STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **EDWARD A. AND DORIS ZELINSKY** for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Year 2019.	:	DETERMINATION DTA NOS. 830517 AND 830681
In the Matter of the Petition of **EDWARD A. AND DORIS ZELINSKY** for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Year 2020.	:	

Petitioners, Edward A. and Doris Zelinsky, filed petitions for redetermination of a deficiency or for refund of New York State personal income tax under article 22 of the Tax Law for the years 2019 and 2020.

A videoconferencing hearing via CISCO Webex was held on April 25, 2023, with all briefs to be submitted by August 7, 2023, which date began the six-month period for the issuance of this determination. Petitioners appeared pro se and the Division of Taxation appeared by Amanda Hiller, Esq. (Michele W. Milavec, Esq., of counsel). After reviewing the entire record in this matter, Jessica DiFiore, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly allocated all of petitioner Edward A. Zelinsky's wages from his New York employer to New York for 2019 and 2020 pursuant to the "convenience of the employer test" set forth in 20 NYCRR 132.18 (a).

FINDINGS OF FACT

The parties entered into a stipulation of facts and the relevant facts have been incorporated into the findings of fact below.

1. Petitioners, Edward A. and Doris Zelinsky, are residents of the State of Connecticut. Edward A. Zelinsky is a professor of law at the Benjamin N. Cardozo School of Law of Yeshiva University in Manhattan (Cardozo) and earned New York source income in 2019 and 2020.

2. Petitioners were the taxpayers in ***Zelinsky v Tax Appeals Trib.***, 1 NY3d 85 (2003), ***cert denied*** 541 US 1009 (2004).

3. Doris Zelinsky is the spouse of Edward A. Zelinsky and signed timely filed joint New York State nonresident and part-year resident income tax returns, form IT-203 (original return), for tax years 2019 and 2020. She had no New York source income in 2019 or 2020.[1]

4. Petitioner's tasks for Cardozo included preparing for and teaching classes, meeting with students, preparing and grading examinations, writing recommendations for students, and conducting scholarly research and writing.

2019

5. Petitioner reported his entire Cardozo salary, including the portion of such salary attributable to the days when he worked at his home in Connecticut, as New York source income on the original return for 2019.

[1] Unless otherwise indicated, all references to "petitioner" shall refer to Mr. Zelinsky.

6. On September 25, 2020, petitioners jointly filed an amended New York State nonresident and part-year resident income tax return, form IT-203-X (amended return), for tax year 2019, claiming a refund in the amount of $10,615.00. On the amended return, petitioners reduced their reported nonresident income allocation from the full salary from Cardozo of $244,871.00 and 55.41% of their income to $90,602.00 and 20.50% of their income, because they allocated income to Connecticut instead of New York, claiming petitioner worked outside of New York for 143 days in tax year 2019.

7. As part of the amended return filed for tax year 2019, petitioners also filed a nonresident and part-year resident income allocation worksheet, form IT-203-B, that reported petitioner commuted from his home in Connecticut to work in Manhattan for 84 days. Petitioner reported that the remainder of his work time in tax year 2019 for Cardozo (143 days reported as worked outside of New York State) was spent at home in Connecticut, performing legal scholarship (researching and writing) and performing administrative tasks. These facts of petitioner's work situation in tax year 2019 are the same as they were in tax years 1994 and 1995, which were at issue in the ***Zelinsky*** decision.

8. The Division did not issue a response or refund for tax year 2019 after petitioners filed their amended return on September 25, 2020.

9. The rejection of the petitioners' refund request by deemed denial for tax year 2019 is premised on the application of the convenience of the employer test as set forth in the Division's regulations at 20 NYCRR 132.18 (a).

2020

10. Petitioner reported his entire Cardozo salary in the amount of $251,925.00 as New York source income on the original 2020 return, including the portion of such salary attributable

to the days when he worked at his home in Connecticut, as New York source income and paid New York State personal income tax in the amount of $15,839.00.

11. On January 30, 2020, the World Health Organization designated the novel coronavirus, COVID-19, outbreak as a Public Health Emergency of International Concern (9 NYCRR 8.202, former Governor Andrew M. Cuomo (Governor Cuomo), Executive Order No. 202 [March 7, 2020]). The following day, the United States Health and Human Services Secretary, Alex M. Azar II, declared a public health emergency for the entire United States in response to COVID-19 (***id.***). Thereafter, travel-related and community contact transmission cases of COVID-19 were documented in New York State with more expected to occur (***id.***). In response, Governor Cuomo declared a state disaster emergency for the entire State of New York (***id.***).

12. The coronavirus changed employment and educational patterns in 2020.

13. Interstate remote work expanded in the years subsequent to 2003 when ***Zelensky*** was decided and then burgeoned further during the COVID-19 pandemic.

14. From January 21, 2020, until March 15, 2020, petitioner taught his classes in person at Cardozo in Manhattan by commuting from Connecticut three days per week to Cardozo.

