STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JAY G. AND DOROTHY A. LANGLAN	:	DETERMINATION DTA NO. 813120
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1991.	:	

Petitioners, Jay G. and Dorothy A. Langlan, 28 Ventura Drive, North Babylon, New York 11703-2707, filed a petition for redetermination of deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1991.

On February 21, 1995 and March 6, 1995, respectively, petitioners by their authorized representative, Blaustein & Weinick (Gary S. Weinick, Esq., of counsel), and the Division of Taxation, appearing by Steven U. Teitelbaum, Esq. (Laura J. Witkowski, Esq., of counsel) consented to have the controversy determined on submission without a hearing. All documentary evidence and briefs were due by August 17, 1995, which date commenced the six-month period to issue a determination in this matter. The Division of Taxation submitted documents on April 10, 1995. Petitioners submitted a brief on June 15, 1995. Petitioners did not submit any documents. On July 27, 1995, the Division of Taxation submitted a nine-page letter as its brief. Petitioners submitted a letter in lieu of a reply brief on August 14, 1995.

Upon review of the entire record, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Long Island Railroad Company pension benefits in the amount of $53,184.00 received by petitioner Jay Langlan, as a retired employee of the Long Island Railroad, constitute an allowable subtraction from Federal adjusted gross income pursuant to Tax Law § 612(c)(3)(i).

FINDINGS OF FACT

1. On or about March 7, 1992, Jay and Dorothy Langlan filed their 1991 personal income tax return.[1] Petitioner filed: Form IT-201; a single page "FORM IT-201 -- STATEMENTS"; five wage and tax statements (Forms W-2, Form RRB-1099-R and Forms 1099-R), as well as a sick pay statement issued by the U.S. Railroad Retirement Board, Bureau of Unemployment and Sickness Insurance, in the name of Jay Langlan. On this return, petitioner reported New York adjusted gross income of $18,070.00 and claimed a New York subtraction of $71,677.00 on line 28.[2] Petitioner also claimed a refund of $4,489.00.

2. In the later part of 1992, petitioner's 1991 Form IT-201 was selected for desk audit by the Division of Taxation ("Division").

3. On December 3, 1992, a Statement of Proposed Audit Changes ("statement") (L-006773647-9) was issued to petitioner for personal income taxes for tax year 1991. The proposed additional total amount due was $499.20. The "Computation Section" contained the following:

> "Please refer to the attachment sheet for a further explanation of this liability.
>
> "Interest is due for late payment or underpayment at the applicable rate. Interest is mandatory under the New York State Tax Law.
>
> "TAX PERIOD ENDED DATE: 12/31/91
> TAX YEAR: 1991 FILE DUE DATE: 04/15/92 DATE RECEIVED: TIMELY
> FILING STATUS: 02
>
> | | | |
> |---|---|---|
> | Tax Per Taxpayer: | | 41.00 |
> | Tax Per Dept of Tax & Finance: | | 5,008.32 |
> | Timely Payments/Credits: | | 4,530.00 |
> | Late Payments: | | 0.00 |
> | Amount Previously Assessed/Refunded: | | 0.00 |
> | BALANCE: | | 478.32 |
>
> | | |
> |---|---|
> | Tax Amount assessed: | 478.32 |
> | Interest Amount Assessed: | 20.88 |
> | Penalty Amount Assessed: | 0.00 |

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[1]Dorothy Langlan is listed as a petitioner along with her husband Jay Langlan because they filed a joint return. However, Mr. Langlan is being referred to as "petitioner" herein since the issues relate to certain payments received by Mr. Langlan.

[2]The Line 28 -- OTHER SUBTRACTIONS was comprised of the following: Railroad Retirement Unemployment $1,240.00; Railroad Retirement $17,253.00; and State Pension S-2 $53,184.00.

Assessment Payments/Credits:	0.00
Current Balance Due:	499.20"

The referenced attachment sheet contained the following:

"Pensions received by retired employees of the Long Island Railroad Co., like employees of the Manhattan and Bronx Surface Transit Operating Authority (MARSTOA) [sic], are subject to NYS tax. These are public benefit subsidiary corporations of the Metropolitan Transportation Authority (MTA) but they are not members of the State or Municipal Retirement System. The pensions however qualify for the Section 612(c) 3-2 exclusion of up to $20,000.00, but since you were not 59 1/2 years old at the time, you are not allowed the deduction.

"We have recomputed your tax as follows:

NY income per your return		$18,070.00
Adjustment		71,677.00
NY income adjusted		89,747.00
Less itemized deductions		16,035.00
Balance	73,712.00	
Less exemptions		1,000.00
NY taxable income		72,712.00
NYS tax on above		$ 5,008.32
Tax withheld		4,530.00
PERSONAL INCOME TAX DUE		478.32"

4. On January 12, 1993, the Division issued a Notice of Deficiency (L-006773647-9) asserting personal income taxes due under Article 22 of $478.32, plus interest of $24.17.

5. Petitioners timely requested a conciliation conference.

6. In response to petitioners' protest of their refund denial and the issuance of the Notice of Deficiency, a conciliation conference was held on March 16, 1994. Petitioners appeared by Gary S. Weinick, Esq. The Division was represented by Donald Bullett, Tax Technician.

7. Pursuant to the Bureau of Conciliation and Mediation Services ("BCMS") conference, a Conciliation Order (CMS No. 129339), dated May 13, 1994 was issued to petitioners, Jay G. and Dorothy A. Langlan, with the following recomputation of the statutory notice:

Deficiency	$977.00 (Refund)
Penalty	N/A
Interest	N/A

8. In its submissions, the Division filed the affidavit of Donald Bullett, with an attached computation sheet.

9. Donald J. Bullett is a Tax Technician II in the Central Office Audit Bureau of the Division and has held this position for approximately 25 years. Mr. Bullett's duties include, inter alia: (a) analyzing petitions filed in protest of actions taken by the Division; (b) "determining the correct tax liability and attempting to resolve cases either by re-audit action or by advocating the matter" before BCMS; and (c) "completing the appropriate advocate forms detailing the events of the conciliation conference" and the Division's conference position. As noted in Finding of Fact "6", Mr. Bullett represented the Division at the BCMS conference held in this matter.

10. Mr. Bullett's affidavit briefly outlines the procedural history of the instant matter, as well as setting forth the basis for the conciliation conferee's recomputation and the subsequent actions of the Division.

In his affidavit, Mr. Bullett stated that the conferee's recomputation of the statutory notice, which was agreed to by the Audit Division, was based upon petitioners' ability to prove that a portion of the income listed on line 28 of the IT-201 qualified as exempt income. The exempt income was identified as the "RR UNEMPLOYMENT" and "RR RETIREMENT" income totalling $18,493.00. According to Mr. Bullett, "the $53,184 in Long Island Railroad Company pension benefits received by the petitioner were still not considered to be an allowable subtraction from New York State adjusted gross income."

Attached to Mr. Bullett's affidavit is a copy of the computation sheet which contained the revised calculation of tax upon which the conferee based his recomputation of the statutory notice, the refund of $977.00. This computation sheet contains the following calculations:

"Total NY income	18070.00
	53184.00
	71254.00
item ded	16035.00
	1000.00
	54219.00
NY Tax	3553.00
NY Tax W/H	4530.00
overpayment	977.00"

The statement "[C]ancel L006773647 in full" appears at the bottom of the computation sheet.

The Bullett affidavit affirms that, as a result of the Audit Division's post conciliation conference modifications, the Division cancelled the Notice of Deficiency and issued a refund check to petitioners on October 28, 1994 in the amount of approximately $1,143.00 (tax plus interest). [3]

11. Petitioner timely filed a petition, dated July 27, 1994, which seeks a redetermination of a deficiency and a refund of personal income taxes for 1991. Petitioner is contesting the disallowed refund of $4,489.00.[4]

The petition contained the following "Allegations of Error":

> "1) The Commissioner of Taxation and Finance erroneously disallowed the taxpayers 'New York Subtractions' from Federal adjusted gross income in the amount of $71,677. The Commissioner erroneously disallowed the exclusion from tax of pension payments received by the taxpayer, JAY G. LANGLAN, as a retired employee of the Long Island Railroad.
>
> "2) The Commissioner of Taxation and Finance erroneously increased the taxpayers' New York adjusted gross income in the amount of $71,677.
>
> "3) The Commissioner of Taxation and Finance erroneously determined that pension amounts received by the taxpayer, JAY G. LANGLAN, as a retired employee of the Long Island Railroad are subject to New York taxation."

