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In this installment of Noonan's Notes, Noonan and Bly examine New York's 548-day rule and offer a list of frequently asked questions they receive from clients and other practitioners in the planning process.

A decade ago, when I had about the same amount of hair, a few less wrinkles, and four fewer kids, I penned an article about New York's 548-day rule, a little-known safe harbor test that allows New Yorkers to escape resident taxation if they follow specific day-counting guidelines over an 18-month period.[1] This safe harbor remains an obscure yet popular topic among some clients and potential clients, and one that gained lots of fans during the past several years, as COVID-related work situations allowed taxpayers to be more transitory. To this day, our 2011 article remains the top hit that pops up on Google when searching for information on the 548-day rule.

So we thought it was time to revisit the rule and to address questions about its application. And for this installment, I'm including as a special guest coauthor Kristine Bly, a senior audit manager in our state and local tax group and a foremost expert on the topic. We'll revisit the basic outlines of the rule and offer a list of frequently asked questions that we receive from clients and other practitioners in the planning process.

Background

The 548-day rule is a special statutorily created exemption for those who would otherwise qualify as New York state resident taxpayers.[2] As our regular readers know, in New York an individual can be taxed as a resident if he is domiciled in the state or if he meets the 183-day statutory residency test. But the 548-day rule is one of two statutorily created exceptions to these residency rules.[3] A New York-domiciled taxpayer is not considered to be a resident for income tax purposes if he meets these three requirements:

- within any period of 548 consecutive days, the taxpayer must be present in a foreign country or countries for at least 450 days;
- during that same 548-day period, neither the taxpayer nor the taxpayer's spouse or minor children can be present in New York state for more than 90 days; and
- during any portion of the 548-day period that is less than a full tax year (the short period), the ratio of the number of days a taxpayer is present in New York (x) over 90 days must not exceed the ratio of the total number of days in that short period (y) over 548 days. This can be expressed mathematically as follows:

[1] Timothy P. Noonan and Andrew W. Wright, "The Nuts and Bolts of New York's 548-Day Rule," *State Tax Notes*, Mar. 7, 2011, p. 725.

[2] N.Y. Tax Law section 605(b)(1)(A)(ii).

[3] The other is the 30-day rule, which is covered later in this article.

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$$x/90 < y/548$$

Under the first requirement, the taxpayer must prove her presence in a foreign country or countries for a minimum of 450 days in the 548-day period. For purposes of this test, any part of a day in a foreign country counts as a day. And if only one spouse is aiming to qualify for the 548-day rule, then only that spouse must meet this 450-day test.

The second prong is as straightforward as it sounds: Neither the taxpayer nor her spouse or minor children can spend more than 90 days in New York during the entire 548-day period. Again, any part of a day spent in New York counts as a day. And unlike the first requirement, even if only one spouse is attempting to qualify for the safe harbor treatment, the other spouse and minor children are also subject to this 90-day requirement.

The third prong, often called the short period test, is a little more complicated. In its simplest form, this test is designed to ensure that the taxpayer does not bunch up any of the allowable 90 New York days onto the front end or back end of any 548-day period. But more directly, the test applies only to periods within the 548 days that don't span a full calendar year. For example, if the relevant 548-day period begins on July 1, 2021, and ends on December 31, 2022, the short period spans July 1, 2021, through December 31, 2021. During this short period, the taxpayer must satisfy the ratio laid out above. And in this example, the ratio would be $X/90 < 183/548$, with X equaling 30.[4] So the taxpayer could spend no more than 30 days in New York state during the 2021 short period.

Frequently Asked Questions

As simple as these requirements appear, we find ourselves inundated with questions from clients. Indeed, there are many nuances in the application of these rules that must be understood before sending someone away on an 18-month adventure. These are the types of questions that come up for any taxpayer investigating this option.

When does a day start and end?

The term "day" under N.Y. Tax Law section 605(b)(1)(B) should be interpreted as a 24-hour period from midnight to midnight. For purposes of counting days, in particular the foreign days, local time zone controls. Thus, in any day spent in a foreign country, that country's time zone counts toward the 450-day test.

What is a foreign country?

Although there's no definition in the statute, our position is generally that "foreign" refers to areas outside the United States, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, the U.S. Virgin Islands, and the Antarctic region that are under the sovereignty of a foreign government. And it might not include ships and aircraft traveling in or above international waters, or offshore installations located outside the territorial waters of any individual nation, though in practice we have not seen that fact pattern arise.

What is a foreign country day?

Any part of a day spent in a foreign country counts as a full day.[5]

What is a New York day?

Any part of a day spent in New York counts as a full New York day. There are only a few exceptions to this rule, which deal with the degree of control a taxpayer can exercise over his ability to physically remove himself from the state.

What are the exceptions?

Transit: Presence in the state will be disregarded if solely for the purpose of boarding a plane, ship, train, or bus for a destination outside the state or continuing travel — begun outside the state — to a point outside the state.

Medical: Confinement to a medical institution for any reason, serious or otherwise, will not constitute a day in New York. This covers situations in which a taxpayer suffers a medical emergency while in New York or specifically seeks out treatment here. At least under the State

[4] That ninth-grade algebra is finally paying off!

[5] NYS Dept. of Taxation and Finance, Advisory Opinion TSB-A-11(3)I.

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Department of Taxation and Finance's current policy, it does not extend to outpatient care, though we believe there may be room to argue otherwise under existing law.

What if I am in a foreign country and New York on the same day?

You count each of them as a respective day for its own portion of the 548-day test (that is, that day counts twice). This often results in a period that may have a higher cumulative day tally than there are calendar days for the same period.

How do I count days in the U.S.?

The short answer: You don't. The 548-day rule deals with time spent in a foreign country and New York only. The only reason time spent in the United States is relevant (for the taxpayer completing the 548-day rule) is its association to the direct reduction of remaining foreign days in the period. For example, if you spend too much time in the United States, it becomes impossible to achieve the prerequisite 450 days in a foreign country. But because parts of days in a foreign country count toward the 450 test, counting days in the U.S. can be distortive.

Can I change my domicile during the 548-day period?

Maybe. The 548-day rule is an *exception* for New York state domiciliaries. Sections of the New York regulations suggest you must be domiciled for the entire period, or at the very least the applicable tax year for which you are seeking nonresident treatment. But the statute can also be read to make this issue irrelevant. So for planning purposes, it's usually sensible to follow the more conservative route.

Can I just go to any foreign country for 548 days?

Yes and no. Like New York state, many countries have their own versions of tax residency based on one's physical presence or connections to that country. If you plan to spend four months or more in any one country in a given year, you should retain local counsel and work to avoid double taxation.

Do I add together my time and my spouse's time for purposes of the 90-day test?

No, each individual gets a separate and distinct 90-day allowance. So days your spouse is in New York will not count against your 90-day allowance, and vice versa.

What are the limitations on my spouse and kids during the 548-day period?

Under the second part of the test, your spouse and minor children cannot spend more than 90 days in New York state during the entire 548-day period. Your spouse and minor children are not otherwise subject to parts 1 (foreign days) or 3 (short-period limitation) of the test, unless your spouse is also seeking coverage under the 548-day rule. A spouse who does not complete his or her own applicable 548-day period will remain taxable as a resident of New York state or city. You may continue to file a joint federal tax return and will be able to file separately at the state level.

My spouse and I live apart. Do my spouse's days count against me?

Yes. The 548-day rule covers your spouse unless you are legally separated. Being separated "in fact" is not sufficient. But as noted above, the spouse's days only "count" for purposes of the 90-day New York limitation.

What if I have a child in the custody of an ex-spouse?

If you and your spouse are legally separated, and there is a written separation or divorce agreement providing that the spouse has physical custody of your minor child, the time spent by the minor child at the spouse's residence does not count as that child's presence in New York state. However, on days your minor child is present in New York, and you are entitled to custody or visitation, those days will count against you.[6] So we advise clients to work with a family law attorney to create written agreements so that the minor's time spent in New York does not adversely affect the 548-day test.

[6] NYS Dept. of Taxation and Finance, Advisory Opinion TSB-A-12(3.1)I.

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Who is a minor child?

Any child under the age of 18. If a child turns 18 during the 548-day period, you can cease counting the days.[7]

Are there special things for a green card holder to consider?

Yes. Green card holders have special rules about the amount of time they can spend outside the country (up to six months). Spending too much time outside the country can cause a client to lose his green card. And immigration officers at border points can seize your green card if they believe there are just grounds.

Do I apply the short period calculation to a full calendar year?

No, under the statute, the short period limitation only applies to periods that have a nonresident portion of the year. A full calendar year does not contain a portion of a nonresident period. So a taxpayer whose 548-day period encompasses a full calendar year (January 1 to December 31) could spend all 90 days in New York during that year, so long as the person spends no time in New York during the short periods.

Do I need to file any special kind of tax return with New York?

No, you'd file the normal Form IT-203, "Nonresident and Part-Year Resident." On this return, there is a special condition code at Item F (as of 2020), Code E5, which alerts the tax department that you qualify under section 605(b)(1)(A)(ii) of the tax law. This also allows you additional time to file in New York state, through the completion of the 548-day period, beyond the typical six-month extension request. You are still required to file your federal tax return timely.

Additional Note — The 30-Day Rule

As noted, there is one other statutorily created safe harbor test that a New York-domiciled taxpayer could otherwise use to avoid resident taxation: the 30-day rule, also outlined in Tax Law section 605(b).[8] Under this rule, a New York-domiciled taxpayer can nonetheless qualify as a nonresident if she:

- maintains no permanent place of abode in New York;
- maintains a permanent place of abode elsewhere; and
- spends less than 30 days in New York during the calendar year.

Unlike the 548-day rule, the 30-day rule is a calendar-year test only. The taxpayer must meet all three requirements of the 30-day rule during a full calendar year to qualify. More to the point, in addition to spending less than 30 days in New York during the calendar year, the taxpayer cannot maintain a permanent place of abode for one day during the year, and the taxpayer must maintain a permanent place of abode in some other place or places for every single day of the calendar year. So on one hand, there's less of a burden on a taxpayer than the 548-day rule, since no time in a foreign country is required, and it only requires being on a one-year program. On the other hand, the taxpayer is allowed fewer days in New York on a pro rata basis, and of course has to get rid of his New York place (or at least rent it out for the entire year).

Like the 548-day rule, the 30-day rule's popularity has increased during COVID-19, again because of taxpayers' ability to be more transitory. So whenever we have a client interested in the potential for the 548-day rule, a discussion around the 30-day rule also makes sense.

Conclusion

State residency rules in general — and New York's application of said rules in particular — are often a minefield, with significant gray areas and risks inherent in their application. The beauty of the 548-day and 30-day rules is certainty: If the taxpayer meets the clearly defined requirements, he will not be a resident during the defined period. And in a world full of uncertainty, often there is nothing more desirable than certainty in tax planning. ■

[7] NYS Dept. of Taxation and Finance, Advisory Opinion TSB-A-12(5)I.

[8] N.Y. Tax Law section 605(b)(1)(A)(i).

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