15. Effective March 20, 2020, Governor Cuomo mandated that "[a]ll businesses and not-for-profit entities in the state shall utilize, to the maximum extent possible, any telecommuting or work from home procedures that they can safely utilize" (Governor Cuomo, Executive Order No. 202.6 [March 18, 2020]; ***see also*** Executive Order 202.8 [March 20, 2020] [amending Order No. 202.6 to provide that, "[e]ach employer shall reduce the in-person workforce at any location by 100% no later than March 22 at 8 pm"; Public Health Law § 12 [1] [prescribing a penalty for violating public health orders]).

16. Commencing on March 16, 2020, Cardozo complied with Governor Cuomo's COVID-related executive order and closed its doors to all in-person activity. From March 16, 2020, through December 31, 2020, petitioner worked exclusively at his home in Connecticut and never physically came into New York to work.

17. Beginning on March 16, 2020, petitioner taught from his Connecticut home and met with Cardozo students and faculty using the internet-based Zoom videoconferencing platform. He also continued performing legal research and writing for Cardozo at his Connecticut home.

18. Starting on March 16, 2020, petitioner did not perform his teaching or scholarly duties for Cardozo in Manhattan due to the closure of the law school and restriction against in-person activity.

19. For the period March 16, 2020, through December 31, 2020, petitioner did not have a classroom or office available to him at the Cardozo campus in Manhattan.

20. On July 24, 2021, petitioners jointly filed an amended New York State nonresident and part-year resident income tax return, form IT-203-X (amended return), for tax year 2020, which requested a refund in the amount of $14,319.00.

21. On the amended return, petitioners allocated $24,185.00 of the originally reported $251,925.00 as New York source wages. This resulted in an income percentage of only 7.03% instead of 73.27% and an allocated New York State tax due in the amount of $1,520.00.

22. On August 19, 2021, the Division sent petitioners a document entitled "Request for Information," in which the Division stated it needed to verify the amount of income petitioners allocated to New York on their amended return. It also stated the following:

> "If you are a nonresident or part-year resident whose assigned primary work location is in New York State, days you worked at a location outside New York State may be considered New York State work days. In particular, days you telecommuted from a location outside New York State are considered New York

> State work days unless your employer has established a bona fide employer office at your telecommuting location."

The Division also requested a copy of petitioners' federal W-2, wage and tax statement for each employer, a completed income allocation questionnaire, form AU-262.55 for each employer, and a full description of the composition of petitioners' wages.

23. In response to the income allocation questionnaire, petitioner stated that, for 2020, he had 134 non-working days, 231 working days, and 207 days that he worked at home in Connecticut, leaving only 24 days worked at Cardozo.

24. On September 17, 2021, the Division issued an account adjustment notice - personal income tax for audit case ID: X-189671301 (account adjustment notice) that allowed a partial refund in the amount of $1,326.35 and denied the remaining $12,992.65 of the $14,319.00 refund requested.

25. The rejection of petitioners' refund request by the account adjustment notice is premised on the application of the convenience of the employer test as set forth in the Division's regulations at 20 NYCRR 132.18 (a). The Division found that wages amounting to $171,701.00 were not properly sourced as New York income and that the New York State withholding amount should have been $5,758.00 instead of $9,482.00, as claimed on petitioners' return.

26. Pursuant to 20 NYCRR 3000.15 (d) (6), the Division submitted 31 proposed findings of fact. In accordance with State Administrative Procedure Act (SAPA) § 307 (1), the Division's proposed findings of fact 1 through 5, 8, 9, 11, 12 through 16, 19 through 27, 29, and 31 are supported by the record and have been substantially incorporated herein. The Division's proposed findings of fact 10 and 28 have been modified to more accurately reflect the record and/or accepted in part and rejected in part as conclusory, irrelevant and/or not supported by the record; to the extent accepted they have been consolidated, condensed, combined, renumbered,

and substantially incorporated herein, as modified. The Division's proposed findings of fact 6, 7 17, 18, and 30 are rejected as conclusory, irrelevant and/or not supported by the record.

CONCLUSIONS OF LAW

A. Where more than six months have passed after the filing of a return, or, as relevant here, an amended return, in which a refund was claimed, such refund is deemed denied and a taxpayer may protest such denial by filing a petition with the Division of Tax Appeals (Tax Law § 689 [c] [3] [A]; ***see Matter of Schoonover***, Tax Appeals Tribunal, July 19, 1990). Accordingly, here, where the Division did not issue a response or refund for tax year 2019 after petitioners filed their amended return requesting such refund, and more than six months have passed, the Division of Tax Appeals has jurisdiction over the petition requesting a refund for 2019.

B. Additionally, an account adjustment notice constitutes a statutory notice affording the right to a hearing (***see*** Tax Law § 2008). Therefore, the Division of Tax Appeals also has jurisdiction over petitioner's protest of the account adjustment notice issued on September 17, 2021, for tax year 2020.

C. New York may tax a nonresident only on income that is "derived from or connected with New York sources" (***see*** Tax Law §§ 601 [e] [1]; 631 [a] [1]; ***Zelinsky***, 1 NY3d at 89-90). New York source income includes income attributable to a business, trade, profession or occupation carried on in this state (***see*** Tax Law § 631 [b] [1] [B]). When a nonresident works partly in New York and partly in another state, the New York source income must be determined by apportionment and allocation according to regulations of the Commissioner of Taxation and Finance (***see*** Tax Law § 631 [c]).

