

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

TSB-A-12(5)I
Income Tax
September 27, 2012

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I111025C

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner asks whether his children will be considered minors for purposes of computing the 548-day rule under the Tax Law described below. We conclude that a child will be considered a minor for purposes of computing the 548-day rule until the child is eighteen years of age.

Facts

Petitioner is a United States citizen domiciled in New York. Petitioner plans to work overseas for several years. He and his wife will be considered part-year residents of New York in 2011, and non-residents in 2012, if they spend 450 days in a foreign country during a 548-day period and spend 90 days (or part days) or less in New York State during this 548-day period. Petitioner asks whether his children will be considered “minors” for the purpose of Tax Law § 605(b)(1)(A)(ii).

Analysis

Tax Law § 605(b)(1) provides the definitions of a resident, nonresident and part-year resident for purposes of taxation. Generally, an individual will be taxed as a resident if they are either: 1) domiciled in New York, or 2) meet the statutory residence test. Tax Law § 605(b)(1) and 20 NYCRR § 105.20(b)(2). However, the Tax Law contains exceptions where a domiciliary will not be treated as a resident for New York state income tax purposes.

One exception, known as the 548-day rule, provides that a domiciliary will not be treated as a resident for New York personal income tax purposes upon meeting three separate requirements. The requirements are (1) the taxpayer is in a foreign country for at least 450 days during any period of 548 consecutive days; (2) during the 548-day period the taxpayer, the taxpayer’s spouse (unless the taxpayer is legally separated) and the taxpayer’s minor children are not present in the State for more than ninety days; and 3) during the nonresident portion of the taxable year in which the 548-day period begins, and during the nonresident portion of the taxable year in which the 548-day period ends, the taxpayer is present in New York State for no more than the number of days which bears the same ratio to 90 as the number of days in such portion of the taxable year bears to 548. Tax Law § 605(b)(1)(A)(ii).

In the opinion request you asked how the term “minor” is defined for purposes of calculating requirement 2 of the 548-day rule exception above. The term “minor” is defined as a person who has not attained the age of eighteen years. Tax Law § 2(4). Therefore, for purposes

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of determining whether Petitioner's children are present in the State more than 90 days during the 548-day limitation period referred to above, each day that Petitioner's children are present in New York and under the age of 18 during this 548-day time period will be counted.

DATED: September 27, 2012

/S/

DEBORAH R. LIEBMAN

Deputy Counsel

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.