STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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

Petitioners, Edward A. and Doris Zelinsky, filed an exception to the determination of the Administrative Law Judge issued on November 30, 2023. Petitioners appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Michele Milavec, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a brief in opposition. Petitioners filed a brief in reply. Oral argument was heard in New York, New York on November 21, 2024, which date began the six-month period for issuance of this decision.

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

ISSUE

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

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge.[1] We have summarized finding of fact 26, in which the Administrative Law Judge ruled on the Division's proposed findings of fact. As so modified, these facts are set forth below.

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

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

3. Doris Zelinsky is the spouse of Edward A. Zelinsky and signed timely filed joint New York State nonresident and part-year resident income tax returns, form IT-203 (original return), for tax years 2019 and 2020. She had no New York source income in 2019 or 2020.[2]

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

2019

5. Petitioner reported his entire Cardozo salary, including the portion of such salary

[1] We note that prior to the hearing below, the parties entered into a stipulation of facts that was incorporated by the Administrative Law Judge into the findings of fact in her determination.

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

attributable to the days when he worked at his home in Connecticut, as New York source income on the original return for 2019.

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

7. As part of the amended return filed for tax year 2019, petitioners also filed a nonresident and part-year resident income allocation worksheet, form IT-203-B, that reported petitioner commuted from his home in Connecticut to work in Manhattan for 84 days. Petitioner reported that the remainder of his work time in tax year 2019 for Cardozo (143 days reported as worked outside of New York State) was spent at home in Connecticut, performing legal scholarship (researching and writing) and performing administrative tasks. These facts of petitioner's work situation in tax year 2019 are the same as they were in tax years 1994 and 1995, which were at issue in the ***Matter of Zelinsky (2003)*** New York Court of Appeals decision.

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

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

2020

10. Petitioner reported his entire Cardozo salary in the amount of $251,925.00 as New York source income on the original 2020 return, including the portion of such salary attributable to the days when he worked at his home in Connecticut, as New York source income and paid New York State personal income tax in the amount of $15,839.00.

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

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

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

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

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

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

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

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

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

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

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

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

> "If you are a nonresident or part-year resident whose assigned primary work location is in New York State, days you worked at a location outside New York State may be considered New York State work days. In particular, days you telecommuted from a location outside New York State are considered New York State work days unless your employer has established a bona fide employer office at your telecommuting location."

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

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

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

25. The rejection of petitioners' refund request by the account adjustment notice is premised on the application of the convenience of the employer rule as set forth in the Division's regulations at 20 NYCRR 132.18 (a). The Division found that wages amounting to $171,701.00

were not properly sourced as New York income and that the New York State withholding amount should have been $5,758.00 instead of $9,482.00, as claimed on petitioners' return.

26. Pursuant to 20 NYCRR 3000.15 (d) (6), the Division submitted proposed findings of fact to the Administrative Law Judge following the hearing. In accordance with State Administrative Procedure Act (SAPA) § 307 (1), the Administrative Law Judge ruled on the Division's proposed findings of fact and, to the extent that they were supported by the record, incorporated the same into the findings of facts in her determination.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

Addressing the procedural posture of the petition in this matter, the Administrative Law Judge began her determination by noting that a petition for a refund may be filed with the Division of Tax Appeals six months following filing a claim for such a refund if the Division of Taxation fails to give formal notice of its denial. The Administrative Law Judge also noted that in this case, the Division of Tax Appeals properly had jurisdiction over the protest of the refund denial for tax year 2020 as petitioners had timely protested the account adjustment notice.

The Administrative Law Judge next described New York's income tax structure with regard to nonresidents, noting that New York may only tax a nonresident on income that is derived from or connected with New York sources, including income attributable to a business, trade, profession or occupation carried on in New York. According to the Administrative Law Judge, the Tax Law provides that when a nonresident works partly in New York and partly in another state, any New York source income must be determined by apportionment and allocation according to the Division's income tax regulations. Under the regulations, the New York adjusted gross income (AGI) of a nonresident who renders services as an employee includes the compensation for personal services entering into his federal AGI, but only to the extent that his

services are rendered within New York State. If a nonresident employee performs services for an employer both within and without New York State, the portion of his or her income derived from New York sources consists of the ratio of total days worked in New York to total days worked both in and out of the state.

