UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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

DEFENDANT UNITED STATES' MEMORADUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Respectfully Submitted,

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MEMORANDUM IN SUPPORT

Plaintiffs Fredrick Perkins and Alice J. Perkins ("Plaintiffs") seek a refund of taxes, penalties, and interest that they paid for 2010 based on language in two treaties between the Seneca Nation and the United States. Summary judgment is appropriate for three reasons. First, the United States Tax Court squarely held that the Treaty with the Six Nations at Canandaigua of November 11, 1794 (the "Canandaigua Treaty") and the Treaty with the Seneca of May 20, 1842 (the "1842 Treaty") do not convey any personal tax exemption, and do not validate Plaintiffs' identical claims for prior tax years. In fact, no other court has recognized an income tax exemption under the Canandaigua Treaty or the 1842 Treaty, and there is no such general presumption that applies to Indian land.

Second, Plaintiffs' business income derived from selling stockpiled gravel it mined under a now-revoked permit to extract and sell materials from another person's gravel pit in the Seneca Nation's Allegany Territory. Those earnings do not qualify as being "income directly derived from the land." Plaintiffs had neither surface nor subsurface ownership of the gravel pit, so they were not selling a part of their physical land at all. Third, Plaintiffs under-reported their gross receipts or sales for 2010, resulting in their reporting and paying a lower amount of tax than was legally due.

Therefore, the Court should grant summary judgment and dismiss all claims by Plaintiffs with prejudice.

I. Background

On November 26, 2014, Fredrick Perkins and Alice Perkins filed a Petition in the United States Tax Court challenging the IRS's determination that their income from the sale of gravel in 2008 and 2009 was taxable. Plaintiffs urged that their business profit from the sale of gravel

mined from the Seneca Nation's Allegany Territory is not subject to federal income tax and, accordingly, that the IRS erred in assessing additional taxes against them.

On February 5, 2016, Plaintiffs filed this lawsuit seeking a refund of the 2010 income tax, penalties, and interest arising out of taxes the IRS assessed for income derived from their sale of stockpiled gravel mined from the Allegany Territory. As in the Tax Court case, Plaintiffs contend that their income from the sale of Seneca Nation gravel extracted on land belonging to another individual is exempt from income tax under two treaties between the United States and the Seneca Nation. Plaintiffs seek relief under Section 6402 of the Internal Revenue Code, requesting the refund of $9,863.68 in income taxes, interest, and penalties paid to the United States. *See* Doc. No. 7.

Alice Perkins is an enrolled member of the Seneca Nation of Indians and had been given permission by the Seneca Nation to extract and sell gravel from property on the Nation's territory. *Id.* at ¶¶ 1 & 22. The Plaintiffs reported to the IRS that income in 2010 from sales of stockpiled gravel originating from the Seneca Nation's Allegany Territory was exempted from federal taxation under the General Allotment Act ("GAA"), but the IRS determined the income to be taxable. *Id.* at ¶¶ 27-28 & Ex. A. Plaintiffs now contend that "the income for which the refund is claimed was exempt from federal income tax under federal treaties with the Seneca Nation." *Id.* at ¶ 10. Specifically, Plaintiffs urge that their income was exempt from federal taxation pursuant to the Canandaigua Treaty and the 1842 Treaty because their gravel sales profits constituted "income derived directly from the land protected by these federal treaties." *Id.* at ¶¶ 10-15 & 26.

The United States filed a motion to dismiss Plaintiffs' Verified Amended Complaint on September 13, 2016 on the basis that Plaintiffs failed to allege facts that would support an

income tax exemption under the Canandaigua Treaty, the 1842 Treaty, or the GAA. *See* Doc. No. 9 & 9-1. United States Magistrate Judge Hugh B. Scott recommended that the Court grant in part, and deny in part, the United States' motion. Judge Scott recommended that the Court deny dismissal of Plaintiffs' claim under the Canandaigua Treaty, because "[p]otentially, … plaintiffs will be able to present a scenario in which a fairly modest amount of income came so directly from Seneca land that, in a sense, they were selling a part of the physical land itself." Doc. No. 14 at 12. Judge Scott urged dismissal of Plaintiffs' claim under the 1842 Treaty based upon the "sharp limitation" set forth in the Second Circuit's unpublished decision in *United States v. Kaid*, 241 F. App'x 747 (2d Cir. 2007), which observed that the 1842 Treaty "clearly prohibit[s] only the taxation of real property[.]" Doc. No. 14 at 14-15 (citing *Kaid*, 241 F. App'x at 750).

Both Plaintiffs and Defendant objected to part of Judge Scott's recommendation. *See* Docs. No. 15 & 16. After considering both objections, the Court denied the United States' motion to dismiss on August 4, 2017. *See* Doc. No. 24. The Court concluded that Plaintiffs plausibly stated a claim under both treaties between the United States and the Seneca Nation because the alleged facts potentially represent a scenario contemplated in dicta from two out-of-Circuit cases hypothesizing that a federal tax on income "directly derived" from Seneca Nation land may burden the "free use and enjoyment" of Seneca land under the Canandaigua Treaty or represent a tax on Seneca land under 1842 Treaty. *Id.* Accordingly, the Court denied the United States' motion. *Id.*; *see also* Doc. No. 36.