The Commissioner's regulations provide that the New York adjusted gross income (AGI) of a nonresident who renders services as an employee includes the compensation for personal services entered into his Federal AGI, but only to the extent that his services were rendered within New York State (***see*** 20 NYCRR 132.4 [b]). If a nonresident employee performs services for an employer both within and without New York State, the portion of his or her income derived from New York sources, and thus apportioned and allocated to New York, consists of the ratio of total days worked in New York to total days worked both in and out of the State (***see*** 20 NYCRR 132.18 [a]). However, such apportionment and allocation are limited by the convenience of the employer test, which states that "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" (***see*** NYCRR 132.18 [a]). "The policy justification for the 'convenience of the employer' test lies in the fact that since a New York State resident would not be entitled to special tax benefits for work done at home, neither should a nonresident who performs services or maintains an office in New York State" (***Speno v Gallman***, 35 NY2d 256, 259 [1974]). "[W]ork performed at an out-of-state home which could just as easily have been performed at the employer's New York office is work performed for the employee's convenience and not for the employer's necessity" (***Wheeler v State Tax Commn.***, 72 AD2d 878 [3d Dept 1979], citing ***Fass v State Tax Commn.***, 68 AD2d 977 [3d Dept 1979], ***affd*** 50 NY2d 932 [1980]. Accordingly, nonresidents employed in New York who work out-of-state when not required to do so by their employers must treat those days as if they had been present in New York, resulting in New York source income (***Zelinksy***, 1 NY3d at 92).

D. Petitioners do not contest that under the "convenience of the employer test," petitioner's income earned from Cardozo for 2019 is fully taxed as New York income. However, they argue that by taxing petitioner's income earned from Cardozo for his days worked from home in Connecticut during 2019 in accordance with the convenience of the employer test, the Division failed to properly apportion his income between the states in which he worked, constituting extraterritorial taxation of a nonresident in violation of the Due Process and Commerce Clauses of the Federal Constitution.

Initially, as the parties have stipulated that petitioner's work situation in tax year 2019 was the same as it was in tax years 1994 and 1995, the tax years at issue in ***Zelinsky***, such holding is binding precedent under the doctrine of stare decisis, and, therefore, determinative of the outcome in this case. "'Stare decisis is the doctrine which holds that common-law decisions should stand as precedents for guidance in cases arising in the future and that a rule of law[,] once decided by a court, will generally be followed in subsequent cases presenting the same legal problem'" (***Wayne Ctr. for Nursing and Rehabilitation, LLC v Zucker***, 197 AD3d 1409, 1412 [3d Dept 2021] [citations omitted]; ***see also People v Bing***, 76 NY2d 331, 338 [1990] [noting that the doctrine of stare decisis "provides that once a court has decided a legal issue, subsequent appeals presenting similar facts should be decided in conformity with the earlier decision"]). "[T]he closeness of a vote bears no weight as to a holding's precedential value as a 'controversy settled by a decision in which a majority concur should not be renewed without sound reasons'" (***People v Taylor***, 9 NY3d 129, 148 [2007] [citation omitted]). However, such strong presumption that the law is well settled by a particular ruling may be rebutted in exceptional circumstances, such as where the holding leads to an unworkable rule, or it creates more questions than it resolves (***see id.***). As evidenced by the many cases applying and/or upholding

the convenience of the employer test with practical, legally-sound results (***see e.g. Matter of Huckaby v New York State Div. of Tax Appeals***, 4 NY3d 427, 436 [2005], ***cert denied*** 546 US 976 [2005] [brackets and citations omitted]; ***Zelinsky***, 1 NY3d 85; ***Fischer v State Tax Commn***, 107 AD2d 918 [3d Dept 1985] ***appeal dismissed***, 65 NY2d 690 [1985]; ***Kitman v State Tax Commn***, 92 AD2d 1018 [3d Dept 1983], ***appeal denied*** 59 NY2d 603 [1983]; ***Wheeler***, 72 AD2d 878), neither of such exceptional circumstances are present here. As petitioners have not provided any relevant statutory or regulatory changes or cases abrogating or superseding the holding in ***Zelinsky***, such holding remains good law and is applicable to the tax years at issue here.

E. "[T]he convenience test constitutes an across-the-board standard designed to comply with both due process and the Commerce Clause" (***Huckaby***, 4 NY3d at 439). "The dormant Commerce Clause of the U.S. Constitution 'prohibits state taxation, or regulation, that discriminates against or unduly burdens interstate commerce and thereby impedes free private trade in the national marketplace'" (***Matter of Intl. Bus. Mach. Corp. v Tax Appeals Trib.***, 214 AD3d 1125, 1126 [3d Dept 2023], quoting ***Huckaby***, 4 NY3d at 436 [brackets and citations omitted]; ***see also South Dakota v Wayfair, Inc.***, 585 US ___, 138 S Ct 2080 [2018]). The dormant Commerce Clause "prohibits a state from imposing a tax which discriminates against interstate commerce by providing a direct commercial advantage to local business" (***Matter of Walt Disney Co. v Tax Appeals Trib. of the State of N.Y.***, 210 AD3d 86, 92 [3d Dept 2022] [internal quotation marks and citation omitted]). Unconstitutional discrimination occurs when in-state economic interests are treated differently from out-of-state economic interests solely because of the location of their activities and provides a commercial advantage to local businesses (***see Intl Bus. Mach. Corp.***, 214 AD3d at 1126, quoting ***Walt Disney Co.***, 210 AD3d

at 92). "To this end, '[a] state tax on interstate commerce violates the dormant Commerce Clause unless it is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State" (***id.*** at 1127, quoting ***Huckaby***, 4 NY3d at 436 [citation omitted]; ***Zelinsky***, 1 NY3d at 90).

