



**COMMITTEE ON  
STATE & LOCAL TAXATION**

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CHAIR

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April 10, 2020

*Sent via E-Mail*

Commissioner Michael R. Schmidt  
New York State Department of Taxation and Finance  
W.A. Harriman Campus, Bldg. 9  
Albany, NY 12227

Commissioner Jacques Jiha  
New York City Department of Finance  
One Centre Street  
New York, NY 10007

**Re: COVID-19-Related Tax Issues - Executive Order No. 202.8 (abating interest, sales tax late filing and payment penalties for a 60-day period) and Executive Order No. 202.12 (extending certain filing and payment deadlines for personal income tax and corporate tax returns)**

Dear Commissioners Schmidt and Jiha:

On behalf of the New York City Bar Association's State and Local Tax Committee, we write to bring to your attention certain issues that have surfaced as we face the COVID-19 pandemic. We know that both you and your staffs have been working hard to continue providing the services and support New Yorkers have come to rely on from their tax departments and we commend everyone for their efforts during these challenging times.

Governor Cuomo has issued Executive Order No. 202.8 authorizing Commissioner Schmidt to abate interest as well as sales tax late filing and payment penalties for a 60-day period, and Executive Order No. 202.12 extending certain filing and payment deadlines for personal income tax and corporate tax returns. The City's Department of Finance has announced that taxpayers can request penalty abatement for late filed extensions and returns for the business and excise taxes that it administers. Your departments have issued (and continue to issue) guidance to taxpayers and we applaud all of the efforts taken by you and your departments in keeping New York taxpayers informed of all COVID-19 related tax relief.

The Committee has identified several issues created by the response to COVID-19 that it recommends be addressed by your Departments: (1) nexus; (2) domicile and statutory residency; and (3) application of the convenience of employer rule. These issues are not intended to be all-inclusive; numerous other issues exist or may be discovered and the Committee urges that the Departments adopt approaches to these additional issues that minimize or eliminate any deleterious impacts from COVID-19 responses.

## I. NEXUS ISSUES

Due to Governor Cuomo’s mandated PAUSE, which requires all non-essential workers to work from home, and many other states’ similar “stay-in-place” mandates, the incidence of teleworking has increased exponentially. This could have nexus implications to the businesses employing those teleworking individuals. Other tax jurisdictions have begun to address this issue and we urge that you also do so. For example, on March 30, 2020, the New Jersey Division of Taxation issued the following:

As a result of COVID-19 causing people to work from home as a matter of public health, safety, and welfare, the Division will temporarily waive the impact of the legal threshold within N.J.S.A. 54:10A-2 and N.J.A.C. 18:7-1.9(a) [the statute and regulation addressing nexus] which treats the presence of employees working from their homes in New Jersey as sufficient nexus for out-of-state corporations. In the event that employees are working from home solely as a result of closures due to the coronavirus outbreak and/or the employer’s social distancing policy, no threshold will be considered to have been met.<sup>1</sup>

New Jersey is not alone in announcing its flexibility regarding nexus determinations during this pandemic. Mississippi has also issued a release that provides that it “will not impose any changes in the employees [*sic*] temporary work locations due to the pandemic to impose nexus . . . for any business while temporary telework requirements are in place.”<sup>2</sup> Pennsylvania<sup>3</sup> has also recently stated that due to the current situation telecommuters will not change a company’s nexus status with respect to corporate income taxes, and other jurisdictions have signaled that they would likely follow suit.<sup>4</sup> The Committee urges the Departments to announce positions similar to those taken by these states.

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<sup>1</sup> New Jersey Division of Taxation Statement Mar. 30, 2020.

<sup>2</sup> *Mississippi Department of Revenue Response to Requests for Release*, Mar. 26, 2020 at 2.

<sup>3</sup> In response to the question: “Will an employee working from home temporarily due to the COVID-19 pandemic create nexus for PA Corporate Net Income Tax (CNIT) purposes for a business that otherwise does not have nexus with PA?” the following statement was provided: “Governor Tom Wolf issued a Proclamation of Disaster Emergency on March 6, 2020. As a result of COVID-19 causing people to temporarily work from home as a matter of safety and public health, the department will not seek to impose CNIT nexus solely on the basis of this temporary activity occurring during the duration of this emergency.” [https://revenue-pa.custhelp.com/app/answers/detail/a\\_id/3738/session/L3RpbWUvMTU4NjE3NzA3NC9zaWQvZDJtOUJKRm8%3D](https://revenue-pa.custhelp.com/app/answers/detail/a_id/3738/session/L3RpbWUvMTU4NjE3NzA3NC9zaWQvZDJtOUJKRm8%3D). (All links in this letter were last checked on April 10, 2020).

<sup>4</sup> James Nani, *DC, Pa. Won’t Count Teleworkers For Nexus Amid Outbreak*, Law360 (Apr. 1, 2020).

Other potential nexus ramifications include those for businesses that have opted to provide goods or services to New York State customers solely in connection with the pandemic. Those businesses should not be deemed to have established nexus by virtue of those pandemic-related transactions and should not be required to register as foreign entities doing business in the State with the Secretary of State. States have enacted or adopted disaster-based relief provisions<sup>5</sup> and the Committee urges that the State and City adopt similar provisions or support relief legislation.

## **II. DOMICILE AND STATUTORY RESIDENCY ISSUES**

Further, COVID-19 has resulted in some individuals being forced to or opting to shelter in states other than their domiciliary state, becoming ill and becoming hospitalized or being required to self-quarantine in non-domicile states, or helping family members who have become ill in states other than their own, with a potential impact on domicile or statutory resident status. Although these issues may not be addressed for several years, we urge the Department of Taxation and Finance to announce its recognition of these issues and its position that domicile and statutory residency issues that arise due to the pandemic will be liberally construed in favor of taxpayers in appropriate instances.

## **III. CONVENIENCE OF EMPLOYER RULE**

This rule deems days a New York State (or City)-based employee works outside the State (or City) to be counted as New York State (or City) days unless the employee is working outside the State (or City) because the employer has required that the employee do so. Given the Governor's declaration of a state of emergency and PAUSE, employees working outside the State (or City) during the pandemic should be deemed to be doing so as a matter of necessity rather than for the employees' convenience, and, thus, not attributed to New York State (or City), and the Committee recommends that the Department of Taxation and Finance announce this position as part of its continuing guidance on COVID-19 tax issues.

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<sup>5</sup> See, e.g., La. Rev. Stat. § 47:53.5(A)(1) ("There shall be excluded from the gross income of a nonresident business that performs disaster or emergency-related work within the state during a declared state disaster or emergency period all income received for disaster or emergency-related work conducted in this state during the disaster period. The nonresident business shall not be considered to have established a level of presence that would require the business to register, file, or remit the taxes imposed by Chapter 1 of Subtitle II of this Title [income taxes] to this state."); Ga. Code § 48-2-100(d)(1) ("An out-of-state business whose presence is solely that of conducting operations within this state for purposes of performing work or services on infrastructure related to a declared state of disaster or emergency during the disaster or emergency period shall not be considered to have established a level of presence that would require that business to register, file, and remit certain state or local taxes or that would require that business to be subject to any licensing or registration requirements in this state. This exemption includes any state or local business licensing or registration requirements, any state or local employer income tax withholding, unemployment insurance, any state or local occupational licensing fees, public service commission or secretary of state licensing and regulatory requirements, and any state or local tax on or measured by, in whole or in part, net or gross income or receipts or net worth, including the filing required for a combined group of which the out-of-state business may be a part. For the apportionment of income pursuant to Chapter 7 of this title, the performance by an out-of-state business of any work in accordance with this Code section shall not increase the amount of income apportioned to this state.")

As this crisis unfolds additional issues may arise and the Committee stands ready to assist you or your staffs in connection with addressing the tax impacts of COVID-19.

We wish you and your Department personnel continued health during this crisis.

Respectfully submitted,

Amy F. Nogid  
Chair, State & Local Taxation Committee<sup>6</sup>

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<sup>6</sup> The Committee would like to thank Scott Clark, Jason Feingertz, William Funk and Debra Herman for their assistance with this letter. David Bunning and Jahlionais (Elisha) Gaston recused themselves from the preparation of this report.