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Report No. 1468
September 29, 2022

Amanda Hiller
Acting Commissioner and General Counsel
New York State Department of Taxation and Finance
W.A. Harriman Campus
Albany, NY 12227

Re: Report No. 1468- Report on New York Personal Income Tax Issues Arising from Remote Work and Telecommuting

Dear Acting Commissioner Hiller:

I am pleased to submit Report No. 1468 of the Tax Section of the New York State Bar Association discussing certain New York personal income tax issues arising from remote work and telecommuting arrangements.

We appreciate your consideration of our Report. If you have any questions, please feel free to contact us and we would be happy to assist.

Respectfully Submitted,

Robert Cassanos
Chair

Enclosure

CC:

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Executive Deputy Commissioner
New York State Department of Taxation and Finance

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Report No. 1468

New York State Bar Association Tax Section

REPORT ON NEW YORK PERSONAL INCOME TAX ISSUES ARISING FROM REMOTE WORK AND TELECOMMUTING

September 29, 2022

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I. Introduction

The COVID-19 pandemic and the concomitant restrictions sometimes imposed on individuals' ability to gather in groups have had a major impact on almost all areas of life; state tax is no exception. Almost since the inception of the pandemic in 2020, one of the most talked about state tax issues has involved the taxation of employees who are required to work outside of the office, either from their home or some other location. This issue is affecting both employers and employees nationwide.

When this alternative remote work location is in a different state or local tax jurisdiction than that of the office (if any) from which the employee regularly works, there can be an impact both on the employee's ultimate personal income tax liability and on the employer's obligation to withhold personal income tax. Although state restrictions on in-person gatherings are being relaxed as of this writing, many workplaces have not returned to full-time in-office work and/or are making such work wholly or partially optional for employees.

While these are nationwide issues, this report (the "Report")[1] will focus on New York State's approach to taxing employee wage compensation for services performed outside of the State, particularly under the so-called "Convenience Rule" (as described below). In particular, this Report focuses on the approach taken by the New York State Department of Taxation and Finance ("NYSDTF") in implementing the Convenience Rule for employees who have telecommuted, whether as a result of the pandemic or otherwise. More broadly, this Report examines the application of the Convenience Rule to employers and employees in today's economy. Many companies are increasingly relying on remote workers to staff and expand their businesses, and/or offering remote work options to enhance their ability to attract and retain employees. These companies often employ technology that allows employees to work from wherever they are located, including increasingly from their own homes. Furthermore, many companies have offices all over the country (or all over the world), or may have eliminated all office space whatsoever. Accordingly, this Report focuses on the Convenience Rule and provides recommendations both to address the Rule's application in today's work environment and to ease certain difficulties in compliance therewith.

II. Summary and Recommendations

This Report does not express a view on the appropriateness or constitutionality of continuing the Convenience Rule.[2] Rather, it seeks to clarify some of the basic concepts

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[1] The principal authors of this report were Alysse McLoughlin and Elizabeth Pascal. Substantial contributions were received from Lee E. Allison, Robert Cassanos, Chelsea Marmor, and Jordan Schiff. Helpful comments were received from Ellen Brody, Catherine Chiou, Ray Freda, Richard Goldstein, Kathleen Gregor, Evan M. Hamme, Kara Mungovan, Leah Robinson, Lance Rothenberg, Michael L. Schler, Irwin M. Slomka, Jack Trachtenberg, Philip Wagman, Gordon E. Warnke, and Robert Zonenshein. This report reflects solely the views of the New York State Bar Association Tax Section and not those of the New York State Bar Association's Executive Committee or its House of Delegates.

[2] For an examination of whether application of the Convenience Rule is constitutional, an issue which is outside of the scope of this Report, *see* James Nani, "NY Remote Worker Tax Rule Unconstitutional, Prof Says," LAW 360 (July 23, 2021), available at https://www.law360.com/tax-authority/articles/1406161/ny-remote-worker-tax-rule-unconstitutional-prof-says. This Report also does not address the issue of whether there is a constitutional

underlying the Convenience Rule, many of which are not clearly defined in guidance, and to suggest ways in which these rules could be streamlined and modernized in appropriate cases.

At present, as described more fully below, New York has at least four separate rules which can apply to determine the source of employee wages for tax and withholding.

First, the general rule contained in the regulations ties source of income to place of performance of the services.[3] This rule is consistent with the approach applied by many states to source income from services, including employee wages.[4]

Second, the Convenience Rule[5] (referred to in the same regulations and defined in administrative guidance promulgated thereunder) acts as a major caveat, in effect reversing the general rule in all cases where (a) the employee is assigned to an office in New York, (b) services are performed outside New York State at a location which is not an office of the employer, and (c) the services are performed at that location because of "convenience" rather than "necessity." In any case in which the Convenience Rule applies, the source of the wage income is "thrown back" to the employee's New York office and allocated to New York despite having been physically performed out-of-state. Note that based on the administrative guidance provided by the NYSDTF, the Convenience Rule does not appear to apply to services performed at an out-of-state office of the employer regardless of the reason the services are performed at that location.

Third, pursuant to the Home Office Rule,[6] the NYSDTF has also promulgated administrative guidance under which the Convenience Rule will not apply if the out-of-state services are performed at a so-called "bona fide" home office, regardless of whether a particular service was performed at such office out of convenience or necessity. In effect, satisfaction of the Home Office Rule treats the employee's home as an office of the employer, thereby subjecting the employee to the same allocation rule applied when the employee performs at multiple employer office locations – allocation of such services is based on time spent in the offices without regard to convenience or necessity. To determine whether a home office is bona fide, an analysis of up to 17 separate factors may be necessary. Although the scope of the Home Office Rule is not entirely clear, guidance issued during the pandemic appears to indicate that complying with the Home Office Rule represents the sole method of avoiding the throwback of income under the Convenience Rule, at least in a case where the employee is assigned to or works primarily at an office in New York State.

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requirement to provide a credit to New York residents based on another state's application of the Convenience Rule. In connection with that issue, *see Comptroller of Treasury of Maryland v. Wynne*, 135 S. Ct. 1787 (2015) (holding that it would be unconstitutional as a violation of the internal consistency test for a state to impose tax on nonresidents on income generated within the state while not providing a credit to its residents for income generated outside of the state). *See also,* Walter Hellerstein, State Taxation ¶¶ 4.16, 20.10 (3d ed. 2015).

[3] See Section IV, Part A below.

[4] *See, e.g.*, "Individual Income Tax Chart: Taxation of Part-Year Residents and Nonresidents, Taxable Income," BLOOMBERG LAW: TAX (generated on May 18, 2022), available at https://www.bloomberglaw.com/product/tax/bbna/chart/2/10094/c80eacd24dc6552a8609d52c003d72db.

[5] As defined below; see Section IV, Part B.

[6] As defined below; see Section IV, Part C.

Finally, the relevant NYSDTF guidance concerning employer withholding does not explicitly state how either the Convenience Rule or the Home Office Rule applies to allocation of wage withholding when employee services are performed both in and out of New York State, although it does appear to incorporate both rules implicitly by reference. However, the guidance does contain a separate safe harbor for certain employees who perform services in New York for 14 days or less per year, among other requirements (the "14-Day Rule"). This safe harbor does not apply to employees who are primarily assigned to a New York office. Application of this provision could result in cases where the employee is subject to personal income tax, but no withholding is required.

For the reasons discussed below, we make the following principal recommendations:

1. The NYSDTF should confirm that the Convenience Rule is applied on a uniform neutral basis. For example, New York residents who are assigned to an office in another state and who are subject to tax in that other state for work performed in New York should get a credit for such taxes against their New York income.[7] We understand that this is consistent with the NYSDTF's current administrative practice, but it would be helpful to have this explicitly confirmed in published guidance. Similarly, the NYSDTF should confirm that the Convenience Rule applies such that days worked from an in-state (i.e., within New York) remote location by a non-New York resident employee assigned to a New York employer's out-of-state office would be "thrown back" and treated as out-of-state working days, rather than counted as in-state working days, unless such remote location satisfies the Home Office Rule.

