The Convenience Rule: Another Bite at the Big Apple

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In this installment of Noonan's Notes, Noonan and Savino review the history of professor Edward Zelinsky's fight against New York's convenience of the employer rule in the context of both his first case and his more recent appeal, including changes that may affect the next ruling.

New York's convenience of the employer rule has been in the limelight with the explosion of remote work in the wake of COVID-19-related lockdowns and changes in employer work-from-home policies.[1] Drama around the rule is not new, however, and taxpayers have been battling the New York State Department of Taxation and Finance for years about its scope and application. One of the chief protagonists in this saga has been professor Edward Zelinsky, the first taxpayer to take the convenience rule all the way to New York's highest court back in 2003. With the convenience rule now taking center stage in some state tax circles, guess who's back as one of the stars of the show.

On April 25 Zelinsky presented his case in a hearing before the New York Division of Tax Appeals, held (ironically) remotely via Webex. And because he waived his rights to privacy and secrecy that ordinarily accompany these hearings, your trusted columnists were there to see it all.[2] Zelinsky outlined his renewed approach for attacking the convenience rule — this time focused on the 2019-2020 tax years, which could make it the first reported New York tax case of a taxpayer challenging the rule's application during the pandemic.

Before analyzing changes in his new appeal, we'll review the history of Zelinsky's long-standing fight against the convenience rule.

Convenience Rule Background

Nonresidents of New York are taxed on their compensation based on the percentage of days worked in New York during the tax year. All states essentially use the same approach, but New York is among those[3] that diverge from it by treating days worked out of state by the employee for the employee's convenience — as opposed to employer necessity — as days worked in New York:

> If a nonresident employee . . . performs services for his employer both within and without New York State, his income

[1] *See* Timothy P. Noonan and Emma M. Savino, "New York's Convenience Rule: Under the COVID Microscope," *Tax Notes State*, May 31, 2021, p. 893; Noonan, "2023: In the Crosshairs, The Future of Telecommuting and State Taxes," *Tax Notes State*, Dec. 19, 2022, p. 1068.

[2] Noonan and Mario T. Caito, "An Inside Look at Zelinsky Part II," Noonan's Notes Blog (May 8, 2023).

[3] Delaware, Nebraska, and Pennsylvania also impose a convenience rule that resembles that of New York. 30 Del. C. section 1124(b); Neb. Admin. R. & Regs. 003.01C; 61 Pa. Code 109.8. Connecticut imposes a reciprocal convenience rule, which it only applies when the resident's home state does. Conn. Gen. Stat. section 12-711(b)(2)(C).

> derived from New York State sources includes that proportion of his total compensation for services rendered as an employee which the total number of working days employed within New York State bears to the total number of working days employed both within and without New York State. *However, any allowance claimed for days worked outside New York State must be based upon the performance of services which of necessity, as distinguished from convenience, obligate the employee to out-of-state duties in the service of his employer*.[4]

Rather than loosen this rule's application during COVID-19, when many New York nonresidents were forced to work at home for a year or more, New York doubled down. Specifically, in July 2020 the tax department issued guidance — in a post on its website — stating that the convenience rule still applied to those telecommuting because of the pandemic.[5] According to department policy, this meant that nonresidents who historically worked in New York but were working out of state thanks to stay-at-home orders would continue to pay state tax on their wages.

One of those nonresidents was Zelinsky. So game on!

Zelinsky 1.0

Before we get there, however, let's look at what happened in Zelinsky's first case. In 1994 and 1995, he was a Connecticut resident working in New York City as a professor of law at the Cardozo Law School.[6] During both years, Zelinsky commuted into New York City three days a week to teach class and meet with students, then worked from his Connecticut home the other two days — preparing exams, writing student recommendations, and conducting scholarly research and writing. In 1994, he taught during two academic semesters and worked a total of 84 days in New York. Because he was on sabbatical during the fall semester in 1995, he only worked 42 days in New York.[7]

Outside of the semester — including during his sabbatical — Zelinsky did not commute into the city, working exclusively from Connecticut, both at home and at a vacation home. When he filed his joint nonresident New York return each year, he apportioned his salary to New York using the total number of days he physically worked in the Empire State over total workdays — that is, not applying the convenience rule.

