STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
HENRY JACKSON	:	DECISION DTA No. 814472
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1991, 1992 and 1994.	:	

Petitioner Henry Jackson, 628 Bauer Court, Elmont, New York 11003-4313, filed an exception to the determination of the Administrative Law Judge issued on March 20, 1997. Petitioner appeared pro se. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Laura J. Witkowski, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a brief in opposition and petitioner filed a reply brief. Oral argument, at petitioner's request, was heard on September 11, 1997 in New York, New York.

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

ISSUE

Whether petitioner properly subtracted his Manhattan and Bronx Surface Transit Operating Authority pension income from his 1991, 1992 and 1994 Federal adjusted gross income pursuant to the subtraction modification provided in Tax Law § 612(c)(3)(i).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and make an additional finding of fact. The Administrative Law Judge's findings of fact and the additional finding of fact are set forth below.

At all times relevant herein, petitioner, Henry Jackson, was a retired employee of the Manhattan and Bronx Surface Transit Operating Authority ("MABSTOA") and received an

annual pension from the MABSTOA pension plan. There is no evidence in the record as to the source of funding of the MABSTOA pension plan. It is undisputed, however, that the MABSTOA pension plan was not contributed to by a New York State or municipal retirement system, and pension payments made pursuant thereto were not paid by a New York State or municipal retirement system.[1]

MABSTOA, a public benefit corporation, was created in 1962 as a subsidiary of the New York City Transit Authority ("NYCTA") to operate bus lines, formerly privately owned and operated, which had been acquired by the City of New York through condemnation proceedings (see, Public Authorities Law [PAL] § 1203-a). As originally enacted, the statute provided that MABSTOA was to operate the bus lines "for a temporary period" until such lines are "sold or otherwise disposed of" (PAL § 1203-a[2]). In 1981, the Legislature amended the statute to provide that MABSTOA "shall continue until terminated by law" (see, L 1981, ch 1038; PAL § 1203-a[11]).

The directors of MABSTOA are the chairman and members of the NYCTA (PAL § 1203-a[2]). Pursuant to PAL § 1201(1), the chairman and members of the NYCTA are also the chairman and members of the Metropolitan Transportation Authority. Such persons are appointed by the Governor with the advice and consent of the Senate (PAL § 1263[1][a]).

Petitioner timely filed a 1991 New York State Resident Income Tax Return (Form IT-201) on or about February 19, 1992. On his return, petitioner claimed a New York subtraction of $19,774.00 in respect of pension income paid to him in that amount during 1991 by the MABSTOA pension plan. In making such payments, the MABSTOA pension plan withheld State and local income taxes.

The Division of Taxation ("Division") reviewed petitioner's 1991 return pursuant to the audit program outlined below. By a Statement of Proposed Audit Changes dated July 18, 1994,

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[1]The source of funding and the administration of the MABSTOA pension plan has been described in a decision of the former State Tax Commission (***Matter of Noone***, State Tax Commission, August 31, 1979) and in two advisory opinions issued by the Division of Taxation (***Matter of Transit Supervisors Organization***, October 13, 1992 [TSB-A-92(9)I]; ***Matter of Transport Workers Union of Greater New York***, December 9, 1986 [TSB-A-86(18)I]).

the Division advised petitioner that his MABSTOA pension did not qualify for exemption from New York income tax "as a NY State, local or municipal pension". The Division increased petitioner's reported New York adjusted gross income by the amount of the claimed exempt pension benefits, thereby resulting in an additional tax liability of $1,555.00, plus interest, for the year 1991. On or about July 21, 1994 petitioner remitted payment in full of the amount asserted in the Statement of Proposed Audit Changes.

Petitioner timely filed his 1992 New York State Resident Income Tax Return on or about March 12, 1993. On his return, petitioner claimed a total New York subtraction of $21,293.00 for "U.S. Annuity; N.Y. Pension". Of this total, $19,774.00 represented pension income paid to petitioner by the MABSTOA pension plan. In making such payments, the MABSTOA pension plan withheld State and local income taxes.

The Division reviewed petitioner's 1992 return pursuant to the audit program outlined below and concluded that petitioner's MABSTOA pension benefits did not qualify for the claimed subtraction modification. By a Statement of Proposed Audit Changes dated June 1, 1995, the Division increased petitioner's reported New York adjusted gross income by the amount of the claimed exempt MABSTOA pension benefits, thereby resulting in an additional tax liability of $1,555.00, plus interest, for the year 1992. The Statement of Proposed Audit Changes stated that petitioner had been allowed a $20,000.00 pension exclusion pursuant to Tax Law § 612(c)(3-a), but the computations on the statement showed that no such allowance had been made.

On October 23, 1995, the Division issued to petitioner a Notice of Deficiency which asserted $1,555.00 in personal income tax due, plus interest, for the year 1992.

Petitioner timely filed his 1994 New York State Resident Income Tax Return on or about April 14, 1995. On line 28 of his return, petitioner identified but did not claim a New York State subtraction of $19,774.00 for "N.Y.S. Pension" in respect of MABSTOA pension benefits paid to him in that amount during that year. Petitioner's return also indicated an income tax liability of $632.00 for the year and petitioner remitted a check in that amount with the return.

Petitioner did not file a request for refund with respect to tax paid for either the 1991 or 1994 tax years. Petitioner claimed refunds for these years in the petition filed herein.

In 1992, the Division developed an audit program by which Division personnel were able to identify and manually review New York State income tax returns wherein taxpayers had subtracted their MABSTOA pension income from their Federal adjusted gross income. This program was developed in response to a 1992 request by the Office of the Comptroller to investigate the validity of such subtraction modifications. Upon investigation, the Division concluded that MABSTOA pensions did not qualify for the subtraction modification set forth in Tax Law § 612(c)(3)(i) and began to develop a computer program to identify tax returns in which MABSTOA pensioners had claimed the subtraction modification. In early 1993, Division personnel began to manually review tax returns for the year 1990 which had been selected by the program. (The year 1990 was the first for which the Division had the technological capability to conduct this program.) Beginning in August 1993, the Division issued the first of approximately 1,400 assessments for the tax year 1990. The Division subsequently applied the program to later tax years.

NYCTA is part of the New York City Employee Retirement System. Employees of NYCTA have civil service status (PAL § 1204[6]).

In 1994, a bill (S 6825/A 9671) was introduced in the Legislature to amend the Public Authorities Law to provide that, for purposes of Tax Law § 612(c)(3)(i), MABSTOA shall be deemed a subdivision of the State and its officers and employees shall, for the same purposes, be deemed officers and employees of a subdivision of the State. This bill was not enacted into law.

Petitioner did not claim that he qualified for the pension exclusion provided for in Tax Law § 612(c)(3-a) and presented no evidence that he had attained the age of 59½ at any time relevant herein.

We find the following additional finding of fact.

On July 27, 1997, the Governor signed into law a bill (S.5159-A/A.7678-A) which amended various sections of PAL, the Tax Law,

> the General City Law, the New York City Administrative Code and the Codes/Ordinance of the City of Yonkers specifically dealing with the status of MABSTOA employees (***see***, §§ 1-11, L 1997, ch 312). The undisputed purpose of the legislation was to include MABSTOA employees and officers in the Tax Law definition of officers and employees of the State or its political subdivisions whose pensions are subtracted from Federal adjusted gross income for the purpose of New York State income tax. This purpose was accomplished by amending sections 1203(3)(b) and 1215 of PAL to provide that employees of MABSTOA, for purposes of Article 22, § 612, subdivision (c)(3)(i) of the Tax Law, will be deemed to be employees of a subdivision of New York State, and that MABSTOA, for such purposes only, will be deemed to be a subdivision of the State, thus allowing MABSTOA pensioners to deduct their pensions from Federal gross income and, in turn, calculate their New York State income tax based on a reduced Federal gross income.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The determination below was decided on the issue of whether MABSTOA employees were employees of the State for purposes of the subtraction modification of Tax Law § 612(c)(3)(i) and the regulations promulgated thereunder. The Administrative Law Judge noted that PAL § 1203-a(1) governed the status of MABSTOA employees, saying they were not employees of the City of New York or the Transit Authority and could not acquire civil service status or become members of the New York City retirement system. However, the Administrative Law Judge also noted that PAL also provides that MABSTOA is a public benefit corporation (PBC) (PAL § 1203-a[2]) which has been treated as the State in certain circumstances, to wit: for purposes of the Worker's Compensation Law, the Vehicle and Traffic Law, the "Taylor Law" (Fair Employment Act), the State Environmental Quality Review Act and the Executive Law.

Having noted these instances where MABSTOA has been treated as the State or a political subdivision, the Administrative Law Judge then undertook a "particularized inquiry" to determine if this PBC should be treated like the State. The Administrative Law Judge looked to the nature of MABSTOA and the statute claimed to be applicable to it, citing ***Collins v. Manhattan & Bronx Surface Tr. Operating Auth***. (62 NY2d 361, 477 NYS2d 91), where the Court of Appeals held that MABSTOA was not a civil division of the State and that the Legislature did not violate the civil service provision of the State Constitution when it expressly

exempted MABSTOA from the requirements of the Civil Service Law. However, he noted that other PBCs had been treated like the State.

After noting that application of Tax Law § 612(c)(3)(i) to MABSTOA pension income would not interfere with the public purpose of MABSTOA, the Administrative Law Judge held that MABSTOA employees should not be considered employees of the State, its subdivisions or agencies because to do so would contravene the Legislature's express intent that MABSTOA employees and officers not become, for any purpose, employees of New York City or the Transit Authority, that MABSTOA be exempt from the requirements imposed by the Civil Service Law and that it could appoint its own officers and employees and assign powers and duties to them. The Administrative Law Judge reasoned that this meant MABSTOA's work was not controlled by the City and that the duties of MABSTOA's employees were more in the nature of a private company.

The Administrative Law Judge rejected petitioner's reliance on the advisory opinion ***Transport Workers Union of Greater New York***, (December 9, 1986 [TSB-A-86(18)I]), which conceded that MABSTOA employees were public employees, saying the opinion was fatally flawed due to a mistake of fact concerning the parent of MABSTOA. In addition, the Administrative Law Judge rejected petitioner's argument that the temporary nature of MABSTOA was a basis for granting its employees public officer status since the Legislature amended PAL § 1203-a(11) in 1984 to provide that MABSTOA was to exist until terminated by law.

Although not central to the determination, the Administrative Law Judge found that the MABSTOA pension did not meet the criterion that it be paid by a State or municipal retirement system (20 NYCRR former 116.3) or contributed to by the State (20 NYCRR 112.3).

In addition, the Administrative Law Judge held that the Division's action did not violate the Fourteenth Amendment of the United States Constitution as applied, since the differing treatment of pensions did not rise to a level of invidious discrimination required to overcome the presumption of constitutionality accorded taxing statutes. Further, petitioner's general claim

of violation of the New York State Constitution, presumably based on MABSTOA employees being considered employees of the State, was rejected given the Administrative Law Judge's determination above.

ARGUMENTS ON EXCEPTION

Petitioner argues on exception that the Administrative Law Judge erred in holding that employees and officers of MABSTOA are not public employees. Petitioner bases his opinion upon the genesis of the subsidiary PBC which, when read in conjunction with Senator Trunzo's Memorandum in Support of S.6825 (never signed into law), lends support to his belief that MABSTOA employees were always intended to be public employees, just as employees of the Transit Authority are public employees. Petitioner also argues that the Division's regulation at 20 NYCRR former 116.3(c)(1) setting forth the two requirements for pensions to qualify for the subtraction modification is prohibited by PAL § 1265(9)(a). Finally, petitioner maintains that MABSTOA is a "political" agency whose employees are treated "unjustly" by any interpretation of PAL § 1203-a which concludes that said employees are not employees of New York State, its political subdivisions or agencies.

The Division argues that Tax Law § 612(c)(3)(i) and the regulation at 20 NYCRR former 116.3 clearly require that the subtraction modification applies only to pensions payable from a State or municipal retirement system to former employees or officers of the State, its political subdivisions or agencies. The Division believes that petitioner has not met either requirement and that since petitioner is seeking an exemption, the provisions must be narrowly construed. The Division believes its regulation is a reasonable interpretation of the statute and the constitutional provisions from which it is derived.

The Division argued that the Advisory Opinion relied upon by petitioner is not persuasive because of the mistake in fact recited therein concerning the erroneous reference to MABSTOA as a subsidiary of the Metropolitan Transportation Authority and not the NYCTA (***Transport Workers Union of Greater New York, supra***). The Division believes that PAL §§ 1203-a and 1204 setting forth the enabling provisions and general powers of MABSTOA support its view

that MABSTOA employees are not employees of the State, its political subdivisions or agencies. Additionally, it contends that numerous court cases have held that MABSTOA is not a subdivision of the State and that one in particular, ***Collins v. Manhattan & Bronx Surface Tr. Operating Auth***. (***supra***), specifically states that just because MABSTOA employees are subject to the Taylor Law, does not infer that they are employees of the State.

