STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
EDWARD A. AND DORIS ZELINSKY	:	DECISION DTA NO. 817065
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law and New York City Earnings Tax on Nonresidents under Chapter 19, Title 11 of the Administrative Code of the City of New York for the Years 1994 and 1995.	:	

Petitioners Edward A. and Doris Zelinsky, 1366 Grasso Boulevard, New Haven, Connecticut 06511, filed an exception to the determination of the Administrative Law Judge issued on November 2, 2000. Petitioners appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Margaret T. Neri, Esq., of counsel).

Petitioners filed a brief in support of their exception and the Division of Taxation filed a brief in opposition. Petitioners filed a reply brief. Oral argument, at petitioners' request, was heard on May 23, 2001 in New York, New York.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether application of the "convenience of the employer" test set forth in the regulations at 20 NYCRR 132.18(a) properly subjected petitioners' entire New York source income to

taxation without any apportionment of such income between New York and Connecticut was violative of the Due Process Clause or the fair apportionment standard of the Commerce Clause of the United States Constitution.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioners,[1] Edward A. Zelinsky 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 New York City. Doris Zelinsky is employed in Connecticut and has no New York source income.

In 1994 and 1995, Professor Zelinsky's duties involved preparing for and teaching classes, meeting with students, preparing and grading examinations, writing recommendations for students and conducting scholarly research and writing. During the years in question, 1994 and 1995, articles written by Professor Zelinsky appeared in the Berkeley Journal of Employment and Labor Law, the Cornell Journal of Law and Policy, the Virginia Tax Review and Tax Notes.

In 1994, Professor Zelinsky worked in New York for 84 days. Specifically, for the 28 weeks constituting the two academic semesters of 1994, Professor Zelinsky commuted from Connecticut to the Cardozo Law School in New York City three days per week, mainly to teach classes and meet with students. On the other two days of each semester week in 1994, Professor

[1]Since the issue in this proceeding centers on the proper tax treatment of income earned only by petitioner Edward A. Zelinsky, unless otherwise specified or required by context, references to "petitioner" or "petitioners" herein shall mean petitioner Edward A. Zelinsky.

Zelinsky worked at his principal residence in New Haven, Connecticut, preparing examinations, writing recommendations and conducting scholarly research and writing.

During the remaining weeks of 1994 before and after the academic semesters, Professor Zelinsky did not commute to New York City. During these nonsemester weeks of 1994, he worked exclusively in Connecticut, both at his principal residence in New Haven, Connecticut and at his secondary residence in Branford, Connecticut, grading examinations, writing recommendations and conducting scholarly research and writing.

In 1995, Professor Zelinsky worked in New York City for 42 days. Professor Zelinsky was on sabbatical leave during the fall semester of 1995. For the fourteen weeks of 1995 constituting the spring semester, Professor Zelinsky commuted from Connecticut to the Cardozo Law School in New York City three days per week, mainly to teach classes and meet with students. On the other two days of each spring semester week in 1995, Professor Zelinsky worked at his principal residence in New Haven, Connecticut, preparing examinations, writing recommendations and conducting scholarly research and writing.

During the remaining weeks of 1995 before and after the spring semester, Professor Zelinsky did not commute to New York City. During these nonteaching weeks of 1995 (including the fall of 1995 when he was on sabbatical leave), Professor Zelinsky worked exclusively in Connecticut, both at his principal residence in New Haven, Connecticut and at his secondary residence in Branford, Connecticut, grading examinations, writing recommendations, and conducting scholarly research and writing.

On the 1994 and 1995 New York nonresident income tax returns filed by the taxpayers, Professor Zelinsky apportioned his salary from the Cardozo Law School to New York on the

basis of the days in each of these years he actually commuted to and was physically present in New York City. The notices of deficiency at issue herein disregard that apportionment and tax Professor Zelinsky on his entire salary from the Cardozo Law School, irrespective of the number of days Professor Zelinsky worked at home in Connecticut.

In this proceeding petitioners seek redetermination of an asserted deficiency for the year 1994, and redetermination of an asserted deficiency and a refund for the year 1995. The deficiencies at issue are asserted in notices of deficiency issued to petitioners by the Division of Taxation ("Division") dated March 16, 1998.

