STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
FRANCIS J. AND JOAN MCCANN	:	DETERMINATION DTA NO. 816567
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax, City of Yonkers Income Tax Surcharge and New York City Personal Income Tax under Articles 22 and 30-A of the Tax Law and the New York City Administrative Code for the Years 1994, 1995 and 1996.	:	

Petitioners, Francis J. and Joan McCann, 15 Newkirk Road, Somerset, New Jersey 08873, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax, City of Yonkers income tax surcharge and New York City personal income tax under Articles 22 and 30-A of the Tax Law and the New York City Administrative Code for the years 1994, 1995 and 1996.

A hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on January 21, 1999 at 10:30 A.M., with all briefs to be submitted by May 14, 1999, which date began the six-month period for the issuance of this determination. Petitioners appeared by Herbert J. Silver, Esq. The Division of Taxation appeared by Terrence M. Boyle, Esq. (Laura J. Witkowski, Esq. and Kathleen D. Chase, Esq., of counsel).

ISSUE

Whether the income earned by petitioner Francis J. McCann, a nonresident of the State of New York during the years at issue, as a result of his employment with the Metro-North Railroad's New York City office, are exempt from New York State, New York City and City of Yonkers personal income taxes pursuant to the Amtrak Reauthorization and Improvement Act of 1990.

FINDINGS OF FACT

1. For each of the years at issue, petitioners, Francis J. and Joan McCann,[1] filed a joint New York State Nonresident and Part-Year Resident Income Tax Return (Form IT-203). The returns listed petitioners' address as 15 Newkirk Road, Somerset, New Jersey 08873. Petitioners were residents of New Jersey during the years at issue. Attached to each of petitioners' personal income tax returns was a Wage and Tax Statement (Form W-2) for Mr. McCann, wherein it was reported that he received taxable New York State wages from the Metropolitan Transportation Authority ("MTA"). According to the W-2 forms, no New York State or City taxes were withheld from the wages paid to Mr. McCann.

2. On their returns, petitioners included the W-2 wages in calculating their New York adjusted gross income. Petitioners calculated their New York State income tax liability, their New York City nonresident earnings tax liability, their New York State income allocation percentage and their allocated New York State tax for each of the years at issue. The total tax liability reported per petitioners' 1994 return was $4,903.00; 1995 return was $8,916.00; and,

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[1]The petitioners in this matter, Francis J. and Joan McCann, are a husband and wife who filed joint New York State personal income tax returns. However, because the income in dispute was earned exclusively by Mr. McCann, all references to "petitioner" herein shall refer solely to Mr. McCann.

1996 return was $6,504.00. However, petitioners did not remit any of the aforementioned tax liabilities, claiming instead on each return that their income was "Tax Exempt."

3. A letter attached to petitioners' 1994 and 1995 returns indicated that they were relying upon a 1991 Advisory Opinion issued by the Department of Taxation and Finance to Metro-North Commuter Railroad, petitioner's employer, (regarding the interpretation of the Amtrak Reauthorization Act of 1990) as the basis for the claim that Mr. McCann's income was "tax exempt." Petitioners asserted that Mr. McCann performed his regularly assigned duties in states other than New York. These duties included: (1) attendance at six meetings per year in Connecticut with representatives of the Connecticut Department of Transportation ("CDOT"); (2) "regularly scheduled meetings" with representatives of New Jersey Transit ("NJT") in New Jersey; (3) maintaining an inventory of utility meters and monitoring utility usage; and (4) coordinating refuse removal contracts covering all of Metro-North's lines, including those in Connecticut.

4. On May 5, 1997, the Division of Taxation ("Division") issued a Statement of Proposed Audit Changes to Mr. and Mrs. McCann relating to the year 1994 in which petitioners were informed that Mr. McCann's W-2 wages had been determined to be subject to New York State and New York City nonresident earnings tax. This document explained the Division's position, in part, as follows:

> The Position Description you supplied, detailing your position purpose and your major accountabilities does not indicate you are required to perform any of your duties in more than one state.
>
> Further, based on your Position Description attendance at a meeting is not considered a "regularly assigned" duty.

