

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-11(3)I
Income Tax
May 6, 2011

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I110318A

On March 18, 2011, the Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner asks whether, for purposes of determining if he spent or will spend 450 days or more in a foreign country for purposes of the “548-day rule”, both full and part days in a foreign country should be counted.

We conclude that both full and part days in a foreign country should be counted in determining whether an individual has spent (or will spend) 450 days or more in a foreign country under the 548-day rule.

Facts

Petitioner is a New York domiciliary who is living and working in a foreign country. The tax years involved in this petition are 2009, 2010 and 2011.

Analysis

The “548-day rule” is contained in Tax Law Section 605(b)(1)(A)(ii). This provision states that a New York State domiciliary will not be deemed a New York State resident notwithstanding his or her domiciliary status if that person:

- (1) within any consecutive 548-day period, is present in a foreign country or countries for at least 450 days; and
- (2) during the period of 548 consecutive days, the taxpayer, the taxpayer's spouse (unless the taxpayer and spouse are legally separated) and the taxpayer's minor child are not present in New York State for more than 90 days; and
- (3) during the nonresident portion of the taxable years within which the 548-day period begins and ends, the number of days in which the taxpayer is present in New York State does not exceed the same ratio to 90 as the number of days in that taxable year bears to 548.

The Income Tax Regulation in 20 NYCRR § 105.20(c) provides that, in counting the number of days spent within and without New York, any part of a calendar day constitutes a day spent within New York State, except when such presence is strictly for travel to a destination outside the state, or while traveling through the State.

The same method should apply in determining whether the taxpayer is present in a foreign country for the requisite number of days, i.e., both full and part days in a foreign country should be counted in determining whether an individual has spent (or will spend) 450 days or more in a foreign country under the 548-day rule. It is possible for a taxpayer to spend part of a day in both New York

