COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

SCOTT E. SAKOWSKI **v.** **COMMISSIONER OF REVENUE**

Docket No. C347594

Promulgated:
July 8, 2024

This is an appeal filed under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 62C, § 39 from the refusal of the Commissioner of Revenue ("Commissioner" or "appellee") to grant abatement of income tax to Scott E. Sakowski ("appellant") for calendar year 2020 ("tax year at issue").

This matter was submitted to the Appellate Tax Board ("Board") on briefs without oral argument pursuant to 831 CMR 1.31[1] Chairman DeFrancisco and Commissioners Good, Elliott, and Metzer joined in the decision for the appellee. Commissioner Bernier dissented.

These findings of fact and report are made pursuant to a request by the appellant under G.L. c. 58A, § 13 and 831 CMR 1.32.[2]

Scott E. Sakowski, pro se, for the appellant.

Celine E. de la Foscade-Condon, Esq., for the appellee.

[1] This citation is to the regulation in effect prior to January 5, 2024.
[2] This citation is to the regulation in effect prior to January 5, 2024.

FINDINGS OF FACT AND REPORT

Based on a Statement of Agreed Facts as well as documentary evidence submitted by the parties, the Board made the following findings of fact.

At all material times, the appellant was a resident of Concord, New Hampshire and, beginning in April 2019, worked as an attorney-advisor with the National Oceanic and Atmospheric Administration ("NOAA"), a federal agency within the U.S. Department of Commerce. The appellant's Form W-2 designated his employer as the U.S. Department of Commerce with an address in New Orleans, Louisiana. The appellant's office from which he was based was the Greater Atlantic Region Office, located in Gloucester, Massachusetts ("Massachusetts Office").

The appellant's supervisor to whom he reported was based out of the NOAA's office in Silver Spring, Maryland. The appellant's job duties included prosecuting civil-administrative actions brought under Federal statutes before Federal administrative law judges. He enforced fisheries regulations in Federal waters, typically located greater than three nautical miles offshore, stretching from Maine to North Carolina. He also advised the NOAA's Office of Law Enforcement on legal matters pertaining to law-enforcement operations.

On March 12, 2021, the appellant timely filed a Form 1-NR/PY, Massachusetts Non-Resident Personal Income Tax Return for the tax

year at issue ("Return"). The Return reported an income tax due of $4,936.00, income tax withheld of $5,055.00, and a refund request of $119.00. The Return indicated a total of 260 working days, all performed in Massachusetts. On March 23, 2021, the Commissioner issued the $119.00 refund.

On October 22, 2021, the appellant filed an Application for Abatement for the tax year at issue, seeking an additional refund of $3,918.66 on the basis that he worked only 54 days in Massachusetts during the tax year at issue. On April 22, 2022, the appellant's abatement request was deemed denied, notice of which was sent to the appellant. On October 21, 2022, the appellant filed his petition with the Board. Based on these facts, the Board found and ruled that it had jurisdiction to hear and decide the instant appeal.

The appellant was hired as a salaried employee with a standard work schedule of forty hours per week, eight hours per day from Monday through Friday, to work in the Massachusetts Office. At the start of his employment in April 2019, the appellant commuted five days a week from his home in Concord, New Hampshire to the Massachusetts Office. The appellant's employer withheld income taxes from his earnings consistent with his working in the Massachusetts Office on a full-time basis. The parties agreed that after a year of employment, the appellant would have been eligible to telework at least two days per week from his home, but as will

be explained, this opportunity was altered by extenuating circumstances.

On March 10, 2020, as the COVID-19 pandemic spread to the New England area, the Massachusetts Governor declared a state of emergency. On March 15, 2020, in response to the growing public-health threat caused by COVID-19, the appellant's employer instructed him and other employees to telework from home. The appellant started working exclusively from his home in New Hampshire on March 16, 2020, and he continued to do so throughout the remainder of the tax year at issue. Apart from not appearing at the Massachusetts Office, the appellant's job duties did not change, and his employer did not adjust his income-tax withholdings during the remainder of the tax year at issue.