Zelinsky argued that the convenience rule was unconstitutional because it violated the commerce and due process clauses of the 14th Amendment, but the New York Court of Appeals disagreed.[8] The overall theme in the original decision is that the convenience rule prevents taxpayers from committing fraud or otherwise manipulating their workdays to reduce their New York tax burden.

Regarding the commerce clause argument, Zelinsky only challenged the second prong of the four-prong *Complete Auto* test — that the tax be fairly apportioned, which requires that it be externally and internally consistent.[9] More specifically, he only challenged that the tax was not externally consistent.

The court noted that "many busy professionals, at the conclusion of a full day, routinely bring work home for the evenings or weekends. Even when undertaken by an out-of-state commuter such as petitioner, this work cannot transform employment that takes place wholly within New York into an interstate business activity subject to the Commerce Clause."[10] And in finding that the tax was fairly apportioned, the court relied on several factors. First, the income was derived from the teaching activity, which occurred in New York. Second, work that he brought home was "inextricably intertwined with the business of his New York

[4] 20 NYCRR 132.18(a) (emphasis added).

[5] New York State Department of Taxation and Finance, "Frequently Asked Questions About Filing Requirements, Residency, and Telecommuting for New York State Personal Income Tax" (updated Oct. 19, 2020).

[6] *Zelinsky v. Tax Appeals Tribunal*, 1 N.Y.3d 85 (2003), *cert. denied*, 541 U.S. 1009 (2004).

[7] *Matter of Zelinsky*, DTA No. 817065 (N.Y. Div. Tax. App. Nov. 21, 2001).

[8] *Zelinsky*, 1 N.Y.3d 85.

[9] *Id.* at 91.

[10] *Id.* at 92.

law school." Third, Zelinsky voluntarily brought work home to Connecticut that he could have done in New York — a choice that cannot transform him into an interstate actor. Finally, the potential for double tax did not necessarily create a commerce clause issue, as we know from *Tamagni*.[11]

The court held that "the convenience of the employer test neither unfairly burdens interstate commerce nor discriminates against the free flow of goods in the marketplace. Nor does it result in differential treatment benefitting in-state interests at the expense of out-of-state interests."[12] In this holding, the court noted that "the convenience test serves merely to equalize tax obligations among residents and nonresidents, preventing nonresidents from manipulating their New York tax liability by choice of auxiliary work location in a manner unavailable to similarly situated New York resident employees. Since a New York resident would not be entitled to any special tax benefits for similar work performed at home, neither should a nonresident."[13]

Zelinsky 2.0

Zelinsky's new case deals with the same issue but under a different factual framework, even though the facts in 2019 looked a bit like *Zelinsky* 1.0. That year, he spent 84 days in New York City and 143 days working from home in Connecticut. The first part of 2020 was similar, as he was still teaching classes in person and continuing his normal commuting pattern of spending three days per week in New York City.[14]

But then COVID-19 happened, and Zelinsky did not set foot in New York City for the balance of the year. But this was neither a personal choice nor for his convenience; rather, he worked exclusively from home because the governor of New York forced him to. Cardozo Law School complied with then-Gov. Andrew Cuomo's COVID-19-related executive order by closing its doors to all in-person activity.[15] So while Zelinsky continued to teach classes, meet with students and faculty, and perform legal research after March 15, he did it all from home in Connecticut; he did not have a classroom or office available to him in New York, as required by Cardozo Law School.

There's also potentially a broader change in the facts between the period in the first case (1994-1995) and the current one: The internet's availability expanded exponentially during this period, and by 2019, remote work was far more prevalent than in the 1990s. So should that change how a court examines the constitutional issues around the rule?

Zelinsky 2.0 is set up to answer that very question. Zelinsky's appeal put forth two arguments for why he is entitled to the refunds he claimed on his amended returns:

- New York cannot tax his wages under the convenience rule after March 16, 2020, because he was obligated to work at home under Cuomo's executive orders and the closure of Cardozo Law School to in-person classes; and
- the convenience of the employer rule itself is unconstitutional anyway and should not be applied to the 2019 or 2020 tax years.

