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 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.

DETERMINATION
DTA NO. 817065

Petitioners, Edward A. and Doris Zelinsky, 1366 Ella Grasso Boulevard, New Haven, Connecticut 06511, filed a petition 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.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on December 7, 1999 at 1:45 P.M., with all briefs to be submitted by May 2, 2000, which date commenced the six-month period for the issuance of this determination. Petitioner Edward A. Zelinsky, Esq., appeared *pro se* and on behalf of petitioner Doris Zelinsky. The Division of Taxation appeared by Barbara G. Billet, Esq. (Margaret T. Neri, Esq., of counsel).

ISSUE

Whether, by applying the "convenience of the employer test" embodied within 20 NYCRR 132.18(a), the Division of Taxation incorrectly subjected to New York taxation without apportionment all of the salary income paid by a certain New York employer to petitioner Edward A. Zelinsky, a nonresident, in contravention of the Due Process Clause or the fair apportionment standard of the Commerce Clause of the United States Constitution.

FINDINGS OF FACT[1]

1. Petitioners, 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.

2. 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.

3. 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

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[1] The parties executed a Stipulation of Facts in connection with this proceeding. These stipulated facts are set forth as Findings of Fact herein. In addition, 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.

classes and meet with students. On the other two days of each semester week in 1994, Professor Zelinsky worked at his principal residence in New Haven, Connecticut, preparing examinations, writing recommendations and conducting scholarly research and writing.

4. 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.

5. 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.

6. 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.

7. 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.

8. 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.

9. 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]

10. 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.

11. 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.

12. 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.

SUMMARY OF THE PARTIES' POSITIONS

13. Petitioner, a nonresident who works for his New York employer Cardozo Law School both in New York and at home in Connecticut, argues that under Due Process and Commerce Clause standards, New York may impose tax only on the portion of his Cardozo Law School salary apportioned and allocated to New York based on the number of days he actually (i.e., physically) was present working in New York. He maintains that the balance of such salary is, by virtue of his physical presence in Connecticut on certain working days, properly apportioned and allocated to Connecticut as Connecticut source income and consequently may not be subjected to tax by New York. Petitioner does not seek a ruling that 20 NYCRR 132.18(a), known as the "convenience of the employer" test, is facially invalid. Rather, he seeks only a determination that such regulation is unconstitutional as applied to his set of circumstances.[3]

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[3] There is no challenge by the Division that petitioners are contesting the constitutionality of regulation 20 NYCRR 132.18(a) on its face, or that there is any jurisdictional impediment to addressing the validity of such regulation in this forum. In fact, there is specific statutory authority to address the validity of a regulation herein (Tax Law § 2006.[7]; ***Matter of Grieg***, Tax Appeals Tribunal, September 16, 1999). The Tax Appeals Tribunal has observed that a taxpayer bears the burden of proving that a statute, as applied, is unconstitutional. On this score, the Tribunal has held:

> [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; ***Matter of Trump v. Chu***, 65 NY2d 20, 489 NYS2d 555, ***appeal dismissed*** 474 US 915). We can see no reason why this rule does not apply with equal force when a taxpayer is challenging the constitutionality of a statute as applied. (***Matter of Ciccone***, Tax Appeals Tribunal, January 23, 1997).

Similarly, then, it follows that the taxpayer challenging the constitutional validity of a regulation as applied bears the burden of establishing the claimed constitutional infirmity.

Specifically, petitioner maintains that Connecticut uses a physical presence approach to sourcing income and does not recognize the convenience of the employer test as a means of sourcing income. Accordingly, Connecticut treats the days he worked at home in Connecticut as resulting in Connecticut source income subject to tax by Connecticut, and allows no credit to offset the tax New York imposes on such income. Thus, petitioner points out that he is in fact subject to multiple taxation on the same income in violation of the constitutional requirement that income must be fairly apportioned in order to comport with Commerce Clause standards against unduly burdening interstate commerce. In the same vein, petitioner asserts that New York's convenience of the employer test also violates due process standards, in that income not sufficiently connected to New York is nonetheless, under such rule, subjected to taxation by New York. Finally, petitioner argues that the convenience test is essentially a throwback to the time when the states surrounding New York, including Connecticut, did not impose income taxes. On this score, petitioner posits that the convenience test is now clearly invalid under his circumstances given that the surrounding states, including his residence state of Connecticut, have enacted and imposed income taxes of their own, thus eliminating the possible tax benefit available to a nonresident of New York who simply chooses to work at home, and likewise eliminating any incentive to achieve such benefit via plan, abuse or subterfuge.

