

Remote  
Worker  
Nexus

# MTC Nexus Committee

## April 26, 2023

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Reference:

**Michael T. Fatale** (General Counsel, Massachusetts Department of Revenue), “**Post-Pandemic State Taxation of Non-Resident Telecommuter Wages,**” **64 B.C. L. Rev.** (forthcoming Nov. 2023)

# Worker Income Tax Nexus

## Residency vs. Source-Based

Although a state may tax all the income of its residents, even income earned outside the taxing jurisdiction (i.e. wages earned everywhere), it may constitutionally tax nonresidents only on their income derived from sources within the state (i.e. wages sourced to that state). *Shaffer v Carter*, 252 US 37, 57 (1920).


Typically, the resident state will give the resident worker a tax credit for tax paid to another state for wages earned in that other state.

## Due Process for Taxation

Notion of fairness: must be “purposeful availment,” i.e., **minimum contacts** between state and person, property, or transaction to be taxed;

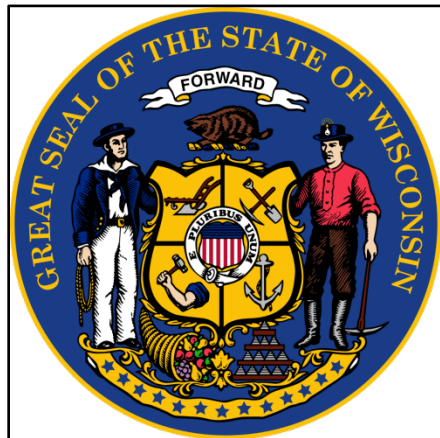
Income to be taxed must be **rationally related** to values connected with state. *Quill Corp. v. North Dakota*, 504 U.S. 298, 306 (1992)

“The simple but controlling question is whether the state has given anything for which it can ask return.” *Wisconsin v. J. C. Penney*, 311 US 435



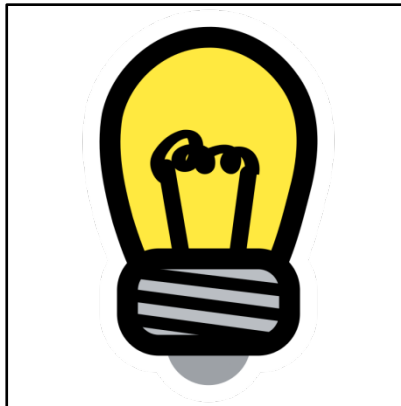
# Due Process

- *Wisconsin v. J.C. Penney. Co.*, 311 U.S. 435 (1940)
  - Wisconsin tax on corporate dividends declared out-of-state from income derived from property located in and business transacted in the state. Delaware corporate taxpayer declared dividends outside of Wisconsin. Court upheld tax. Corporation availed itself of privilege of carrying on business within state.



# Due Process

- *International Harvester v. Wisconsin*, 322 U.S. 435 (1944)
  - The Court held that physical presence is not needed for the imposition of a fairly apportioned **dividends received tax** imposed on non-resident shareholder. Wisconsin enacted a taxing scheme that required a corporation to withhold a percentage of all of its dividends, including dividends payable to non-residents of Wisconsin.



# *Complete Auto Transit* “Commerce Clause” Test

- In *Complete Auto Transit Inc. v. Brady*, 430 U.S. 274 (1977), the court determined that a state tax imposed on interstate commerce does not violate the Commerce Clause if it meets four-part test:
  - 1) Tax must apply to activity with “substantial nexus” to the taxing state
  - 2) Tax fairly apportioned
  - 3) Tax must not discriminate against interstate commerce
  - 4) Tax fairly related to benefits provided by the state

# New York “convenience of the employer” rule

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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 out-of-state duties in the service of his employer. 20 NYCRR 132.18 (a).

**Due Process/Commerce Clause challenge:** *Matter of Zelinsky v. Tax Appeals Trib. of New York*, 1 N.Y.3d 85, 769 N.Y.S.2d 464, 801 N.E.2d 840 (2003) (Law professor at NYC law school split work time between NYC and home in Connecticut, sought refund of New York income tax on wages for work performed in Connecticut and for which Connecticut would not allow a credit)




# *Zelinsky*: “convenience of the employer rule” upheld

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No Commerce Clause violation for double taxation: “New York has validly taxed the income of a nonresident derived from New York sources, while Connecticut has, as it may, taxed the income of its resident.”

No discrimination: “Since a New York resident would not be entitled to any special tax benefits for similar work performed at home, neither should a nonresident.”

No due process violation: “New York . . . provides a host of tangible and intangible protections, benefits and values to the taxpayer and his employer, including police, fire and emergency health services, and public utilities. . . . Petitioner has a ‘minimum connection’ to New York by virtue of his employment.


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## Corporate nexus from remote employee

- Where a foreign corporation permitted an employee to telecommute full-time from New Jersey home, as employee carried out the purpose of the corporation's organization in New Jersey by creating computer code that became part of its web-based service, it was "doing business" in New Jersey and subject to corporate income tax. *Telebright Corp. v. Director, N.J. Div. of Taxation*, 424 N.J. Super. 384, 38 A.3d 604 (2012).
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## Nexus relief during COVID- 19

- Several states published temporary guidance that in-state remote worker presence will not create income tax nexus for the out-of-state business if such presence is due to “stay home” orders in effect during COVID-19: AL AZ DC GA IA IN KY LA MA MD MN MS ND OK OR PA RI SC.
  - That guidance has since expired.
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# Ohio COVID -19 Policies

March 2020 Governor Mike DeWine executive order declaring emergency and Ohio's director of health "stay home" order subject to certain exceptions for "essential businesses and operations"

General Assembly enacted emergency legislation in Section 29, 2020 H.B. 197 addressing municipal taxation for telecommuting employees:

**. . . during the period of the emergency . . . any day on which an employee performs personal services at a location, including the employee's home, to which the employee is required to report for employment duties because of the declaration shall be deemed to be a day performing personal services at the employee's principal place of work.**

# *Buckeye Inst. v. Kilgore*, 2021-Ohio-4196

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Ohio residents/nonresidents of Columbus working for Columbus employer, began telecommuting during pandemic “stay home” order, sought refund of Columbus income tax on telecommuting wages and challenged Section 29 as unconstitutional in violation of Due Process Clause and Ohio Constitution by authorizing municipalities to tax extraterritorial income.

Trial court granted City’s motion to dismiss, affirmed on appeal.

“This case also involves the General Assembly's authority to legislate in response to a state-wide emergency for the general welfare of all Ohio citizens.”

“The city . . . does afford to plaintiff not only a place to work but a place to work protected by the municipal government.”

# *Schaad v. Alder*, 2022-Ohio-340, appeal to Ohio Supreme Court pending

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Ohio resident/Cincinnati nonresident denied refund of Cincinnati income tax withheld on telecommuting wages earned from Cincinnati employer during “stay home” order, challenged Section 29 as due process violation for permitting municipality to tax nonresidents for work performed outside of the city.

Trial court granted defendant’s motion to dismiss, affirmed by Court of Appeals, determining that Section 29 was an emergency state law applicable to all state residents, relying on *Buckeye Inst. v. Kilgore*, 2021-Ohio-4196.

# *Curcio v. Hufford*, 2022-Ohio-4766

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Ohio residents/nonresidents of cities of Oregon and Toledo challenged Section 29 for violation of Due Process Clause and Ohio Constitution for authorizing extraterritorial taxation, seeking refund of Oregon and Toledo income taxes on their telecommuting wages during the pandemic period. Trial court granted cities' motion to dismiss, affirmed on appeal.

“Section 29 was a valid administrative limitation on municipalities' power to levy taxes, a state statute *regulating* local income taxes.”

“The legislature used its jurisdiction over the taxpayers to authorize the cities to determine tax liabilities during the state of emergency.” (citing *Schaad v. Adler*)



*Morsy v. Dumas*, on appeal to Ohio Court of Appeals, CA 22 112061, Eighth Appellate District





Pennsylvania resident telecommuted to work for Cleveland employer during pandemic, challenged Section 29:

authorizing municipal income tax without jurisdiction in violation of due process;

expanding municipal taxation in violation of the Home Rule Amendment of the Ohio Constitution; and

violating the Commerce Clause as applied, in that Pennsylvania does not provide a credit for the Cleveland income tax resulting in double-taxation.

Trial court granted plaintiff's motion for summary judgment, distinguishing *Buckeye Institute* and *Schaad* as concerning Ohio resident taxpayers. Appeal pending.





# *Boles v. City of St. Louis, Missouri* Circuit Court, No. 2122-CC00713

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Nonresidents of St. Louis split time between telecommuting and working for employers in St. Louis during 2018, 2019, 2020. Employers withheld St. Louis earnings tax on wages. St. Louis allowed refunds for telecommuting time during 2018 and 2019, but denied for 2020 during the pandemic, due to fiscal concerns. Nonresidents filed suit, seeking refunds. Court granted the refunds.

“Earnings Tax” defined as “salaries, wages, commissions and other compensation earned by nonresidents of the city for work done or services performed or rendered in the city.”