However, according to the Administrative Law Judge, such apportionment of income is limited by the convenience of the employer rule, which states that any allowance claimed for days worked outside New York must be based upon the taxpayer's performance of services which of necessity, as distinguished from convenience, obligate the employee to out-of-state duties in the service of the employer (***see*** 20 NYCRR 132.18 [a]) ("convenience rule"). Citing case law concerning application of the convenience of the employer rule, the Administrative Law Judge noted that New York courts have long upheld the regulation as valid, holding that nonresidents employed in New York who work out-of-state when not required to do so by their employers must treat those days as if they had been present in New York (***see e.g. Matter of Zelinsky [2003]*** at 90).

The Administrative Law Judge observed that petitioners were not contesting that Mr. Zelinsky's income from his New York-based employer for 2019 would be fully subject to New York income tax under the convenience rule. Rather, according to the Administrative Law Judge, petitioners argued that by taxing Mr. Zelinsky's income for his days worked from home, the Division failed to properly apportion his income, resulting in unconstitutional extraterritorial taxation in violation of the Due Process (US Const Amend XVI, § 1) and Commerce Clauses (US Const art I, § 8, [3]) of the Constitution of the United States. The Administrative Law Judge noted that the parties had stipulated to the fact that nothing had changed with regard to Mr. Zelinksy's work situation when compared to the facts in ***Matter of Zelinsky (2003)***. The

Administrative Law Judge observed that petitioners did not provide any relevant statutory or regulatory changes or cases abrogating or superseding the court's holding in ***Matter of Zelinsky (2003)*** and accordingly concluded that it is binding on the instant matter under the doctrine of stare decisis.

In reaching her conclusion, the Administrative Law Judge cited to several key New York State court cases regarding the convenience rule, noting that the rule has been consistently upheld as comporting with due process and the Commerce Clause of the Constitution of the United States. The Administrative Law Judge explained that, while the dormant Commerce Clause prohibits discriminatory state taxation or undue burdens on interstate commerce, a taxpayer's crossing of state lines to do his work at home does not impact any interstate market in which residents and nonresidents compete so as to implicate the Commerce Clause.

The Administrative Law Judge observed that petitioner argued that New York's income tax on nonresidents' New York-source income fails the requirement of fair apportionment, a part of the four-part test employed in ***Complete Auto Transit, Inc. v Brady*** (430 US 274 [1977], ***reh denied*** 430 US 796 [1977]) to determine whether a state tax on interstate commerce passes dormant Commerce Clause scrutiny. In ***Complete Auto Transit***, the Supreme Court of the United States held that a state tax is fairly apportioned when it is internally and externally consistent. According to the Administrative Law Judge, a state tax will be deemed internally consistent if it is structured in such a way that if every state were to impose it, multiple taxation would not result. A tax will be externally consistent where it taxes only that portion of the income from interstate activity that reflects the in-state component of the activity being taxed. The Administrative Law Judge concluded that the convenience test is internally consistent because, if New York's overall tax scheme were to be utilized by every state, there would be no

threat of multiple taxation due to the credit New York offers against other states' income tax. Similarly, because New York's nonresident income tax was limited to income derived from Mr. Zelinksy's employment with Cardozo, a New York-based employer, the Administrative Law Judge concluded that the convenience rule was also externally consistent.

Turning to petitioner's due process arguments, the Administrative Law Judge found that the Court of Appeals in ***Matter of Zelinsky (2003)*** found that both because of his physical presence in New York and because he availed himself of the benefits of the economic market in New York through his employment with Cardozo, Mr. Zelinsky manifested a connection to New York sufficient to satisfy due process. Accordingly, the Administrative Law Judge concluded that the Division's taxation of all of Mr. Zelinsky's income from his employment with Cardozo in 2019 did not violate due process.

The Administrative Law Judge next considered petitioner's argument that due to Executive Order 202.8 requiring certain New York employers to reduce their on-site workforces from March through December 2020, Mr. Zelinsky worked from petitioners' home in Connecticut for the necessity of Cardozo. According to petitioner, any income stemming from his work performed in Connecticut during this period should have been allocated to Connecticut pursuant to the Executive Order directing New York-based nonessential businesses to reduce their on-site workforces. The Administrative Law Judge rejected this argument, reasoning that merely because petitioner's New York office at the law school was not available to him does not lead to the conclusion that the out-of-state personal services were performed there for the employer's necessity. Thus, according to the Administrative Law Judge, the Executive Order does not change the outcome for the period during tax year 2020 affected by the Executive Order. The Administrative Law Judge concluded that petitioner had not met his burden of

establishing that the personal services Mr. Zelinsky performed outside New York were performed there for the necessity of Cardozo. Determining otherwise, according to the Administrative Law Judge, would effectively turn New York employers into unwitting interstate actors without their consent.

Lastly, the Administrative Law Judge addressed petitioner's argument that ***Matter of Zelinsky (2003)*** is distinguishable from the case at hand. Among other reasons, petitioner distinguishes that case primarily because the scholarship he performed at home in Connecticut is a core function of his work as a law professor and is not "ancillary" to his employment. While acknowledging petitioner's scholarship as a significant part of his employment, the Administrative Law Judge noted that petitioner failed to demonstrate that Cardozo required petitioner to perform his job in Connecticut. The Administrative Law Judge noted that, notwithstanding petitioner's reliance thereon, Judge Smith's dissenting opinion in ***Matter of Huckaby v New York State Div. of Tax Appeals, Tax Appeals Trib.*** (4 NY3d 427 [2005], ***cert denied*** 546 US 97 [2005]) and secondary source commentary critical of ***Matter of Huckaby*** and ***Matter of Zelinsky (2003)*** does not rise to the level of binding precedential authority. For these reasons, the Administrative Law Judge denied the petitions and sustained the Division's refund denial for 2019 and the account adjustment notice for 2020.

ARGUMENTS ON EXCEPTION

Petitioner argues that the Administrative Law Judge improperly omitted facts that were stipulated to or otherwise made part of the record at the hearing in rendering the determination below. Key among these is the importance of petitioner's scholarship to his employer, which petitioner argues should be considered as important as his teaching responsibilities.

With respect to the Administrative Law Judge's conclusions of law, petitioner argues that the Administrative Law Judge incorrectly concluded that petitioner's salary from Cardozo was properly subject to New York income tax under relevant state law provisions. Petitioner alleges that his salary was earned "wholly without New York state" during the period the Executive Order was in effect and thus not subject to New York's income tax. Petitioner also argues that his salary was "earned at his home for Cardozo's necessity, and not for anyone's convenience" and thus such days spent working at home during 2019 and 2020 were not subject to the convenience of the employer rule. Petitioner further argues that for days worked during 2020 after the issuance of the Executive Order, the convenience rule is inapplicable to him as he had no New York-based office or classroom available to him due to Cardozo's reduction of its onsite employee presence in compliance with the Executive Order. Petitioner stresses that if any of his arguments bear true, none of his income from Cardozo is subject to New York's income tax on nonresidents' New York source income.

According to petitioner, the Administrative Law Judge also misapplied federal constitutional law, specifically failing to consider how the Due Process Clause and dormant Commerce Clause limit New York's ability to tax New York-source income of nonresident employees. Petitioner claims that the dormant Commerce Clause protects him as an interstate commuter and requires sourcing of the income attributable to the days he spent working from home to Connecticut, citing to ***Comptroller of the Treasury of Maryland v Wynne*** (575 US 542 [2015]), inter alia, for such proposition. Petitioner also argues that the Due Process Clause forbids New York's taxation of his income from Cardozo as petitioner casts his income as having an extraterritorial source and "taxes [petitioner] in both years on his worldwide income as if he were a New York resident."

With respect to ***Matter of Zelinsky (2003)***, petitioner argues that it is distinguishable from the present matter on the facts and the law insofar as that case did not adjudicate the state law claims here at issue. To the extent that federal constitutional claims are made here, petitioner asks us to consider ***Matter of Zelinsky (2003)*** to no longer be controlling precedent, as its main holding has been eroded by subsequent decisions of the Supreme Court of the United States (***see MeadWestvaco Corp. v Illinois Dept. of Revenue***, 553 US 16 [2008]; ***Comptroller of the Treasury of Maryland v Wynne***). For these reasons, petitioner asks us to reverse the determination of the Administrative Law Judge and grant the refunds for 2019 and 2020.

In opposition to petitioner's exception, the Division posits that the Administrative Law Judge fully and correctly determined the issues presented at the hearing and asks that we affirm the determination below. According to the Division, it is not the Division's burden to demonstrate that its determination to deny the refunds was correct and petitioner has failed to meet his burden of demonstrating that the Division's denial of the refunds was incorrect.