On March 1, 2018, the United States Tax Court granted the IRS's motion for summary judgment on Plaintiff's challenges to IRS notices of deficiency for 2008 and 2009. *Perkins v. Comm'r*, 2018 WL 1146343 (T.C. Mar. 1, 2018). The Tax Court, analyzing "the same question about the same taxpayers at the same time" as this Court, *id.* at *2, held as a matter of law that

(1) the Canandaigua Treaty does not exempt the Perkinses from paying taxes on their gravel income, *id.* at *6; and (2) "[t]he gravel wasn't attached to the land when it was sold, so the Perkinses aren't exempt from tax on the sale of the gravel under the 1842 Treaty[,]" *id.* Plaintiffs intend to appeal the Tax Court's order to the Second Circuit.[1]

II. Legal Standard

A. Summary Judgment

Summary judgment is appropriate when the material facts are undisputed, and on those facts, a party is entitled to judgment as a matter of law. FED. R. CIV. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 320-26 (1986). A material fact is disputed when the admissible evidence leaves room for reasonable minds to differ on the issue. *Id.* In making this determination, the Court must view the evidence and inferences from the evidence in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). It is not the Court's role to make credibility determinations, weigh the evidence, or choose between competing inferences. *Rogoz v. City of Hartford*, 796 F.3d 236, 245 (2d Cir. 2015). However, a party must make a "sufficient showing" on the essential elements of her case to demonstrate genuine issues of material fact that must be heard before a court can fairly resolve the case. *Celotex Corp.*, 477 U.S. at 323.

B. Taxing Authority of the United States

Absent a clear expression to the contrary, general acts of Congress apply to Native Americans, like all other citizens. *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S.

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[1] The United States requested a stay of these proceedings pending the Second Circuit's consideration of Plaintiffs' appeal. *See* Doc. No. 43. That request was denied by order dated April 18, 2018. *See* Doc. No. 53.

99, 116 & 120 (1960). Native Americans therefore are subject to the same federal income tax laws as are other United States citizens unless there is an exemption explicitly created by treaty or statute. *Squire v. Capoeman*, 351 U.S. 1, 6 (1956); *Superintendent of Five Civilized Tribes, for Sandy Fox, Creek No. 1263 v. Comm'r*, 295 U.S. 418, 420-21 (1935). Native Americans generally "are subject to the payment of income taxes as are other citizens[,]" so, "to be valid, exemptions to tax laws should be clearly expressed." *Squire*, 351 U.S. at 6; *see also Choteau v. Burnet*, 283 U.S. 691, 697 (1931) ("The intent to exclude must be definitely expressed, where, as here, the general language of the act laying the tax is broad enough to include the subject-matter."); *Gunton v. Comm'r*, 2006 WL 1627978, at *1 (Tax 2006) ("Any exemption must be based on the clear and unambiguous language of a statute or treaty").

However, there is an implicit tension between the "clearly expressed" standard for interpreting income tax exemptions and the canon that treaties regarding Native Americans are "interpreted liberally in favor of the Indians, with any ambiguities … resolved in their favor." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 200 (1999). Circuit courts diverge on the point at which a favorable standard of construction should be applied to treaties in cases involving income tax exemptions. The Ninth Circuit requires that a treaty contain "*express* exemptive language" before a court may engage in the canon of construction favoring Native Americans. *Ramsey v. United States*, 302 F.3d 1074 (9th Cir. 2002) (emphasis added). The Third and Eighth Circuits hold that a treaty need only include language that "can be reasonably construed to confer income exemptions," applying a liberal reading even to whether a tax exemption has been "clearly expressed." *See Lazore v. Comm'r*, 11 F.3d 1180, 1185 (3d Cir. 1993) (quoting *Holt v. Comm'r*, 364 F.2d 38, 40 (8th Cir. 1966)).

In any case, it is unanimously held that claims of tax exemption must rely upon explicit textual support. "[I]t is one thing to say that courts should construe treaties and statutes dealing with Indians liberally, and quite another to say that, based on those same policy considerations which prompted the canon of liberal construction, courts themselves are free to create favorable rules." *Fry v. United States*, 557 F.2d 646, 649 (9th Cir. 1977). There is no general tax exemption divorced from statute.

C. Canandaigua Treaty

The Canandaigua Treaty was entered into in 1794 to (1) reconfirm peace and friendship between the United States and the Six Nations (the Seneca Nation in particular); (2) correct the inadvertent geographical error in the boundaries allotted to the Indians at the 1784 Treaty of Fort Stanwix; and (3) relinquish any rights the United States may have acquired through that error. *Seneca Nation of Indians v. New York*, 206 F. Supp. 2d 448, 487 (W.D.N.Y. 2002) (citations omitted). Article III of the Canandaigua Treaty states, in part,

> 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[.]

Canandaigua Treaty of 1794, Nov. 11, 1794, 7 Stat. 44, Art. III, Doc. No. 14-1 at 2.

