

# NEW YORK'S REVISED CONVENIENCE RULE PROVIDES SOME CLARITY AND CONTINUED CONTROVERSY

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New York's Revised Convenience Rule Provides Some Clarity and Continued Controversy *The Department of Taxation has issued a Technical Services Bureau Memorandum setting forth a new policy with respect to the application and implementation of the convenience rule.*

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Over the past several years, New York's "convenience of the employer" rule has been one of the most talked about tax topics on the New York tax scene. Taxpayers have complained about it, practitioners have written about it,<sup>1</sup> other states have rallied against it,<sup>2</sup> and even Congress has jumped into the act. All the while, the New York State Department of Taxation and Finance has stood strong, applying the rule in audits and successfully defending the rule in litigated cases. And just when the controversy surrounding the rule seemed to be all but dead, the Department gave us another reason to write about it.

On 5/15/06, the Department's Office of Tax Policy Analysis issued a new Technical Services Bureau Memorandum—TSB-M-06(5)I—setting forth a new policy with respect to the application and implementation of the convenience rule on a going-forward basis. The issuance of this TSB-M—while certainly providing some clarity

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and guidance to taxpayers and practitioners about the application of the rule—no doubt ensures that the rule will remain the focus of attention in tax publications, audits, and court cases. The following discussion summarizes the recent history surrounding the convenience rule and analyzes the new tests set forth in TSB-M-06(5)I.

### The Convenience Rule Prior to TSB-M-06(5)I

While New York (like all states with an income tax) taxes its own residents on all their income, nonresidents are taxed on income derived only from New York sources.<sup>3</sup> When a nonresident employee commutes to New York to work for a New York-based employer, the employee must pay tax on the related earned income, based on the employee's New York workdays. In order to limit a nonresident's ability to reduce the New York tax liability by working from home, however, New York has adopted a "convenience of the employer" rule.<sup>4</sup> The terms of the convenience rule (contained in 20 N.Y. Codes, Rules & Regs. §132.18(a)) provide simply that days worked from home are treated as New York work days unless the nonresident employee worked outside of New York by necessity: "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."

To satisfy the "necessity" requirement, nonresidents had to demonstrate that their jobs, by nature, could not be performed within New York.<sup>5</sup> Although most states also tax nonresidents for work performed in their state, very few employ a convenience-type rule. Currently, only New York, Pennsylvania, Nebraska, and Delaware have a formal convenience rule. New Jersey has no formal rule but generally has applied this approach in practice.

### Taxpayers' claims fail at the administrative level.

But, as has been chronicled in this and other publications, the actual application of the convenience rule has produced harsh and somewhat inconsistent results. In *Matter of Annitto*,<sup>6</sup> the taxpayer was required to work out of his Connecticut home because his New York employer, in an attempt to reduce corporate office rental costs, eliminated his office space. The employer provided the taxpayer with a computer and dedicated phone line so that he could perform his work duties from Connecticut. Despite the fact that the taxpayer did not have an office in New York, the Department of Taxation treated him as having spent 100% of his work time in New York.

Similarly, in *Matter of Unterweiser*,<sup>7</sup> a New York employer eliminated a nonresident employee's desk job and asked her to perform different duties. But because the corporate office was not equipped to adequately satisfy the requirements of her amended position, the taxpayer performed her duties from her New Jersey home. Despite these facts, the Division of Taxation argued, and the Division of Tax Appeals agreed, that the taxpayer was working from home out of convenience, not necessity. And, most recently, in *Matter of Kakar*,<sup>8</sup> even where the taxpayers tried to prove that the New York workspace was inadequate and lacked necessary privacy, an administrative law judge (ALJ) concluded—no doubt with the

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Department's urging—that with a "minimum of ingenuity, arrangements *could have been made*" to provide the taxpayer with an adequate and secure work environment at the employer's New York office. (Emphasis added.)

### Another taxpayer finds success.

Despite these difficult cases, in some situations taxpayers have prevailed, albeit for reasons that are less than clear or consistent. For instance, in *Matter of Devers*,<sup>9</sup> a New York employer, again in an attempt to minimize rent costs, eliminated the nonresident taxpayer's office space. The employer formally "relocated" the taxpayer to its Virginia office, although the taxpayer worked out of his home in Connecticut. The taxpayer's access to the New York building was rescinded and he no longer communicated with the New York personnel. Based on these facts, an ALJ with the Division of Tax Appeals determined that the taxpayer worked outside of New York by necessity. The distinction between *Devers* and earlier cases like *Annitto* and *Unterweiser*, however, is difficult to pinpoint, thus further highlighting the confusing and sometimes inconsistent application of the convenience rule.

