UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

FREDRICK PERKINS and ALICE J. PERKINS,	
Plaintiffs,	No. 1:16-cv-00495-LJV
v.	
UNITED STATES OF AMERICA,	
Defendant.	

DEFENDANT UNITED STATES' REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' VERIFIED AMENDED COMPLAINT

Defendant United States of America, through undersigned counsel, submits the following reply brief in support of its motion to dismiss Plaintiffs' Verified Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6).

Plaintiffs seek a refund of $9,863.68 in personal income taxes, interest, and penalties paid to the United States for income tax year 2010. They urge that the income they derived from the sale of gravel extracted from Seneca Nation common land is exempted from federal taxation. However, Plaintiffs have failed to state a claim for relief. Accordingly, their complaint should be dismissed with prejudice.

With regard to Native American lands, two basic categories of income are not subject to federal income tax: (1) where a treaty, agreement, or act of Congress expressly provides that the income is not subject to tax; or (2) where the income is derived directly from restricted allotted land and satisfies the five-factor test set forth in Revenue Ruling 67-284. *See* Revenue Ruling 67-284, 1967-2 CB 55, 1967 WL 14945, at *1.

Although they allege in their Verified Amended Complaint that the income at issue here "directly derived from the land," Doc. No. 8 at 3, Plaintiffs indicate that their refund claim "falls within the first category of income not subject to federal tax," and that they do not wish to argue that the gravel was extracted from restricted land held under the General Allotment Act or acts or treaties containing an exception provision similar to the General Allotment Act. *Id.* at 8-9. Instead, Plaintiffs only urge that their income is expressly exempt from federal income tax due to language contained in two federal treaties: the Canandaigua Treaty of 1794 (the "Canandaigua Treaty"), and the 1842 Treaty with the Seneca (the "1842 Treaty"). *See* Doc. No. 12 at 1-3. Plaintiffs therefore must allege facts sufficient to establish that these treaties expressly convey the income tax exemption they seek. *See Squire v. Capoeman*, 351 U.S. 1, 6 (1956).

In their opposition to the United States' motion to dismiss, Plaintiffs devote significant effort to explaining the liberal statutory construction due to federal statutes or treaties dealing with Indians, and stating broad propositions regarding the understanding of the Seneca Nation at the time the treaties were negotiated. *See* Doc. No. 12 at 2-19. Although they contend that the "income earned … from the sale of gravel extracted from the Seneca Nation of Indian Allegany Territory is explicitly exempt from federal income tax due to language contained in federal treaties[,]" *see id.* at 2, they first discuss the treaties' actual language on the bottom of page 18 of their 23-page brief. *Id.* at 19. Plaintiffs then cite the Canandaigua Treaty's broad "free use and enjoyment" clause and the 1842 Treaty's protection from "all taxes … for … any other purpose[,]" contending that those provisions "clearly exempt" the income at issue here. *Id.* at 18 & 22. But no

case law supports Plaintiffs' argument; to the contrary, the cases to consider these clauses have found that they do not provide clear exemption from federal income or excise taxation.

The Canandaigua Treaty

> Article III of the Canandaigua Treaty states,
>
> > Now, the United States acknowledge all the land within the aforementioned boundaries, to be the property of the Seneka nation: and the United States will never claim the same, nor disturb the Seneka nation, nor any of the Six Nations, or of their Indian friends residing thereon and united with them, in the free use and enjoyment thereof.

Lazore v. C.I.R., 11 F.3d 1180, 1185 (3d Cir. 1993) (quoting Canandaigua Treaty of 1794, Nov. 11, 1794, 7 Stat. 44, Art. III). Plaintiffs urge that this treaty prohibits the imposition of income tax for their sale of gravel from Seneca Nation land. The Federal Circuit in *Cook v. United States*, 86 F.3d 1095, 1097-98 (Fed. Cir. 1996) held that the "free use and enjoyment" clause "cannot reasonably be interpreted as exempting [plaintiffs] from the payment of excise tax" on the sale of a commodity from tribal land. That is because the Canandaigua Treaty secures the Seneca's "peaceful possession" and use of their land, and does not prohibit the assessed excise taxes. *Id.*

Plaintiffs cite *Cook* for the proposition that the Canandaigua Treaty's protection of the "use of land" confers a tax exemption for "income derived directly from land." Doc. No. 12 at 22. That argument is without merit. The distinction Plaintiffs rely upon is relevant to the analysis of whether the income was "derived directly from the land," and therefore conveyed "free of all charge or encumberance whatsoever," under the General Allotment Act. *See Cook*, 86 F.3d at 1098 (citing *Squire*, 351 U.S. at 7-8). That is,

Squire and *Cook* distinguish "income derived directly from land" that is exempted from taxation by the General Allotment Act of 1887, from the sale of a commodity that "merely takes place on Indian land," which is not tax exempt under that statute. *Id.* Plaintiffs incorrectly conflate the *Squire* language defining "income derived directly from land" under the General Allotment Act with the "use of the land" that is protected by the "free use and enjoyment" language of the Canandaigua Treaty. *Id.* That the Supreme Court held that the General Allotment Act's transfer of land "free of all charge or incumbrance" included a tax exemption for "income derived directly from the land," *Squire*, 351 U.S. at 6-7, does not suggest that the Canandaigua Treaty's "free use and enjoyment" clause provides the same exemption. *Cook* simply does not stand for the proposition that a tax on income derived directly from land is plainly barred by language conveying the "free use and enjoyment" of the land. *Id.*

Similarly, Plaintiffs' reliance upon the Third Circuit's *Lazore* opinion is misplaced. The *Lazore* court explained that,

> While we are sympathetic to the Lazores' claim that the Treaty of Canandaigua recognized the Haudenosaunee as a separate nation, we are unable to accept it as sufficient to create an exemption from the federal income tax. As we have concluded above, we are constrained from finding an exemption in the absence of some textual support. Nor do we find that the treaty's statement that the United States will not disturb the Haudenosaunee in "the free use and enjoyment" of their lands to be capable of being reasonably construed as supporting an exemption from the income tax.

Lazore, 11 F.3d at 1186-87. Although Plaintiffs are correct that the *Lazore* court noted in dicta that the "free use and enjoyment provision 'might be sufficient to support an exemption from a tax on income derived directly from the land,'" Doc. No. 12 at 21

(quoting *Lazore*, 11 F.3d at 1187), the Third Circuit went on to explain in the next sentence that "[i]n order to hold that the Treaty of Canandaigua exempted the Haudenosaunee from the federal income tax, however, we would need to find language capable of being construed more broadly. We cannot find any such language." *Lazore*, 11 F.3d at 1187. The *Lazore* court did not hold that the "free use and enjoyment" clause clearly expressed an exemption to tax for income derived directly from the land.

The other case relied upon by Plaintiffs, *Hoptowit v. Commissioner*, 709 F.2d 564, 565 (9th Cir. 1983), considered a claim of income tax exemption under language protecting the "exclusive use and benefit" of Yakima lands included in the Treaty with the Yakimas of 1855. The Ninth Circuit did not find income tax exemption at all, and certainly did not determine as a matter of law that the "exclusive use and benefit" language there – much less the "free use and enjoyment" provision at issue here – provided a "clearly expressed" tax exemption to the plaintiffs. *Id.* at 566. Instead, that court explained that "*any* tax exemption created by this ['exclusive use and benefit'] language" would be limited to income derived directly from the land. *Id.* (emphasis added).

To be clear, the three cases cited by Plaintiffs to establish that the "free use and enjoyment" clause of the Canandaigua Treaty provides an "clearly expressed" income tax exemption actually state the opposite or are entirely silent on the issue.

The 1842 Treaty

Plaintiffs also fail to establish that the 1842 Treaty clearly provides the tax exemption they seek. Article 9 of the 1842 Treaty states,

> The parties to this compact mutually agree to solicit the influence of the Government of the United States to protect such of the lands of the Seneca Indians, within the State of New York, as may from time to time remain in their possession from all taxes, and assessments for roads, highways, or any other purpose until such lands shall be sold and conveyed by the said Indians, and the possession thereof shall have been relinquished by them.

Treaty with the Seneca, 1842, 7 Stat. 586. Plaintiffs contend that this provision sets forth a clear and unambiguous tax exemption for income derived for the use of trial land. However, Plaintiffs entirely ignore the Second Circuit's holding in *United States v. Kaid*, 241 F. App'x 747, 750 (2d Cir. 2007). There, the appellants challenged their convictions for conspiracy to commit money laundering and trafficking in contraband cigarettes. *Id.* They urged, in part, that the United States was entirely prohibited from taxing cigarette sales on Native American reservations under the 1842 Treaty. *Id.* The Second Circuit affirmed the judgment of the Western District of New York, holding that the 1842 Treaty "clearly prohibit[s] only the taxation of real property[.]" *Id.*; *see also Snyder v. Wetzler*, 193 A.D. 2d 329, 331 (N.Y. App. Div. 1993) ("We find the Treaty [of 1842] clearly refers only to taxes levied upon real property or land").

Plaintiffs identify no cases to support the proposition that the 1842 Treaty provides any personal income tax exemption. Instead, they contend without basis that the terms "all taxes" and "for any other purpose" confer a clear and unambiguous income tax exemption. The Second Circuit has disagreed. *Kaid*, 241 F. App'x at 750.

Conclusion

In their opposition to the United States' motion to dismiss, Plaintiffs rely upon general propositions of liberal statutory construction and broad statements of Congressional intent. What they do not do is set forth a valid claim that the income at issue here was exempted from personal income tax by "clearly expressed" treaty language. Accordingly, the Court should dismiss their Verified Amended Complaint with prejudice pursuant to Fed. R. Civ. P. 12(b)(6).

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that service of the foregoing *Reply Brief in Support of Motion to Dismiss Plaintiffs' Verified Amended Complaint*, has this 20th day of October, 2016, been made via electronic notification through the Court's CM/ECF electronic filing system, to all parties who have entered an appearance in this action and are participating in the Court's CM/ECF electronic filing system.

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