The taxes asserted in such notices of deficiency are New York State and New York City personal income taxes levied per Articles 22 and 30 of the Tax Law. The taxes for which petitioners claim refund are also New York State and New York City personal income taxes levied per Articles 22 and 30 of the Tax Law. [2]

The amount of additional tax asserted by the Division for 1994 is $6,038.54, all of which petitioners contest. The amount of additional tax asserted by the Division for 1995 is $6,246.11, all of which petitioners contest. In addition, for 1995, petitioners request a refund of $2,719.00.

A conciliation conference in the Bureau of Conciliation and Mediation Services was requested and held as requested. A conciliation order, sustaining the deficiencies and rejecting the refund, was issued on March 26, 1999.

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[2] Although the stipulation of facts as well as some of the captioned correspondence in this matter refer to Tax Law Article 30, it appears the New York City portion of the tax deficiencies concern the New York City Earnings Tax on Nonresidents under Tax Law Article 30-B and Chapter 19, Title 11 of the Administrative Code of the City of New York.

The deficiencies and the rejection of the Zelinskys' refund request are premised on the employer convenience doctrine. The parties agree that, if that doctrine can constitutionally be applied in this case, the deficiencies and the rejection of the refund are correct. The sole issue for decision is the constitutionality of the employer convenience doctrine on the facts of this case.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge determined that petitioner's income from New York sources, i.e., his compensation from Benjamin N. Cardozo School of Law in New York City, was taxable pursuant to Tax Law § 631(a) and not subject to allocation pursuant to Tax Law § 631(c) and the regulations at 20 NYCRR 132.15 and 132.18. That portion of 20 NYCRR 132.18, allowing for an allocation of that portion of petitioner's income which was for compensation for services outside of New York State, which of necessity, as opposed to convenience, obligated the employee to perform out-of-state duties in the service of his employer, was the focus of the case presented to the Administrative Law Judge.

The Administrative Law Judge noted that where a nonresident individual is employed by a New York employer and performs his services both at the employer's New York locus and at his out-of-state home, where the services could have been performed at the employer's New York facility, such services are performed out-of-state for the employee's convenience and not the employer's necessity. As a result, the Administrative Law Judge determined that the New York source income was properly subject to New York tax.

This subjects income earned by petitioner while physically located and working outside of New York State to New York tax, and, in this case, where petitioner's state of residence was Connecticut, to Connecticut tax as well. This is so because Connecticut bases its tax on physical

presence. The Administrative Law Judge noted that the tension created by these two taxing schemes and its resolution is the focus of this case.

The Administrative Law Judge noted that the validity of the convenience versus necessity test had been confirmed by the Court of Appeals in ***Matter of Speno v. Gallman*** (35 NY2d 256, 360 NYS2d 855) wherein the Court held that the justification for the rule is that since a resident of New York would not be entitled to any special tax benefit for work done at home, neither should a nonresident who performs services or maintains an office in New York. Additionally, a constitutional challenge to the test was raised and rejected in ***Matter of Colleary v. Tully*** (69 AD2d 922, 415 NYS2d 266), where the petitioner argued that the rule violated the Due Process and Commerce Clauses. Finally, the Administrative Law Judge noted that the Appellate Division had endorsed a strict standard of employer necessity where the home is the workplace in question.

The Administrative Law Judge opined that the convenience of the employer rule was a limit on apportionment and a necessary refinement to prevent nonresidents working in New York from gaining a tax advantage over residents by choosing to work at home.

The Administrative Law Judge noted that petitioner, a Connecticut resident, is subject to tax on his salary allocated to those days worked at home in Connecticut with no credit for the tax levied by New York on the same income under the convenience rule. The issue for the Administrative Law Judge became whether the convenience rule is invalid where the tax benefit or differential between the resident and nonresident employee is magnified due to the nonresident state imposing a tax on the income, thus creating multiple taxation of the same income in violation of Due Process and Commerce Clause standards.

