STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JAY G. AND DOROTHY A. LANGLAN	:	DECISION DTA No. 813120
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1991.	:	

Petitioners Jay G. and Dorothy A. Langlan, 216 Millard Avenue, West Babylon, New York 11704, filed an exception to the determination of the Administrative Law Judge issued on February 1, 1996. Petitioners appeared by E. Parker Brown, II, Esq. and Blaustein & Weinick (Gary S. Weinick, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Laura J. Witkowski, Esq., of counsel).

Petitioners filed a brief in support of their exception and a reply brief. The Division of Taxation filed a brief in opposition. Oral argument at petitioners' request was heard on March 6, 1997.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether Long Island Railroad Company pension benefits received in the year 1991 by petitioner Jay G. Langlan as a retired employee of the Long Island Railroad constituted an allowable subtraction from Federal adjusted gross income pursuant to Tax Law § 612(c)(3)(i).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

On or about March 7, 1992, Jay and Dorothy Langlan filed their 1991 personal income tax return.[1] Petitioner filed: Form IT-201; a single page "FORM IT-201 --STATEMENTS"; five wage and tax statements (Forms W-2, Form RRB-1099-R and Forms 1099-R), as well as a sick pay statement issued by the U.S. Railroad Retirement Board, Bureau of Unemployment and Sickness Insurance, in the name of Jay Langlan. On this return, petitioner reported New York adjusted gross income of $18,070.00 and claimed a New York subtraction of $71,677.00 on line 28.[2] Petitioner also claimed a refund of $4,489.00.

In the later part of 1992, petitioner's 1991 Form IT-201 was selected for desk audit by the Division of Taxation ("Division").

On December 3, 1992, a Statement of Proposed Audit Changes ("statement") (L-006773647-9) was issued to petitioner for personal income taxes for tax year 1991. The proposed additional total amount due was $499.20. The "Computation Section" contained the following:

> "Please refer to the attachment sheet for a further explanation of this liability.
>
> "Interest is due for late payment or underpayment at the applicable rate. Interest is mandatory under the New York State Tax Law.
>
> "TAX PERIOD ENDED DATE: 12/31/91
> TAX YEAR: 1991 FILE DUE DATE: 04/15/92 DATE RECEIVED: TIMELY
> FILING STATUS: 02
>
> Tax Per Taxpayer: 41.00
> Tax Per Dept of Tax & Finance: 5,008.32
> Timely Payments/Credits: 4,530.00
> Late Payments: 0.00
> Amount Previously Assessed/Refunded: 0.00

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[1]Dorothy Langlan is listed as a petitioner along with her husband Jay Langlan because they filed a joint return. However, Mr. Langlan is being referred to as "petitioner" herein since the issues relate to certain payments received by Mr. Langlan.

[2]The Line 28 -- OTHER SUBTRACTIONS was comprised of the following: Railroad Retirement Unemployment $1,240.00; Railroad Retirement $17,253.00; and State Pension S-2 $53,184.00.

BALANCE: 478.32

Tax Amount assessed:	478.32
Interest Amount Assessed:	20.88
Penalty Amount Assessed:	0.00
Assessment Payments/Credits:	0.00
Current Balance Due:	499.20"

The referenced attachment sheet contained the following:

"Pensions received by retired employees of the Long Island Railroad Co., like employees of the Manhattan and Bronx Surface Transit Operating Authority (MARSTOA) [sic], are subject to NYS tax. These are public benefit subsidiary corporations of the Metropolitan Transportation Authority (MTA) but they are not members of the State or Municipal Retirement System. The pensions however qualify for the Section 612(c) 3-2 exclusion of up to $20,000.00, but since you were not 59 1/2 years old at the time, you are not allowed the deduction.

"We have recomputed your tax as follows:

NY income per your return	$18,070.00	
Adjustment	71,677.00	
NY income adjusted	89,747.00	
Less itemized deductions	16,035.00	
Balance	73,712.00	
Less exemptions	1,000.00	
NY taxable income	72,712.00	
NYS tax on above	$ 5,008.32	
Tax withheld	4,530.00	
PERSONAL INCOME TAX DUE		478.32"

On January 12, 1993, the Division issued a Notice of Deficiency (L-006773647-9) asserting personal income taxes due under Article 22 of $478.32, plus interest of $24.17.

Petitioners timely requested a conciliation conference.

In response to petitioners' protest of their refund denial and the issuance of the Notice of Deficiency, a conciliation conference was held on March 16, 1994. Petitioners appeared by Gary S. Weinick, Esq. The Division was represented by Donald Bullett, Tax Technician.

Pursuant to the Bureau of Conciliation and Mediation Services ("BCMS") conference, a Conciliation Order (CMS No. 129339), dated May 13, 1994 was issued to petitioners, Jay G. and Dorothy A. Langlan, with the following recomputation of the statutory notice:

Deficiency	$977.00 (Refund)
Penalty	N/A
Interest	N/A

In its submissions, the Division filed the affidavit of Donald Bullett, with an attached computation sheet.

Donald J. Bullett is a Tax Technician II in the Central Office Audit Bureau of the Division and has held this position for approximately 25 years. Mr. Bullett's duties include, ***inter alia***: (a) analyzing petitions filed in protest of actions taken by the Division; (b) "determining the correct tax liability and attempting to resolve cases either by re-audit action or by advocating the matter" before BCMS; and (c) "completing the appropriate advocate forms detailing the events of the conciliation conference" and the Division's conference position. As noted above, Mr. Bullett represented the Division at the BCMS conference held in this matter.

Mr. Bullett's affidavit briefly outlines the procedural history of the instant matter, as well as setting forth the basis for the conciliation conferee's recomputation and the subsequent actions of the Division.

In his affidavit, Mr. Bullett stated that the conferee's recomputation of the statutory notice, which was agreed to by the Audit Division, was based upon petitioners' ability to prove that a portion of the income listed on line 28 of the IT-201 qualified as exempt income. The exempt income was identified as the "RR UNEMPLOYMENT" and "RR RETIREMENT" income totalling $18,493.00. According to Mr. Bullett, "the $53,184 in Long Island Railroad Company pension benefits received by the petitioner were still not considered to be an allowable subtraction from New York State adjusted gross income."

Attached to Mr. Bullett's affidavit is a copy of the computation sheet which contained the revised calculation of tax upon which the conferee based his recomputation of the statutory notice, the refund of $977.00. This computation sheet contains the following calculations:

"Total NY income	18070.00
	53184.00
	71254.00
item ded	16035.00
	1000.00
	54219.00
NY Tax	3553.00
NY Tax W/H	4530.00

overpayment 977.00"

The statement "[C]ancel L006773647 in full" appears at the bottom of the computation sheet.

The Bullett affidavit affirms that, as a result of the Audit Division's post conciliation conference modifications, the Division cancelled the Notice of Deficiency and issued a refund check to petitioners on October 28, 1994 in the amount of approximately $1,143.00 (tax plus interest).[3]

Petitioner timely filed a petition, dated July 27, 1994, which seeks a redetermination of a deficiency and a refund of personal income taxes for 1991. Petitioner is contesting the disallowed refund of $4,489.00.[4]

The petition contained the following "Allegations of Error":

> "1) The Commissioner of Taxation and Finance erroneously disallowed the taxpayers 'New York Subtractions' from Federal adjusted gross income in the amount of $71,677. The Commissioner erroneously disallowed the exclusion from tax of pension payments received by the taxpayer, JAY G. LANGLAN, as a retired employee of the Long Island Railroad.
>
> "2) The Commissioner of Taxation and Finance erroneously increased the taxpayers' New York adjusted gross income in the amount of $71,677.
>
> "3) The Commissioner of Taxation and Finance erroneously determined that pension amounts received by the taxpayer, JAY G. LANGLAN, as a retired employee of the Long Island Railroad are subject to New York taxation."