Petitioner challenges the second prong of this four-part test - that the tax be fairly apportioned. The fair apportionment requirement ensures that each state taxes only its fair share of an interstate transaction and diminishes the probability that an interstate transaction will be improperly burdened by multiple taxation (***Zelinsky***, 1 NY3d at 91 [quotation marks and citation omitted]). "A tax is fairly apportioned if it is both internally and externally consistent" (***id.***). A tax will be deemed internally consistent if it is structured in such a way that if every state were to impose it, multiple taxation would not result (***id.***). The convenience of the employer test meets this requirement. If every other jurisdiction adopted the convenience of the employer test utilized by New York, no multiple taxation would occur. New York sources a nonresident's income to New York on days where he physically works outside of New York for his own convenience as opposed to some necessity. However, New York also grants a credit pursuant to Tax Law § 620 against the tax that New York residents pay to other jurisdictions for income derived there. Accordingly, the convenience of the employer test is internally consistent.

A tax will be externally consistent where it taxes only that portion of the income from interstate activity that reflects the in-state component of the activity being taxed (***id.***). External consistency is determined by examining "'the economic justification for the State's claim upon the value taxed, to discover whether a State's tax reached beyond that portion of value that is fairly attributable to economic activity within the taxing state'" (***Intl. Bus. Mach. Corp.***, 214

AD3d at 1128, quoting ***Huckaby***, 4 NY3d at 436 n. 5). "If a state overreaches by taxing an activity that another state is also justified in taxing, the burden placed on interstate commerce is too great to withstand constitutional scrutiny" (***Huckaby***, 4 NY3d at 437). There is no specific apportionment formula or method needed to satisfy constitutional requirements (***Zelinsky***, 1 NY3d at 91). Once a state has chosen such formula, "'an objecting taxpayer has the burden to demonstrate by clear and cogent evidence that the income attributed to the State is in fact out of all appropriate proportions to the business transacted … in that State, or has led to a grossly distorted result" (***id.***) [internal quotations and citations omitted].

F. Here, for 2019, the tax was imposed on income derived from petitioner's employment with Cardozo, a New York employer, where his duties included preparing for and teaching classes, meeting with students, preparing and grading examinations, writing recommendations for students, and conducting scholarly research and writing under the authority of the convenience of the employer test. "The convenience test stands for the proposition that New York will not tax a nonresident's income derived from a New York employer's participation in interstate commerce because in such a case, the nonresident's income would not be derived from a New York source" (***Huckaby***, 4 NY3d at 438). Conversely, New York will tax a nonresident's income from a New York employer that does not participate in interstate commerce because the nonresident's income is derived from a New York source. Petitioner did not offer any evidence that Cardozo required petitioner to carry out any of the school's business activities in Connecticut. Petitioner's choice to bring work home to Connecticut "cannot transform him into an interstate actor" (***id.*** at 93). The dormant Commerce Clause protects markets and participants in those markets, it does not protect individual taxpayers (***id.***). As held by the Court of Appeals in ***Zelinsky***:

> "The taxpayer's crossing of state lines to do his work at home simply does not impact upon any interstate market in which residents and nonresidents compete so as to implicate the Commerce Clause. On these facts, 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. Rather, 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" (1 NY3d at 93-94).

If petitioner were allowed to allocate his income to Connecticut when he worked at home instead of New York, he would be permitted to avoid paying taxes that his colleagues pay who do the same work at home within New York.

Even assuming petitioner's performance of his duties at home in another state triggered an analysis under the dormant Commerce Clause, the Division's allocation of all of petitioner's salary from Cardozo for 2019 to New York was reasonably apportioned. Petitioner and his employer received tangible and intangible protections, benefits, and values. Petitioner was paid a New York salary with additional benefits regardless of whether he worked in the office or remotely. When petitioner worked from the office, he received police, fire and emergency health services, and public utilities. "Petitioner's election to absent himself from the locus of his New York employment does not diminish what New York provides in order to enable him to earn that income" (***Zelinsky***, 1 NY3d at 95). Additionally, when he performed his duties remotely, New York provided the infrastructure that allowed him to have the virtual presence to do so. The Division's taxation of all of petitioner's 2019 income from his employment with Cardozo was fairly attributable to economic activity within New York and did not violate the dormant Commerce Clause.