A full airing of the constitutional issues is beyond the scope of this article, but perhaps we'll do our own version of a 2.0 article on that topic. However, the idea that a court might reexamine a taxing scheme's constitutionality because of changes in technology or how the world works is not new. Indeed, some of the arguments that supported the *Zelinsky* 1.0 decision have eroded over time. With the rise in remote work post-pandemic, fewer taxpayers would "abuse" the system — as the court of appeals suggested — by going home to work for a few hours and treating that day as a non-New York workday.[16] Rather, some taxpayers now work almost entirely

[11] *Id.* at 95-96. *See also* Noonan and Ariele R. Doolittle, "New York's High Court Halts Wynne Challenges," Noonan's Notes Blog (Apr. 3, 2019); Jennifer Carr, "New York Can't Ignore *Wynne* Forever," *Tax Notes State*, Feb. 18, 2019, p. 571.

[12] *Zelinsky*, 1 N.Y.3d at 94.

[13] *Id.* at 94.

[14] *Matter of Zelinsky*, DTA Nos. 830517 and 830681.

[15] Office of Gov. Andrew Cuomo, Executive Order No. 202.8 (Mar. 7, 2020).

[16] *See Zelinsky*, 1 N.Y.3d at n4: "Of course, in the absence of the convenience test, opportunities for fraud are great and administrative difficulties in verifying whether an employee has actually performed a full day's work while at home are readily apparent."

remotely, except for a few times a year when they are required to come into the office for a companywide meeting. Should the change in how work is done change how the law is examined?

Maybe. The concept that a court might reexamine the constitutionality of a taxing scheme because of changes in technology was critical to probably the most important state tax case in this century: *Wayfair*.[17] There, the U.S. Supreme Court revisited the constitutional nexus rules established in 1967 in *Bellas Hess*[18] and 1992 in *Quill*[19] in light of changes to the retail market occasioned by the internet. The Court stated, "Though *Quill* was wrong on its own terms when it was decided in 1992, since then the Internet revolution has made its earlier error all the more egregious and harmful. The *Quill* Court did not have before it the present realities of the interstate marketplace."[20]

So Zelinsky may be on to something here. Indeed, during the hearing he made an interesting observation to prove his point, noting that the idea that the taxpayer, the division, the judge, the court reporter, and all witnesses could participate in a full Division of Tax Appeals hearing from various locations via Webex was unfathomable just 10 years ago. We've all changed with the times; shouldn't the law as well?

Zelinsky's other argument is just as interesting. This argument is based on the theory that he was working from home in Connecticut out of necessity — not his or his employer's convenience. Zelinsky pointed to a couple of key facts to support this argument:

- the executive orders issued by then-Gov. Cuomo required him to work from home;
- he did not have a classroom or an office available to him in New York City; and
- he did not even enter New York City after March 15, 2020.

There's considerable merit to these claims. Under New York's regulations, days worked at home out of necessity are not convenience days when they "*obligate* the employee to out-of-state duties in the service of his employer."[21] After March 2020, Zelinsky was unquestionably obligated to work at home by his employer, since his employer was obligated to close its school and offices by the governor. Zelinsky categorically could not have worked in his New York office or classroom without violating all sorts of COVID-19 protocols and rules we all were required to follow in 2020, and potentially being subject to penalties. This seems like the dictionary definition of a day worked outside New York for necessity (and not convenience), and that alone should result in his winning his 2020 appeal on state law grounds — regardless of how a court views the constitutional issues.

Conclusion

The earliest we'll see a decision here will be the winter of 2024, so we may not have any clarity from the department on the application of the convenience rule for a little while. But this is also not the only case pending in the Division of Tax Appeals where this issue arises,[22] so it is possible that we get one result from Zelinsky and another from a different case under appeal, which may even precede the *Zelinsky* 2.0 decision. In the meantime, as we've outlined in these pages, taxpayers and employers with these issues still have options to deal with the convenience rule, with a few workarounds made possible through the regulations and guidance.[23] ■

[17] *South Dakota v. Wayfair Inc.*, 138 S. Ct. 2080 (2018).

[18] *National Bellas Hess v. Department of Revenue*, 386 U.S. 753 (1967).

[19] *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

[20] *Wayfair*, 138 S. Ct. at 2097.

[21] 20 NYCRR 132.18(a) (emphasis added).

[22] Full disclosure: We have a few there, too.

[23] *See* Noonan and Savino, "New York's Convenience Rule: Under the COVID Microscope," *Tax Notes State*, May 31, 2021, p. 893.