Petitioner asserts that he properly subtracted from Federal adjusted gross income, in arriving at New York adjusted gross income, pension amounts paid to him as a retired employee of the Long Island Railroad. He argues that, as a former employee of the Long Island Railroad, he "qualifies as a former employee of the State of New York, its subdivisions and its agencies" and therefore is entitled to exclude from New York adjusted gross income, pursuant to Tax Law § 612(c)(3)(i), pension amounts paid to him by the Long Island Railroad.

12. The Division served its answer, dated November 21, 1994, on petitioner.

13. In accordance with State Administrative Procedure Act § 307(1), petitioner's proposed finding of fact has been accepted and substantially incorporated herein.

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[3]The record is silent as to the date the Division cancelled the notice.

[4]It appears that the petition in this matter was filed prior to the cancellation of the notice of deficiency and the refund of $977.00 in tax plus interest.

SUMMARY OF THE PARTIES' POSITIONS

14. Petitioner argues that the 1991 Long Island Railroad Company pension benefits which he received are exempt from taxation under Tax Law § 612(c)(3)(i) and therefore were improperly taxed by the Division. He contends that the regulation promulgated by the Division, 20 NYCRR 112.3,[5] is contrary to the Tax Law, the New York Constitution and the case law, and therefore should be declared invalid. Petitioner also challenges the Division's application of Tax Law § 612(c)(3)(i) on constitutional grounds. He argues that:

> "The Division's application of the statute constitutes discrimination against Long Island Railroad Company employees (employees falling within the constitutional category of '[sic] employees of the State and its subdivisions and agencies) merely because of the 'funding' or payment requirement contained in the Regulations." (Petitioners' brief, p. 8.)

15. The Division asserts that the pension benefits paid to petitioner by the Long Island Railroad ("LIRR") were properly includible in petitioners' New York State adjusted gross income pursuant to Tax Law § 612 (c)(3)(i) and 20 NYCRR former 116.3(c)(1). The Division maintains that even though employees of LIRR are employees of the State and its subdivisions and agencies, "the pension plans for LIRR employees did not become State or municipal retirement systems as a result of the LIRR becoming a public benefit subsidiary corporation" (Division's brief, p. 4). It also contends that 20 NYCRR former 116.3(c)(1) is valid. Additionally, the Division argues that petitioners' constitutional arguments are without merit.

The Division contends that petitioners have failed to meet "their burden of establishing that the pension benefits received by Mr. Langlan from the LIRR in 1991 were exempt from New York State personal income tax under Article 22 of the Tax Law" (Division's brief, p. 9). It asserts that petitioners' refund claim should be denied and the petition should be dismissed.

16. In his reply letter, petitioner asserts that Tax Law § 612(c)(3)(i) does not contain the funding requirement contained in 20 NYCRR former 116.3(c)(1). He argues that since the regulation is inconsistent with the statute, the regulation should be held to be without legal effect and disregarded. Petitioner maintains that the LIRR pension benefits of $53,184.00

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[5]Petitioner references the regulation as renumbered, effective January 29, 1992, after the period in issue. The correct section is 20 NYCRR former 116.3.

which he received, as a retired employee of the LIRR, "constitute an allowable subtraction from Federal adjusted gross income under Tax Law § 612(c)(3)(i)" (Petitioners' reply letter, pp. 3-4).

CONCLUSIONS OF LAW

A. New York Constitution, article XVI, § 5, 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."

New York Constitution, article V, § 7 provides:

> "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."

Tax Law § 612 codifies these constitutional provisions.

B. Tax Law § 612 reads, in pertinent part:

> "(a) General. The New York adjusted gross income of a resident individual means his federal adjusted gross income as defined in the laws of the United States for the taxable year, with the modifications specified in this section.
>
> * * *
>
> "(c) Modifications reducing federal adjusted gross income. There shall be subtracted from federal adjusted gross income:
>
> * * *
>
> "(3)(i) 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. 20 NYCRR former 116.3(c)(1) states:

> "Pensions and other benefits paid by a New York State or municipal retirement system (Tax Law, § 612 [c][3]). Pensions and other benefits (including but not limited to annuities, interest and lump sum payments) 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 or to the beneficiary of a deceased officer or employee, shall be subtracted in computing New York adjusted gross income."