Petitioner asserts that he properly subtracted from Federal adjusted gross income, in arriving at New York adjusted gross income, pension amounts paid to him as a retired employee of the Long Island Railroad. He argues that, as a former employee of the Long Island Railroad, he "qualifies as a former employee of the State of New York, its subdivisions and its agencies" and therefore is entitled to exclude from New York adjusted gross income, pursuant to Tax Law § 612(c)(3)(i), pension amounts paid to him by the Long Island Railroad.

The Division served its answer, dated November 21, 1994, on petitioner.

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[3]The record is silent as to the date the Division cancelled the notice.

[4]It appears that the petition in this matter was filed prior to the cancellation of the notice of deficiency and the refund of $977.00 in tax plus interest.

In accordance with State Administrative Procedure Act § 307(1), petitioner's proposed finding of fact has been accepted and substantially incorporated herein.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge took note of the rule that statutory exemptions are strictly construed against the taxpayer and that it must be demonstrated that his interpretation of the provision is the only reasonable one to gain entitlement (***citing Matter of Grace v. New York State Tax Commn.***, 37 NY2d 193, 371 NYS2d 715, ***lv denied*** 37 NY2d 708, 375 NYS2d 1027). The Administrative Law Judge determined that petitioner was a former "public employee" as a former employee of a subsidiary public benefit corporation of the Metropolitan Transit Authority (Public Authorities Law § 1265[9][a]). However, citing Public Authorities Law § 1265(9)(b), the Administrative Law Judge concluded that there was no evidence that the Long Island Railroad had ever chosen to become a "participating employer" within the New York State employees' retirement system with respect to one or more classes of their respective officers or employees and, therefore, the benefits received by petitioner were not paid out of a "New York State or municipal retirement system plan" and exempt from taxation under Tax Law § 612(c)(3)(i). The Administrative Law Judge rejected petitioner's argument that he was entitled to an exemption for the pension income from a concededly private plan based solely on the fact that he was a former New York State public employee and, as such, the New York Constitution, Article XVI, § 5 intended to exclude his pension as one paid to a former employee of the State. Relying on the constitutional provisions of Article V, § 7 and Article XVI, § 5, the Administrative Law Judge found that all compensation paid by the State is taxable, but benefits obtained from membership in any pension or retirement system of the State or a subdivision thereof were exempt. The Administrative Law Judge said it was clear from these two constitutional sections and the record from the 1967 Constitutional Convention Proceedings that the Legislature intended to protect only those benefits paid from the funds of the State or a municipality so as not to tax its own funds. The Administrative Law Judge reasoned that since the Long Island Railroad was a private plan, its benefits were not meant to be protected.

The Administrative Law Judge also rejected petitioner's contention that taxing his benefits was unconstitutional because it violated his equal protection rights by discriminating between employees of the State based upon who funded their pensions. She found the contention to be a facial challenge to the constitutionality of Tax Law § 612(c)(3)(i) and, as such, beyond the jurisdiction of the Tax Appeals Tribunal (***citing Matter of Fourth Day Enters.***, Tax Appeals Tribunal, October 27, 1988).

ARGUMENTS ON EXCEPTION

Petitioner argues that Tax Law § 612(c)(3)(i) is not ambiguous and should be applied as written without resort to extrinsic materials, especially in light of the fact that neither the Division nor the Administrative Law Judge cited any ambiguity in the statute. Petitioner contends that silence of the statute with regard to the source of the pension benefits and ambiguity are two separate issues which have been confused by the Administrative Law Judge.

