STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ALLISON GREENBERG	:	DECISION DTA NO. 829737
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law and the New York City Administrative Code for the Years 2014 and 2015.	:	

Petitioner, Allison Greenberg, filed an exception to the determination of the Administrative Law Judge issued on July 14, 2022.[1] Petitioner appeared by Akerman, LLP (Ira Stechel, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Linda Farrington, Esq., of counsel).

Petitioner filed a brief in support of the exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a reply brief. Oral argument was heard in New York, New York on May 25, 2023, 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.

ISSUE

Whether the Division of Taxation properly denied resident credit claimed by petitioner for the years 2014 and 2015.

FINDINGS OF FACT

We have not included facts exclusively related to the petition of Scott J. and Martha M.

[1] The determination also adjudicated the petition of Scott J. and Martha M. Farrell (DTA No. 829738), who did not file an exception.

Farrell, as those petitioners did not file an exception. Accordingly, we have not included the Administrative Law Judge's findings of fact 12 through 18, 22, 23, 28, 29, 35, 38, and 39. We have also renumbered the Administrative Law Judge's findings of fact 19-21, 24-27, 30-34, 36, 37, and 40 as 12-14, 15-18, 19-23, and 24-26, respectively. We have added finding of fact 27 to summarize relevant facts in the determination regarding Mr. Farrell. Additionally, we have modified finding of fact 22 as renumbered herein and have added additional findings of fact 28 and 29 to more fully reflect the record. We have not included the Administrative Law Judge's finding of fact 40, a summary of her treatment of proposed findings of fact. As so modified, the Administrative Law Judge's findings of fact appear below.

1. Petitioner Allison Greenberg was domiciled in New York State and City during tax years 2014 and 2015.

2. Ms. Greenberg filed a New York State resident income tax return, form IT-201, for tax year 2014 as a New York State and City resident. Ms. Greenberg then filed an Amended New York State resident income tax return, form IT-201-X, for tax year 2014 as a New York State and City resident.

3. Ms. Greenberg received a schedule K-1 as a partner of Hildene Holding Company, LLC (Hildene) for tax year 2014. The schedule K-1 received by Ms. Greenberg reported ordinary income of the partnership as well as carried interest. The carried interest was reported as interest income, dividends, and capital gains. As a New York resident, Ms. Greenberg correctly reported all of her schedule K-1 income from Hildene on her 2014 amended New York return.

4. With her original and amended New York returns, Ms. Greenberg filed form IT-112-R, New York State Resident Credit, to claim a resident tax credit (RTC) for taxes paid to

Connecticut. On form IT-112-R attached to her amended return for 2014, Ms. Greenberg correctly reported all of her New York income in Column A for a total of $3,738,074.00. However, the Division of Taxation (Division) and Ms. Greenberg disagree about the treatment of Connecticut sourced income reported in Column B as follows:

Income Type	IT-112-R Column B Line #	Amount reported by Ms. Greenberg	Amount allowed on audit	Amount in dispute
Interest Income	2	$590,730.00	0	$590,730.00
Dividends	3	$385,832.00	0	$385,832.00
Capital Gains	7	$562,068.00	0	$562,068.00
Flow-through ordinary income	11	$2,135,805.00	$2,135,805.00	0
Total		$3,674,435.00	$2,135,805.00	$1,538,630.00

5. Ms. Greenberg filed a Connecticut nonresident return reporting and paying tax to Connecticut on the schedule K-1 income from Hildene sourced to Connecticut under Connecticut law in 2014. This return reported and paid tax on all of the income reported by Ms. Greenberg as Connecticut sourced on the IT-112-R ($3,674,435.00). The Division accepted the RTC for the taxes paid to Connecticut on the $2,135,805.00 of ordinary income sourced to Connecticut as filed. Therefore, the only dispute is whether the taxes paid on the $1,538,630.00 of carried interest income (reported on form IT-112-R as interest income, dividends and capital gains) to Connecticut are eligible for a RTC under Tax Law § 620 based on the source and character of the income.

6. Ms. Greenberg filed a New York State resident income tax return, form IT-201, for tax year 2015 as a New York State and City resident.

7. Ms. Greenberg also received a schedule K-1 as a partner of Hildene for tax year 2015. The schedule K-1 received by Ms. Greenberg reported an ordinary loss of the partnership as well as carried interest income. The carried interest was reported as interest income, dividends, and

capital gains. As a New York resident, Ms. Greenberg correctly reported all of her schedule K-1 income from Hildene on her 2015 New York return.