2. The NYSDTF should address the fact that in today's environment, companies operate differently and employees are frequently not tied to one office location; furthermore, companies may not even have sufficient desk space for all of the employees that are "assigned" to an office. Accordingly, the NYSDTF should promulgate guidance confirming that when employees work in multiple offices and any such office is in New York State, work performed at all such offices (including a bona fide home office) should be apportioned using the general rule based on where services are performed. Further, guidance is needed concerning how to determine which of these offices constitutes an employee's "assigned" office for purposes of applying the portion of the Convenience Rule referring to the employee's "assigned or primary office," and how the term "assigned or primary office" itself should be construed, including whether an employee may have more than one such office. To the extent work is performed at a location or locations other than a "bona fide employer office" (as defined below), then the NYSDTF should explain how work performed at such other location or locations would be apportioned between the relevant offices of the employer if, as we recommend, employees may have both an "assigned office" and a "primary office", which are separate offices, and only one of such offices is in New York. In such a case, we recommend that the work performed by the employee at such other location or

[7] See footnote 2 above.

locations would be apportioned between the assigned and primary offices of the employer based on the relative number of days the employee spends in each of those offices during the taxable year. As part of its guidance addressing this issue, the NYSDTF should explain how (if at all) double taxation would be avoided in this type of case.

3. The NYSDTF should promulgate clear guidance defining whether and when a force majeure event creating a practical necessity for working from home would ever satisfy the Convenience Rule. Examples could include casualty events, including the destruction of the employer's office (e.g., a terrorist attack) or a weather-related event that renders the offices permanently or temporarily unusable (e.g., a hurricane or flood). The same principles would presumably apply to a pandemic which renders the employer's premises unusable. Such guidance could distinguish, for example, between cases in which office attendance is truly optional and cases in which attendance is limited for health reasons by the employer or a public authority. In particular, the guidance should address cases in which remote work is required by reason of a government edict to protect employee health and safety. If some or all of these force majeure-type events do not create an employer necessity under the Convenience Rule, the guidance should explain why this is the case.

4. The NYSDTF should promulgate clear guidance explaining whether an employer's desire (a) to reduce occupancy costs by requiring employees to work from a remote location on a full- or part-time basis, or (b) to reduce compensation costs or increase productivity by hiring workers to work remotely, constitutes an employer necessity under the Convenience Rule. If a desire to reduce occupancy costs or otherwise increase profitability is not an employer necessity, the guidance should explain why this is the case.

5. An important requirement of the Home Office Rule is that a home office must be established pursuant to a "bona fide business purpose" of the employer in order to qualify as a bona fide home office. The NYSDTF should confirm how the questions in 3 and 4 above are answered in this context as well. We note that the answers may not necessarily be the same. For example, if an employer needs to accept a remote work arrangement to retain or acquire a valued employee, this could constitute a bona fide business purpose under the Home Office Rule even if it is not deemed an employer necessity under the Convenience Rule.

6. Another important condition of the Home Office Rule is that the establishment of the home office must be required by the employer. The NYSDTF should confirm whether a formal employment contract is required to validate the employee's home office, or whether this requirement can be met by less formal written guidelines promulgated by the employer. For example, this confirmation should clarify whether this condition is satisfied by a firm-wide email or other announcement to the effect that "for the duration of limited access during the pandemic, employees are expected to continue to work from home," or that "following our transition to a hotel model, we need to ensure that we have adequate space to accommodate those employees on premises, so accordingly you are expected to work from home at least two days a week until further notice."

7. The secondary factors and other factors enumerated for the Home Office test should be modernized and streamlined, as more fully described in the discussion below.[8]

III. Background: The Growth of Telecommuting

Remote work arrangements have been in existence for a long time and have been steadily increasing in frequency. However, the COVID-19 pandemic has highlighted the issue of how employees operating under such arrangements should be taxed. Although remote work arrangements are often amalgamated under a generalized common designation of "telecommuting," there are really multiple distinct patterns of remote work that largely fall into two categories. The first and smaller category consists of workers who do not "commute" into the main office on a regular basis in the customary sense of the term, but work full-time at home or at a branch office, and only come into their employer's main office infrequently or occasionally (e.g., for meetings or training sessions). These employees may not be assigned to any office of the employer. The other, larger category consists of regular commuters who work part-time at their employer's main office and part-time from a home or satellite office.

According to the U.S. Bureau of Labor Statistics, the percentage of workers who work remotely at least some of the time has risen slowly but steadily since 2006, from about 21 percent to 24 percent in 2015.[9] In 2020, during the pandemic, as many as 40 percent of workers were performing their job duties from home. A significant percentage of those workers say that they will continue to work remotely some or all of the time after the pandemic, with the greatest share of such individuals possessing a higher educational degree and having jobs in the fields of management, professional occupations, and finance.[10] Recent studies show that approximately 37 percent of all jobs can be performed completely at home, accounting for 46 percent of all wages.[11] While this trend has been growing for some time, it is likely that it was meaningfully accelerated and enlarged by the pandemic. Thus, it is likely that the tax issues implicated by remote work arrangements will continue to feature prominently after the pandemic and may even increase in importance. For example, in a recent survey of 91 companies, 86 percent reported that they would

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[8] See Section IV, Part G below.

[9] "24 Percent of Employed People Did Some or All of Their Work at Home in 2015," *TED: The Economics Daily*, BUREAU OF LABOR STATISTICS, U.S. DEPARTMENT OF LABOR (July 8, 2016), available at https://www.bls.gov/opub/ted/2016/24-percent-of-employed-people-did-some-or-all-of-their-work-at-home-in-2015.htm.

[10] Matthew Dey, Harley Frazis, Mark A. Loewenstein, & Hugette Sun, "Ability to Work from Home: Evidence from Two Surveys and Implications for the Labor Market in the COVID-19 Pandemic," *Monthly Labor Review*, BUREAU OF LABOR STATISTICS, U.S. DEPARTMENT OF LABOR (June 2020), available at https://www.bls.gov/opub/mlr/2020/article/ability-to-work-from-home.htm.

[11] Maureen Soyars Hicks, "The Number of People Who can Telework is Higher than was Estimated," *Monthly Labor Review*, BUREAU OF LABOR STATISTICS, U.S. DEPARTMENT OF LABOR (June 2020), available at https://www.bls.gov/opub/mlr/2020/beyond-bls/the-number-of-people-who-can-telework-is-higher-than-was-estimated.htm

allow or require some form of hybrid work and 14 percent would not require any in-office work. None apparently reported that they would require full-time in-office work.[12]

IV. New York State Personal Income Tax and the Convenience Rule

A. General Personal Income Tax Rules

While New York State residents are subject to tax on all of their income, New York State nonresidents are subject to tax only on that portion of their income that is attributable to New York State sources. In the case of income from carrying on a business, including the performance of services as an employee, a nonresident taxpayer is taxed only on income "attributable to . . . a business, trade, profession or occupation carried on in this state."[13]

For purposes of determining what portion of an employee's compensation is New York State-source income in any year under the Tax Law, regulations promulgated by the NYSDTF specify that compensation is allocated to New York State based on the percentage of days that the employee works within New York State during the taxable year.[14] Thus, if an employee works 200 days in a given year, 120 of them being in New York and 80 of them being outside New York, 120/200, or 60 percent, of his or her compensation income will be treated as New York source income that will be subject to tax. The regulations then provide an example demonstrating that, generally, the place where the work is done is controlling and not the place where the employer is based.[15] In other words, subject to the Convenience Rule discussed in the next section, New York sources employment income from the performance of services to the place where the services were actually performed, which is the general rule for sourcing service income in most other states as well.

B. The Convenience Rule

Regulations promulgated by the NYSDTF provide that in any case where an employee works both inside and outside New York State during the taxable year, "any allowance claimed for days worked outside New York State must be based upon the performance of services which of necessity, as distinguished from convenience, obligate the employee to [perform] out-of-State

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[12] Peter Eaves & Matthew Haag, "After Pandemic, Shrinking Need for Office Space Could Crush Landlords," NEW YORK TIMES (Apr. 8, 2021), available at https://www.nytimes.com/2021/04/08/business/economy/office-buildings-remote-work.html.

[13] N.Y. TAX LAW § 631(b) (McKinney 1999).

[14] N.Y. COMP. CODES R. & REGS. tit. 20, § 132.18(a) (2000) ("[I]f a nonresident employee . . . performs services for his employer both within and without New York State, his 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.").

