STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
| of | : | |
| LONG ISLAND RAIL ROAD CO. | : | DETERMINATION<br>DTA NO. 811989 |
| for Redetermination of a Deficiency or for Refund of Special Assessments on the Generation of Hazardous Waste under Article 27 of the Environmental Conservation Law for the Period Ended September 30, 1991. | : | |

Petitioner, Long Island Rail Road Co., Jamaica Station, Jamaica, New York 11435, filed a petition for redetermination of a deficiency or for refund of special assessments on the generation of hazardous waste under Article 27 of the Environmental Conservation Law for the period ended September 30, 1991.

On October 26, 1993 and December 11, 1993, respectively, petitioner by its duly authorized representative, Thomas M. Taranto, Esq., and the Division of Taxation by William F. Collins, Esq. (Robert Tompkins, Esq., of counsel) waived a hearing and agreed to submit the matter for determination based upon documents and briefs to be submitted by May 9, 1994. The Division of Taxation submitted its documentary evidence on February 1, 1994. Petitioner, in turn, submitted a brief with four attached exhibits on February 28, 1994. The Division of Taxation submitted its responding brief on April 5, 1994. Petitioner submitted its reply brief on May 9, 1994. After review of the evidence and arguments submitted, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner may properly be held subject to the hazardous waste special assessment imposed under Environmental Conservation Law § 27-0923 notwithstanding the tax-exempt status granted to petitioner pursuant to Public Authorities Law § 1275.

FINDINGS OF FACT

The facts in this case are limited and not in dispute. On March 18, 1993, the Division of Taxation ("Division") issued to petitioner, Long Island Rail Road Co. ("LIRR"), a Notice of Deficiency asserting a Special Assessment on Generation, Treatment or Disposal of Hazardous Waste in New York State (the "Hazardous Waste Special Assessment or "HWSA") for the period ended September 30, 1991. This Notice of Deficiency asserts tax due in the amount of $1,313.50, plus interest and additional charge (penalty), for a total asserted deficiency of $1,956.09.[1]

Petitioner is a public benefit subsidiary corporation wholly owned by the Metropolitan Transportation Authority ("MTA"). In its operation of the transportation system known as the Long Island Rail Road, petitioner generates and is required to treat and dispose of certain hazardous wastes (the types of hazardous wastes involved include nickel cadmium batteries required to operate petitioner's fleet of electric trains, high pH alkaline solutions used for pre-maintenance cleaning purposes, and certain lighting

ballasts containing PCBs). There appears to be no dispute as to the amount of such hazardous wastes involved, or as to the dollar amount of the HWSA as calculated pursuant to the Environmental Conservation Law ("ECL"). In fact, the only issue presented is whether petitioner, which enjoys tax exemption pursuant to the provisions of Public Authorities Law ("PAL") § 1275, may be subjected to the HWSA imposed pursuant to ECL 27-0923.

CONCLUSIONS OF LAW

A. ECL 27-0923, effective July 27, 1982 (L 1982, ch 857, § 23), provides for the imposition of an assessment upon each ton of hazardous waste generated within New York State, with the amount of such assessment based on rates which vary depending upon the

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[1]The only notice at issue in this proceeding is that described above (i.e., carrying assessment number H921123098W and seeking in total $1,956.09, which amount and notice number are referenced in like amount and notice number on the petition filed in this matter). While petitioner's brief discusses an HWSA refund request and denial for a prior period, the same is not a part of this case and no opinion is rendered with respect to such particular request or denial.

manner of waste disposal utilized.[2] The assessment is imposed upon every "person" generating hazardous waste within New York State, with the term "person" defined in ECL 27-0901(1) as follows:

> "'Person' means an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, state, federal government and any agency thereof, municipality, commission, political subdivision of a state, or any interstate body."

B. The MTA was created in 1965 by PAL § 1263. Through its affiliates and subsidiaries, including petitioner, the MTA is charged with implementing and operating a unified mass transportation system in New York City and the

nearby suburban counties.[3] It is undisputed that petitioner is a public benefit corporation and is a wholly-owned subsidiary of the MTA. A public benefit corporation is defined in General Construction Law § 66(4) as a "corporation organized to construct or operate a public improvement wholly or partly within the state, the profits from which inure to the benefit of this or other states, or to the people thereof." In addition, PAL § 1266(5) provides that:

> "[e]ach such public benefit subsidiary corporation shall be a body politic and corporate and shall have all those powers vested in the authority by the provisions of this title which the authority shall determine to include in its certificate of incorporation except the power to contract indebtedness."

