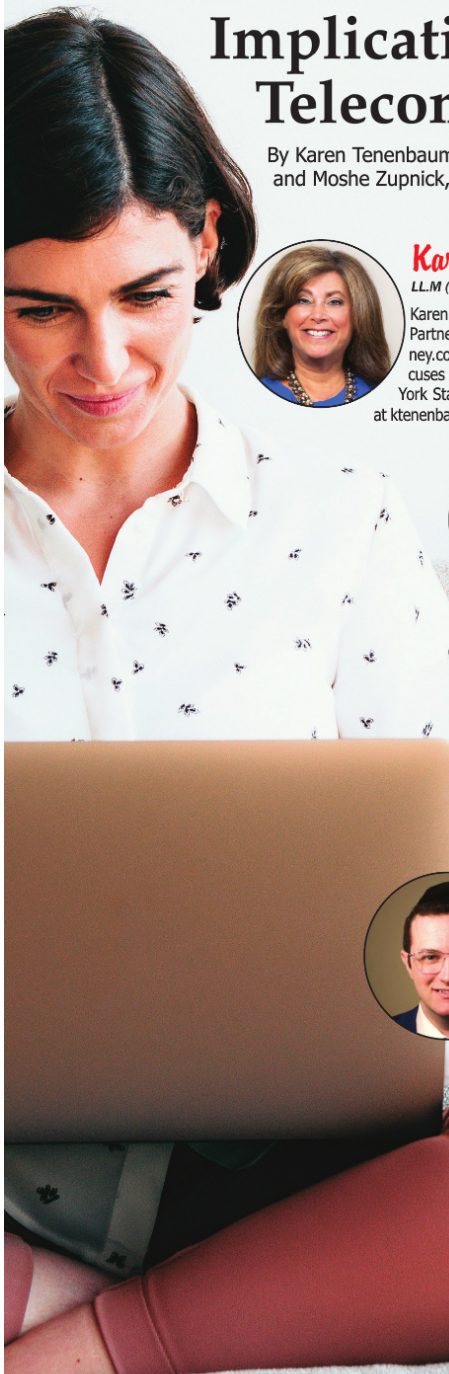


New York State Tax Implications of Telecommuting

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Telecommuting has long been an employment practice with well-established rules governing where employees should be taxed if they live in one state and work for an employer in a different state. However, COVID made telecommuting mainstream so that many more taxpayers are dealing with potential changes in what they owe. Taxation of telecommuters varies by state, but more importantly, it is an issue that requires a fact-sensitive analysis.

General Rules

Taxpayers who live and work in different states may be subject to taxation in more than one state. In New York, if a taxpayer is a nonresident (or part-year resident) but their primary business office is located in New York, telecommuting days are still considered "days worked in the state" and the taxpayer will continue to owe New York State income tax on that income even though the taxpayer was physically working outside New York.

Importantly, there is an exception. If the employer specifically acted to establish a bona fide employer office at the taxpayer's telecommuting location, the taxpayer will not have a tax obligation to New York State from wages earned while working from the bona fide office.

Bona Fide Office Exception

To demonstrate that a location is a bona fide office, the State requires that taxpayers prove the existence of either (i) the primary factor or, in the alternative, (ii) four of six secondary factors and three of the ten tertiary or other, factors. The primary factor is whether the home office contains or is near specialized facilities. If the employee has duties that require special equipment or facilities that cannot be performed at the employer's place of business, but such facilities are available near the taxpayer's home, the home will qualify as a bona fide employer office.

Most taxpayers will not fall under the primary factor and instead must resort to a combination of secondary and other factors to avoid taxation. Examples of these factors include:

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

However, these and the other factors on the State's list can be difficult to prove. For example, under #4 above, virtual Zoom meetings do not qualify.

Conclusion

Telecommuting-related audits are likely to increase significantly. Since the result will turn on a complicated assessment of many different factors, it is important for taxpayers to consult with an experienced tax professional in presenting their case.

¹ New York State Dept. of Taxation and Finance, 2006 New York Tax Treatment of Nonresidents and Part-Year Residents Application of the Convenience of the Employer Test to Telecommuters and Others. TSB-M-06(5).
² Frequently Asked Questions about Filing Requirements, Residency, and Telecommuting for New York State Personal Income Tax, October 19, 2020. <https://www.tax.ny.gov/pit/ile/nonresident-faqs.htm#telecommuting>.
³ Id.
⁴ Will COVID-19 Affect Your Clients' New York State Tax Residency?, by Karen Tenenbaum, Esq. and Marisa Friedrich, Esq., Nassau Lawyer, December 2020.