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

TSB-A-12(3)I
Income Tax
July 5, 2012

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. I120228A

The Department of Taxation and Finance received a Petition for Advisory Opinion for [redacted]. Petitioner asks whether time spent by Petitioner's minor child in New York State with a separated spouse should be counted for purposes of determining if Petitioner qualifies for the "548 Day rule" provided for in Tax Law section 605. We conclude that the days spent by Petitioner's minor child in New York State at a residence of a separated spouse are not counted in determining whether the Petitioner is an excepted resident pursuant to the "548 Day rule" for New York State income tax purposes.

Facts

Petitioner is a New York domiciliary who intends to live and work in a foreign country. For the foreseeable future, he expects to meet all of the requirements of the "548-day rule" with regard to his own time in and out of New York and the U.S.

Petitioner is also married and has one minor child, but he will be legally separated from his spouse (and eventually divorced) while he is living overseas. Pursuant to a custody agreement, the child resides primarily with Petitioner's spouse. Petitioner has certain visitation rights, permitting the child to stay with him on certain weekends, holidays, and school breaks, subject to his availability and the child's schedule. But his child otherwise resides with Petitioner's spouse, and Petitioner has consented to permit his spouse to reside wherever she chooses. However, he expects that his wife will choose to reside with their child in Manhattan for the foreseeable future.

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
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> (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
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> (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.

Chapter 57 of the Laws of 2009, Part A-1 ("Part A-1") amended the definition of "resident individual" for determining residency for New York State income tax purposes for taxable years beginning on or after January 1, 2009. Part A-1 amended subsection (b) of section 605 of the Tax Law. Prior to this, a taxpayer domiciled in New York was not taxed as a resident if, within any 548 consecutive day period, (1) the taxpayer is present in a foreign county for at least 450 days, (2) the taxpayer is not present in the state for more than 90 days, and (3) his or her spouse and minor children do not reside at the taxpayer's permanent place of abode in New York for more than ninety days. Under the prior law, a taxpayer who was present in a foreign country, but whose spouse and minor children resided in New York, was able to avoid being taxed as a resident by having their spouses and minor children avoid using their permanent places of abode in New York. Instead, the spouse and children stayed with relatives in New York, or temporarily rented a hotel room in New York. In these situations, the spouse and minor children spent more than ninety days in New York, but not at the taxpayer's permanent place of abode. Part A-1 closed this loophole by providing that the taxpayer would still be taxed as a resident in New York, unless the taxpayer's spouse and minor children are not present in New York for more than ninety days.

Part A-1 also added the parenthetical language that excluded from consideration under the 548-day rule the residency of a taxpayer's legally separated spouse. We reviewed the legislative history of Part A-1. In our opinion, there is nothing in the legislative history to suggest that the Legislature intended to have a minor child's time residing with a legally separated spouse in New York State count towards the taxpayer's presence within New York State for purposes of the 548 day rule.

Therefore, if the taxpayer and his spouse are legally separated, and there is a written separation agreement providing that the spouse has physical custody of the Petitioner's minor child, the time spent by the minor child at the spouse's residence does not count as the Petitioner's presence in New York State in determining whether Petitioner is a New York resident for personal income tax purposes. However, if Petitioner's minor child is present in New York on any day when the Petitioner is entitled to custody or visitation, these days count towards determining residence or domiciliary status for purposes of the 548 day rule. The Income Tax Regulation section 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.

DATED: July 5, 2012

/S/
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