Petitioners cite to ***Central Greyhound Lines, Inc. v Mealy***, 334 US 563 (1948) in support of their position that New York can only tax that portion of petitioner's Cardozo income that was earned while he was present in New York. However, ***Central Greyhound*** involved apportioning gross receipts from a bus company that performed services in multiple states, thus conducting interstate business, and is distinguishable from the facts herein. "Income derived from a business's interstate activities differs from income a nonresident earns from a New York employer-nonresidents do not implicate themselves or their employers in interstate commerce merely by working from home" (***Huckaby***, 4 NY3d at 435). Petitioner's income at issue is from Cardozo, a New York employer that provides educational services to its students in New York City. While the Court of Appeals has recently found that there is no distinction between the treatment of gross receipts and net income when evaluating each tax under the dormant Commerce Clause (***see Comptroller of Treasury of Maryland v Wynne***, 575 US 542, 550-554 [2015]), the taxpayer's crossing of state lines to do his work at home does not impact any interstate market in which residents and nonresidents compete so as to implicate the Commerce Clause (***Zelinsky***, 1 NY3d at 93-94; ***Huckaby,*** 4 NY3d at 437 [noting that "[w]here work is performed out of state of necessity for the employer, the employer creates a nexus with the foreign state and essentially establishes itself as a business entity in the foreign state"]). Petitioner's choice to work from home away from New York State "cannot convert his employer's New York business into an interstate one when Cardozo did not employ him to carry out any of the school's business activities in Connecticut" (***Zelinsky***, 1 NY3d at 92). Accordingly, the allocation of all of petitioner's income earned from a New York Law School to New York for tax year 2019 pursuant to the convenience of the employer test did not violate the Commerce Clause.

G. The Due Process Clause looks to determine whether there is a sufficient connection between a taxpayer and the taxing state before the state has the authority to impose its power to tax (***Huckaby***, 4 NY3d at 437; ***Zelinsky***, 1 NY3d at 96). There must be a minimum connection between the state and the person it seeks to tax and the income attributed to the State must be rationally related to values connected with the taxing State (***Huckaby***, 4 NY3d at 437; ***Zelinsky***, 1 NY3d at 96). "A state . . . may not tax value earned outside its borders" (***Zelinsky***, 1 NY3d at 96). Significantly, the tax imposed does not need to have an exact relation to the services actually provided to the taxpayer (***Huckaby***, 4 NY3d at 438). In ***Zelinsky***, the Court found that the Due Process Clause requires that the tax imposed must have a fiscal relation to opportunities that the State has provided, to the protection that it has offered, and to the benefits it has conferred, and by virtue of his employment at Cardozo, petitioner had minimum connection to New York due to his physical presence there and because he availed himself of the economic market in New York (***id.***).

In ***Huckaby***, New York taxed the income of a nonresident derived from work for a New York employer, where the taxpayer, a Tennessee resident, worked 75% of his workdays in Tennessee and only 25% of his workdays in New York for the relevant two-year period (4 NY3d at 430). The taxpayer chose to perform most of his work in Tennessee rather than New York (***id.*** at 431). His New York employer did not require him to perform any work in Tennessee and would not have objected if he had worked out of its New York office (***id.***). There, the Court of Appeals held that "the minimum connection required by due process plainly exists . . . where petitioner accepted employment from a New York employer and worked in his employer's New York office approximately 25% of the time annually" (***id.*** at 438). The Court continued "[m]oreover, the amount of time that petitioner spent working in New York - 25% - is significant

enough to satisfy any rough proportionality requirements called for by due process" (***id.***). The Court then cited to its holding in ***Zelinksy***, for the proposition that New York's taxation of all a nonresident's income from New York was "rationally related" to values connected with the state because of the many tangible and intangible protections, benefits and values New York provided to the taxpayer and his employer every day, regardless of whether the taxpayer chose to avail himself of them (***id.***). The New York Court of Appeals found that both the petitioner herein, in his prior case, and the petitioner in ***Huckaby***, realized current pecuniary benefits under the protection of the government (***id.***).

Under the same facts present for 2019, in reviewing the issue for tax years 1994 and 1995, the Court in ***Zelinsky*** found that both because of his physical presence in New York and because he availed himself of the benefits of the economic market in New York through his employment with Cardozo, he had a minimum connection to New York to satisfy the Due Process Clause (***id.***). Accordingly, the Division's taxation of all of petitioner's income earned from his employment with Cardozo for 2019 did not violate due process. Petitioner has failed to carry his burden of proof to show that the Division's allocation of all of his income from his employment with Cardozo to New York in 2019 violated the Due Process and dormant Commerce Clauses.

H. While petitioners do not contest that the convenience of the employer test dictates that petitioner's 2019 income earned from his employment with Cardozo should all be apportioned to New York State, they assert that for 2020, specifically, March 15, 2020 through December 31, 2020, the convenience of the employer test does not apply, and, even if it did, this income must be allocated to Connecticut due to measures taken in response to the COVID-19 pandemic. As the facts and effects of the COVID-19 pandemic are unprecedented, this is an issue of first

impression. The fact that petitioner's employer did not provide accommodations but instead allowed petitioner to work out-of-state at home does not constitute necessity or requirement by Cardozo (***see Matter of Tuohy***, Tax Appeals Tribunal, February 13, 2003). Petitioner has failed to meet his burden that he worked out-of-state due to his employer's necessity.

Petitioner cites to ***Fass*** in support of his argument that his income for March 15, 2020 through December 31, 2020, was not New York source income because he worked from home out of Cardozo's necessity due to the COVID-19 pandemic where he temporarily did not have access to an office at Cardozo. In ***Fass***, the Court held that petitioner's performance of some of his duties in New Jersey were for the necessity of his employer and that the allocation of all of his income from his employer to New York for the relevant tax year was not proper despite the fact that these services could have been performed somewhere in New York State (68 AD2d 977). There, the taxpayer was a New Jersey resident who edited and published magazines regarding specialty areas, including sportscars, motorcycles, firearms, home improvements, dogs and horses (***id.***). As part of the taxpayer's duties, he was required to test, analyze, and investigate new products in these areas and report his findings in articles for the magazines (***id.***). To perform these duties, petitioner needed access to a firing range with ballistics equipment and storage facilities; a garage to store automobiles and motorcycles for testing and evaluation and a stable and kennel for horses and dogs (***id.***). Those specialized facilities were built at petitioner's farm and residence in New Jersey (***id.***). The Court found that a taxpayer should not be denied the right to allocate his income merely because his out-of-state activities could have been performed somewhere in New York State, and that the relevant cases have held that an employee's out-of-state services are not performed for an employer's necessity only where they could have instead been performed at his office (***id.*** at 978). However, as held in a subsequent

decision by the same Court, the facts in ***Fass*** were unique and unquestionably distinguishable from a scenario like that at issue here, involving the use of a home office (***see Phillips v. New York State Dept. of Taxation and Fin.***, 267 AD2d 927, 930 [3d Dept 1999], ***lv denied***, 94 NY2d 763 [2000]; ***see also Kitman***, 92 AD2d at 1019 [noting "[b]ecause of the obvious potential for abuse where the home is the workplace in question, the commission has generally applied a strict standard of employer necessity in these cases, which, with rare exception, has been upheld by the courts"]; ***Wheeler***, 72 AD2d 878; ***Gross v State Tax Commn.***, 62 AD2d 1117 [3d Dept 1978]). Put simply, in ***Fass***, the services the petitioner performed could not have been performed within New York State because the specialized facilities needed to perform the tasks for which the petitioner was hired were built in New Jersey. The facts in the present case are easily distinguishable.

Here, there is no specialized equipment needed that would prevent petitioner from performing his duties within New York State. Petitioner's duties were not of such a specialized nature that they rise to the level of holding that the work performed was out-of-state by the necessity of the employer because New York businesses were mandated to have everyone work remotely instead of in their New York office (***see Phillips***, 267 AD2d at 930). Petitioner's claim of necessity "is nowhere near as compelling as that set forth in [***Fass***], which did not deal with an office . . ." (***id.***). Where the services performed require an office, the fact that petitioner's New York office at the law school was not available due to the COVID-19 pandemic does not result in the determination that the out-of-state services were performed for the employer's necessity. Petitioner has not met his burden of establishing that the work he performed at home, out of New York State, was so specialized that it had to be done away from New York by the necessity of Cardozo.

To hold otherwise would directly contradict the very purpose of the convenience of the employer test (***see Speno***, 35 NY2d at 259 [concluding that "[t]he policy justification for the 'convenience of the employer' test lies in the fact that since a New York State resident would not be entitled to special tax benefits for work done at home, neither should a nonresident who performs services or maintains an office in New York State"]). 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 (***see id.***). Doing so would effectively turn New York employers into interstate actors without their consent, forcing them to remit income tax to another state they had no intention of conducting business in, and, therefore, no minimum connection with, in violation of the Due Process Clause. Accordingly, it was proper for the Division to allocate petitioner's income earned from Cardozo to New York for tax year 2020.

I. Petitioners contend that for the period from March 15, 2020 through December 31, 2020, petitioner's services for Cardozo were performed "wholly without New York State" because he did not enter New York State during that period and therefore, pursuant to 20 NYCRR 132.4 (b), his income from that time is not New York source income. In support of this proposition, petitioner cites to ***Linsley v Gallman*** (38 AD2d 367 [3d Dept 1972], ***affd*** 33 NY2d 863 [1973]) and ***Hayes v State Tax Commn*** (61 AD2d 62 [3d Dept 1978]). However, those cases are distinguishable from the instant action. ***Linsley*** involved payment on a declining annual scale for five years of money to a former employee for advisory services through phone consultation after his retirement, where he had moved out of New York. In ***Hayes***, the petitioner resigned from his original employment and then became a consultant for his former employer and worked exclusively out of his home (61 AD2d 62). Unlike the petitioners in ***Linsley*** and

