

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions	:
of	:
ROBERT AND KIRA CIARDULLO	:
for the Redetermination of Deficiencies or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 2012, 2013, 2014, 2015, and 2016.	DECISION DTA NOS. 828251, 829356, 829357, 829671 AND 829938

Petitioners, Robert and Kira Ciardullo, filed an exception to the determination of the Administrative Law Judge issued on November 10, 2021. Petitioners appeared by Benjamin R. Katz, Esq. The Division of Taxation appeared by Amanda Hiller, Esq. (Peter B. Ostwald, Esq., of counsel).

Petitioners filed a brief in support of the exception. The Division of Taxation filed a letter brief in opposition. Petitioners filed a reply brief. Oral argument was heard in Albany, New York, on September 29, 2022, which date began the six-month period for issuance of this decision.

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

ISSUES

I. Whether, for purposes of the add-back to federal adjusted gross income under Tax Law § 612 (b) (1), interest income paid on bonds issued by states other than New York, which are federally tax-exempt but taxable in New York, equals either the gross interest income paid on the bonds, or such gross interest paid less amortized bond premiums allocable to the tax year.

II. Whether petitioner Robert Ciardullo was engaged in a trade or business as a bond trader.

III. Whether the taxation of gross interest income paid on bonds issued by states other than New York violates the New York or United States Constitutions.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except findings of fact 40 and 41, which we have edited to more accurately reflect the record. The modified findings of fact, together with the facts as found by the Administrative Law Judge, appear below.

1. During the years 2012 through 2016 (the years at issue), petitioners, Robert and Kira Ciardullo, were residents of New York State.

2. For the years at issue, petitioners engaged in various investing activities. As part of their overall investing strategy, petitioners bought and held federally tax-exempt obligations issued by state and local governments other than New York (municipal bonds or bonds). In some instances, petitioners paid a premium to acquire the bonds.

2012

3. Petitioners timely filed a New York resident income tax return for 2012 on April 15, 2013 (2012 initial return). On the 2012 initial return, petitioners reported federal adjusted gross income of \$1,452,750.00 consisting of wages, salaries and tips of \$1,146,885.00,¹ taxable interest income of \$268.00, ordinary dividends of \$1,677.00, business income of \$9,299.00,² a

¹ Attached to the 2012 initial return is form W-2, wage and tax statement for Robert Ciardullo from Robert C. Ciardulo MD PC, showing wages of \$1,047,978.11. There was no explanation for the discrepancy.

² A 2012 schedule C, profit or loss from business, reports the business income for Kira Geraci-Ciardullo MD, as “medical doctor: allergist.”

capital loss of \$119.00,³ rental real estate, royalties, partnerships and S corporation income of \$296,576.00, and a federal adjustment of \$1,836.00. On line 20 of the 2012 initial return, petitioners reported a New York addition for interest income on non-New York state and local bonds and obligations of \$183,596.00, and on line 23 included a New York addition for “other” in the amount of \$164.00. Petitioners claimed an itemized deduction of \$72,002.00, and reported taxable income of \$1,564,508.00, New York State tax of \$107,169.00, tax withheld of \$96,439.00, and tax due of \$10,730.00.

4. On April 15, 2015, petitioners filed an amended resident income tax return, form IT-201-X, for 2012 (first 2012 amended return). On the first 2012 amended return, petitioners amended line 20, New York additions for interest income on non-New York state and local bonds and obligations, to \$32,839.00. Petitioners reported New York adjusted gross income of \$1,485,753.00, claimed a standard deduction of \$15,000.00, reported taxable income of \$1,470,753.00, and tax of \$100,747.00. Petitioners reported total payments of \$111,451.00, consisting of tax withheld of \$96,439.00 and amount paid with original return of \$15,012.00, and requested a refund of \$10,704.00. Petitioners reported Robert Ciardullo’s occupation as “Medical Doctor Surgeon” on the first 2012 amended return.

5. On July 6, 2015, the Division of Taxation (Division) issued an account adjustment notice to petitioners for 2012 in response to their first 2012 amended return. The account adjustment notice adjusted total payments to \$107,169.00, adjusted the refund to \$6,701.35, and issued a refund check to petitioners in that amount for 2012.

6. On November 30, 2015, the Division issued to petitioners a statement of proposed audit changes (2012 statement) for the year 2012, stating in part:

³ Petitioners’ 2012 schedule D, capital gains and losses, reports a long-term capital loss of \$119.00.

“Interest income on obligations from any state other than New York State or any political subdivision of another state, though exempt from federal income tax, is taxable to New York (Sections 612 (b) (1) and 1303 of the New York State Tax Law). Such income should have been reported on line 20 of the 2012 Form IT-201.

All or part of the income that was credited to your account or which you received from the mutual fund(s) shown below was derived from non-New York State and local obligations. Because you did not make the proper line modification on your New York State return, we have adjusted your New York taxable income for the portion of the non-New York interest income included in your distribution(s) from the mutual fund(s)”

The 2012 statement listed taxable amounts from several mutual fund distributions of non-New York interest made to petitioners totaling \$178,585.00, less the amount reported on petitioners’ return of \$32,839.00, for a net adjustment of \$145,746.00. The statement further explained:

“Many bond funds invest in obligations of both non-New York and New York securities. Interest income generated from a New York State or municipal bond security is not taxable. For any bonds earning interest from New York State or municipal sources, that portion has been eliminated in the computation of your taxable interest income.

The information we have concerning the amount of state and local bond interest that you earned was obtained from your payer. Payers are required to report this data under Section 658 of the New York State Tax Law. If you cannot reconcile this information with what was reported to you by your payer(s) or broker(s) on your 2012 year-end statements, you must contact your broker(s) for an explanation. We cannot adjust our billing without a statement from your payer(s) identifying the amount, the fund, account number, cusip number and the percentage of each fund’s portfolio that represents non-New York bond interest.”

The 2012 statement recalculated petitioners’ New York adjusted gross income to \$1,631,499.00, determined taxable income of \$1,616,499.00 and tax of \$110,730.00, and asserted additional tax due of \$9,983.00 plus interest.

7. The Division issued to petitioners a notice of deficiency, assessment number L-044051602, dated April 4, 2016, asserting tax due of \$9,983.00 plus interest for tax year 2012.

8. On April 5, 2016, petitioners filed a second amended resident income tax return, form IT-201-X, for 2012 (second 2012 amended return). On the second 2012 amended return, petitioners again amended line 20, New York additions for interest income on non-New York state and local bonds and obligations, to \$202,286.00. Petitioners amended line 31 for New York subtractions, reporting as “other” “accrued interest on bonds” in the amount of \$48,495.00. Petitioners reported New York adjusted gross income of \$1,606,541.00. Petitioners also amended their deductions, claiming itemized deductions of \$233,981.00. Petitioners reported taxable income of \$1,372,560.00 and tax of \$94,020.00. Petitioners reported total payments of \$111,451.00, consisting of tax withheld of \$96,439.00 and amount paid with original return of \$15,012.00, and requested a refund of \$8,736.00. Petitioners reported Robert Ciardullo’s occupation as “Doctor” on the second 2012 amended return.

9. On April 12, 2016, the Division sent a response to petitioners’ inquiry regarding assessment number L-044051602 for 2012, stating in part:

“The information we have concerning the amount of state and local bond interest that you earned was obtained from your payer. Payers are required to report this data under New York Tax Law, section 658. If you cannot reconcile this information with what was reported to you by your payer(s) or broker(s) on your 2012 year-end statements, you must contact your broker(s) for an explanation.

We cannot adjust our billing without a statement from your payer(s) identifying the amount, the fund, account number, CUSIP number, and the percentage of each fund’s portfolio that represents non-New York bond interest.”

10. On April 16, 2016, petitioners filed a third amended resident income tax return, form IT-201-X, for 2012 (third 2012 amended return). On the third 2012 amended return, petitioners again amended line 20, New York additions for interest income on non-New York state and local bonds and obligations, to (- \$3,806.00). Next to the line for New York additions, petitioners wrote “see attached.” Petitioners attached to the third 2012 amended return a schedule entitled

“Schedule of Actual Interest Earned Net of Deduction of Non NYS Exempt Bond Interest
Premium and Accrued Interest on Non-NYS Exempt Bond Interest For Year 2012 Form 201X

Line 20: ‘Additions.’” Petitioners listed the following on the schedule:

“Total NYS Tax Exempt Interest Per NYS Audit Number X922844839	178585
Less Accrued Interest Per Confirmations Previously Sent	- 48,495
Less Bond Premium Offset Per Schedule	<u>-133896</u>
<u>Additions Per Line 20 IT 201X Year 2012</u>	<u>- 3806”</u>

Petitioners left line 31, other New York subtractions, blank on the third 2012 amended return. Petitioners reported New York adjusted gross income of \$1,448,944.00, claimed a standard deduction of \$15,000.00, reported taxable income of \$1,433,944.00, and tax of \$98,225.00. Petitioners reported total payments of \$111,451.00, consisting of tax withheld of \$96,439.00 and amount paid with original return of \$15,012.00, and requested a refund of \$2,531.00.

11. On May 2, 2016, the Division sent another response to petitioners’ inquiry regarding assessment number L-044051602 for 2012, stating in part:

“We have reviewed your Confirmations and calculated \$45,984.00 of accrued interest expenses related to bonds specifically listed in our 2012 assessment. We are unable to include accrued interest from 2010.

Based on the documentation you submitted, we have reduced the taxable municipal bond interest on Line 20 of form IT-201, from \$178,585.00 (reported by Pershing, LLC) to \$132,601.00.

Please be advised that bond premium amortization is not a direct offset to taxable municipal bond interest earned, but rather an itemized deduction addition to be reported on Line 11 of the New York State itemized deduction worksheet.

Since you claimed the appropriate New York State standard deduction for the 2012 tax year, no adjustment can be made to this assessment based on the eligible

amortization amounts identified in your correspondence.

We are unable to offset bond interest with amortization based on your claim that you are an investor/trader, since this activity must be attributable to a trade or business carried on by the taxpayer (see New York State Tax Law section 612(c)(10)).

Based on our adjustments, your return has been recomputed.

Line 019 Federal Adjusted Gross Income	1,452,750.00
Line 020 Interest Income on State/Local Bonds	132,601.00
Line 033 New York Adjusted Gross Income	1,585,515.00
Line 34 New York Deductions	15,000.00
Line 37 New York Taxable Income	1,570,515.00
Line 061 Total Tax and Contributions	107,580.28

	NY State	(=) Total
Revised Total Tax	107,580.28	107,580.28
Tax Previously Stated (-)	100,747.00	100,747.00
Net Tax Due (=)	6,833.28	6,833.28

The tax due has been adjusted based on the additional information you supplied.”

12. On August 30, 2016, the Division sent another response to petitioners’ inquiry regarding assessment number L-044051602 for 2012, stating in part:

“We received your reply and revised information about the above assessment(s).

This bill is determined to be correct for the reasons which were previously explained to you in our Adjustment Notice dated 05/02/16.

Trading for your own personal account is investing, not a trade or business.

Interest income from state or local bonds, other than New York, are taxable to a New York State resident under section 612(b)(1) and 1303 of the New York State Tax Law.

If you buy a bond between interest payment dates, part of the purchase price of that bond represents interest accrued before the date of purchase. If you receive a statement from your broker which reflects the full amount of interest, which includes the accrued amount, you are entitled to net the accrued interest against that amount reported via your broker’s statement in reporting the appropriate addition modification.

Based on the information submitted we have allowed the deduction of accrued

interest paid in the amount of \$45,984.00 from the interest income earned on Non New York State and local bonds for only the bonds listed on our bill.

If you purchase a non New York State or local bond at a premium, the amortized portion of the premium paid may only be deducted as an itemized deduction. You cannot net the amortized portion of the bond premium against the bond interest that you are reporting as an addition modification. The only exception is if the bond is used in a trade or business. In that instance the premium can be deducted as an above the line deduction.

Your representative indicated in his letter dated 05/06/16 that you are entitled to subtracted bond premium amortization from the non NY bond interest you earned at line 20 of your 2012 income tax return.

Please note bond premium amortization cannot be directly subtracted from your interest income.

The bond premium amortization should be reported as an addition adjustment at line 11 on form IT-201-D, New York State Resident Itemized Deduction Schedule.

Therefore, the bond premium amortization you subtracted from the bond interest you earned reported at line 20 of your 2012 amended income tax return has been disallowed.

Our records indicate that you were allowed the standard deduction and therefore, the bond premium amortization is not allowed.”

The correspondence showed tax due of \$6,833.28 plus interest for the year 2012.”

13. On August 31, 2016, the Division issued a notice of disallowance to petitioners disallowing their claim for refund of \$2,531.00 for 2012, stating, in part:

“2012 Bill #L044051602 dated 11/30/15 is determined to be correct for the reasons which were previously explained to you in our Adjustment Notice dated 05/02/16. Therefore, the refund claimed on your 2012 amended return dated 04/15/16 is disallowed.”

The notice of disallowance further contained the same explanation as that in the August 30, 2016 correspondence (*see* finding of fact 12).

14. On September 23, 2016, the Division issued to petitioners a notice and demand for payment of tax due for assessment number L-044051602 for tax year 2012, asserting tax due of

\$6,833.28 plus interest.

15. Petitioners reported Robert Ciardullo's occupation as Doctor on his 2012 federal form 1040, U.S. individual income tax return.

16. Petitioners submitted into the record 2012 Tax and Year-End Statements from Cetera Advisors LLC. The 2012 year-end statement for Robert Ciardullo shows federally tax-exempt interest income of \$159,307.52, specified private activity bond interest of \$5,500.00, ordinary dividends of \$14.87, accrued interest purchased of \$38,236.17, and proceeds from broker and barter exchange transactions of (\$118.96). The proceeds from broker and barter exchange transactions consisted of two long-term transactions of securities acquired on June 30, 2010 and sold on December 3, 2012, and securities acquired on December 10, 2008 and sold on January 3, 2012, for a net loss of \$118.97, and a short-term transaction of securities acquired on February 9, 2012 and sold on December 3, 2012 for a gain of \$.01.

