The Nuts and Bolts of New York's 548-Day Rule

by Timothy P. Noonan and Andrew W. Wright

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Last November we used this column to discuss a recent Tax Appeals Tribunal decision in *Matter of Robertson* and the importance of that decision for tax practitioners engaged in New York residency audits and the (often frustrating) exercise of day counts.[1] This month, we decided to write about another loosely related, day count rule: the 548-day rule.

Unlike other day count tests, which often seem like an attempt to trap or trick taxpayers into paying more taxes, this rule is taxpayer-friendly. It offers protections against resident taxation for taxpayers who would otherwise qualify as taxable residents. Yes, indeed, there actually are tax laws designed to help taxpayers. This one, however, can be one of the more diabolical tests, in part because it requires us to do the one thing many have dreaded since high school: fractions. So grab your slide rule (or, for you accountants, remove said slide rule from your front pocket), and let's talk about the 548-day rule.

Background on Residency Rules

Before diving headfirst into the specifics of the 548-day rule, we should briefly summarize the basic residency rules for New York state income tax purposes to give our topic some context. In New York an individual can be taxed as a resident on either of two grounds: The individual is domiciled in New York or the individual meets the test of a statutory resident of New York.[2] That residency determination carries with it significant tax consequences because New York residents are taxed on their worldwide income, while nonresidents are taxed only on New York-source income. We won't dwell here on the intricacies of New York's residency rules.[3] Suffice it to say, the determination of residency is one that we spend a great deal of time fighting, and the 548-day rule is one of the weapons that can be used to fight the label of domiciliary and its tax implications — at least for periods of 548 days.

The '548-Day Rule' — An Exception to Taxation of New York Domiciliaries

Now to the rule itself. New York's tax law contains special and limited provisions under which domiciliaries may be granted tax relief. One of those provisions is the aptly named 548-day rule.[4] A purported domiciliary that meets the 548-day rule is *not considered a resident* for income tax purposes during any part of that 548-day period. However, to qualify under this provision, there are three separate (and somewhat complicated) hoops through which the taxpayer must jump:

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[1]Timothy P. Noonan, "A New Day Dawns for Determining What Constitutes a New York Day," *State Tax Notes,* Nov. 8, 2010, p. 431, *Doc 2010-23125*, or *2010 STT 215-5*.

[2]*See* New York Tax Law section 605(b)(1) and 20 NYCRR section 105.20(a).

[3]For a detailed discussion on the nuts and bolts of a New York residency audit, see Timothy P. Noonan and Mark S. Klein, "The Nuts and Bolts of a New York Residency Audit," *State Tax Notes*, Dec. 22, 2008, p. 793, *Doc 2008-25828*, or *2008 STT 247-3*.

[4]*See* N.Y. Tax Law section 605(b)(1)(A) and 20 NYCRR section 105.20(b)(2). Another of these important provisions is the 30-day rule. 20 NYCRR 105.20(b)(1).

- 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.
- 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 the 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. Here's a visual:

$$X/90 \leq Y/548$$

Sorry for the math and the fractions. Whenever we have one of these 548-day cases, I can't help but feel like I'm back in seventh grade, doing (or not doing) my math homework.

Breaking Down the 548-Day Rule

Let's lessen the pressure on your head a little by tackling this in pieces. To qualify for the 548-day rule, a taxpayer must meet each of the three prongs of the test. However, as you might have gathered from reading through (our condensed and reworded version of) each element, some parts of this test are easier to grasp than others. So an explanation of each part of the test, its complexities, and its nuances is necessary.

Presence in Foreign Country (450 days)

The first prong is easy enough. To qualify, the taxpayer must prove his or her presence in a foreign country (or countries) for a minimum of 450 out of the 548 days in the full period. The manner in which some of the days spent in the United States (specifically the New York days) must be spread across the 548-day period is also important, but for purposes of the first prong of the test, what is important is that the taxpayer spends at least 450 days of the period in a foreign country.

Presence in New York (90 Days)

The second prong, which builds on the first, is also fairly straightforward. The first part of the test tells us that the taxpayer must be present in a foreign county or countries for at least 450 of the 548 total days in the full period. Part two of the test tells us that, of those days the taxpayer spends in the United States, only 90 of those days may be spent in New York.