The Division also cites the unsuccessful attempts by the Legislature to change the law in 1994, 1995 and 1996, and the statements in the Memorandum in Support by Senator Trunzo that MABSTOA never was a subdivision of New York State and that the Court of Appeals in the ***Collins*** case made this clear.

Finally, the Division argues that the pensions paid to MABSTOA employees were not payable from a State or municipal retirement system as required by its own regulation.

OPINION

Tax Law § 612(a) defines New York adjusted gross income as Federal adjusted gross income with modifications. This case involves whether petitioner qualifies for the modification specified in Tax Law § 612(c)(3)(i) for pensions paid to officers and employees of New York State, its subdivisions and agencies. Since we have already decided that the pension does not have to be paid from the State or a municipal retirement system (***see, Matter of Langlan***, Tax Appeals Tribunal, September 4, 1997), the only remaining issue for resolution is whether petitioner was an officer or employee of New York State, its subdivisions and agencies for the purposes of Tax Law § 612(c)(3)(i).

Tax Law § 612(c)(3)(i) codifies Article XVI, § 5 of the New York State Constitution which provides that all compensation, except pensions, paid to officers and employees of the State, its subdivisions and agencies is subject to taxation. The seminal question is whether MABSTOA falls within the definition of State, its subdivisions and agencies for purposes of Tax Law § 612(c)(3)(i). It is concluded herein that it does and that petitioner's pension income from MABSTOA was exempt from taxation.

The subtraction modification constitutes a statutory exemption from taxation and,

therefore, must be strictly construed against the taxpayer (***see, Matter of Grace v. New York State Tax Commn***., 37 NY2d 193, 371 NYS2d 715, ***lv denied*** 37 NY2d 708, 375 NYS2d 1027), but not so "narrow and literal as to defeat [the] settled purpose" of the exemption (***Matter of Grace v. New York State Tax Commn., supra***, 371 NYS2d, at 718).

MABSTOA was described in PAL § 1203-a as a subsidiary PBC of the NYCTA. The same statute dictates that the directors of MABSTOA shall be the chairman and members of the Transit Authority. The stated goal of the NYCTA, as set forth in PAL § 1202, was to acquire and operate transit facilities for the convenience and safety of the public on a self-sustaining basis. The Transit Authority was created for the benefit of the people of New York State and was meant to be regarded as performing a governmental function in carrying out its public purpose (PAL § 1202[2]).

As a subsidiary of the NYCTA, MABSTOA plays a critical role in implementing the stated legislative goal and furthering the stated governmental purpose of the NYCTA. This same observation was made by the Court of Appeals in ***Clark-Fitzpatrick, Inc. v. Long Island R. R. Co***. (70 NY2d 382, 521 NYS2d 653) when comparing the Metropolitan Transportation Authority and its subsidiary public benefit corporation, the Long Island Railroad. It is apparent from PAL that MABSTOA was created in the form of a subsidiary to the Transit Authority to facilitate the sale or other disposition of the omnibus lines the City had taken by condemnation (PAL § 1203[a][2]). The legislative purpose was to make MABSTOA a separate entity from the Transit Authority for the subsequent sale of the omnibus lines. It also explains why their employees were specifically excluded from civil service protection.

The courts have recognized that PBCs, or public authorities, although created by the State and subject to dissolution by the State, are "independent and autonomous, deliberately designed to be able to function with a freedom and flexibility not permitted to an ordinary State board, department or commission" (***Matter of Plumbing, Heating, Piping & Air Conditioning Contrs. Assn. v. New York State Thruway Auth***., 5 NY2d 420, 185 NYS2d 534, 536; ***see also***, ***Grace & Co. v. State Univ. Constr. Fund***, 44 NY2d 84, 404 NYS2d 316; ***Collins v.***

Manhattan & Bronx Surface Tr. Operating Auth., supra) leading to the hybrid character of authorities like MABSTOA, which exhibit the qualities of both private corporations and State instrumentalities and resulting in treatment as both under different circumstances.

Specifically, pursuant to PAL § 1215, MABSTOA is included within the definition of "other political subdivision" for purposes of Worker's Compensation Law § 50(4) and is, thus, treated as the State with respect to securing compensation to its employees. PAL § 1215 also provides for the inclusion of MABSTOA within the definition of "any political subdivision" for purposes of Vehicle and Traffic Law former §§ 93-k and 94-ff (***see***, Vehicle & Traffic Law §§ 310 et seq. and 330 et seq.). MABSTOA was also specifically included, along with other governmental agencies and public authorities, within the definition of "covered organization" for purposes of the 1975 New York State Financial Emergency Act for the City of New York. MABSTOA and its employees were, thus, subject to the wage freeze provisions of this act (see, L 1975, chs 868-870; McKinney's Uncons Laws of NY § 5401 et seq.). Also, PAL § 1203-a(6) and § 1212 provide that the Notice of Claim requirements for "public corporations" set forth in General Municipal Law § 50-e are applicable to MABSTOA.