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[2]The assessment fee schedule was initially set pursuant to Laws of 1982 (ch 857). Said fees were later changed pursuant to Laws of 1985 (ch 38) and were again modified via Laws of 1990 (ch 423). In that there appears to be no dispute as to the calculation of the dollar amount of the assessment at issue in this proceeding, it is unnecessary to discuss the particular fee amounts in further detail.

[3]The legislative creation of legally separate entities known as public authorities, such as the MTA, commenced in the early 1900's. These entities became the vehicle used to obtain funding for public projects while insulating the State itself from the burden of long-term debt and from the State constitution's requirement of a public (voter) referendum to approve the incurrence of long-term debt by the State. In general terms, public authorities, which can be created only by special legislative action, serve as umbrella entities which, independent of the State itself, undertake to contract for debt (typically via the issuance of bonds) to secure funds for carrying out particular public benefit functions (see, Schulz v. State of New York, ___ NY2d ___, ___ NYS2d ___ [June 30, 1994]).

Said section also states, in pertinent part, as follows:

> "[e]ach such subsidiary corporation and any of its property, functions and activities shall have all of the privileges, immunities, tax exemptions and other exemptions of the authority and of the authority's property, functions and activities" (emphasis added).

C. As the foregoing sets out, petitioner enjoys all the powers, privileges and exemptions of its parent, the MTA, except for the power to contract for indebtedness. In turn, the MTA's (and hence petitioner's) exemption from taxes, fees and assessments is found at PAL § 1275, which provides, in pertinent part, as follows:

> "It is hereby found, determined and declared that the creation of the authority and the carrying out of its purposes is in all respects for the benefit of the people of the state of New York and for the improvement of their health, welfare and prosperity and is a public purpose, and that the authority will be performing an essential governmental function in the exercise of the powers conferred upon it by this title. Without limiting the generality of the following provisions of this section, property owned by the authority, property leased by the authority and used for transportation purposes, and property used for transportation purposes by or for the benefit of the authority exclusively pursuant to the provisions of a joint service arrangement or of a joint facilities agreement or trackage rights agreement shall all be exempt from taxation and special ad valorem levies. The authority shall be required to pay no fees, taxes or assessments, whether state or local, including but not limited to fees, taxes or assessments on real estate, franchise taxes, sales taxes or other excise taxes, upon any of its property, or upon the use thereof, or upon its activities in the operation and maintenance of its facilities or on any fares, tolls, rentals, rates, charges or other fees, revenues or other income received by the authority and the bonds of the authority and the income therefrom shall at all times be exempt from taxation, except for gift and estate taxes and taxes on transfers" (emphasis added).

D. The narrowed question presented in this case is which of the two legislative acts takes precedence: the later-imposed HWSA, constituting a tax imposed by its terms upon all hazardous waste generators in the State, or the earlier-granted exemption from taxes carried by the MTA and its subsidiaries, including petitioner. In turn, after review of the legislative aims and purposes behind the two enactments, the existing conflict between these enactments, and the very broad language defining "person" in ECL 27-0901 it is concluded that the HWSA may properly be imposed against petitioner notwithstanding petitioner's tax-exempt status. First, the extremely broad drafting of ECL 27-0901 overrides the tax exemption granted to petitioner as a public benefit subsidiary corporation by PAL § 1275. In this regard, it is difficult to envision a

broader or more inclusive definition of the term "person" than that contained in ECL 27-0901 (see, Conclusion of Law "F"). Furthermore, the MTA's tax exemption pursuant to PAL § 1275 provides, specifically, that the MTA (and its subsidiaries) is carrying out an "essential governmental function". In this regard, the MTA is acting in the State's interest and, accordingly, enjoys exemption much like the State. Since the State itself is included in the definition of "person(s)" specifically subject to the HWSA under ECL 27-0901, it is difficult to comprehend how a legislatively created authority and its public benefit subsidiary corporations, which are carrying out an essential State governmental function, should not likewise be subject to the assessment imposed by the ECL.