With regard to petitioner's due process argument, the Administrative Law Judge determined that the convenience rule did not deprive petitioner of his life, liberty or property without due process and that the tax imposed because of the convenience rule bore a fiscal relation to the protections, opportunities and benefits given by the state. The Administrative Law Judge rejected petitioner's argument that his cross-border commute constituted interstate commerce with which New York's convenience rule unconstitutionally interfered. Petitioner argued to the Administrative Law Judge that the convenience rule represented excessive regulation on interstate commerce, specifically, that it did not allow for a fair apportionment of the tax. The Administrative Law Judge said that since petitioner was treated the same as any in-state counterpart, i.e., he was not subject to any additional tax in traveling to New York for his job, he received the benefits of the courts, the regulated labor market and benefits from fire, police and emergency services. The Administrative Law Judge noted that petitioner received the benefit of these services even on those days he chose to remain home. Therefore, the Administrative Law Judge reasoned that sourcing petitioner's income to New York on those days was attributable to his overall economic activities in New York.

With respect to the Commerce Clause issue, the Administrative Law Judge initially rejected petitioner's contention that he was engaged in interstate commerce, saying that there was no evidence of the same. The Administrative Law Judge noted that the fact that petitioner lived in one state and worked in another did not constitute interstate commerce, and the convenience rule did not impact an interstate market or burden the flow of goods in commerce. The key conclusion reached by the Administrative Law Judge was that even if the regulation had an impact on a nonresidents' choice of work location, it does not provide an advantage to residents

employed by petitioner's employer; rather, all employees are treated equally with respect to tax on their New York income.

The Administrative Law Judge rejected petitioner's reliance on ***Camps Newfound/Owatonna v. Town of Harrison*** (520 US 564, 137 L Ed 2d 852) for primarily the same reasons.

The Administrative Law Judge noted the decisions of both the Appellate Division and the Court of Appeals in ***Matter of Tamagni v. Tax Appeals Tribunal*** (230 AD2d 417, 659 NYS2d 515) and ***Matter of Tamagni v. Tax Appeals Tribunal*** (91 NY2d 530, 673 NYS2d 44, ***cert denied*** 525 US 931, 142 L Ed 2d 280) where it was explicitly stated that there was no Commerce Clause implication resulting from Mr. Tamagni's daily commute from New Jersey into New York where he worked as an investment banker.

The Administrative Law Judge observed that even if petitioner's circumstances were subject to Commerce Clause protection, the convenience rule could not be said to fail the constitutional test since it met the internal and external consistency tests. The Administrative Law Judge noted that there is a provision in Tax law § 620 which provides for a credit against ordinary tax for income tax imposed by another jurisdiction upon compensation for personal services performed in the other jurisdiction. Therefore, if the tables were turned and petitioner was a New York resident working in Connecticut, the same convenience of the employer rule would provide for a credit against any tax levied on the personal service income also taxed by Connecticut. Therefore, the rule is internally consistent. As mentioned above, the rule was found externally consistent because there was sufficient connection between the income and New

York and the amount of income taxed by New York is not out of all proportion to the ties to New York.

The Administrative Law Judge concluded that the apportionment and allocation rules are in symmetry and do not unfairly apportion to the advantage of a resident and the disadvantage of a nonresident. In succinct terms, the Administrative Law Judge identified the underlying tension in this matter:

> Simply because Connecticut does not, under its physical presence sourcing rules, recognize the income in question as New York source income, and instead taxes the same as Connecticut source income without credit for taxes paid to New York, does not serve to invalidate the regulation in issue as applied to petitioner . . . (Determination, conclusion of law "V").

ARGUMENTS ON EXCEPTION

Petitioner argues that the convenience of the employer rule applied to the facts of this case violates the Due Process Clause and the dormant Commerce Clause by taxing in New York salary properly apportioned to Connecticut for the days petitioner was physically present in Connecticut, working as an employee of his New York employer. Petitioner contends that the Supreme Court's decision in ***Central Greyhound Lines v. Mealey*** (334 US 653, 92 L Ed 1633) requires fair apportionment of nonresident income tax liability based on the taxpayer's in-state and out-of-state physical presence. Petitioner argues that the ***Speno*** and ***Colleary*** cases do not dispose of the constitutional issues raised by him in this matter. In addition, petitioner points out that the Division's own regulations acknowledge an obligation to apportion income when an employee's out-of-state presence is required by his employer. He concludes that there is no constitutionally sound distinction between those days and days worked out-of-state for the

employee's own convenience. Further, petitioner argues that neither the public services provided by New York nor the possibility of a tax-motivated decision justify the failure to apportion income.

Petitioner believes the application of the convenience rule to him causes double taxation in violation of the constitutional requirement that state taxes be externally consistent. Petitioner reasons that Connecticut has primary constitutional authority for taxing a resident on the days he works in Connecticut, being the state of residence and source of income.

Petitioner argues that the Administrative Law Judge misread the relevant case law on application of the Commerce Clause to his situation and ignored the economic disadvantage that the convenience rule inflicts on nonresidents who work at home versus residents who work at home.

Finally, petitioner contends that ***Tennessee Gas Pipeline Co. v. Urbach*** (96 NY2d 124, 726 NYS2d 350) confirms his constitutional analysis. In ***Tennessee Gas***, the Court of Appeals declared unconstitutional New York's tax on gas importers since that tax resulted in double taxation and, thus, failed the fair apportionment test under the Commerce Clause. Whereas the petitioner in Tennessee Gas focused on the internal consistency test, petitioner focused on the external consistency portion of the fair apportionment test. The basis for this is that the Court in ***Tennessee Gas*** said that the import tax contained no credit for taxes assessed on the purchase of the gas out-of-state and a double tax occurred, thereby creating an unconstitutional burden on interstate commerce. Petitioner maintains that New York's refusal to recognize the Connecticut tax burden causes double taxation and is not a permissible exercise of the State's taxing powers.

OPINION

Tax Law § 631(a)(1) provides that the New York adjusted gross income of a nonresident individual shall include, among other items, the sum of the net amount of items of income, gain, loss and deduction entering into his Federal adjusted gross income, as defined in the laws of the United States for the taxable year, derived from or connected with New York sources. A nonresident individual's items of income, gain, loss and deduction derived from or connected with New York State sources are items, in part, attributable to a business, trade, profession or occupation carried on in New York State (Tax Law § 631[b][1]). The regulations promulgated pursuant to the statute provide as follows:

> The New York adjusted gross income of a nonresident individual rendering personal services as an employee includes the compensation for personal services entering into his Federal adjusted gross income, but only if, and to the extent that, his services were rendered within New York State. ... Where the personal services are performed within and without New York State, the portion of the compensation attributable to the services performed within New York State must be determined in accordance with sections 132.16 through 132.18 of this Part (20 NYCRR 132.4[b]).

The pertinent regulation for purposes of this matter states:

> If a nonresident employee . . . performs services for his employer both within and without New York State, his income 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. The items of gain, loss and deduction ... of the employee attributable to his employment, derived from or connected with New York State sources, are similarly determined. *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 . . .*
> *(20* NYCRR 132.18[a], emphasis added).

Unlike previous cases involving the convenience rule, petitioner makes no pretense that he is working at home for any other reason than his own convenience. His complaint is that he is being double taxed on the same income he earned from the Cardozo School of Law in New York City for the period in issue. The gravamen of his contention is that the convenience rule as applied to his situation violates the Due Process Clause and the dormant Commerce Clause of the United States Constitution by taxing his New York salary which should have been apportioned to Connecticut for those days when he was physically present there.

As noted by the Administrative Law Judge, New York does recognize the fair apportionment of income (***see***, Tax Law § 631 and the regulations at 20 NYCRR Part 132) but limits the apportionment and allocation of income out of New York with the convenience rule. Historically, the rule has been viewed as protecting "the integrity of the apportionment scheme by including income as taxable where it results from services substantially connected with New York but performed outside New York to effect a subterfuge" (***Matter of Colleary v. Tully***, ***supra***, 415 NYS2d, at 268). ***Colleary*** followed the seminal case of ***Matter of Speno v. Gallman*** (***supra***) where the Court of Appeals traced the history of the "place of performance doctrine," i.e., that personal services performed outside New York would not be taxable, from the Tax Law section providing for a tax on nonresidents on income from sources in the State to the refinement of this doctrine by the convenience rule. Presumably, the large number of commuters spurred the modification, which has been consistently applied by the New York courts. The ***Speno*** court stated the policy consideration for the rule was that since a New York resident would not be