The 2012 year-end statement for Kira Ciardullo shows federally tax-exempt interest income of \$47,288.75, specified private activity bond interest of \$1,375.00, ordinary dividends of \$37.56, and accrued interest purchases of \$22,278.60. The 2012 form 1099-B, proceeds from broker and barter exchange transactions, included with the year-end statement, shows a redemption of securities for which short or long-term determination was unknown to the broker, with a realized gain or loss of \$0.00.

2013

17. Petitioners filed a New York resident income tax return for 2013 on November 3, 2014 (2013 initial return). On the 2013 initial return, petitioners reported federal adjusted gross income of \$991,229.00 consisting of wages, salaries and tips of \$879,532.00,⁴ taxable interest

⁴ Attached to petitioners' initial 2013 return are forms W-2, wage and tax statements for Robert Ciardullo

income of \$1,797.00, ordinary dividends of \$175.00, business income of \$1,126.00,⁵ no capital gain or loss, rental real estate, royalties, partnerships and S corporation income of \$108,614.00, and a federal adjustment of \$15.00. On line 20 of the 2013 initial return, petitioners reported a New York addition for interest income on non-New York state and local bonds and obligations of \$43,521.00. Petitioners reported New York adjusted gross income of \$1,034,750.00, claimed a standard deduction of \$15,400.00, and reported taxable income of \$1,019,350.00, New York State tax of \$69,825.00, tax withheld of \$87,733.00, and requested a refund of \$17,908.00. The 2013 initial return lists Robert Ciardullo's occupation as plastic surgeon.

18. On November 26, 2014, the Division issued a refund check to petitioners in the amount of \$17,908.00 for tax year 2013.

19. On December 30, 2016, the Division issued to petitioners a statement of proposed audit changes, assessment number L-045883894, for the year 2013 (2013 statement), stating that “[t]he interest income on state and local bonds and obligations shown on your return does not agree with the amount(s) reported by the payer(s).” The 2013 statement further explained:

“The following income is taxable to New York (NYS Tax Law sections 612(b)(1) and 1303):

- Interest income on obligations from any state other than New York State or any political subdivision of another state;

- Interest or dividend income on obligations or securities of any authority, commission, or instrumentality of the United States, which the laws of the United States exempt from federal income tax but not from state income taxes.

You must report such income on line 20 of your 2013 personal income tax return.

from Robert C. Ciardulo MD PC showing wages of \$739,231.75 and for Kira Ciardullo from Westchester Health Associates, PLLC, showing wages of \$140,300.00.

⁵ A 2013 schedule C-EZ, net profit or loss from business, reports the business income for Kira Geraci-Ciardullo MD, as medical doctor: allergist.

All or part of the income that was credited to your account or which you received from the sources shown in the Fund details section of this notice was derived from non-New York State and local obligations. Because you did not make the proper line modification on your New York State return, we adjusted your New York taxable income for the portion of non-New York interest income included in your distributions from these sources.”

The 2013 statement listed taxable amounts from several fund distributions of non-New York interest income made to petitioners totaling \$337,035.00, less the amount reported on petitioners’ return of \$43,521.00, for a net adjustment of \$293,514.00. The statement further explained:

“Many funds invest in obligations of both non-New York and New York securities. Interest income generated from a New York State or municipal bond security is not taxable. We did not include investment interest from New York State or municipal sources when we computed your taxable income.

We obtained the information we have concerning the amount of state and local bond interest that you earned from your payer. Payers are required to report this data under NYS Tax Law, section 658. If you cannot reconcile this information with what your payer or broker reported to you on your 2013 year-end statements, you must contact your payer or broker for an explanation. We cannot adjust our billing without a statement from your payer or broker”

The 2013 statement recalculated petitioners’ New York adjusted gross income to \$1,328,264.00, determined taxable income of \$1,312,864.00 and tax of \$89,931.00, and asserted tax due of \$20,106.00 plus interest.

20. On August 7, 2017, the Division sent a notice of assessment resolution to petitioners regarding assessment number L-045883894 for the year 2013, stating, “Based on our review of the information provided, the assessment(s) is sustained and your request for refund or credit is denied.” The notice of assessment resolution shows tax due of \$20,106.00 plus interest, and payments/credits of \$23,727.10, with no balance due.⁶

⁶ A case contact in the Division’s audit file for 2013 indicates that the 2013 assessment was paid in full before a notice of deficiency was issued.

21. On September 15, 2017, petitioners filed an amended resident income tax return, form IT-201-X, for 2013 (2013 amended return). On the 2013 amended return, petitioners amended line 20, New York additions for interest income on non-New York state and local bonds and obligations, to \$33,026.00. Petitioners amended line 31 for New York subtractions, reporting as “other” “accrued interest” in the amount of \$22,012.00. Petitioners reported New York adjusted gross income of \$1,002,243.00. Petitioners also amended their deductions, claiming itemized deductions of \$7,300.00. Petitioners reported taxable income of \$994,943.00 and tax of \$68,154.00. Petitioners reported total payments of \$107,839.00, consisting of tax withheld of \$87,733.00 and amount paid with original return of \$20,106.00, and reported a refund due of \$21,777.00. Petitioners reported Robert Ciardullo’s occupation as Doctor on the 2013 amended return.

22. Petitioners attached to the 2013 amended return a “disclosure statement for refund claim due to appeal of disallowance of amortized premium and other adjustments” in which they stated that they will appeal the assessment and have paid under protest the assessment for 2013, and requested that a refund check not be sent until the matter is resolved at a conciliation conference or subsequent appeal.

23. Also attached to the 2013 amended return was a “schedule of interest additions for municipal bonds other than New York State” with reference to line 20 of the return, on which petitioners list “qualified stated interest on municipal bonds other than New York State” of \$337,035.00 less “amortized premium” of \$304,009.00, totaling “interest additions for municipal bonds other than New York State” of \$33,026.00.

24. On May 30, 2019, the Division issued to petitioners a notice of disallowance for 2013, sustaining assessment number L-045883894, which had been paid in full, and denying the

refund claim of \$21,777.00. The notice of disallowance for 2013 states, “Bond premium amortization expenses are not a direct offset to taxable municipal bond interest earned, but rather an itemized deduction addition to be reported on Line 11 – Addition adjustments of the IT-201-D Resident Itemized Deduction Schedule.”

25. Petitioners submitted into the record portions of 2013 Tax and Year-End Statements from Cetera Advisors LLC. The 2013 year-end statement for Robert Ciardullo shows federally tax-exempt interest income of \$229,802.56 and specified private activity bond interest of \$12,575.00. The first page of the statement also shows a summary of form 1099-B with gross proceeds of \$110,000.00 and a cost basis of \$0.00, and refers to the 1099-B section of the statement for details. However, pages 2 through 4 of the 2013 year-end statement were not submitted by petitioners and the documents submitted do not contain the 1099-B section detail.