In considering the implication of ECL 27-0901's inclusion of the State as subject to the HWSA, Matter of Clark-Fitzpatrick v. LIRR Co. (70 NY2d 382, 521 NYS2d 653) is instructive. In Clark-Fitzpatrick, the Court of Appeals held, inter alia, that the LIRR should be immune from punitive damages given its essential public purpose and its largely public source of funding. Relevant to this case, however, is the following language of the court:

> "The LIRR, of course, is not itself the State or one of its political subdivisions; rather, it is, pursuant to Public Authorities Law § 1266(5), a public benefit subsidiary corporation of the MTA. Although 'public benefit corporations . . . created by the State for the general purpose of performing functions essentially governmental in nature, are not identical to the State or any of its agencies, but rather enjoy, for some purposes, an existence separate and apart from the State, its agencies and political subdivision' (Grace & Co. v. State Univ. Constr. Fund, 44 NY2d 84, 88, 404 NYS2d 316, 375 NE2d 377 [State University Construction Fund]), we have held that a particularized inquiry is necessary to determine whether -- for the specific purpose at issue -- the public benefit corporation should be treated like the State (see, Grace & Co. v. State Univ. Constr. Fund, 44 NY2d 84, 404 NYS2d 316, 375 NE2d 377, supra)." (Id. at 386-387.)

In the case at hand, the "particularized inquiry" to determine whether petitioner "should be treated like the State" is short and direct. That is, the Legislature specifically chose, in adopting the language of ECL 27-0901, to subject the State itself to the HWSA. Thus, it follows logically that a public benefit corporation carrying out an essential governmental function would likewise be subject to the HWSA, unless specifically excluded therefrom. Further support for this conclusion may be found in the fact that the Federal government is also included as a "person" subject to the HWSA. While, as conceded by the Division, the Federal

government may not be so subject due to the fact that the Federal government has not consented to be subject to a State-imposed tax,[4] it remains that the definition of person is extremely broad and was obviously intended to cover, without exception, all hazardous waste generators. Stated differently, whether or not the Legislature could subject the Federal government (and its agencies) to tax in no way diminishes the fact that the statute in question was drafted to do so, thus evidencing a clear intent to subject all hazardous waste generators to the HWSA without exception. Such being the case, it cannot be concluded that petitioner's earlier granted tax-exempt status accompanying the creation of the MTA overrides the later-enacted ECL special assessment which, within its definition of person, specifically includes the State and government corporations.

E. In further support of the assessment, the Division maintains that the statutes in question present an irreconcilable conflict and that in such circumstances the prior statute (here the tax exemption ) is abrogated by the later conflicting statute (the HWSA) pursuant to rules of statutory construction (see McKinney's Cons Laws of NY, Book 1, Statutes §§ 396, 398). Petitioner argues, in contrast, that the very broad and inclusive tax

exemption granted petitioner by PAL § 1275 represents a special act which cannot be overridden by a subsequent general act such as ECL 27-0901 without direct, intelligible reference thereto. In this regard, petitioner claims that the statutes are not in irreconcilable conflict, and that inclusion of the term "government corporation" in ECL 27-0901 represents a vague, unclear reference (as opposed to a direct, intelligible reference) insufficient to cause ECL 27-0901 to override PAL § 1275.

F. In simplest analysis, it appears clear that both statutes cannot operate at the same time. That is, if both apply, petitioner is required to pay a tax under the ECL which it is not required to pay under PAL § 1275. In turn, resolution of this conflict may be had by accepting the later-

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[4]Though couched in terms of a fee, neither side seriously disputes that the HWSA is in essence a tax.

enacted statute as overriding the former. Such a result is consistent with the very broad definition of persons subject to the HWSA and is more reasonable than the very strained reading offered by petitioner as a means of reconciling the conflict. On this score, petitioner maintains that the term "government corporations" is vague and ambiguous. In turn, while admitting that such term might be broad enough to encompass a public benefit corporation, petitioner argues that its use leaves an uncertainty (or lack of clarity) which should militate in favor of petitioner's claim that its exemption under PAL § 1275 overrides the HWSA. Again, an overly strained interpretation of ECL 27-0901 is required in order to accept petitioner's position. Said section (ECL 27-0901) specifically includes "corporations" as among those persons subject to the HWSA. Petitioner is, in fact, a corporation (albeit a public benefit subsidiary corporation) and thus a simple and solid argument for its inclusion as a person subject to the HWSA is clear from the statutory language even without the added term "government corporation". In addition, such added term appears in the parenthetical phrase "including a government corporation" immediately following the term corporation. This form of drafting indicates an intent to clarify that all corporations, including those such as petitioner, which ordinarily enjoy tax exemption, were meant to be included in the coverage of the HWSA. Furthermore, the use of the term "government corporation" as opposed to some other term is of no overriding significance.[5] Though such term is

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[5]Department of Environmental Conservation regulations regarding solid wastes, and more particularly hazardous wastes, define the term "person". More specifically, 6 NYCRR 370.2(b), defining terms used in 6 NYCRR Parts 370-374 and 376 (covering hazardous waste management), repeats the definition of "person" as set forth in ECL 27-0901 and thus includes the term "government corporation" (see, 6 NYCRR 370.2[b][128]). In addition, 6 NYCRR 375-1.3(q), dealing with identification, registration and cleanup of hazardous waste sites, defines "person" to mean an:

> "individual, trust, firm, joint stock company, corporation, partnership, association, state, municipality, commission, political subdivision of a state, public benefit corporation or interstate body" (emphasis added).

No reason is specified for the definitional differences between such sections (i.e., the exclusion of reference to the Federal government and inclusion of reference to public benefit corporations in the latter regulation [6 NYCRR 375-1.3(q)]).

not found in other related areas of law, it is apparent (as is tacitly conceded by petitioner) that such term is broad enough to include petitioner. It is true that the term "public corporations" might have been used, given that such term is contained in the State's Constitution (article X, § 5) and is defined in General Construction Law § 66(2), (3) and (4) as including, respectively, a municipal corporation, a district corporation and a public benefit corporation. However, it is at least equally true that use of the term "government corporation" in a clarifying parenthetical phrase serves not only to indicate that all corporations, including otherwise generally tax-exempt corporations, are subject to the HWSA, but also distinguishes and avoids any potential confusion with the concept of "publicly held" or "publicly traded" corporations. In any event, it is clear that the parenthetical inclusion of government corporations only indicates the fact that no corporations were excluded from being subject to the HWSA and serves to show the breadth of the definition of "persons" subject to the HWSA.

G. The purposes behind the enactment of the HWSA are clear. In basic terms, the aim of the legislation is to discourage hazardous waste production and landfill disposal thereof by imposing a fee on hazardous waste generators, weighted in favor of recycling (zero fee) or on-site incineration disposal (a lower fee) as opposed to off-site landfill disposal (the highest fee). In turn, the fees generated by the HWSA are used to defray the costs of cleaning up existing

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The only other reference to the term "government corporation" appears in connection with Congressional committee and conference activity with regard to the proposed Superfund Amendments and Reauthorization Act of 1986 (Pub L 99-499) in which the term "person" was defined as under ECL 27-0901 (i.e., as "an individual, trust, firm, joint stock company, corporation [including a government corporation], partnership, association, state, municipality, commission, political subdivision of a State, or interstate body"). However, this proposed definition was apparently not enacted, for the definition of "person" under 42 USC § 9601 remains, without using the term "government corporation", as follows:

> "The term 'person' means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body."

hazardous waste dump sites.[6] Nowhere in this legislation, and specifically noting its broad definition of "persons" as described, is there any indication that any hazardous waste producer was to be allowed to escape imposition of the fees (save for the rare situation of a waste generator who could recover and recycle all of its wastes, in which case the generator, while remaining subject to the legislation, would have no disposal waste tonnage against which the fees would be measured).

H. Petitioner argues that to subject a public benefit corporation such as itself to the HWSA creates a redundant funding situation in that the Legislature annually subsidizes petitioner's operations. Petitioner argues, therefore, that in being subjected to the special assessment petitioner will pay monies to the State which in turn will be repaid to petitioner in the form of its subsidy. This argument, stating in essence the proverbial "robbing Peter to pay Paul" situation, overlooks the fact that the amount of subsidy is an annual legislative determination. In point of fact, accepting this argument to determine that petitioner is not subject to the special assessment is to overstep into the area of legislative/gubernatorial prerogative vis-a-vis the level of funding subsidies for particular purposes

(that is, the legislative choice to allocate more funds to hazardous waste and less to transportation or vice versa). In the same manner, under the definition of "person" in the ECL, the State and its agencies are subject to the ECL hazardous waste assessment. Therefore, it could be argued, analogously to petitioner's position, that imposing such an assessment upon a State agency is in essence the State paying itself (i.e., interagency payments). However, as set

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[6]The sponsor's memorandum in support states the purpose of the legislation as follows:

> "To fund and implement a comprehensive program for the cleanup of inactive hazardous waste disposal sites in the state by: assessing and collecting fees on the generation and disposal of hazardous wastes in the state and causing the Department of Environmental Conservation (DEC) to use such monies to remediate sites according to a 'state inactive hazardous waste remedial plan' it shall develop and submit to the Governor and the Legislature." (Revised Mem in Support, Bill Jacket, L 1982, ch 857.)

forth above, this choice is a matter of legislative priority and prerogative.