Spouse or Minor Child in New York (90 Days)

This is the second layer of prong two of the test. It mandates that the taxpayer's spouse and minor children spend 90 days or less in New York state during the 548-day period. Thus, for purposes of the 548-day rule, not only will the taxpayer's physical location be at issue but also the location of the taxpayer's spouse and children. So if the taxpayer leaves a spouse or minor child behind in New York during the 548-day period, he or she may lose eligibility for the 548-day rule. This part of the 548-day rule was changed in 2009.[5] Before that change, the 548-day rule concerned itself only with the number of days spent by the taxpayer's spouse and children *at the taxpayer's permanent place of abode* in New York. So days spent by the spouse with family, or in a hotel, didn't count. Now it doesn't matter where they stay. Any time spent in New York by the spouse or minor child counts for purposes of this 90-day test.

The 'Short Period'

The third prong of the 548-day rule is undoubtedly the most confusing. When dealing with any period spanning 548 days, part (or parts) of that period will always last only part of a tax year. For instance, if the relevant 548-day period begins on January 1, 2009, and ends on July 2, 2010, the "short period" spans from January 1, 2010, through July 2, 2010. It is during this short period that the taxpayer must satisfy the ratio laid out above.

The ratio — In our example, the ratio would look like this:

$$X/90 \leq 183/548$$

Because the "short period" of January 1, 2010, through July 2, 2010, contains 183 days, the taxpayer may be present in New York only for a number of days that bears the same ratio to 90 as 183 bears to 548. It doesn't take a math whiz to determine that to qualify for the 548-day rule, this taxpayer may spend no more than 30 days in New York state during the short period.[6] Unfortunately, that is about as easy as short period calculations can be. When the 548-day period touches three separate tax years, the taxpayer will have two short periods to contend with, and thus two ratios to compute. Fear not, though. The mechanics of the computation are the same, and shifting the 548-day period around may prove advantageous to the taxpayer.

Special Considerations and Tricks and Traps

So now you (I hope) understand the basics of the rule. Was that so hard? Now, however, for some extra insight. Indeed, even after grasping how the rule works, it's important to see how it can apply in practice, what to watch out for, and how you can use this rule to help clients who are living or working abroad for extended periods of time. So here goes:

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[5] *See* TSB-M-09(11)I (Oct. 19, 2009).

[6] In case you want to see the math — where $548X \leq 183 \times 90$, $X \leq 16{,}470/548$, $X \leq 30$.

What counts as a 'day spent' in New York?

Because the 548-day rule focuses on the location where a taxpayer spends his or her time, it's important to note that "days" for the 548-day test are the same as "days" for statutory residency. That means that *any part of a day* spent in New York counts as a full New York day,[7] regardless of the reason for the taxpayer's presence. In reality, a minute counts as a day for these purposes. However, this description can be misleading, because even the Department of Taxation and Finance's own guidelines state that no audit is to be based on such a minimal amount of time spent in New York — common sense must prevail.[8]

What counts as a 'day spent' in a foreign country?

When counting days spent in a foreign country, the same rule applies. That means that any day in a foreign country counts toward reaching the threshold of 450 days. Sources within the tax department have confirmed to us that, based on the regulation that defines a day as "any part of a day," they would define a day spent in a foreign country as any part of a day.

What about travel days?

Because the 548-day rule deals with taxpayers who are spending time in both foreign countries and the United States, most cases are likely to involve a number of "travel days." New York regulations provide that presence in the state is disregarded if solely for the purpose of (1) boarding a plane, ship, train, or bus for a destination outside the state[9] or (2) continuing travel,[10] begun outside the state, to a point outside the state. When counting the number of days a taxpayer spent in New York for purposes of the 548-day rule, those travel exceptions to the rule of a "day spent" must be considered.

What happens if the spouse spends less than 450 days in a foreign country?

That's OK. Spousal time counts only for purposes of prong two — the 90-day limit for days in New York.

What if the taxpayer is abroad for much longer than 548 days?

No problem. Indeed, oftentimes a taxpayer spends much longer than this abroad while technically still domiciled in New York.[11] In those cases, as long as the taxpayer continues to meet the requirements of the 548-day rule, that individual, though technically still domiciled in New York, will be considered a nonresident for personal income tax purposes.[12] In other words, taxpayers can combine multiple 548-day periods, consecutive or nonconsecutive, to avoid taxation as a resident if they can meet all of the elements of the rule for each period of 548 days.

What's the point of the short period?

