

**New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau**

TSB-H-81 (15)
Income Tax
April 14, 1981

**STATE OF NEW YORK
STATE TAX COMMISSION**

ADVISORY OPINION

PETITION NO. I801121B

On November 21, 1980 a Petition for Advisory Opinion was received from Edward Yule, Jr., 4 Laurel Court, Northport, New York 11768.

The issue raised by Petitioner is whether pension benefits payable to retired employees of the Long Island Rail Road Company pursuant to the Long Island Rail Road Company Pension Plan and the Long Island Rail Road Company Plan for additional pensions would be exempt from the Personal Income Tax imposed under Article 22 of the Tax Law.

Article XVI,§5 of the Constitution of the State of New York provides as follows: "All salaries, wages and other compensation, except pension, paid to officers and employees of the state and its subdivisions and agencies shall be subject to taxation." Article V, §7 provides that "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."

These constitutional provisions exempting certain pensions from taxation are embodied in section 612(cX3) of the Tax Law. In effect, this provision exempts from the Personal Income Tax imposed under Article 22 of the Tax Law "Pensions of officers and employees of this state, its subdivisions and agencies "This statutory language is elucidated in the Personal Income Tax Regulations, as follows:

"The following items are to be subtracted from Federal adjusted gross income in order to properly compute the New York adjusted gross income of a resident individual:

- ...
(c) Pensions to New York State and municipal officers and employees and other benefits payable by State and municipal retirement systems. If a taxpayer's Federal adjusted gross income includes any amount on account of a pension payable to him as an officer or employee of this State or of any of its subdivisions or agencies, or as the beneficiary of a deceased officer or employee, this should be subtracted in computing his New York adjusted gross income. The same is true of any other benefit to the taxpayer by a New York State or municipal retirement system created under a law which provides that all rights therein shall be exempt from New York income tax." 20 NYCRR 116.3.

It follows from the foregoing that two pre-requisites must be met in order for a pension payment to qualify for the exemption. First, it must be received by a former officer or employee of New York or one of its subdivisions or agencies. Second, the benefit must be payable from a state or municipal retirement system. See, in regard to this second criterion, Matter of Noone, State Tax Commission Decision of September 7, 1979, TSB-H-79-(180)-I. In the present instance as will be demonstrated below, only the first of the two criteria is met. Consequently, the pension payments in question are subject to the Personal Income Tax imposed under Article 22 of the Tax Law.

The Long Island Railroad Company (hereinafter "LIRR") is stated by Petitioner to be a public benefit subsidiary corporation of the Metropolitan Transportation Authority (hereinafter "MTA"), having been reincorporated as such on or about February 8, 1980. MTA is a public benefit corporation created under Title 11 of Article 5 of the Public Authorities Law. Public authorities generally are corporate instrumentalities of the State, created by the Legislature for the furtherance of certain public purposes. Public benefit corporations are corporations "...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." General Construction Law, §66.4

MTA is stated, in the Public Authorities Law, to be a "state agency" solely 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. However, section 1265.9(a) of the Public Authorities Law, contained in Article 11, provide that "...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" (Emphasis supplied). It follows that Petitioner, an employee of a public benefit subsidiary corporation (a form of public benefit corporation), is a "public employee." This may fairly be construed to mean an employee falling within the Constitutional category of "employees of the State and its subdivision and agencies."

Section 1265.9(b) of the Public Authorities Law provides that a public benefit subsidiary corporation of the MTA may be a "participating employer" in the New York State Employees Retirement System (hereinafter "ERS") with respect to one or more classes of officers and employees of . . .such public benefit subsidiary corporation." Petitioner's employer, however, has not chosen to so act to bring Petitioner within the coverage of ERS, opting instead to continue to utilize pension plans in existence prior to its reincorporation as a public benefit subsidiary corporation.

The issue thus dispositive of the present matter is whether the pension plans in question constitute "any pension or retirement system of the state or of a civil subdivision thereof," (N.Y. Const. Art. V, §7), or a "State...[or] municipal retirement..." system. 20 NYCRR 116.3(e).

The pension plans at issue are privately trustee and are contributed to by LIRR. Employee contributions are also required under certain circumstances. The plans were established, prior to the time LIRR became a public benefit subsidiary corporation, as private pension plans, privately funded. Prior to the time LIRR became a public benefit subsidiary corporation benefits paid from such plans were determined by the Counsel to the Department of Taxation and Finance not to be exempt from the Personal Income Tax, based on a finding that "the Company's pension plans are private plans making payments to private employees." Memorandum L-140, October 25, 1972. While LIRR'S employees are now "public employees," the pension plans have not thereby become state or municipal retirement systems. They were not created by legislative act nor, specifically, "under a law which provides that all rights therein shall be exempt from New York income tax." Further, pensions paid pursuant to such plans are not payable from funds contributed to by the State, any of its subdivisions, municipalities, civil divisions or agencies. LIRR, which is presently a type of public benefit corporation and which funds and operates the pension plans at issue, does not fall under any of the foregoing rubrics. Thus, it has been said that "The very name, 'public benefit

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'corporation', imparts a distinct connotation of separateness and judicial distinction from the state, its political subdivisions and municipal corporations. Bell v. Manhattan and Bronx Surface Transit Operating Authority, 81 Misc. 2d 162, 364 N.Y.S. 2d 274. See also Hyde Park Fire and Water v. Dutchess County, 97 Misc. 2d 104, 410 NYS 2d 783. Also germane to the present matter is the statement of the court in Smith v. Levitt, 37 A.D. 2d 418, 326 NYS 2d 335, that "Public benefit corporations created by the State for the purpose of carrying out functions determined by the Legislature to be governmental in nature are not identical with the State itself and enjoy a separate and independent nature existence... Funds of the UDC cannot be considered moneys of the State simply because the UDC is a public benefit corporation." Cf., Dormitory Authority of N.Y. v. Span Electric Corp, 18 NY 2d 114, 271 NYS 2d 983.

Petitioner has indicated that he will be eligible to receive his pension benefits as of June 1, 1986. In accordance with the foregoing considerations such payments would be subject to the Personal Income Tax imposed under Article 22 of the Tax Law, pursuant to the applicable provisions of the Tax Law and the Constitution of the State of New York as presently constituted.

DATED: March 18, 1981

s/LOUIS ETLINGER
Deputy Director
Technical Services Bureau