

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

by Nicole Belson Goluboff

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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*.<sup>1</sup> 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.<sup>2</sup>

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

<sup>1</sup>*Huckaby 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*.)

<sup>2</sup>20 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.")

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.<sup>3</sup> In a 4-3 decision, the New York Court of Appeals upheld the tax.<sup>4</sup>

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,<sup>5</sup> 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

<sup>3</sup>Tax Law sections 601, 631.

<sup>4</sup>*Huckaby 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).

<sup>5</sup>S. 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*.<sup>6</sup>

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.<sup>7</sup>

### 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.<sup>8</sup> A study conducted in 2000 found that almost one in five employee-telecommuters worked for out-of-state supervisors.<sup>9</sup>

As I have previously noted,<sup>10</sup> 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.<sup>11</sup> Further, several other states have maintained a rule similar to New York's.<sup>12</sup> By refusing to hear first

*Zelinsky* and now *Huckaby*, the Supreme Court has effectively authorized any state to apply the convenience rule to telecommuters in any other state and punish them for their cross-border telework arrangements.

### Reckless Disregard

Because the convenience rule results in disproportionate and (in some cases) double taxation of interstate telecommuters, it can make telework extremely expensive for many Americans. Thus, it is a powerful deterrent to the practice. Indeed, even the New York Court of Appeals in *Huckaby* acknowledged that the convenience rule might be "a discouragement to telecommuting."<sup>13</sup> However, as noted above, this is no time to obstruct telework.

**Workforce distribution is an essential element of both public- and private-sector contingency plans. Obstructing telework now is indefensibly shortsighted.**

Budget-straining gas prices and imperiled fuel supplies have given telework national attention as a conservation tool. Following Hurricane Katrina, the federal government urged Americans to drive less.<sup>14</sup> The U.S. Office of Personnel Management exhorted federal agencies to increase the use of telework among their employees.<sup>15</sup> The U.S. General Services Administration offered free use of its telework centers to all federal employees through December 2005.<sup>16</sup> Private businesses, too, have increased telecommuting opportunities for their employees.<sup>17</sup> In addition to the looming energy crisis, the threat of a bird flu pandemic has compelled employers to heed the merits of decentralizing workers.<sup>18</sup>

Among the many lessons of September 11, the anthrax scare, the SARS epidemic, the international

<sup>6</sup>*Zelinsky v. Tax Appeals Tribunal of New York*, 1 N.Y.3d 85 (2003), cert. denied, 541 U.S. 1009 (2004). (For the Court of Appeals' decision, see *Doc 2003-25309* or *2003 STT 228-10*.)

<sup>7</sup>*Id.*

<sup>8</sup>Herman, Tom, and Rachel Emma Silverman, "Telecommuters May Face New Taxes," *The Wall Street Journal*, Nov. 1, 2005 (citing data supplied by the Telework Advisory Group at WorldatWork).

<sup>9</sup>ITAC, "Telework America 2000 Research: Key Findings," October 2000, available at <http://www.workingfromanywhere.org>. See also Maher, Kris, "Corner Office Shift: Telecommuting Rises In Executive Ranks," *The Wall Street Journal*, Sept. 21, 2004, at B1 (indicating that companies recruiting out-of-state executives increasingly favor hiring them on a telecommuting basis, rather than requiring them to relocate).

<sup>10</sup>Goluboff, Nicole Belson, "Congress Must Slam the Brakes On New York's Convenience-of-the-Employer Rule," *State Tax Notes*, May 2, 2005, p. 363, *2005 STT 83-13*, or *Doc 2005-7616*.

<sup>11</sup>See *Matter of Speno*, 35 N.Y.2d 256 (1974)(New Jersey); *Matter of Phillips*, 267 A.D.2d 927 (App.Div. 3d Dept. 1999)(Pennsylvania); *Matter of Gray*, DTA No. 819457 (Feb. 24, 2005) (New Hampshire); *Matter of Wallace*, DTA No. 817182 (Dec. 21, 2000) (Maine); *Matter of Roemer*, DTA No. 815734 (Sept. 3, 1998) (Florida); *Matter of King* (State Tax Commission, Apr. 6, 1987) (North Carolina).

<sup>12</sup>See, e.g., 61 Pa. Code section 109.8; Neb. Admin. Code sections 316-22-003.01C(1).

<sup>13</sup>*Huckaby 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).

<sup>14</sup>Leonhardt, David; Jad Mouawad, and David E. Sanger, "To Conserve Gas, President Calls for Less Driving," *The New York Times*, Sept. 27, 2005, at A1.

<sup>15</sup>Linda M. Springer, director of the U.S. Office of Personnel Management, Memorandum for Heads of Departments and Agencies Concerning Human Capital Flexibilities to Reduce Fuel Consumption, Sept. 2, 2005, available at <http://www.chcoc.gov>.

<sup>16</sup>*Id.*

<sup>17</sup>Armour, Stephanie, "Companies Helping Workers With Commuting Costs," *USA Today*, Sept. 20, 2005; Amit R. Paley, "Telecommuting Interest Soars; Pump Prices Spur Workers to Abandon Long Drives," *The Washington Post*, Sept. 14, 2005, at B01.

<sup>18</sup>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.<sup>19</sup> Congress must

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<sup>19</sup>Telework Exchange, "Telework Exchange 'Fuel Smart Economy: It's No Gas' Study Shows \$5.7 Million Hike in Federal Employee and \$105.8 Million Hike in White-Collar America Daily Commuting Costs," Sept. 21, 2005, available at <http://www.teleworkexchange.com>.

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. ☆