8. With her 2015 New York return, Ms. Greenberg filed form IT-112-R, New York State resident credit, to claim an RTC for taxes paid to Connecticut. On this form, Ms. Greenberg correctly reported all of her New York income in Column A for a total of $11,081,700.00. However, the Division and Ms. Greenberg disagree about the treatment of Connecticut sourced income reported in Column B as follows:

Income Type	IT-112-R Column B Line #	Amount reported by Ms. Greenberg	Amount allowed on audit	Amount in dispute
Interest Income	2	$4,819,778.00	0	$4,819,778.00
Dividends	3	$2,651,905.00	0	$2,651,905.00
Capital Gains	7	$22,102,196.00	0	$22,102,196.00
Flow-through ordinary income	11	($18,389,010.00)	($18,389,010.00)	0
Total		$11,184,849.00	0	$11,184,849.00

9. Ms. Greenberg filed a Connecticut nonresident return reporting and paying tax to Connecticut on the schedule K-1 income from Hildene sourced to Connecticut under Connecticut law in 2015. This return reported and paid tax on all of the income reported by Ms. Greenberg as Connecticut sourced on the IT-112-R ($11,184,849.00). The Division accepted the sourcing of the flow-through ordinary loss to Connecticut but, because no tax is paid on a loss, the Division disallowed the claimed RTC in its entirety. Therefore, the remaining dispute is whether the taxes paid on the $11,184,849.00 of carried interest income (reported on the form IT-112-R as interest income, dividends and capital gains reduced by the ordinary loss) to Connecticut are eligible for a RTC under Tax Law § 620 based on the source and character of the income.

10. The Division audited Ms. Greenberg for 2014 and 2015 and accepted her income, deductions, and residency status as filed. However, the Division concluded that Ms. Greenberg

was only entitled to a RTC for taxes paid to Connecticut on the ordinary income of Hildene. Therefore, the Division adjusted Ms. Greenberg's returns to disallow the RTCs to the extent they were claimed for taxes paid to Connecticut on the carried interest income of Hildene.

11. As a result of the Division's adjustments disallowing the RTCs, the Division issued a notice of deficiency, number L-047839423, to Ms. Greenberg on March 27, 2018, assessing additional tax due for the years 2014 and 2015 in the amount of $839,932.00, plus interest.

12. During the course of the audit, petitioner's representative requested that the Division provide support for its position. By letter dated July 14, 2017, the Division stated, in part, as follows:

> "This letter is a follow up to your phone call on July 11, 2017. During our conversation, you had requested citation supporting our position. Please note that there are currently no citations in the tax law that define incentive fee v. incentive allocation income. However, we have enclosed an article labeled 'Structuring Hedge Fund Manager Compensation: Tax and Economic Consideration", from the Journal of Taxation, Volume 112, Number 05, May 2010. This article clearly explains the concept of incentive fee v. incentive allocation.
>
> We would like to again explain our position as was stated in our position letters dated April 11, 2017 and June 13, 2017. Pursuant to page 6 of the Operating Agreement of Hildene Holding Company, LLC, incentive compensation in the agreement is defined as incentive allocation paid to the fund. Incentive allocation is a form of carried interest (capital gains, interest, and dividends) and New York State does not consider carried interest to be intangible income employed in a trade or business. Please note that this type of allocation is treated as a special allocation under Internal Revenue Code Section 704(b). As the income passes down from the partnership to the partner, it retains its source and character (refer to New York State Tax Law Section 617(b) and New York State Regulation Section 137.6 which was previously provided.) Since the income generated is not considered as intangible income used in a trade or business, we would not currently tax this income if received by a nonresident.
>
> In the current matter, the capital gains, interest, and dividends your client received from the Hildene Company was incentive allocation which is a form of carried interest. Given that New York State does not tax nonresidents on this type of income, we would not allow a resident tax credit on taxes paid to other states if those same taxes would not be imposed on a nonresident of New York."

13. Petitioner Allison Greenberg filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS). A conciliation conference was held on December 4, 2018. BCMS issued a conciliation order dated August 23, 2019 sustaining the notice.

14. Petitioner Allison Greenberg timely filed a petition with the Division of Tax Appeals that was acknowledged on December 27, 2019. The Division filed an answer on February 19, 2020.

15. At all relevant times, Hildene was a Delaware Limited Liability Company and Ms. Greenberg was a member. On audit, petitioner provided an operating agreement, dated March 7, 2008, for Hildene.