Basically, if you run enough scenarios, you'll see that taxpayers often fail the short-period test because their New York days are bunched up at the beginning or end of the 548-day period. So it's easy enough to figure out when, in general, the short-period test will be violated. Taxpayers have to be careful not to bunch up the New York days during the short period that is used.

Developing a matrix

What we've done for many clients is develop a matrix illustrating days allowed in and out depending on when the 548-day period begins and ends. This type of pre-planning is critical, because unlike other "day count" tests (such as the 183-day rule for statutory residency), the number of days allowed isn't always easily understood, especially when dealing with short periods and shifting 548-day periods (more on those below). It also ensures that, at some point, a client will say to his child: "Sorry little Jimmy, I know you want to go home and see Grammy for Christmas, but the guy from Noonan's Notes said we can't spend any more days in New York."

Filing issues

So let's say you have a client who has been abroad since January 1, 2010, and you have counseled him about the number of days he can spend in various locations to ensure he meets the 548-day rule for any period in 2010. At this point, however, since the earliest period beginning in 2010 won't end until July 1, 2011, how do you advise your client to file when he's required to file his 2010 return on April 18, 2011? Well, you likely advise your client to file an extension, using Form IT-370.[13] That will grant your client an automatic six-month extension of time to

[7]*See* 20 NYCRR section 105.20(c).

[8]*See* Nonresident Audit Guidelines, p. 55 (Mar. 31, 2009). The guidelines, of course, presume that all auditors are capable of exercising the degree of common sense necessary to use this rule.

[9]For instance, if a taxpayer, who is spending time in Connecticut, comes into the city of New York to catch a flight to Paris, he will not be deemed to have spent a day in New York even though he was physically present.

[10]For instance, if the taxpayer is flying from London to Tulsa, Okla., his layover in New York at JFK Airport will not count as a day spent because he meets the continuing travel exception.

[11]*See Matter of Taylor* (ALJ, July 8, 2010) for an example of a taxpayer who spent a number of years abroad but was still considered a New York domiciliary.

[12]*See* Nonresident Audit Guidelines, p. 43 (Mar. 31, 2009).

[13]*See* TSB-M-05(7)I for more information.

file. So the taxpayer will realistically have from July 1, 2011, when the short period ends, until October 18, 2011, to calculate the ratio and determine filing status. And what about paying in estimates? That one is a little less clear. Depending on how many New York days the client has already accrued in the 2011 short period, it is likely that you would advise your client to pay the estimated tax as though he or she was a resident when filing for the extension. Then, when the client files a return in October, assuming he or she did in fact meet the 548-day test, a refund can be requested. There may be cases (that is, a client who accrues only a handful of days in the short period before the filing deadline) in which it is safer to file as a nonresident under the assumption that the 548-day test will be met. However, if unforeseen circumstances cause the taxpayer to gain enough New York days between April 18 and July 1 that he or she fails the short-period test, the taxpayer may face penalties and interest on top of the resident tax he now owes. In other words, most times, it's better to be safe than sorry.

Shifting short periods

We've saved the real goods for last. One of the major, somewhat hidden, benefits of the 548-day rule is that the 548-day period can be moved, shifted, rearranged, and so on. So long as the taxpayer meets the requirements of the 548-day rule for any 548-day period, the taxpayer can avoid resident taxation for that period of time. For example, we once had an auditor questioning whether our client met the 548-day rule for the period October 1, 2005, through April 1, 2007. The audit period covered the 2006 tax year. It was a confusing calculation because of multiple short periods, and it turned out that we failed the second short-period test because the taxpayer was allowed to spend only 18 days in New York between January 1, 2007, and April 1, 2007. He had spent 19 days in New York during that time. Never fear, though. All we had to do was shift the period one month forward (so covering the period from November 1, 2005, to May 1, 2007) and we were fine. The requisite number of days jumped to 20, and since our client didn't spend any days in New York in April 2007, he met the test for the period in question and therefore didn't qualify as a resident for any portion of the 2006 tax year.

Conclusion

It happens often that New York residents, for reasons personal or professional, decide to live abroad. And in many cases, it's hard for them to prove, by clear and convincing evidence, that their domicile shifted overseas as well. But the 548-day rule swoops in to help some of those taxpayers. And although the tax benefits of this rule come only in 548-day packages, the rule's effect can still be significant. So watch out for it, and make sure, as always, that your clients are watching their days and documenting their day counts. ✰

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