Using the figures and allocation percentage set forth on petitioners' 1994 Form IT-203, the Division calculated that petitioners owed $4,203.00 in New York State and City taxes, plus interest. The total amount of tax determined to be due for the 1994 tax year ($4,203.00) differed from the amount set forth on petitioners' return ($4,903.00) due to an addition error made by petitioners on their return.

5. On June 30, 1997, the Division issued to petitioners a Notice of Deficiency (assessment # L-013475182-1), asserting New York State and City taxes in the amount of $4,203.00, plus interest, for the year 1994.

6. On July 18, 1996, the Division issued a Notice and Demand (assessment # L-012434245-7) to petitioners assessing New York State, New York City and Yonkers taxes in the amount of $3,929.00, plus penalty (Tax Law § 685[a][2]) and interest for the year 1995. The total amount of tax assessed ($3,929.00) was less than the amount listed as due on petitioners' 1995 return as a result of petitioners' failure to properly compute their tax liability on their return.

7. Following petitioners' disagreement with the assessment for the year 1995, the Division transmitted a Request for Additional Information, dated March 7, 1997, in which petitioners were asked for additional information regarding their claim that their 1995 income was tax exempt. Petitioners responded to the request via letter dated March 27, 1997. Attached to this letter was a copy of petitioner's "Position Description." This document indicated that Mr.McCann worked as a "Project Manager Cost Analysis" in the "Operating Budgets and Performance Analysis" Department of the Operating Division of the Metro-North Railroad. The major responsibilities of this position and the percentage of time spent on each included (1) developing the propulsion budget and evaluating actual results (30%); (2) monitoring joint service, Conrail and Amtrak

agreements (15%); (3) assisting in developing Operating Division statistical data base and unit cost system, including annual submission to Federal Transportation Administration ("FTA") (24%); and (4) establishing and maintaining energy management function for all utilities, covering optimum rates, energy initiatives and contractual relationships (30%). The purpose of this position was described as follows:

> Staff function to contribute to creation and distribution of information regarding operational and financial performance, including operating and capital budgets. To provide support in managing energy initiatives and utilization. To establish effective relationships with utilities, governmental entities, and other railroads with which Metro-North interacts.

The Division issued to petitioners a Response to Taxpayer Inquiry on April 28, 1997, in which the Division sustained assessment # L-012434245-7.

8. On July 10, 1997, the Division issued a Notice and Demand (assessment # L-013844956-1) to petitioners assessing New York State, New York City and Yonkers taxes in the amount of $6,504.00, plus penalty (Tax Law § 685[a][2]) and interest for the 1996 year.

9. Petitioner began his employment with the MTA in September 1971. In early 1983, the MTA created a subsidiary, the Metro-North Commuter Railroad, to operate the commuter line out of the Grand Central Terminal in New York City to Poughkeepsie and Dover Plains, New York and New Haven, Connecticut as well as three branch lines operated solely within the State of Connecticut. Metro-North operated the New Haven Commuter Rail Service under an agreement with the CDOT.

10. Beginning in 1985 and continuing through the years at issue, petitioner was the Project Manager of Cost Analysis in the Operating Department. His office was located at 420 Lexington Avenue in New York City. Petitioner's responsibilities included development and monitoring of the propulsion budget (energy use), monitoring conservation activities and coordinating contracts

that the MTA had with Conrail, which operated the freight service, Amtrak, the CDOT and the NJT.

11. The agreement between the MTA and the NJT required meetings to be held to discuss any operating problems with respect to the New Jersey lines operated by the NJT. During the years at issue, petitioner attended quarterly meetings in New Jersey with NJT representatives with respect to the two rail lines operated by NJT for Metro-North within the boundaries of the State of New Jersey.

12. Pursuant to the agreement between Metro-North and the CDOT, monthly meetings were required to be held, alternating between New York and Connecticut. Petitioner attended all the meetings scheduled during the years at issue. The purpose of these meetings was to monitor the joint sevice agreement between Metro-North and CDOT with respect to the one main line and three branch lines operated by Metro-North within the boundaries of the State of Connecticut. Petitioner regularly presented reports on energy use and energy conservation at these meetings.

13. Petitioner was involved, during the years 1994 through 1996, in the development of a database of utilities (i.e., water, electric) for Metro-North. This task required petitioner to go out and meet with various personnel of the railroad to coordinate the inspection of the approximately 2,000 meters located along both the New York and Connecticut lines. The inspection involved checking the meters, obtaining the meter numbers and recording the boilerplate type as part of building the database for the railroad.

14. During the years at issue, petitioner was required to prepare an annual report of the over 100 grade crossings operated by Metro-North in New York and Connecticut, as mandated by the Federal Transportation Administration. Generally, this task involved taking a railroad highway vehicle to the grade crossings and recording the necessary information, although it was

sometimes necessary to take a high rail vehicle (regular highway vehicle which has the capacity of being switched to operate on the track itself) if the crossing was not easily accessible by ordinary roads.

15. An agreement between Metro-North and Conrail required monthly billing to Conrail for maintenance and use of "turnouts" (i.e., switches that allow a train to go from one track to another). This required petitioner to conduct an annual inventory of the track turnouts on track lines both within and outside New York State.

16. The annual inventories of the grade crossings and the track turnouts, and the creation of the utility database, required petitioner to spend approximately 18-20 days per year in Connecticut during the years in question.

17. The Division submitted proposed findings of fact numbered "1" through "48". Petitioner submitted proposed findings of fact as well, in unnumbered paragraphs. Such proposed findings of fact are accepted in substance and have been incorporated into this determination.

CONCLUSIONS OF LAW

A. Prior to 1990, section 11504(a) of the Federal Transportation Law (49 USC § 11504[a]) provided a limited exemption for railroad employers with respect to their duty to withhold income tax on the compensation paid to certain employees. At that time, this provision was limited to employer relief from the multi-state withholding tax burden; it did not exempt employees from the burden of multi-state income taxation.

The exemption provided to employers in section 11504(a) applied to employees who either: (1) performed "regularly assigned duties on a locomotive, car or other track-borne vehicle" in at least two states; or (2) were "engaged principally in maintaining roadways, signals,

communications and structures or in operating motortrucks from railroad terminals" in at least two states. It is clear from the language of this provision that there were two separate categories of employees covered by the exemption from withholding. The first category was for employees who actually, physically worked on a locomotive or car, such as engineers and conductors who ride the train. The second category was for roadway maintenance workers who were assigned to a specific roadway which crossed state lines and who worked in any given state on an as-needed basis.

B. In 1990, section 11504(a) was amended by Public Law 101-322, otherwise known as the Amtrak Reauthorization and Improvement Act of 1990 ("Amtrak Act"). This section was subsequently renumbered as section 11502(a), with minor changes not relevant herein, by Public Law 104-88, known as the ICC Termination Act of 1995. The Amtrak Act changed the focus from an employer withholding tax exemption to an employee income tax exemption and provided, in pertinent part, as follows:

> No part of the compensation paid by a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title to an employee who performs regularly assigned duties as such an employee on a railroad in more than one State shall be subject to the income tax laws of any State or subdivision of that State, other than the State or subdivision thereof of the employee's residence.

Subsection (b) of section 11504 was concerned with employees of motor carriers who drove motor vehicles in two or more states.