The 2013 year-end statement for Kira Ciardullo shows federally tax-exempt interest income of \$122,278.81 and specified private activity bond interest of \$1,375.00.

2014

26. Petitioners filed a New York resident income tax return for 2014 on October 14, 2015 (2014 initial return). On the 2014 initial return, petitioners reported federal adjusted gross income of \$1,245,372.00 consisting of wages, salaries and tips of \$991,842.00,⁷ taxable interest income of \$214.00, ordinary dividends of \$5,453.00, taxable refunds, credits or offsets of state and local income taxes of \$17,908.00, business income of \$1,506.00,⁸ capital gains of

⁷ Attached to petitioners’ initial 2014 return are forms W-2, wage and tax statements for Robert Ciardullo showing wages of \$852,440.42, with the section for employer’s name and address left blank, and for Kira Ciardullo from Westchester Health Associates, PLLC, showing wages of \$139,402.00.

⁸ A 2014 schedule C, profit or loss from business, reports the business income for Kira Geraci-Ciardullo MD, as medical doctor: allergist.

\$6,845.00,⁹ rental real estate, royalties, partnerships and S corporation income of \$221,624.00, and a federal adjustment of \$20.00. On line 20 of the 2014 initial return, petitioners reported a New York addition for interest income on non-New York state and local bonds and obligations of \$67,710.00. On line 25, for New York subtractions, petitioners subtracted \$17,908.00 for taxable refunds, credits, or offsets of state and local income taxes. Petitioners reported New York adjusted gross income of \$1,295,174.00, claimed a standard deduction of \$15,650.00, and reported taxable income of \$1,279,524.00, New York State tax of \$87,647.00, tax withheld of \$94,094.00, and requested a refund of \$6,447.00. The 2014 initial return lists Robert Ciardullo's occupation as plastic surgeon.

27. On November 17, 2015, the Division issued a refund check to petitioners in the amount of \$6,447.00 for tax year 2014.

28. On January 22, 2018, the Division issued to petitioners a statement of proposed audit changes, assessment number L-047622663, for the year 2014 (2014 statement), stating that “[t]he interest income on state and local bonds and obligations shown on your return does not agree with the amount(s) reported by the payer(s).” The 2014 statement generally contained the same explanation as the 2013 statement (*see* finding of fact 19), and indicated that petitioners were required to report the interest income from non-New York sources on line 20 of the 2014 return.

The 2014 statement listed taxable amounts from several fund distributions of non-New York interest made to petitioners totaling \$352,529.39, less the amount reported on petitioners' return of \$67,710.00, for a net adjustment of \$284,819.39. The 2014 statement noted that the

⁹ Petitioners' 2014 schedule D, capital gains and losses, reports a short-term capital gain of \$25.63 for an equity dividend fund held for four months, and long-term capital gains of \$6,819.00 for assets held for over one year.

Division's computation of taxable income did not include interest from New York State or municipal sources.

The 2014 statement recalculated petitioners' New York adjusted gross income to \$1,579,993.00, determined taxable income of \$1,564,343.00 and tax of \$107,157.00, and asserted tax due of \$19,510.00 plus interest.

29. On April 17, 2018, petitioners filed an amended resident income tax return, form IT-201-X, for 2014 (2014 amended return). On the 2014 amended return, petitioners amended their deductions from standard to itemized deductions of \$9,822.00. Petitioners reported taxable income of \$1,285,352.00 and tax of \$88,047.00. Petitioners reported total payments of \$107,157.00, consisting of tax withheld of \$94,094.00 and amount paid with original return of \$13,063.00, and reported an overpayment of \$19,110.00. Petitioners included with the 2014 amended return an attached statement stating that "the Taxpayers are protesting and appealing the 1/22/2018 Statement of Proposed Audit Change, Assessment ID: L-047622663-3. Please do not refund any money at this time."

30. On June 4, 2018, the Division sent to petitioners a notice of assessment resolution regarding assessment number L-047622663, for the year 2014. The notice of assessment resolution states:

"We received the IT-201-X Amended Resident Income Tax Return filed as a protest to the above NYS assessment L-047622663-3 (2014). The IT-201-X (2014) has not been accepted and processed by our department.

Thank you for your payment of \$23,132.81 on February 14, 2018 which has paid the above assessment in full.

We have reviewed the information you sent in response to the above assessment. The assessment L-047622663-3 (2014) is considered correct as issued and has been sustained.

The assessment is determined to be correct as issued for the following reasons

which were previously explained to you in notices sent by our department.

Please note bond premium amortization cannot be directly subtracted from your interest income. The following court rulings support our department's treatment of amortization:

- Advisory Opinion TSB-A-03(3)I – George Lavenia
- Tribunal Decision DTA No. 822845, Howard Solomon, dated June 2, 2011
- ALJ (Administrative Law Judge) Determination DTA NO. 826159, Steve Kanney, dated September 3, 2015

The only exception is if the bond is used in a trade or business. In that instance the bond premium amortization can be deducted as an above the line deduction. Trading for your own account is investing, not a trade or business.

The bond premium amortization should be reported as an addition adjustment on line 11 of Form IT-201-D, New York State Resident Itemized Deduction Schedule.

If you paid accrued interest on the purchase of municipal bonds provide our department the 2014 year-end statements from Pershing LLC that itemizes the accrued interest paid by CUSIP number and security description, and your case will be reviewed again.”

The notice of assessment resolution shows tax assessed for 2014 of \$19,510.00 plus interest of \$3,622.81, less payments/credits of \$23,132.81, and no current balance.

31. On May 30, 2019, the Division issued to petitioners a notice of disallowance for 2014, sustaining assessment number L-047622663, which had been paid in full, and denying the refund claim of \$12,663.00. The notice of disallowance for 2014 states, “Bond premium amortization expenses are not a direct offset to taxable municipal bond interest earned, but rather an itemized deduction addition to be reported on Line 11 – Addition adjustments of the IT-201-D Resident Itemized Deduction Schedule.”

32. Petitioners submitted into the record portions of 2014 Tax and Year-End Statements from Cetera Advisors LLC. The 2014 year-end statement for Robert Ciardullo shows federally tax-exempt interest income of \$222,896.30, specified private activity bond interest of

\$12,575.00, ordinary dividends of \$2.18, exempt interest dividends of \$20,356.78, and specified private activity bond interest dividends of \$4,010.06. The first page of the statement also shows a summary of form 1099-B with gross proceeds of \$677,437.60 and a cost basis of \$0.00, and refers to the 1099-B section of the statement for details. However, pages 2 through 6 of the 2014 year-end statement were not submitted by petitioners and the documents submitted do not contain the 1099-B section detail.