The United States Tax Court rejected Plaintiffs' argument that this language prohibits the taxation of their gravel income for 2008 and 2009, holding that the Canandaigua Treaty does not create rights for individual members of the constituent nations of the Iroquois Confederacy. *Perkins*, 2018 WL 1146343, at *4. It held that the phrase "or of their Indian friends residing thereon and united with them" cannot reasonably be read as creating personal rights. *Id.* That phrase does not refer to individuals, but instead "is part of a list that includes the Nation and any of the other nations of the Iroquois Confederacy." "The inclusion of 'Indian friends residing

thereon and united with them' means that the Nation gets to choose who is a member of the Nation and perhaps even can be seen as a promise not to use non-Seneca Indians as putative sellers of Seneca land." *Id.* Moreover, the Tax Court held that the Canandaigua Treaty does not create any tax exemption: "[b]y its express terms, the treaty protects the Seneca Nation's lands from being 'disturbed,' which is different from creating a tax exemption." *Id.* Accordingly, the Tax Court found that "the Canandaigua Treaty doesn't exempt the Perkinses from paying taxes on the gravel income." *Id.* at *6.[2]

It appears that no other federal court has held that the "free use and enjoyment" clause of the Canandaigua Treaty – or similar language in other treaties – preserves or confers a tax exemption of any kind. Cases considering similar arguments uniformly rejected claims of tax exemption for, among other activities, income derived from logging activity on tribal trust land, *see Red Lake Band of Chippewa Indians v. United States*, 861 F. Supp. 841, 845-46 (D. Minn. 1994), *aff'd* 62 F.3d 1421 (8th Cir. 1995) (table); income earned as a tribal council member, *see Hoptowit v. Comm'r*, 709 F.2d 564, 566 (9th Cir. 1983) & *Jourdain v. Comm'r*, 617 F.2d 507, 509 (8th Cir. 1980); income earned for work for the Mohawk Housing Corporation and a private company in New York, *see Lazore v. Comm'r*, 11 F.3d 1180, 1184-85 (3d Cir. 1993); and excise taxes on diesel fuel sold from the Onondaga Reservation, *see Cook v. United States*, 86 F.3d 1095, 1097-98 (Fed. Cir. 1996).

[2] The Tax Court also rejected Plaintiffs' argument, previously raised in this case, that the Two Row Wampum belt shows that the Seneca Nation understood the Canandaigua Treaty to preserve land or income from the land from taxation. *Id.* at *6.

D. 1842 Treaty

Plaintiffs also rely upon the 1842 Treaty to support their claim of tax exemption. 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, Doc. No. 14-2 at 5.

It does not appear that any court has previously considered an individual's claim of income tax exemption under the 1842 Treaty. However, the Second Circuit in *Kaid* rejected the contention that the United States was prohibited from taxing cigarette sales on Native American reservations under the 1842 Treaty. 241 F. App'x at 750. The Second Circuit held that the 1842 Treaty "clearly prohibit[s] only the taxation of real property[.]" *Id.* New York State courts have concurred that the 1842 Treaty only recognizes a limited immunity from taxation. *See 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"); *see also New York State Dep't of Taxation and Fin. v. Bramhall*, 667 N.Y.S.2d 141, 147-48 (N.Y. App. Div. 4th Dep't 1997) (the 1842 Treaty only "prohibits the State from taxing reservation land[.]").

The Tax Court determined that *Kaid* was persuasive and compelled that Plaintiffs' gravel income in 2008 and 2009 was not tax exempt under the 1842 Act. *Perkins*, 2018 WL 1146343, at *6. The Tax Court found that the gravel did not constitute "real property" and, accordingly, was not protected from tax under the 1842 Treaty. *Id.* Ten judges of the Tax Court, in concurrence, observed that the 1842 Treaty does not confer *any* individual rights on the

constituent members of the Seneca Nation, and plainly covers only taxes imposed by the State of New York – not the federal government. *Id.* at *8-*10.

E. Collateral Estoppel

As the Supreme Court explained over 70 years ago, "[c]ollateral estoppel operates … to relieve the government and the taxpayer of 'redundant litigation of the identical question of the statute's application to the taxpayer's status.'" *Comm'r v. Sunnen*, 333 U.S. 591, 598 (1948) (quoting *Tait v. Western Md. R. Co.*, 289 U.S. 620, 624 (1933)). Where two cases involve income taxes in different years, collateral estoppel applies in "situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged." *Id.* at 599-600 (citing *Tait*, 289 U.S. at 624)). That is, "if the very same facts and no others are involved in the second case, a case relating to a different tax year, the prior judgment will be conclusive as to the same legal issues which appear, assuming no intervening doctrinal change." *Id.* at 721.

F. Refund Actions

It is axiomatic that a taxpayer is not entitled to a refund unless he has overpaid his tax. *See Lewis v. Reynolds*, 284 U.S. 281, 283 (1932). An "action to recover on a claim for refund is in the nature of an action for money had and received and it is incumbent upon the claimant to show that the United States has money which belongs to him." *Id.* "It is not enough that he can prevail on the particular items on which he sues, for he may have underpaid with respect to other components entering into the tax." *Dysart v. United States*, 340 F.2d 624, 628 (Ct. Cl. 1965). Accordingly, once the government challenges the validity of the tax treatment accorded an item found in the same return, a taxpayer must prove the correctness of the challenged item. *Id.*; *see*

also Zeeman v. United States, 275 F. Supp. 235, 255-56 (S.D.N.Y 1967), *aff'd*, 395 F.2d 861 (2d Cir. 1968).

III. Summary Judgment Evidence

Alice Perkins is an enrolled member of the Seneca Nation of Indians. (Local Rule 56(a)(1) Statement of Undisputed Material Facts (hereinafter "¶") 1.) Her husband, Fredrick Perkins, is not a member of the Seneca Nation. (¶ 2.)