The current version of the statute, 49 USC § 11502(a) which was enacted as part of the ICC Termination Act of 1995, provides as follows:

> No part of the compensation paid by a rail carrier providing transportation subject to the jurisdiction of the Board under this part to an employee who performs regularly assigned duties as such an employee on a railroad in more than one State

> shall be subject to the income tax laws of any State or subdivision of that State, other than the State or subdivision thereof of the employee's residence.[2]

C. The Taxpayer Services Division of the Department of Taxation and Finance issued, on March 18,1991, an Advisory Opinion in response to a petition received from Metro-North, petitioner's employer. The issue raised by Metro-North was how the Amtrak Act affects employees traveling to more than one state during the course of their employment, including the meaning of the term "regularly assigned" as applied to the provisions of the Act. The Advisory Opinion stated, in part, that employees who do not perform their duties on locomotives and are not employees maintaining roadways, signals, communications and in structures or in operating motor trucks from railroad terminals but who do regularly perform their duties in more than one State will not be subject to New York State income tax on the compensation paid by their employer. However, the Advisory Opinion went on to state that:

> [t]he determination of whether an employee is "regularly assigned" duties to be performed in New York State and one or more other states cannot be made from the occupation titles listed herein.[3] Such question is a factual matter not susceptible of determination in an advisory opinion. An advisory opinion merely sets forth the applicability of pertinent statutory and regulatory provisions to a "specified set of facts". Tax Law §171, subd. Twenty-four, 20 NYCRR 901.1(a).

In light of the above-quoted language, petitioner's claim that it was appropriate for him to rely on the Advisory Opinion requested by Metro-North is unfounded. Absent an advisory opinion addressing the specific facts surrounding petitioner's employment with Metro-North, there was no justification for his claim that the compensation earned was exempt from New York State personal income taxes.

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[2]Section 11504(b) was moved to 49 USC § 14503(a).

[3]Mr. McCann's job title is not among those listed in the Advisory Opinion.

D. The Division cites to the transcript from the Congressional debate on the bill as confirmation of its conclusion that the exemption applies only to those employees who actually, physically work "on the rails." One of the co-authors of the Amtrak Act, Senator Gorton of Washington, stated, on June 25, 1990, the following:

> This bill contains a vitally important provision which I coauthored that will end discriminatory tax treatment suffered by some transportation workers in the State of Washington. . . . I first learned of this problem several years ago from railroad employees who reside in Spokane. During the course of their day, these workers would work on a train passing through Idaho and Montana. Suddenly, these employees, and in some cases retirees, were receiving notices for back taxes from our neighboring States for the portion of the employees' work day when the train traveled through the neighboring States. I felt this action was extremely discriminatory and amounted to double taxation for Washington State workers. (136 Cong Rec S8676-03).

The Division argues that the exemption provided by the Amtrak Act applies only to those employees who physically work on a train, such as engineers and conductors. The Division points to the only legislative history available (the above-quoted statements of the bill's co-author) which it argues clearly indicates that the bill was designed to target only those employees who worked "on a train passing through one or more states."

Petitioner seeks a broader interpretation of the statute, arguing that any employee of the railroad whose regular assignments require him to be in more than one state qualifies for the exemption. Petitioner cites to the following portion of Senator Gorton's statement in support of his position: "[m]y provision provides that rail and motor carrier transportation workers will only have to pay State taxes to their State of residence" (136 Cong Rec S8676-03).

E. In that the statute at issue is a Federal statute, any interpretation must be guided by Federal principles of statutory construction (***National Bank of Auburn v. Lewis***, 81 NY 15). Under Federal principles of construction, the court's function is to enforce the clear language of a

statute according to its terms (***Rake v. Wade***, 508 US 464, 124 L Ed 2d 424). In determining the meaning of the statute, the court considers the text and context of the statute (***Conroy v. Aniskoff***, 507 US 511, 123 L Ed 2d 229). The court's objective is to discern the plain meaning of the statute, not isolated sentences (***Beecham v. United States***, 511 US 368, 128 L Ed 2d 383). The court is also guided by the object and policy of the statute. As the Supreme Court has stated: "[w]e examine first the language of the governing statute, guided not by 'a single sentence or member of a sentence, but look[ing] to the provisions of the whole law, and to its object and policy'" (***John Hancock Life Ins. v. Harris Bank***, 510 US 86, 126 L Ed 2d 524).

In construing the statute, it is first important to consider its relative position and purposes within the larger framework. The subject of Title 49 of the United States Code is transportation. Subtitle IV contains general interstate commerce provisions addressing such topics as jurisdiction, rates and tariffs, licensing and operations. Chapter 115 of that subtitle addresses federal-state relations. The policy of Subtitle IV is to clarify the lines of jurisdiction and authority between the states and the Federal government. Such is the context of former section 11504 (a) and section 11502(a) which relieve certain railroad employees from burdensome tax obligations (***see***, ***Jensen v. Department of Revenue***, 13 Or Tax 296).

F. The first issue to be addressed is whether petitioner performed regularly assigned duties in two or more states during the years at issue. The term "regular" is defined, in part, as "recurring, attending or functioning at fixed or uniform intervals" (***Webster's Ninth New Collegiate Dictionary*** 985 [1989]). In order for petitioner's employment to qualify, his assignments to perform in another state must be on a regular or scheduled basis, as distinguished from random assignments or those performed on an "as needed" basis (***Butler v. Department of Revenue***, 14 Or Tax 195). A review of the facts in this case establishes that petitioner was

required to perform certain assignments on a scheduled or regular basis. As part of his duties, petitioner was required to attend six meetings a year in Connecticut and four in New Jersey. Not only was his attendance required at each of these meetings but he was also required to present reports on various topics at these meetings, including reports on energy use and energy conservation. In addition, petitioner regularly inspected the utility meters, grade crossings and track turnouts located outside New York State. Although the number of working days spent outside New York State amounted to approximately 10% of petitioner's total working days, these out-of-state days were necessary in order for petitioner to meet his employment responsibilities.

G. The next issue to be addressed is whether petitioner was an employee who worked "on the railroad" within the meaning of 49 USC former § 11504(a) and 49 USC § 11502(a). The Division proposes a narrow interpretation which would limit the exemption only to those employees who actually work *on* the railroad, such as conductors or engineers. In response, petitioner prefers a broader interpretation which would encompass all employees of the railroad. In fact, petitioner testified at the hearing that the phrase "working on the railroad" is a term of art within the railroad industry which is synonymous with the phrase "working for the railroad."

In ***Butler v. Department of Revenue*** (***supra***), the court described the policy behind the statute as follows:

> Congress intended to relieve employees of railroads and interstate trucking firms from income taxes that could be imposed if the employees earn part of their income while passing through a state. For example, a truck driver or train engineer might pass through several states during a single day, technically earning income in each of the states. This could subject these employees to burdensome filing requirements and conflicting claims for tax credits. The apparent purpose of the federal provisions was to relieve these employees of unreasonable burdens by limiting their tax obligations.

Although the court and Senator Gorton both refer to individuals who actually work on the railroad in their examples, the intent of the statute is to protect employees of railroads who, in any capacity of their employment, could have income taxes imposed by more than one state as a result of the nature of their employment. Such was the approach taken by the Advisory Opinion of March 18, 1991 requested by Metro-North, whereby it included both workers on the railroad and other workers, such as administrative employees, who worked in more than one state. In addition, Mr. McCann did actually and regularly work on the railroad in more than one state during the time that he was conducting on site inspections of utility meters, grade crossings and track turnouts. These inspections were necessary in order for petitioner to perform his assigned duties of monitoring the agreements Metro-North had with NJT and CDOT, presenting reports at the meetings with CDOT and NJT, creating a database of utilities and preparing an annual report of the grade crossings for the Federal Tansportation Administration. Absent protection from the Amtrak Act, petitioner could be taxed on his income earned by several states simply because he had passed through them during the performance of his assigned duties. In that petitioner is regularly assigned duties working on the railroad in more than one state, the compensation he earned from Metro-North during the years at issue is subject to personal income tax only by the state of his residence (New Jersey) and is exempt from New York State, New York City and City of Yonkers personal income tax.

H. The petition of Frances J. and Joan McCann is granted, and the Notice of Deficiency dated June 30, 1997, the Notice and Demand dated July 18, 1996 and the Notice and Demand dated July 10, 1997 are canceled.

DATED: Troy, New York
November 12, 1999

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE