State Taxation of Interstate Telecommuters: The U.S. Supreme Court’s Silence Puts Congress in the Driver’s Seat

by Nicole Belson Goluboff

On October 31 the U.S. Supreme Court denied the petition for certiorari filed by Thomas Huckaby in Huckaby v. New York State Division of Tax Appeals. The case concerned a Tennessee resident who telecommuted to a New York employer and was taxed by New York on 100 percent of his income, even though he earned 75 percent of that income in Tennessee and only 25 percent of it in New York. The state imposed the tax under its convenience of the employer rule.2

Under that rule, nonresidents who choose to telecommute some or most of the time to their New York employers must treat the income they earn while working from home as if it were earned in New York and pay New York tax on it. Huckaby claimed that New York’s application of the rule to him violated the Due Process and Equal Protection clauses of the U.S. Constitution, as well as New York’s statutory tax law.3 In a 4-3 decision, the New York Court of Appeals upheld the tax.4

The U.S. Supreme Court’s decision to let New York’s ruling stand threatens the nation’s capacity to expand the use of telework. And it does so at a particularly inopportune time: Right now, interest in telework is intensifying because of its utility as an emergency management and disaster recovery strategy.

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However, the Supreme Court’s failure to review Huckaby is hardly the end of the road for all unduly taxed telecommuters. Congress can — and must — eliminate the telework tax by passing The Telecommuter Tax Fairness Act,5 a bipartisan bill that would abolish the convenience-of-the-employer rule.

Convenience Rule Ignored Twice

The Supreme Court’s decision in Huckaby marks the second time within two years that the Court has

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1Huckaby v. New York State Division of Tax Appeals, 4 N.Y.3d 427 (2005), cert. denied, 74 U.S.L.W. 3272 (Oct. 31, 2005). (For the Court of Appeals’ decision, see Doc 2005-6487 or 2005 STT 62-21.)
220 NYCRR 132.18(a). (“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. . . . 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.”)
3Tax Law sections 601, 631.
5S. 1097; H.R. 2558.
refused to address constitutional challenges to New York’s convenience rule. The first was in Zelinsky v. Tax Appeals Tribunal of New York.\(^6\)

In Zelinsky, New York applied the convenience rule to Edward Zelinsky, a Connecticut resident and a professor at Cardozo School of Law in New York, who often worked from home. New York taxed him on 100 percent of his salary income, including the income he earned in Connecticut. Because Connecticut also taxed the income he earned there, Zelinsky was double-taxed on that income. He claimed that the double tax risk to which New York subjected him violated the Due Process and Commerce clauses. As in Huckaby, the New York Court of Appeals rejected his claims.\(^7\)

**Telecommuters Nationwide at Risk**

The Supreme Court’s rejection, two years in a row, of appeals to review the convenience rule leaves a significant portion of the American workforce at risk. Currently, nearly 10 million Americans telecommute to their employers, either some or all of the time.\(^8\) A study conducted in 2000 found that almost one in five employee-telecommuters worked for out-of-state supervisors.\(^9\)

As I have previously noted,\(^10\) New York has applied the convenience rule to telecommuters around the country — not just in Tennessee and Connecticut, but also in New Jersey, Pennsylvania, New Hampshire, Maine, Florida, and North Carolina.\(^11\) Further, several other states have maintained a rule similar to New York’s.\(^12\) By refusing to hear first

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\(^6\)Zelinsky v. Tax Appeals Tribunal of New York, 1 N.Y.3d 85 (2003), cert. denied, 541 U.S. 1099 (2004). (For the Court of Appeals’ decision, see Doc 2003-25309 or 2003 STT 228-10.)

\(^7\)Id.


\(^12\)See, e.g., 61 Pa. Code section 109.8; Neb. Admin. Code sections 316-22-003.01C(1).

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\(^16\)Id.


\(^18\)See, e.g., Armour, Stephanie, “Firms Ponder Bird Flu Scenarios,” USA Today, Nov. 6, 2005.
power outage of 2003, and this season’s devastating hurricanes, is that workforce distribution is an essential element of both public- and private-sector contingency plans. Obstructing telework now is indefensibly shortsighted.

In the absence of a judicial remedy for a rule so grossly out of sync with the nation’s immediate priorities, Congress must get involved. Our lawmakers must protect both telecommuters like Huckaby, who live far from their employer’s state and rarely travel there, and those like Zelinsky, who live close to their employer’s state and continue to travel to the office frequently. According to one recent study, if all U.S. white-collar workers teleworked only two days a week, the country would conserve over 233 million gallons of fuel each week.\textsuperscript{19} Congress must not condone a state tax that threatens to squander such a significant savings potential.

U.S. Sens. Chris Dodd, D-Conn., and Joseph Lieberman, D-Conn., as well as U.S. House Reps. Christopher Shays, R-Conn., Rosa DeLauro, D-Conn., and Tom Davis, R-Va., have demonstrated that they appreciate the need for congressional intervention: They have sponsored the Telecommuter Tax Fairness Act, which would prohibit states from taxing nonresidents on the income they earn while working from home. Now the rest of Congress must get on board.

If the federal government expects Americans to participate in the effort to conserve energy and safeguard the public health, it must remove obstacles to their participation. Congress must free more Americans to work from home by banning the tax on interstate telecommuting. It must make the Telecommuter Tax Fairness Act the law.