

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-01(4)I
Income Tax
July 31, 2001

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I010131A

On January 31, 2001, a Petition for Advisory Opinion was received from Michael Dodman, Department of State, 5010 Warsaw Place, Washington, D.C., 20521-5010.

The issue raised by Petitioner, Michael Dodman, is whether he is taxable as a resident of New York State during a period of study in New Jersey in 1998-1999, which fell between two extended overseas assignments when he was treated as a nonresident of New York State pursuant to the 548 day rule under section 605(b)(1)(A)(ii) of the Tax Law.

Petitioner submits the following facts as the basis for this Advisory Opinion.

Petitioner is domiciled in New York State where he was born and raised. He has not lived in New York State since 1980, although he, his wife and children visit family in Buffalo and the New York City area nearly every year. The longest period he has been in New York State in any calendar year since 1984 is three weeks. Petitioner does not own or maintain any property in New York State and he does not earn any income from New York State sources. Petitioner's permanent address is the home of his parents at 80 Thomas Jefferson Lane, Snyder, New York 14226.

Petitioner is a Foreign Service Officer employed by the United States Department of State. The nature of his work is such that he and his family live overseas for extended periods of time. Petitioner does not own a permanent place of abode. When posted overseas Petitioner resides in government owned quarters. During periods of assignment in the United States, he has either rented or purchased a home for a temporary period. Petitioner currently does not own any real estate.

Petitioner and his family returned to the United States in 1990 following his service at the United States Embassy in Poland. Petitioner's 1990 assignment to the State Department in Washington, D.C. was not fixed. From mid-1990 through mid-1994, he resided and maintained a home in Arlington, Virginia, which was his permanent place of abode for the period. Petitioner paid resident taxes in Virginia throughout this period. Petitioner owned a home in Arlington, Virginia from 1991-1999 in which he lived from 1991-94 and rented it out the remaining years.

From mid-1994 through mid-1998, during the period of his assignment to the United States Embassy in Ankara, Turkey, Petitioner states that he was treated as a nonresident of New York State based on the 548-day rule under section 605(b)(1)(A)(ii) of the Tax Law. Petitioner used the following 548 day periods for such determination:

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- (1) July 30, 1994 through January 20, 1996 – 527 out of 548 days overseas with travel to the United States August 7, 1995 to August 27, 1995, including 10 days in New York State.¹
- (2) January 1, 1996 through July 1, 1997 – 516 out of 548 days overseas with travel to the United States July 29, 1996 to August 30, 1996, including 13 days in New York State.
- (3) March 24, 1997 though September 22, 1998 – 450 out of 548 days overseas with travel to the United States December 14, 1997 to January 2, 1998, and July 6, 1998 to September 22, 1998, including 10 days in New York State in 1997, and 19 days in New York State in 1998. (The number of days in New York during 1998 does not exceed the maximum number of days allowed under the 548 day rule.)

Petitioner returned to the United States from this assignment on July 6, 1998. Petitioner states that the last day of his final 548 day period related to this assignment was September 22, 1998. When he returned to the United States, his travel orders actually listed two assignments, first to Princeton, New Jersey for the purpose of participating in a 10 month Masters degree program at Princeton University, then to Warsaw, Poland in the summer of 1999 for a three year tour via a temporary assignment in Washington, D.C. for training tied to the Poland assignment. The State Department paid for the degree program, and Petitioner continued to receive his United States government salary during this period. Although his official duty state during this period was Washington, D.C., Petitioner and his family maintained a home and resided in Princeton, New Jersey from August 1998 to May 1999. Petitioner was not considered a New Jersey resident during this period because he was in New Jersey for a limited period with a particular purpose, and he did not reside in New Jersey more than 183 days in either 1998 or 1999.

From June 1999 until August 16, 1999, Petitioner was on temporary assignment in Washington, D. C. for training with respect to the Warsaw, Poland assignment. On August 16, 1999, Petitioner and his family departed for his current assignment in Warsaw, Poland. This assignment had been made prior to his leaving Turkey, so that the nature and length of his time in the United States was clearly defined before actually returning to the United States. Petitioner's assignment to Poland is for three years. Petitioner states that his first 548-day period related to this assignment began May 27, 1999.

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We note that the dates provided by Petitioner equal a period of 540 days rather than 548 days. Presumably, the closing date for this period should be January 28, 1996. However, the determination of whether Petitioner was a resident for such period is not at issue in this Advisory Opinion.

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It is assumed for purposes of this Advisory Opinion that Petitioner qualified as a nonresident under section 605(b)(1)(A)(ii) of the Tax Law for the period July 30, 1994 through September 22, 1998, and for the 548 day period beginning May 27, 1999.

Discussion

Section 605(b)(1)(A) of the Tax Law provides that a resident individual means an individual:

who is domiciled in this state, unless (i) he maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the of the taxable year in this state, or (ii) (I) within any period of five hundred forty-eight consecutive days he is present in a foreign country or countries for at least four hundred fifty days, and (II) during such period of five hundred forty-eight consecutive days he is not present in this state for more than ninety days and does not maintain a permanent place of abode in this state at which his spouse (unless such spouse is legally separated) or minor children are present for more than ninety days, and (III) during the nonresident portion of the taxable year with or within which such period of five hundred forty-eight consecutive days begins and the nonresident portion of the taxable year with or within which such period ends, he is present in this state for a number of days which does not exceed an amount which bears the same ratio to ninety as the number of days contained in such portion of the taxable year bears to five hundred forty-eight

Section 105.20(b) of the Personal Income Tax Regulations ("Regulations") provides, in part, that as long as an individual who is domiciled in New York State continues to meet the requirements of either section 605(b)(1)(A)(i) or (ii) of the Tax Law, such individual will be considered a nonresident of New York State for personal income tax purposes. However, where such individual fails to meet those conditions, such individual will be subject to New York State personal income tax as a resident. Where an individual domiciled in New York State claims to be a nonresident for any taxable year (or portion thereof), the burden is upon such individual to show that such individual satisfied the requirements set forth in section 605(b)(1)(A)(i) or (ii) of the Tax Law.

Section 105.20(e)(1) of the Regulations defines a "permanent place of abode" as a dwelling place permanently maintained by the taxpayer, whether or not owned by the taxpayer. However, a place of abode, whether in New York State or elsewhere, is not deemed permanent if it is maintained only during a temporary stay for the accomplishment of a particular purpose.

In this case, it is assumed that Petitioner met the conditions of section 605(b)(1)(A)(ii) of the Tax Law with respect to the 548 day rule for an individual present in a foreign country for the period July 30, 1994 through September 22, 1998. Therefore, for purposes of this advisory opinion it is assumed that Petitioner was a nonresident of New York State for the period July 30, 1994 through

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September 22, 1998. It is also assumed that Petitioner met the conditions of such section for the 548 day period beginning on May 27, 1999.

With respect to the period at issue, September 23, 1998 through May 26, 1999, Petitioner was not present in a foreign country and did not meet the requirements of section 605(b)(1)(A)(ii) of the Tax Law to be treated as a nonresident of New York State pursuant to the 548 day rule.

Petitioner also did not meet the three requirements of section 605(b)(1)(A)(i) of the Tax Law for the taxable period September 23, 1998 through December 31, 1998 or for the taxable period January 1, 1999 through May 26, 1999. Petitioner did not have a permanent place of abode in New York State during such periods. However, Petitioner did not maintain a permanent place of abode outside of New York State during such periods. Petitioner's abode in New Jersey from August 1998 to May 1999 was not considered a permanent place of abode because Petitioner was on a temporary assignment for a particular purpose. Likewise, Petitioner's assignment in Washington, D. C. from June 1999 to August 1999, was a temporary assignment for a particular purpose. Therefore, for the portion of 1998 and 1999 at issue, when Petitioner was not considered a nonresident of New York State pursuant to the 548 day rule under section 605(1)(A)(ii) of the Tax Law, Petitioner did not meet the condition of section 605(b)(1)(A)(i) of the Tax Law, described in section 105.20(e) of the Regulations, that he maintain a permanent place of abode outside of New York State.

Accordingly, for the taxable periods September 23, 1998, through December 31, 1998 and January 1, 1999 through May 26, 1999, the portion of 1998 and 1999 that Petitioner was not considered a nonresident of New York State pursuant to the 548 day rule under section 605(b)(1)(A)(ii) of the Tax Law, Petitioner was a part-year resident of New York State pursuant to section 605(b)(1)(A) of the Tax Law.

DATED: July 31, 2001

/s/
Jonathan Pessen
Tax Regulations Specialist III
Technical Services Division

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.