Background

In March 2020, in response to the COVID-19 pandemic, Governor Charlie Baker declared a state of emergency in Massachusetts and ordered that all non-essential businesses cease in-person operations. Shortly thereafter on April 21, 2020, the governor issued a temporary emergency order pursuant to which the Massachusetts Department of Revenue would collect income taxes from residents of states who previously traveled to Massachusetts for work but were performing such services remotely during the health crisis. This was a shift from the Commonwealth's existing policy to only collect income taxes from people for the days they physically worked in Massachusetts. The order is set to expire on September 13, 2021, 90 days after the Baker administration declared the end of the state of emergency.

Complaint

In response to the Massachusetts temporary order, on October 19, 2020, the State of New Hampshire filed a lawsuit against the Commonwealth in the U.S. Supreme Court.

The compliant alleged that the Commonwealth had violated the Granite State's sovereignty to set its own tax policies, and that the temporary order was an unconstitutional confiscation under the Commerce Clause and Due Process Clause of the Constitution. The state argued that its decision not to tax the income of its residents is a strategic policy to gain a competitive advantage, and that the Massachusetts order undermined New Hampshire's ability to do this. The Commonwealth pointed out that anyone who believed that they were harmed by the order could appeal to Massachusetts' tax authorities, and argued that requiring employers to keep track of their employees' changing locations during the pandemic would be an administrative nightmare for Massachusetts employers.

Supreme Court Proceedings

On June 28th, the U.S. Supreme Court (with dissents from Justices Thomas and Alito)

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declined to hear the case but did not provide an explanation as to why. President Biden's acting Solicitor General, Elizabeth Prelogar, filed a brief in support of Massachusetts and suggested that this type of litigation should be filed by affected individuals rather than a state government. Furthermore, she noted that the temporary nature of the Massachusetts policy, which would be lifted by the time the Court could hear the case, did not make the case a good candidate for the Court to issue a ruling on larger questions relating to telework and taxation. In fact, a number of states (including Arkansas, Delaware, Nebraska, New York, and Pennsylvania) prior to the pandemic already had so-called "convenience of the employer rules" in place that tax employees of businesses with offices in their states, even if those employees do not actually work in those offices. Such policies can result in double taxation, i.e. workers paying taxes on the same income to two states and without offsetting tax credits. Arkansas and Nebraska joined a brief filed by Ohio, Indiana, Louisiana, Missouri, Oklahoma, Texas and Utah in support of New Hampshire's motion for the limited purpose of arguing that the U.S. Supreme Court does not have discretion to decide not to hear original actions brought by one state against another. New Jersey, Connecticut, Hawaii and Iowa also filed a brief in support of New Hampshire, arguing that the Court should exercise original jurisdiction and that New Hampshire should prevail on the merits.

Significance

Over 100,000 individuals (more than 15% of New Hampshire's workforce) could be affected by the temporary order. It is also unlikely that New Hampshire will be able to seek relief in a different court given that the U.S. Supreme Court has exclusive jurisdiction over disputes between states.

New York's courts have previously heard a similar claim alleging violation of the Dormant Commerce Clause, which requires that taxpayers have a minimum level of economic contacts with a state and must in some way avail themselves of the benefits of the state's economy in order to be subject to its taxes. The court determined in *Zelinsky v. Tax Appeals Tribunal of the State of New York*, 801 N.E.2d 840 (N.Y. App. 2003) that employees working remotely for a company based in New York with New York offices were availing themselves of New York's market, and that this established sufficient contact to tax their income.

Congress could also intervene by passing federal legislation. In August 2020, representatives of Connecticut and New Hampshire introduced H.R.7968, the Multi-State Worker Tax Fairness Act of 2020, which would limit states' ability to tax nonresident telecommuters.

Although the Massachusetts policy is set to expire in September, open questions remain about how states will move forward in taxing nonresidents in connection with work done for in-state companies, particularly as many workers continue to split their time between remote and in-person work. Given that Massachusetts' primary source of revenue is income tax, this hybrid work model could have a major impact of the state's economics or lead to more permanent tax policies, which in turn could require businesses to relocate their offices if they want to avoid double taxation for their employees.

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