

**New York State Department of Taxation and Finance
Office of Counsel**

TSB-A-17(4)I
Income Tax
October 10, 2017

**STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE**

ADVISORY OPINION

PETITION NO - I150626A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] (together, the “Petitioner”¹). Petitioner asks whether the Petitioner qualifies for the subtraction modification under Tax Law § 612(c)(3)(i) for the pension payments he received from his employment at Battery Park City Parks Conservancy Corporation (“BPCPCC”). We conclude that BPCPCC is considered to be part of “this State, its subdivisions and agencies” for purposes of the subtraction modification under Tax Law § 612(c)(3)(i) and Petitioner’s pension payments from BPCPCC may be subtracted from federal adjusted gross income in accordance with that section.²

Facts

Petitioner was employed by BPCPCC as a horticulturist and maintained the planted area of the parks and open spaces of Battery Park City. Petitioner retired from BPCPCC in July 2013. In 2014, Petitioner received pension income from the Cultural Institutions Retirement System (“CIRS”) Pension Plan of which BPCPCC was a participating employer.³ The purpose of the pension plan was to provide covered employees with a retirement annuity upon retirement. Only employees hired and maintaining a position at BPCCPP could accumulate benefits in the CIRS Pension Plan. BPCPCC fully contributed to the pension payments paid to and received by the Petitioner.

BPCPCC is a nonprofit corporation wholly owned by the Battery Park City Authority (“BPCA”). BPCA is a public benefit corporation created by the State Legislature through the passage of the Battery Park City Authority Act⁴ (“the Act”). BPCA’s powers are provided by and

¹ The question in the case involves the pension income of Thomas J. Birch and all references to “petitioner” shall refer to Thomas J. Birch unless otherwise indicated.

² This opinion relates only to former employees of BPCPCC that were part of the Cultural Institutions Retirement System (“CIRS”) Pension Plan as it existed prior to BPCPCC’s consolidation of operations with BPCA.

³ At fiscal year-end, October 31, 2015, BPCPCC withdrew from the CIRS Plan, and all BPCPCC employees are now employees of BPCA who, for retirement benefits and to the extent eligible, joined the New York State and Local Retirement System. The consolidation of BPCPCC operations with those of BPCA, including BPCPCC’s withdrawal from the CIRS Plan and transfer of employees of BPCPCC to BPCA (the “Consolidation of Operations”), was undertaken for purposes of operational efficiency. The advisory opinion requested by the Petition remains relevant because the Petitioner has received and will receive pension payments under the CIRS Plan in connection with his prior employment by BPCPCC. Petitioner states that BPCPCC still exists; it has neither been liquidated, dissolved nor otherwise had its existence terminated.

⁴ Codified as Public Authorities Law §§ 1970–1988.

enumerated in the Act, and its corporate existence continues until terminated by law. If terminated, all rights and properties of BPCA vest in the State.

BPCA was created to develop and improve, in cooperation with the City of New York and the private sector, the area on the lower west side of Manhattan known as Battery Park City. The Act prescribes the development and improvement of a mixed commercial and residential planned community with utilities systems and civic and public facilities such as schools, open public spaces, recreational and cultural facilities. The Act states that the development is necessary for the prosperity and welfare of the people of New York City and the State, and the powers and duties of BPCA are necessary and proper for the purpose of achieving these results. Petitioner states that BPCA is a participating employer in the New York State & Local Retirement System.

BPCA owns, manages, and supervises Battery Park City. Under certain mapping agreements between BPCA and the City of New York, BPCA is obligated: 1) to maintain and repair, or to cause to be maintained and repaired, substantial parks and public open spaces within Battery Park City; 2) to establish a fund or funds for maintenance and operation of the parks and open spaces; and 3) to require ground lessees (“lessees”) of certain residential properties to make periodic contributions to the funds. Under the ground leases between the lessees and BPCA, BPCA has the right to transfer its maintenance obligations to a trust or other entity subject to the reasonable approval of the Lessees. BPCA’s obligation for maintaining and repairing the parks and open spaces continues unless and until the City exercises its right to reacquire the Battery Park City Site, and with it the parks and open spaces, pursuant to certain agreements between the City and BPCA; the City and the New York State Urban Development Corporation (“UDC”), a state agency; the City, UDC and the Battery Park City Development Corporation (“BPCDC”), a wholly-owned subsidiary of UDC; and UDC, BPCDC and BPCA. If the City exercises its right to reacquire, the City will succeed to all the rights and obligations of BPCA with respect to the parks and open spaces described below.