On April 21, 2020, the Commissioner promulgated an emergency regulation at 830 CMR 62.5A.3 ("COVID-19 Regulation"),[3] which was in effect from March 10, 2020 until September 13, 2021, ninety days after the Governor declared the end of the COVID-19 state of emergency in Massachusetts. Pursuant to the COVID-19 Regulation, non-resident employees who worked in Massachusetts prior to the pandemic, but worked remotely during the regulation's effective

[3] As emergency regulations are in effect for only three months, the COVID-19 Regulation went through several iterations. The term "COVID-19 Regulation" refers to all versions of the emergency regulation.

time because of "Pandemic-related Circumstances,"[4] were to apportion their income from the affected time period by one of two methods, whichever resulted in the lesser tax due: (1) the taxpayer's percentage of work performed in Massachusetts during January and February of 2020, or (2) if the taxpayer worked for the same employer in 2019, the apportionment percentage properly used to determine Massachusetts-source wages on the employee's 2019 Massachusetts income tax return. Consistent with the COVID-19 Regulation, the appellant's employer continued to withhold Massachusetts income tax from the appellant's paychecks as if he were working full time from the Massachusetts Office.

As will be explained in the following Opinion, the appellant failed to advance sufficient evidence or convincing arguments that application of the COVID-19 Regulation to the income at issue resulted in improper taxation.

Accordingly, the Board issued a decision for the appellee in this appeal.

[4] The term "Pandemic-related Circumstances" was defined as (a) a government order issued in response to the COVID-19 pandemic, (b) a remote work policy adopted by an employer in compliance with federal or state government guidance or public health recommendations relating to the COVID-19 pandemic, (c) the worker's compliance with quarantine, isolation directions relating to a COVID-19 diagnosis or suspected diagnosis, or advice of a physician relating to COVID-19 exposure, or (d) any other work arrangement in which an employee who performed services at a location in Massachusetts prior to the Massachusetts COVID-19 state of emergency performed such services for the employer from a location outside Massachusetts during the period in which 830 CMR 62.5A.3 was in effect. 830 CMR 62.5A.3(2). The appellant did not argue that his switch to telecommuting on March 10, 2020 was not the result of "Pandemic-related Circumstances."

OPINION

The appellant challenges the application of the COVID-19 Regulation to his income from the NOAA for the period from March 16, 2020 through the end of the tax year at issue, contending that the regulation violated the Commerce and Due Process Clauses of the U.S. Constitution ("Constitution"), and further that his income from the NOAA for that period had no connection to Massachusetts. The Board herein addresses these concerns.

I. The COVID-19 Regulation passes Constitutional muster.

"A tax measure is presumed valid and is entitled to the benefit of any constitutional doubt, and the burden of proving its invalidity falls on those who challenge the measure." ***Opinion of the Justices***, 425 Mass. 1201, 1203-1204 (1997) (quoting ***Daley v. State Tax Commission***, 376 Mass. 861, 865 (1978) and citing ***Andover Savings Bank v. Commissioner***, 387 Mass. 229, 235 (1982)); *see also* ***WB&T Mortgage Co. v. Assessors of Boston***, 451 Mass. 716, 721 (2008).

In deciding this appeal, the Board is also mindful of the Supreme Judicial Court's directive in ***Duarte v. Commissioner of Revenue***, 451 Mass. 399, 408 (2008) that the Board "lacks authority to declare regulations promulgated by the commissioner to be facially 'invalid and of no legal effect,' although it may find

that their application in a case before it is violative of due process or inconsistent with the statutory purpose."

Finally, as the Supreme Judicial Court has recognized, Commerce Clause analyses are "informed not so much by concerns about fairness for the individual [taxpayer] as by structural concerns about the effects of state regulation on the national economy" (***D & H Distrib. Co. v. Commissioner of Revenue***, 477 Mass. 538, 547 (2017) (citation omitted)), and the Due Process Clause requires only "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax" (***Capital One Bank v. Commissioner of Revenue***, 453 Mass. 1, 16 n.14 (2009)(citing ***Miller Brothers Co. v. Maryland***, 347 U.S. 340, 344-45 (1954)).

The abrupt closure of many offices and workplaces during the worldwide COVID-19 pandemic transitioned millions of workers to teleworking. This shift created sudden questions relating to state taxation, including whether a Massachusetts employer needed to determine: (1) the location of their employees working remotely on any given day; (2) whether such remote location imposed a personal income tax, and at what rate; and (3) how to reconcile the withholding, filing, and payment obligations for each remote location. Similarly, questions arose for employees, including whether they would be liable to pay income tax to states in which

they were temporarily located at any time during the pandemic while teleworking.