14. The Division argues, in contrast, that the convenience of the employer test has been upheld by the New York courts on numerous occasions and that the justification for such test, to wit, avoiding subterfuge and abuse so as to prevent a tax benefit from being available to a nonresident but not available to a resident taxpayer, remains valid. The Division posits that the income deemed New York source income via the convenience test is sufficiently connected to New York to meet with Due Process requirements, in that such income in question is generated

by petitioner's New York employer based on petitioner's fulfillment of his employment responsibilities for such New York employer. Further, the Division argues that the Commerce Clause is not invoked under petitioner's circumstances, in that there is no identifiable market or flow of goods implicated or infringed upon by application of the rule with its resulting attribution of income to New York . The Division admits that the right to interstate travel is always protected by the Constitution, but maintains that such individual right to travel has nothing to do with commercial intercourse and thus this case does not implicate the Commerce Clause. The Division views the income in question as properly considered New York source income, and urges that the refusal of Connecticut to recognize the convenience test and accept the New York sourcing of the income, so as to either exclude the income from Connecticut taxable income or to provide petitioner with a credit for the tax paid to New York on such income, is a matter for petitioner to challenge in Connecticut. The Division maintains that this case comes down to sourcing and choice, noting that the relevant law and regulations allow for and require apportionment for out-of-state work performed by a nonresident where that nonresident employee is obligated to perform such work out of state. The Division states that the convenience test simply serves the purpose of protecting the integrity of apportionment against abuse or subterfuge when the issue of work location is a matter of choice and there is the possibility of a resulting tax benefit to a nonresident not available to a resident. The Division also points out that, unlike Connecticut, New York affords its residents a credit under Tax Law § 620 and 20 NYCRR 120 for taxes paid to other jurisdictions based on income derived therefrom which is also subject to tax by New York, and thus protects its residents under circumstances of this kind.

CONCLUSIONS OF LAW

A. Tax Law § 631(a) provides that the New York source income of a nonresident individual (such as petitioner Edward A. Zelinsky) includes the net amount of items of income, gain, loss and deduction reported in Federal adjusted gross income that are "derived from or connected with New York sources." Included among these items are those attributable to a business, trade, profession or occupation carried on in this State (Tax Law §631[b][1][B]).

B. Tax Law 631(c) provides, in part, that:

> [i]f a business, trade, profession or occupation is carried on partly within and partly without this state, as determined under regulations of the [commissioner of taxation], the items of income, gain, loss and deduction derived from or connected with New York sources shall be determined by apportionment and allocation under such regulations.

C. Regulations of the Commissioner of Taxation pertaining to business activities carried on in New York State 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 131.16 through 131.18 of this Part (20 NYCRR 131.4[b]).

D. Regulations pertaining to and explaining the "Methods of Allocating Income and Deductions From Sources Within and Without New York State," as in effect during the years in question, provided as follows:

> § 132.15 *Apportionment and allocation of income from business carried on partly within and partly without New York State.*
>
> (a) If a nonresident individual . . . carries on a business, trade, profession or occupation both within and without New York State, the items of income . . . attributable to such business, trade, profession or occupation must be apportioned and allocated to New York State on a fair and equitable basis in accordance with approved methods of accounting.

* * *

> § 132.18 *Earnings of nonresident employees and officers.*
>
> (a) if the nonresident employee . . . performs service for his employer both within and without New York State, his income derived from New York 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.* In making the allocation provided for in this section, no account is taken of nonworking days, including Saturdays, Sundays, holidays, days of absence because of illness or personal injury, vacation, or leave with or without pay. (Emphasis added)

It is the application of the highlighted portion of section 132.18(a) to petitioners' circumstances which causes the dispute in this case.

E. As a starting point, it is well settled that a nonresident employed by a New York employer is not subject to the convenience of the employer test of 20 NYCRR 132.18(a) when he works outside of New York, performs no work within New York, and has no office or place of business in New York (i.e., where suitable facilities to carry out his employment duties are not maintained for or available to him in New York) (***Matter of Linsley v. State Tax Commn***., 38 AD2d 367, 329 NYS2d 486, ***affd*** 33 NY2d 863, 352 NYS2d 199; ***Matter of Gleason v. State Tax Commn***., 76 AD2d 1035, 429 NYS2d 314; ***Matter of Hayes v. State Tax Commn***., 61 AD2d 62, 401 NYS2d 876). In these circumstances the so-called "place of performance doctrine" applies and the out-of-state location where the employee's services are performed, rather than the location of the employer paying for such services, is determinative for income sourcing and taxation purposes (***Matter of Speno v. Gallman***, 35 NY2d 256, 260, 360 NYS2d 855, 858; ***see*** 20 NYCRR 132.4[b]). In contrast, however, 20 NYCRR 132.18(a), and the many cases addressing and upholding the disputed portion of such regulation as valid, provide that

where a nonresident individual employed by a New York employer performs services both at the employer's New York facility and at his out-of-state home, under circumstances where the services could have been performed at the employer's in-state facilities, such services are performed out of state for the employee's convenience and not for the employer's necessity (***Matter of Speno v. Gallman, supra; Matter of Phillips v. New York State Dept. of Taxation and Finance***, 267 AD2d 927, 700 NYS2d 566, ***lv denied*** 94 NY2d 763, 708 NYS2d 52; ***Matter of Kitman v. State Tax Commn***., 92 AD2d 1018, 461 NYS2d 448; ***Matter of Wheeler v. State Tax Commn***., 72 AD2d 878, 421 NYS2d 942; ***Matter of Colleary v. Tully***, 69 AD2d 922, 415 NYS2d 266; ***Matter of Fass v. State Tax Commn***., 68 AD2d 877, 414 NYS2d 780, ***affd*** 50 NY2d 932, 431 NYS2d 526; ***Matter of Simms v. Procaccino***, 47 AD2d 149, 365 NYS2d 73; ***Matter of Page v. State Tax Commn.***, 46 AD2d 341, 362 NYS2d 599). As a result, where a nonresident employee chooses to work at home and is not obligated or compelled by some necessity to work for his New York employer at such out-of-state location, the compensation for the employee's services on such days is held to be New York source income properly subject to tax by New York (***Id***). In effect, the result of applying the convenience test is to limit apportionment and allocation of income out of New York (to the state where the services were performed), in favor of attributing such income to New York. In turn, New York tax is imposed on the income the nonresident earned while physically located and working out of state. In addition, where the employee's home state sources income based only on physical presence, the employee will pay income tax to that state unless such state affords a credit to offset the New York tax. Thus, "double" taxation results where, as here, different rules for sourcing income leave both states claiming to be the source of the employee's income. The real question then is who, if anyone, is under an obligation to ameliorate this result. In fact, the issue as focused is

whether sourcing based on physical presence is the only acceptable apportionment method, with sourcing under a rule such as the convenience test prohibited *per se*, or at least prohibited where, in conjunction with the tax system of another jurisdiction, it results in some level of double taxation.

F. As set forth above, the convenience test portion of 20 NYCRR 132.18(a) has been applied and discussed in numerous cases in New York. In ***Matter of Speno v. Gallman (supra)***, the Court of Appeals specifically confirmed the validity of the convenience versus necessity test, holding 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 (***see, Matter of Burke v. Bragalini***, 10 AD2d 654, 196 NYS2d 391). Specifically, the Court in ***Speno*** stated the following:

> In view of the large number of nonresidents who avail themselves of employment within New York State, the place of performance doctrine was refined by virtue of the "convenience of the employer" test. Under this refinement, a nonresident who performs services in New York or has an office in New York is allowed to avoid New York State tax liability for services performed outside the State only if they are performed of necessity in the service of the employer. Where the out-of-state services are performed for the employee's convenience they generate New York State tax liability.
>
> . . . 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 . . . .

In ***Matter of Colleary v. Tully (supra)*** the Appellate Division reaffirmed the validity of the rule and also specifically rejected a challenge thereto based on Due Process and Commerce Clause grounds, stating the following:

> Petitioner's next contention is that the 'convenience of the employer' test is unconstitutional because it causes an unfair apportionment of taxable and

> non-taxable income due to inaccurate correlation of the apportionment to income earned within the State. It is said that this unfair apportionment is a violation of the Commerce Clause of the United States Constitution. The argument is without merit. The 'convenience of the employer' test merely serves to protect 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. Moreover, the validity of the test has met with approval in ***Matter of Speno v. Gallman, supra***, (citations omitted) (***Matter of Colleary v. Tully, supra.***).

In the context of due process, the Court in ***Colleary*** went on to note that "the source of an out of State employee's income is the employer within the State. Thus, the employment relationship is important in establishing the necessary connection with [the] State" (***Id.***)

In the later decided ***Matter of Kitman v. State Tax Commn. (supra)*** the Appellate Division stated that "[b]ecause of the obvious potential for abuse, where the home is the workplace in question, the [former State Tax Commission] has generally applied a strict standard of employer necessity in these cases, which, with rare exception, has been upheld by the courts [citations omitted]."

G. Given the numerous instances where the convenience test has been applied and upheld, including specifically the ***Speno*** and ***Colleary*** cases which upheld the test as valid and rejected a challenge thereto based on commerce clause and due process grounds, the inquiry would appear to be ended. However, in ***Speno*** and ***Colleary*** the courts justified the convenience test on the bases that it served to curtail a special tax benefit available to nonresident employees but not available to resident employees, and that it protected the integrity of the apportionment scheme required under Tax Law § 631(c) and implemented via 20 NYCRR 132, by preventing income otherwise taxable to New York from escaping taxation via subterfuge. Stated differently the convenience rule, which limits what would otherwise be required apportionment, was held to be

a necessary and reasonable refinement serving to prevent nonresidents employed in New York and ordinarily subject to tax by New York on the income from such employment (like their resident counterparts), from enjoying a tax advantage over their similarly employed resident counterparts by the subterfuge (or simple expedient) of choosing to work at home. It appears undisputed that, but for the convenience test, petitioner's employment income would be apportioned and allocated, under Tax Law § 631(c) and the implementing regulations, in part to petitioner's home state of Connecticut based on the number of days he worked there. Thus, the question is not whether apportionment is required, but rather whether the rationale for the exception to such required apportionment is justified under the instant circumstances where the abuse, subterfuge and special tax benefit considerations are allegedly no longer present or available.

H. Obviously, the "special tax benefits" and the "subterfuge" spoken of in ***Speno*** and ***Colleary***, respectively, become possible when a nonresident lives in a state which does not impose an income tax or imposes an income tax at a rate which is significantly lower than the tax rate in New York. Without a rule such as the convenience test, the nonresident employed in New York may gain a clear tax benefit over a New York resident so employed simply by choosing (if not planning) to stay at home to work. That is, the nonresident apportions and allocates income on such days out of New York to his no (or comparatively lower) tax residence state and escapes some or all tax on the related income, whereas the resident who works at home realizes no such special benefit when he, too, chooses to work at home. In this case, it is undisputed that petitioner is subject to tax by his residence state of Connecticut on the portion of his Cardozo salary based on days he worked at home in Connecticut, with no credit afforded by Connecticut for New York tax imposed on such income attributed to New York via the

convenience test. Therefore, petitioner claims that the justification for the convenience test, i.e., that nonresident taxpayers can manipulate their New York tax liability by work location choice whereas a New York resident similarly employed cannot, is vitiated under his circumstances (and indeed under any similar circumstances where the home state imposes an income tax). Petitioner, as noted earlier, does not seek a determination that the portion of the regulation in issue (the convenience test) is invalid in all cases. In fact, the Courts' concerns about special tax benefits for a nonresident over a resident, and about the incentive for abuse and subterfuge to gain such a benefit, would apparently remain unquestionably valid in situations where the nonresident's home state does not impose an income tax on the income in issue. The question thus becomes further refined to whether the convenience test remains valid under circumstances where the tax benefit or differential between the resident and the nonresident employee is mitigated as in this case because the nonresident's home state imposes a tax on the income at issue.

I. While a multitude of New York cases have applied and upheld the convenience test, those cases have focused mainly on the factual distinction between "convenience" and "necessity" **(**Conclusion of Law "E", ***supra.; see, e.g., Matter of Phillips v. New York State Dept of Taxation and Finance, supra***). In ***Matter of Colleary (supra)*** where the constitutional issues were raised and rejected, and in ***Matter of Speno (supra)***, where the convenience test was specifically held to be valid, the Courts were principally concerned with the potential for tax disadvantage to the New York resident employee versus his counterpart nonresident employee and the potential for abuse available under apportionment based solely on the physical presence of the employee performing the services. It is at least noteworthy that for the tax years in question in those cases New Jersey, the residence state of both of the taxpayers, did not impose a

general income tax in the manner of that which is imposed today (***see***, New Jersey Gross Income Tax Act, NJ Rev Stat § 54A:1-1, *et seq.*, effective July 1, 1976), thus perhaps crystallizing the concern over income source manipulation with its resultant possible special tax benefit. Nonetheless, the New York courts have subsequently upheld and justified the convenience test as valid, leaving only for discussion petitioner's argument that the justification for the rule is no longer valid because times and circumstances have changed and the states surrounding New York, including Connecticut, now impose income taxes resulting in multiple taxation of the same income in violation of due process and commerce clause standards (***see***, Conn Gen Stat § 12-700, *et seq.*, effective January 1, 1991).

J. Petitioner argues that as applied to his circumstances, the convenience of the employer test of 20 NYCRR 132.18(a) violates the Due Process Clause and the Commerce Clause of the United States Constitution. Petitioners' position, at its succinct essence, is that income from employment is not only subject to apportionment when the employee performs services for his employer in more than one jurisdiction but moreover must be, where at all feasible, apportioned based on the physical location of the employee at the time the services are performed. Hence, petitioner claims that his salary income from Cardozo Law School should simply be apportioned between New York (where his employer Cardozo is located) and Connecticut (where he lives and sometimes chooses to perform work for his employer) based on the respective number of days on which petitioner actually performed services for his employer in each of such jurisdictions. He argues that on days when he does not work at his employer's facilities in New York, but rather chooses to remain at home to work, New York is constitutionally precluded from treating such days as New York working days.

K. The issue of whether a state's method of taxation results in a prohibited deprivation of property under the Due Process Clause (US Const, 14th Amend, § 1), which states "nor shall any State deprive any person of life, liberty or property without due process of law," may be resolved by determining "whether the taxing power exerted by the state bears fiscal relation to the protections, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return." (***Wisconsin v. J.C. Penney, Co.***, 311 US 435.) In ***Quill Corp. V. North Dakota*** (504 US 298, 119 L Ed 2d 91), the Supreme Court stated the following:

> The Due Process Clause 'requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax,' ***Miller Bros. Co. V. Maryland***, 347 US 340, 344-345, 98 L Ed 744, 74 S Ct 535 (1954), and that the 'income attributed to the State for tax purposes must be rationally related to "values connected with the taxing State."' ***Moorman Mgf. Co. v. Bair***, 437 US 267, 273, 57 L Ed 2d 197, 98 S Ct 2340, (1978) ***(Quill Corp. V. North Dakota***, ***supra***, 119 L Ed 2d at 102).

Thus, for Due Process purposes, to validate the result of applying the convenience test leaving petitioner's Cardozo salary sourced or attributed entirely to New York rather than apportioned within and without New York, there must be some link between the taxing State (New York), petitioner, and the income at issue, and there must be some reasonable relationship between the amount of income subject to tax and the extent of petitioner's activities in New York.

L. Petitioner also argues that his cross border commute to pursue and engage in his employment and his performance of employment activities in the two jurisdictions constitutes interstate commercial activity subject to commerce clause protection. He maintains, in turn, that the convenience of the employer test, as applied to the circumstances of this case, runs afoul of

the Commerce Clause of the United States Constitution (US Const, art I, § 8, cl 3), which provides that Congress is vested with the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." A state tax affecting interstate commercial activity violates the Commerce Clause unless it "is [1] applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State" (***Complete Auto Transit v. Brady***, 430 US 274, 279, 51 L Ed 2d 326, 331). While due process is concerned with preventing unwarranted deprivations of property under concepts of fundamental fairness (the relationship of the state exacting tax to the benefits, opportunities and protections afforded by the state to the subject being taxed), the Commerce Clause is concerned with excessive regulation or unwarranted burdens disrupting or restricting the free flow of commerce and equal access to economic markets.

M. Petitioner here challenges only the second prong of the four-part test enunciated in ***Brady***, to wit, the requirement that the tax be "fairly apportioned." States have been accorded a fair degree of flexibility with respect to choosing methods of income apportionment (***see, Moorman Manufacturing Co. v. Bair, Director of Revenue of Iowa***, 437 US 267, 57 L Ed 2d 197). However, the "fairness" of an apportionment method, or here the validity of a test which when applied results in an apportionment of income not based only on the physical presence of the income recipient, is judged by whether the resulting income allocation and imposition of tax is both internally and externally consistent (***Goldberg v. Sweet***, 488 US 252, 261, 102 L Ed 2d 607; ***Container Corp. of America v. Franchise Tax Bd.***, 463 US 159, 77 L Ed 2d 545). "Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would

not also bear" (***Oklahoma Tax Commn. v. Jefferson Lines***, 514 US 175, 185, 131 L Ed 2d 261). "External consistency, on the other hand, 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" (***id.***, at 185). Thus, internal consistency serves to avoid multiple taxation occasioned by the imposition of multiple identical taxes by multiple jurisdictions. In this case, the question becomes whether multiple identical taxation would result if every other jurisdiction imposed a sourcing or attribution regulation identical to New York's version of 20 NYCRR 132.18(a), including the convenience test, to determine where to apportion and allocate employment income. External consistency, on the other hand, questions whether the tax resulting from the application of 20 NYCRR 132.18(a) is justifiably proportionate to the taxpayer's business activities in the taxing state.

N. Treated first is petitioner's due process argument. On this score, the portion of petitioner's employment income from Cardozo deemed New York source income via 20 NYCRR 132.18(a) is sufficiently connected to New York and does not reflect disproportionate attribution of income so as to require cancellation of the resulting tax imposed thereon. First, the Court in ***Matter of Colleary v. Tully (supra***) specified that employment income is connected to New York via the fact that the employer is located here. In turn, petitioner's employer in New York maintains offices and facilities at its place of business which are available to petitioner and suitable for the performance of his employment duties, including those duties he performs by choice at his Connecticut residence. There is no basis in the record for concluding that petitioner's work at home was "ancillary" to his employment, as opposed to part and parcel of the duties imposed on and expected of him by his employer. Likewise, there is no claim that petitioner's choice to work at home on certain days was specifically motivated by tax

considerations. Indeed, it is undisputed that petitioner was subject to Connecticut tax on the income in question. At the same time, however, there is no claim or evidence that petitioner was required by his employer or by other circumstances to perform any of his employment duties outside of New York on any of the days in question, and it appears the sole motivation for doing so was choice and convenience. [4] Further, his salary from Cardozo appears to have been entirely connected with and resulted from his duties as a professor of law for this New York employer. Thus, it cannot be said that the income in question bears no reasonable connection or fair relationship to New York such that subjecting the same to New York income tax violates due process standards.

Petitioner enjoys the benefits of employment opportunities offered in New York. The regulation at 20 NYCRR 132.18(a) simply serves to preclude any differential treatment or special benefit arising from engaging in such employment in New York but choosing (for whatever reasons) to perform certain employment duties elsewhere. Petitioner enjoys the same benefits of New York employment as do his in-state counterpart employees. Petitioner is not impeded in traveling to New York, for employment, by some additional tax imposed against him by New York but not imposed against his in-state counterpart, nor are any New York services denied to petitioner. Petitioner may utilize the New York courts for resolving disputes, including labor and other disputes with his employer, and he benefits from a regulated labor market, as well as from fire, police, emergency health and other services. His choice not to be present in New York to carry out his employment duties on certain days does not diminish the availability of or the costs associated with these items. It cannot be said that sourcing income to New York

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[4] Though not specified in the record certain benefits of choosing to work at home in lieu of commuting, including travel expense savings as well as perhaps time savings enabling more efficient use of work time, appear self-evident.

on the convenience or choice days subjects to New York tax income that is not fairly attributable to petitioner's overall economic activities within New York (***Oklahoma Tax Commission v. Jefferson Lines, Inc.***, 514 US 175, 131 L Ed 2d 261).

O. Turning to petitioner's commerce clause arguments, the initial question is whether petitioner is engaged in interstate commerce such that he is entitled to the protections afforded under the commerce clause. Petitioner likens his circumstances of splitting his working days between his employer's facilities and his home to a business which carries out its income producing activities in more than one jurisdiction. While petitioner cites a number of cases to support the claim that he is engaged in interstate commerce, this claim is not borne out. In fact, neither petitioner nor his employer appear to be involved in interstate commerce. There is no evidence that petitioner's teaching duties constitute an interstate activity. The fact that petitioner lives in one state but is employed in another, and the fact that he performs his employment duties in two jurisdictions, are both simply the result of his choice to do so. These circumstances, resulting from choice, do not in either regard elevate petitioner's activities into interstate commerce. The commerce clause may be invoked to invalidate state measures which "unjustifiably . . . discriminate against or burden the interstate flow of articles of commerce" (***Oregon Waste Systems v. Department of Envtl. Quality of Ore.***, 511 US 93, 128 L Ed 2d 13). Under the facts of this case there is no apparent interstate market substantially impacted by the convenience test embodied in 20 NYCRR 132.18(a). There is no apparent burden to any interstate flow of articles of commerce. In this case, the potentially regulated "activity," if any, would appear to be petitioner's choice to work at home rather than to commute and work at his employer's facilities in New York. This activity or choice does not have any substantial impact on interstate commerce (***see*** Conclusion of Law "P"). To the extent it could be said that the

regulation might impact a nonresident's (such as petitioner's) choice as to work location, it does not do so to provide any advantage to an in-state individual employed by petitioner's employer. Rather, it serves to place these employees on an equal footing vis-a-vis New York tax on their New York employment income.

P. The convenience test does not subject petitioner to New York tax because he commutes from Connecticut to New York to work at offices maintained for and made available to him here. Rather, he is subject to tax because he is employed here. In ***Matter of Tamagni v. Tax Appeals Tribunal*** (91 NY2d 530, 673 NYS2d 44), the Court of Appeals sustained the imposition of New York income tax on income from intangible assets against taxpayers who were statutory residents of New York, notwithstanding that the taxpayers were also domicilliaries of New Jersey and that New Jersey subjected the same income from intangible assets to its income tax. The Tamagnis argued that the income should be apportioned and sourced only to New Jersey, under the position that the situs of intangibles and hence the income derived therefrom should be based on the location of their owner. The Court rejected this argument and sustained the New York tax because it was imposed based on petitioners' status as residents of New York. The Court characterized such taxation as based on a "purely local occurrence" rather than based on interstate activities engaged in by petitioners. The Court noted, over one dissent, that there was no commerce clause implication resulting from Mr. Tamagni's daily commute from New Jersey to New York where he worked as an investment banker and participated in economic activities. [5]

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[5] The Appellate Division was even more direct in its opinion in ***Tamagni,*** holding unequivocally that the practice of commuting from one state to another and partaking of various daily economic activities before returning home, did not produce the requisite effect to be considered engaged in interstate commerce. (***Matter of Tamagni v. Tax Appeals Tribunal,*** 230 AD2d 417, 659 NYS2d 515).

In ***Tamagni***, a case decided after the Supreme Court's decision in ***Camps Newfound/Owatonna, Inc. v. Town of Harrison*** (520 US 564, 137 L Ed 2d 852), the Court of Appeals focused its commerce clause analysis on identifying similarly situated in-state and out-of-state interests being subjected to differential treatment, and found none. In petitioner's case, the common denominator is employment in New York, and in-state as well as out-of-state individuals employed in New York are simply not treated differently vis-a-vis the New York tax imposed on their employment income as a result of apportionment determined by applying the convenience test of 20 NYCRR 132.18(a). Rather, in result, they are treated equally.

Q. In ***Camps Newfound/Owatonna, Inc. v. Town of Harrison (supra)***, a Maine property tax exemption available to in-state summer camps serving primarily Maine residents but not available to in-state summer camps serving primarily out-of-state residents, was struck down on commerce clause grounds as discriminating against interstate interests so as to result in advantage to in-state interests. The Court held that because some 95 percent of the campers attending the effectively higher taxed camps came from out of state, the taxing scheme implicated an identifiable interstate market (i.e, nonresident camp attendees) and thus implicated interstate commerce. In practical effect the out-of-state campers were, by the impact of the different (beneficial) tax treatment accorded certain in-state camps, apparently discouraged from attending the camps serving them because the additional tax cost of the exemption not available to the camps serving them would be borne by such out-of-state campers traveling to Maine. Unlike the exemption in ***Camps Newfound*,** however, the regulation at issue here does not promote the interests of in-state employees at the expense of nonresident employees based on the latter's interstate movement or activities. Rather, it places such employees on an equal New York tax footing with each other. Any burden resulting from petitioner's choice to work at home

or any discouragement from doing so comes not from the New York regulation and its convenience test, but rather from Connecticut's choice not to allow a credit for New York taxes paid on income connected with petitioner's New York employment. In sum, there is simply no interstate interest or activity impacted by the regulation at issue comparable to the nonresident campers whose attendance at camps serving them primarily was discouraged by Maine's differential tax treatment of such camps, resulting in advantage to other camps serving primarily resident campers (***Camps Newfound/Owatonna, Inc. v. Town of Harrison, supra.***), or to the nonresident commuters who were subjected to tax on their commute to New York City while resident commuters were not so subject (***City of New York v. State of New York***, 94 NY2d 577, 709 NYS2d 122), or to the common carrier whose buses traversed in-state and out-of-state routes (with the latter constituting some 43 percent of its receipts) subjected to tax by New York on all receipts without apportionment (***Central Greyhound Lines, Inc. v. Mealey***, 334 US 653, 92 L Ed 1633). The regulation does not prevent, limit or discourage petitioner from traveling to his employer's place of business in New York to carry out his employment duties at the facilities provided and maintained there for such purposes. In short, petitioner identifies no similarly situated commercial interests or activities being disparately treated by New York's apportionment of his employment income under the regulation and its convenience test.

R. Assuming petitioner's circumstances of commuting from Connecticut across the border to New York to engage in employment, and his choice to perform employment duties in two states, constitutes commercial activity subject to the protections afforded under the Commerce Clause, the question becomes whether the result of applying the convenience test, under which petitioner becomes subject to tax in New York in addition to Connecticut, constitutes invalid denial of fair apportionment resulting in invalid taxation by New York. As noted above, the two

overriding considerations as to whether there is fair apportionment are the internal and external consistency of the measure imposed (***Goldberg v. Sweet, supra.***).

With respect to internal consistency, if every other jurisdiction adopted the convenience test as does New York, no multiple taxation would occur. That is, while 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." (Emphasis as in original.)

S. 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.

T. With regard to external consistency, the consideration is much like that for due process. The question is whether the employment income being attributed to New York and subjected to tax as a result of the convenience test, notwithstanding the out-of-state physical presence of the income recipient on certain days, is nonetheless sufficiently connected to New York sources and activities. The test of external consistency focuses on the relationship between the tax and how the income being subjected thereto is generated. Thus, there must be some connection between the value (income) being taxed and the state (here New York) doing the taxing. As outlined previously, there is sufficient connection of the income to New York which, together with the

justification for the convenience test, overcomes concerns that the amount of income taxed by New York is out of all proportion to the ties between New York, the income and its recipient.

U. Petitioner essentially admits that the "special tax benefit" and the "subterfuge" spoken of may arise where the nonresident lives in a state which does not impose an income tax, thus leaving the nonresident employed in New York but choosing to work at home at a clear tax advantage over a New York resident. In this case, however, it is argued that petitioner Edward A. Zelinsky would not receive such a tax benefit, for Connecticut imposes an income tax and has subjected his income related to the days worked at home to such income tax. Notwithstanding this latter fact, the stated justification for the convenience test, i.e., concerns about tax motivated work location choices and disparate (disadvantaged) treatment to New York residents as a result remain present. It does not simply follow from the holdings in ***Colleary*** and ***Speno*** that the concerns justifying the convenience rule are alleviated entirely when or if the nonresident's home state simply imposes an income tax. Enactment of an income tax alone is not sufficient to invalidate the rule because it remains that tax rate differentials between states can still result in a substantial tax benefit, i.e., under circumstances where the nonresident's home state imposes a tax at a rate lower than that imposed by New York. In fact, the courts did not quantify the degree of tax benefit to be avoided by the rule. States with no income taxes, as well as those with rate differentials, or noncomparable deductions, exemptions and exclusions, all give rise to potential differential treatment and support the validity of the convenience rule. These considerations serve to highlight the problems presented in judging the convenience rule against the myriad possible taxing structures of other states on a case-by-case basis, to decide which differentials might be significant enough to justify the rule and which ones do not rise to such

level. This approach also fails to consider the fact and impact of possible repeals as well as enactments of taxes by other states.

V. In sum, the application of 20 NYCRR 132.18(a) under the circumstances at hand does not violate either due process or commerce clause standards. Stripped to its essence, petitioner's claim is that he was not physically present in New York on the days in dispute (the days worked at home upon which his apportionment and allocation of income was based), but rather was physically present working in Connecticut. Hence, petitioner claims the income must be apportioned to Connecticut, i.e., the income should follow the physical presence of its recipient. In contrast, New York has imposed a limitation on this approach based on the issue of choice, to wit, the choice of the income recipient to work at home. New York justifies this limitation because its result is to treat residents and nonresidents employed in New York on an equal footing, with neither receiving any special tax benefit resulting from their choice to work at home rather than at their employer's facilities. That is, all resident and nonresident employees, including petitioner, are potentially subject to New York tax on their entire New York employment income. On days when they physically work in New York, each is subject to tax on such income. In turn, under 20 NYCRR 132.18(a) and its convenience test, the nonresident employee remains subject to New York tax on employment income as does the resident employee on days when they choose their work location (specifically when the choice is to work at home), such that neither reaps any tax benefit or advantage over their counterpart as a result of this choice. Finally, each may avoid New York tax when they are unable to choose their work location (i.e., when performing out-of-state work due to employer necessity or requirement) and are subject to tax by another jurisdiction. That is, the nonresident employee is entitled to apportion and allocate income out of state on such days while the resident employee is entitled to

have the income on such days recognized as non-New York source income for purposes of the resident credit under Tax Law § 620 (***see*** Conclusion of Law "R"). Thus, the apportionment and allocation rules are in symmetry and do not unfairly apportion to the advantage of the resident versus the nonresident employee. 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 or require New York to disavow the income as New York source income properly subject to tax. The New York regulation and its convenience test does not impose any New York tax on a nonresident employed in New York that is not also imposed on any resident so employed in New York. Rather, it only prevents him from reaping any tax benefit not generally available to all persons similarly employed in New York (***see*** Conclusion of Law "U"). The regulation does not cause any predictably disproportionate New York tax burden to fall on all out-of-state (nonresident) employees. That burden, if any, results in this case from the manner in which Connecticut chooses to subject its residents to tax, a matter clearly within its purview (***Matter of Tamagni v. Tax Appeals Tribunal, supra***). The regulation is not aimed to disadvantage petitioner but, as noted, to equalize all similarly situated persons (residents and nonresidents) employed in New York. That petitioner is taxed by two jurisdictions under these circumstances cannot be said to result from an apportionment rule applied by New York in contravention of the commerce clause or the due process clause.

Ultimately, petitioner pays a price for choosing to work at home. However, that price is not exacted when he has no choice in the matter. The problem lies with two states having valid, though different, sourcing rules. New York's rule has been upheld on numerous occasions. It is

not designed to burden out-of-state interests so as to benefit in-state interests. In justifying the convenience test neither ***Colleary*** nor ***Speno*** quantified the possible disparate benefit to be eliminated by the test, and there is no proof that, although petitioner is subject to tax on his New York employment income by his home state of Connecticut, the benefit the rule is designed to eliminate has been entirely eliminated. To conclude otherwise would be out of harmony with the reasoning and result reached in those cases.

W. The petition of Edward A. Zelinsky and Doris Zelinsky is hereby denied; the notices of deficiency dated March 16, 1998 are sustained; and petitioners' request for a refund for the year 1995 is denied.

DATED: Troy, New York
November 2, 2000

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE