STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
HENRY JACKSON	:	DETERMINATION 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, filed a petition 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.

A hearing was held before Daniel J. Ranalli, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on July 15, 1996 at 9:15 A.M. All briefs were filed by October 8, 1996, which date began the six-month period for the issuance of this determination. Petitioner appeared pro se. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Laura J. Witkowski, Esq., of counsel).

Following the hearing and upon notice to the parties, this matter was reassigned to Administrative Law Judge Timothy J. Alston. After due consideration of the record, Administrative Law Judge Alston renders the following determination.

ISSUE

Whether petitioner may properly subtract his Manhattan and Bronx Surface Transit Operating Authority pension income from his 1991, 1992 and1994 Federal adjusted gross income pursuant to the subtraction modification provided in Tax Law § 612(c)(3)(i).

FINDINGS OF FACT

1. 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]

2. 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 As originally enacted, the statute provided that MABSTOA was to operate the bus lines "for a temporary period" until such lines are "sold or otherwise disposed of" (PAL §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]).

3. 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]).

4. 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.

5. The Division of Taxation ("Division") reviewed petitioner's 1991 return pursuant to the audit program outlined in Finding of Fact "11". By a Statement of Proposed Audit Changes dated July 18, 1994, 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

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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]).

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.

6. 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.

7. The Division reviewed petitioner's 1992 return pursuant to the audit program outlined in Finding of Fact "11" 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.

8. 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.

9. 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.

10. 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.

11. 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.

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

13. 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.

14. 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.

15. The Division submitted proposed findings of fact numbered "1" through "56". Proposed findings of fact "4", "7", "9", "11", "14", "22", "23", "26", "28", "29", "33"-"37", "41"-

"46", and "52"-"56" are accepted and have been incorporated, in substance, into the Findings of Fact. There were two proposed findings of fact numbered "23"; both are accepted. Proposed findings of fact "1"-"3", "5", "6", "8", "10", "12", "13", "15"-"21", "24", "25", "32", "38"-"40", and "47"-"51" are irrelevant to this determination and are therefore not presented as findings of fact. Proposed finding of fact "27" is not accepted because this proposed finding states the Division's position and is thus not in the nature of a Finding of Fact. There were no proposed findings of fact numbered "30" or "31".

SUMMARY OF THE PARTIES' POSITIONS

16. Petitioner contends that MABSTOA was a subdivision of New York State. In support, petitioner cited an advisory opinion of the former State Tax Commission (Matter of Transport Workers Union of Greater New York, supra).

17. Petitioner also contends that MABSTOA and NYCTA are for all practical purposes "one and the same". Petitioner testified that it was common for employees of MABSTOA to subsequently become employees of the Transit Authority and vice-versa. Petitioner also offered his opinion that MABSTOA, having been created to exist on a temporary basis, was used by those in power to circumvent civil service laws. Petitioner asserts that there is no valid reason to treat retired employees of MABSTOA differently from the retired employees of NYCTA and that to do so violates the Fourteenth Amendment of the United States Constitution. Petitioner also contends that the Division's action herein violates the New York State Constitution.

18. Petitioner also asserts that to allow MABSTOA retirees the benefit of the subtraction modification at issue would add no annual cost to MABSTOA as an employer or to the MABSTOA pension plan.

19. The Division contends that petitioner was not entitled to the subtraction modification under Tax Law § 612(c)(3)(i). Specifically, the Division asserts that the relevant regulations represent a reasonable interpretation of this provision and that MABSTOA pension income fails to satisfy either of the two requirements necessary to be eligible for the subtraction modification as set forth in the regulations. That is, the Division maintains that MABSTOA

employees are not employees of a subdivision or agency of New York State for purposes of Tax Law § 612(c)(3)(i) and that MABSTOA pensions are not paid from a State or municipal retirement system as required under the regulations.

CONCLUSIONS OF LAW

A. Article XVI, § 5 of the New York State Constitution provides:

> "All 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."

Additionally, Article V, § 7 of the State Constitution states:

> "After July first, nineteen hundred forty, membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired."

B. Tax Law § 612(a) defines New York adjusted gross income as Federal adjusted gross income with modifications as specified in that section. Tax Law § 612(c)(3)(i) codifies the above-cited constitutional provisions and provides that, in order to compute New York adjusted gross income, there shall be subtracted from Federal adjusted gross income:

> "Pensions to officers and employees of this state, its subdivisions and agencies, to the extent includible in gross income for federal income tax purposes . . . ."

C. The Division has promulgated regulations in connection with Tax Law § 612(c)(3)(i). 20 NYCRR former 116.3 (renumbered 112.3, effective January 13, 1992) provided, in relevant part:

> "Pensions and other benefits . . . included in Federal adjusted gross income and paid by a New York State or municipal retirement system to an officer or employee of New York State, its political subdivisions or agencies . . . shall be subtracted in computing New York adjusted gross income."