The Division argues that the Administrative Law Judge correctly determined that the income of New York nonresidents derived from or connected to New York sources was properly subject to income tax, which is determined by apportionment and allocation under the Division's income tax regulations. The regulations provide that if a nonresident employee renders services both in and outside New York, any allowance for days worked outside New York must be based on the performance of services which were performed out of necessity of the employer outside New York. The Division argues that under the convenience rule, it is not sufficient that the employer does not accommodate the employee's work at the employer's office, but rather the services rendered must be of a type that could not be performed at the employer's New York

based worksite in order for such workdays to be excluded from the New York income apportionment ratio.

OPINION

Petitioner argues on exception that the Administrative Law Judge erred by failing to find that Cardozo equally valued petitioner's teaching duties and scholarship. We have reviewed the record and find that the findings of fact as determined by the Administrative Law Judge reflect the record established at the hearing. We observe that the Court of Appeals in ***Matter of Zelinsky (2003)*** described petitioner's job duties that were in addition to his teaching responsibilities as "ancillary" when noting that it would not matter to his employer where he performed those duties so long as they were performed (***id.*** at 94). We also find that the Administrative Law Judge specifically acknowledged petitioner's scholarship as a significant part of his employment in the determination below. Accordingly, we see no reason to modify the relevant finding of fact as determined by the Administrative Law Judge.

Turning to petitioner's legal arguments, we observe that the Tax Law provides for the imposition of an income tax on income of every nonresident and part-year resident individual which is derived from sources in New York equal to the tax base multiplied by the New York source fraction (***see*** Tax Law § 601 [e] [1]). Under Tax Law § 601 (e) (3), as applicable to the matter before us, the New York source fraction is equal to a taxpayer's New York source income divided by such taxpayer's New York AGI determined as if such taxpayer were a New York resident individual. Tax Law § 631 (a) sets forth that "[t]he New York source income of a nonresident individual shall be the sum of the following: (1) [t]he 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 . . . ."

Income from New York sources includes income arising from a "business, trade, profession or occupation carried on in this state" (Tax Law § 631 [b] [1] [B]). When a business, trade, profession or occupation is carried on both within and without New York, as determined by the regulations, 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 (***see*** Tax Law § 631 [c]).

The Division's regulations regarding New York business activities provide that:

> "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 [f]ederal 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 convenience rule appears at 20 NYCRR 132.18, and states that:

> "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 working days employed both within and without New York State . . . However, any allowance claimed for days worked outside of 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" (20 NYCRR 132.18 [a]).

It is the application of the convenience rule to petitioner's workdays in 2019 and 2020 that petitioner claims should be sourced to Connecticut that is the crux of this matter. Petitioner disagrees with the Administrative Law Judge's conclusion that neither the dormant Commerce Clause nor due process is offended by New York's tax on nonresidents' New York-source

income. The Division argues that the Administrative Law Judge correctly determined that petitioner's employment with a New York employer and ongoing presence constituted the minimum contact needed to satisfy due process. Furthermore, the Division maintains that New York's tax on nonresident income from New York sources is fairly apportioned and thus does not violate the dormant Commerce Clause.

We start with a short history retracing the development and application of the convenience of the employer rule in New York. New York's implementation of an income tax in 1919 imposed a tax on "the entire net income . . . from every business, trade, profession or occupation carried on in this state by natural persons not residents of this state" (***see*** L 1919, ch 627, ***see also*** Tax Law former § 351). Later, the Legislature recodified the Tax Law (***see*** L 1960, ch 563), including Tax Law former § 632 (c), which provided that "[i]f a business, trade, profession or occupation is carried on partly within and partly without this state, as determined under the regulations of the tax commission, 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" (***see also*** L 1987, ch 28, §§ 77, 78 [amending and renumbering Tax Law § 632 to Tax Law § 631]).

Over time, the policy underlying the convenience of the employer rule was applied by New York courts to exclude workdays where work was performed outside of New York for reasons other than the employer's necessity (***see e.g. Burke v Bragalini***, 10 AD2d 654 [3d Dept 1960] [holding that "[a]ny allowance claimed for work outside the State must be for those purposes that, out of necessity as distinguished from convenience, obligated the employee to out-of-State duties in the service of employer"]). By the mid-1970s the convenience of the employer rule had been adopted as an income tax regulation (***see*** 20 NYCRR former 131.16), and the

Court of Appeals upheld its application to include days in the New York income apportionment ratio for which the taxpayer failed to demonstrate that such work was performed outside of New York for the necessity of the taxpayer's employer (***see Matter of Speno v Gallman***, 35 NY2d 256, 259 [1974]).