Petitioner urges that the construction placed upon the statute by the Administrative Law Judge was unconvincing in that it relied upon provisions of the New York Constitution which petitioner believes are not supportive of the Division's claim that Tax Law § 612(c)(3)(i) intended that the pension benefits to be subtracted from Federal income must have been paid by the State or its subdivisions or agencies. Petitioner also rejects the Administrative Law Judge's and Division's reliance on the record of proceedings from the Constitutional Convention of 1967, which petitioner points out "proposed the very 'paid by' language" the Division and the Administrative Law Judge wish to read into Tax Law § 612(c)(3)(i), but which was defeated at the polls. Petitioner dismisses as "conjecture" the Administrative Law Judge's belief that the rationale for Article XVI, § 5 was that the State should not be taxing its own moneys. Petitioner notes that Article XVI deals with taxation and Article V deals with officers and civil departments, the latter of which was never meant to modify a provision in the taxation article.

Petitioner also contends that the statute in issue does not provide an exemption or a deduction; rather, it is part of the definition of "income" subject to tax. As such, the statute must be construed most strongly against the Division. Citing ***Matter of Grace v. New York***

State Tax Commn. (***supra***), petitioner argues that the Division effectively defeated the tax when it read words of limitation into the statute which do not appear therein. Further, there is no reason to defer to the interpretation of the Division in this matter because the statute does not involve knowledge and understanding of underlying operational practices or an evaluation of factual data and inferences to be drawn therefrom and it is a question of straight statutory reading.

Petitioner believes that since the statute is clear, no constitutional issues need be reached. However, given the broad prohibition against taxing pensions in Constitution Article XVI, § 5, it would be unconstitutional to limit Tax Law § 612(c)(3)(i) with the "paid by" language proposed by the Division.

The Division responds by asserting that it has long been recognized that the statute in issue represents the codification of Constitution Article V, § 7 and Article XVI, § 5 which, when read together, clearly indicate an intent to not tax pensions "paid by" the retirement system of the State or civil division thereof. The Division argues that both sections deal with pensions and should be read together.

The Division contends that the regulation at 20 NYCRR former 116.3 required that the pension must be received by a former officer or employee of the State or one of its subdivisions or agencies and that the pension be paid by a State or municipal retirement system. The Division argues that the regulation was a reasonable interpretation of the law and should be given deference in a case like this, where there is an ambiguity in the language of the statute.

Ultimately, the Division argues that the codification of the Constitutional provisions, history of the legislation and several advisory opinions lead to the conclusion that its interpretation of the statute was correct. The Division acknowledges that there may be several valid interpretations of a statute and an administrative agency is free to choose any one of them, while a taxpayer who challenges the interpretation must show that another interpretation is both plausible and the only reasonable construction. The Division criticized petitioner's interpretation by the example of a State officer or employee who receives a pension from a

private employer unrelated to his State service. The Division contends that under petitioner's interpretation of the statute that pension could be subtracted from income as well.

The Division concedes that there are circumstances where regulations have been found inconsistent with the statutes under which they were promulgated (***Matter of McNulty v. New York State Tax Commn.***, 70 NY2d 788, 522 NYS2d 103), but argues that is not the case herein.

Petitioner replies that there is no ambiguity in Tax Law § 612(c)(3)(i) which necessitated an interpretation solely because the Division's "gloss" of the statute is not supported by the language of the statute. Petitioner criticizes the citation of advisory opinions to support the Division's interpretation, saying that it is like "quoting itself."

To the Division's argument that petitioner's literal reading of the statute would allow the subtraction of any pension, petitioner claims the Division is merely introducing a "red herring" because it has never suggested that the modification in issue applied to anything other than pensions of government employees attributable to government service and that the plain meaning of the statute would not permit such a construction.

OPINION

The New York adjusted gross income ("AGI") of a resident individual is his Federal AGI with certain modifications (Tax Law § 612[a]) including one reducing Federal AGI by subtracting pensions to officers and employees of the State, its subdivisions and agencies (Tax Law § 612[c][3][i]).