A. Background of A & F Trucking

In 1985, Alice and Fredrick Perkins established A & F Trucking, a sole proprietorship registered to conduct business in the State of New York. (¶ 3.) At that time, A & F Trucking owned a dump truck and was engaged solely in work that could be accomplished with that truck, such as hauling gravel. (*Id.*) Other than the Perkinses, A & F Trucking had no employees. (*Id.*)

Two to three years later, A & F Trucking expanded when the company bought a backhoe, allowing it to earn additional income by digging out driveways and laying gravel. (¶ 4.) By 2010, the company was quite diversified and was engaging in a wide range of construction-related tasks such as paving, site development, installing septic systems, excavating, hauling, trucking, snow removal, gravel extraction and sales, and building roads in and around the Seneca Nation's Allegany Territory in Salamanca, New York. (¶ 5.) A & F Trucking reported total gross receipts or sales of nearly $1.5 million in 2008; $1.7 million in 2009; and $1 million in 2010. (¶ 6.) By 2010, A & F Trucking employed seven individuals. (¶ 7.)

B. The Jimerson Pit

Alton Jimerson, a member of the Seneca Nation, owned the surface rights to a 116-acre parcel of land on the Seneca Nation's Allegany Territory that included an open 10.4 acre gravel

pit (the "Jimerson Pit"[3]). (¶ 8.) The subsurface of the Jimerson Pit is owned by the Seneca Nation of Indians, since all sand and gravel located in the Allegany Territory is the sole and exclusive property of the Seneca Nation. (¶ 9.) Upon Alton Jimerson's death, the surface land was inherited by his granddaughter, Janice Crowe. (¶ 10.)

The surface land that includes the Jimerson Pit sits in a flood plain; therefore, it is not suitable for residential housing. (¶ 11.) The Jimerson Pit does not have electricity. (¶ 12.) Prior to the 1990s, Jimerson occasionally sold raw gravel out of the bank of his mine pit to contractors who had the equipment to load it and haul it away. (¶ 13.) The contractors who removed bank gravel from the Jimerson Pit were not members of the Seneca Nation. (*Id*.)

1. A & F Trucking's Role at the Jimerson Pit

In 1991, Alton Jimerson, then over 90 years old, approached Alice Perkins to offer A & F Trucking a business opportunity excavating and selling gravel from the Jimerson Pit. (¶¶ 14 & 15.) The excavation work would include processing raw materials from the gravel pit and sales to customers onsite. (*Id*.)

On April 12, 1993, Jimerson provided the following written statement:

> I Alton Jimerson give permission to Alice Perkins dba A&F Trucking to mine gravel from property I own off Sawmill Run. I agree that she can remove gravel now while her permit is pending council's approval.

(¶ 16.)

On April 13, 1996, Janice Crowe provided the following written statement:

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[3] At Alice Perkins's deposition, Plaintiffs' counsel requested that the United States refer to the mining location as the "Jimerson Pit." (¶ 8 n.1.)

> I, Janice Crowe, give permission to Alice J. Perkins d.b.a. A & F Trucking to continue gravel operations on the land previously owned by Alton Jimerson, my grandfather. I am Administrator of his estate.

(¶ 17.) A & F Trucking never maintained an office at the Jimerson Pit site. (¶ 18.) Alice Perkins first conducted A & F Trucking business from an office within her home and then later in an office located across the street from her home. (¶ 20.) The Jimerson Pit was located about five miles from the Perkins' home. (¶ 19.)

Alice Perkins initially caused A & F Trucking to mine gravel from the Jimerson Pit in order to supply her business with gravel for its own construction projects such as installing septic systems and fixing driveways. (¶ 21.) A & F Trucking later sold a large amount of processed gravel to Cold Spring Construction, the main contractor managing construction of the expressway from Steamburg to Salamanca. (¶ 22.) A & F relied upon gravel sales to diversify its sources of business income. (¶ 23.) Gravel mining and sales at the Jimerson Pit were very profitable for A & F Trucking and its owners, Alice and Fredrick Perkins. (¶ 24.) A & F Trucking reported $897,895 of gross income from gravel sales in 2008 – approximately 60% of its receipts for that year. (¶ 25.) A & F Trucking reported $648,343 of gross income from gravel sales in 2009, which constituted nearly 40% of its receipts for that year. (¶ 26.) A & F Trucking reported $184,552 of gross income from gravel sales in 2010. (¶ 27.)

2. Role of the Seneca Nation and the Surface Landowner

Because the Seneca Nation maintains the ownership rights to the entire subsurface of the Allegany Territory, including the gravel in the Jimerson Pit, A & F Trucking was required to obtain permission from the Nation to mine at the Jimerson Pit. (¶ 28.) In 1999, the Seneca Nation enacted the Sand and Gravel Permit Law. (¶ 29.) Under that law, gravel extraction and the sale of sand and gravel from the Allegany Territory are allowed only upon annual submission of a written application to the Seneca Nation Council's Natural Resource Committee ("NRC")

and the tendering of an application fee. (*Id.*) The NRC reviews the applications and makes a recommendation to the Seneca Nation Council whether to approve or deny the requested permit. (¶ 30.) There is no requirement that an applicant or permittee be a member of the Seneca Nation. (¶ 32.) The Sand and Gravel Permit Law prohibits the sale of stockpiled sand and gravel that has not previously been removed from the premises after the termination of a permit. (¶ 31.)