20 NYCRR 112.3(c)(1) was amended effective August 17, 1994, to provide as follows:

> "(i) Retirement benefits provided for in clause (a) . . . of this subparagraph which are included in Federal adjusted gross income, relate to services performed as public officers or public employees and all or a portion of which are actually contributed to (rather than merely being deemed contributed to) by New York State, its political subdivisions or agencies . . . shall be subtracted in computing New York adjusted gross income:
>
> (a) pensions and other retirement benefits . . . paid to a public officer or public employee . . . of New York State, its political subdivisions or agencies;

* * *

(iii) The provisions of this paragraph can best be illustrated by the following examples:

* * *

Example 5: A retired employee of a public benefit corporation receives a pension from a fund which was not contributed to by New York State, any of its political subdivisions or agencies . . . and which is taxed under the Internal Revenue Code as annuity income. Since such pension income is not exempt from New York State personal income tax under New York State law because such pension was not actually contributed to by New York State, any of its political subdivisions or agencies . . . the amount included in Federal adjusted gross income on account of this pension is not subtracted in determining such employee's New York adjusted gross income and is therefore included in such employee's New York adjusted gross income." (20 NYCRR 112.3[c][1].)

D. The first question to be addressed is whether MABSTOA employees are employees of the "state, its subdivisions and agencies" for purposes of the subtraction modification of Tax Law § 612(c)(3)(i) and the regulations promulgated thereunder.

PAL § 1203-a(1) provides that the status of officers and employees of MABSTOA "shall be governed exclusively by the provisions of this section." PAL § 1203-a(3)(b) provides that MABSTOA shall have the power to appoint officers and employees and further states:

"[O]fficers and employees [of MABSTOA] shall not become, for any purpose, employees of the city or of the transit authority and shall not acquire civil service status or become members of the New York city employees' retirement system."

E. As noted in PAL § 1203-a(2) MABSTOA is a "public benefit corporation". That term 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."

F. The courts have long recognized that public benefit corporations, 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, 423, 185 NYS2d 534, 536; see also Grace & Co. v. State Univ. Constr. Fund, 44 NY2d 84, 88, 404

NYS2d 316, 317; Collins v. Manhattan & Bronx Surface Tr. Operating Auth., 62 NY2d 361, 369, 477 NYS2d 91, 94).

It has been observed that public authorities such as MABSTOA have "some of the characteristics of a private corporation and some of a state instrumentality" (1929 Opns Atty Gen 223, 224). Accordingly, under certain circumstances such entities have been treated as the State and under other circumstances they have not. Consistent with this observation, the Legislature has statutorily defined state agency or subdivision so as to include, under some circumstances, MABSTOA specifically or, under other circumstances, public benefit corporations generally. Obviously, under such circumstances, MABSTOA is properly treated as the State. 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 "other political subdivision" for purposes of Vehicle & Traffic Law former §§ 93-k and 94-ff (see, Vehicle & Traffic Law §§ 310 et seq. and 330 et seq.).

Additionally, MABSTOA falls within the definition of "government" or "public employer" for purposes of New York's Taylor Law (Fair Employment Act, Civil Service Law § 201 et seq.) and MABSTOA employees are thus subject to this law's provisions, including its prohibition against strikes and similar activities. MABSTOA is also included within the definition of "agency" or "state agency" for other purposes, including, among others, the 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.

G. Where presented with the question of whether a public benefit corporation should be treated as the State or as a private entity, 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 v. Long Island Rail Road, 70 NY2d 382, 387, 521

NYS2d 653, 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).

H. A review of decisions of the Court of Appeals addressing this issue reveals that, generally, public benefit corporations have not been treated like the State. Specifically, the Court held that the State Thruway Authority, vested by the Public Authorities Law 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). Additionally, 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).

An exception to this general rule may be seen in Clark-Fitzpatrick v. Long Island Rail Road (supra). In that case, the Court held that, like the State, the Long Island Rail Road, a public benefit subsidiary corporation of the Metropolitan Transportation Authority, was not subject to punitive damages in a civil action. The Court thus treated a public benefit corporation like the State where classification as a private entity would have frustrated the public benefit corporation's purpose.[2]

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[2]Also addressing the status of public benefit corporations is Levy v. City Commn. on Human Rights (85 NY2d 740, 628 NYS2d 245), in which the Court held that the New York City Transit Authority's status as a public benefit corporation did not preclude the City's Commission on Human Rights from obtaining jurisdiction over the Authority. In Levy, however, unlike the cases cited above, the Authority, by resisting the Commission's jurisdiction, sought to be accorded a status distinct from both "private" corporations and city agencies since the