Hayes, petitioner here, like the nonresident petitioner in ***Huckaby***, was physically present in New York for part of the year and continued in his position with a New York employer (***see Evans v Tax Commn***, 82 AD2d 1010-1011 [3d Dept 1981], ***lv denied*** 54 NY2d 606 [1981] [distinguishing ***Linsley*** and ***Hayes***, because in those cases they left their employment and consulted from Connecticut while the taxpayer in ***Evans*** worked in New York for 10 days that year and remained in the employ of his company in that same capacity despite thereafter working from home until he resigned on May 16th of that year]). Petitioner, without citing to any authority in support of his position, asserts that the first two and a half months of 2020 should be considered separately from the remainder of the year, and ignores 20 NYCRR 132.18 [a], the regulation put in place to address such a scenario where a nonresident works both within and without New York State and, as significant here, where a determination is needed as to why the work is performed out of state (***see Huckaby***, 4 NY3d at 434). This is especially true here, where the Executive Order resulting from the COVID-19 pandemic was temporary, and not a permanent change like in ***Linsley*** and ***Hayes***, where petitioner worked exclusively out of New York without any intention of ever returning to work in state again. As stated above, petitioner has not established that he worked away from New York out of his employer's necessity during the COVID-19 pandemic.

Additionally, while not physically present in New York from March 15, 2020 through December 31, 2020, petitioner remotely connected to Cardozo and had a virtual presence in New York when hosting Zoom classes and meetings with his students. In this modern economy with its internet technology, one can be present in a state without needing to physically be there (***cf. Wayfair***, 138 S Ct at 2094-2097 [where the Court overruled prior precedent requiring a business to have a physical presence in order to have the nexus required to collect and remit sales tax

because "the real world implementation of Commerce Clause doctrines now makes it manifest that the physical presence rule as defined by ***Quill*** (***Quill Corp. v North Dakota***, 504 US 298 [1992]), must give way to the 'far-reaching systemic and structural changes in the economy' and 'many other societal dimensions' caused by the Cyber Age'"]). The very reason petitioner was able to earn an income from Cardozo during the pandemic is because he could be virtually present there to perform his duties of teaching and meeting with students.

J. Petitioners also argue that the Division's allocation of all of petitioner's 2020 income earned from Cardozo to New York violates the Due Process and dormant Commerce Clauses. For the same reasons stated in analyzing the application of these clauses to petitioner's 2019 income from Cardozo, the Division's allocation of all of petitioner's 2020 income earned from Cardozo does not violate the Due Process and dormant Commerce Clauses.

Neither the dormant Commerce Clause nor due process is offended when New York taxes all of a taxpayer's income from his New York employer (***see Huckaby***, 4 NY3d 427). "Nonresident individuals are simply not the same as interstate businesses, and these differences must be taken into account when considering whether a tax meets with due process" (***id.*** at 439 n. 6). New York will not tax a nonresident's income derived from a New York employer's participation in interstate commerce because such income would not be derived from a New York source (***see id.*** at 438). However, that is not the case here. Cardozo is a New York law school that is not engaged in interstate commerce. Petitioner performed duties for and received an income from Cardozo, which constitutes New York source income. Petitioner does not dispute that he accepted employment from a New York employer and worked in his employer's New York office for approximately 10% of his time in 2020, which is significant enough to satisfy any rough proportionality required by due process (***see id.***). Additionally, petitioner has

been provided tangible and intangible protections, benefits, and values connected with New York. New York afforded his employer, and on the days petitioner traveled to New York, petitioner, police, fire and emergency health services, and public utilities. Additionally, during the time petitioner was home pursuant to the Executive Order, petitioner still nonetheless benefited from protections, benefits, and values, including his New York salary and benefits received from a New York law school and the infrastructure that allowed him to successfully perform his duties from home, including his virtual presence utilizing the Zoom platform that allowed him to remotely teach his students. Through petitioner's employment with Cardozo, petitioner had the minimum contact necessary for New York to tax his income derived from Cardozo and it was fairly apportioned. The outcome for tax year 2020 is the same as it was for 2019, and the Division's allocation of all of petitioner's income that he earned from his employment with Cardozo for tax year 2020 did not violate the Due Process Clause or the dormant Commerce clause.

K. Petitioners contend that ***MeadWestvaco Corp. v Illinois Dept. of Rev.*** (553 US 16 [2008]) and ***Wynne*** (575 US 542) erode the holding in ***Zelinsky***. They assert that ***MeadWestvaco*** affirms the United States Supreme Court's opposition to extraterritorial income taxation like that which occurs when New York taxes petitioner's income earned in Connecticut under the convenience of the employer doctrine. ***MeadWestvaco*** is not instructive of the instant matter. There, the issue was whether Mead Corporation's gain from the sale of Lexis/Nexis, a subsidiary/division located in a state other than the parent corporation, MeadWestvaco, was subject to apportionment. In remanding the case to the appellate court, the Court found that the concept of "operational function" may indicate whether an asset is part of a taxpayer's unitary business but the constitutionally relevant question to be answered on remand was whether the

asset at issue "was a unitary part of the business being conducted in the taxing State rather than a discrete asset to which the State had no claim" (***id.*** at 29-30). As that question was not answered in ***Meadwestvaco*** and the issue by its very nature involved a multistate business, its holding has no relevance here.