[15] N.Y. COMP. CODES R. & REGS. tit. 20, § 132.18(a) (2000). This rule based on sourcing wages where the work is performed is a long-standing rule in New York; as early as 1919, the Attorney General of the State of New York pointed out that "the work done, rather than the person paying for it, should be regarded as the 'source' of income. It would follow that payments, wherever and by whomever made, for services performed without the State are not taxable against nonresidents and payments wherever and by whomever made, for services performed within the State are taxable against nonresidents." Op. Att'y Gen. 301, 301 (May 29, 1919).

duties in the service of his employer."[16] This is the so-called Convenience Rule. Although the regulations contain no examples or explanation of this rule, the NYSDTF has promulgated guidance to the effect that an employee whose work-related duties do not require that work be performed outside New York cannot treat days spent working outside New York as non-New York work days.[17] This is apparently based on the premise that the source of the employee's compensation is the employer located in New York State rather than the place of actual performance of service, which is in tension with the general rule cited above that the place of performance controls.[18] As a result, the question of where an employee's wage income should be sourced becomes a question not only of where the work was performed, but of what constitutes "convenience" versus "necessity."

The Convenience Rule applies to source compensation for remote work to New York only for an employee who is assigned to, or works primarily at, an office of the employer in New York (the "Primary or Assigned Office Requirement"). In the case of such an employee, moreover, the Convenience Rule does not appear to apply to source to New York any income for work the employee performs at an office of the employer outside New York (including a so-called "bona fide home office," as discussed below). It should be noted that when an employee performs *no* services in New York during the taxable year, the Convenience Rule does not apply.[19]

C. The "Home Office" Exception

In applying the Convenience Rule, the NYSDTF has issued guidance indicating that in certain circumstances, an employee's home office will be considered a so-called "bona fide" office of the employer, such that the Convenience Rule will not apply to "throw back" days worked at home into New York State.[20] The current guidance reflecting the NYSDTF's interpretation of the Home Office test is set forth in a Technical Service Bureau Memorandum that was issued by the NYSDTF in 2006, which also provides important guidance on other aspects of the Convenience Rule (the "TSB-M" or "Home Office Rule TSB-M").[21] The NYSDTF published this guidance to clarify its interpretation of the Convenience Rule following the Court of Appeals decision in *Huckaby*, wherein it was determined that the Convenience Rule applied with respect to days worked by an employee at his home in Tennessee.[22] According to the TSB-M, the Convenience Rule generally dictates that days worked by an employee at home outside of New York will be

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[16] N.Y. COMP. CODES R. & REGS. tit. 20, § 132.18(a) (2000).

[17] Income Tax-District Office Audit Manual, Nonresident Audits, Allocation (8.1.12.6.2) (May 4, 1998).

[18] *Huckaby v. N.Y. State Div. of Tax Appeals*, 829 N.E.2d 276, 280 (N.Y. 2005) ("That is, we accepted the Department's interpretation of the Tax Law in the convenience test, and held that 'sources within the state' does not simply mean 'place of performance.'"); *Colleary v. Tully*, 69 AD2d 922 (App. Div., 3rd Dep't, 1979) ("the source of an out-of-State employee's income is the employer within the State").

[19] *See Matter of Arthur Hull Hayes*, TSB-H-78(9)I (State Tax Comm'n, 1978).

[20] We believe the proper interpretation of the Home Office Rule is to place the employee's home on the same footing as the other offices of the employer, all of which should be allocated wage income based on a "days-spent" basis. If this were not the case, it would create a discrepancy between a bona fide home office and other bona fide employer offices.

[21] TSB-M-06(5)I (NYS DEP'T. OF TAX. AND FIN., May 15, 2006).

[22] *Matter of Huckaby v. NYS Div. of Tax App.,* 4 N.Y.3d 427 (2005), *cert. den.* 546 US 976 (2005).

included as New York work days in determining the employee's New York source income, but only if (a) the employee is assigned to or working primarily at a New York office of the employer, and (b) the circumstances establish that the employee's home office is not a "bona fide office of the employer." In the TSB-M, the NYSDTF set forth a number of factors that the home office must meet in order to be treated as a bona fide office of the employer (the "Home Office Rule").

Pursuant to the Home Office Rule, in order to be considered a bona fide home office, the employee's home office must either satisfy the primary factor — viz., that the home office contain or be near specialized facilities (a lab or a test facility, for example) that the employee could not easily access if he or she worked from the employer's office — or it must meet four "secondary" factors and three "other" factors.

The secondary factors, four of which must be present, are as follows:

- The home office is a requirement or condition of employment.
- The employer has a bona fide business purpose for the employee's home office location.
- The employee performs some of the core duties of his or her employment at the home office.
- The employee meets or deals with clients, patients or customers on a regular and continuous basis at the home office.
- The employer does not provide the employee with designated office space or other regular work accommodations at one of its regular places of business.
- The employer provides reimbursement of expenses for the home office.

The "other" factors, of which an employee must meet three, are as follows:

- The employer maintains a separate telephone line and listing for the home office.
- The employee's home office address and phone number are listed on the business letterhead and/or business cards of the employer.
- The employee uses a specific area of the home exclusively to conduct the business of the employer that is separate from the living area.
- The employer's business is selling products at wholesale or retail and the employee keeps an inventory of the products or product samples in the home office for use in the employer's business.
- Business records of the employer are stored at the employee's home office.

- The home office location has a sign indicating it is a place of business of the employer. Advertising for the employer shows the employee's home office as one of the employer's places of business.

- The home office is covered by a business insurance policy or by a business rider to the employee's homeowner insurance policy.

- The employee is entitled to and actually claims a deduction for home office expenses for federal income tax purposes.

- The employee is not an officer of the company.

In theory, the Home Office Rule could be viewed as a sort of safe harbor. However, this interpretation was cast into doubt during the COVID-19 pandemic when the NYSDTF issued guidance (the "Pandemic Guidance") specifying that "[i]f 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."[23] In other words, at least during the pandemic, the NYSDTF construed the Convenience Rule so that it applied to throw back to New York income earned outside New York, even in cases where the employee had to work at home due to a government order and/or employer health and safety restrictions.[24] Note, however, that this guidance applied only to employees whose "primary" office was in New York State. This interpretation of the Convenience Rule is an expansive one, as discussed further below, but it appears to be consistent with at least some prior decisions in this area.[25]

D. The Primary or Assigned Office Requirement

As indicated above, the Convenience Rule recognizes that an employee may work from multiple offices located in different states. While this is not explicitly stated as a general rule, it necessarily follows from the conclusion that a bona fide home office is a bona fide employer office, and hence the Convenience Rule does not apply to work performed at that location. If an employee does work from more than one office, it may be difficult to determine that employee's primary or assigned office location for purposes of the Convenience Rule, and there is currently no case law or administrative guidance as to how to make this determination. In practice, auditors tend to look beyond administrative points of connection (e.g., HR or payroll assignment) to indications of

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[23] "Frequently Asked Questions about Filing Requirements, Residency, and Telecommuting for New York State Personal Income Tax," NYS DEP'T OF TAX. AND FIN. (June 30, 2021), available at https://www.tax.ny.gov/pit/file/nonresident-faqs.htm#telecommuting.

[24] Paul Jones, "Remote Work Complicates Employer Tax Compliance, Pressures States to Revise Rules," STATE TAX NOTES (Apr. 11, 2022), available at https://www.taxnotes.com/tax-notes-today-state/corporate-taxation/remote-work-complicates-employer-tax-compliance-pressures-states-revise-rules/2022/04/05/7db5p (challenges are expected "over whether New York's rule can be enforced in the case of workers who were required [to] work from home because of lockdown orders").

[25] For example, in *Matter of Arthur B. Churchill*, 38 AD2d 631, a nonresident taxpayer worked at home due to a physical disability. The court ruled that the days worked at his out-of-state home must be allocated to New York because they were for the taxpayer's convenience and not the employer's necessity.

physical nexus, such as where the employee is showing up to work and the location of the office in which the managers to whom the employee is reporting are physically located. Nonetheless, this remains an area subject to administrative ambiguity.

A further question arises whether the assigned or primary office location "attracts" all the income where the Home Office Rule applies. The Home Office Rule TSB-M confirms that in a case in which a nonresident employee's primary or assigned office is located in New York, but the employee's home satisfies the Home Office Rule, the employee's income is apportioned between the New York office and the bona fide home office on a days-spent basis.[26] However, it is unclear whether an employee can have, for example, an assigned office in New York and a primary office in another state, or vice versa, and if so, whether and how income subject to the Convenience Rule is apportioned or allocated between the two offices. As discussed below, we believe that additional guidance is necessary to clarify the Primary or Assigned Office Requirement in the context of operation of the Convenience and Home Office Rules.[27]

E. Interplay of the Convenience Rule and Resident Tax Credits

Most states allow a credit to a resident individual for certain income taxes paid to another state. If an employee is assigned to, or has a primary, office in New York, but is working remotely from another state which imposes tax on wages earned based on where services were performed without application of the Convenience Rule, the employee may be subject to tax twice on his or her wages, and his or her employer may be obligated to withhold two states' taxes on the same compensation. This is because many states limit their resident credit for taxes paid to other jurisdictions on income derived from sources within the other state, relying on the resident state's rules for determining the sourcing of such income. Accordingly, if the resident state does not apply a convenience rule, it may not allow a credit for income tax paid to a state based on such rule.[28]

New York is one of only five states (New York, Delaware, Pennsylvania, Connecticut, and Nebraska) with a convenience rule. The remaining states that impose a personal income tax do so on employee wage income based on where the services are actually performed. (During the pandemic, Massachusetts temporarily imposed a rule akin to New York's Convenience Rule, requiring allocation of wages earned while working remotely to employment in-state.[29])

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[26] *See* TSB-M-12(5)I (NYS DEP'T. OF TAX. AND FIN., July 5, 2012) (discussing application of the 14-Day Rule where an employee is assigned to a primary work location outside of New York State and does not work in New York State for more than 14 days).

[27] See Section V, Part B below.

[28] Paul Jones, "Remote Work Complicates Employer Tax Compliance, Pressures States to Revise Rules," STATE TAX NOTES (Apr. 11, 2022), available at https://www.taxnotes.com/tax-notes-today-state/corporate-taxation/remote-work-complicates-employer-tax-compliance-pressures-states-revise-rules/2022/04/05/7db5p ("[A]n employee whose office is in a convenience of the employer state but who chooses to telecommute from another state could face double taxation on income earned in the latter if both states claim the same income.").

[29] The Massachusetts Department of Revenue issued a regulation during the pandemic, which required nonresidents who worked in Massachusetts prior to the pandemic to treat telecommuting days during the pandemic as days worked from their employer's location for purposes of determining their tax liabilities (830 Mass. Code Regs. 62.5A.3). Before the pandemic, nonresidents who worked in Massachusetts were taxed only the days they worked in

As a result, many states may not allow a resident credit for taxes paid to New York under the Convenience Rule.[30] While state taxing rules are not always in harmony with one another and there is no absolute constitutional prohibition on double taxation, the potential obligation of an employee to have to pay taxes on the same income to two states without any offsetting credit would be regarded as burdensome and unfair by most employees. This could also put New York employers at a disadvantage in hiring remote workers.[31]

It should be noted that Connecticut and New Jersey, states from which New York employees frequently commute, do not impose double tax with respect to wages captured under New York's application of the Convenience Rule. New Jersey has a very broad credit; it is one of the few states that allows a resident credit for taxes paid to other states on employee compensation irrespective of how New Jersey or such other state sources such income. Furthermore, Connecticut's own convenience rule takes an approach that addresses the potential for double-taxation. Under its statute, Connecticut imposes tax on employee wage income under its convenience rule only where the state where the employee is based applies the same rule.[32] Thus, for example, Connecticut will impose tax on a Pennsylvania resident working from home for a Connecticut employer, but not on a New Jersey resident telecommuting from her home. Overall, the effect of Connecticut's narrowly tailored convenience rule is to limit the likelihood of double taxation on both its residents and on nonresidents who work for Connecticut employers. Accordingly, Connecticut-resident employees who telecommute and are subject to income tax in another state because of a convenience rule may claim a credit on their Connecticut income tax return for taxes paid to that state.[33] While these rules may ease the burden of double taxation on many true "telecommuters," remote workers who reside in other states and telecommute to New York could be at greater risk of double taxation.

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the state, not on any days they may have spent working from home. The new regulation required them to treat the at-home days as in-office days if they were working from home due to the pandemic. This new regulation was challenged by New Hampshire, with New Hampshire filing a petition for certiorari with the United States Supreme Court. The Supreme Court declined to take the case.

[30] Furthermore, for employees who are resident in states that do not impose an income tax, such as Texas and Florida, such employees will be subject to a tax even though they are working from a jurisdiction that does not impose any personal income tax.

[31] Smaller companies, in particular, are increasingly resorting to remote workers in order to access a broader and deeper pool of employees, according to news reports. *See* Sarah Kessler, "How Remote Work Helped Tech Companies Outside Silicon Valley Grow," N.Y. TIMES (Apr. 23, 2022), available at https://www.nytimes.com/2022/04/23/business/dealbook/remote-work-tech.html (describing how many employers increasingly seek to hire remote employees to expand their potential talent base). Because the Convenience Rule appears in certain cases to be a "cliff rule," even a single day of presence in New York could in theory subject an out-of-state employee to a full year's worth of New York taxes, at least if the employee is "assigned" to that office.

[32] Conn. Dep't Rev. Serv., *2019 Legislative Changes Affecting Income Tax and the Income Tax Withholding*, SN 2019(12) (Mar. 4, 2020). *See also* Conn. Gen. Stat. § 12-704(a)(1), -(2), -(5) (as amended by P.A. 18-49, § 19).

[33] Conn. Dep't Rev. Serv., *2019 Legislative Changes Affecting Income Tax and the Income Tax Withholding*, SN 2019(12) (Mar. 4, 2020); Conn. Dep't Rev. Serv., 2019 Form CT-1040 Instructions, p. 5 (rev. 12/2019) ("Connecticut resident employees working from a remote location who are subject to tax on income earned in a jurisdiction that applies the convenience of the employer test, can claim a credit on their Connecticut income tax return for taxes paid to such jurisdiction"). This rule was enacted by Connecticut to relieve their residents of the double-tax burden that some of them had to bear as employees of New York-based companies.

Like many states, New York allows a resident credit for tax on income derived from sources within a state based on the application of New York's own sourcing rules to nonresidents. In principle, under New York's rules, a credit should be allowed pursuant to a "reverse Convenience Rule."[34] This could arise, for example, for a New York resident assigned to work in a non-New York office located in a state which has a convenience rule. Assume in such a case that, during the pandemic, the office is closed and the employee works from home in New York, but the other state treats that wage income as local (i.e., non-New York) source under its convenience rule. The NYSDTF's Pandemic Guidance contains a somewhat Delphic statement that "[a] person who lives in one state but works in another may have tax liability in both states, but typically will receive a tax credit in their state of residence to eliminate double taxation of that income." [35] While not entirely clear, this statement could be read to allow a credit in the situation just described.

F. Description of the Withholding Rules

Every employer maintaining an office or transacting business in New York and paying taxable wages is required to deduct and withhold New York state and local personal income tax from these wages.[36] The employer must allocate a nonresident employee's wages based on the number of days the employee works in New York as compared to his or her total days worked, as follows:[37]

$$\text{New York Source Income} = \text{Nonresident's Total Compensation} \times \frac{\text{Total Days Worked in New York}}{\text{Total Days Worked Everywhere}}$$

The relevant guidance does not mention the Convenience Rule, but rather tracks very closely the general rule set forth in the regulations. Presumably, even though the aforementioned formula refers only to place of performance, it was intended to incorporate the Convenience Rule in calculating the "Days Worked in New York" (whether or not such days are actually worked in New York), since the relevant guidance states that "[t]he amount withheld must be substantially equivalent to the tax reasonably estimated to be due from the inclusion of the wages in the employees' New York adjusted gross income or New York source income."

It should be noted that the NYSDTF does provide employers with relief from withholding obligations for nonresident employees in limited situations. An employer will not have to withhold

[34] See footnote 2 above.

[35] "Frequently Asked Questions about Filing Requirements, Residency, and Telecommuting for New York State Personal Income Tax," NYS DEP'T OF TAX. AND FIN. (June 30, 2021), available at https://www.tax.ny.gov/pit/file/nonresident-faqs.htm#telecommuting.

[36] N.Y. TAX LAW § 671(a).