The Department's ad hoc application of the convenience rule placed nonresident taxpayers in a quandary. Under the old rule, it was difficult to definitively determine whether a particular situation would meet the "necessity" requirement. Furthermore, the Department seemed to ignore the fact that not all nonresidents who worked from home were doing so to avoid New York taxes. Moreover, it failed to acknowledge that legitimate business reasons could force an individual to work outside New York even though the work itself could be performed in the state. Finally, according to some taxpayers, the Department's application of the convenience rule also created constitutional concerns under Due Process Clause and Commerce Clause.

### New York's highest court rejects Zelinsky's constitutional challenges.

Despite these apparent shortcomings, the convenience rule recently survived two constitutional attacks in cases that were argued before New York's Court of Appeals, the state's highest court. In 2003, in *Zelinsky v. New York State Tax Appeals Tribunal*,<sup>10</sup> the court examined whether a nonresident who worked as law professor part of the week in New York and part of the week at his Connecticut home, had to pay New York tax on his entire income. The court unanimously held that the work the taxpayer performed at home was "inextricably intertwined" with his professional duties performed in New York. Thus, the taxpayer was required to pay New York tax on his entire income.

The court also noted that the convenience rule did not violate—or even implicate—the dormant Commerce Clause because "[t]he taxpayer's crossing of state lines to do his work at home simply does not impact upon any interstate market in which residents and nonresidents compete." Moreover, the court held that the taxpayer's due process rights were not violated because he maintained sufficient physical presence in New York and because he "purposefully avail[ed] [him]self of the benefits of an economic market in the forum State."<sup>11</sup> Finally, the court dismissed the taxpayer's claim that the convenience rule created double taxation. According to the court, any threat of double taxation was the fault of Connecticut because that state failed to provide a credit for the taxes paid to New York on income earned during actual Connecticut workdays. (Connecticut sourced that income inside its own borders rather than to New York, and thus no credit was available.)

## High court also rejects constitutional challenges by Huckaby.

Two years later, the Court of Appeals again upheld the constitutionality of the convenience rule, in *Huckaby v. New York State Division of Tax Appeals*.<sup>12</sup> Compared to *Zelinsky*, in *Huckaby* the taxpayer's connection to New York was even more attenuated because he was a Tennessee resident (i.e., not a commuter) who was paid to work primarily from home. Here, the Tax Department could not argue that the taxpayer was paid to work in New York but chose to work at home to reduce his state tax bill. Despite this factual difference, the court once again found no due process violation. In reaching that conclusion, the court noted that the taxpayer worked approximately 25% of the time in New York, and thus satisfied the "minimum connection" requirement of the Due Process Clause.<sup>13</sup>

*Huckaby* generated a strong dissent. Nevertheless, perhaps signaling the inherent problems associated with the application of the convenience rule to noncommuters, the Court of Appeals in *Huckaby* was sharply divided, with three of the seven justices dissenting. The dissent argued that the purpose of the convenience rule was to hinder tax evasion, which obviously was not a motivation for Huckaby's work-at-home situation. Also, the dissent believed that the rule violated the taxpayer's due process rights because the amount of the tax was not "rationally related" to the extent of time the taxpayer spent in New York. Where the majority required only a "minimal connection" to satisfy due process, the dissent required proportionality. Despite these concerns and this strong dissent, the U.S. Supreme Court (as it did in *Zelinsky*) denied certiorari, so it appeared that the convenience issue had run its way through the courts.

## Other State/Federal Involvement

Perhaps one of the more interesting aspects of the convenience rule issue is that the federal government and at least one other state have entered into the convenience rule debate as well. Connecticut, a New York-bordering state that does not apply a convenience rule,<sup>14</sup> has been particularly unhappy with New York's application of the rule.

Residents of Connecticut who work at home for their New York employers potentially face double taxation. Under New York's convenience rule, they are forced to pay New York taxes on their work-at-home wages despite the fact that they are physically present in Connecticut on those workdays. And, as Connecticut residents, they also pay Connecticut taxes on all their income, including wages for working both in New York and in Connecticut. But Connecticut refuses to provide them with a credit in connection with wages for days worked at home because, under Connecticut's rules (as noted above), those wages are sourced to Connecticut and should not be subject to tax by another state (e.g., New York). Even Connecticut's then-Commissioner of the Department of Revenue Services, Gene Gavin, entered the public debate, co-authoring an article in this Journal in 2002 that chastised New York's policy.<sup>15</sup>

Connecticut's response to New York's convenience rule has not been limited to mere public statements. In May 2005, both of Connecticut's U.S. Senators and three Representatives introduced identical bills in the Senate (S. 1097) and the House (H.R. 2558). Collectively entitled the "Telecommuter Tax Fairness Act of 2005," the bills require that a nonresident employee be physically present within a foreign state before that state may impose its income tax. The physical presence requirement would be codified as follows: "In applying its income tax laws to the salary of a nonresident individual, a State may only deem such nonresident individual to be present in or working in such State for any period of time if such nonresident individual is physically present in such State for such period and such State may not impose nonresident

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income taxes on such salary with respect to any period of time when such nonresident individual is physically present in another State."

The bills go on to specifically state that "physical presence" is determined irrespective of the nonresident individual's "convenience." Both of these bills are currently in the respective committees in the House and Senate, although several organizations are advocating for their expedited passage.<sup>16</sup>

### The Revised Convenience Rule

Perhaps in response to the concerns raised by taxpayers, other states, and Congress, the Department of Taxation and Finance, as noted above, recently issued a Technical Services Bureau Memorandum (TSB-M-06(5)I) containing a revised convenience rule. The new version no longer relies exclusively on "physical necessity." And more important, it creates a narrow exception that will allow nonresident taxpayers who meet certain criteria to work from home untaxed by New York. Under the new rules, which are effective for tax years beginning after 2005, for a taxpayer whose assigned or primary office (i.e., generally the office out of which the employee is supervised) is in New York State, any "normal work day" spent at a home office will be treated as a day worked outside the state if the taxpayer's home office qualifies as a "bona fide employer office." Thus, the revised rule establishes two new operative terms: (1) "normal work day," and (2) "bona fide employer office."

A "normal work day" is "any day that the taxpayer performed the usual duties of his or her job." According to the Department's TSB-M, "responding to occasional phone calls or emails, reading professional journals or being *available* if needed does not constitute *performing the usual duties* of his or her job." (Emphasis in original.) Any day spent at a home office that is not a normal work day will be considered a nonworking day.

### Factors used to determine "bona fide employer office."

The most significant component of the new rule, however, is the "bona fide employer office" requirement. In order to avoid coming under the revised convenience rule, a nonresident must demonstrate that his or her home office qualifies as a "bona fide employer office." To help taxpayers satisfy this requirement, the Department's TSB-M sets forth a hierarchy of factors that will be used to determine whether a home office is a "bona fide employer office." (The below discussion of these factors is summarized in the table in Exhibit 1.)

The factors are divided into three groups: (1) the primary factor, (2) the secondary factors, and (3) "other" factors. A taxpayer's home office will constitute a bona fide employer office if it meets either: (1) the primary factor, *or* (2) at least four out of six secondary factors *and* three out of ten "other" factors.

**The primary factor.** The primary factor really adds nothing new. According to the TSB-M, the primary factor requires that the home office contain or be close to specialized facilities. As illustrated by an example in the TSB-M, if a nonresident employee's duties require the use of a test track to test new cars, and a test track is not available near the employer's offices in New York City, but is available near the employee's out-of-state home, the home office will meet this factor. As noted above, this is not a stunning revelation. This situation likely also would have avoided tax under the old convenience rule.

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**The secondary factors.** If a nonresident employee's home office does not satisfy the primary factor, New York income taxation still may be avoided if the employee can demonstrate that it satisfies at least four secondary factors and three "other" factors. The secondary factors include: (1) *Home office is a requirement or condition of employment.* This factor is satisfied if the employer requires an employee to work from the employee's home office as a condition of employment. The TSB-M provides the following example: a written employment contract states that the employee must work from home to perform specific duties for the employer. (2) *Employer has bona fide business purpose for employee's home office location.* This factor is satisfied if the employer has a bona fide business purpose for establishing an office in the locale where the employee's home is located. The TSB-M does not define the phrase "bona fide business purpose," although it does provide the following example of a home office meeting this requirement: An employee is an engineer working on several projects in his or her home state and it is necessary that the employee have an office near these projects in order to meet project deadlines. (3) *Employee performs some of the core duties of employment at the home office.* Unfortunately, the TSB-M does not define "core duties." Rather, it provides the following example: The core duties of a stockbroker include the purchase and sale of stock. Thus, a stockbroker who executes stock purchases and sales from the home office would be performing some of the core duties of employment at the home office. If, however, the stockbroker merely reads business publications on the weekend, such activity would not constitute performing any core duties at the home office. (4) *Employee meets or deals with clients, patients, or customers on a regular and continuous basis at the home office.* This factor is satisfied if an important part of an employee's duties include physically meeting with clients, patients, or customers in the normal course of the employer's trade or business, and those meetings are performed on a regular and continuous basis at the home office. The TSB-M provides the following seemingly obvious example: The employer has clients located near the employee's home office and the employee must meet with the clients, e.g., once a week, at the employee's home office in order to perform the duties of his or her job. (5) *Employer fails to provide the employee with regular work accommodations at its regular places of business.* This factor is satisfied if the employer does not provide the employee with designated office space or other regular work accommodations at one of the employer's regular places of business. Under the example in the TSB-M, an employer wishes to reduce the size of its New York office space in order to decrease rental expenses and, therefore, the employer no longer provides designated office space or other regular work accommodations for one of its employees. Instead, the employer allows the employee to work from the employee's home. If the employee does come to the New York office, the employee must use a "visitors" cubicle, conference room, or other available space that is also used by the other employees of the company. (6) *Employer reimbursement of home office expenses.* This factor is satisfied if (1) the employer (a) reimburses the employee for substantially all of the expenses (e.g., utilities, insurance) related to the home office, or (b) pays the employee a fair rental value for the home office space used, and (2) the employer furnishes or reimburses the employee for substantially all of the supplies and equipment used by the employee.<sup>17</sup> For purposes of this factor, "substantially all of the expenses" means at least 80%.

**The "other" factors.** In addition to meeting at least four of the secondary factors detailed above, a nonresident employee's home office must also satisfy at least three of the "other" factors. The TSB-M does not provide any explanation or analysis of the "other" factors but merely lists them, as follows: (1) The employer maintains a separate telephone line and listing for the home office. (2) The employee's home office address and phone number is listed on the business letterhead and/or business cards of the employer. (3) The employee uses a specific area of the home exclusively to conduct the business of the employer that is separate from the living area. The home office will not meet this factor if the area is used for both business



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and personal purposes.(4) The employer's business is selling products at wholesale or retail and the employee keeps an inventory of the products or product samples in the home office for use in the employer's business.(5) Business records of the employer are stored at the employee's home office.(6) The home office location has a sign indicating a place of business of the employer.(7) Advertising for the employer shows the employee's home office as one of the employer's places of business.(8) The home office is covered by a business insurance policy or by a business rider to the employee's homeowner insurance policy.(9) The employee is entitled to and actually claims a deduction for home office expenses for federal income tax purposes.(10) The employee is not an officer of the company.

### Application of the New Rule

All in all, the Department has made a solid effort in its attempt to limit the burden—and the controversy—surrounding the implementation of the convenience rule. While the "normal work day" test and the "primary factor" are basically similar to the tests the Department has historically applied in audits, the addition of the secondary and other factors *potentially* could address many of the difficult problems arising in some of the cases discussed above. This depends, of course, on how the Department will apply the new rules in the field in actual personal income tax audits. But at the very least, on a going-forward basis, the publication of these rules could allow taxpayers and practitioners to effectively structure arrangements to take advantage of the new tests and successfully allocate wages out of New York State.

The following examples illustrate how the rule might play out in a few different circumstances.

#### *Huckaby/Zelinsky scenarios.*

Even under the new rules, Professor Zelinsky still has a problem. No matter what the Professor's reasons for staying home, he clearly would not meet the primary factor, and it is extremely doubtful he would come anywhere close to meeting four of the six secondary factors. His home office would not be required by his employer (factor 1); it is unlikely he could establish that his employer had a bona fide business purpose for having him work at home (factor 2); he probably would not be meeting with students at the home office (factor 4); and he certainly would have office space or accommodations at the university (factor 5). Thus, even under these new rules, Zelinsky still loses.

In contrast, Huckaby might benefit from the new rules. In his case, it appears that he would be performing core duties at the home office (factor 3); that he has no designated office in New York (factor 5); and that his employer could be reimbursing his home office expenses (factor 6). Whether he could meet one of the three remaining secondary factors is unclear based on the facts of the case, but it certainly seems possible. Further, as should be the case with most taxpayers, Huckaby should easily be able to meet several of the "other" factors listed in the TSB-M.

Thus, taxpayers like Huckaby who find themselves clearly in a "telecommuting" situation are much more likely to avoid the convenience rule under these new rules. Again, this conclusion assumes (perhaps naively) that the Department will uniformly apply the new tests on a reasonable basis upon audit. But Professor Zelinsky, and others working at home under normal circumstances, still will not be happy. At a minimum, however, the new rules set forth in TSB-M-06(5) address an important distinction between Huckaby and Zelinsky, one that has been recognized by practitioners and by several justices of the New York Court of Appeals. For this reason alone, it appears these new rules, at least on their face, will have a

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positive effect.

### The *Unterweiser* situation.

What about Ms. Unterweiser? The Department's position in this case seems unreasonable, as it argued that Ms. Unterweiser—who was kicked out of her New York office by her employer—was working at home for her own convenience. The same goes for the recent Division of Tax Appeals decision in *Kakar*, where the Division seemed to be allowed to step into the shoes of an employer and decide what constituted reasonable workplace accommodations.

Fortunately, it appears the new convenience rule could help taxpayers like Unterweiser, and perhaps even was designed to do so. Specifically, she likely would meet most of the secondary factors, as she arguably was at her home office as a condition of employment, her employer (again arguably) had a bona fide purpose for having her there, she performed "core duties" at the home office, she did not have office space at the New York office, and presumably her employer reimbursed her expenses. Also, like Huckaby and, as indicated above, most other taxpayers, it appears she also could meet several of the ten "other" factors set forth in the TSB-M.

### Continued Concerns

Of course, no system is perfect. The convenience rule is still somewhat odd, and the lack of conformity among states will rightfully continue to be a sore spot and a reason for obliteration of the rule altogether. Also, as mentioned above, we really have no idea how these rules will be applied by particular auditors in the field. Indeed, one of the problems evident in the construction of the TSB-M is that many of the factors are described by virtue of certain examples or situations in which they may apply. Obviously, in determining whether a particular factor applies, it is quite possible that auditors will focus on the example, rather than the general rule. Practitioners should be ready to face these types of arguments in connection with specific factors.

Also questionable is the Department's decision to make the new rules prospective, applying the changes to tax years beginning after 2005 only. This means that taxpayers mired in "convenience" audits for years beginning prior to 2006 will not be able to take advantage of the new tests to help resolve their cases. Of course, that likely will not (nor should it) stop the ambitious taxpayer or practitioner from using these provisions to their benefit in ongoing audits. Indeed, if the Department believes this is the most correct and fair interpretation of the convenience rule, there should be no reason why these tests should apply only to future periods.

It is also surprising that the Department has once again decided to implement a significant change such as this in a Technical Services Bureau Memorandum, as opposed to enacting a new regulation. Normally, New York's State Administrative Procedure Act (SAPA) prohibits an administrative agency from relying on or implementing a "rule" until such time as the rule has been duly promulgated and filed with the Secretary of State's office, as required under the Executive Law in the New York State Constitution.<sup>18</sup> Of particular note, SAPA defines a "rule" to be "the whole or part of each agency statement, regulation or code of general applicability that implements or applies law, or prescribes ... the procedure or practice requirements of any agency..."<sup>19</sup>



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Here, given the scope of the change in the application of the convenience rule and the fact that the TSB-M seems to create new rules of general applicability, it would seem more appropriate for a change of this type to be contained in a regulation. This especially would seem to be the case given recent case law. Just last year, the Tax Appeals Tribunal questioned the viability of a change in the rules regarding income from the exercise of stock options made by the Tax Department via a TSB-M, prompting the legislature to require that the change in the stock option rules be included in a regulation.<sup>20</sup> That being said, in most circumstances the application of the TSB-M will be used primarily as a benefit to taxpayers, so it is unlikely that a taxpayer would actually ever challenge this TSB-M on SAPA grounds.

Finally, employers should be careful to recognize potential ancillary effects of achieving compliance under the new tests. Indeed, some employers may actually want to avoid establishing "bona fide employer offices" in other states because that may cause the company to have nexus in other states for other tax purposes.

### Connecticut and Congress

It is doubtful that Connecticut will find much solace with these "convenience rule" changes. Residents of that state will continue to face double taxation on days that do not meet the requirements of the new TSB-M. Similarly, the new tests fail to address the constitutional concerns raised by taxpayers and, more specifically, by the three dissenting New York Court of Appeals justices in *Huckaby*. Indeed, although the state's high court has spoken on the issue, it did so through a divided court. The TSB-M may provide a more reasonable and workable rule, but it likely will not shield the Department from further constitutional attacks.

For many of these reasons, the pending federal legislation noted above still should be an issue of concern for New York. Certainly, the new rules could eliminate the headline-grabbing situations where a nonresident is "conveniently" working at home after being kicked out of the employer's office. But as long as double taxation and constitutional concerns are there, the convenience rule will be subject to attack. Thus, we still need to keep a watchful eye on Congress to see whether there will be any response or action on the legislation. We can be assured the supporters of this legislation will be undeterred by what they likely feel is a feeble attempt by the Department to save the convenience rule.<sup>21</sup>

### Other Convenience Issues

Despite whatever complaints exist on both sides of the issue, it appears that this new TSB-M provides excellent opportunities for tax planning. For instance, arrangements between an employer and an employee that may currently fail to meet some of the "secondary factors" could be brought into compliance by making modifications to the employer/employee relationship, such as having them agree that the home office is required as a condition of employment, creating paperwork detailing the bona fide business purpose, making provisions for reimbursement of expenses, etc. The same can be true with respect to the "other" factors, for which a current non-compliant employer/employee relationship can be easily modified to meet the provisions of the test. The employer can set up a separate telephone line for the employee, change business cards, begin storing records at the employee's home office, put company signage up at that office, etc. Again, many changes can be made on a prospective basis in order to make sure that, at least for the future, taxpayers avoid the clutches of the convenience rule. As noted, this is a very positive development and could permit many taxpayers who previously would

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have been subject to New York taxation based on the convenience rule to avoid taxation altogether.

### Reverse convenience?

Another interesting convenience rule issue relates to what can be called the "reverse convenience rule." While New York's regulations and the TSB-M make it obvious that New York will consider out-of-state "convenience days" to be New York work days for allocation purposes, there has been less certainty with regard to how the state will handle the reverse situation. Specifically, it was unclear how New York would source payments received for services performed by a nonresident who is regularly employed outside New York if the employee performed some services from, for example, a vacation home located in New York. In earlier proceedings in *Matter of Zelinsky*,<sup>22</sup> the Tax Appeals Tribunal indicated that a "reverse convenience" test would apply in such circumstances. Specifically, the Tribunal intimated that New York would consider the New York "convenience days" (i.e., those worked at the New York vacation home) to be Connecticut work days, stating: "[W]here a New York resident is employed in Connecticut but chooses to work at home in New York on certain days, New York would ... source the income on the 'choice to work at home' days as derived from Connecticut."<sup>23</sup>

Up until now, this interesting comment by the Tribunal has never been formally addressed by the Department, and it does not appear to be addressed specifically in the TSB-M. Nonetheless, Department personnel have indicated privately to the authors that the "note" included under the section of the TSB-M entitled "Current application of the convenience of the employer test" was designed to cover the reverse-convenience situation. The note indicates that "[i]f the employee's assigned or primary work location is at an established office or other bona fide place of business of the employer outside New York State, then any normal work day worked at home would be treated as a day worked outside New York State." Presumably, this could be read to include situations where a nonresident performs services for a non-New York employer while in New York for the employee's own convenience. But the Department certainly could have made it clearer or addressed the issue more specifically. Nonetheless, the reverse-convenience concept has been embraced by the Tribunal and now seemingly has been blessed by the Department. As such, it should be used by employers and employees in determining a proper New York allocation of income.

### Conclusion

The convenience rule certainly has had a rough ride over the past several years, but the implementation of the new TSB-M is most certainly a good step by the Tax Department and a positive development for taxpayers. While the hierarchy of factors is a bit archaic and unusual—and while it remains to be seen how the Department will apply the rules in practice—they nonetheless provide excellent guidance for auditors, taxpayers, and practitioners, and hopefully will go a long way toward ensuring that the inconsistent and sometimes unfair results reached in previous cases can be avoided. What will not be avoided, however, will be the discussion, argument, and controversy surrounding the rule. We can be sure that this discussion will continue to keep all of us tax folks busy, and will undoubtedly be the continued subject of speeches, articles, audits, and court cases.

## EXHIBIT 1. ARE YOU SAFE UNDER NEW YORK'S NEW CONVENIENCE RULE?

### The New Convenience of the Employer Test

#### Issue #1: Is It a "Normal Work Day"?

If not, STOP. It is a non-workday and the rest of the Convenience Rule does not apply.

#### Issue #2: Does the Home Office Qualify as a "Bona Fide Employer Office"?

##### Step 1: The Primary Factor.

Employee's duties require the use of special facilities that cannot be made available at the employer's place of business, but those facilities are available at or near the employee's home.

If the home office does NOT satisfy the primary factor, proceed to Step 2.

##### Step 2: The Secondary and "Other" Factors.

The home office may still qualify as a "bona fide employer office" if it meets four out of six Secondary Factors PLUS three out of ten "Other" Factors.

The Secondary Factors: (4 out of 6) The "Other" Factors: (3 out of 10)

----- 1) Home office is a requirement 1) Employer maintains a separate or condition of employment. telephone line and listing for 2) Employer has bona fide business the home office. purpose for the employee's home 2) Employee's home office address office location. and phone number are on the 3) Employee performs some core employer's business letterhead duties at the home office. and/or cards. 4) Employee meets with clients, 3) Employee uses a specific area patients, or customers at the of the home exclusively for the home office. employer's business. 5) Employer does not provide the 4) Employee keeps inventory of employee with office space or products or samples in the regular work accommodations. home office. 6) Employer reimburses expenses 5) Employer's business records are for the home office. stored at the home office. 6) Employer signage at the home office. 7) Home office is advertised as employer's place of business. 8) Home office covered by a business-related insurance policy . 9) Employee properly claims a deduction for home office expenses for federal income tax purposes. 10) Employee is not an officer of the company.

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<sup>1</sup>For a sampling of coverage in this Journal alone, see, e.g., U.S. Supreme Court Update, 15 JMT 41 (February 2006) and 14 JMT 41 (July 2004) (discussing the Court's denials of certiorari in, respectively, *Zelinsky v. N.Y.S. Div. of Tax App.*, and *Huckaby v. N.Y.S. Div. of Tax App.*, both discussed in the text below); Shop Talk, "Taxing Telecommuters: The Debate Continues Over 'Convenience/Necessity' Test," 13 JMT 30 (Mar/Apr 2003), and "New York's Tax Commissioner Replies on Taxation of Telecommuters," 12 JMT 38 (January 2003); Lee, Lipari, and Newman, "New York: Odd Tax Laws Spell Trouble for Telecommuters and Employers," 10 JMT 37 (July 2000).

NEW YORK'S REVISED CONVENIENCE RULE PROVIDES SOME CLARITY AND CONTINUED CONTROVERSY

<sup>2</sup>See, e.g., Gavin and Pavano, "The Long Arm of the Empire State: Convenience Rule Discourages Interstate Telecommuting," 12 JMT 6 (Mar/Apr 2002) (Gene Gavin was then the Commissioner of the Connecticut Department of Revenue Services (DRS), and Stacey Pavano was a tax attorney in the DRS legal division).

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<sup>3</sup>N.Y. Tax Law §601(e). For a more detailed discussion of personal income taxation of residents and nonresidents of New York, see Comeau and Noonan, "Executive Compensation and Employer Withholding: A Closer Look at a Complicated Issue," 13 JMT 24 (August 2003).

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<sup>4</sup>In practice, the rule is based on whether the employee is at home for *the employee's own convenience* and, thus, is incorrectly named.

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<sup>5</sup>See 2005 Form IT-203-I (Instructions for Nonresident and Part-Year Resident Income Tax Return): Instructions for Form IT-203-B, an income allocation worksheet that includes Schedule A, "Allocation of Wage and Salary Income to New York State."

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<sup>6</sup>TSB-A-96(10)I (N.Y.S. Dept. of Tax'n and Finance, Advisory Opinion, 12/27/96).

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<sup>7</sup>N.Y. Tax App. Trib., DTA No. 818462, 7/31/03.

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<sup>8</sup>N.Y.S. Div. of Tax App., ALJ Determination, DTA No. 820440, 2/16/06.

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<sup>9</sup>N.Y.S. Div. of Tax App., ALJ Determination, DTA No. 819751, 5/5/05.

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<sup>10</sup>1 N.Y.3d 85, 769 N.Y.S.2d 464, 801 NE2d 840 (2003), *cert. den.* U.S. S.Ct., 4/26/04.

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<sup>11</sup>Quoting *Quill Corp. v. North Dakota*, 504 US 298, 119 L Ed 2d 91 (1992).

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<sup>12</sup>4 N.Y.3d 427, 796 N.Y.S.2d 312, 829 NE2d 276 (2005), *cert. den.* U.S. S.Ct., 10/31/05.

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<sup>13</sup>The taxpayer also claimed that the convenience rule violated the Equal Protection Clause because of its different treatment of nonresidents who work outside New York for personal convenience and those who work out-of-state due to necessity. The court quickly dismissed this claim and held that the distinction complied with the Commerce and Due Process Clauses and thus was "rational in every respect."

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NEW YORK'S REVISED CONVENIENCE RULE PROVIDES SOME CLARITY AND CONTINUED CONTROVERSY

<sup>14</sup>Connecticut's refusal to employ the convenience rule is interesting, since its individual income tax law was patterned after New York's law and is, in most respects, substantially similar.

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<sup>15</sup>See Gavin and Pavano, *supra* note 2.

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<sup>16</sup>See "Position Statement in Support of the Telecommuter Tax Fairness Act" (January, 2006), available online via the website of The Telework Coalition, at [www.telcoa.org/id304.htm](http://www.telcoa.org/id304.htm). The Telework Coalition, as described on its website, is a not-for-profit corporation that seeks to take a proactive approach towards promoting telework and telecommuting.

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<sup>17</sup>While the actual "secondary factor 6" language in TSB-M-06(5)I, 5/15/06, may be a bit ambiguous, the authors of this article have confirmed with personnel from the Tax Department's Technical Services Bureau that phrase (2) in the text applies to both proceeding clauses (i.e., (1a) "the employer reimburses the employee..." and (1b) "the employer pays the employee...").

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<sup>18</sup>See N.Y. Exec. Law art. 6, §§101-a and 102; N.Y. State Admin. Procedure Act art. 2, §§202 and 203; N.Y. Const. art. IV, §8.

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<sup>19</sup>N.Y. State Admin. Procedure Act §102.2.

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<sup>20</sup>See Matter of Stuckless, N.Y. Tax App. Trib., DTA No. 819319, 5/12/05; and 2006-2007 *New York State Executive Budget* (S.B. 6460, A.B. 9560), Memorandum in Support, Part QQ (requiring "the Commissioner ... to issue regulations which would clarify New York State's tax treatment of stock options ... received by a nonresident or part-year resident taxpayer"). The Tribunal has granted reargument in that case, and the matter is still under consideration.

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<sup>21</sup>Indeed, at least one commentator has already publicly criticized the draft of the TSB-M that was circulated earlier this year. See Goluboff, "New York's Proposed Telework Tax Policy: State Won't Shift Gears," 2006 STT 98-24.

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<sup>22</sup>N.Y. Tax App. Trib., DTA No. 817065, 11/21/01.

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<sup>23</sup>Quoting and concurring with the ALJ's opinion in Zelinsky, N.Y.S. Div. of Tax App., ALJ Determination, DTA No. 817065, 11/2/00. Internal quotation marks omitted.