Faced with these challenges and others, the Commissioner sought to "minimize disruption for employers and employees during the COVID-19 state of emergency." *Department of Revenue Technical Information Release ("TIR") 2020-5.* In particular, the Commissioner chose to maintain the pre-pandemic status quo for the sourcing of employees' wages to Massachusetts by basing apportionment on employees' pre-pandemic work locations.

Revenue departments of several neighboring states also preserved their sourcing rules during the national state of emergency to maintain the pre-pandemic status quo for income tax withholding obligations. For example, as announced by the New York Department of Taxation and Finance, that state's "convenience of the employer" rule, which sources a non-resident employee's income to New York when the employee is telecommuting from out of state (*see* 20 NYCRR 132.18[a]) continued to apply during the COVID-19 pandemic. Thus, nonresident workers telecommuting for a New York employer pursuant to executive stay-at-home orders still had their income sourced to New York unless the employer had established a bona-fide employer office at the nonresident's telecommuting location. *See* Frequently Asked Questions About Filing Requirements, Residency, and Telecommuting for New York State Personal Income Tax (https://www.tax.ny.gov/pit/file/nonresident-

faqs.htm). The New York Division of Tax Appeals upheld this regulation against a Constitutional challenge like that in the instant appeal. *See* ***In the Matter of the Petition of Edward A. and Doris Zelinsky***, New York Division of Tax Appeals, Determination DTA Nos. 830517 and 830681, at p. 19 ("The Executive Order mandating that all employees work from home due to a worldwide pandemic cannot result in special tax benefits to those who do not live in New York, but nonetheless work for, and benefit from, a New York employer.").[5]

In reviewing the appellant's challenges to the COVID-19 Regulation, the Board is aware that it cannot "'substitute [its] judgment as to the need for a regulation, or the propriety of the means chosen to implement the statutory goals, so long as the regulation is rationally related to those goals.'" ***Caccio v. Secretary of Pub. Safety***, 422 Mass. 764, 769 (1996) (quoting ***American Family Life Assur. Co. v. Commissioner of Ins.***, 388 Mass. 468, 477, *cert. denied.*, 464 U.S. 850 (1983)).

With respect to the appellant's constitutional arguments under the Commerce and Due Process Clauses, it is well settled that a state lacks authority to "tax value earned outside its borders." ***Allied-Signal, Inc. v. Director, Div. of Taxation***, 504 U.S. 768, 777 (1992). However, in the age of technology, what is

[5] The New York "convenience of the employer" regulation withstood an earlier challenge by the same taxpayers. *See* ***Zelinsky v. Tax Appeals Tribunal***, 1 N.Y.3d 85 (2003), *cert. denied*, 541 U.S. 1009 (2004).

outside a state's borders has become a concept that cannot be measured by physical presence alone. Instead, as the Supreme Court held, the courts must review the facts of each case based on "rules that are appropriate to the twenty-first century, not the nineteenth." ***South Dakota v. Wayfair, Inc.***, 585 U.S. 162, 176 (2018) (citation omitted).

The appellant's job duties did not change during the time when he telecommuted for pandemic-related reasons, nor did his employer adjust his withholdings. The appellant does not question the taxability in Massachusetts of the salary that he received from the NOAA prior to the pandemic. The only fact that changed was that the appellant did not physically appear in the Massachusetts Office during the relevant time, but as ***Wayfair*** established, physical presence is not the touchstone for constitutionality.

The Commerce and Due Process Clauses require sufficient nexus for the imposition of tax on a non-resident's income. *See* ***Commonwealth Edison Co. v. Montana***, 453 U.S. 609, 626 (1981)(Commerce Clause requires a tax to be "in 'proper proportion' to [a person's] activities within the State and, therefore, to their 'consequent enjoyment of the opportunities and protections which the State has afforded' in connection with those activities"); ***Miller Brothers Co. v. Maryland***, 347 U.S. 340, 344-45 (1954) (Due Process Clause requires "some definite link, some

minimum connection" between the income and the taxing state). Under the facts of this appeal, there is a strong connection to the taxing state – the appellant made a choice to accept full-time employment in the Massachusetts Office starting in 2019, and he continued that employment throughout the tax year at issue. According to the Supreme Judicial Court, such a purposeful choice is decisive to a finding of nexus. *See* ***Capital One Bank***, 453 Mass. at 16 (finding sufficient nexus despite the company's lack of physical presence in state).