The 2014 year-end statement for Kira Ciardullo shows federally tax-exempt interest income of \$122,516.31 and specified private activity bond interest of \$1,375.00. Line 11 of the 2014 1099-INT, interest income, shows bond premium for covered transactions of \$340.37. The 2014 statement shows ordinary dividends of \$0.60, exempt interest dividends of \$7,508.69, and specified private activity bond interest dividends of \$1,609.99. The first page of the statement also shows a summary of form 1099-B with gross proceeds of \$285,000.00 and a cost basis of \$0.00, and refers to the 1099-B section of the statement for details. However, pages 2 through 4 of the 2014 year-end statement were not submitted by petitioners and the documents submitted do not contain the 1099-B section detail.

2015

33. Petitioners filed a New York resident income tax return for 2015 on July 15, 2016 (2015 initial return). On the 2015 initial return, petitioners reported federal adjusted gross income of \$1,113,942.00 consisting of wages, salaries and tips of \$930,245.00,¹⁰ taxable interest income of \$491.00, ordinary dividends of \$6,581.00, taxable refunds, credits or offsets of state

¹⁰ Attached to petitioners' initial 2015 return are forms W-2, wage and tax statements for Robert Ciardullo showing wages of \$857,233.26 from Robert C. Ciardulo MD PC, and for Kira Ciardullo from Westchester Health Associates, PLLC, showing wages of \$73,022.28.

and local income taxes of \$21,495.00, business loss of \$7,993.00,¹¹ capital loss of \$695.00,¹² and rental real estate, royalties, partnerships and S corporation income of \$163,818.00. On line 20 of the 2015 initial return, petitioners reported a New York addition for interest income on non-New York state and local bonds and obligations of \$300,685.00. On line 23 for “other” New York additions petitioners reported \$300,685.00 and attached form IT-225, other additions and subtractions statement, indicating in part 1, other New York additions, interest expense on loans used to buy obligations exempt from New York State tax and other expenses relating to the production of income exempt from New York State tax of \$300,685.00.

On line 25, for New York subtractions, petitioners subtracted \$21,495.00 for taxable refunds, credits, or offsets of state and local income taxes. On line 31, for “other” New York subtractions, petitioners reported \$210,580.00 and indicated on a statement attached to form IT-225 subtractions for amortization of premium non-NYS bonds of \$190,409.49 and accrued interest paid on non-NYS bonds of \$20,170.24.

Petitioners reported New York adjusted gross income of \$1,182,552.00, claimed a standard deduction of \$15,850.00, and reported taxable income of \$1,166,702.00, New York State tax of \$79,919.00, tax withheld of \$94,015.00, and requested that an overpayment of \$14,096.00 be applied to the following year’s estimated tax. The 2015 initial return lists Robert Ciardullo’s occupation as plastic surgeon.

34. On November 16, 2018, the Division issued to petitioners a statement of proposed audit changes, assessment number L-049133760, for the year 2015 (2015 statement), stating that

¹¹ A 2015 schedule C, profit or loss from business, reports the business loss for Kira Geraci-Ciardullo MD, as medical doctor.

¹² Petitioners’ 2015 schedule D, capital gains and losses, reports a long-term capital loss of \$695.00 for assets held for over one year.

“[t]he interest income on state and local bonds and obligations shown on your return does not agree with the amount(s) reported by the payer(s).” The 2015 statement explained:

“Interest income on obligations from any state other than New York State or any political subdivision of another state, though exempt from federal income tax, is taxable to New York State under NYS Tax Law sections 612(b)(1) and 1303.

You must report such income on line 20 of your 2015 personal income tax return.

All or part of the income that was credited to your account or which you received from the sources shown in the Fund details section of this notice was derived from non-New York State and local obligations. Because you did not make the proper line modification on your New York State return, we have adjusted your New York taxable income for the portion of the non-New York interest income included in your distribution(s) from these sources.”

The 2015 statement listed taxable amounts from several fund distributions of non-New York interest income made to petitioners totaling \$294,060.00, and indicated that petitioners reported \$0.00 of this amount on their 2015 return, resulting in a net adjustment of \$294,060.00. The 2015 statement noted that the Division’s computation of taxable income did not include interest from New York State or municipal sources.

The 2015 statement recalculated petitioners’ New York adjusted gross income to \$1,476,612.00, determined taxable income of \$1,460,762.00 and tax of \$100,062.00, and asserted tax due of \$20,143.00 plus interest.

35. On January 3, 2019, the Division issued to petitioners a notice of deficiency, assessment number L-049133760, asserting tax due of \$20,143.00 plus interest for tax year 2015.

36. On March 19, 2019, petitioners filed an amended resident income tax return, form IT-201-X, for 2015 (first 2015 amended return). On the first 2015 amended return, petitioners amended line 20, New York additions for interest income on non-New York state and local bonds and obligations, to \$294,060.00, and line 23, “other” New York additions, to \$0.00.

Petitioners amended line 31, “other” New York subtractions to \$206,594.00. Petitioners reported

New York adjusted gross income of \$1,179,913.00, claimed an itemized deduction of \$9,781.00, reported taxable income of \$1,170,132.00, and tax of \$90,488.00. Petitioners reported total payments of \$114,158.00, consisting of tax withheld of \$94,015.00 and amount paid with original return of \$20,143.00, and requested a refund of \$21,943.00. Petitioners reported Robert Ciardullo's occupation as Doctor on the first 2015 amended return.

Petitioners attached to the first 2015 amended return a statement entitled "Form 225 as an Attachment to Form 201X" wherein they indicated amortized bond premium of \$190,409.00 and accrued bond interest paid of \$16,185.00.

Also attached to the first 2015 amended return was correspondence from petitioners' representative stating that the petitioners are protesting and appealing the 2015 statement and requesting that no refund be sent at this time.

37. Petitioners filed a second amended resident income tax return, form IT-201-X, for 2015 (second 2015 amended return), dated May 22, 2019. On the second 2015 amended return, petitioners amended the New York State itemized deduction schedule, reporting on line 11 of the schedule addition adjustments of \$190,410.00 and reporting on line 13 itemized deduction adjustment of \$219,616.00. The final itemized deduction amount reported of \$9,781.00 remained the same as the first 2015 amended return, and the amounts reported for taxable income, New York State tax, payments made and amount of refund claimed were the same as reported on the first 2015 amended return. Petitioners reported Robert Ciardullo's occupation as surgeon on the second 2015 amended return.

Petitioners included with the second 2015 amended return a letter from their representative stating that they are protesting and appealing the 2015 statement and that they "contest the disallowance of amortized premium on IT 201D since it's part of cost basis and is

not interest income.”

38. On October 30, 2019, the Division issued to petitioners a notice of disallowance for 2015, sustaining assessment number L-049133760, which had been paid in full, and denying the refund claim of \$21,943.00. The notice of disallowance for 2015 states, “Bond premium amortization is not allowed as a direct offset to taxable municipal bond interest earned. Rather, it is allowable as an itemized deduction addition to be reported on Line 11 of the Form IT-201-D: Resident Itemized Deduction Schedule.”

39. Petitioners submitted into the record portions of 2015 Tax and Year-End Statements from Pershing LLC. The 2015 year-end statement for Robert Ciardullo shows federally tax-exempt interest income of \$140,703.16, specified private activity bond interest of \$12,575.00, bond premium on tax-exempt bonds for covered transactions of \$1,327.30, ordinary dividends of \$3.28, capital gain distributions of \$46.72, exempt interest dividends of \$69,030.06, and specified private activity bond interest dividends of \$12,192.21. The first page of the statement also shows a summary of form 1099-B with gross proceeds of \$2,915,000.00 and a cost basis of \$0.00, and refers to the 1099-B section of the statement for details. However, pages 2 through 11 of the 2015 year-end statement were not submitted by petitioners and the documents submitted do not contain the 1099-B section detail.

The 2015 year-end statement for Kira Ciardullo shows federally tax-exempt interest income of \$99,022.56, specified private activity bond interest of \$1,375.00, bond premium on tax-exempt bonds for covered transactions of \$839.08, ordinary dividends of \$1.36, capital gain distributions of \$18.88, exempt interest dividends of \$25,568.45, and specified private activity bond interest dividends of \$4,999.74. The first page of the statement also shows a summary of form 1099-B with gross proceeds of \$1,045,000.00 and a cost basis of \$0.00, and refers to the

1099-B section of the statement for details. However, pages 2 through 8 of the 2015 year-end statement were not submitted by petitioners and the documents submitted do not contain the 1099-B section detail.

2016

40. Petitioners filed a New York resident income tax return for 2016, dated April 11, 2017 (2016 initial return). On the 2016 initial return, petitioners reported federal adjusted gross income of \$819,360.00 consisting of wages, salaries and tips of \$606,633.00,¹³ taxable interest income of \$9,495.00, ordinary dividends of \$2,473.00, taxable refunds, credits or offsets of state and local income taxes of \$14,096.00, business income of \$1,786.00,¹⁴ capital gain of \$336.00,¹⁵ taxable amount of pensions and annuities of \$4,975.00, rental real estate, royalties, partnerships and S corporation income of \$179,692.00, and federal adjustment of \$126.00. On line 20 of the 2016 initial return, petitioners reported a New York addition for interest income on non-New York state and local bonds and obligations of \$132,675.00. For New York subtractions, on line 25, petitioners subtracted \$14,096.00 for taxable refunds, credits, or offsets of state and local income taxes; on line 29, petitioners subtracted \$4,975.00 for pension and annuity income exclusion; and on line 31, petitioners reported \$67,093.00 for “other.”

Petitioners reported New York adjusted gross income of \$865,871.00, claimed an itemized deduction of \$29,736.00, and reported taxable income of \$836,135.00, New York State

¹³ Attached to petitioners’ initial 2016 return are forms W-2, wage and tax statements for Robert Ciardullo showing wages of \$603,896.51 from Robert C. Ciardulo MD PC, and for Kira Ciardullo from Westchester Health Associates, PLLC, showing wages of \$2,736.00.

¹⁴ A 2016 schedule C, profit or loss from business, reports the business income for Kira Geraci-Ciardullo MD, as medical doctor.

¹⁵ Petitioners’ 2016 schedule D, capital gains and losses, shows a short-term loss of \$3,261.00 and a long-term capital gain of \$3,597.00 for assets held for over one year. The transaction detail for the short-term loss showing dates of acquisition and sale is not included in the record.

tax of \$57,275.00, tax withheld of \$70,145.00, estimated payments of \$14,096.00, and requested that an overpayment of \$26,966.00 be applied to the following year's estimated tax. The 2016 initial return lists Robert Ciardullo's occupation as plastic surgeon.

41. On May 22, 2017, the Division issued to petitioners an account adjustment notice for 2016. The account adjustment notice states that petitioners' New York itemized deductions were either added or computed incorrectly. The Division adjusted the total itemized deductions to \$29,650.00, recalculated petitioners' taxable income to \$836,221.00, computed tax of \$57,281.14, and adjusted the claimed overpayment to \$26,959.86.

42. Petitioners filed an amended resident income tax return, form IT-201-X, for 2016 (first 2016 amended return), dated May 22, 2019. On the first 2016 amended return, petitioners amended line 20, New York additions for interest income on non-New York state and local bonds and obligations, to \$0.00, and line 23, "other" New York additions, to \$132,675.00. Petitioners amended line 31, "other" New York subtractions to \$33,546.00. Petitioners reported New York adjusted gross income of \$899,418.00, claimed an itemized deduction of \$63,196.00, reported taxable income of \$836,222.00, and tax of \$64,065.00. Petitioners reported total payments of \$84,241.00, consisting of tax withheld of \$70,145.00 and estimated payments of \$14,096.00, and reported an overpayment of \$20,176.00.

Petitioners attached to the first 2016 amended return a statement that "Taxpayers compute Line 31 of IT 201X for Year 2016 as follows: $1/2$ of 67091 = 33546 from Line 11 IT-201D." Petitioners also attached to the first 2016 amended return correspondence from their representative stating that the petitioners are protesting and appealing the disallowance of half the premium on IT 201D "since it's part of cost basis and is not interest income. If you agree that the amount paid is correct, please refund the overpayment. If you disagree, please issue the

Taxpayer an assessment of additional tax due which the Taxpayer will formally protest with the Division of Tax Appeals (DTA).”

43. On November 6, 2019, the Division issued to petitioners a statement of proposed audit changes, assessment number L-050909656, for the year 2016 (2016 statement), stating that “[t]he interest income on state and local bonds and obligations shown on your return does not agree with the amount(s) reported by the payer(s).” The 2016 statement contained the same explanation as the 2015 statement (*see* finding of fact 34) and stated the petitioners must report the interest income from non-New York sources on line 20 of the 2016 return.

The 2016 statement listed taxable amounts from several fund distributions of non-New York interest income made to petitioners totaling \$133,489.00, and indicated that petitioners reported \$0.00 of this amount on their 2016 return, resulting in a net adjustment of \$133,489.00. The 2016 statement noted that the Division’s computation of taxable income did not include interest from New York State or municipal sources.

The 2016 statement recalculated petitioners’ New York adjusted gross income to \$1,032,907.00, determined taxable income of \$1,016,957.00 and tax of \$69,662.00, and asserted tax due of \$12,381.00 plus interest, and penalty of \$1,962.81.

Regarding the penalty, the 2016 statement explained:

“We have added a negligence penalty of 5% of the amount of additional tax due (section 685(b)(2) of the New York State Tax Law).

In addition to the 5% negligence penalty, an amount equal to 50% of any interest due on the deficiency or portion of a deficiency attributable to negligence has been imposed (section 685(b)(2) of the New York State Tax Law).

We computed the penalties for the following reason:

You have previously made the same error in computing New York tax and you were notified of the correct reporting requirements.”

44. On November 15, 2019, petitioners filed a second amended resident income tax return, form IT-201-X, for 2016 (second 2016 amended return). On the second 2016 amended return, petitioners amended line 20, New York additions for interest income on non-New York state and local bonds and obligations, to \$133,489.00, and line 23, "other" New York additions, to \$0.00. Petitioners reported New York adjusted gross income of \$900,232.00, claimed an itemized deduction of \$63,196.00, reported taxable income of \$837,036.00, and tax of \$57,337.00. Petitioners reported total payments of \$84,241.00, consisting of tax withheld of \$70,145.00 and estimated payments of \$14,096.00, reported an overpayment as shown on the original return of \$26,966.00, and reported an amount of tax owed of \$62.00.

45. On April 6, 2020, the Division issued to petitioners a notice of deficiency, assessment number L-050909656, and asserting tax due of \$12,381.00 plus interest, and penalty of \$2,200.22 for 2016.

46. Petitioners submitted into the record 2016 Tax and Year-End Statements from Pershing LLC. The 2016 year-end statement for Robert Ciardullo shows interest income of \$26.60, federally tax-exempt interest income of \$53,145.93, bond premium on tax-exempt bond covered transactions of \$17,253.39, ordinary dividends of \$23.82, capital gain distributions of \$360.99, exempt interest dividends of \$40,271.35, specified private activity bond interest dividends of \$6,139.24, and gross proceeds from broker and barter exchange transactions of \$2,009,979.68, with a cost basis for covered transactions of \$1,588,329.99. The proceeds from broker and barter exchange transactions consisted of three short-term transactions with a total loss of \$1,054.73 and several long-term transactions with a realized gain of \$5,659.42 for covered transactions and a realized gain of \$596.94 for non-covered transactions.

The 2016 year-end statement for Kira Ciardullo shows interest income of \$41.18,

federally tax-exempt interest income of \$81,966.27, bond premium on tax-exempt bond covered transactions of \$12,164.94, ordinary dividends of \$29.19, capital gain distributions of \$41.38, exempt interest dividends of \$9,818.25, specified private activity bond interest dividends of \$1,622.30, and gross proceeds from broker and barter exchange transactions of \$2,627,338.55, with a cost basis for covered transactions of \$1,336,841.17. The 2016 form 1099-B, proceeds from broker and barter exchange transactions, shows a total realized loss of \$1,917.03 from three short-term transactions, a realized loss for long-term covered transactions of \$3,677.68, and a realized gain from long-term non-covered transactions of \$2.89.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge cited the sections of the Tax Law that describe how taxable income is calculated for purposes of the New York State personal income tax. New York adjusted gross income (AGI) starts with a taxpayer's federal AGI and is increased and decreased by New York-specific modifications (Tax Law §§ 611 [a]; 612 [a]). Included among the modifications increasing federal AGI in reaching New York AGI is interest income on bonds issued by states other than New York (Tax Law § 612 [b] [1]). The Administrative Law Judge observed that the question posed by petitioners is whether that interest income should properly be reported as gross interest paid less amortized bond premiums allocable to that taxable year.

The Administrative Law Judge determined that this question was answered in *Matter of Solomon* (Tax Appeals Tribunal, June 2, 2011), where this Tribunal held that reportable interest income from non-New York bonds for purposes of New York personal income tax represents the gross interest paid on the bonds.

The Administrative Law Judge noted that petitioners' argument that the principle of federal conformity requires that interest income, for New York purposes, be calculated as

payments less bond premiums, was rejected in *Matter of Solomon*. The Administrative Law Judge recognized that bond interest income is tax-exempt under the Internal Revenue Code (IRC), in contrast to the Tax Law. She also noted that this Tribunal has held that federal conformity does not extend to circumstances where a different meaning is clearly required and remains subject to the modifications prescribed by the Tax Law. The Administrative Law Judge determined that petitioners' argument that they are unable to claim the amortized bond premiums as an itemized deduction does not warrant a different result.

The Administrative Law Judge next addressed petitioners' argument that Dr. Robert Ciardullo was engaged in a trade or business as a bond trader and thus petitioners are entitled to subtract from federal AGI allocable amortized bond premiums as an expense incurred in a trade or business. The Administrative Law Judge observed that the courts have employed a factual analysis to distinguish between traders, who are considered to be engaged in a trade or business, and investors, who are not. The Administrative Law Judge found that Dr. Robert Ciardullo described himself as an "investor/trader . . . only for myself and my own account" and not a professional bond trader, notwithstanding the amount of time spent researching bond trades. The Administrative Law Judge determined that petitioners did not meet their burden of proof to show that the bond premiums at issue were attributable to a trade or business carried on by Dr. Robert Ciardullo.

Finally, the Administrative Law Judge considered petitioners' constitutional arguments, but determined that such claims constituted facial challenges to the Tax Law, and not as-applied challenges. Because the Division of Tax Appeals lacks jurisdiction to consider facial constitutional challenges, the Administrative Law Judge declined to address the substance of such arguments. Accordingly, the Administrative Law Judge denied the petition and sustained

the notices of deficiency and notices of disallowance.

ARGUMENTS ON EXCEPTION

Petitioners contend that the Administrative Law Judge incorrectly determined that interest income, for purposes of the Tax Law, includes amortized bond premiums for bonds issued by states other than New York. They state that amortized bond premiums represent cost basis, rather than income, and thus should be deductible from interest income stemming therefrom. They argue that changes to the Tax Law in 2010 phased out the full amount of the itemized deduction to which they would have otherwise been entitled, thus denying them the opportunity to deduct the bond premiums paid. They also assert that *Matter of Solomon* is distinguishable because there, the taxpayer could have deducted the amortized bond premium if he had itemized his deductions rather than claiming the standard deduction. Petitioners argue that treating amortized bond premiums as income is at odds with accepted practice of how interest income from bonds is reported in other states and at the federal level.

Petitioners also argue that Dr. Robert Ciardullo qualifies as a bond trader rather than an investor because of the amount of time he spends managing his portfolio and the number of bond trades he made during these tax years. Petitioners distinguish *Estate of Yaeger v Commr.* (889 F2d 29 [2d Cir 1989]), claiming that it would have been impossible to make a reasonable capital gain on frequent trades of bonds considering the generally low interest rates in place at the time.

Petitioners also argue that the denial of a deduction for amortized bond premiums for other states' bonds constitutes a violation of the United States and New York Constitutions.

The Division maintains that the Administrative Law Judge correctly determined all issues in her determination and notes that petitioners make the same arguments on exception as they did below. The Division argues that *Matter of Solomon* controls in this case, as the issue is

identical. The Division asserts that federal conformity does not apply in these circumstances, as a different meaning is clearly required, considering the explicit requirement of the Tax Law that interest income from non-New York state and local bonds be added to federal AGI and that such bond interest is tax-free under federal law. The Division agrees with the Administrative Law Judge's rejection of petitioners' argument that interest income from bond transactions should be reported net of amortized bond premiums.

The Division states that the Administrative Law Judge correctly determined that Dr. Robert Ciardullo does not qualify as being engaged in the business or trade of bond trading for purposes of the Tax Law. The Division notes that, under the caselaw regarding such a status, how much time one devotes to the investment activity is not determinative.

The Division argues that the Administrative Law Judge correctly determined that the Division of Tax Appeals lacks jurisdiction over facial constitutional challenges to the Tax Law. The Division also states that petitioners have not shown their arguments to be as-applied constitutional violations, and accordingly the Administrative Law Judge correctly determined that their constitutional arguments cannot be considered.

OPINION

We begin with Tax Law § 611 (a), which defines taxable income for New York residents as their New York adjusted gross income subject to their New York exemptions and deductions. As petitioners are New York State residents, their New York adjusted gross income equals their federal AGI, subject to New York-specific additions and subtractions (*id.*, Tax Law § 612 [a]). At issue here is whether amortized bond premiums, that is, the amounts paid above face value for bonds issued by states other than New York, including political subdivisions of such states, must be added back to New York AGI to the extent not included in federal AGI.

Petitioners maintain that amortized bond premiums represent cost basis and not income, and thus should not be required to be included in interest income. In effect, they argue that interest income from bonds should be defined as the net of gross interest income therefrom and the amortized bond premium allocable to that tax year. They also argue that changes to the Tax Law in 2010 phased out the full amount of the itemized deduction to which they would have otherwise been entitled, thus denying them the opportunity to deduct the premium paid for the bonds. They assert that *Matter of Solomon* is distinguishable in that the taxpayer there could have claimed the amortized bond premium if he had itemized his deductions rather than claiming the standard deduction. Petitioners cite the doctrine of federal conformity as supporting their position.

We disagree with petitioners' arguments and affirm the determination of the Administrative Law Judge.

The Administrative Law Judge correctly determined that *Matter of Solomon* addressed this issue. In that case, we were asked whether interest income under Tax Law § 612 (b) (1) constitutes the gross annual interest payments or the gross annual interest payments less amortized bond premiums allocable to the year at issue. The Tribunal found that while the Tax Law did not define interest income, when a term is used in a comparable context, Tax Law § 607 (a) provides for conformity with federal tax law relating to income taxes, unless a different meaning is clearly required (*id.*). Because interest from state and municipal bonds is tax-free under the IRC, as opposed to New York's treatment of interest income from non-New York bonds, we found that the Tax Law requires a different meaning for what constitutes "interest income" and rejected the taxpayer's argument that interest income represents gross interest income net of allocable amortized bond premium (*id.*).

We note that the IRC provides for an offset of investment costs in taxable bonds by providing an above-the-line amortized bond premium adjustment against qualified stated interest (*see* Treas Reg [26 CFR] § 1.171-2 [a]; *see also* IRS Pub 550, Ch 3). The Tax Law also permits an adjustment for amortized bond premiums, but does so in a different manner than the IRC. Specifically, Tax Law § 615 (d) (3) provides for an increase in itemized deductions to the extent such bond premiums were not deductible in determining federal AGI and not subtracted from federal AGI in reaching New York AGI pursuant to Tax Law § 612 (c) (10). Petitioners were unable to take advantage of this provision, however, on account of the phase out of itemized deductions for taxpayers having New York AGI above certain thresholds (*see* Tax Law § 615 [f], [g]). Petitioners' disagreement with the statutory scheme for treatment of bond premiums thus actually lies with the phase out of itemized deductions for certain taxpayers and not with the itemized deduction allowed under Tax Law § 615 (d) (3).

Petitioners also argue that Dr. Robert Ciardullo should be considered to be engaged in the trade or business of bond trading. In support of this claim, Dr. Ciardullo averred that he considers himself an "investor-trader" based on the time spent researching transactions as well as the volume and value of the trades he executed. Such a distinction carries tax consequences, as ordinary and necessary business expenses, including amortized bond premium, are allowed as a subtraction from federal AGI in determining New York AGI to the extent such expenses are attributable to a trade or business carried on by the taxpayer (Tax Law § 612 [c] [10]).

The courts have distinguished between individuals engaged in a trade or business as opposed to individuals managing their own investments (*Higgins v Commr. of Internal Revenue*, 312 US 212 [1941], *rehearing denied* 312 US 714 [1941]; *Estate of Yaeger v Commr.*). Mere management of investments, whatever the scope of such activity, has been held

to be the work of an investor not engaged in the trade or business of a trader (*Bedell v Commr. of Internal Revenue*, 30 F2d 622, 624 [1929]; *Mayer v Commr. of Internal Revenue*, 67 TCM 2949 [1994]). In order for a taxpayer's activities to constitute the trade or business of trading, the taxpayer must show that he or she is seeking to catch the swings in market movements and to profit from such changes (*id.*). Deriving income resulting from frequency of trades rather than dividends, interest or long-term appreciation, has been held to be a distinguishing characteristic of one engaged in the business of trading securities (*id.*).

We agree with the Administrative Law Judge that petitioners have not met their burden of showing that Dr. Robert Ciardullo was carrying on a trade or business in bond trading. The Administrative Law Judge noted that petitioners held their securities long-term and most of the profit was derived from interest income, rather than short-term trades. As discussed above, the courts have repeatedly found the distinction between income derived from short-term profits and income from dividends, interest, or long-term appreciation to be determinative (*see e.g. Estate of Yaeger; see also Van Der Lee v Commr. of Internal Revenue*, 501 Fed Appx 30 [2d Cir 2012]). Petitioners' argument that Dr. Robert Ciardullo is a bond trader based on his engaging in more than 500 bond trades over five years is also unavailing in light of the U.S. Tax Court's holding that more than 1000 transactions in one year did not qualify the taxpayer in *Yaeger* as a securities trader (*Estate of Yaeger*, 889 F2d at 33-34).

Turning to petitioners' constitutional arguments, we note that statutes are presumed to be constitutional and thus this Tribunal lacks jurisdiction to consider the constitutionality of provisions of the Tax Law on their face (*see Matter of Eisenstein*, Tax Appeals Tribunal, March 27, 2003; *Matter of Fourth Day Enters.*, Tax Appeals Tribunal, October 27, 1988). We are, however, empowered to consider whether the application of a statute to a particular set of facts

violates the constitution (*id.*). Petitioners bear the burden of proving that a statute, as applied, is unconstitutional (*Matter of HDV Manhattan, LLC*, Tax Appeals Tribunal, February 12, 2016 *confirmed* 156 AD3d 963 [3d Dept 2017]). Petitioners have not shown how the Division applied the Tax Law to their particular circumstances in a manner that would differ from another similarly situated taxpayer. As such, we decline to consider petitioners' constitutional arguments.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Robert and Kira Ciardullo is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of Robert and Kira Ciardullo are denied; and
4. The notices of deficiency dated April 4, 2016 (for tax year 2012, as modified by the Division by correspondence dated May 2, 2016) and April 6, 2020 (for tax year 2016), and the notices of disallowance dated August 31, 2016 (for tax year 2012), May 30, 2019 (for tax years 2013 and 2014), and October 30, 2019 (for tax year 2015) are sustained.

Dated: Albany, New York
March 23, 2023

/s/ Anthony Giardina
Anthony Giardina
President

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner

/s/ Cynthia M. Monaco
Cynthia M. Monaco
Commissioner