16. The operating agreement of Hildene, dated March 7, 2008, lists its principal place of business as 140 East 45th Street, Suite 3C, New York, New York, and further states that "[t]he Company may have such other business offices within or without the State of Delaware as determined from time to time by the Managers." The operating agreement further states that Hildene's business "shall be to serve as a holding company, and that the Company shall not engage in any direct business activities."

17. Ms. Greenberg provided a revised member agreement, dated March 8, 2012, between her and Hildene. This member agreement stated in paragraph 4(a) that Ms. Greenberg would receive a profit allocation equal to 6.5%.

18. The revised member agreement between Ms. Greenberg and Hildene, dated March 8, 2012, lists Hildene's office address as 500 Fifth Avenue, Suite 1120, New York, New York.

19. Both member agreements provided that net profits described in paragraph 4(a) would be allocated to the members in accordance with the terms of paragraph 4.1(b) of the operating

agreement. This incentive income, otherwise known as "carried interest," was correctly categorized by Hildene as capital gains, interest and dividends and reported to each member on a schedule K-1 under those categories. Under federal law, this type of carried interest is treated as a special allocation under IRC (26 USC) § 704 (b) and, as the income passes down from the partnership to the partner, it retains its source and character.

20. Petitioner paid tax to both Connecticut and New York during the taxable years in issue on all of their dividends, interest and capital gains income reported to her by Hildene.

21. Hildene wholly owns Hildene Advisors, LLC, which has interest in two private investment hedge funds, Hildene Opportunity Fund I, LP, and Hildene Opportunity Fund II, LP (the Hildene funds). Hildene Advisors, LLC is the general partner of Hildene. Hildene Capital Management, LLC (Hildene Capital) is the investment manager of Hildene and is an active investment manager that invests on behalf of the two aforementioned Hildene funds. Hildene Capital is paid a performance-based fee and a percentage of assets fee for the management of the Hildene funds. Petitioner, in turn, receives flow-through investment income from Hildene in the form of carried interest, consisting of interest income, dividends, capital gains and ordinary business income or loss.

22. According to an affidavit, dated October 15, 2021, of John Scannell, a Senior Advisor at Hildene Capital, Hildene Capital was an asset management firm based in Stamford, Connecticut. Also according to Mr. Scannell, as of September 1, 2021, Hildene Capital managed over $13 billion in assets.

23. According to Mr. Scannell's affidavit, during the tax years in issue, Ms. Greenberg served as the Marketing Director of Hildene Capital.[2]

[2] It is noted that in a number of the proposed findings of fact submitted to the Administrative Law Judge

24. According to Mr. Scannell's affidavit, on account of Ms. Greenberg's services rendered to Hildene Capital in her capacity as Marketing Director, Hildene Capital awarded her additional contingent compensation (i) in the form of an interest in the performance incentive fee to be earned by Hildene Capital through its subsidiaries, and (ii) a performance allocation incentive in the form of a membership interest in Hildene Capital, entitling Ms. Greenberg to a share of the profits to be derived by Hildene Capital through its subsidiaries.[3]

25. Section 4 of the Revised Member Agreement between Hildene and Ms. Greenberg provides, in part, as follows:

> "4. Compensation.
>
> (a) As full consideration to the Member for the services to be rendered pursuant to this Agreement and the Operating Agreement, the Member shall be granted a profit allocation ("Profit Allocation") equal to a six and one-half percent (6.5%) Economic Interest in the Company. The foregoing percentage applies to the Member's Economic Interest in Net Profits other than in connection with Incentive Compensation. Net Profits attributable to Incentive Compensation shall be allocated to the Member in accordance with Section 4.1(b) of the Operating Agreement and reinvested in a Fund may be deferred in accordance with the terms of any deferred compensation plan established by the Company. The Member acknowledges and agrees that he or she will be solely responsible for payment of all foreign, federal, state and local income, unemployment, insurance, social security and other taxes, fees and contributions imposed or required to be paid, remitted or withheld with respect to the Profit Allocation. Furthermore, this Agreement shall in no manner be deemed to impose an employer-employee relationship between the parties hereto."

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they interchange Hildene Capital with Hildene. For example, petitioners' proposed finding of fact 37 alleges that Ms. Greenberg served as marketing director of Hildene, but Mr. Scannell's affidavit, which petitioners cite to in support for their proposed fact, states that Ms. Greenberg served as marketing director of Hildene Capital. Mr. Scannell's affidavit abbreviates Hildene Capital Management, LLC to "Hildene," while petitioners' brief abbreviates Hildene Holding Company, LLC to "Hildene."

[3] It is unclear from the affidavit whether petitioner is claiming that Ms. Greenberg received an incentive fee and profit allocation from Hildene Capital in addition to the "profit allocation" and "incentive compensation" she received from Hildene pursuant to the Revised Member Agreement, or if petitioner is again conflating Hildene Capital and Hildene. Ms. Greenberg's schedules K-1 reporting the income at issue are from Hildene.

26. The Division's tax field audit record for the audit of Ms. Greenberg contains an entry, dated September 15, 2016, which states that according to Hildene Capital's website, "the company is a New York-based asset management firm with HQs in NY and CT."

27. As noted previously, the determination below also adjudicated the petition of Scott J. and Martha M. Farrell, who did not take an exception. Mr. Farrell was a member of Hildene during the 2014 tax year. As relevant here, the terms of his member agreement with Hildene are identical to the terms of Ms. Greenberg's revised member agreement. Accordingly, Mr. Farrell was awarded additional contingent compensation under identical terms as that awarded to Ms. Greenberg (***see*** finding of fact 25). According to Mr. Scannell, Mr. Farrell was a co-portfolio manager for Hildene Capital and reported to the Chief Investment Officer. Similar to petitioner, Mr. Farrell received a K-1 from Hildene for the 2014 tax year that reported ordinary income, and interest, dividend and capital gain income. Mr. Farrell and his spouse reported and paid tax on all of Mr. Farrell's income from Hildene on both their New York resident return and their Connecticut nonresident return. Mr. Farrell's New York return claimed a resident credit with respect to the tax paid to Connecticut on the income from Hildene. As with petitioner, the Division allowed the credit with respect to the ordinary income from Hildene and denied the credit with respect to the carried interest portion of the income from Hildene.

28. An affidavit of the Division's auditor, dated September 7, 2021, states that "Hildene [Holding Company] operated solely in Connecticut at all times." Additionally, the Division's tax field audit record of the Scott J. Farrell audit states, in an entry dated February 14, 2018, that "the investment fund or general partner is engaged in business in Connecticut."

29. The K-1 forms issued by Hildene to petitioner for 2014 and 2015, as well as the K-1 form issued to Mr. Farrell for 2014 list a Stamford, Connecticut address.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge first considered the factual question of whether petitioner proved that Hildene's business operations were conducted exclusively in Connecticut. She concluded that petitioner did not meet her burden of proof on this point and that this failure fatally undermined petitioner's claim to the New York State resident tax credit during the years at issue.

Although her conclusion on this factual question was determinative, the Administrative Law Judge also addressed petitioner's legal argument for the resident credit for the sake of a complete record on appeal. For purposes of addressing this argument, the Administrative Law Judge assumed that Hildene operated exclusively in Connecticut.

The Administrative Law Judge observed that, as the income at issue was derived from intangible personal property, qualification for the credit depended on whether the intangible property was employed in a business, trade, profession, or occupation carried on in Connecticut. The Administrative Law Judge determined that the intangible property at issue was not employed in a business. Rather, the Administrative Law Judge found that the partnership owned the hedge funds and traded intangible property for its own account. According to the Administrative Law Judge, this kind of activity is not considered a business under the Tax Law. Accordingly, as the income at issue was derived from intangible personal property *not* used in a business, the Administrative Law Judge found that it did not qualify for the resident credit.

The Administrative Law Judge rejected petitioner's contention that the income at issue should be characterized as compensation for services and thus properly sourced to Connecticut. Given the well-established rule that partnership income retains its character when passed through to partners, the Administrative Law Judge concluded that any characterization of the income at

issue as compensation for services as indicated in petitioner's member agreement is properly given no effect in determining the source and character of the income.

The Administrative Law Judge distinguished ***Sobel v Commr. of Revenue Serv.*** (2017 WL 1240119 [Superior Ct of Ct]), a Connecticut case upon which petitioner relied. The Administrative Law Judge found factual differences between ***Sobel*** and the present matter, and also that ***Sobel*** was inconsistent with New York law.

The Administrative Law Judge also rejected petitioner's contention that the double taxation of intangible income in the present case as a result of the denial of the resident credit is unconstitutional. In reaching this conclusion, the Administrative Law Judge relied primarily on ***Matter of Tamagni v Tax Appeals Trib. of State of N.Y.*** (91 NY2d 530 [1998], ***cert denied*** 525 US 931 [1998]).

ARGUMENTS ON EXCEPTION

According to petitioner, the evidence shows that Hildene was a business that operated in Connecticut during the years at issue. Petitioner notes that the Division did not contest this point during the audit.