I. The Division does not dispute the importance of the purposes served by the MTA and its subsidiaries. In this regard, the need for and ability of the MTA to obtain capital for maintaining and upgrading its facilities and carrying out its mass transit system responsibilities are recognized as critical to the State in general and to the metropolitan region in particular (see, L 1965, ch 324, § 1[2]). In fact, and as petitioner points out, in 1981 a transportation emergency was declared with regard to the MTA. In the face of this declaration, the significance of petitioner's tax-exempt status granted by PAL § 1275 is not to be lightly cast aside. However, the use of the broad definition of persons subject to the HWSA, coupled with the fact that the transportation emergency was declared one year before the HWSA was enacted yet there is no indication that the MTA (or anyone else) was not subject to the HWSA when it was enacted, further justifies the conclusion that the Legislature intended to subject petitioner as well as all other hazardous waste generators to the HWSA notwithstanding the MTA's critical and essential mission and the provisions of PAL § 1275. In addition, the Legislature has created over 80 public authorities to carry out essential governmental ends for the public's benefit. Each carries some form of tax-exempt status and petitioner, while enjoying one of the broadest grants of exemption, has not shown why or how its function and purpose and its grant of exemption is so significantly different from the others as to conclude that petitioner, as opposed to any other public authority, should not be subject to the HWSA. In this regard, there is some sense in concluding that the Legislature's use of an all-inclusive definition of person, as opposed to some other drafting technique whereby some particular "persons" (e.g., specific public authorities) were excused from the HWSA, means simply what it indicates -- all are included.

J. Petitioner makes much of the fact that the Legislature did not include prefatory language in ECL 27-0901 stating that "notwithstanding any provision of law to the contrary" the HWSA was imposed on all persons as defined. However, given the broad definition of persons covered, such language would be only redundant and unnecessary. The breadth of the definitional language makes obvious the fact that the Legislature knew and intentionally

subjected otherwise exempt entities to the HWSA. Such language, coupled with the lack of any exempting language supports the conclusion that all hazardous waste generators, including otherwise exempt entities, were covered.

K. Petitioner points out that it is exempt from taxes with respect to "its property, . . . the use thereof, [and] its activities in the operation and maintenance of its facilities . . ." (PAL § 1275), arguing in turn that such language plainly encompasses and overrides an assessment on generating, treating and disposing of hazardous wastes because the latter is an integral part of the operation of a commuter railroad. However, this argument loses force in light of the fact that the State and its agencies are subject to the HWSA notwithstanding that many, if not most, of such entities undoubtedly generate, treat and dispose of hazardous wastes in carrying out their functions. Furthermore, and as the Division points out, to exempt petitioner from the HWSA is more than simply allowing petitioner a tax exemption. That is, petitioner would be exempt from the incentives and disincentives which form the heart and purpose of the HWSA (i.e., funding the remediation of inactive hazardous waste sites, discouraging the generation of hazardous waste and its flow into landfills in favor of incineration disposal and, where possible, recovery and recycling). In the same vein, and notwithstanding that surplus funds raised by the HWSA are transferred to the State's General Fund (see, L 1990, ch 41; L 1991, ch 166), the HWSA is not a general revenue-raising measure but rather represents a specific imposition with a specific purpose, as described. The fact that surplus funds go to the State's General Fund is not sufficient basis, given the legislative history and aim of the HWSA and the definition of persons subject thereto, to conclude that petitioner or any other "person" generating hazardous waste was meant to be excused from participation.

L. Finally, the petition filed in this matter challenges the Notice of Deficiency as issued, thereby including by implication a challenge to the additional charge (penalty) set forth thereon. In turn, petitioner has advanced several arguments as to why it should not be subject to the HWSA. However, petitioner has advanced no specific arguments as to why the additional charge should be abated. Absent any such specific argument(s) or explanation(s), and in light

of the foregoing analysis and conclusion finding petitioner clearly subject to the HWSA, the imposition of additional charge per the Notice of Deficiency is sustained.

M. The petition of Long Island Rail Road Co. is hereby denied and the Notice of Deficiency dated March 18, 1993, together with penalty and interest, is sustained.

DATED: Troy, New York
October 20, 1994

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE