STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
MICHAEL BYRNE AND MARGARET BYRNE[1]	:	DECISION DTA NO. 813995
for Redetermination of Deficiencies or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1990, 1991 and 1992.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on June 19, 1997 with respect to the petition of Michael Byrne and Margaret Byrne, 23 Brooks Drive, Stony Point, New York 10980-1725. Petitioners appeared by Goldberger & Goldberger (Alan S. Goldberger, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Laura J. Witkowski, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception. Petitioners filed a brief in opposition and the Division of Taxation filed a reply brief. Oral argument was not requested.

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

[1]Pursuant to a stipulation entered into on May 3, 1996 and May 15, 1996, respectively, by Alexander Gurevitch, Esq. and Steven U. Teitelbaum, Esq. (Laura J. Witkowski, Esq., of counsel), 120 similarly situated petitioners have agreed to be bound by the outcome of this determination. Likewise the Division of Taxation has agreed to be bound by this determination with respect to these 120 similarly situated petitioners.

ISSUE

Whether petitioners properly subtracted Mr. Byrne's Manhattan and Bronx Surface Transit Operating Authority pension income from his 1990, 1991 and 1992 Federal adjusted gross income pursuant to the subtraction modification provided for in Tax Law § 612(c)(3)(i).

FINDINGS OF FACT

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

At all times relevant herein, petitioner Michael Byrne was a retired employee of the Manhattan and Bronx Surface Transit Operating Authority ("MABSTOA") and received an annual pension from the MABSTOA pension plan.[2] There is no evidence in the record as to the source of funding of the MABSTOA pension plan. It is clear, however, that the MABSTOA pension plan was not part of either a New York State or municipal retirement system. It is also clear 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.[3]

MABSTOA, a public benefit corporation, was created in 1962 as a subsidiary of the New York City Transit Authority ("Transit Authority") to operate bus lines, formerly privately owned

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[2]The dispute in this case involves the pension income of petitioner Michael Byrne. Margaret Byrne is a petitioner in this matter only because she and her husband, Michael Byrne, filed joint returns for the years in question. Accordingly, all references to "petitioner" in this decision shall refer to Michael Byrne unless otherwise indicated.

[3]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]).

and operated, which had been acquired by the City of New York through condemnation proceedings (***see***, Public Authorities Law [PAL] § 1203-a). MABSTOA operates such bus lines through a lease agreement with the City and the Transit Authority (***id.***). 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 Transit Authority (PAL § 1203-a[2]). Pursuant to PAL § 1201(1), the chairman and members of the Transit Authority 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]).

With certain enumerated exceptions, MABSTOA possesses all powers vested in the Transit Authority including the power to sue and be sued; to have a seal; to acquire, hold and use equipment; to acquire real property by purchase or condemnation; to receive grants of property, money or assistance from any person, government or agency; to make rules and regulations for its organization and management; to make rules for the regulation of its transit facilities; to retain counsel, engineers and private consultants for technical services; to use officers and employees of the city with its consent and to pay the agreed upon compensation for them; to make contracts, leases and conveyances including the power to contract with other transit facilities for combined fares and division of such fares; to surrender to the city property no longer required by it; to rent space and grant concessions on or in any of its facilities; to erect signs or to sell the right to do so; to exercise all requisite and necessary authority to manage, control and direct the maintenance

and operation of the transit facilities transferred to it and to extend, modify or curtail its routes (giving notice to the New York City Board of Estimate at least 30 days prior to any change and upon request conducting a public hearing); to do all things necessary to carry out its purposes; and to submit copies of certain reports to the Mayor of the City of New York (***see***, PAL § 1204).

MABSTOA is specifically empowered to appoint officers and employees, assign powers and duties to them and fix their compensation. In addition, the PAL provides that:

> "[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." (PAL § 1203-a[3][b].)

PAL § 1203-a(1) states that the status of officers and employees of MABSTOA is to be governed exclusively by the provisions of said section.

MABSTOA and any of its property, functions and activities are entitled to all of the privileges, immunities, tax exemptions and other exemptions of the Transit Authority (PAL § 1203-a[4]).

Pursuant to PAL § 1203-b, MABSTOA and the Transit Authority may each transfer to the other from time to time such available funds as they may jointly determine to be necessary or desirable.

The Comptroller of the City of New York is authorized to examine the books and records of MABSTOA related to its financial condition (PAL § 1208). MABSTOA is required to submit an annual report to the mayor, comptroller and board of estimate (PAL § 1213).

MABSTOA is authorized to use the officers, employees, agents, facilities and services of the city on the same terms and conditions as are applicable to the Transit Authority (PAL § 1203-a[5][b]).

Like MABSTOA, the New York City Transit Authority is a public benefit corporation. The purposes of the Transit Authority "are in all respects for the benefit of the people . . . and the authority shall be regarded as performing a governmental function." (PAL § 1202[2].) Unlike employees of MABSTOA, employees of the Transit Authority have civil service status (PAL § 1204[6]). Additionally, the Transit Authority is part of the New York City Employee Retirement System.

Petitioner timely filed a 1990 New York State Resident Income Tax Return (Form IT-201) on or before April 15, 1991. On his return, petitioner claimed a New York subtraction of $24,959.00 in respect of pension income paid to him in that amount during 1990 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 1990 return pursuant to the audit program outlined below. By a Statement of Proposed Audit Changes dated August 6, 1993, 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 $1,764.00, plus interest of $326.61, for the year 1990. On or about August 17, 1993 petitioner remitted payment in full of the amount asserted in the Statement of Proposed Audit Changes. Petitioner subsequently filed a claim for refund dated July 7, 1994 to recover this payment. Pursuant to a Notice of Disallowance dated December 27, 1994 the Division disallowed this claim and advised petitioner that his MABSTOA pension "does not qualify for total exemption as a New York State, local or municipal pension."

Petitioner timely filed his 1991 New York State Resident Income Tax Return on or about April 10, 1992. On his return, petitioner claimed a New York subtraction of $24,840.00 for "NY Exempt Pensions" for 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 1991 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 July 5, 1994, 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 $1,765.00, plus interest, for the year 1991.

On August 15, 1994, the Division issued to petitioner a Notice of Deficiency which asserted $1,765.00 in personal income tax due, plus interest, for the year 1991.

Petitioner timely filed his 1992 New York State Resident Income Tax Return on or about March 31, 1993. On his return, petitioner claimed a New York State subtraction of $24,840.00 for "Exempt Pensions" in respect of MABSTOA pension benefits paid to him in that amount during that year. 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 April 18, 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 $1,828.00, plus interest, for the year 1992.

On June 12, 1995, the Division issued to petitioner a Notice of Deficiency which asserted $1,828.00 in personal income tax due, plus interest, for the year 1992.

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.

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.

We find the following additional findings of fact.

> In the 1996 legislative session, a similar bill was introduced and passed in the Senate, but failed to pass in the Assembly.
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> During the 1997 legislative session, a similar bill (S.5159/A.7678) was passed by both the Senate and Assembly and

> signed into law by Governor Pataki on July 29, 1997 (***see***, L 1997, ch 312, §§ 1-11). The law amended PAL § 1203-a(3)(b) to provide that the officers and employees of MABSTOA were deemed officers and employees of a subdivision of New York State for purposes of the pension exemption accorded those persons in Tax Law § 612(c)(3)(i).

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.

The Division has at least one other audit program in existence that is based upon the Division's determination that the pension income does not qualify for the Tax Law § 612(c)(3)(i) subtraction modification because such pension income was not paid from a State or municipal retirement system. The employer involved in the one identified audit program is the Long Island Railroad Company.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge determined that MABSTOA employees were employees of the State, its subdivisions and agencies for purposes of the subtraction modification set forth in Tax Law § 612(c)(3)(i), which section offers no definition of the phrase "State, its subdivisions and agencies." The Administrative Law Judge relied on the definition of "public benefit corporations" and "public authorities" found in PAL, the General Construction Law and case law in concluding that under some circumstances MABSTOA had been treated as the State.

The Administrative Law Judge noted that the courts had made a "particularized inquiry" to determine whether public benefit corporations should be treated like the State. This scrutiny considers the nature of the entity and the statute claimed applicable to it. The Administrative Law Judge reviewed several of the cases where this inquiry had been utilized by the courts and

then turned the analysis on the instant facts with respect to MABSTOA. The Administrative Law Judge found that under the "particularized inquiry," MABSTOA met the criteria for "State, its subdivisions and agencies" because it was a public benefit corporation with a strong identity with the Transit Authority, including the ability to freely transfer funds between the two agencies. Additionally, it acquired the Transit Authority's purpose of performing a governmental function and has been recognized as a State agency for other purposes.

The Administrative Law Judge also found the case of ***Rose v. Long Island R. R. Pension Plan*** (828 F2d 910, ***cert denied*** 485 US 936) persuasive in that the plan was found to be a governmental plan under the Employee Retirement Income Security Act ("ERISA"). Given MABSTOA's similarity to the Long Island Railroad ("LIRR") and the Court's analysis (relying on six factors set forth in Rev. Rul. 57-128) of whether the LIRR was a political subdivision of the State for purposes of compliance with ERISA, the Administrative Law Judge reasoned that the same analysis would also support a conclusion that MABSTOA was a political subdivision of the State.

The Administrative Law Judge reasoned that the exemption provided by Tax Law § 612(c)(3)(i) was meant to provide a financial benefit to retirees for their public service and that this was consistent with MABSTOA's public purpose and in no way interferes with said purpose or impedes its independence or operation as an authority.

The Administrative Law Judge also found that it was not necessary that the pension be paid by the State or municipal subdivision and that the Division's regulation setting forth the requirement was invalid as beyond the scope of the statute under which it was promulgated. Together with the finding that MABSTOA was within the meaning of "State, its subdivisions and agencies" the finding that the pension need not be paid by the State or a municipal

subdivision provided the basis for the Administrative Law Judge's conclusion that the pension income of MABSTOA employees was exempt.

ARGUMENTS ON EXCEPTION

The Division argues that the Administrative Law Judge erroneously determined that MABSTOA employees were employees of the State, its subdivisions and agencies, and that the particularized inquiry leads to a contrary conclusion. The Division conceded the second requirement set forth in its regulation at 20 NYCRR former 116.3, that the pension be paid by the State or municipal retirement system.

The Division contends that the narrow exemption provided for by Tax Law § 612(c)(3)(i) was not applicable to petitioners during the years in issue since MABSTOA employees were not employees of the State or its subdivisions and agencies and MABSTOA's enabling legislation indicates that it was not intended to be classified as a subdivision of the State. The Division cites several cases where authorities have not been treated as the State or its subdivisions and agencies and argues that MABSTOA deserves no different treatment. The Division contends that one such case, ***Collins v. Manhattan & Bronx Surface Tr. Operating Auth.*** (62 NY2d 361, 477 NYS2d 91)**,** minimizes the effect of MABSTOA employees being subject to the Public Employees Fair Employment Act vis-a-vis their status as employees of the State.

The Division also maintains that the amendments effectuated by Chapter 312 of the Laws of 1997 establish that MABSTOA was not a subdivision of the State prior to the law's enactment. Based upon the rules of statutory construction, the Division believes that the language of the statutory amendment is prospective and that the legislative history confirms the Legislature's intent to make a substantive change in the law, thus implying that prior to the law's

enactment MABSTOA employees could not be considered employees of the State, its subdivisions and agencies.

In response, petitioner endorses the analysis relied upon by the Administrative Law Judge in his determination below, specifically the particularized inquiry and the analysis utilized by the Court in ***Rose v. Long Island R. R. Pension Plan*** (***supra***) in determining whether the LIRR's pension plan was exempt from ERISA as a "governmental plan." Finally, petitioner argues that the amendments in Chapter 312 of the Laws of 1997 were expressly intended as "clarifying" amendments to correct a misinterpretation of the law by a State agency, citing ***Matter of Honeoye Cent. School Dist. v. Berle*** (72 AD2d 25, 423 NYS2d 336, ***affd*** 51 NY2d 970, 435 NYS2d 721). Additionally, petitioner distinguishes itself from our decision in ***Matter of Campac Assocs***. (Tax Appeals Tribunal, January 12, 1995) wherein we stated that the use of the words "clarifying amendment" in a memorandum in support was not enough to establish legislative intent to expand upon the term "transferor," saying that in the present matter the Legislature was merely clarifying the status of MABSTOA employees as employees of the State or its subdivisions and agencies to prevent "the further injustice of singling out MABSTOA employees from other public benefit corporation employees for an oppressive tax burden" (Petitioners' brief, p. 26).

OPINION

We affirm the determination of the Administrative Law Judge. The only issue before us in this matter is whether petitioner, a former MABSTOA employee, qualified 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. The Division has conceded that the pension did not need to

be paid from a State or municipal retirement system (***see***, ***Matter of Langlan***, Tax Appeals Tribunal, September 4, 1997).

This matter presents the same issue found in ***Matter of Jackson*** (Tax Appeals Tribunal, March 5, 1998) wherein we found that the pensions paid to former employees and officers of MABSTOA qualified for the Tax Law § 612(c)(3)(i) modification. Since we find no factual distinction between the cases, we rely on our analysis in ***Jackson***. However, unlike ***Jackson,*** the parties hereto were aware of the change in the law prior to submitting their briefs. Therefore, we will briefly address that issue.

We believe that the intent of the legislation passed in 1997 was to clarify the status of MABSTOA officers and employees, just as set forth in the legislation itself (L 1997, ch 312) (***cf., Matter of Campac Assocs.***, ***supra***). It is unnecessary to look any further to ascertain legislative intent (***Crossroads Apt. Corp. v. City of Rochester***, 79 AD2d 1095, 435 NYS2d 840; ***Matter of Honeoye Cent. School Dist. v. Berle***, ***supra*** [where the intent of an amendment was construed to clarify the apparent ambiguities in a statute and rectify the misinterpretations in the departmental regulation]).

In the instant matter, the legislative history does not lend significant support to the Division's position. Only two documents even suggest that MABSTOA officers and employees were not employees of the State or its subdivisions prior to the amendment. In the Commissioner of Taxation and Finance's letter of July 10, 1997, he requests that the bill "apply prospectively only in order to avoid refund claims by . . . MABSTOA [employees]." Given the effective date set forth in the bill ("immediately"), refund claims based on the amendment would not be permitted. The Division of the Budget's memorandum states summarily that since employees of MABSTOA "are not considered to be employees of New York State, its

subdivisions or agencies, their pensions are not fully exempt." This statement assumes the validity of the Division's interpretation of the law prior to the amendment and adds little to bolster the Division's argument that the prior law did not include MABSTOA employees as officers or employees of the State, its subdivisions and agencies.

As in ***Jackson***, we do not rely on the 1997 amendment which clarified the status of MABSTOA employees as a basis for our decision herein nor do we believe the intent of the statute to clarify the status of MABSTOA employees should be a basis for finding a retroactive intent (***Schultz Constr. v. Ross***, 76 AD2d 151, 431 NYS2d 144, ***appeal dismissed*** 52 NY2d 897, 437 NYS2d 307). The statute is, by definition, prospective. Rather, given the discussion of the statutes, the case law and the history of MABSTOA in ***Jackson***, we believe MABSTOA employees were employees of the State, its subdivisions and agencies within the meaning and intent of the laws prior to the amendment's enactment.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;

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

3. The petition of Michael Byrne and Margaret Byrne is granted; and

4. The claim for refund for the year 1990 is granted and the notices of deficiency, dated August 15, 1994 and June 12, 1995 are canceled.

DATED: Troy, New York
March 26, 1998

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner