

Experts Weigh In on New Hampshire-Massachusetts Tax Dispute

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By Amy Hamilton

The government-mandated work-from-home fact pattern in *New Hampshire v. Massachusetts* distinguishes the case from earlier challenges to state “convenience of the employer” rules, according to leading state tax lawyers.

“People in New Hampshire are literally prevented from going to their Massachusetts offices,” said Jeffrey A. Friedman of Eversheds Sutherland (US) LLP. “They have to work from home. It’s not a convenience thing, it’s a requirement. I just think it’s a sharper case.”

During December 2 and 3 sessions held remotely, panelists at the New York University School of Professional Studies Institute on State and Local Taxation discussed state-versus-state original jurisdiction tax cases before the U.S. Supreme Court.

Pending is a New Hampshire [complaint](#) challenging the constitutionality of [Massachusetts's regulation](#), finalized in October, that allows the state to source and tax the income of nonresident workers who are telecommuting because of the pandemic. The complaint alleges that the regulation violates the commerce and due process clauses by taxing New Hampshire residents for work performed entirely in that state, which has no individual income tax. New Hampshire argues that the Court should hear the case in part because no other forum exists to resolve the issues.

But [several states](#) already use convenience of the employer rules to tax the wages or salaries of commuters who live in other states. During a question-and-answer session, an audience member asked why wouldn’t the Supreme Court — were it to hear *New Hampshire v. Massachusetts* — uphold the Massachusetts regulation as New York courts have done in cases challenging that state’s convenience of the employer rules.

Hollis Hyans of Blank Rome LLP pointed out that the Court has never reviewed any of those cases. Friedman asked her whether New Jersey would bring suit against New York in the way New Hampshire has done to Massachusetts.

“New York still has guidance on its website sticking to the old convenience of the employer rules, even with a COVID fact pattern,” Hyans said. “It’s still saying you’re working at the location of your employer unless your employer has set up an office.” She didn’t speculate on whether a state might bring a similar case against New York, but said taxpayers definitely will.

University of Connecticut law professor Richard Pomp said his own circumstances are similar to that of another [tax professor](#) who has brought challenges in New York: Pomp is a Connecticut resident who is an adjunct professor for a New York-based law school and has an office available to him in New York City. Yet Pomp said he believes the New Hampshire fact pattern presents a fundamentally different situation.

“With COVID, these offices are shut,” Pomp said. “I can’t go into my NYU office. How can you apply convenience of the employer when I cannot work in New York?”

New Hampshire’s challenge also is different because the situation amounts to “taxation without representation by Massachusetts,” Pomp said.

“Why can a state tax nonresidents in the first place?” Pomp asked rhetorically. New Hampshire residents who commute to Boston offices don’t get to vote on the people levying the Massachusetts tax on their wages or salaries. “The answer is kind of subtle, I think, that the nonresident commuter is actually riding the coattails of the residents,” Pomp said. Put another way, he said that as long as a state can’t discriminate against the nonresident commuter, then the resident voters will act in their own self-interest to make sure that the Massachusetts rates are reasonable, as are the rules for the state’s tax base.

“But when it comes to this kind of issue — jurisdiction — the residents don’t have a dog in the fight now,” Pomp said. “No one is looking out for the interests of the nonresident.”

When Friedman said the Massachusetts regulation targets out-of-state individuals, Pomp not only agreed but said that the approach is “spreading like a cancer.” Pomp added that, if anything, the Supreme Court “should get in early” if the justices believe Massachusetts is being overly aggressive.

“Imagine: Once you have nexus, do you always have nexus?” Pomp asked. “And what is this, trailing nexus on steroids? They ought to just be greatly offended by it and nip it in the bud.”

Pomp and Friedman both said they’d like to think that the Court would take the case, but declined to predict that it would. Pomp likened the New Hampshire-Massachusetts tax dispute to the boundary wars that the Founders imagined when they enumerated the types of Article III original jurisdiction suits.

But just because the Court has original jurisdiction does not mean it will hear the case, Pomp said. In February, the Court [declined to hear](#) *Arizona v. California*. Arizona had asked the Court to assume original jurisdiction and determine that California’s enforcement of its \$800 minimum franchise tax is unconstitutional when levied on Arizona entities with passive investments in California limited liability companies that elected to be taxed as partnerships. Arizona had argued that California winds up taxing nonresidents that conduct no actual business in the state.

During a panel on passthroughs, Kelvin Lawrence of Dinsmore & Shohl LLP said the Supreme Court had asked the U.S. solicitor general to weigh in on whether to take *Arizona v. California*. The solicitor general [recommended](#) that the Court not exercise its jurisdiction.

“What’s interesting and telling here is that Justice [Clarence] Thomas wrote a [dissenting opinion](#)

, joined by Justice [Samuel A.] Alito [Jr.], in which he argued that the Constitution doesn't permit the Court to decline jurisdiction in cases like these," Lawrence said. Thomas wrote about how the Constitution uses the term "shall" with regard to its original jurisdiction over suits between states and how declining review leaves the states without any other remedy to reconcile their differences, Lawrence said.

Pomp said he expects the Court to again ask the U.S. solicitor general to chime in on *New Hampshire v. Massachusetts*. Friedman said that in *Arizona v. California*, the solicitor general had argued against the Court taking the case in part by saying that Arizona has an adequate forum for resolving its issues in California. But that argument is weak in regard to New Hampshire individuals, Friedman said, because they would be forced to bring their cases to the Massachusetts Appellate Tax Board and then go through years of litigation.

"It's probably a really good argument as to why we need greater federal court jurisdiction generally," Friedman said.

Pomp asked how many years it would take before an individual with a case at the Massachusetts Appellate Tax Board would be in a position to file for cert with the U.S. Supreme Court. Friedman said it would be between five and seven years. "It'd be a long time, and by that point the pandemic will be distant memory, hopefully," Friedman said.

Friedman and Pomp also discussed the styling of New Hampshire's argument in its complaint. New Hampshire argues throughout the document that it has created an advantageous state tax system — counsel refer to it as the "New Hampshire Advantage" — because it has no sales tax and no traditional personal income tax. The argument, Friedman said, is that the New Hampshire Advantage is being undermined by the tax policies of a sister state, Massachusetts, which runs afoul of the commerce clause and other constitutional principles.

Pomp said the approach is interesting but he probably would have led with the "no taxation without representation" argument. He said he also would have added details about the growing risk of multiple states seeking to tax a New Hampshire resident's wage or salary income. For example, Pomp said, a New Hampshire resident could decide to go to a summer home in Vermont and do some work from there; Vermont could tax that individual on a source basis, while Massachusetts is now saying that it can tax that income, too.

It's understandable that no state wants to take an economic hit right now, Pomp said. "States are all hurting," he said, adding, "You can't act unconstitutionally to solve a problem you have with your fisc."