BPCA established the Parks and Open Space Operating Corporation (“POSOC”), now renamed BPCPCC,⁵ under the New York Not-for-Profit Corporation Law. The Certificate of Incorporation (as last amended in 1991) states that the purposes for which BPCPCC is formed are to support and benefit the State of New York directly and indirectly by performing the functions of government as set forth in section 1974 of the Act, particularly by providing parks, playgrounds, buildings and other spaces within Battery Park City for use by the general public and by maintaining and operating the parks, playgrounds, street trees, curb areas and other public features and areas within Battery Park City, including the provision of such services necessary to make such open spaces available to the public.

⁵ POSOC’s name was amended to the Battery Park City Parks Corporation (“BPCPC”) and further amended to BPCPCC, its current name.

The Certificate of Incorporation states that BPCPCC is not organized for profit and its net earnings will not benefit any director, officer, employee or person connected with the Corporation. Also, in the event BCPPCC is liquidated, dissolved or otherwise ceases to exist, its property or assets shall be distributed only to a New York State or New York City fund, agency, public benefit corporation or other instrumentality or entity that is created by the State to provide for the maintenance or operation of the parks. If no such entity exists, then its assets and property shall be distributed to another organization qualifying under IRC § 501(c)(3) to be used for purposes similar to the those of BPCPCC. BPCPCC is exempt from federal income tax under IRC § 501(a) as an organization described in IRC § 501(c)(3).

BPCPCC is managed by a board of directors. The Bylaws of BPCPCC require that all directors concurrently serve as members of BPCA. Currently, the President and Chief Operating Officer of BPCA serves as the same officer of BPCPCC. Any director of BPCPCC may be removed by BPCA, at any time, with or without cause.

Through several management agreements between BPCA and BPCPCC that existed prior to the consolidation of operations between BPCA and BPCPCC,⁶ BPCA authorized BPCPCC to undertake all responsibilities and services related to the operation, management, maintenance, repair, restoration, replacement, upgrade and security of the parks and open spaces. BPCPCC provided all services including: 1) the removal of litter, rubbish, snow, ice and obstructions; 2) landscaping; 3) removal of graffiti; and 4) routine cleaning and maintenance.

The Management Agreements indicated that future control of BPCPCC could be transferred by BPCA to the lessees, acting as a group, or by the City's exercise of its right to reacquire all assets of BPCA, including the Battery Park City Site that included the Parks and Open Spaces under the Mapping Agreement. However, the lessees did not have a unilateral right to effectuate such a transfer and BPCA maintained sole governing control of BPCPCC. Also, Petitioner states that it is highly unlikely that the City would exercise its right to reacquire control of BPCA, and with it BPCPCC, because exercising that right requires the City to redeem or cause the defeasance of all outstanding BPCA indebtedness.

Under the Management Agreements, BPCPCC's activities, including its budgetary process, were monitored and controlled by BPCA. BPCPCC was required to adopt an annual budget that was reviewed and approved by BPCA, and to maintain and submit to BPCA detailed financial and operational records. If BPCA did not approve the budget submitted and resubmitted by BPCPCC, BPCA in its sole discretion could establish an annual budget. Also, BPCA was allowed to request an audit of BPCPCC at any time upon the delivery of written notice. BPCA's financial reporting comprises the financial reporting for both itself and BPCPCC, and its assets, liabilities, and results of operations are combined with the operations of BPCA for financial reporting purposes.

⁶ The Management agreements were terminated as a result of the consolidation of operations between BPCPCC and BPCA.

BPCA heavily subsidizes BPCPCC's operations by providing the majority of funds for its operating budget. The three main funding sources are: 1) revenues generated by BPCPCC from miscellaneous programming and events; 2) Civic Facilities Maintenance payments from leases and certain commercial leases assigned by BPCA to BPCPCC under the Management Agreements; and 3) additional funds provided by BPCA. Historically these payments represented approximately 1%, 66%, and 33% respectively of BPCPCC's operating budget.

BPCA maintained functional control over BPCPCC under the Management Agreements. The Agreements required that: 1) all major alterations to the parks and open spaces be approved by BPCA; 2) any licensing agreement entered into by BPCPCC for concessions and visitor Services could be revoked by BPCA; 3) any sublicense arrangement for concessions and visitor Services be subject to prior written approval and certain termination rights of BPCA; and 4) all rules and regulations governing the public use of, and behavior in, the parks and open spaces be approved by BPCA. BPCA also prescribed operating standards for the parks and open spaces and the procedures for concessions and visitor services. Finally, the Management Agreements restricted BPCPCC from assigning or otherwise encumbering the Management Agreements and from settling any losses connected with the damage or destruction of the parks and open spaces without BPCA's consent.

The Management Agreements provided BPCPCC with the sole and exclusive right and power to select, appoint, employ, direct, supervise, control, remove, discipline and discharge all persons employed by BPCPCC in any of its activities in connection with the parks and open spaces. However, the President/Chief Operating Officer of BPCPCC was subject to BPCA approval, and it was considered an event of default under the Management Agreement for BPCPCC to allow the President/Chief Operating Officer to continue in office if BPCA had given notice to BPCPCC that such person was no longer satisfactory.

Analysis

The New York taxable income of a resident individual shall be his or her New York adjusted gross income less his or her New York deductions and New York exemptions. Tax Law § 611(a). Tax Law § 612 provides that the New York adjusted gross income of a resident individual is his or her federal adjusted gross income with certain modifications. Tax Law § 612(c)(3)(i) provides that, to the extent includible in gross income for federal income tax purposes, pensions paid to officers and employees of "this State, its subdivisions, and agencies" will be subtracted from an individual's adjusted gross income. New York Tax Regulation 112.3(c)(1) provides that pensions and other retirement benefits (including but not limited to annuities, interest and lump sum payments) paid to a public employee will qualify for the exemption pursuant to Tax Law § 612(c)(3)(i) if the benefits relate to the services performed by the public employee and all or a portion are actually contributed (rather than merely deemed

contributed) by New York State, its political subdivisions or agencies. Therefore, in order to be able to claim the income exclusion above, an initial determination must be made as to whether BPCPCC is considered New York State, or a subdivision or agency of New York State for purposes of Tax Law § 612(c)(3)(i).

The terms State, subdivisions and agencies are not defined in Tax Law § 612(c)(3)(i) or the regulations pertaining to that section. However, the Tax Appeals Tribunal has issued decisions in cases involving a public benefit corporation subsidiary, and whether that subsidiary is considered “the State, subdivisions and agencies” for purposes of the § 612(c)(3)(i) subtraction modification. *See, Matter of Jackson* (Tax Appeals Tribunal, March 5, 1998); *Matter of Byrne* (Tax Appeals Tribunal, March 26, 1998); *Matter of Langlan* (Tax Appeals Tribunal, September 7, 1997).

In *Matter of Jackson* (Tax Appeals Tribunal, March 5, 1998), the Tribunal used a particularized analysis inquiry when determining whether pension payments received by a former employee of the Manhattan and Bronx Surface Transit Operating Authority (“MABSTOA”) qualified for the subtraction modification. MABSTOA, a public benefit corporation subsidiary of the New York City Transit Authority (“Transit Authority”), a public benefit corporation, was created to operate bus lines that were acquired by the City of New York through condemnation proceedings. Its enabling statute required that MABSTOA’s directors be the chairman and members of the Transit Authority, and MABSTOA was given the majority of powers vested in the Transit Authority.⁷