D. Public Authorities Law § 1265(9) provides that:

> "(a) Notwithstanding section one hundred thirteen of the retirement and social security law or any other general or special law, the authority and any of its subsidiary corporations may continue or provide to its affected officers and employees any retirement, disability, death or other benefits provided or required for railroad personnel pursuant to federal or state law. Notwithstanding any provisions of the civil service law, no officer or employee of a subsidiary corporation of the

> authority, other than a public benefit subsidiary corporation, shall be a public officer or a public employee;
>
> "(b) The authority and any of its public benefit subsidiary corporations may be a 'participating employer' in the New York state employees' retirement system with respect to one or more classes of officers and employees of such authority or any such public benefit subsidiary corporation, as may be provided by resolution of such authority or any such public benefit subsidiary corporation, as the case may be, or any subsequent amendment thereof, filed with the comptroller and accepted by him pursuant to section thirty-one of the retirement and social security law. In taking any action pursuant to this paragraph (b), the authority and any of its public benefit subsidiary corporations shall consider the coverages and benefits continued or provided pursuant to paragraph (a) of this subdivision."

E. The Division asserts that the pension benefits paid to petitioner by the LIRR were properly includible in petitioner's New York State adjusted gross income pursuant to Tax Law § 612(c)(3)(i) and 20 NYCRR former 116.3(c)(1). It contends that 20 NYCRR former 116.3(c)(1) contains two prerequisites which must be met in order for the pension payment to qualify for the exemption. First, the payment must be received by a former officer or employee of New York State or one of its subdivisions or agencies. Second, the pension payment or benefit must be payable from a State or municipal retirement system.

The Division argues that in the instant case only one of the two prerequisites of 20 NYCRR former 116.3(c)(1) have been met. It maintains that inasmuch as the LIRR is a public benefit corporation of the Metropolitan Transportation Authority established pursuant to Public Authorities Law § 1266, its employees are "employees of the State and its subdivisions and agencies". The Division contends that the second requirement cannot be met since LIRR pension plans "did not become State or municipal retirement systems as a result of the LIRR becoming a public benefit subsidiary corporation" (Division's brief, p. 4). It argues that "the pension plans were not created by legislative act or under a law which provides that all rights therein shall be exempt from income tax, nor are the pensions payable from funds contributed to by the State or any of its subdivisions, municipalities, civil divisions or agencies" (Division's brief, p. 4). The Division asserts that since the two requirements of 20 NYCRR former 116.3(c)(1) have not been met, petitioner is not entitled to subtract his pension income when determining his New York adjusted gross income. The Division does concede that, if petitioner

was age 59 1/2 or older, up to $20,000.00 of his LIRR pension would be excluded from his New York adjusted gross income pursuant to Tax Law § 612(c)(3-a).

F. Petitioner contends that the 1991 pension benefits, in the amount of $53,184.00, which he received as a retired employee of the LIRR are exempt from taxation under Tax Law § 612(c)(3)(i) and therefore were improperly taxed by the Division. He asserts that he, as a former LIRR employee, is a former employee of New York State, its political subdivisions or agencies, inasmuch as the LIRR is a public benefit subsidiary corporation. Therefore, he argues that since he is a former New York State employee he is entitled to subtract the pension he received from the LIRR from his Federal adjusted gross income pursuant to Tax Law § 612(c)(3)(i).

Petitioner contends that the requirement in 20 NYCRR former 116.3(c)(1) that the pension benefits be payable from a state or municipal retirement system is strictly the interpretation of the Division and is inconsistent with the statute in issue. He maintains that both Tax Law § 612(c)(3)(i), and New York State Constitution, article XVI, § 5 are silent on the issue of the source of funding of the pension benefits. He argues that the only requirement contained in both the statute and the New York State Constitution is that the benefits be paid to an employee of New York State or any of its subdivision, municipalities, civil divisions or agencies.

G. Statutory exemptions are strictly construed against the taxpayer, who must demonstrate that the only reasonable interpretation of the provision provides his entitlement to the exemption (Matter of Grace v. State Tax Commn., 37 NY2d 193, 371 NYS2d 715, lv denied 37 NY2d 708, 375 NYS2d 1027; Matter of Old Nut Co. v. State Tax Commn., 126 AD2d 869, 511 NYS2d 161, lv denied 69 NY2d 609, 516 NYS2d 1025; Matter of Bredero Vast Goed N.V. v. State Tax Commn., 146 AD2d 155, 539 NYS2d 823, appeal dismissed 74 NY2d 791, 545 NYS2d 105).

In order to determine whether, in this case, petitioner is entitled to the exemption under Tax Law § 612(c)(3)(i), it is necessary to first address the issue of whether petitioner, as a

former employee of the LIRR, is a former employee of New York State or one of its subdivisions or agencies. The LIRR is a public benefit subsidiary corporation of the Metropolitan Transportation Authority ("MTA") established pursuant to Public Authorities Law § 1266. Public authorities generally are corporate instrumentalities of the State, created by the Legislature for the furtherance of certain public purposes. General Construction Law § 66(4) defines a "public benefit corporation" 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."

The MTA is stated in Public Authorities Law § 1263(5) to be a "'state agency' for the purposes of sections 73 and 74 of the Public Officers Law." These provisions relate to such matters as conflict of interest and ethical standards. Review of Public Authorities Law § 1265(9)(a), set forth in Conclusion of Law "D", indicates that only an officer or employee of a public benefit subsidiary corporation shall be a public officer or a public employee. Since the LIRR is a public benefit subsidiary corporation, petitioner, one of its former employees, is a former "public employee".

H. Since I have determined that petitioner, as a former employee of the LIRR, is a former New York State public employee, I will next address whether the pension he received from the LIRR should be excluded from his Federal adjusted gross income pursuant to Tax Law § 612(c)(3)(i).

Public Authorities Law § 1265(9)(b), set forth in Conclusion of Law "D", allows the MTA and any of its public benefit subsidiary corporations, i.e., the LIRR, to become a "participating employer" in the New York State employees' retirement system with respect to one or more classes of their respective officers or employees. This section along with Public Authorities Law § 1265(9)(a) also allows the MTA and its public benefit subsidiary corporations to continue the benefit plans which they already had in effect. There is no evidence in the record, that the LIRR ever became a participating employer in the New York State employees' retirement system with respect to the pension plan under which petitioner

received his benefits. Since the LIRR pension benefits which petitioner received were not payable out of a "New York State or municipal retirement system plan", he fails to qualify for the exemption under Tax Law § 612(c)(3)(i). Petitioner has failed to carry his burden of proving that he is entitled to exclude his LIRR pension benefits from his Federal adjusted gross income in arriving at his New York adjusted gross income.

The Division properly included the $53,184.00 in pension benefits which petitioner received from the LIRR in his Federal adjusted gross income.

I. Petitioner argues that even though the benefits he receives from the LIRR are from a private plan, he, as a former New York State public employee is entitled to exclude his pension benefits from his Federal adjusted gross income in determining his New York State adjusted gross income. He contends that the Division's interpretation of the statute is incorrect and invalid. He asserts that neither Tax Law § 612(c)(3)(i), nor New York Constitution, article XVI, § 5, which it codified, explicitly state that the pension benefits must be payable from a State or municipal retirement system in order to be exempt from taxation. Petitioner argues that it is clear from the language that the Legislature used in New York Constitution, article XVI, § 5, that it intended "to exclude from taxation pensions paid to employees of the State without requiring the the benefits be paid from a state or municipal retirement system" (Petitioners' reply letter, p. 2). Petitioner contends that since the regulation is contrary to, and inconsistent with the statute and case law, the regulation "should be deemed invalid and of no legal effect" (Petitioners' brief, p. 8). The Division's interpretation of Tax Law § 612(c)(3)(i) is in issue here. Interpretation of a statute by the agency charged with its enforcement is, as a general matter, given great weight and judicial deference so long as the interpretation is neither irrational, unreasonable nor inconsistent with the governing statute (Matter of Trump-Equitable Fifth Ave. Co. v. Gliedman, 62 NY2d 539, 478 NYS2d 846, 849).