The parties have conceded that petitioner, a Long Island Railroad ("LIRR") employee, was a State employee for purposes of Tax Law § 612(c)(3)(i). The Administrative Law Judge concluded that inasmuch as petitioner was an employee of the LIRR, a public benefit corporation owned by the Metropolitan Transportation Authority, as established pursuant to Public Authorities Law § 1266, he was an employee of the State, its subdivisions and agencies.

However, that is where the litigants part company. In the Division's regulations in effect during the period in issue, 20 NYCRR former 116.3(c)(1) provided that the subtraction from AGI was limited to pensions paid to an officer or employee of New York State, its political

subdivisions or agencies and paid by a New York State or municipal retirement system. The resolution of this case is dependent on the validity of this second requirement of the regulation.

Petitioner argues that the pension modification in Tax Law § 612(c)(3)(i) is not an exemption, but it fits squarely within the definition of said term found in ***Black's Law Dictionary*** (Fifth Ed., 1979), which defines exemptions as various amounts subtracted from gross income to determine taxable income. Therefore, we agree with the Division that this provision must be read most strongly against petitioner, consistent with the rule of ***Matter of Grace v. New York State Tax Commn.*** (***supra***). With this burden in mind, we continue our analysis.

The plain language of the statute does not specifically restrict the modification to pensions paid by New York State or municipal retirement systems and, other than cases and advisory opinions which have applied the regulation, the provision of the statute, as applied to employees of the LIRR, has not been interpreted by any court. However, the clarity of the statute is muddied by the Division's regulation which provides for limitations not set forth in the statute. The resulting disparity is worthy of an analysis of the statute's history for direction in determining its meaning. Unfortunately, the legislative history of Tax Law § 612(c)(3)(i), added by the Laws of 1960, chapter 563, yields very little of the Legislature's intent. The Budget Report on Bills concerning the Senate bill containing the modification for pensions reducing the Federal income base merely restates the language in the statute. The Department of Taxation and Finance's Memorandum in Support to Governor Rockefeller is silent on the provision. The Governor's Approval Message, dated April 18, 1960, only stated that the law was approved to permit taxpayers to use Federal income tax figures as the basis for determining State income tax, consistent with the Wise-Calli amendment to the State Constitution, approved by the voters in 1959. The law was viewed as a simplification of the tax preparation process representing a substantial savings to the State.

As noted above, the parties hereto have argued the merits of the record of the Constitutional Convention Proceedings from 1967 and, to a lesser extent, discussed the

Constitutional Convention of 1938, which adopted the current language of Article XVI, § 5 sought to be changed by the 1967 Constitutional Convention.

The record of the proceedings from 1967, with respect to Article XVI, § 5 of the State Constitution, indicates that the focus, as gleaned through the comments of Senator Greenberg, was to eliminate the language concerning the taxation of salaries and wages of State employees (said to be unnecessary), but retained the exception for pensions. In questioning from other delegates, Senator Greenberg speculated as to the source of the pension income, implying that said funds had to be "hooked up with the State Retirement System" (2 NY Constitutional Convention Record, p. 480). These comments by Senator Greenberg were not related to the amendment being proposed and did not provide a basis for his assertion that purported to provide the intent of the drafters of the 1938 amendment and, as such, are accorded very little weight for the purposes of this decision. Further, even though Senator Greenberg indicated that employees of other "authorities" were eligible for the modification, the issue of such employees who belonged to non-State-funded retirement systems was never addressed.

In its attempt to explain its rationale for the provision of the regulation at 20 NYCRR former 116.3, which requires that the pension must be paid by a State or municipal retirement system, the Division contends that Tax Law § 612(c)(3)(i) was also a codification of Article V, § 7 of the State Constitution, which provides that membership in any pension or retirement system of the State shall be a contractual relationship, the benefits of which shall not be diminished or impaired. In fact, the Division has issued several advisory opinions which stated that both constitutional provisions were embodied in Tax Law § 612(c)(3)(i) (***see, Transport Workers Union of Greater New York***, TSB-A-86-[18]-I, December 9, 1986; ***Patrick J. Falco***, TSB-H-81-[14]-I, March 18, 1981; ***Wilbur W. Stillwagon***, TSB-H-81-[16]-I, March 18, 1981; ***Edward Yule, Jr.***, TSB-H-81-[15]-I, March 18, 1981). In addition, the former State Tax Commission in ***Matter of Noone***[5] (August 31, 1979) used the same rationale to dispose of a

[5]In Matter of The Racal Corp. & Decca Elecs. (Tax Appeals Tribunal, May 13, 1993) we stated: "As decisions of a body of coordinate jurisdiction, the State Tax Commission decisions are not binding precedent for us, but are entitled to respectful consideration (citation omitted)."

case where an employee of the Manhattan and Bronx Surface Transit Operation Authority was found not eligible for the pension modification because the pension was paid from current operating revenues and did not constitute a pension payable by a State or municipal retirement system. We cannot agree with this interpretation.

The statutory modification for pensions paid to State officers and employees is the codification of Article XVI, § 5 of the State Constitution which uses similar language. We see no such connection to Article V, § 7. The Division argues that Article V, § 7, when read in conjunction with Article XVI, § 5, reveals a legislative intent to protect only those pensions paid by a State or municipal retirement system. However, the purpose of Article V, § 7 was to insure that pension and retirement benefits would not be subject to unilateral action by the Legislature or the employer. The Court of Appeals stated in ***Ballentine v. Koch*** (89 NY2d 51, 651 NYS2d 362) that:

> "Article V, § 7 of the N.Y. Constitution protects as 'a contractual relationship' the benefits of membership in a public pension or retirement system against diminishment and impairment. The provision 'fix[es] the rights of the employees at the time of commencement of membership in [a pension or retirement] system, rather than as previously at retirement' (***Matter of Guzman v. New York City Employees' Retirement Sys***., 45 NY2d 186, 190-191, 408 NYS2d 59, 379 NE2d 1189, citing ***Birnbaum v. New York State Teachers Retirement Sys***., 5 NY2d 1, 9, 176 NYS2d 984, 152 NE2d 241), and thus prohibits unilateral action by either the employer or the Legislature that impairs or diminishes the rights established by the employee's membership (***Matter of Village of Fairport v. Newman***, 90 AD2d 293, 295, 457 NYS2d 145, ***appeal dismissed*** 58 NY2d 1112, 462 NYS2d 1030, 449 NE2d 747" (***Ballentine v. Koch, supra***, 651 NYS2d, at 364).

It would seem that this stated purpose of Article V, § 7 of the Constitution is not related to the provision in Tax Law § 612(c)(3)(i) for reducing AGI by subtracting pensions to State officials and employees and the Division has not addressed itself to the purpose set forth by the Court of Appeals in the ***Ballentine*** case. Article XVI, § 5 is not part of the contractual relationship between retirement system members and the State and the modification is not a subject for negotiation between the parties. The modification is not a benefit of membership in

a State retirement system and it is concluded that Article V, § 7 is unrelated to the constitutional or statutory provision for a modification to AGI, i.e., subtracting pensions to State officials and employees.

The Division argues that to accept such a literal reading of the statute would also require the definition of "pension" to be inclusive of any pension, not only pensions paid by State or municipal retirement systems. This contention is without merit when considered in light of our analysis of Tax Law § 612(c)(3)(i), which has been determined to be the codification of Article XVI, § 5 of the New York Constitution. As the language of that constitutional provision indicates, "[a]ll salaries, wages and other compensation, except pensions, paid to officers and employees of the state and its subdivisions and agencies shall be subject to taxation." The language itself leaves no doubt that the salaries, wages, compensation and pensions were those paid on account of services performed as public officers and public employees. To interpret it otherwise would lead to an absurd result. The Division's regulation at 20 NYCRR 112.3(c)(1) was amended in 1994 to provide that a pension payment would qualify for the subtraction modification if it relates to services performed as a public officer or public employee. Although not specifically applicable to the period in issue, the regulation does validate the consistent interpretation of which pensions were intended to be subject to the modification in Tax Law § 612(c)(3)(i).

We are cognizant of the fact that in reaching our decision in this matter we will be invalidating part of the Division's regulation at 20 NYCRR former 116.3(c)(1) insofar as it requires the benefits to be paid by a New York State or municipal retirement system. The Tax Law has bestowed that authority upon us (Tax Law § 2006[7]) and we have in the past exercised that authority with due respect and deference to the Division's rule-making authority (***see, Matter of Shorter***, Tax Appeals Tribunal, July 31, 1997). In general, regulations are upheld unless shown to be irrational and inconsistent with the statute (***Matter of Slattery Assocs. v. Tully***, 79 AD2d 761, 434 NYS2d 788, ***affd*** 54 NY2d 711, 442 NYS2d 978) or erroneous (***Matter of Koner v. Procaccino***, 39 NY2d 258, 383 NYS2d 295). Of course, the

interpretation of the agency charged with administering a statute is entitled to deference, but not where, as here, the issue is one of pure statutory construction (***Debevoise & Plimpton v. New York State Dept. of Taxation & Fin.***, 80 NY2d 657, 593 NYS2d 974; ***Kurcsics v. Merchants Mut. Ins. Co.***, 49 NY2d 451, 426 NYS2d 454). As discussed above, the Division is not empowered to "promulgate a regulation that adds a requirement that does not exist under the statute. '. . . Administrative agencies can only promulgate rules to further the implementation of the law as it exists; they have no authority to create a rule out of harmony with the statute'" (***Emunim v. Town of Fallsburg***, 78 NY2d 194, 573 NYS2d 43).

Since the language of Tax Law § 612(c)(3)(i) contains no language which qualifies or limits the word "pensions," we find that the Division's regulation is out of harmony with the statute by adding the requirement that the pensions be paid by a New York State or municipal retirement system.

". . . [T]he failure of the Legislature to include a matter within the scope of an act may be construed as an indication that its exclusion was intended" (McKinney's Cons Laws of NY, Book One, Statutes, § 74; ***Pajak v. Pajak***, 56 NY2d 394, 452 NYS2d 381). We believe the Legislature's failure in this instance was indicative of its intention to not limit the pension modification exemption to those paid by the State or municipal retirement systems. Further, in light of our decision above, we believe petitioner has established that his interpretation is the only plausible and reasonable one and that the Division's interpretation of the exemption's scope was clearly erroneous (***see, Matter of Moran Towing & Transp. Co. v. New York State*** Tax Commn., 72 NY2d 166, 531 NYS2d 885).

Based upon the foregoing discussion, it is concluded that the Division's regulation at 20 NYCRR former 116.3(c)(1) is invalid to the extent that it may be interpreted as precluding the exemption of pension income pursuant to Tax Law § 612(c)(3)(i) unless such benefits are paid from a New York State or municipal retirement system, since no such requirement exists under the statute. By reaching this conclusion, it is not necessary to address whether the LIRR was a

"participating employer" in the New York State employees retirement system pursuant to Public Authorities Law § 1265(9)(b).

Accordingly, it is ORDERED, ADJUDGED AND DECREED that:

1. The exception of Jay G. and Dorothy A. Langlan is granted;

2. The determination of the Administrative Law Judge is reversed;

3. The petition of Jay G. and Dorothy A. Langlan is granted; and

4. The Notice of Deficiency, dated January 12, 1993, is cancelled and petitioner's refund request is granted.

DATED: Troy, New York
September 4, 1997

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Donald C. DeWitt
President

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Carroll R. Jenkins
Commissioner

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Joseph W. Pinto, Jr.
Commissioner