[37] TSB-M-12(5)I (NYS DEP'T. OF TAX. AND FIN., July 5, 2012) ("Nonworking days are normally considered to be Saturdays, Sundays, holidays, days of absence because of illness or personal injury, vacation, or leave with or without pay.").

on wages paid during a given year to a nonresident employee who performs services both in and out of New York State if all of the following conditions are met:

- The employee is assigned to a primary work location outside of New York State;
- The employer reasonably expects that the employee will work in New York State for 14 days or fewer in the calendar year;
- The employee does not work in New York State for more than 14 days in such calendar year; and
- The employee's compensation is not in one of the categories to which the 14-Day Rule does not apply, such as compensation of nonresident salespersons, athletes, and entertainers, as well as most deferred compensation.[38]

For this purpose, days spent in New York in training, etc., are not taken into account in determining the 14-day threshold. This rule will not apply, however, if the employer reasonably expects that an employee will be required to work in New York State for more than 14 days in the calendar year. Furthermore, it must be noted that this 14-day safe harbor only applies to an employer with respect to its withholding obligations. This 14-day safe harbor does not apply in determining whether an employee has a personal income tax obligation to New York.

With respect to telecommuting employees, the 14-Day Rule does not apply to employees assigned to a work location in New York, and thus will not ease the impact of complying with the Convenience Rule for employers. Furthermore, as noted above, this 14-day safe harbor may be difficult to apply, because in certain circumstances it can be difficult to determine the primary office to which an employee is assigned. This uncertainty could potentially expose the employer to underwithholding on an employee's salary if the employer believes that the employee is assigned to a non-New York office, resulting in the imposition of penalties by New York against the employer.[39]

V. Discussion

A. The Role of Office Location

As outlined above, New York's regulations contain two rules for sourcing employee wage income: (i) the general "place of performance" rule, which allocates income to the place where the services in question were performed, and (ii) the Convenience Rule, which throws any allowance worked for days outside of New York back to New York unless such work is "based upon the performance of services which of necessity, as distinguished from convenience, obligate the

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[38] *Id.*

[39] In New York, an employer who underwithholds tax from taxable wages is liable for the underwithheld tax (i.e., the tax becomes the employer's tax liability). N.Y. TAX LAW § 675. However, the employer should receive a credit against the additional tax due for any tax the employee remits to the state attributable to the taxable wages the employer paid to that employee. N.Y. TAX LAW § 676.

employee to perform out-of-State duties in the service of his employer."[40] However, as the administrative guidance has evolved, this two-pronged approach gives an incomplete picture. In fact, the basic rule — which appears to be stated only in passing in the TSB-M that defines the Home Office Rule — really allocates days worked based on the location of the office to which the employee is assigned or where the employee primarily works. The relevant passage states:

> [U]nder this rule [i.e., the Convenience Rule], days worked at home are considered New York work days only if the employee's assigned or primary work location is at an established office or other bona fide place of business of the employer (hereinafter, a bona fide employer office) in New York State. If the employee's assigned or primary work location is at an established office or other bona fide place of business of the employer outside New York State, then any normal work day worked at home would be treated as a day worked outside New York State. . . . For tax years beginning on or after January 1, 2006, it is the Tax Department's position that in the case of a taxpayer whose assigned or primary office is in New York State, any normal work day spent at the home office will be treated as a day worked outside the state if the taxpayer's home office is a bona fide employer office (as determined below).[41]

In other words, the Convenience Rule applies only to employees who are assigned to or who work primarily at an "established office or other bona fide place of business of the employer" in New York State. So, if an employee has a single primary or assigned "bona fide employer office" and this office is located outside of New York State, the Convenience Rule simply does not apply, and the general rule allocates all days worked by the employee outside of New York as non-New York working days. If, on the other hand, the employee's single primary or assigned "bona fide employer office" is located inside New York State, the Convenience Rule applies in lieu of the general rule and allocates all days worked by the employee outside of New York at locations other than employer offices and bona fide home offices to the New York office as working days, at least where such work is performed at that location out of convenience rather than necessity (as those terms may be defined for purposes of the Convenience and Home Office Rules).

But what if the employee works at multiple offices in different states while being assigned to (and/or working primarily at) a New York office? The Convenience Rule should presumably apply, but only to days worked at home (to the extent not covered by the Home Office Rule) or at other non-office "convenience" locations, and not to days worked at the non-New York bona fide employer office. This must be the case because if the employee's home meets the Home Office Rule, the home itself becomes a bona fide employer office, with the effect that a day worked at home is then treated as a day worked outside New York State. Presumably, the same rule must logically apply to a conventional bona fide employer office at which the employee works. Thus, any work performed at an office of the employer outside the state is considered a non-New York

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[40] N.Y. COMP. CODES R. & REGS. tit. 20, § 132.18(a) (2000).

[41] TSB-M-06(5)I (NYS Dep't. of Tax. and Fin., May 15, 2006).

day, because there is no requirement in the Home Office Rule that the employee's home either be the employee's assigned office or that it be the employee's primary office.

In essence, then, the implicit framework for sourcing employment income appears to be that if an employee's work is performed at an office of the employer, it is sourced to the location of such office, regardless of convenience or necessity. If the employee's work is not performed at such an office, then whether the Convenience Rule applies depends on if an assigned or primary New York office exists for that employee: if not, the rule does not apply, but if there is then it does. However, because the TSB-M does not contain a "tie-breaker" rule, this still leaves open the issue of how the Convenience Rule applies in a case where an employee is assigned to a New York office and works primarily from a non-New York office (or vice versa). For an analysis of this issue, see Section B below.

B. Office Assignment

The foregoing analysis gives great weight to the concept of an "assigned or primary" work location. In particular, it raises the question of what it means to be "assigned" to an office. This term is not explicitly defined, yet there is circumstantial evidence that there is at least an element of formalism to the concept of assignment. First, the Home Office Rule TSB-M itself appears to recognize that the primary work place may not be the assigned office, because it refers to an "assigned or primary" work location. Presumably, therefore, it is possible to be assigned to an office at which one does not primarily work. While it could be argued that the term "or" as used in the sentence means that the primary office is of importance only if there is no assigned office, such an interpretation would seem to enable employees who work primarily in New York to avoid the Convenience Rule merely by being assigned elsewhere while working primarily in New York. Presumably, this interpretation was not intended. Alternatively, perhaps the term "assigned or primary" could be interpreted to mean "assigned *and* primary" — but again, this just raises the prospect that in a case where the assigned office was not the primary office, and either office was located outside New York, the Convenience Rule would not apply. Presumably this was not intended either. As a further alternative, the term "assigned or primary" could be interpreted to refer only to a single office, which could be either the assigned or primary office based on some unstated, non-public criteria. This approach could lead to subjective and inconsistent determinations by both taxpayers and the State, and therefore would appear to be inconsistent with both the ordinary meaning of the term "or" and the overall sourcing regime.[42] The better interpretation would therefore seem to be to give the word "or" its ordinary, disjunctive meaning so that the Convenience Rule would apply if either prong is satisfied.

In that regard, we note that the fifth of the secondary factors under the Home Office Rule (described above) is that the "employer does not provide the employee with designated office space or other regular work accommodations at one of its regular places of business." The explanation provided in the relevant guidance reads as follows:

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[42] One way perhaps to apply such an "assigned primary" approach so as to avoid some of these potential pitfalls would be to have a broad multi-factor test for an assigned office, but then choose the "assigned primary office" from that group based on the number of days spent at the office. Complexity aside, this would appear to be substantially similar to simply choosing the primary office, at least if the criteria for determining assignment were broad enough and were consistently applied. In any event, these criteria should be transparent.

> If the employer does not provide the employee with designated office space or other regular work accommodations at one of its regular places of business, then the home office will meet this factor. For example, an employer wishes to reduce the size of the office space maintained in New York to decrease rental expenses and, therefore, no longer provides designated office space or other regular work accommodations for one of its employees. Instead, the employer allows the employee to work from the employee's home. If the employee must come to the office, the employee must use the "visitors" cubicle, conference room, or other available space that is also used by the other employees of the company. In this instance, the home office will meet this factor.[43]

Note that in order to be subject to the Convenience Rule, the employee must be assigned to or have a primary place of employment in New York. So, apparently, an office can satisfy that standard even if it has no designated place for the employee to work. Looking at the structure of the TSB-M, it appears that bona fide employer offices are defined uniformly throughout — it does not matter whether the office being tested is in or out of New York. Therefore, it would appear that an employee could have an assigned office (either in or out of New York) at which the employee has no place to work and does not primarily work. While not entirely clear, arguably the main if not exclusive function of the concept of "assignment" is to pull an employee's wage income into the Convenience Rule even if the employee does not work primarily at an office in New York. If that is correct, then this expansive approach to defining an assigned office would generally seem helpful to the State rather than to the employee, at least so long as the concepts of assigned or primary are interpreted to be disjunctive and not exclusive.[44]

In many cases, however, a broad definition of "assignment" can make the results turn on relatively random facts, such as whether an employer routinely reassigns relocating employees to the work office closest to their place of residence. Where an employee relocates to another state and works primarily from home, whether the employer then reassigns the employee to a non-New York office appears to dictate whether the Convenience Rule applies at all. If this interpretation was not intended, the NYSDTF should provide clarification. While one could imagine various multi-factor "substance"-based definitions of "assignment," such as a definition based on where the employee's supervisors are located, these are almost sure to create greater confusion and uncertainty, in many cases to the detriment of New York State. Perhaps one relatively simple approach would be to define an "assigned" office as the office in which the employee is recorded on the books and records of the firm for payroll or benefits purposes,[45] and to define the employee's "primary" office as the bona fide employer office at which the employee spends the largest number

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[43] *Id.*, "Secondary Factors."

[44] However, as noted below, if a disjunctive approach is used, the system needs to be able to fairly apportion work done away from employer offices, for example at a home office which is not a bona fide home office. That topic is discussed below.

[45] It is possible to use other criteria for assignment; however the use of multiple criteria will create the need for a mini-tie breaker rule and/or a more complex allocation regime, as will the use of a single criterion which often produces multiple results. We think the suggested criteria is more likely (although perhaps not guaranteed) to produce a unique result.

of days of the year.[46] It should be noted that the practical realities of the contemporary workplace could easily result in an employee having an office that would technically satisfy this definition of an assigned office while working primarily at a different office, in which case each of those offices could be a potential location to which income might be sourced for purposes of the throw-back rule. Using a disjunctive approach, if one of those offices was in New York State, the Convenience Rule would apply to work done at a home office which did not satisfy the Home Office Rule. The critical issue would then be how to allocate days worked from a home office which did not satisfy the Home Office Rule in a case in which there were two "assigned or primary" offices, one of which was in New York and one was outside.

Ultimately, the inquiry of how to apply the Convenience Rule where an employee has two "assigned or primary" offices is reduced to two different approaches. One is to assert that there is a "force of attraction" principle at work — that is, a principle that would attract all wage income attributable to time spent working in locations other than bona fide offices of the employer (or a home office that satisfies the Home Office Rule), to New York. The other approach would be to find some neutral rule of general applicability, such as to apportion the income between the employee's primary and assigned office. The issue at stake is whether the method used results in a fair apportionment of the employee's income.

To illustrate the issues raised in such cases involving multiple offices, we consider the following examples:

Example 1:

Suppose an employee who is not a New York resident is assigned to and works primarily at a non-New York office of a company that also has an office in New York. Assume that in 2022, the employee works 15 days from the New York office and 235 days from the non-New York office. Presumably, the proper allocation of income to New York would be 15/250. That result is consistent with the guidance in the withholding area, discussed below, which is intended to match as closely as possible the substantive tax result. If this is not the intended result, the NYSDTF should provide clarification.[47]

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[46] In the event that this or a similar approach is not adopted, and a subjective multi-factor approach to defining "assignment" is used, then consideration should be given to making days of presence the most important factor. In other words, under such a multi-factor approach, in determining whether an employee has been assigned to an office, primary consideration should be given to the amount of time spent by that employee in that office. Under such an approach, it could be argued that de minimis days of presence should be disregarded in making that determination, so as to avoid distortive results. In this regard, we note that in a similar situation — that of relieving employers of the need to withhold on employee wages — the State has chosen to use a 14-day de minimis period as a safe harbor. A similar approach could be adopted here, which would have the effect of simplifying and making more consistent the determination in cases in which the employee in question spent no more than 14 days a year in a particular office. Giving priority to the number of days worked would, if anything, be even more appropriate if the disjunctive approach recommended above was not adopted at all and instead the concept of a single "assigned primary" office was used. See footnote 42 above.

[47] As discussed further in Part V.C below, if the employee works in the New York office on those 15 days for his convenience and not the employer's necessity, then if the Convenience Rule applies to work performed at a bona fide employer office, which we do not think is the proper interpretation, the proper allocation would have been zero, rather than 15/250.

Example 2:

Assume that an employee is relocating from New York to another state, and the employer has offices in New York and also in a different state than the one to which the employee is relocating. The employer allows the employee to work from his new home, and the employee is not officially assigned to either of the two employer offices. The employee seldom comes to the New York office, but does not meet the requirements to be considered to have a bona fide home office under the Home Office Rule. In such a case, it may well be that New York would assert that the employee is still "assigned to a New York office" and allocate all of his income to New York. The NYSDTF should clarify whether this is an intended and appropriate result.[48]

Example 3:

The facts are the same as in Example 2, except that the employer also has an office in the state to which the employee has relocated and the employee is reassigned to that office. In practice, the employee continues to work primarily from home and comes into that office only occasionally. In addition, very infrequently, the employee works in the New York office, although he no longer is assigned to and does not primarily work in that office. For example, suppose that in a year, the employee works 150 days from a home office that does not comply with the Home Office Rule, 85 days from the non-New York office to which he has been assigned, and 15 days from the New York office. What is the result? Presumably, it is the same as in Example 1. Since the employee has neither an assigned nor a primary work place in New York, the Convenience Rule should not apply in this case.

Example 4:

Assume that the facts are the same as in Example 3, except that the employee remains on the employer's New York books and records for payroll purposes and is not formally assigned to the office in his state of residency. Now, it appears that there are at least three possible results: First, the allocation could remain the same as in Example 3, since the same total quantity of work is performed in New York. However, this result is not consistent (at least under a disjunctive approach[49]) with the fact that the employee is still recorded on the employer's books and records in New York. Second, all 150 days spent at home could be allocated to the assigned New York office and none to the non-New York office. (This would be somewhat similar to the result in Example 2. Essentially, the fact that the employee is assigned to an office in New York and works there at least a few days during the year would be the controlling factor under this approach.) Third, the home days could be apportioned on some equitable basis (such as days spent) between the assigned and primary offices.

On balance, the third of these approaches seems the fairest, although one could also argue for example that services performed at the home office would be "attracted" to the state of residence where that is the state of the non-New York "assigned or primary" office. In any event,

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[48] This would be the result if the Convenience Rule applied in Example 2. See Part V.D below for a further discussion of issues related to whether it is appropriate to apply the Convenience Rule in such cases.

[49] If a multi-factor test is used, however, presumably the employee would remain free to argue that he had been assigned to the office in his state of residency because of his time spent there, the location of his supervisors, or various other factors.

there does not appear to be any guidance covering this fact pattern, and we encourage the NYSDTF to clarify how existing guidelines would apply in this scenario.

C. Reciprocal Application

The foregoing also raises the issue of whether the application of these rules is intended to be reciprocal, or whether the Convenience Rule is merely intended to be a rule which applies only to the benefit of New York State. While there may be no explicit requirement that an allocation rule prevent or minimize double taxation, this would certainly be desirable as a policy goal and in some instances may be constitutionally mandated. The relevant guidance in this area is phrased in terms of throwing income back to New York, but we understand that in at least one fact pattern, New York has applied the rule in a reciprocal manner, which we believe to be appropriate.

Example 5:

X is a New York resident and an employee of a corporation with an office in Connecticut to which X is assigned. In 2021 during the pandemic X's Connecticut office was closed and X worked from home in New York. Assume X's New York home does not satisfy the Home Office Rule. Applying its own version of the Convenience Rule (assumed for purposes of this example to be identical to the New York rule), Connecticut subjects X's wage income to Connecticut tax. Assuming New York uses consistent sourcing rules for all employment, it should regard X's wage income as Connecticut sourced and grant a New York credit for the Connecticut income taxes imposed on X for services X performed in New York.

We believe that granting the credit is the right answer in this case because it applies the Convenience Rule on a uniform neutral basis. If this is not the intended result, the NYSDTF should clarify.