Petitioners assert that the holding in ***Wynne*** confirms that individuals are afforded protections by the dormant Commerce Clause. In ***Wynne***, the US Supreme Court analyzed the constitutionality of Maryland's income tax scheme where Maryland residents paid a "state" income tax and a "county" income tax (575 US at 546). Despite the misleading name, the "county" tax was also collected by the state (***id.***). Residents who paid income tax to another jurisdiction for income earned in that jurisdiction were only allowed a credit against the "state" tax, but not the "county" tax (***id.***). As a result, Maryland residents that earned income in other jurisdictions paid tax twice (***id.***). There, the Court held that Maryland's income tax scheme failed the internal consistency test placing interstate commerce at a disadvantage as compared with intrastate commerce as residents who worked outside of Maryland would pay tax to the jurisdiction where they earned the income and also the "county" portion of the Maryland tax (***id.*** at 562-565). Because Maryland only provided a credit against the "state" tax and not the "county" tax, the total burden on interstate commerce was higher than on intrastate commerce, unconstitutionally discriminating against interstate commerce (***id.*** at 567). As established above, the convenience of the employer test was internally consistent. Accordingly, the holding in ***Wynne*** does not "erode" ***Zelinsky*** or affect the holding herein.

Even assuming what petitioner contends is true, namely, that the holding in ***Wynne*** confirms that individuals are afforded protections by the dormant Commerce Clause, this holding does not support the proposition that by working from home, petitioner was engaged in interstate

commerce subject to the dormant Commerce Clause. In ***Wynne***, the taxpayers were Maryland residents earning pass-through income from income earned in other states that, because of Maryland's tax scheme, was subject to double taxation, and thus, were involved in interstate activity. New York's taxation of New York source income from a nonresident who chooses to work from home in another state does not involve interstate activity (***Zelinsky***, 1 NY3d at 93-94).

L. Petitioners also argue that the holding in ***Zelinsky*** does not apply to his 2019 and 2020 income because his scholarship work done at home is a core function of his work as a law professor and is not an "ancillary" activity. He also contends that the holding in ***Zelinsky*** has been eroded by the subsequent decisions of the US Supreme Court, criticisms from judges of the Court of Appeals and commentators, and subsequent events, including the post-COVID emergence of remote work as a widespread part of American life.

Acknowledging petitioner's scholarship work as a significant part of his employment with Cardozo does not change the outcome here (***see*** 20 NYCRR 132.18 [c]). New York distinguishes between employees who work out-of-state for personal convenience and those who work out-of-state as a necessity, so that it properly taxes nonresidents only on income sourced to New York and avoids taxing income earned from interstate commerce (***see Huckaby***, 4 NY3d at 439-440). Here, petitioner has offered no evidence that Cardozo required petitioner to perform any work in Connecticut or any state other than New York. Therefore, the sourcing of all of petitioner's income from Cardozo to New York for tax years 2019 and 2020 was proper.

Petitioners cite to the dissent in ***Huckaby*** (4 NY3d at 440-450) and commentary on ***Zelinsky***, as support of their position that the holding in ***Zelinsky*** is no longer good law. This

argument is unpersuasive. As explained above, neither is sufficient to ignore the binding precedent set therein.

M. Notably, the Division cites to a link to a newspaper article as well as to links to the Cardozo website for its claim that Cardozo opened its doors in August of 2020. Initially, the Division did not request official notice be taken of this article and website or submit copies of the substance thereof. Accordingly, because the article and websites and the information provided therein were not submitted into the record or authenticated as to their accuracy, they will not be considered (***see Matter of Schoonover***).

Additionally, a court may only take judicial notice of particular facts if the items are of common knowledge or are determinable by referring to a source of indisputable accuracy (***see Matter of Crater Club v Adirondack Park Agency***, 86 AD2d 714 [3d Dept 1982], ***affd*** 57 NY2d 990 [1982]). Courts today will often judicially notice matters of public record (Fisch on New York Evidence, § 1063 at 600 [2d ed]). While official notice can be taken of all facts of which judicial notice could be taken (***see*** SAPA § 306 [4]), the contents of the article and website are not common knowledge and are not facts of which official notice may be taken.

Even assuming, arguendo, facts in the record established that Cardozo had opened its doors in August of 2020, such facts are not relevant here. The Division asserts that because higher education institutions were allowed to resume operations after July 20, 2020, and that, thereafter, Cardozo did resume some in-person activities in New York, petitioner's decision to continue working from his home in Connecticut for the remainder of 2020 was for his convenience and not for Cardozo's necessity (***see Fischer***, 107 AD2d at 920 [holding that regardless of whether certain functions of employment require a taxpayer to perform services outside of New York, the work sought to be allocated must be performed away from the New

York due to the necessity of the employer]; ***Matter of Howell***, Tax Appeals Tribunal, October 31, 1991 [finding that while it may have been inconvenient for the taxpayer to perform his duties at his employer's office in New York, such inconvenience is of no consequence, as to prove an allocation of income to a state other than New York a taxpayer must show it was due to the necessity of his employer]). While such argument is sound, as petitioner has failed to meet his burden that working from home at any point during 2020 was for his employer's necessity and not his convenience, it is moot.

N. The petitions of Edward A. and Doris Zelinsky are denied, and the refund denial for 2019 and the account adjustment notice, dated September 17, 2021, are sustained.

DATED: Albany, New York
November 30, 2023

Jessica DiFiore
ADMINISTRATIVE LAW JUDGE