entitled to a tax benefit for work done at home, neither should a nonresident. Despite petitioner's protestations, we believe the prospect of a lower tax rate provides the same incentive for subterfuge that existed in 1974 when the ***Speno*** case was decided, albeit not as great a benefit as the one which existed then. Petitioner contends that we may not draw such an inference because the evidence does not indicate his New York or Connecticut tax brackets or a significant differential in the tax that might have been due. We are mindful of this failure of proof as well as the lack of any Connecticut tax returns or an employment agreement for the years in issue. However, this failure of proof will not be construed most favorably for petitioner where he has the burden of proof (***Matter of Brussel***, Tax Appeals Tribunal, June 25, 1992; 20 NYCRR 3000.15[d][5]). We take the strongest possible negative inference from petitioner's failure to present evidence that would demonstrate where and when petitioner discharged his duties for the law school (***see***, ***Noce v. Kaufman***, 2 NY2d 347, 161 NYS2d 1; ***Milio v. Railway Motor Trucking Co.***, 257 App Div 640, 15 NYS2d 73). We conclude that petitioner did not produce such evidence because it would not have contradicted the presumption that his services were performed in New York (***see***, ***Laffin v. Ryan***, 4 AD2d 21, 162 NYS2d 730).

The facts of this case indicate that petitioner was compensated for a set of duties which culminated in his provision of instruction to students at the Cardozo School of Law in New York City for three days a week during the two academic semesters in 1994 and the spring semester in 1995. The facts imply that the School of Law took no position on the locus of petitioner's ancillary job functions indirectly related to his instructional duties. There is no evidence such as an employment contract that would indicate that petitioner was compensated for his days at home. Although petitioner argues that he worked at home in Connecticut for a substantial

number of days during each year, the evidence does not demonstrate that he was compensated for anything but his appearance at, and performance of duties in, New York City at the school as an instructor. Petitioner's interpretation of his job duties, the weight he attributed to each of them and the place of their performance was chosen by him for his personal gain and convenience. We find no justification for allocating any income from his Cardozo position to any other jurisdiction.

Petitioner's characterization did indeed create a situation where the potential for double taxation existed. But the evidence in this record does not support petitioner's claim. The finely parsed facts do not indicate what weight, if any, the law school placed on petitioner's ancillary duties or if they were aware of or condoned his activities.[3] We believe the school's position is critical because if his value to the school is his presence in the classroom as the facts and common sense indicate, then it is not unreasonable to conclude that his three days in New York comprise 100% of the basis for his salary and fully allocable to New York. The fact that petitioner chose to discharge ancillary functions in any jurisdiction other than New York is irrelevant to the school and to New York State. Allocation of the New York source income was not justified and should not have been made in a vacuum. Although he based his constitutional argument on the assumption that the convenience rule caused double taxation, it appears that the rule would have prevented it if heeded by petitioner. We believe it was just this type of arbitrary allocation the rule was meant to prohibit. This conclusion is strengthened by the fact that the

[3]Although never raised as an issue herein, petitioner's brief makes mention of the potential impact of the convenience rule on "telecommuting," but any such allegation would have to be buttressed by the position of the employer in the form of proper and credible evidence.

policy consideration set forth in ***Speno*** is still present and petitioner's allocation allows him to enjoy a benefit not available to his New York counterparts.

Although we believe the analysis above disposes of this matter, we will address petitioner's constitutional arguments. Petitioner insists that his constitutional challenge is to the application of the convenience rule to his particular circumstances. Since petitioner alleges that the rule as applied to his special circumstances is the direct cause of double taxation "in reality," it is imperative that he establish that tax was paid to Connecticut. However, the sparse record is devoid of any documentation or credible testimony that this occurred. Neither the stipulation of facts nor the documentary submissions contain any credible evidence that this occurred. Since petitioner waived his right to a hearing, no credible sworn testimony is available. The double taxation is referred to in his legal arguments only, and we have cautioned that such unsworn statements will receive little weight and be treated as weak as hearsay evidence (***Matter of Café Europa***, Tax Appeals Tribunal, July 13, 1989). Therefore, petitioner has not established that a double taxation occurred in this matter, "in reality." Therefore, the "as applied" challenge must be interpreted as a facial challenge to the constitutionality of the convenience rule, i.e., whether the taxing schemes create the potential for or threat of double taxation.

