

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-90 (11) I
Income Tax
August 21, 1990

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. 1900522A

On May 22, 1990, a Petition for Advisory Opinion was received from MAJ Stephen E. Charkow, VII Corps Liaison Officer, 12 (GE) Panzer Division, APO New York 09036.

The issue raised by Petitioner, MAJ Stephen E. Charkow, is whether he would be considered a nonresident of New York State for calendar year 1991, the year during which he retires from active duty with the United States Army.

Petitioner, a domiciliary of New York State, is in the United States Army and is stationed in Germany. Petitioner plans to retire from active duty at the end of October 1991. After retirement, Petitioner will return to New York State. Petitioner states that he knows he will meet the first and second requirements of the 548 day rule set forth in Section 605(b)(1)(ii) of the Tax Law, but is not sure how to calculate the third requirement of said section.

Section 605(b)(1) of the Tax Law states:

- (b) Resident, nonresident, and part-year resident defined.
- (1) Resident individual. A resident individual means an individual:
- (A) 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 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 any period of less than twelve months, which would be treated as a separate taxable period pursuant to section six hundred fifty-four, and which period is contained within such period of five hundred forty-eight consecutive days, 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 period of less than twelve months bears to five hundred forty-eight, or
 - (B) who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eight-three days of the taxable year in this state, unless such individual is in active service in the armed forces of the United States.

Section 102.2(b) of the Personal Income Tax Regulations (hereinafter Regulations) provides that:

Any person domiciled in New York State is a resident for income tax purposes for a specific taxable year, unless for that year he satisfies all three of the requirements in paragraph (1) or all three requirements in paragraph (2) of this subdivision:

(1) For a specific taxable year all three of the following requirements are met:

(i) he maintains no permanent place of abode inside New York State during such year;

(ii) he maintains a permanent place of abode outside this State during such entire year; and

(iii) he spends in the aggregate not more than 30 days of the taxable year in this State; or

(2) For a specific taxable year beginning after December 31, 1977, all three of the following requirements are met:

(i) within any period of 548 consecutive days he is present in a foreign country or countries for at least 450 days;

(ii) during such period of 548 consecutive days he is not present in New York State for more than 90 days, 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 90 days; and

(iii) during any period of less than 12 months, which would be treated as a separate taxable period pursuant to Part 148 of this Subchapter, and which is contained within such period of 548 consecutive days, he is present in New York State for a number of days which does not exceed an amount which bears the same ratio to 90 as the number of days contained in such period of less than 12 months bears to 548.

As long as an individual who is domiciled in New York State continues to meet the requirements of either paragraph (1) or paragraph (2) of this subdivision, he will be considered a nonresident of New York State for income tax purposes. However, if for any taxable year he fails to meet those conditions, he will be subject to New York State personal income tax as a resident for that year. Where an individual domiciled in New York State claims to be a nonresident for any taxable year, the burden is upon him to show that during that year he satisfied the requirements set forth in paragraph (1) or paragraph (2) of this subdivision.

Example: B, a single individual, is domiciled New York State. During the period July 1, 1978 through December 30, 1979 (a period of 548

Petitioner would be a resident of New York State. Thereafter, he will be considered a resident of New York State unless he meets the requirements of section 102.2(b)(1) or (2) of the Regulations.

The following is the computation of the number of days allowed in New York State during the period January 1, 1991 through October 31, 1991:

(1/1/91 - 10/31/91)	304 days	
	<u>548 days</u>	x 90 days = 50 days allowed during 1991

However, if Petitioner's period of 548 consecutive days is from July 2, 1990 through December 31, 1991, and Petitioner was a nonresident of New York State for the period January 1, 1990 through July 1, 1990, the period July 2, 1990 through December 31, 1990 would not be a separate taxable period pursuant to Part 148 of the Regulations and the third requirement of the 548 day rule (section 102.2(b)(£)(iii) of the Regulations) would not apply. Therefore Petitioner would be a nonresident for the entire year of 1991.

It should be noted that Petitioner cannot be present in New York State more than 90 days during the entire 548 day period (July 2, 1990 - December 31, 1991.) If Petitioner meets the other requirements, that is, if he spends 450 days of the 548 day period in a foreign country and, if applicable, Petitioner does not maintain a permanent place of abode in New York State at which Petitioner's wife or minor children are present more than 90 days, Petitioner will be considered a nonresident for the period January 1, 1990 through December 31, 1991. Thereafter, he will be considered a resident of New York State unless he meets the requirements of section 102.2(b)(1) or (2) of the Regulations.

It should be further noted that days spent vacationing in Europe by Petitioner at the end of his active duty commitment would be considered as days present in a foreign country for purposes of the 548 day rule.

In any administrative proceeding the burden would be on the Petitioner to prove the number of days he was present in a foreign country for the purposes of the 548 day rule. It would be up to the trier of fact in the administrative proceeding to determine whether Petitioner has met his burden of proof. Such factual questions cannot be decided in an advisory opinion. However hotel and motel receipts, airline ticket receipts, and military orders would be the type of proof that would be relevant at such a hearing.

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If Petitioner is required to file Form IT-203 Nonresident and Part Year Resident Income Tax Return, Petitioner should submit a statement with such return explaining how Petitioner meets the requirements of the 548 day rule (section 102.2(b)(2) of the Regulations).

DATED: August 21, 1990

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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