From 1991 through June 2009, the Seneca Nation Council permitted Alice Perkins, through A & F Trucking, to extract and sell gravel from the Jimerson Pit on the Allegany Territory. (¶ 33.) A & F Trucking was required to send a monthly report of its gravel sales to the Seneca Nation and to pay royalties to the Nation based upon the cubic yards of gravel it sold. (¶ 34.) The Nation paid royalties to the landowner based on the gravel sales reported by A & F Trucking. (¶ 35.) At some point, Alice Perkins objected to having the Nation, as "middle man," pay royalties to Janice Crowe, because Crowe reported that she did not receive royalties from the Nation, and there was no paper trail to document whether payments had been made. (*Id.*) Therefore, A & F Trucking began writing royalty checks directly to Janice Crowe. (*Id.*)

Alice Perkins was the contractor for gravel extraction at the Jimerson Pit, and she had the status of "permittee" under Seneca Nation law. (¶ 36.) She did not own the surface land and she removed and sold gravel only with the permission of the Seneca Nation Council and the landowner. (*Id.*) Alice Perkins submitted yearly permit renewal applications to the Seneca Nation on behalf of A & F Trucking. (¶ 37.) The annual Sand and Gravel Permit Application was signed by Janice Crowe, as the surface landowner, and Alice J. Perkins, as the applicant and contractor. (¶ 38.) In 2008 and 2009, the Permit Applications were accompanied by a letter to the Seneca Nation reflecting that "the landowner, Janice Crowe," and Alice J. Perkins, doing

business as A & F Trucking, agreed to the mining plan that was previously submitted to the NRC. (¶ 39.) Each cover letter was signed by Alice Perkins and Janice Crowe. (*Id.*)

Alice Perkins's 2008-2009 permit application, signed on May 5, 2008, reported that the surface land containing the gravel pit was owned by Janice Crowe. (¶ 40.) Crowe owned the same 116 acres of surface land that her grandfather, Alton Jimerson, had owned. (*Id.*) The 2008-2009 application reflected that 7.4 acres of the Jimerson property were currently being mined, and requested approval of an additional three acres for sand and gravel mining. (¶ 41.) All of A & F Trucking's mining and extraction of gravel from the Jimerson Pit took place from the subsurface of land that was owned by Alton Jimerson and, later, Janice Crowe. (¶ 42.) That is, none of the gravel or sand sold by A & F Trucking was extracted from surface land owned by Plaintiffs. (*Id.*) Again, the sand and gravel itself did not belong to Plaintiffs. (¶¶ 9 & 28.)

3. Process of Gravel Extraction and Sales from the Jimerson Pit

A & F Trucking mined, stockpiled, and sold gravel from the Jimerson Pit between 1991 and 2009 consistent with a four-stage plan. (¶ 43.) In stage one, A & F Trucking cleared the surface of the land of trees, stumps, topsoil, vegetation, and other overburden. (¶ 44.) Topsoil was stockpiled so it could be used in the final restoration stage. (*Id.*) In stage two, A & F Trucking utilized power shovels, draglines, front-end loaders, and bucket wheel excavators to scoop material from the pit bank. (¶ 45.) A & F Trucking fed the bank materials into a large bulk processing machine that processed the materials and separated them into stockpiles. (¶ 46.) The screening plant separated the sand and various grades of gravel (boulders, crushed stone, crushed gravel, and backfill) into different piles on the surface of the Jimerson Pit. (*Id.* & ¶ 47.) In certain instances, the gravel was washed. (*Id.*)

In stage three, A & F Trucking sold sand and gravel products to individuals who came to the Jimerson Pit, or A & F Trucking delivered the material to purchasers through its trucking operation. (¶ 47.) A & F Trucking's gravel and sand customers included townships, contractors, the Seneca Nation, and individual customers. (*Id*.) Stage four of the mining process refers to the reclamation of the land after the conclusion of mining and depletion of the stockpiles. (¶ 48.) A & F Trucking never engaged in reclamation of the Jimerson Pit. (*Id*.)

In July 2004, Alice Perkins purchased land adjoining the Jimerson Pit (the "Griffin Parcel"). (¶ 49.) The Griffin Parcel was used for access to the Jimerson Pit and was intended to supply new bank gravel once the Jimerson Pit expanded. (*Id.*) Alice Perkins also anticipated building a home and boat dock on the Griffin Parcel after the pit was closed and reclaimed. (*Id.*) No gravel was extracted by A & F Trucking from beneath the Griffin Parcel, and A & F Trucking never was permitted by the Seneca Nation to extract gravel from that tract. (*Id*.)