Similarly, we believe there are other cases where similar principles could apply, and again we think the Convenience Rule should be applied on a uniform neutral basis. Consider the following two examples:

Example 6:

Y is a New Jersey resident and an employee of a corporation with an office in New Jersey to which Y is assigned. Y also has a vacation residence in New York. In 2021 during the pandemic, Y's New Jersey office is closed and Y works from home partly in New Jersey and partly in New York. Assume that neither residence would satisfy the Home Office Rule. New Jersey does not have a convenience rule, and because Y is not assigned to nor works at a New York office, the New York Convenience Rule does not apply either. The question is, how should Y's 2021 income be apportioned for state personal income tax purposes? If one applies the "general rule," then Y's income should be allocated between New York and New Jersey in proportion to days worked in either location. However, applying the principles of the Convenience Rule uniformly, because Y is at all times is assigned exclusively to a non-New York office, *all* of Y's wages earned for time spent working from home in New York during the pandemic should be "thrown back" to New Jersey and *none* of them should be taxed by New York, since all of it is non-New York source income of a nonresident.

The question here is whether the principles of the Convenience Rule should be applied on a uniform neutral basis. We think it should as a matter of tax policy; the absence of a convenience rule in New Jersey should not change the result. If the facts were identical except that Y worked in Connecticut or another state with such a rule, the outcome should not change. If this is not the intended treatment, the NYSDTF should clarify.

Example 7:

As a further illustration, one might consider the case where the nonresident employee has two "assigned or primary" offices, one within New York and one without, but also works from home. If a disproportionate share of the work attributable to days spent at home is allocated to New York, the system ceases to be neutral, because if the non-New York state adopted the same disproportionate allocation rule there could be double taxation without taking into account any credits that may be allowed. This result should not arise under either the residence-based or proportional allocation approaches, however.

Assuming that the foregoing discussion of the Convenience Rule and Home Office Rule in Parts V.A and V.B is correct, and that these rules should be applied in a uniform neutral manner as described in this Part V.C, some major questions nevertheless remain regarding the scope and application of these rules. These include what is meant by the phrase "of necessity" in the Convenience Rule and what is the scope of the Home Office Rule, both issues which we address below.

D. "Of Necessity, As Distinguished From Convenience"

The Convenience Rule is defined by a single clause in a single sentence in the relevant regulations as follows: "any allowance claimed for days worked outside New York State must be based upon the performance of services which of necessity, as distinguished from convenience, obligate the employee to perform out-of-State duties in the service of his employer."[50] This sentence has generated a substantial amount of administrative guidance as well as case law, but some of its aspects are still not clear. The language itself is arguably susceptible of at least two interpretations.

The first interpretation is simply that the place where the employee happens to be working must be necessitated by the employer's needs, not the employee's wishes. That is the way that the rule is usually summarized — the "convenience of the employee" versus the "necessity of the employer." This approach can be seen as consistent with the rules for allocation of wage income between offices. For example, suppose X is a valued member of the IT department of a firm with offices nationwide. For personal reasons, X moves from New York to a different state and is reassigned from the New York office to another office in that state (similar to the employee in Example 3 above). It would seem that the Convenience Rule would not cause X to allocate any of his wages to New York, even though he moved out of New York for his own convenience (family reasons) and he could perform his duties from any location. One way to explain and justify this result, is to conclude that the employer's desire to retain X is a sufficient "necessity" to validate X's reassignment, under the principles of the Convenience Rule. But as pointed out above, the

[50] N.Y. COMP. CODES R. & REGS. tit. 20, § 132.18(a) (2000).

same rationale would not appear to be sufficient under existing guidance if after the move, X continues to work from home and is not reassigned to an office outside New York (similar to the employee in Example 2 above), unless the Home Office Rule applied.

If this interpretation of the Convenience Rule is the correct one, then certain guidance issued by the NYSDTF appears questionable. For example, during the pandemic, the NYSDTF stated that "[i]f 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."[51] However, in extreme cases — for example, if the employer is legally prohibited from allowing employees on the premises, or if the premises are destroyed by a casualty event — it seems difficult to argue that the location of work outside the office is not necessitated by the employer's requirements, whether to comply with public health and safety edicts or more simply because there is no other place to work. From this perspective, the Pandemic Guidance and other similar illustrations of the Convenience Rule appear to be inconsistent with the strictures of the Convenience Rule, because in such situations the employer has a necessity to continue its business and no other place than employees' homes in which to continue it. Regardless of the detailed requirements of the Home Office Rule, it would appear that in that case, the Convenience Rule ought to be easily met.

The same issue which arises in the case of a casualty or other force majeure event at the assigned office could arise, although perhaps less starkly, in other cases as well. For example, in cases in which the employer has an office but requires employees to work from home to limit occupancy costs, the Home Office Rule TSB-M recognizes the reality of such a factor and accords it weight, but only as one of six secondary factors rather than as a determinative factor in its own right. Similarly, there may be cases in which the employer wishes to attract or retain an employee who wishes to work remotely, and so the employer — out of the need to retain the employee — consents to such arrangement. It could be argued that the principle of employer "necessity," broadly construed, applies to such a case.

There is a second, opposing interpretation of the Convenience Rule, namely that the employer's needs are not really relevant to that rule — rather, "necessity" under the Convenience Rule measures the importance of the specific location to the performance of the work itself. For example, if an employee is supervising a construction job in New Jersey, the employee needs to be in New Jersey. But if the employee's New York office is destroyed in a casualty event or closed because of a pandemic, the employee needs a place to work, but that place does not necessarily have to have a specific location. For example, in theory, an employee who works from a phone and laptop could drive to New York, park, and do the work in the car. This interpretation looks to whether there is a specific unique geographical location where the work needs to be performed — and if there is not, then the Convenience Rule applies, whether or not the employer's office is open, functional, or even continues to exist.

This second interpretation of the Convenience Rule is at least theoretically consistent with the Pandemic Guidance, since there is no unique geographical location where the vast majority of

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[51] "Frequently Asked Questions about Filing Requirements, Residency, and Telecommuting for New York State Personal Income Tax," NYS DEP'T OF TAX. AND FIN. (June 30, 2021), available at https://www.tax.ny.gov/pit/file/nonresident-faqs.htm#telecommuting.

office work must be performed. This interpretation is also arguably consistent with the literal language of the regulation (quoted above) and the "primary factor" of the Home Office Rule. However, this interpretation of the Convenience Rule is not consistent as a conceptual matter with the general rule that work performed in offices is not subject to any type of throwback requirement. Therefore, one must conclude either that work performed in an office of the employer is simply allocated under a different rule, without regard to the Convenience Rule; or else one must conclude that the concept of "necessity" is somehow different (and more easily satisfied) in the case of work performed in an office of the employer than in the case of work that is not performed in such an office. Neither of these approaches is particularly satisfying.

If one takes the view that the Convenience Rule simply does not apply to work performed at an office of the employer, but only to non-office work, then neither of the two interpretations of the Convenience Rule described above appears more sensible than the other. Under such a view, the basic function of the sourcing rules for wage income is really just to allocate as much as possible of an employee's wage income to the location of one or more bona fide offices of the employer (including a home office which satisfies the Home Office Rule) based on days spent at each such office. Wages for work that is not performed at such an employer office would presumably get thrown back to a jurisdiction where an assigned or primary office is located. In the case of an employee with more than one assigned or primary office, the wage income for work which was performed at "convenience" locations would be allocated among the relevant offices under one of the rules discussed above in Part V.B.[52] This approach essentially relegates the "place of performance" source rule to a tie-breaker rule for such non-office work and makes the basic rule a "place of employment" rule. One could argue that this is not consistent with the literal terms of the regulations, but it may be a more reasonable method for applying the rules.

E. Scope of the Office Rule

It appears from the foregoing discussion that as long as an employer is careful not to assign an employee who works from an out-of-state home to (and the employee does not work primarily from) a New York office, the Convenience Rule does not apply to draw income into New York, in which case it would appear that the employee's wage income is allocated to New York based solely on the percentage of the employee's days worked in New York. But there may be cases in which there is an assignment to a New York office even where the New York office is not the primary workplace or has any facilities to accommodate the employee, and the employee's actual place of work — the home — does not qualify as a bona fide employer office under the Home Office Rule. This could result in a dramatically different result, with all or most of the time spent working by the employee outside of New York being taxed by New York. This fact pattern underscores the importance of the Home Office Rule, indicating that care should be taken to make sure that the factors determining whether the Home Office Rule is satisfied accurately reflect the realities of the employee's work experience and are not governed by technical foot faults. If the employee has really been working from home and that is the employee's actual office, then that should count for something. With that in mind, we turn to an analysis of the Home Office Rule.