The Tribunal noted that courts have recognized that public benefit corporations and public authorities have a hybrid character and qualities of both private corporations and State instrumentalities. These dual qualities can result in treatment as either a private corporation or the State under different facts and circumstances. The Tribunal concluded that the proper analysis for determining whether MABSTOA, a public benefit corporation subsidiary, should be treated as a private corporation or the state considers the nature of the instrumentality and the statute claimed to be applicable to it. The Tribunal determined that: 1) the public transportation provided by MABSTOA is a public service, and the profits of that service inure to the benefit of the State; 2) MABSTOA, as a subsidiary of the Transit Authority, implements the Transit Authority’s goals and purposes under its direct management and direction; 3) the Transit Authority and MABSTOA have overlapping powers and functions and a free transfer of funds between the entities; and 4) the identity of functions between the entities indicates that the two entities share the same purpose, to

⁷ These powers include: 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 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; to make contracts, leases and conveyances; 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 exercise authority to manage, control, and direct the maintenance and operation of the transit facilities transferred to it; and to do all things necessary to carry out its purposes.

benefit the people of New York State, a governmental function. The Tribunal concluded that the employees of MABSTOA were employees of the State, its subdivisions and agencies for purposes of the Tax Law § 612(c)(3).

In this case, BPCPCC was formed under the Not-for-Profit Corporation law as a wholly owned subsidiary of BPCA, a public benefit corporation. Although the particularized inquiry analysis in *Jackson* was used to analyze the treatment afforded to a public benefit corporation subsidiary (MABSTOA) of a public benefit corporation (the New York City Transit Authority), the spirit of the inquiry supports its extension to BPCPCC, as BPCPCC was created solely to carry out a public purpose and governmental function as the wholly owned and controlled subsidiary of BPCA.

We conclude that the employees of BPCPCC are employees of the State, its subdivisions and agencies for purposes of Tax Law § 612(c)(3). First, BPCPCC was created by BPCA for one purpose, that is, to maintain and operate the parks and open spaces within Battery Park City. Except for maintaining and operating the parks and open spaces, BPCPCC had no other functions or powers. Secondly, BPCA was created by the Legislature to develop and improve Battery Park City, including its parks and open spaces, for the prosperity and welfare of the people of New York City and the State. As its wholly-owned subsidiary, BPCPCC assisted BPCA in carrying out its mandated duties under the Act for the benefit of the public. BPCA achieved this assistance through its detailed Management Agreements with BPCPCC and its direct organizational, operational, and functional control of BPCPCC. Third, BPCA and BPCPCC had overlapping powers and functions in that both entities were required to maintain and operate the parks and open spaces in Battery Park City. BPCA's powers and duties are set forth in the Act and those powers and duties were carried out by BPCPCC through the Management Agreements between the two entities. Furthermore, the majority of funds (over 99 percent) used by BPCPCC to maintain and operate the parks and open spaces were provided by BPCA. Finally, the identity of functions between BPCA and BPCCPP indicates that the two entities shared the same purpose, namely to operate and maintain the parks and open spaces for the people of New York, a governmental function.⁸

To qualify for the subtraction modification under Tax Law § 612(c)(3)(i), the pension benefits also must: 1) relate to the services performed by the public employee; and 2) all or a portion of those benefits must be contributed (rather than merely deemed contributed) by New York State, its political subdivisions or agencies. 20 NYCRR 112.3(c)(3)(i). As indicated above, the purpose of BPCPCC's pension plan was to provide covered employees with a retirement annuity upon retirement. Also, only BPCPCC employees that were hired and maintained a position at BPCPCC could accumulate benefits in the pension plan. Therefore, BPCPCC's

⁸ We express no opinion whether in the event control of BPCPCC shifted to private interests or the City of New York, benefit payments attributable to services rendered after such change in control would qualify under Tax Law § 612(c)(3)(i).

pension plan benefits paid to Petitioner are related directly to his service as a public employee. Secondly, as BPCPCC contributed to the pension payments paid to and received by Petitioner, the pension plan satisfies the requirement that all or a portion of the pension benefits are actually contributed by the State, its political subdivisions or agencies.

Accordingly, based on the facts presented, the pension benefits received by Petitioner qualify for the subtraction modification under Tax Law § 612(c)(3)(i) and may be subtracted from his federal adjusted gross income.

DATED: October 10, 2017

/S/

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NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.