The appellant contends that his work duties were not Massachusetts based, as the activities he regulated occurred offshore in Federal waters, and further, his supervisor was not based out of the Massachusetts Office. However, prior to the pandemic, the appellant worked full-time in Massachusetts, eight hours per day, five days per week, for a total of forty hours per week in his employer's Massachusetts Office. The appellant points to no authority for the proposition that the location of the activities that he regulates, or the location of his supervisor, should dictate his liability for taxation. Moreover, Massachusetts continued to provide services, including fire and police protection and road maintenance, to protect Massachusetts workplaces during the pandemic, thus enhancing employees' work security regardless of their states of residency. *See* ***Oklahoma Tax Comm'n v. Jefferson Lines, Inc.***, 514 U.S. 175, 200 (1995) (noting

the "usual and usually forgotten advantages conferred by the State's maintenance of a civilized society").

Further, the appellant has advanced no evidence establishing that any other state had staked claim to his income during his pandemic-related telecommuting. Even if another state laid rightful claim to the same income due to his physical presence in that state while teleworking, the COVID-19 Regulation offered a credit to prevent double taxation of the income, thus satisfying Constitutional concerns with fair apportionment. *Contrast* ***Comptroller Maryland v. Wynne***, 575 U.S. 542, 562-63 (2014).

Based on the connection of the appellant's income to a Massachusetts source, the Board ruled that the COVID-19 Regulation passed Constitutional muster.

II. The COVID-19 Regulation is valid under state statute.

The Board is guided by a presumption that the COVID-19 Regulation is valid and does not exceed the Commissioner's authority to implement the underlying statute. *See* ***Levy v. Board of Registration & Discipline in Medicine***, 378 Mass. 519, 525 (1979)("[W]e must apply all rational presumptions in favor of the validity of the administrative action and not declare it void unless its provisions cannot by any reasonable construction be interpreted in harmony with the legislative mandate.")(quoting ***Consolidated Cigar Corp. v. Dept. of Pub. Health***, 372 Mass. 844,

855 (1977)). *See also* ***Holyoke Gas and Electric Department v. Commissioner of Revenue, et al.***, Mass. ATB Findings of Fact and Reports 2002-262, 277-8 ("Moreover, where a regulation is consistent with the statute which it interprets and represents a reasonable interpretation of that statute, the administrative interpretation is entitled to deference.").

The underlying tax statute, G.L. c. 62, § 5A ("§ 5A"), taxes "income derived from or effectively connected with . . . any trade or business, including any employment carried on by [a non-resident] in the commonwealth." The Commissioner's specific statutory authority to promulgate regulations prescribing how to apportion a nonresident's income to Massachusetts is granted by § 5A(b):

> The commissioner shall adopt regulations providing for the ***method of determining the items and amounts*** of Massachusetts gross income ***derived from sources within the commonwealth by a non-resident, based*** upon the method set forth in section thirty-eight of chapter sixty-three or ***upon any other reasonable method***.

(emphasis added). By this language, the Legislature delegated to the Commissioner the authority to establish income tax apportionment formulas to identify both the items and the amounts of state-sourced income, so long as the apportionment method is "reasonable," including constitutionally sound. The Commissioner has previously exercised the authority to promulgate regulations for establishing apportionment rules based on various factors.

See, e.g., 830 CMR 62.5A.1(5)(a)-(e)(apportioning income based on factors including miles traveled or commissions).

Generally, the Commissioner maintains that the portion of a non-resident's income that is earned while telecommuting for a Massachusetts employer while outside the state is excluded from Massachusetts income. *See* 830 CMR 62.5A.1(5)(a). However, § 5A itself does not impose a physical-presence condition. As the Board has recognized:

> unlike the prior version of § 5A, which did not define "derived from or effectively connected with any trade or business," the amended statute[6] incorporates an exceedingly broad definition of the phrase. This definition includes any item "that results from, is earned by, is credited to, accumulated for or otherwise attributable to" a trade or business in the Commonwealth.

McTygue v. Commissioner of Revenue, Mass. ATB Findings of Fact and Reports 2010-329, 344-45, *aff'd*, 80 Mass. App. Ct. 1102 (2011)(unpublished order rendered under Rule 1.28). "The amended language is patently inclusive in its reach," with its focus on "whether Massachusetts has a right to tax [income] based on the income's provenance." ***Welch v. Commissioner of Revenue***, Mass. ATB Findings of Fact and Report 2023-391, 407.

Further underscoring the notion that physical presence in the Commonwealth is not necessary to justify Massachusetts taxation, the exceedingly broad definition in § 5A of income derived from or

[6] The amendment was effective for tax years beginning on or after January 1, 2003.

effectively connected with any trade or business, including employment, carried on in Massachusetts goes on to include such income "regardless of the taxpayer's residence or domicile in the year in which it is received."

Under the facts of this appeal, the appellant purposefully engaged in employment with the Massachusetts Office. Throughout the tax year at issue, the appellant continued to perform his job duties and continued to receive compensation "that result[ed] from, [was] earned by, [was] credited to, accumulated for or otherwise attributable to" his employment with the NOAA and the Massachusetts Office, consistent with the statutory definition of income "derived from or effectively connected with any trade or business in the commonwealth." Moreover, the state's provision of police and fire protection services to the Massachusetts Office did not cease because the appellant was telecommuting from outside the state. *See* ***Zelinsky v. Tax Appeals Tribunal***, 1 N.Y.3d 85, 95 (N.Y. 2003). The Board therefore ruled that the COVID-19 Regulation as applied to the appellant was rationally related to § 5A's definition of income "derived from or effectively connected with any trade or business" conducted in Massachusetts.

The appellant's eligibility to telework on a part-time basis at some undefined time does not alter the outcome of this appeal. The appellant provided no persuasive evidence as to a telecommuting start date unrelated to the COVID-19 pandemic, and his employer

did not at any relevant time change his withholdings. Instead, the facts line up squarely with the COVID-19 Regulation's purview of teleworking because of "Pandemic-related Circumstances."

Because the COVID-19 Regulation explicitly applies to a so-called "in-state business," the dissent questions whether the Commissioner intended the same taxing consequences to apply to a government employer like the NOAA. This is a strained and overly restrictive reading of the regulation. Such a reading would mean that colleges, hospitals, and other nonprofit entities would not be affected by the COVID-19 Regulation and they, as well as their employees, would be in the state of tax uncertainty that the COVID-19 Regulation was enacted to address.

Moreover, this question is addressed by guidance from the Commissioner in *Department of Revenue Directive 21-1*, issued April 30, 2021, shortly after the COVID-19 Regulation's final promulgation on March 5, 2021. The Commissioner therein did not employ the term "business," but instead used the word "employer" when it referred to the COVID-19 Regulation's personal income tax rules that were applicable to non-resident employees. The latter would, without doubt, include the NOAA, and the Commissioner's use of the terms interchangeably evidences the lack of intent to adopt the more restrictive reading of the regulation adopted by the dissent. The Board gives deference to the Commissioner's

interpretation of his own regulation. *See generally* ***Ten Local Citizen Group v. New England Wind, LLC***, 457 Mass. 222, 229 (2010).

CONCLUSION

The Board found and ruled that the appellant failed to advance sufficient evidence or convincing arguments that the COVID-19 Regulation's application to the income at issue was improper.

Accordingly, the Board issued a decision for the appellee.

THE APPELLATE TAX BOARD

By: /S/ _____
Mark J. DeFrancisco, Chairman

A true copy,

Attest: /S/ _____
Clerk of the Board

Commissioner Bernier Dissenting:

The COVID-19 Regulation was limited in scope to "income earned by a non-resident employee who ***telecommutes on behalf of an in-state business***" (emphasis added). The COVID-19 Regulation also only applied to individuals "performing such services from a

location outside Massachusetts ***due solely to the Massachusetts COVID-19 state of emergency***" (emphasis added).

While the COVID-19 Regulation is constitutional, as noted by the majority, Mr. Sakowski is still entitled to an abatement for two reasons: (1) the COVID-19 Regulation exceeds the Commissioner's statutory authority by conflicting with § 5A when applied to Mr. Sakowski, and (2) the COVID-19 Regulation's language, as contemporaneously promulgated, does not apply to Mr. Sakowski.

Conflict with § 5A

The COVID-19 Regulation exceeds the power given to the Commissioner to tax non-resident individuals by § 5A ("Non-Resident Income Tax Statute"). The authority cited by the Commissioner to implement the COVID-19 Regulation, G.L. c. 14, § 6(1), limits the Commissioner to promulgate or revise regulations "not inconsistent with law."

The Non-Resident Income Tax Statute only allows for the imposition of a nonresident income tax for income "derived from the Massachusetts gross income." The statute then states that "Massachusetts gross income shall be determined solely with respect to items of gross income from sources within the commonwealth of such person." This is then further defined in pertinent part as:

> Items of gross income from sources within the commonwealth are items of gross income derived from or effectively connected with: (1) any trade or business, including any employment carried on by the taxpayer in the commonwealth, whether or not the nonresident is actively engaged in a trade or business or employment in the commonwealth in the year in which the income is received;

After March 16, 2020, Mr. Sakowski's income is no longer "derived from or effectively connected with" any "employment carried on by the taxpayer in the commonwealth."

The Non-Resident Income Tax Statute also provides in pertinent part within subsection (b):

> The commissioner shall adopt regulations providing for the method of determining the items and amounts of Massachusetts gross income "derived from sources within the commonwealth" by a non-resident, based upon the method set forth in section thirty-eight of chapter sixty-three or upon any other reasonable method.

This language indicates that the Legislature has granted the Commissioner the authority to determine "the amounts," i.e. how to apportion the income already deemed to be from a state source; however, these amounts must be "from sources within the commonwealth," which subsection (a) explains to be "employment carried on by the [nonresident] taxpayer in the commonwealth." The plain language of subsection (b) uses the term Massachusetts gross income which is a defined term located in subsection (a).

The Non-Resident Income Tax Statute has been interpreted by previous incarnations of the Board, by the Massachusetts Appeals

Court, and by the Supreme Judicial Court of Massachusetts. In ***Commissioner of Revenue v. Destito***, 23 Mass. App. Ct. 977 (1987), the Massachusetts Appeals Court affirmed the Board's interpretation of the Non-Resident Income Tax Statute when finding a non-resident was not liable for tax imposed for his sick and annual leave payout. In ***Destito***, the Commissioner attempted to impose tax upon a federal employee that had "lived in New Hampshire" for more than 15 years and was only subject to Massachusetts income taxation because he had a "duty station" located in Bedford, Massachusetts. ***Id.*** at 977. The Appeals Court distinguished the taxpayer in Destito from the one in ***Horse v. Commissioner of Revenue***, 389 Mass 177 (1983) where a Florida resident had been held liable for Massachusetts tax because the income derived was from the installment sale of Massachusetts real property. ***Id.*** at 978. In ***Destito***, like Mr. Sakowski, the taxpayer owned no real property. He was simply a federal employee living in New Hampshire no longer having to report to his duty station in Massachusetts and therefore no longer subject to Massachusetts income taxation.

In ***Commissioner of Revenue v. Dupee***, 423 Mass. 617, (1996), the SJC affirmed the Board's decision interpreting the Non-Resident Income Tax Statute to limit the Commissioner from taxing a taxpayers' capital gain from the sale of a portion of an interest in a sports franchise (Boston Celtics) unless the "source of the

gain would have to have been a trade or business personally "carried on by the taxpayer in the commonwealth." ***Commissioner of Revenue v. Dupee***, 423 Mass. 617, 619 (1996)(citing M.G.L. c.62, § 5A(a)(1)). The Court denied the Commissioner's argument that the lack of a comma punction between the words "employment" and "carried" in subsection (a) would extend the meaning to tax all nonresident income from Massachusetts sources regardless of whether the applicable taxpayer personally carries out that business. ***Id.*** at 620.

In 2002, the Supreme Judicial Court affirmed the Board again and declined to overturn ***Dupee*** or ***Distito***. In ***Commissioner of Revenue v. Oliver***, 436 Mass. 467, 474 (2002), the Supreme Judicial Court affirmed the Board again and declined to overturn ***Dupee*** or ***Distito*** specifically commenting that ***Destito*** "accords with [their] own reading of the" Non-Resident Income Tax Statute stating that there is "nothing in the language of the statute that explicitly permits taxation of nonresident income "derived from or effectively connected with" past Massachusetts employment where the taxpayer has not "carried on" any business in the Commonwealth during the taxable year of receipt. ***Id.*** at 474.

The Legislature amended the Non-Resident Income Tax Statute in 2003; however, the Supreme Judicial Court recently clarified that while the amendment:

> now permits a tax on a nonresident who did business in the Commonwealth regardless of whether the business was conducted in that particular year. . . . The amendment did not affect the language construed in ***Dupee***.

VAS Holdings & Invs. LLC v. Commissioner of Revenue, 489 Mass. 669, 688 n.23 (2022) (emphasis added).

In ***VAS Holdings***, the Supreme Judicial Court clarified that the 2003 Amendment affected only the timing element of the "carried on by the taxpayer in the commonwealth" requirement – meaning the result in ***Dupee***, where the shareholder did not actively participate in the activities of the entity, would remain the same under that portion of the statute. ***Id***. at 687-688.[7] Accordingly, ***Distito***, and ***Oliver*** are all still valid when interpreting that relevant section of the Non-Resident Income Tax Statute language in subsection (a): "nonresident income derived from or connected with past Massachusetts employment." The amendment targeted the timing of the income, meaning a taxpayer could not earn income in Massachusetts and then collect that income while no longer connected to Massachusetts to evade the Massachusetts income tax that would otherwise be owed. The 2003 Amendment's application to ***Distito***, and ***Oliver*** can easily be distinguished from Mr. Sakowski's situation where the amendment simply does not apply.

[7] The statute was also amended to impose tax on the sale of a business; however, that part of the statute is not relevant to the case at bar as Mr. Sakowski is being taxed based on having previously reporting to work at NOAA's Gloucester Office.

In ***Destito***, the taxpayer had earned his sick leave and annual leave separation payments while reporting to a duty station located in Massachusetts for over 34 years while living in New Hampshire; however, he filed to receive these payments after he no longer had to report to Massachusetts. Prior to the 2003 Amendment these payments were not subject to Massachusetts income taxation; however, after the 2003 Amendment they would be since that unused annual leave and sick pay had been earned over the 34-year period when he reported to a Massachusetts duty station. In contrast, Mr. Sakowski's income, after March 16, 2020, lacks any connection to Massachusetts. He must still pay income tax during the time he reported to the Gloucester Office but after he was instructed to telecommute from his New Hampshire home, the connection of his income with Massachusetts ceased. He was not charged with enforcing federal regulations inside Massachusetts but in the federal waters outside of the commonwealth and he reported to a supervisor in Baltimore while working from his New Hampshire home office.

In ***Oliver***, the taxpayer received a generous severance package from his Massachusetts employer that kept him on the company's payroll for over two years until his official retirement date while he was effectively retired in Florida - a state with no personal income tax. Prior to the 2003 Amendment, his payroll while living in Florida was not subject to Massachusetts income taxation; however, after the 2003 Amendment his payroll would have been

subject to Massachusetts income tax since it was part of a severance package that had been earned from his years of service in Massachusetts working for a Massachusetts company. In contrast, Mr. Sakowski had to actively work from his New Hampshire home office in order to receive a paycheck for the remainder of 2020 whereas the taxpayer in ***Oliver*** had already earned the payments he was receiving while residing in Florida.

The COVID-19 Regulation, as it is applied to Mr. Sakowski, contradicts the Non-Resident Income Tax Statute. Mr. Sakowski is entitled to an Abatement as the application of it to this Mr. Sakowski would be "illegal" in this particular application as it would conflict with existing statutes. *See* ***Commissioner of Revenue v. Marr Scaffolding Co.***, 414 Mass. 489, 492 (1993) (reversing the Board's decision applying equitable estoppel while stating that the Board could rule that the taxpayer was entitled to an abatement if "the tax is excessive in amount or illegal")(citing G.L. c. 62C, § 7); *see also* ***Expedito Duarte vs. Commissioner of Revenue***, 451 Mass. 399 (2008)(limiting the Board's power to declare a Commissioner regulation to be facially invalid and of no legal effect only in the application of cigarette license suspension appeals under G.L. c. 62C, § 68 and still leaving open the Board's ability to find the application of a Commissioner regulation to be violative of due process or inconsistent with applicable statutory purposes). Mr. Sakowski was only subject to Massachusetts income

taxation when he reported to the Gloucester Office as that was the only time he carried out his employment in the commonwealth; however, after March 16, 2020, that connection to Massachusetts was severed. Every other aspect of his job lacks any connection to the commonwealth. As an employee of NOAA charged with enforcing fisheries regulations in Federal waters from North Carolina to Maine and reporting to a supervisor in Baltimore, Maryland, Mr. Sakowski liability for Massachusetts income taxation ended on March 16, 2020.

Application to Mr. Sakowski

Even if the application of the COVID-19 Regulation were within the Commissioner's authority, a plain reading of the COVID-19 Regulation as it was promulgated does not impose Massachusetts income tax upon Mr. Sakowski while he was telecommuting from his New Hampshire home. The Commissioner, along with his staff, had the proverbial "power of the pen" but failed to craft a regulation that applies to Mr. Sakowski. The scope of the COVID-19 Regulation as amended, extended, and repromulgated limits the sourcing of income earned by a non-resident employee who telecommutes on behalf of an in-state business from a location outside the state due to the COVID-19 state of emergency in Massachusetts.

The Commissioner chose to use the phrase "in-state business" when crafting the scope of the COVID-19 Regulation. "In-state

business" is an undefined term. The greater regulatory scheme in existence at the time of the pandemic instead uses the term "Massachusetts source income" to describe how income is "generally taxable to non-residents" and is:

> (a) any trade or business, including any employment, carried on by a non-resident in Massachusetts, whether or not the non-resident is actively engaged in a trade or business or employment in Massachusetts in the year in which the income is received;

830 CMR 62.5A.1(1)(a).

Instead, the Commissioner used the term "in-state business" which is not even defined in the applicable definitions section of the regulation or anywhere else for that matter. See 830 CMR 62.5A.1(2). The federal government is not normally considered an "in state business" for the purposes of Massachusetts income taxation. The DOR by regulation defines a number of different Massachusetts businesses and the federal government is not among them. *See* 830 CMR 63.39.1(2). Moreover, the federal government is not required to file foreign registrations with the commonwealth unlike out of state LLCs, partnerships, and corporations.

In addition, Mr. Sakowski began telecommuting after being instructed to by his federal government supervisor operating out of a different state. The Parties stipulated that Mr. Sakowski's "employer instructed him and other employees to telework from home." Accordingly, Mr. Sakowski did not start telecommuting due

solely to the "Massachusetts COVID-19 state of emergency" as the COVID-19 Regulation requires but rather due to a directive from his federal government employer due to the risks of COVID-19 nationally.

The COVID-19 Regulation must be interpreted and applied in a light most favorable to Mr. Sakowski as he is not seeking to qualify for a specific tax exemption but rather the application of a tax regulation. See ***Xtra, Inc. v. Comm'r of Revenue***, 380 Mass. 277, 281 (1979)(stating that the Appellate Tax Board "correctly applied the principle that ambiguities in taxing statutes are to be resolved in favor of the taxpayer"); see also, ***Commissioner of Revenue v. Dupee***, 423 Mass. 617, 622 (1996) (holding that "ambiguities in taxing statutes are to be resolved in favor of the taxpayer" citing ***McCarthy v. Commissioner of Revenue,*** 391 Mass. 630, 633, 462 N.E.2d 1357 (1984), quoting ***Cabot v. Commissioner of Corps. & Taxation,*** 267 Mass. 338, 340, 166 N.E. 852 (1929)) *see also* ***Grady v. Commissioner of Revenue,*** 421 Mass. 374, 377 (1995), quoting ***Commissioner of Revenue v. AMI Woodbroke, Inc.***, 418 Mass. 92, 94 (1994) ("taxing statutes are to be construed strictly against the taxing authority, and all doubts resolved in favor of the taxpayer").

The COVID-19 Regulation, as construed against the Commissioner, does not apply to Mr. Sakowski as an employee of NOAA charged with enforcing fisheries regulations in Federal

waters from North Carolina to Maine since the NOAA is not clearly an "in-state business" as that term was left undefined during the promulgation of the COVID-19 Regulation. In addition, Mr. Sakowski did not start telecommuting "due solely to the Massachusetts COVID-19 state of emergency" as the COVID-19 Regulation requires.

Accordingly, a decision should have been issued in favor of Mr. Sakowski.

THE APPELLATE TAX BOARD

By: /S/ _____
Nicholas D. Bernier, Commissioner

A true copy,
Attest: /S/ _____
Clerk of the Board