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[52] See the discussion at the end of Part V.B above.

As described above, pursuant to the TSB-M discussing the Home Office Rule,[53] in order to be considered a bona fide home office, the employee's home office must satisfy a multi-factor test by meeting either a single primary factor, or four secondary factors and three "other" factors. As demonstrated below, however, several of these factors are outmoded and/or irrelevant for many employees.

Ultimately, while it may be possible for most employees to meet three of the other factors, it may be difficult for an employee to satisfy four of the six secondary factors if narrowly construed. As a result, many employees will not qualify as having a bona fide home office, even if, in substance, their home office functions as their primary office. Essentially, the Home Office Rule is rarely satisfied, offering no relief to the average telecommuter. Furthermore, those workers who work in at-will, lower wage positions are even less likely than the average telecommuter to be able to meet the factors, as they will have less ability to persuade their employers to engage in the sort of formalistic activities that would allow an employee to satisfy these requirements. Set forth below is a discussion of how application of certain of the secondary and other factors can be more reasonably applied.

1. *The Secondary Factors*

- **The home office is a requirement or condition of employment.** Many employees nowadays do not have an employment contract. Thus, this factor may be met only if the employee and the employer enter into an agreement requiring the employee to work from home. It should be considered whether a unilateral statement by the employer (for example, "employees are not to come into the office for the duration of the pandemic until further notice without employer permission") should suffice to meet this requirement, and if not, why not. Further, if such a home office is required for employment, the NYSDTF should consider why this alone does not suffice to satisfy the Convenience Rule.

- **The employer has a bona fide business purpose for the employee's home office location.** It has traditionally been held that this factor is satisfied if the bona fide business purpose relates to the job functions performed by the employee for the employer. However, for employees in a number of occupations (for example, a research analyst or an IT manager), their work can often be performed anywhere. Many employees in these fields are connected to their employer and customers solely via telephone and computer. In this situation, the employer's business purpose for having the employee work from a home office is likely to be retention of a valuable employee and/or the reduction of office or other operating costs. Employee retention and increased profits (through reduction of office and operating costs) should constitute sufficient "business purpose," and there should be clarification that such a purpose meets this factor.

- **The employee performs some of the core duties of his or her employment at the home office.** Since an employee who performs most of his or her duties via

[53] TSB-M-06(5)I (NYS Dep't. of Tax. and Fin., May 15, 2006).

phone and computer likely performs most or all of his or her core duties from the home office, most employees should be able to meet this requirement.

- **The employee meets or deals with clients, patients, or customers on a regular and continuous basis at the home office.** The TSB-M refers to "physically meeting" with clients, customers, etc., at the home office for this factor to be met. This factor is simply not applicable for many workers regardless of where they work. Many employees never meet with clients, patients, or customers of their employer, whether because such interaction is not part of their job responsibilities or because their communication with these parties is only ever done remotely. A fairer and more neutral test would be that either the job task does not require face-to-face interaction with clients, patients or customers or, if it does, such interaction occurs at the home office on a basis at least as regular and continuous as such meetings occur at the employer's office. Furthermore, even employees who did meet with clients, patients, or customers in person prior to the pandemic may not have held any in-person meetings during the pandemic, thus making this factor even more difficult to satisfy. At the very least, there should be a "force majeure" exception to this requirement to accommodate such exceptional situations.

- **The employer does not provide the employee with designated office space or other regular work accommodations at one of its regular places of business.** This factor is still applicable and probably more likely satisfied since the start of the pandemic, because many workplaces have considered or are considering downsizing or converting to shared office space. As noted above, this factor is also relevant in determining whether the employee is "assigned" to an office, and (more importantly) why income should be thrown back to a location where it is not possible to perform the employee's duties.

- **Employer reimbursement of expenses for the home office.** This factor requires that the employer reimburse the employee for more than 80 percent of the expenses of the home office, including reimbursement for utilities, insurance, and all other expenses associated with working from home. Although reimbursement would seem to reflect the substitution of a bona fide office at the employee's home rather than the employer's location, it simply does not reflect the typical telecommuting arrangement. Under the national Fair Labor Standards Act, an employer is not required to reimburse an employee for home office expenses, unless incurring those expenses causes an employee's wages to dip below the minimum wage. While a highly compensated employee might have the bargaining power to insist on reimbursement for substantially all home office expenses, it is unlikely that a lower-wage employee would have the same bargaining power. Furthermore, it is possible that that this factor can be manipulated by having the employee and employer enter into an agreement where the employee is paid less, but the employer does provide reimbursement for office expenses.

2. *The "Other" Factors*

- **The employer maintains a separate telephone line and listing for the home office.** This factor is clearly obsolete because of today's technology. Most employees either use only their cell phone for work, have an office number automatically routed to their cell phone when they are not in the office, or use a computer-based network for their voice communications. If this factor is not eliminated entirely, it should be considered met if the employee uses a cell phone number for work calls, or if the employee's office line is available to the employee via a computer-based phone network or is otherwise forwarded to the employee.

- **The employee's home office address and phone number is listed on the business letterhead and/or business cards of the employer.** Again, this factor is outdated. Most employers do not use a business letterhead, and if they do, the letterhead often does not list addresses of all of the employer's offices or information about most of the employees. Similarly, many if not most employees do not have or use business cards with any frequency. We recommend that this factor be considered satisfied if the employee includes his or her cell phone number on the signature block attached to his or her emails, or if the phone number listed on the signature block connects through to the employee in his home office (e.g., with an internet phone).

- **The employee uses a specific area of the home exclusively to conduct the business of the employer that is separate from the living area.** This factor can and should be met for a bona fide home office so long as it requires the employee just to show (by photos or otherwise) that they have a designated office or desk for their work. However, it is impossible for a telecommuter to prove a negative, viz., that they perform no personal duties at that desk. Moreover, the importance of this factor is questionable because most employees perform some non-work activities at their desks at the employer's location. In addition, many employees, especially lower-wage employees, may not be able to renovate their homes to create separate work spaces.

- **The employer's business is selling products at wholesale or retail and the employee keeps an inventory of the products or product samples in the home office for use in the employer's business.** This factor would not apply to employees in a wide swath of industries.

- **Business records of the employer are stored at the employee's home office.** Given that most business records are now stored electronically, this factor should be satisfied if an employee has the ability to store, retain, and access records physically and/or electronically from the home office.

- **The home office location has a sign indicating a place of business of the employer.** This factor makes no sense in the context of work done exclusively by phone and computer from an employee's home. We believe this factor is irrelevant in today's economy and should be eliminated.

- **Advertising for the employer shows the employee's home office as one of the employer's places of business.** Again, this factor makes no sense in the context of modern economic conditions and should be retired.

- **The home office is covered by a business insurance policy or by a business rider to the employee's homeowner insurance policy.** This factor may still apply, as some businesses are required to ensure that their telecommuters are covered by insurance. However, not all businesses are required to obtain insurance for their employees' home offices. It is questionable whether this factor is a core feature identifying a home office.

- **The employee is entitled to and actually claims a deduction for home office expenses for federal income tax purposes.** This factor can no longer be met since Congress eliminated the relevant deduction. Accordingly, this factor should be eliminated.

- **The employee is not an officer of the company.** Understandably, this factor can still be met in many cases.

VI. Conclusion

Working from home is now a mass phenomenon. It is not limited to a small group of employees; rather, workers in a range of industries, and at different levels of seniority in the employer's organization, are now primarily or exclusively remote. The Convenience Rule and Home Office Rule should be clarified in a number of respects, both to address the increasingly varied and complicated fact patterns resulting from this economic trend and, more narrowly, to produce logical and fair results for employees who have worked remotely during the COVID-19 pandemic. In addition, it is up to the NYSDTF to determine whether it will continue to impose the Home Office Rule in the limiting manner that it has to date, or whether new guidance will be offered allowing a loosening of certain requirements in light of the realities of today's work environment. It should be acknowledged that such updates, while resulting in a more accurate reflection of current work arrangements, will likely result in a loss of tax revenue to New York State. Nonetheless, it may also be the case that an overly ambitious attempt to collect wage taxes from even "true" remote workers could adversely affect the ability of New York businesses, especially smaller businesses, to attract talented employees who reside permanently in more distant locales.