Published on *The National Law Review* https://natlawreview.com

New York Expands Rationale For State Income Tax "Convenience Rule"

Article By:

Raymond P. Turner

The November 30, 2023, opinion of a New York administrative law judge in *In the Matter of the Petition of Edward A. and Doris Zelinsky* upholds the state's so-called income tax "convenience rule" with an expanded legal rationale that New York employers with remote and hybrid employees outside of New York State will want to note. The case is now pending in the New York Tax Appeals Tribunal.

The convenience rule is an income-sourcing rule applicable to New York state income tax. According to current administrative guidance, days worked by a non-New York resident at home out of state are considered workdays in New York if

- the employee's "assigned or primary work location" is at an established office or other bona fide place of business of the employer in New York State; and
- the employee performs the work outside of New York not because the employer's business requires it but rather for the convenience of the parties, especially the employee.

New York is one of six states with similar versions of a convenience rule, but New York's is arguably the most aggressively interpreted and enforced. In addition to double state income taxation of the employee on the same wages earned physically outside of New York, the rule often requires New York employers to withhold from the same wages both state income tax for the employee's resident state and New York income tax. This is because most resident states in which the employee may be working for a New York employer do not grant a tax or wage withholding credit against the resident state's required tax withholding for wages that are merely deemed to be worked in New York rather than earned while the employee is physically in New York.

In the post-pandemic world of rapidly increasing remote and hybrid employment, the employers most adversely affected by the New York convenience rule are those with no offices or facilities outside of New York. Such employers cannot plausibly reassign employees working in other states to an office in a state with no convenience rule.

The 26-page opinion addresses New York convenience rule taxation of wages from remote work performed in Connecticut, both before the pandemic (2019) and during the pandemic (2020), by a law professor at a New York City law school. Part of the opinion relates only to remote work in 2020

pursuant to pandemic work-from-home requirements. Moreover, some of the authorities and grounds, in the opinion, assume the nonresident employee works in New York for at least part of a tax year. However, much of the opinion's reasoning would apply to the ongoing enforcement of the rule to withholding on wages of pure remote employees who are hired to work outside of New York exclusively and *may never set foot* in New York during a tax year.

In this regard, the opinion includes a rationale for the rule based on the 2018 U.S. Supreme Court sales tax "nexus" opinion in *South Dakota v. Wayfair, Inc*. *Wayfair* overturned prior precedent that required a business to have a *physical* presence in a state in order to have sufficient constitutional nexus for the state to impose sales taxes on the business. Relying on *Wayfair*, the judge stated that Professor Zelinsky's use of Zoom classes and other Internet collaborative tools to connect him with his students gave him a "virtual" presence in New York that justified imposition of New York income tax on his wages earned while at his home in Connecticut.

New York's convenience rule ultimately depends on the legal significance of the remote or hybrid employee's deemed presence in the state; however, reliance on a sales tax constitutional nexus case to find a legally sufficient non-physical presence is highly questionable in an income tax sourcing issue for an individual. In addition to the employee's residence, the almost universal income tax sourcing factor for wages and other personal service income is the place where the work is *physically* performed. Nevertheless, this virtual presence argument now appears to be a part of New York's position for continued application of the convenience rule to hybrid and remote employees, including those initially hired to work solely remotely and who may never actually go to New York for work.

National Law Review, Volume XIV, Number 162