During the years including 2008 through 2010, A & F Trucking employee Greg Vanderweghe was responsible for running the mining and sales operation at the Jimerson Pit. (¶ 50.) Vanderweghe normally was the only worker in the pit during the nine months of the year in which mining and sales took place. (*Id*.) Alice Perkins was not involved in the extraction process at the Jimerson Pit. (¶ 51.) Instead, she acted as a business manager for the project, keeping track of the paperwork, payroll, and insurance, and coordinating with the Seneca Nation. (*Id.*) Sometimes she would go to the Jimerson Pit in the evenings to "make sure everything was okay." (*Id*.) Fredrick Perkins would occasionally help Vanderweghe if Vanderweghe got behind in his work at the Jimerson Pit. (¶ 52.) Janice Crowe, as the surface landowner, had nothing to do with the operation of the Jimerson Pit other than owning the surface land and receiving

royalties based upon A & F Trucking's gravel sales. (¶ 53.) Janice Crowe relied upon royalties from A & F Trucking's gravel sales to supplement her income. (*Id.*)

On or about May 5, 2008, Alice J. Perkins submitted a Sand & Gravel Permit Application to the Seneca Nation for A & F Trucking to extract and sell gravel from 10.4 acres containing the Jimerson Pit, located at Jimerson and Sawmill in Salamanca, New York, from 2008 to 2009. (¶ 54.) A & F Trucking stated that it would conduct crushing, screening, and washing on-site, and that the surface landowner was Janice Crowe. (*Id.*) Crowe signed the application as "owner." (*Id.*) Alice J. Perkins signed the application as "applicant or authorized representative." (*Id.*) The Seneca Nation Council approved A & F Trucking's application. (*Id.*)

4. The Seneca Nation's Denial of A & F Trucking's 2009-2010 Sand & Gravel Permit Application

On or about April 21, 2009, Alice J. Perkins submitted a Sand & Gravel Permit Application to the Seneca Nation for A & F Trucking to extract and sell material from 10.4 acres containing the Jimerson Pit for 2009 through 2010. (¶ 55.) A & F Trucking reported that it would conduct crushing, screening, and washing on-site, and that the surface landowner was Janice Crowe. (*Id.*) Crowe signed the permit application as "owner." (*Id.*) Alice J. Perkins signed the permit application as "contractor." (*Id.*) Although the chairman of the NRC recommended approval of the 2009-2010 application, the Seneca Council soundly defeated his motion to approve the application. (¶ 56.) On June 13, 2009, Alice Perkins was told that A & F Trucking must stop further mining operations at the Jimerson Pit. (*Id.*)

As of June 13, 2009, A & F Trucking ceased gravel extraction and processing at the Jimerson Pit. (¶ 57.) Initially, the Seneca Council told Alice Perkins that A & F Trucking was not allowed to sell the stockpiled sand and gravel that it had previously extracted from the Jimerson Pit. (¶ 58.) However, A & F Trucking eventually received verbal permission to sell its

business inventory stockpiled at the Jimerson Pit site. (*Id.*) A & F Trucking never received written permission to sell stockpiled gravel. (*Id.*) All gravel sales from June 13, 2009 through December 31, 2010 derived from the stockpile of gravel that A & F Trucking had mined from the Jimerson Pit prior to June 13, 2009. (¶ 59.)

Alice Perkins and Fredrick Perkins now receive income from the sale of gravel, from a pit that is not on Seneca Nation land, through an entity named Perkins LLC. (¶ 60.) The only current permittee to extract and sell gravel from the Allegany Territory is a large company that is run by non-Seneca individuals. (¶ 61.)

C. Plaintiffs' 2010 Income Tax Return

Plaintiffs' income taxes for 2008 to 2010 were prepared at Ellis Tax Service in Salamanca, New York. (¶ 62.) Prior to 2008, Plaintiffs began taking the position on their federal tax returns that all income derived from gravel sales from Seneca Nation land is exempt from income tax under the GAA.[4] (¶ 63.) Plaintiffs filed their 2010 income tax return in or around July 2012, but had not received permission to file a late return for that year. (¶ 64.)

For tax year 2010, Plaintiffs reported $711,457 in gross receipts or sales for A & F Trucking. (¶ 65.) Plaintiffs deducted from their taxable gross receipts the amount of $184,552 earned from selling stockpiled gravel from the Jimerson Pit. (*Id.*) Since the gravel income was "earned from the de[pletion] of … land," Plaintiffs stated that it was deductible as an "other cost – Native American land not subject to federal income taxes" under the GAA. (*Id.*) Over 80% of income reported by A & F Trucking for 2010 was earned from A & F Trucking's non-gravel work, including paving, trucking, excavating, and snow removal. (¶ 66.)

[4] The General Allotment Act does not apply to the Seneca Nation. *See* 25 U.S.C. § 339.

A & F Trucking's actual gross receipts in 2010 were higher than $711,457. (¶ 67.) Alice Perkins does not know how the figure $711,457 came to be reported on her 2010 income tax return. (*Id.*) Plaintiffs' bank records reflect that A & F Trucking's gross receipts or sales in 2010 were $952,242.92. (*Id.*)

Plaintiffs submitted receipts and invoices in a file folder to their tax preparer, who made an allocation between expenses relating to taxable income and to allegedly exempt income on their 2010 income tax return. (¶ 68.) Plaintiffs were not involved in how their preparer determined income and expenses were to be reported on their 2010 income tax return. (*Id.*) Alice Perkins simply "assumed that he was doing what was supposed to be done." (*Id.*) Plaintiffs did not, themselves, allocate between expenses relating to taxable income and allegedly exempt income when submitting invoices and receipts to their accountant. (¶ 69.)

The 2010 income tax return, and the supporting evidence provided to Plaintiffs' tax preparer, reflect that all income from gravel sales was deducted from A & F Trucking's gross receipts. (¶ 70.) The 2010 income tax return and supporting evidence also reflect deductions for expenses related to gravel sales, including a deduction for A & F Trucking employee Greg Vanderweghe's salary, and fuel expenses related to gravel transport and sales. (*Id.*) That is, A & F Trucking did not report the gravel-related income as taxable, but still deducted many costs related to its gravel sales from taxable income. (*Id.*)

Plaintiffs' business records included a summary sheet that purports to reflect the income and expenses of A & F Trucking for 2010. (¶ 71.) The figures of income and expenses listed on that summary sheet were reported, directly, on Schedule C of Plaintiffs' 2010 income tax return. (*Id.*) Alice Perkins did not prepare the summary sheet, cannot identify its author, and cannot explain how it came to be created. (*Id.*)

Plaintiffs' 2010 income tax return was examined by the Internal Revenue Service. (¶ 72.) Because the IRS determined all income from gravel sales to be taxable, Plaintiffs were assessed an additional $6,113 in tax related to their self-reported $184,552 of gravel income, plus $1,220.20 in accuracy-related penalties, $1,521.50 in late filing penalties, and $1,020.98 in interest. (*Id.*) Plaintiffs paid the $9,863.68 and filed this refund suit. (*Id.*)

IV. Analysis

The summary judgment evidence establishes that Plaintiffs are not entitled to a refund for three reasons. First, neither the Canandaigua Treaty nor the 1842 Treaty confer or preserve an income tax exemption. Second, Plaintiffs had an attenuated connection to the Jimerson Pit and the Seneca Nation's gravel within that pit, so their gravel income was not "directly derived from the land." Finally, Plaintiffs under-reported their business income, so they are not entitled to any refund of taxes paid to the IRS.

A. Plaintiffs' Income is Not Tax Exempt Under The Canandaigua Treaty, The 1842 Treaty, or Any General Presumption.

The gateway issue in this lawsuit is whether income "derived directly from the land" is exempted from income tax under the Canandaigua Treaty, the 1842 Treaty, or a general presumption that allegedly applies to income resulting from Seneca land. Fully 14 of the 15 participating members of the Tax Court, considering the identical issue in that proceeding, answered a resounding "no." That determination should guide this Court's analysis of the same argument.

It is well-settled that tax exemptions are not presumed in the law. To the contrary, the Supreme Court has mandated that "exemptions to tax laws should be clearly expressed." *Squire*, 351 U.S. at 6; *see also Choteau*, 283 U.S. at 697; *Gunton*, 2006 WL 1627978, at *1. Even courts that apply a liberal construction to the very existence of exemptive language require some

statutory text that "can be reasonably construed to confer income exemptions[.]" *See Lazore*, 11 F.3d at 1185; *Holt*, 364 F.2d at 40. The broad language of the Canandaigua Treaty and the 1842 Treaty relied upon by Plaintiffs does not suffice.

1. Plaintiffs' Gravel Income is Not Tax Exempt Under the Canandaigua Treaty.

Plaintiffs urge that imposing an income tax upon their business's gravel income would burden their "free use and enjoyment" of common Seneca land under the Canandaigua Treaty. No other court has applied the Canandaigua Treaty in that manner.

a. The Tax Court Found That the Canandaigua Treaty's "Free Use and Enjoyment" Clause Does Not Exempt Plaintiffs' Gravel Income from Federal Tax.

Considering these same facts, the United States Tax Court concluded that the Canandaigua Treaty does not create a tax exemption for individual members of the constituent nations of the Iroquois Confederacy like Alice Perkins. *Perkins*, 2018 WL 1146343, at *4. The Tax Court explained that the phrase "or of their Indian friends residing thereon and united with them" cannot reasonably be read as creating personal rights. *Id.* That court cited four prior cases rejecting the claim that the Canandaigua Treaty creates a tax exemption for individual members of the Six Nations. *Id.* at *4 (citing *Sylvester v. Comm'r*, 77 T.C.M. (CCH) 1346 (1999); *Maracle v. Comm'r*, 61 T.C.M. (CCH) 2083, 2084 (1989); *George v. Comm'r*, 57 T.C.M. (CCH) 1168, 1168-69 (1989) & *Nephew v. Comm'r*, 56 T.C.M. (CCH) 1122, 1123 (1989)). The phrase "[o]r of their Indian friends residing thereon" does not refer to individuals, but instead "is part of a list that includes the Nation and any of the other nations of the Iroquois Confederacy." *Id.* "The inclusion of 'Indian friends residing thereon and united with them' means that the Nation gets to choose who is a member of the Nation and perhaps even can be seen as a promise not to use non-Seneca Indians as putative sellers of Seneca land." *Id.*

Moreover, the Tax Court declined to find that any exemptive purpose was evidenced by the Canandaigua Treaty's "free use and enjoyment" clause. *Id.* "By its express terms, the treaty protects the Seneca Nation's lands from being 'disturbed,' which is different from creating a tax exemption." *Id.* Accordingly, the Tax Court found that "the Canandaigua Treaty doesn't exempt the Perkinses from paying taxes on the gravel income." *Id.* at *6.

b. No Other Court Has Found an Income Tax Exemption Based on the "Free Use and Enjoyment" Clause or Similar Treaty Language.