Additionally, MABSTOA falls within the definition of "government" or "public employer" and MABSTOA employees are "public employees" for purposes of New York's "Taylor Law" (Fair Employment Act, Civil Service Law § 201 et seq.). MABSTOA employees are, thus, subject to this law's provisions, including its prohibition against strikes and similar activities. MABSTOA is also an "agency" as defined in State Administrative Procedure Act § 102(1) and, jointly with the Transit Authority, has issued rules governing the conduct and safety of the public in the use of the facilities of the Transit Authority and MABSTOA (***see***, 20 NYCRR Part 1050). Further, the ethics provisions of PAL §§ 73 and 74 are applicable to public benefit corporations such as MABSTOA. It also appears that MABSTOA had the option to have its employees become eligible to participate in the State Employees' Retirement System (***see***, Retirement & Social Security Law § 31). Finally, MABSTOA, as a public benefit corporation, is also included within the definition of "agency" or "state agency" for other

purposes, including, among others, State Finance Law § 53-a, the State Environmental Quality Review Act (see, Environmental Conservation Law § 8-0105) and Executive Law § 310(11)(b), which involves the State's promotion of increased participation by minority- and women-owned business enterprises in State contracts.

The Supreme Court in ***Collins v. Manhattan & Bronx Surface Tr. Operating Auth***. (116 Misc 2d 6, 453 NYS2d 289) noted:

> MABSTOA is not, even in form, an autonomous, distinct or independent entity. It is a subsidiary of the TA [Transit Authority], managed and directed by the chairman and members of the TA (P.A.L. § 1203-a[1][2]) who are appointed by the Governor with the advice and consent of the State Senate and, in the case of four of the members, upon written recommendations of the Mayor of the City of New York (P.A.L. § 1263[1][a]) (***Collins v. Manhattan & Bronx Surface Tr. Operating Auth., supra***, 453 NYS2d, at 292).

Although the Court of Appeals ultimately reversed the Supreme Court and the Appellate Division in the Collins case, the scope of its decision was very narrow, concluding that "public authorities are not civil divisions within the meaning of the constitutional provision [referring to Article V, § 6 which mandates that appointments and promotions in the civil service of the State and all of the civil divisions thereof shall be made according to merit and fitness and competitive examination]" (***Collins v. Manhattan & Bronx Surface Tr. Operating Auth., supra***, 477 NYS2d, at 95). This was consistent with the provision in PAL § 1203-a(3)(b) wherein it was stated that the employees and officers of MABSTOA would not acquire civil service status. But it did not foreclose the treatment of MABSTOA as a subdivision or agency of the State for other purposes, which has been demonstrated on numerous occasions as noted above and concluded herein for the purposes of Tax Law § 612(c)(3)(i).

In fact, the courts have made a "particularized inquiry . . . to determine whether -- for the specific purpose at issue -- the public benefit corporation should be treated like the State" (***Clark-Fitzpatrick, Inc. v. Long Island R. R. Co., supra***, 521 NYS2d at, 655). Such an inquiry involves an analysis of the "nature of the instrumentality and the statute claimed to be applicable to it" (***Grace & Co. v. State Univ. Constr. Fund, supra***, 404 NYS2d, at 318).

Several decisions of the Court of Appeals reveal that the treatment accorded PBCs

depends upon the particular facts and circumstances. The Court held that the State Thruway Authority, vested by PAL with specific and detailed power to construct and maintain a thruway system, was not subject to the public bidding requirements which are imposed on other State boards and departments pursuant to State Finance Law § 135 (***see, Matter of Plumbing, Heating, Piping & Air Conditioning Contrs. Assn. v. New York State Thruway Auth., supra***). The Court also held that the State University Construction Fund, a public benefit corporation created to receive and administer monies available for construction of facilities of the State University, was not a State agency and, thus, not subject to a statute authorizing adjustments in contracts "awarded by the state" (***see, Grace & Co. v. State Univ. Constr. Fund, supra***). As referred to above, the Court of Appeals held that MABSTOA was not a civil division of the State and that the Legislature did not violate the civil service provision of the State Constitution (Article V, § 6) when it expressly exempted MABSTOA from the requirements of the Civil Service Law (***see, Collins v. Manhattan & Bronx Surface Tr. Operating Auth., supra***). It is interesting to note that in each of these cases the law involved would have imposed a burden upon a public authority or corporation. In contrast, in the instant matter, allowing MABSTOA retirees the pension exemption would not interfere with MABSTOA's provision of public transportation or the "freedom and flexibility" it enjoys as a public authority.

But the Court has also held PBCs to be subdivisions of the State. In ***Clark-Fitzpatrick, Inc. v. Long Island R. R. Co.*** (***supra***), the Court held that, like the State, the Long Island Railroad, a public benefit subsidiary corporation of the Metropolitan Transportation Authority, was not subject to punitive damages in a civil action. The Court's holding was based on the "essential public function served by [the LIRR] in providing commuter transportation and the public source of much of its funding" (***Clark-Fitzpatrick, Inc. v. Long Island R. R. Co., supra***, 521 NYS2d, at 655).

It is concluded herein that under the "particularized inquiry" analysis MABSTOA employees are employees of the "state, its subdivisions and agencies" for purposes of Tax Law § 612(c)(3)(i). Applying the analysis in ***Clark-Fitzpatrick***, we believe the public transportation

provided by MABSTOA is a public service, the profits of which inure to the benefit of the State. As stated above, the fact that MABSTOA is a subsidiary of the Transit Authority and implements its goals and purposes under the direct management and direction of the Transit Authority creates an identity of function which is undeniable. In fact, many of the powers and functions of the two entities overlap (PAL § 1203-a[3], [6]) and the law even permits a free transfer of funds between the entities (PAL § 1203-b) and the sharing of the privileges, immunities, tax exemptions and other exemptions enjoyed by the Transit Authority by MABSTOA (PAL § 1203-a[4]).

Such an identity of function leads to the conclusion that these two entities also share one other stated characteristic of the Transit Authority, to wit: the provision in PAL § 1202(2) that the Transit Authority's purposes are for the benefit of the people of the State and the authority shall be considered as "performing a governmental function." We do not believe that the strength of this analysis is in any way diminished by the fact that the omnibus lines were formerly run by private companies since they were acquired by the City through condemnation proceedings, their operation vested in a subsidiary of the Transit Authority which was cloaked with the State's mantle in the numerous instances discussed above.

Finally, in 1997, the Legislature amended (L 1997, ch 312) PAL (§§ 1203-a[b] and 1215), the Tax Law (§ 612, in particular), the Administrative Code of the City of New York, the General City Law and the codes and ordinances of the City of Yonkers to clarify the status of employees of MABSTOA as employees of a subdivision of New York State for the purposes of Tax Law § 612(c)(3)(i).

Although one could argue that the bill and its legislative history, because of the bill's clarifying nature, support a retroactive application, it remains that the power to interpret laws is vested in the courts, not the Legislature, particularly with regard to questions of interpretation pending in the courts (McKinney's Cons Laws of NY, Book 1, Statutes § 75[a]).

It is a general rule of statutory construction that there is a presumption that statutes operate prospectively and not retroactively (McKinney's Cons Laws of NY, Book 1, Statutes

§ 51[c]). The statute in issue sets forth an "immediate" effective date, which has been held to mean it can have no retroactive operation or effect (McKinney's Cons Laws of NY, Book 1, Statutes § 51[b]) and specifically applies to pension contributions and distributions made on or after January 1, 1997. We believe that the amendment to PAL § 1203-a, which drives the extension of the pension exemption in Tax Law § 612(c)(3)(i), is not retroactive and we do not rely on its application as a basis for our decision herein.

It is our conclusion that, given the discussion above, the law in effect during the periods in issue support a finding that petitioner, as a MABSTOA employee, was an employee of the State, or one of its subdivisions or agencies, thereby satisfying the requirements of Tax Law § 612(c)(3)(i) and entitling petitioner to the pension exemption.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Henry Jackson is granted;

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

3. The petition of Henry Jackson is granted; and

4. The refund claims for 1991 and 1994 are granted and the Notice of Deficiency, dated October 23, 1995, is modified, consistent with a recalculation of petitioner's tax liability for 1991, 1992 and 1994 which factors in petitioner's pension exemption provided for herein.

DATED: Troy, New York
March 5, 1998

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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