York, and other Convenience Rule states, continued to adhere to this narrow exception.<sup>64</sup>

Undoubtedly, the pandemic has raised confusion regarding the applicability of the Convenience Rule.<sup>65</sup> For instance, would it be regarded  
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a result of the epidemic, forcing them to work from home or even from another state?<sup>66</sup> This intricate question led to New Hampshire filing suit against Massachusetts in the United States Supreme Court.<sup>67</sup> The issue arose when Massachusetts ordered all businesses to close their physical offices due to the pandemic and associated safety concerns.<sup>68</sup> Furthermore, Massachusetts announced that it would keep taxing any nonresident working for any state business from another state, provided that the employee had worked in Massachusetts before the pandemic and only relocated due to the  
ness closure order.<sup>69</sup> Nevertheless, many employees relocated and worked from out of state.<sup>70</sup> Many of them began working from New Hampshire for their Massachusetts-based employers.<sup>71</sup> New Hampshire filed suit against Massachusetts, arguing that because New Hampshire does not impose an income tax on its residents, Massachusetts is infringing on New

working remotely from New Hampshire.<sup>72</sup>

New Jersey filed a brief in support of New Hampshire  
United States Supreme Court, arguing that the Convenience Rule harms both

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62. Nicole Belson Goluboff,  
*Tax Fairness Act*, 20 PRAC. TAX LAW. 55, 56 (2005).

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states that tax their inhabitants and states that do not, such as New Hampshire.<sup>73</sup> Additionally, residents of states who work remotely for a business located in one of the Convenience Rule states may be subject to both

where they live and work.<sup>74</sup> Moreover, New Jersey argued that even if the states offered a full or partial tax credit in these circumstances, the states would lose billions in revenue as a result.<sup>75</sup> Additionally, despite providing a tax credit to its residents who are working for a Convenience Rule state, ion, healthcare, and even police protection.<sup>76</sup> As a result, states must decide whether to provide their residents with a tax credit or suffer significant financial loss.<sup>77</sup>

petition to hear the case,<sup>78</sup> this disagreement led New York to reaffirm its Convenience Rule. The state reiterated that nonresidents who work remotely for a New York-based business from another state due to the pandemic or otherwise will continue to be subject to New York income tax unless their

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#### *E. Remedial Federal Legislation?*

Commerce Clause of the United States Constitution.<sup>80</sup> The Commerce Clause . . . among the

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on nonresidents has been introduced in Congress; however, there has been no further action.<sup>82</sup> The Multi-State Worker Tax Fairness Act (Act),<sup>83</sup> first

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73. See Amicus Curiae Brief States of New Jersey, Connecticut, Hawaii, & Iowa in Support of Plaintiff at 2-3, 6-7, *New Hampshire v. Massachusetts*, No. 22O154 (2020).

74. See *id.* at 6-7 ( [R]esidents who work from home could be required to pay taxes on the same income to two States despite never leaving their Home State. ).

75. See *id.* at 2-3.

76. See *id.* at 8.

77. *Id.* at 2, 7-8.

78. See No. 22O154, *New Hampshire v. Massachusetts*, *supra* note 67.

79. See *Frequently Asked Questions about Filing Requirements, Residency, and Telecommuting for New York State Personal Income Tax*, *supra* note 64.

80. U.S. CONST. art. I, § 8, cl. 3; see also Joel Michael, *Constitutional Restrictions on Taxation of Nonresidents*, HOUSE RSCH. (Sept. 2018), <https://www.house.leg.state.mn.us/hrd/pubs/ss/clssnonr.pdf> [<https://perma.cc/47B2-MGM5>].

81. U.S. CONST. art. I, § 8, cl. 3.

82. See Multi-State Worker Tax Fairness Act of 2016, S. 2813, 114th Cong. (2016); Multi-State Worker Tax Fairness Act of 2020, H.R. 7968, 116th Cong. (2020); American Workers, Families, and Employers Assistance Act, S. 4318, 116th Cong. (2020).

83. See S. 2813.

introduced in 2016, has been reintroduced in the House of Representatives in 2020.<sup>84</sup> The Act would prohibit the taxation of nonresidents and effectively nullify the Convenience Rule by requiring states to only tax those who earn income while physically working within that state.<sup>85</sup> Furthermore, the Act would prohibit states from treating work performed by employees in other such.<sup>86</sup>

The Health Economic Assistance, Liability Protection and Schools Act, which includes the American Workers, Families and Employers Assistance Act, was also recently introduced by certain senators.<sup>87</sup> Under this bill, remote workers would be temporarily allowed to pay taxes only on income earned in their state of residency or in any other state where they have worked for at least ninety days in 2020 or will do so for at least thirty days in 2021-2024.<sup>88</sup>

### III. THE HARMFUL EFFECTS OF THE CONVENIENCE RULE ON EMPLOYERS, CONVENIENCE AND NON-CONVENIENCE RULE STATES

The Convenience Rule harms employees in several ways. First, as discussed above, the Convenience Rule opens the door to possible double taxation on nonresident employees.<sup>89</sup> The fact that the main solution to avoid

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Remote workers are also more susceptible to potential double taxation because states must decide whether to issue a tax credit for these employees or suffer significant financial losses.<sup>91</sup> Second, as explained in *Zelinsky v.*

employees to be reluctant to enter New York altogether.<sup>93</sup> This is because New York will likely tax their full income if they fail the Convenience Rule test, causing employees to remain in their home state.<sup>94</sup> This way, they can save on other expenses associated with commuting, such as gas.<sup>95</sup> However, nonresident employees may be

part of their income tax.

The Convenience Rule also harms employers. First, employers must ascertain whether any of their employees work from another state. If an employee works remotely from another state, the employer is required to<sup>96</sup> This would cost the employer time and expenses in complying with this requirement. Second,

hesitate to hire out-of-state employees altogether, which may lead to the potential loss of great talent.<sup>97</sup> Finally, the Convenience Rule causes great difficulty to employers seeking to avoid double taxation of their employees when implementing telework temporarily and in case of an emergency.<sup>98</sup>

States applying the Convenience Rule are also suffering. As discussed above, many nonresident employees may avoid stepping foot in the state because of the taxes imposed on nonresidents working in that state.<sup>99</sup> The Convenience Rule may also deter employers from hiring out-of-state employees due to the hardships associated with managing nonresident employees in a Convenience Rule state.<sup>100</sup> All of this results in employees and businesses wanting to avoid such a state, which could be costly to the state. The challenges the Convenience Rule presents may cause businesses that would otherwise open in such a state to reconsider their decision, which would directly

Finally, the Convenience Rule also harms states that do not follow it. Non-Convenience Rule states are forced to choose whether to provide a full tax credit for their citizens who work for a Convenience Rule state, as

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93. See Goluboff, *supra* note 62, at 57-58.

94. See *id.* at 56-58.

95. *Id.*

96. N.Y. STATE DEP T OF TAX N AND FIN., *supra* note 1, at 2.

97. See Goluboff, *supra* note 62, at 58.

98. *Id.*

99. See Walczak, *supra* note 16.

100. See Goluboff, *supra* note 62, at 58.

Court.<sup>101</sup> If they issue the tax credit, the state will likely suffer a financial loss because they will continue to pay for public services and social programs for an employee who pays reduced income taxes to that state. If they do not issue the tax credit, their residents who work for a Convenience Rule state may be subjected to double taxation.<sup>102</sup> In either case, the non-Convenience Rule states are harmfully affected by a handful of states that impose taxes on nonresident employees under their Convenience Rule.

#### IV. THE MODERN WORKPLACE ENVIRONMENT REQUIRES A NEW AND FAIR TAX SOLUTION FOR ALL STATES AND NONRESIDENTS

The COVID-19 pandemic has highlighted the significance of technological advancements and creative solutions for the workforce while businesses across the nation closed their physical doors due to safety concerns. Although telework is not a new concept, the pandemic has increased its prevalence. Because many employees throughout the country began working remotely for the first time, and many relocated to their home state, states must change their income tax policies, especially considering that many businesses have announced that they will allow their employees to work remotely on a permanent basis.<sup>103</sup>



states has opened the door to potential double taxation and many other hardships.<sup>110</sup> The decision to work remotely for any reason should not subject an individual to the possibility of double taxation, nor should the test