Petitioner also contends that the Administrative Law Judge wrongly concluded that Hildene traded on its own account. According to petitioner, Hildene was an active investment manager for third party investors. Petitioner asserts that Hildene's fee structure is typical of professional asset management firms.

Petitioner asserts that her partnership interest in Hildene was an asset employed in a business conducted in Connecticut, which generated the intangible income at issue. Petitioner thus argues that the income derived from the conduct of the business was also derived from an asset employed in that business.

As she did below, petitioner cites ***Sobel v Commr. of Revenue Serv.*** in support of her position. According to petitioner, ***Sobel*** presents a mirror image of the present matter, i.e., a Connecticut resident who was a member of a New York-based LLC that managed a hedge fund and received a percentage of the gain that the funds earned from trading assets. The taxpayer in ***Sobel*** claimed a resident credit on his Connecticut return for income tax paid to New York. The court rejected Connecticut's claim that the taxpayer was trading on his own account and determined, instead, that he was providing investment management services. Hence, the income at issue was considered to be derived from New York sources and a resident credit could be claimed. Petitioner acknowledges that ***Sobel*** is not precedential, but given the similarity of the relevant statutes and facts, asserts its persuasive authority.

Petitioner further contends that the Division's position unlawfully imposes double taxation upon her. Petitioner asserts that carried interest income at issue is, like the incentive fee, compensatory. Petitioner argues that the difference in federal tax treatment of the carried interest and the incentive fee, i.e., capital gain versus ordinary income, is immaterial in the present proceeding because both kinds of income are taxed at the same rate at the state level. Petitioner also asserts that 2017 federal tax legislation supports her argument that the payment of a profits interest is compensatory and connected to a trade or business. Petitioner further asserts that the Division's regulation interpreting the resident credit statute distorts and extends its meaning, contrary to the rules of statutory construction. Petitioner thus claims that the regulation lacks a rational basis.

Petitioner also calls attention to the Division's treatment of the ordinary income that she received from Hildene during the years at issue. That is, the Division allowed the resident credit with respect to petitioner's ordinary income from Hildene, and disallowed the credit with respect

to petitioner's carried interest income from Hildene. Petitioner asserts that such different treatment is illogical as both forms of income were compensatory in nature.

The Division agrees with the Administrative Law Judge's finding that petitioner's entitlement to the resident credit turns on whether the income at issue was derived from Connecticut sources. The Division further agrees with the Administrative Law Judge's finding that, as the income at issue was from intangibles, it was necessarily New York income unless petitioner shows that the property was employed in a business carried on in Connecticut. The Division contends that the Administrative Law Judge properly determined that the intangible income at issue was not employed in a business and therefore was not derived from Connecticut sources. According to the Division, then, petitioner is not entitled to the resident credit as claimed. The Division asserts that petitioner has cited no relevant legal authority in support of her position.

The Division observes that, if carried interest can be properly sourced to other states for purposes of the resident credit as petitioner contends, then it also could be considered New York source income for New York nonresidents, contrary to the Division's current interpretation of the Tax Law.

The Division asserts that ***Sobel*** should not control the outcome here. The Division also asserts that relevant case law makes clear that, contrary to petitioner's contention, double taxation of income that results from a taxpayer's residency status is not unconstitutional.

OPINION

In a Division of Tax Appeals proceeding, a notice of deficiency is presumed correct and the burden of proof is generally on petitioner to show, by clear and convincing evidence, that the proposed deficiency is erroneous (Tax Law § 689 [e]; 20 NYCRR 3000.15 [d] [5]; ***see Matter of***

Gilmartin v Tax Appeals Trib., 31 AD3d 1008 [3d Dept 2006]; ***see also Matter of Leogrande v Tax Appeals Trib.***, 187 AD2d 768 [3d Dept 1992], ***lv denied*** 81 NY2d 704 [1993]).

We first address the Administrative Law Judge's denial of petitioner's credit claim based on her finding that petitioner failed to prove that Hildene's operations were conducted exclusively in Connecticut. We disagree.

The affidavit of the Division's auditor states that "Hildene [Holding Company] operated *solely* in Connecticut at all times (emphasis added)" (finding of fact 28). Additionally, in an entry dated February 14, 2018, the Division's tax field audit record of the Peter Farrell audit states that "the investment fund or general partner is engaged in business in Connecticut" (***id.***). Consistent with these statements, the Division allowed a resident credit with respect to 100% of the ordinary income portion of both petitioner's and her fellow partner Peter Farrell's partnership income (findings of fact 4, 8 and 27). The Division's audit thus necessarily concluded that such income was derived from or connected to Connecticut sources (***see*** Tax Law § 620 [a] ***infra***). Further, given the 100% allocation, the Division found that Hildene conducted its business exclusively in Connecticut with respect to the ordinary income portion of the partnership's income. The partnership's intangible income is derived from the same investment management activity as the ordinary income portion (***see*** finding of fact 21). The Division's audit and the affidavit of its auditor thus show that Hildene operated exclusively in Connecticut during the years at issue.

Also supportive of a finding that Hildene operated in Connecticut, are Hildene's K-1 forms, listing a Stamford, Connecticut address (***see*** finding of fact 29) and the affidavit of John Scannell, a Senior Advisor at Hildene Capital, stating that Hildene Capital is an asset management firm based in Stamford, Connecticut (***see*** finding of fact 22).

In contrast, evidence in the record suggesting that Hildene may have operated in New York during the years at issue is flawed. The Administrative Law Judge's conclusion on this point relied on an entry in the tax field audit record of petitioner, dated September 15, 2016, that states: "Per website, the company is a NY-based asset management firm with HQ's in NY and CT."[4] This comment, however, appears under the heading "Pre-audit analysis" and the auditor's lack of familiarity with Hildene at that point in the audit is shown by the following comment, also included in the September 15, 2016 entry: "The source of the flow through income is unknown."[5] This context diminishes the evidentiary weight properly accorded the September 15, 2016 entry. The Administrative Law Judge also relied on the operating agreement of Hildene and the member agreements of petitioner and Peter Farrell, each of which lists a New York City office address for Hildene. The significance of this information, however, is diminished by the fact that these agreements predate the audit period.

As we have determined that Hildene conducted its operations exclusively in Connecticut during the period at issue, we now address whether, given that fact, petitioner may receive resident credit on her carried interest income.

Petitioner was a New York resident and therefore subject to New York personal income tax on her income from all sources (***see*** Tax Law §§ 612 [New York adjusted gross income of a resident individual equals federal adjusted gross income, plus or minus specific modifications] and 611 [New York taxable income equals New York adjusted gross income less New York deductions and exemptions]).

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[4] Exhibit J, attachment 2.

[5] ***id.***

A partnership is not subject to tax under article 22. Rather, the partners in a partnership pay tax on each's distributive share of the partnership's items of income, gain, loss, and deduction (Tax Law § 617; 20 NYCRR 117.1). Hence, petitioner's distributive share of her partnership income as reported on her K-1 forms was included in her federal adjusted gross income and therefore was included in her New York adjusted gross income, subject to any applicable New York modifications under Tax Law § 612 (20 NYCRR 117.2).

Each item of partnership income, gain, loss, or deduction must have the same character for a partner under article 22 as for federal income tax purposes (Tax Law § 617 [b]; 20 NYCRR 117.4 [a]; ***see also Caprio v New York State Dept. of Taxation & Fin.***, 25 NY3d 744, 747 [2015], ***rearg denied*** 26 NY3d 955 [2015] ["To ensure parallel state and federal treatment, each item of pass-through gain retains the same character for state and federal income tax purposes"]).[6] In addition, each such item retains its character even where the item flows through tiers of partnerships to the resident partner (20 NYCRR 117.4 [b]). Accordingly, amounts distributed to petitioner by Hildene during the years at issue as ordinary income, capital gain, interest, and dividends retained their character and were properly reported as such on petitioner's returns.

Tax Law § 620 (a) allows for a tax credit to a New York resident against the tax "otherwise due under [article 22]" for "any income tax imposed for the taxable year by another state" on income "both derived therefrom and subject to tax under [article 22]." Hence, the income in question must be subject to income tax in both states and must be "derived from" the

[6] The federal rule is that "[t]he character of any item of income, gain, loss, deduction, or credit included in a partner's distributive share . . . shall be determined as if such item were realized directly from the source from which realized by the partnership, or incurred in the same manner as incurred by the partnership" (Internal Revenue Code [26 USC] § 702 [b]).

other state (***Matter of Mallinckrodt***, Tax Appeals Tribunal, November 12, 1992). The parties agree (and the record shows) that the income at issue was subject to income tax in both New York and Connecticut. They contest whether such income was "derived from" Connecticut.

As Tax Law § 620 (a) is a credit statute, we are compelled to construe its language against petitioner, albeit not so narrowly as to defeat its settled purpose (***Matter of Mallinckrodt*** citing ***Matter of Grace v New York State Tax Commn.***, 37 NY2d 193, 196 [1975], ***rearg denied*** 37 NY2d 816 [1975], ***lv denied*** 338 NE2d 330 [1975]). Petitioner must show a clear entitlement to the credit (***Matter of Golub Serv. Sta. v Tax Appeals Trib. of State of N.Y.***, 181 AD2d 216, 219 [3d Dept 1992]) and must show that her interpretation of the statute is the only reasonable interpretation (***Matter of Spiezio***, Tax Appeals Tribunal, July 19, 2016).

For purposes of the resident credit, "[t]he term *income derived from sources within* another state . . . is construed so as to accord with the definition of the term *derived from or connected with New York sources*, as set forth in [Tax Law § 631 (a)] in relation to the New York source income of a nonresident individual" (20 NYCRR 120.4 [d]). Tax Law § 631 (a) generally defines New York source income for a nonresident individual as income "derived from or connected with New York sources." As the parallel language indicates, the resident credit under Tax Law § 620 (a) is generally allowable only to the extent that similar income to a nonresident is subject to tax under Tax Law § 631 (a).

The regulation further provides:

> [T]he resident credit against ordinary tax is allowable for income tax imposed by another jurisdiction upon compensation for personal services performed in the other jurisdiction, income from a business, trade or profession carried on in the other jurisdiction, and income from real or tangible personal property situated in the other jurisdiction. *Conversely, the resident credit is not allowed for tax imposed by another jurisdiction upon income from intangibles, except where such income is from property employed in a business, trade or*

> *profession carried on in the other jurisdiction.* Thus, for example, no resident credit is allowable for an income tax of another jurisdiction on dividend income not derived from property employed in a business, trade or profession carried on in such jurisdiction" (emphasis added) (20 NYCRR 120.4 [d]).

With respect to a nonresident individual's income from intangible personal property, Tax Law § 631 (b) (2) is consistent with the resident credit regulation, stating, in relevant part, that "[i]income from intangible personal property . . . shall constitute income derived from New York sources only to the extent that such income is from property employed in a business, trade, profession, or occupation carried on in [New York]."

The assets of the Hildene funds that generated the interest income, dividends, and capital gains at issue were intangible personal property (Tax Law § 631 (b) (2) [defining income from intangible personal property as "including annuities, dividends, interest, and gains from the disposition of intangible personal property"]; NY Const, art XVI, § 3 [providing that "[m]oneys, credits, securities and other intangible personal property" within New York not employed in carrying on of any business are deemed located at the owner's domicile]).

As to the "property" which must be "employed in a business, trade, or profession carried on in the other jurisdiction" in order for intangible income to qualify for the resident tax credit, "[c]learly, the property which the statute requires to be [so] employed . . . is the very same intangible property . . . from which the income is derived . . . This is the only reasonable way to read the statute" (***Matter of Epstein v State Tax Commn.***, 89 AD2d 256, 257 [3d Dept 1982]).

Matter of Epstein concerns whether a nonresident's income from intangibles should be considered New York source income and therefore analyzes the language of Tax Law § 631 (b) (2) (former 632 [b] [2] renum L 1987, c 28]). Given the previously noted similarity of language between the regulation (20 NYCRR 120.4 [d]) and the statute (Tax Law § 631 [b] [2]) and that

regulation's express direction to construe the resident credit in accord with the definition of New York source income for a nonresident, ***Matter of Epstein***'s interpretation of Tax Law § 631 (b) (2) plainly applies to the identical language in 20 NYCRR 120.4 (d).

Consistent with ***Matter of Epstein***, then, the intangible personal property which must be employed in a business in Connecticut in order for petitioner's intangible income to qualify for the resident credit is the property that generated the income at issue; that is, the assets of the Hildene funds from which petitioner's interest income, dividends, and capital gains in 2014 and 2015 were derived.

We thus reject, as contrary to ***Matter of Epstein***, petitioner's contention that, for purposes of the resident credit, her partnership interest in Hildene was the intangible personal property employed in a business in Connecticut which generated the intangible income at issue.

"Employed in a business" in 20 NYCRR 120.4 (d) simply means used in the conduct of a business (***see Matter of LePage***, Tax Appeals Tribunal, May 17, 2021, citing McKinney's Cons Laws of NY, Book 1, Statutes § 94 [statutory language is "generally construed according to its natural and most obvious sense"]; ***see also*** TSB-M-92[3]I ["New York's Tax Policy Relating to the Taxation of Intangible Personal Property of Nonresidents"] [October 9, 1992] [equates "employed in a business" with "used in the conduct of a business"]).

Petitioner has failed to show that the intangible assets of the Hildene funds were employed in the conduct of Hildene's business, as the record contains little beyond very general information regarding the business of Hildene (***see*** findings of fact 21 and 22). Indeed, petitioner does not even argue that the assets of the Hildene funds were employed in the conduct of its business. We conclude, therefore, that petitioner has failed to meet her burden to establish a

clear entitlement to the resident credit (***Matter of Golub Serv. Sta. v Tax Appeals Trib. of State of N.Y.***, 181 AD2d at 219).

We also find that petitioner has failed to show, contrary to the Administrative Law Judge's finding, that Hildene was not trading on its own account. Petitioner contends that Hildene was an active investment manager for third party investors. This may well be the case, but there is insufficient evidence in the record to support such a finding. As the Administrative Law Judge observed in her determination, petitioner "failed to present any evidence as to whether they were overseeing or investing other people's money, [and] provided no list of investors or other unrelated members of the partnerships."

Petitioner's failure of proof stands in contrast to the evidence presented in ***Sobel v Commr. of Revenue Serv.***, upon which she relies. In reaching the conclusion that the taxpayer was not trading on his own account, the court in ***Sobel*** made the following review of the evidence presented therein:

> "The plaintiff further testified that he oversaw 'millions' of trades per year and traded 'other people's money.' The court credits this testimony. There was ample corroborating evidence . . . . That evidence consisted of letters to and from investors, telephone records, handwritten records of transactions, register letters, audited financial statements, and testimony from the plaintiff's accountant. In addition, a November 1997 list of investors for LIF, Ltd. contained the names of 91 persons and entities from the Atlantic islands, Hong Kong, Brazil, Argentina, and numerous European nations. A list of limited partners of LAM, LP contained six names from five states. As detailed below, the plaintiff reported receiving millions of dollars each year in capital gains income. All of this evidence is fully consistent with the proposition that the plaintiff engaged in a very high volume of trading with client money" (***Sobel v Commr. of Revenue Serv.***).

Based on the evidence, the ***Sobel*** court found that "the investment partnerships were funded by others and the plaintiff was managing the property of unrelated limited partners."

The factual differences between ***Sobel*** and the present matter deprive that case of any persuasive authority. We agree with the Administrative Law Judge that "[t]he court's factual findings upon which it based its decision that Mr. Sobel was not trading on his own account are absent here."

Petitioner also complained about the difference in treatment accorded her performance incentive fee income, treated as ordinary income, and her allocation incentive income, the intangible income at issue, only one of which qualifies for the resident credit under the facts herein, as discussed. According to petitioner, both are compensatory in nature and should receive like treatment. As discussed previously, however, different treatment of such different kinds of income is required by the resident credit statute and regulations. We note that the Court of Appeals has provided the following rationale for resident credit's treatment of income from intangibles:

> "The credit is not generally available for intangible income because that income has no identifiable situs. Intangible income generally is not derived, at least directly, from the taxpayer's efforts in any jurisdiction outside of New York, and cannot be traced to any jurisdiction outside New York. It is simply investment income, and under the long-recognized doctrine of *mobilia sequuntur personam* (["(m)ovables follow the * * * person"] Black's Law Dictionary 905 [5th ed 1979]), it is subject to taxation by New York as the State of residence (***see***, ***Maguire v Trefry***, 253 US 12, 16 [1920], 40 S Ct 417, 48-419, [1920] 64 L Ed 739 [1920]). However, where the taxpayer can show that intangible income is in fact derived from the taxpayer's activities in a State other than New York, the taxpayer is entitled to the credit (20 NYCRR 120.4 [d] [credit allowed where the income is derived 'from property employed in a business, trade or profession carried on in' another State])" (***Matter of Tamagni v Tax Appeals Trib. of the State of N.Y.***, 91 NY2d at 536 [1998]).

Finally, although she contends that the determination's interpretation of the resident credit wrongly imposes double taxation upon her, petitioner expressly states in her reply brief on exception that she is not raising an issue of constitutionality. Rather, as noted, she contends that

the determination's interpretation misconstrues the statute, and that the relevant regulation distorts the meaning of the statue. By our previous discussion, we reject these contentions.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Allison Greenberg is denied;

2. The determination of the Administrative Law Judge as relevant to petitioner Allison Greenberg is affirmed;

3. The petition of Allison Greenberg is denied; and

4. The notice of deficiency, dated March 27, 2018, is sustained.

DATED: Albany, New York
November 22, 2023

/s/ Anthony Giardina
Anthony Giardina
President

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

/s/ Kevin A. Cahill
Kevin A. Cahill
Commissioner