In the decades since its adoption, courts of this state have consistently upheld the rule against constitutional challenges, holding that its application comported with due process by not attempting to reach non-New York source income and likewise not offending the dormant Commerce Clause by discriminating against interstate commerce (***see e.g. id.***; ***see also Matter of Zelinsky (2003)***; ***Matter of Huckaby***; ***Matter of Colleary v Tully***, 69 AD2d 922 [3d Dept 1979] [affirming the employment relationship as establishing the necessary connection with the state to satisfy due process]).

With respect to tax year 2019, we observe that the parties entered into a stipulation of facts wherein they agreed that the facts of petitioner's work situation were the same as they were in 1994 and 1995, the tax years at issue in ***Matter of Zelinsky (2003)***. There, petitioner made substantially similar constitutional arguments as he makes here, arguing that application of the convenience of the employer rule as applied to him violates the Due Process and Commerce Clauses of the Constitution of the United States. We also consider petitioner's constitutional arguments here as applied to tax year 2020.

Petitioner argues that two Supreme Court of the United States cases decided since ***Matter of Zelinsky (2003)*** have eroded the authority of that case, namely ***MeadWestvaco Corp. v Illinois Dept. of Revenue*** (553 US 16 [2008]) and ***Comptroller of the Treasury of Maryland v Wynne*** (575 US 542 [2015]). We first note that the jurisdiction of this Tribunal is prescribed by its enabling legislation (***Matter of Fourth Day Enters.***, Tax Appeals Tribunal, October 27,

1988). This jurisdiction does not include a challenge that a statute is unconstitutional on its face (***Matter of A & A Serv. Sta., Inc.***, Tax Appeals Tribunal, October 15, 2009, ***confirmed sub nom. Matter of Aydin v Commissioner of Taxation & Fin.,*** 81 AD3d 1203 [3d Dept 2011]). With respect to such claims, our authority is limited to as-applied challenges (***Matter of Eisenstein***, Tax Appeals Tribunal, March 27, 2003). We thus address petitioner's arguments as applied to the facts of the case.

Petitioner argues that the convenience rule is rendered unconstitutional by ***MeadWestvaco*** because application of the rule subjects extraterritorial values to New York income tax in violation of the Due Process Clause of the Constitution of the United States (***see MeadWestvaco Corp.***, 533 US at 19.; ***see also Container Corp. of Am., v Franchise Tax Bd.*** 463 US 159, 164 [1983]). The Due Process Clause demands that there exist "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax" as well as a rational relationship between the tax and the "values connected with the taxing State" (***MeadWestvaco*** at 24, quoting ***Quill Corp. v Heitkamp***, 504 US 298, 306 [1992]; and ***Moorman Mfg. Co. v Bair***, 437 US 267, 273 [1978], ***reh denied*** 439 US 885 [1978]). Against this background, the Supreme Court of the United States has established that the states have wide latitude in the selection of apportionment formulas and a formula-produced assessment will only be disturbed when a taxpayer has proved by clear and cogent evidence that the income attributed to the state is out of proportion to the activities conducted there or has otherwise led to a grossly distorted result (***Moorman Mfg. Co.*** at 274; ***see also Norfolk & Western Railroad Co. v State of North Carolina ex rel. Maxwell***, 297 US 682, 688 [1936]; ***Hans Rees' Sons Inc. v North Carolina ex rel. Maxwell***, 283 US 123, 133 [1931]).

At the outset, we note that ***MeadWestvaco*** addresses the constitutionality of an apportioned state tax on a unitary business operating in multiple states (***MeadWestvaco*** at 19). There, the taxpayer realized a capital gain from the sale of an asset, one of its business divisions, which was determined on appeal in state court not to constitute a unitary business with the taxpayer (***id.*** at 21-22). The State of Illinois had required the taxpayer to apportion and allocate the capital gain from the sale of the business division under the theory that the business division that was sold served an "operational purpose" to the taxpayer despite not constituting a unitary business with the taxpayer (***id.***). The court reaffirmed that states "may tax an apportioned sum of [a] corporation's multistate business if the business is unitary" but held that states may not tax the extraterritorial income of a nonunitary business (***id.*** at 25). On that point, the court remanded to the Appellate Court of Illinois the question of whether the business division at issue constituted a unitary business with the taxpayer (***id.*** at 32).

We do not see the applicability of the multistate unitary business doctrine to the instant matter and thus do not agree with petitioner that ***MeadWestvaco*** has "eroded" ***Matter of Zelinsky (2003)'s*** holding that New York's application of the convenience of the employer rule comports with due process. Because the tax here at issue, while imposed on the income of nonresidents, is limited to New York source income, it did not "reach beyond that portion of value . . . fairly attributable to economic activity within the taxing State" (***see Oklahoma Tax Commn. v Jefferson Lines***, 514 US 175, 185 [1995], ***reh denied*** 514 US 1135 [1995]). We agree with the Administrative Law Judge that petitioner has failed to demonstrate that the income attributed to New York was out of appropriate proportion to petitioner's activities in New York or otherwise led to a grossly distorted result (***see Matter of Huckaby*** at 438). We agree with the Administrative Law Judge that both because of his physical presence in New York and by

availing himself of the economic market in New York through his employment with Cardozo, petitioner had sufficient contacts with New York to satisfy due process (***see also Zelinksy*** [2003] at 11).

We now address petitioner's argument that New York's convenience rule violates the dormant Commerce Clause insofar that it fails the fair apportionment prong of the four-part test described in ***Complete Auto Transit*** (430 US at 279; ***see also Container Corp. of Am. v Franchise Tax Bd.***, [setting forth the internal and external consistency tests for determining whether a tax is fairly apportioned]). According to petitioner, ***Central Greyhound Lines, Inc. of New York v Mealey*** (334 US 653 [1948]) lays the basis for the proposition that petitioner's New York apportionment ratio must source days worked from his home to Connecticut in order to be considered fairly apportioned. In ***Central Greyhound Lines***, New York's unapportioned gross receipts tax on an interstate transportation company was held to be unconstitutional where nearly half of the miles traveled were through other states (***id.*** at 661). The court held that while an unapportioned gross receipts tax would not survive constitutional scrutiny, the tax "need not fall" if it were to be determined according to a fair method of apportionment (***id.*** at 663). The court further refined the concept of fair apportionment and established the internal and external consistency tests in ***Container Corp. of Am.*** to determine whether a state's apportionment scheme is fairly apportioned (***see Container Corp. of Am.*** at 169). As applicable here, we examine whether New York's income tax on New York-source income is internally and externally consistent as applied to petitioner and thus whether it meets the requirement of fair apportionment under ***Complete Auto Transit***.

According to ***Complete Auto Transit***, the first component of fairness in an apportionment formula is internal consistency. The court described an apportionment scheme as internally

consistent if when applied by every jurisdiction, it would result in no more than all of the income being taxed (***id.*** at 169). Here, in a thought experiment reflecting New York's income tax structure, if every state were to subject its residents to an income tax on their worldwide income with a credit for taxes paid to other jurisdictions, but only tax nonresidents' income derived from intra-state sources, such income would not be subject to multiple taxation, as each state would only tax nonresidents on the income arising from internal sources (***see Wynne*** at 562 [finding that a tax structure similar to New York's that did not feature a full tax credit failed the internal consistency test]). A New York resident earning income in another state under this hypothetical would receive the benefit of New York's tax credit, offsetting the tax imposed in the other jurisdiction and eliminating any risk of multiple taxation under the internal consistency test.[3] According to the court in ***Wynne***, the virtue of the internal consistency test is that it allows courts to distinguish between tax schemes that inherently discriminate against interstate commerce and tax schemes that result in multiple taxation as a result of the interaction of two different but nondiscriminatory and internally consistent schemes (***id.*** at 563). That is the case here. We conclude that New York's income tax on petitioner's New York source income is internally consistent as applied.

We also consider whether New York's income tax as applied to petitioner's New York source income is externally consistent to determine whether the tax is fairly apportioned. External consistency requires that a state tax reaches only that portion of the revenues from interstate activity which reasonably reflects the in-state component of the activity being taxed (***see Container Corp. of Am.***, at 169; ***Goldberg v Sweet***, 488 US 252, 262 [1989]). By its own

[3] The fact that Connecticut does not offer a full credit to its own residents on income earned extraterritorially does not escape our notice, especially in light of the fact this was the precise problem with Maryland's tax scheme in ***Wynne*** (**see** Conn Gen Stat Ann § 12-704; ***Wynne*** at 564, 8 n).

terms, Tax Law § 631 is only imposed on income of nonresidents derived from sources within New York. In this specific case, the only portion of petitioner's income that the tax reaches is his salary from Cardozo, his New York-based employer. The requirement of Tax Law § 631 that nonresidents apportion and allocate their New York source income ensures that the income tax on nonresidents is limited to the in-state activities being taxed, including employment carried on within and without New York and is thus externally consistent. Accordingly, we find that the application of the convenience of the employer rule to petitioner's New York source income comports with the dormant Commerce Clause's requirement of fair apportionment.

Petitioner presupposes that performing any job duties outside of the state for an in-state employer requires a conclusion that the employee was engaging in interstate commerce even if the job duties were not performed outside of the state for the necessity of the employer. However, in the briefs on exception and below, petitioner did not identify a case subsequent to ***Matter of Zelinsky (2003)*** that stands as clear, binding authority for such a conclusion. This is not surprising, as the upshot would be that employees would be able to reassign the situses of their sources of income derived from employment by choosing an out-of-state location where they would perform their job responsibilities, thereby subjecting an employer to the law of that jurisdiction without the employer's consent.[4] Notwithstanding petitioner's arguments to the contrary, the dissent in ***Matter of Huckaby*** and commentary critical of ***Matter of Zelinksy (2003)*** do not persuade us to declare these cases as abrogated or otherwise undermined by subsequent events. For these reasons, we agree with the Division that the Administrative Law

[4] While not dispositive on the issue, we take notice of the Supreme Court of the United States' denial of New Hampshire's motion for leave to file a bill of complaint in ***New Hampshire v Massachusetts*** (141 SCt 2848 [2021]), leaving intact Massachusetts's administrative action of subjecting nonresident income from Massachusetts employers to its income tax after issuing on-site work force reduction orders, notwithstanding the fact that Massachusetts did not subject nonresident income from Massachusetts employers to its income tax prior to the COVID-19 pandemic.

Judge correctly determined that New York's income tax on nonresident income comports with due process and the dormant Commerce Clause as applied to the facts of petitioner's case.

Turning to petitioner's state law claims, we note that the key difference between the tax years at issue in this case when compared to the tax years at issue in ***Matter of Zelinsky (2003***) is the emergence of a global pandemic in 2020 that impacted commuting patterns and found millions of Americans working remotely. Petitioner argues that subjecting his income to New York's income tax on nonresidents working both inside and outside of New York was in contravention of the Division's own regulations and case law regarding the sourcing of income derived from work performed outside of New York for the necessity of the employer. Petitioner notes that during this period that he did not have an office or classroom available to him and that he was prohibited from commuting into New York to work in-person from March 15, 2020, through the end of that year. According to petitioner, as he was required to work from his home in Connecticut for Cardozo's necessity, the days he worked from home should be allocated to Connecticut.

In support of his argument, petitioner relies on the regulation at 20 NYCRR 132.4 (b), which provides that:

> "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. Compensation for personal services rendered by a nonresident individual wholly without New York State is not included in his New York adjusted gross income, regardless of the fact that payment may be made from a point within New York State or that the employer is a resident individual, partnership or corporation. *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 according with sections 132.16 through 132.18 of this Part*" (emphasis added).

The findings of fact reflect that petitioner performed his teaching duties at Cardozo during the first three months of 2020 by commuting into New York City three times per week. It was only after the issuance of the Executive Order requiring New York employers to reduce their on-site work force presence did petitioner stop commuting into New York.

We do not agree with petitioner's contention that the personal services he provided to his employer in 2020 were performed "wholly without New York State" when he admittedly commuted to Cardozo during the first quarter of the year. Petitioner relies on ***Matter of Fass v State Tax Commn.*** (68 AD2d 977 [3d Dept 1979], ***affd*** 50 NY2d 932 [1980]) for the proposition that his income earned through his employment with Cardozo from March to December 2020 did not constitute New York source income because he could not perform his employment duties at his employer's New York office. In ***Matter of Fass***, the court held that the taxpayer established that performance of some of his job duties in New Jersey was for the necessity of his employer and thus allocation of all of his income from his employer to New York was improper (***id.***). The taxpayer in ***Matter of Fass***, a New Jersey resident, edited and published magazines concerning sportscars, motorcycles, firearms, home improvement, and dogs and horses (***id.***). The taxpayer demonstrated that he needed access to specialized facilities to test and analyze products in these areas in order to report his findings in articles in the magazines (***id.***) These specialized facilities were installed at the taxpayer's home and farm in New Jersey (***id.***). The court found that a taxpayer should not be denied the right to allocate income to New Jersey simply because the personal services could have been performed in New York if those specialized facilities had been installed there instead (***id.***).

We agree with the Administrative Law Judge that ***Matter of Fass*** represented a unique situation that was distinguished by the courts and this Tribunal in subsequent cases (***see e.g.***

Matter of Wheeler v State Tax Commn., 72 AD2d 878 [3d Dept 1979] [distinguishing work performed at home on weekends from job duties performed for the necessity of the employer using specialized out-of-state facilities like in ***Matter of Fass***]; ***Matter of Kitman v State Tax Commn.***, 92 AD2d 1018 [3d Dept 1983], ***lv denied*** 59 NY2d 603 [1983] [concluding that televisions installed at out-of-state home did not qualify as specialized equipment like in ***Matter of Fass***, thus the time spent watching television there was not for the employer's necessity]; ***Matter of Phillips v New York State Dept. of Taxation & Fin.***, 267 AD2d 927 [3d Dept 1999], ***lv denied*** 94 NY2d 763 [2000] [the fact that the taxpayer had to perform job duties outside normal office hours was insufficient to justify a finding of employer necessity in working out-of-state]; ***see also Matter of Tuohy***, Tax Appeals Tribunal, February 13, 2003 [holding that a taxpayer's work performed out-of-state was done for his convenience and not the employer's necessity despite not being provided office space]; ***Matter of Unterweiser***, Tax Appeals Tribunal, July 31, 2003 [taxpayer's out-of-state work held not to be performed there for the necessity of her employer where her services as an employee were substantially the same after her office at her New York-based employer was no longer available]).

We agree with the Administrative Law Judge that Cardozo's allowing its employees to work from home, wherever that may have been, does not constitute its own necessity to have those job functions performed in those places. We are guided by the Appellate Division's decision in ***Matter of Colleary***, where the taxpayer worked two days per week in his employer's New York place of business, and three days per week in New Jersey writing scripts for a television program (***Matter of Colleary*** at 922). The taxpayer claimed that the work performed in New Jersey was performed under a contract separate and distinct from the contract for the supervisory work performed in New York at the employer's place of business (***id.***). The court

rejected this bifurcation of the taxpayer's personal services rendered for his employer, reasoning that the Division could rationally treat the taxpayer as having been engaged in one employment relationship in which he provided services both within and without the state (***id.*** at 923). The court noted that the taxpayer's employer maintained no office for the taxpayer in New York for the performance of his duties and that it made no difference to the employer where the taxpayer completed his script writing (***id.***). On these facts, the court concluded that the taxpayer was not performing personal services in New Jersey for the necessity of his employer and thus the convenience of the employer test was properly applied (***id.***).

For us, the nature of the employment relationship is paramount in considering whether the days on which a taxpayer claims to have performed personal services outside New York are subject to application of the convenience rule. In other words, the question boils down to whether the employer established a nexus in another jurisdiction by directing its employee to perform personal services in that out-of-state location for its own necessity (***see Matter of Huckaby*** at 437 ["[t]he convenience test stands for the proposition that New York will not tax a nonresident's income derived from a New York employer's participation in interstate commerce because in such a case the nonresident's income would not be derived from a New York source"]). Absent a showing of such a fact, a nonresident taxpayer's personal services performed for a New York employer will be subject to the convenience rule if the taxpayer performs those personal services both within and without New York. As petitioner has not shown that Cardozo required him to perform the functions of his job at his home in Connecticut, as opposed to anywhere else, we conclude that the convenience of the employer rule was properly applied in calculating petitioner's New York apportionment ratio under Tax Law § 631 and 20 NYCRR 132.18.

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 petitions of Edward A. and Doris Zelinsky are denied; and

4. The refund denial for 2019 and the account adjustment notice for 2020, dated September 17, 2021, are sustained.

DATED: Albany, New York
May 15, 2025

/s/ Jonathan S. Kaiman
Jonathan S. Kaiman
President

/s/ Cynthia M. Monaco
Cynthia M. Monaco
Commissioner

/s/ Kevin A. Cahill
Kevin A. Cahill
Commissioner