I. For the reasons that follow, it is concluded that MABSTOA employees should not be considered employees of the State, its subdivisions or agencies for purposes of Tax Law § 612(c)(3)(i). While there is no evidence in the record to suggest that the application of this provision to MABSTOA pension income would interfere with the public purpose of MABSTOA, such application would clearly contravene the Legislature's express intent that the status of MABSTOA officers and employees be governed by PAL § 1203-a and that such officers and employees not become, for any purpose, employees of New York City or the Transit Authority (PAL § 1203-a[3][b]). Consistent with this express intent that MABSTOA be independent of the State and of the City, the Legislature has exempted MABSTOA from the requirements imposed by the Civil Service Law and empowered MABSTOA to appoint its own officers and employees, assign powers and duties to them and to fix their compensation. By law, then, the work of MABSTOA employees is not controlled by the City. Additionally, the duties of MABSTOA employees have been described as being more within the duties of employees of private companies since the bus lines operated by MABSTOA were formerly owned by private companies (see, Collins v. MABSTOA, supra, 62 NY2d at 371, 372, 477 NYS2d at 96). Under these circumstances, it is appropriate to follow the general rule discussed above and not treat MABSTOA like the State. It is concluded, therefore, that MABSTOA pension income may not escape State income taxation under Tax Law § 612(c)(3)(i).[3]

J. The advisory opinion upon which petitioner relies to support his contention that MABSTOA is a subdivision of New York is unavailing (see, Paragraph "16"). Advisory opinions are confined to the facts as presented by the petitioner therein and are binding on the Division only with respect to the person to whom the opinion is rendered (Tax Law § 171[24]).

Commission's statutory authority clearly extended to both private corporations and city agencies (id., at 743, 744, 628 NYS2d at 247). Given these unique circumstances, the precedential value of Levy to the matter at hand appears limited.

[3]This conclusion is based on the legal relationship between MABSTOA and NYCTA as set forth in the relevant statutes. Petitioner's conclusory and unsubstantiated testimony suggesting that MABSTOA and NYCTA were "one and the same" and that MABSTOA was being used as a vehicle to circumvent the civil service laws (which may or may not have led to a different conclusion) is rejected (see, Paragraph "17").

Such opinions are not precedential (see, 20 NYCRR 2375.5). Additionally, the advisory opinion in question, Transport Workers Union of Greater New York (supra), contains a significant factual error in that it states that MABSTOA is a subsidiary of the Metropolitan Transportation Authority. In fact, as noted previously, MABSTOA is a subsidiary of NYCTA. This error is significant because PAL § 1265(9)(a) states that no employees of a subsidiary corporation of the MTA, other than a public benefit subsidiary, shall be public employees. Therefore, if one erroneously believed MABSTOA to be a subsidiary of the MTA, one might conclude that employees of MABSTOA were public employees under PAL § 1265(9)(a). The factual error thus undermines the persuasive authority of the advisory opinion.

K. Regarding petitioner's reference that MABSTOA was intended to exist only temporarily, it is noted that the Legislature amended PAL § 1203-a(11) in 1984 to provide that MABSTOA was to exist "until terminated by law". Accordingly, any argument relying on MABSTOA's original status as a temporary entity is no longer relevant (see, Collins v. MABSTOA, supra, 477 NYS2d at 96, n.3).

L. The second criterion necessary to qualify for the subtraction modification under the regulations is that pensions must be paid by a State or municipal retirement system (20 NYCRR former 116.3) or actually contributed to by the State (20 NYCRR 112.3). There is no dispute that the MABSTOA pension fails to meet this criterion. This failure is sufficient, by itself, to disqualify petitioner from entitlement to the benefit of Tax Law § 612(c)(3)(i) unless it is shown that the regulation is invalid.

Inasmuch as this determination has concluded that petitioner was not an employee of the State for purposes of the subtraction modification, it is not necessary to pass upon the validity of the relevant regulations.

M. Petitioner also claimed that the Division's action herein was in violation of the Fourteenth Amendment to the United States Constitution. Presumably, by this claim, petitioner asserts that in its application of the subtraction modification in this instance, the Division has denied petitioner equal protection of the laws based upon the taxation of his MABSTOA

pension while the pensions of State employees are not taxed.[4] This argument must be rejected, for although the statute as applied herein does draw a line between the treatment accorded government retirees and all other retirees, such differing treatment clearly does not rise to the level of invidious discrimination required to overcome the "strongest" presumption of constitutionality enjoyed by taxing statutes (see, Cove Hollow Farm, Inc. v. State Tax Commn., 146 AD2d 49, 539 NYS2d 127).

N. As to petitioner's generic claim that the Division's action herein was in violation of the New York State Constitution, this assertion appears to be predicated on petitioner's contention that MABSTOA employees are employees of the State. Since it has been determined that petitioner was not an employee of New York State, its subdivisions or agencies within the meaning of Tax Law § 612(c)(3)(i), the application of this statute must be deemed constitutional.

O. The petition of Henry Jackson is denied and the Notice of Deficiency dated October 23, 1995 is sustained.

DATED: Troy, New York
March 20, 1997

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE

[4]The jurisdiction of the Division of Tax Appeals extends to challenges to the constitutionality of a statute as applied (see, Matter of Fourth Day Enterprises, Tax Appeals Tribunal, October 27, 1988).