In construction of statutes, the intention of the Legislature is first to be sought from a literal reading of the act itself or of all statutes relating to the same general subject matter. The legislative intent is to be ascertained from the words and language used in the statute, and if

language thereof is unambiguous and the words plain and clear, there is no occasion to resort to other means of interpretation (McKinney's Cons Laws of NY, Book 1, Statutes § 92[b]; see, DiMarco v. Hudson Valley Blood Services, 147 AD2d 156, 542 NYS2d 521, 522-523). Tax Law § 612(c)(3)(i) is set forth in Conclusion of Law "B". Since this statute is silent on the issue of whether the pension benefits paid must be payable from a State or municipal retirement system in order to be exempt from taxation, it is necessary to review New York Constitution, article XVI, § 5, and article V, § 7, which are codified in Tax Law § 612(c)(3)(i). Both these constitutional provisions are set forth in Conclusion of Law "A".

Petitioner has argued that the intent of the Legislature when it adopted New York Constitution, article XVI, § 5, was to exclude pensions paid to public employees regardless of the source of the pension benefits. Petitioner's argument is without merit. New York Constitution, article XVI, § 5, explicitly subjects all salaries, wages and other compensation, except pensions, paid to public officials and employees to taxation. This provision implicitly requires that the salaries, wages, other compensation, as well as the pensions be paid by the State or its subdivisions or agencies. New York Constitution, article V, § 7, specifically protects the benefits obtained from membership in any pension or retirement system "of the state or a civil division thereof. . . ." The benefits protected include the pension itself. When both these constitutional provisions are read together, it is clear that the Legislature intended to protect only those pensions paid from the funds of the State or a municipality. The Legislature's intent, at the time it adopted New York Constitution, article XVI, § 5, to exempt only those pension benefits paid by the State or a municipality from a State or municipal retirement system is confirmed in the 1967 NY Constitutional Convention Record. At that time, the Constitutional Convention delegates considered amending New York Constitution, article XVI, § 5. During their debate about a proposed amendment to this provision, the intent of the Legislature when it first adopted this provision was stated a number of times. The purpose of this provision, according to the delegates, was to subject to taxation the salaries and wages of State officials, as well as to exempt from taxation that portion of the retirement

allowance which is represented by moneys contributed by the State or the municipality. The rationale for this exemption appears to have been that the State should not be taxing its own moneys. (See, 2 NY Constitutional Convention Record, pp. 478 and 481 [1967].)

The requirements of 20 NYCRR former 116.3(c)(1) are consistent with existing law. I find the Division's interpretation of Tax Law § 612(c)(3)(i) to be reasonable.

J. As an alternative argument, petitioner claims that the United States Supreme Court decision in Davis v. Michigan Department of Treasury (489 US 803, 103 L Ed 2d 891 [1989]), and the resulting addition of Tax Law § 612(c)(3)(ii), render 20 NYCRR former 116.3(c)(1) invalid. He asserts that it is unfair to discriminate against New York State employees whose benefits are not payable from a State or municipal retirement system, inasmuch as Federal employees' benefits, which are not payable from a State or municipal retirement system, are exempt from taxation pursuant to Tax Law § 612(c)(3)(ii). He asserts that the Division is unconstitutionally applying the statute in this case. Furthermore, petitioner contends that the Division's position violates the equal protection clause of the United States Constitution. He claims that "the Division's application of the statute constitutes discrimination against Long Island Railroad Company employees (employees falling within the constitutional category of 'employees of the State and its subdivisions and agencies) [sic] merely because of the 'funding' or payment requirement contained in the regulations" (Petitioners' brief, p. 8).

This argument constitutes a challenge to the constitutionality of the statute on its face. The jurisdiction of the Tax Appeals Tribunal and the Division of Tax Appeals is prescribed by the enabling legislation (Matter of Fourth Day Enterprises, Tax Appeals Tribunal, October 27, 1988). This jurisdiction does not include a challenge that a statute is unconstitutional on its face (Matter of Unger, Tax Appeals Tribunal, March 24, 1994 citing Matter of Fourth Day Enterprises, supra). At the administrative level, the statutes of the State of New York are presumed to be constitutional (Matter of Fourth Day Enterprises, supra).

K. The petition of Jay G. and Dorothy A. Langlan is denied and the denial of Jay G. and Dorothy A. Langlan's refund claim as modified by Conciliation Order (CMS No. 129339), dated May 13, 1994, is affirmed.

DATED: Troy, New York
February 1, 1996

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE