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Edward A. Zelinsky

Benjamin N. Cardozo School of Law, zelinsky@yu.edu

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Recommended Citation

Edward A. Zelinsky, *Coronavirus, Telecommuting, and the 'Employer Convenience' Rule*, 95 State Tax Notes 1101 (2020).

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Coronavirus, Telecommuting, And the ‘Employer Convenience’ Rule

by Edward A. Zelinsky

Reprinted from *Tax Notes State*, March 30, 2020, p. 1101

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Edward A. Zelinsky is the Morris and Annie Trachman Professor of Law at Yeshiva University's Benjamin N. Cardozo School of Law in New York City. He wrote this article at his home in New Haven, Connecticut.

In this article, Zelinsky criticizes New York's income tax penalty for nonresident telecommuters, particularly in the context of the coronavirus emergency.

As the coronavirus crisis has evolved, New York Gov. Andrew Cuomo (D) has strongly advocated telecommuting. In the initial stage of this public health emergency, the governor said that to encourage social distancing, businesses should let people work from home voluntarily.¹ As the crisis continued, Cuomo later required nonessential employees to work at home.²

The governor now must act as vigorously to reform New York's income tax policies to meet the coronavirus emergency. Unfortunately, at the same time that New York's governor mandates telecommuting, New York's tax law irrationally penalizes telecommuting by imposing New York income taxes on out-of-state telecommuters for the days they work at home. Deploying the concept of the "convenience of the employer," New York's overaggressive taxation of out-of-state

telecommuters can cause those telecommuters to be double taxed or to be taxed at New York's higher state income tax rates.³ Either outcome discourages telecommuting when, as Cuomo correctly maintains, work at home is a vital tool for meeting the coronavirus emergency.

Cuomo should instruct New York's tax collectors to stop enforcing New York's extraterritorial income tax penalty on out-of-state telework for New York employers. If the governor does not act, Congress has the constitutional authority⁴ to prevent New York from imposing its income tax on out-of-state telecommuters on the days they work at home. Congress should act quickly if the governor does not.

The problem stems from New York's so-called convenience of the employer test. Under that test, New York taxes nonresident telecommuters on the days they work at their out-of-state homes — even though, on those days, the nonresident telecommuter does not set foot in the Empire State and uses no New York public services.

Consider the (unfortunately typical) case of Manohar Kakar, who lives and works at his home in Gilbert, Arizona, for a New York employer.⁵ On the

³The commentary on New York's "convenience of the employer" doctrine is extensive. See, e.g., Edward A. Zelinsky, "Pass the Multi-State Worker Act Also," *State Tax Notes*, May 30, 2016, p. 719; Zelinsky, "Hillenmeyer, 'Convenience of the Employer,' and the Taxation of Nonresidents' Incomes," 64(2) *Clev. St. L. Rev.* 303 (2016); Walter Hellerstein, *State Taxation* 25-33, para. 20.05[4][e][i] (2015); Hellerstein et al., *State and Local Taxation: Cases and Materials* 391-402 (2014); Morgan L. Holcomb, "Tax My Ride: Taxing Commuters in our National Economy," 8(8) *Fla. Tax. Rev.* 885 (2008); and William V. Vetter, "New York's Convenience of the Employer Rule Conveniently Collects Cash From Nonresidents, Part 2," *State Tax Notes*, Oct. 23, 2006, p. 229.

⁴U.S. Const. Art. I, section 8 (empowering Congress "to regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes").

⁵*In the Matter of the Petition of Manohar and Asha Kakar*, New York Division of Tax Appeals, Small Claims Determination, DTA NO. 820440 (Feb. 16, 2006).

¹Nick Reisman, "Cuomo Wants Businesses to Voluntarily Keep Workers Home," *Spectrum News*, Mar. 11, 2020.

²New York state, "Governor Cuomo Signs the 'New York State on PAUSE' Executive Order," Mar. 20, 2020.

days when Kakar came to New York for work purposes, New York properly taxed the income attributable to those days actually spent in New York. New York was ready to provide Kakar public services on those days such as police, fire, and emergency medical coverage. However, New York also imposed its income tax on the remainder of Kakar's income earned on the days when he worked at his home in Arizona.

The net result in this (and similar) cases is the double state taxation of the income the telecommuter earned at home. In a case like Kakar's, Arizona reasonably taxed the income he earned at home in the Grand Canyon State. Kakar is an Arizona resident. On his work-at-home days, Arizona provided the public services that protected him. If Kakar needed an emergency medical technician or a police officer when he worked at home, that service was provided by Arizona and its localities, not by New York.

Nevertheless, implementing its long-standing employer convenience policy, New York reached outside its borders to tax Kakar on the income he earned at his home in Arizona. The result was double state taxation as both Arizona and New York taxed the telework-based income Kakar earned in Arizona while neither state provided a credit for the taxes assessed by the other.⁶

When he took his predicament to the New York Division of Tax Appeals, Tax Appeals Tribunal,⁷ the board sustained New York's taxation of the income Kakar earned working at home in Arizona. This decision (and others like it) are not flukes but, rather, implement New York's long-standing policy of taxing nonresident telecommuters extraterritorially on the income they earn at their out-of-state homes.⁸ As a result, out-of-state telecommuters who obey Cuomo's guidance to work at home risk double state income taxation or income taxation at New York's higher tax rates.

Some states (unlike Arizona) provide a credit to their residents when New York reaches beyond its

border and taxes teleworkers on income earned at their out-of-state homes. While the credits abate the problem caused by New York's tax overreaching, for two reasons they do not completely solve the problem. First, states give credits at their (usually lower) tax rates rather than at the higher tax rates New York typically imposes. For example, New Jersey gives a credit to its residents when New York taxes the income earned at their residences in the Garden State. However, that New Jersey income tax credit is based on New Jersey's generally lower tax rates.⁹ Thus, a telecommuter who works at his New Jersey home for a New York employer is penalized by New York's higher tax rate on a day she works at home. This telecommuter pays a higher tax rate (New York's) than is paid by her next-door neighbor who works at home for a New Jersey employer — even though on this day they both receive the same public services at home from New Jersey and its localities.

Second, those credits deplete the treasuries of the states granting them. In effect, New Jersey and other states granting a credit in these circumstances subsidize New York's extraterritorial taxation of nonresident telecommuters by abating for their citizens the taxes New York assesses against income earned outside New York's borders.

In good times, New York's policy of taxing the income earned by out-of-state telecommuters makes no sense. In times like today, that policy is even more unsound. If a nonresident telecommuter working at his out-of-state home needs to go to the hospital, he will go to his local hospital, not to a New York facility. That is an outcome New York should welcome, not discourage, as it does today under the convenience of the employer rule.

Cuomo is right to mandate telecommuting. He should reinforce his own message by announcing that, retroactive to the beginning of this year, New York will cease taxing income earned at home by out-of-state telecommuters. If the governor won't stop New York's irrational income tax penalty for nonresident telecommuters on the days they work at home, Congress should. ■

⁶ Ariz. Rev. Stat. section 43-1071.A.1 (granting residents an Arizona income tax credit "only for taxes paid to the other state . . . on income that is derived from sources within that state").

⁷ *Manohar and Asha Kakar*, DTA NO. 820440.

⁸ *Zelinsky v. Tax Appeals Tribunal*, 1 N.Y. 3d 85 (2003), cert. denied 541 U.S. 1009 (2004); and *Huckaby v. New York State Division of Tax Appeals*, 4 N.Y. 3d 427 (2005), cert. denied 546 U.S. 976 (2005). The taxpayer in *Zelinsky* was me.

⁹ N.J. Stat. section 54A:4-1(b) (limiting credit for New Jersey resident).