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Escape From New York: Tennessee Telecommuter's Due Process Challenge To New York Income Taxes Will Not Be Heard By The Supreme Court

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The Supreme Court recently disappointed many taxpayers and observers by declining to review the case of a Tennessee computer programmer who had been forced to pay income tax to the Empire State on account of his employer's presence there. Telecommuters forced to pay disproportionate taxes in New York and other jurisdictions where they do not reside or regularly toil had been hoping that the Court would see this case as an opportunity to resolve the serious due process implications that had divided the New York Court of Appeals. That court's decision is reported at 829 N.E.2d 276 (N.Y. 2005).

Huckaby Toils In Tennessee

The facts of the case are relatively simple. The taxpayer, Thomas Huckaby, lived in Tennessee and worked as a computer programmer for a local Tennessee employer until 1991. When his Tennessee employer went out of business, Huckaby hired on with one of its former clients, a union that happened to be headquartered in New York. Huckaby and his new employer agreed that he would work from home and travel to New York only as needed to develop software or to train employees in the home office on its use. In the tax years in question, Huckaby spent 75% of his working days in Tennessee and the balance in New York.

New York's income tax is triggered by receipt of "income . . . derived from . . . a business, trade profession, or occupation carried on in the state." The obvious statutory question is whether the "business . . . carried on in the state" refers to the location of the employer or the employee. In 1960, New York's Commissioner of Taxation and Finance passed aggressive interpretive regulations, since known as the "convenience of the employer test," conditioning the application of the income tax on the presence of the employer. And, while the regulation exempted the time the employee spent out-of-state from the calculation of New York income, it did so only with respect to those days when the employee was absent from the state "by necessity" performing "out-of-state duties in the service of his employer." 20 NYCRR 132.18(a).

Showing commendable rectitude, Huckaby dutifully filed New York State returns and conceded his liability for New York tax on 25% of his income. Citing New York's

convenience of the employer test, the Commissioner issued notices of deficiency and imposed tax on all of Huckaby's income. Huckaby objected on due process and equal protection grounds, and his case eventually found its way to the New York Court of Appeals.

New York Court Holds Huckaby Liable For Tax On Entire Income

A majority of the New York Court of Appeals sustained the tax. A powerful dissent, authored by Justice Smith, would have found the application of New York's tax to fail due process scrutiny. Relying on the United States Supreme Court's decision in *Allied Signa v. Division of Taxation*, 504 U.S. 768 (1992), that "a state may not tax value earned outside its borders," Justice Smith would have found a sufficient nexus to support the application of New York's tax law as an initial matter. But, applying *Moorman Manufacturing v. Blair*, 437 U.S. 267 (1978) and *Hans Rees' Sons v. North Carolina*, 283 U.S. 123 (1931), Justice Smith would also recognize a due process requirement that any income tax on a telecommuter like Huckaby be reasonably apportioned to "values connected with the taxing state." New York's "convenience of the employer" rules resulted, according to Justice Smith, in a complete failure of apportionment and, thus, a denial of due process.

The Court's decision to deny certiorari in this case is disappointing. The New York court's holding has important implications not only to employees facing telecommuter taxes like Huckaby, but to businesses and other taxpayers facing taxation out of proportion to their activities in the taxing state. ■



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