In ***Matter of Brussel*** (***supra***), we stated that:

> [i]t is well established that the taxpayer has the burden to establish that a statute is unconstitutional on its face (***see***, ***Matter of Wiggins v. Town of Somers***, 4 NY2d 215, 173 NYS2d 579; ***Matter of Maresca v. Cuomo***, 64 NY2d 242, 485 NYS2d 724, ***appeal dismissed***, 474 US 802; ***Trump v. Chu***, 65 NY2d 20, 489 NYS2d 455, ***appeal dismissed***, 474 US 915).

We see petitioner's argument as a facial challenge to the Division's interpretation of Tax Law § 631(a)(1) as embodied in 20 NYCRR 132.18(a). The Supreme Court has said that a state's apportionment taxing scheme must only tax a fair share of interstate transactions and that there is no one mandated method of taxation (***Goldberg v. Sweet***, 488 US 252, 102 L Ed 2d 607). The test is whether the tax is internally and externally consistent. Petitioner concedes that the convenience rule is internally consistent, i.e., if every state had the rule no multiple taxation would occur.[4] Petitioner's challenge rests squarely on the external consistency of the rule, i.e., whether New York has only taxed that portion of the nonresident income which reasonably reflects the in-state component of the activity being taxed (***Goldberg v. Sweet***, ***supra***). It has been held that external consistency looks to "the economic justification for the State's claim upon the value taxed, to discover whether a State's tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State" (***Oklahoma Tax Commn. v. Jefferson Lines***, 514 US 175,131 L Ed 2d 261, 272). Given our conclusion above, we believe that the nonresident tax imposed upon petitioner herein was proportionate to his business activities in the State since we determined that his salary was earned entirely in New York where he performed his job function. In addition, petitioner enjoys all the benefits of New York employment as his in-state peers including the protection of fire, police, emergency health services and public utilities.

We recognize that the movement of persons across state lines is a form of commerce (***see***, ***Camps Newfound/Owatonna v. Town of Harrison***, ***supra***). The question, however, is whether

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[4]In fact, two other states have very similar convenience rules: Pennsylvania (61 Penn Code § 109.8) and Nebraska (Nebraska Admin. Rules and Regs., Title 316, § 22-003[C][1]).

the convenience rule benefits in-state economic interests by burdening out-of-state interests, i.e., does it regulate evenhandedly with only incidental effects on interstate commerce, or discriminate against interstate commerce (***City of New York v. State***, 94 NY2d 577, 709 NYS2d 122 [wherein a commuter tax was found to be unconstitutional because it found "commuting" to be a taxable event and frankly discriminated against nonresidents]). We conclude that the convenience rule does treat residents and nonresidents evenhandedly in both purpose and effect. Failing a business reason for not appearing at the New York work location (employer's necessity) neither a resident nor a nonresident receives a benefit for days each chooses to allocate outside New York.

The convenience rule does not promote the interests of in-state employees over out-of-state employees - - it merely puts them on an equal tax basis. It was petitioner's unilateral and completely voluntary allocation of his income that created a threat of double taxation, not the convenience rule. Petitioner was aware that by taking the position that his job was performed in Connecticut it was subject to Connecticut income tax (Regulations of Connecticut State Agencies 12-711[b]-4[a][1], [d]). He was also aware that Connecticut provides a credit against Connecticut income tax for income tax imposed by New York on income earned from services performed by a Connecticut resident in New York (Regs. of Conn. State Agencies 12-704[a]-4[a][3]) but that it does not provide a credit for New York tax on income generated from services performed in Connecticut, which is considered Connecticut source income. As the Administrative Law Judge stated below, and in which we concur:

> [W]hile New York sources the nonresident's income to New York on days when he physically works outside of New York for his own convenience as opposed to some necessity, New York also

consistently applies the convenience test in sourcing income for purposes of the New York credit afforded under Tax Law § 620 against the tax that New York residents pay to other jurisdictions upon income derived from sources in such other jurisdictions. Specifically, to qualify for the credit, the tax imposed by the other jurisdiction must be imposed on income "derived therefrom" (Tax Law § 620[a]). Under the implementing regulations, "the resident credit against ordinary tax is allowable for income tax imposed by another jurisdiction upon compensation for personal services performed in the other jurisdiction, income from a business, trade or profession carried on in the other jurisdiction, and income from real or tangible personal property situated in the other jurisdiction" (20 NYCRR 120.1[a][2]; 120.4[d]). In fact, 20 NYCRR 120.4(d) provides, as a definition, that "*[i]ncome derived from sources within* another state . . . is construed so as to accord with the definition of the term *derived from or connected with New York State sources*, as set forth in Part 132 of this Title in relation to the adjusted gross income of a nonresident individual" (Determination, conclusion of law "R," emphasis as in original).

Applying the foregoing to the situation reciprocal to petitioner's, i.e., where a New York resident is employed in Connecticut but chooses to work at home in New York on certain days, New York would include his employment income as New York income subject to tax (residents are generally subject to tax on income from all sources) but would also, consistently, source the income on the "choice to work at home" days as derived from Connecticut for purposes of allowing the credit against New York tax based on the tax due Connecticut on such income. Similarly, if Connecticut (or any other state) adopted a convenience test identical to the New York test, the Connecticut resident in petitioner's circumstances would have New York source income on the days worked by choice at home, with such income subject to New York tax. He would also pay Connecticut tax on such income as a resident (as does petitioner). However, he would also receive a resident credit against Connecticut resident income tax because Connecticut would recognize the New York sourcing of such income per the convenience test it had adopted, thus eliminating multiple taxation. Accordingly, if an identical convenience provision was adopted by Connecticut, no multiple taxation would result and, thus the convenience test does not fail the internal consistency requirement of fair apportionment. The problem is that Connecticut does not recognize and has not adopted the

> convenience test. This, however, is not a basis upon which to invalidate such test for New York purposes. In fact, if Connecticut were to adopt an identical convenience test regulation, the same would simply be viewed as reciprocal rather than retaliatory or discriminatory (Determination, conclusion of law "S").

In fact, it was Connecticut's taxing scheme which created the threat of double taxation. The New York convenience rule existed in regulations at least as early as its inclusion in Manual 67 (1967) where language identical to the current 20 NYCRR 132.18 is found in 20 NYCRR former 131.16, some 24 years prior to the enactment of the Connecticut income tax in 1991. As stated above, the New York taxing scheme afforded a credit to residents that earned income in another state and paid income tax to both that state and New York. Although Connecticut certainly was aware of the convenience rule and the credit afforded by New York when it enacted its personal income tax in 1991, it did not provide its residents a credit for taxes paid to another jurisdiction, thereby setting the stage for the threat of double taxation. This is analogous to the situation which arose in ***Tennessee Gas Pipeline Co. v. Urbach*** (***supra)*** where New York's import tax did not provide a credit for taxes paid on the purchase of gas which occurred out-of-state. This import tax fell before Commerce Clause scrutiny. However, the fact that Connecticut did not provide the credit to its residents does not transform the convenience rule into an unconstitutional reach across state lines to tax income earned as a result of services performed in that state. On the contrary, it was a permissible taxation of New York source income for which no basis for allocation was established. Despite petitioner's contentions, we see only incidental effect on interstate commerce and evenhanded treatment of in-state and out-of-state economic interests.

Petitioner's reliance on ***Central Greyhound Lines v. Mealey*** (***supra***) is misplaced. ***Central Greyhound*** dealt with New York's taxation of unapportioned receipts from transportation going through more than one state. As the Administrative Law Judge noted, there is simply no interstate interest or activity impacted by the regulation in issue; certainly not comparable to Maine's differential tax treatment of camps serving primarily nonresident campers (***Camps Newfound/Owatonna v. Town of Harrison***, ***supra***), or to nonresident commuters who were subjected to a tax on their commute to New York City (***City of New York v. State***, ***supra***) or to common carriers whose vehicles traveled through New York and other jurisdictions but whose receipts New York taxed without apportionment (***Central Greyhound Lines v. Mealey***, ***supra***).

The Due Process analysis requires that there be a definite link between the state and the person, property or transaction it seeks to tax (***Miller Brothers Co. v. Maryland***, 347 US 340, 98 L Ed 744). Given our analysis above, we believe there is a connection between New York and petitioner which repels any constitutional challenge based on the Due Process Clause of the Constitution.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Edward A. and Doris Zelinsky is denied;

2 The determination of the Administrative Law Judge is affirmed;

3. The petition of Edward A. and Doris Zelinsky is denied;

4. The notices of deficiency, dated March 16, 1998, are sustained; and

5. Petitioners' request for refund for the year 1995 is denied.

DATED: Troy, New York
November 21, 2001

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner