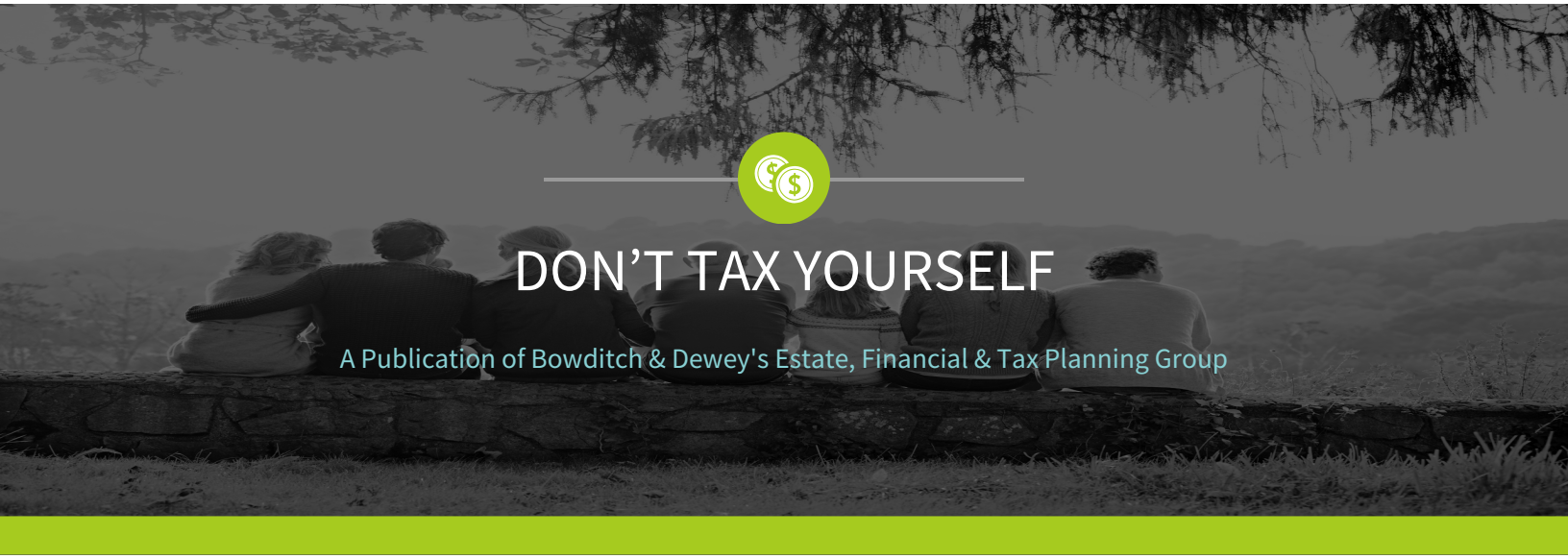


DON'T TAX YOURSELF

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New Hampshire Sues Massachusetts Over State Income Taxes for Remote Work

BY BOWDITCH & DEWEY • OCTOBER 20, 2020

Massachusetts employers and their employees who work out of state can add state income tax to their list of uncertainties caused by the COVID-19 pandemic. On October 16, 2020, the Massachusetts Department of Revenue issued a final regulation that requires employees of Massachusetts based employers who reside out of state but travel to Massachusetts for work but are prohibited from travelling due to COVID-19 restrictions to continue to pay Massachusetts income tax.

This widely criticized regulation is now under attack. On October 19, 2020, The State of New Hampshire filed a Motion For Leave To File Bill Of Complaint with the United States Supreme Court challenging the legitimacy of this rule.

The rule, which became final on October 16, 2020 and automatically expires at the earlier of December 31, 2020 or when the Governor declares an end to the current state of emergency, seems fair at first blush. Massachusetts is just trying to maintain the status quo. However, the long-standing rule is that an individual is subject to tax in the jurisdiction where the services are performed and not where the employer is located. Massachusetts has adhered to this general rule, at least until now, by imposing its income tax on out-of-state residents proportionately.

New Hampshire argues that Massachusetts' attempt to tax its residents who no longer travel to Massachusetts to work infringes on its sovereignty. First, New Hampshire's tax and economic policies at the core of the "New Hampshire Advantage" specifically exclude tax on income and on sales of tangible property. Second, New Hampshire residents working for Massachusetts employers are now treated differently.

Those who didn't travel to Massachusetts prior to COVID-19 restrictions are not required to pay Massachusetts tax but those who did, but now remain in New Hampshire, have to pay Massachusetts tax. In addition, New Hampshire also points out that those employees who no longer travel to Massachusetts for work no longer rely on Massachusetts services paid for by Massachusetts income tax such as police, fire, and roads and now rely on New Hampshire's police departments, fire departments and highway department.

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So, what do Massachusetts employers do? Massachusetts based employers who employ New Hampshire residents still need to withhold and pay over income tax to the Massachusetts DOR. The regulation is effective until it is repealed, or a court rules it ineffective. Employers should also be careful about re-characterizing those New Hampshire resident employees as "permanently remote" to avoid the withholding obligation. The Massachusetts DOR will undoubtedly scrutinize this type of re-characterization.

Employees, on the other hand, should continue to pay their Massachusetts income tax obligations. But they should also preserve their rights to claim a refund in the event the Supreme Court rules in their favor.

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