It does not appear that any other federal court has held that the "free use and enjoyment" clause of the Canandaigua Treaty – or similar language in other treaties – preserves or confers *any* individual tax exemption. And, as this Court observed, no other court had specifically considered whether an assurance of "free use and enjoyment" of native land bars taxes on income derived from the land. *See* Doc. No. 24 at 1. Cases considering similar claims rejected exemptions for, among other activities, income from the cutting and sale of timber from tribal land, *see Red Lake Band*, 861 F. Supp. at 845-46; income earned as a tribal council member, *see Hoptowit*, 709 F.2d at 566 & *Jourdain*, 617 F.2d at 509; income earned for work for the Mohawk Housing Corporation and a private company in New York, *see Lazore*, 11 F.3d at 1184-85; and excise taxes on fuel sold from the Onondaga Reservation, *see Cook*, 86 F.3d at 1097-98.

For example, the Federal Circuit in *Cook v. United States* affirmed the Court of Federal Claims' holding that the Canandaigua Treaty's "free use and enjoyment" clause did not support an exemption from federal excise tax for diesel fuel sales by Onondaga Nation members conducting commerce on the Onondaga Reservation. 86 F.3d at 1097-98. The Federal Circuit 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 only secures the Seneca's "peaceful possession" and use of their land, and does not prohibit the assessed excise taxes. *Id.*

Also denying a claim of income tax exemption under the Canandaigua Treaty, the Third Circuit in *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. That is, the court found that the Canandaigua Treaty provided no textual support for an income tax exemption under the "free use and enjoyment" clause.

In *Red Lake Band of Chippewa Indians*, the District of Minnesota rejected the argument that income from the cutting and sale of timber from tribal lands pursuant to a permit issued by the Chippewa Tribe was exempt from federal tax. *Red Lake Band*, 861 F. Supp. at 845-46. The taxpayers there argued that their income "was derived directly from the land and therefore should be exempt from taxation" under provisions in the Treaty of Greenville of 1795 protecting the right of the Chippewa to the "quiet enjoyment" of tribal land "without any molestation from the United States." *Id.* at 843 & 845. The District of Minnesota disagreed, applying the Eighth Circuit's *Jourdain* opinion for the proposition that "the 'molestation' prohibited by the Treaty of Greenville was interference with the rights of Indians to hunt and otherwise enjoy their land, not the 'right' to be free from federal taxation." *Id.* at 845. The *Red Lake Band* court stated that no language in *Jourdain* limits its holding to income that is not "derived directly from the land," and that "other cases which did involve income derived from the land have held that no tax exemption existed under the [Treaty of Greenville]." *Id.* (citing *Holt*, 364 F.2d at 42).

Similarly, in *Hoptowit v. Commissioner*, the Ninth Circuit rejected a claim of income tax exemption under language protecting the "exclusive use and benefit" of Yakima lands included in the Treaty with the Yakima of 1855. 709 F.2d at 565. The Ninth Circuit found that such broad language did not expressly confer an income tax exemption to a Native American taxpayer for his service as a Tribal Council Member. *Id.* at 566.

c. Dicta Regarding "Free Use and Enjoyment" Does Not Confer a Tax Exemption.

This Court identified a possible basis for a tax exemption (sufficient to overcome Rule 12(b)(6) dismissal) within dicta of reported opinions by the Third and Ninth Circuits. Judge Scott concluded that, based upon those "legal authorities that suggest similar conclusions indirectly," Doc. No. 14 at 9, "[p]otentially, … plaintiffs will be able to present a scenario in which a fairly modest amount of income came so directly from Seneca land that, in a sense, they were selling a part of the physical land itself[,]" *id.* at 12. The Court's Decision and Order then held that plaintiffs plausibly stated a claim under both treaties between the United States and the Seneca Nation, adopting Judge Scott's determination that the alleged facts potentially could represent a scenario contemplated in *Hoptowit* and *Lazore* where a federal tax on income "directly derived" from Seneca Nation land may burden the "free use and enjoyment" of Seneca land under the Canandaigua Treaty. Doc. No. 24 at 7. However, the dicta in *Lazore and Hoptowit*, cited by both opinions, does not justify the tax exemption Plaintiffs seek.

In *Hoptowit*, the Ninth Circuit rejected the argument that the application of the income tax to a tribal council member's salary burdened the "exclusive use and benefit" of Yakima lands. *Hoptowit*, 709 F.2d at 566. Contrasting Hoptowit's contention with other cases construing the General Allotment Act and the Supreme Court's decision in *Capoeman*, the Ninth Circuit observed that "any tax exemption created by this ["exclusive use and benefit"] language is limited to the income derived directly from the land." *Id.* That is, the Ninth Circuit did not

conclude that the "exclusive use and benefit" language conferred a tax exemption, but instead explained that the text of the Treaty with the Yakima compels that *any* exemption that it might confer would apply only to "income derived directly from the land" based on *Capoeman*. *Id.*

Similarly, the Third Circuit in *Lazore* held that the income of two members of the Mohawk Nation was not tax exempt under the Canandaigua Treaty's "free use and enjoyment" clause. *Lazore*, 11 F.3d at 1187. That court found no textual support in the Canandaigua Treaty for the appellants' contention that their income (from employment in a metal plant and the Mohawk Indian Housing Corporation) was exempt from income tax. *Id.* The *Lazore* court noted that "the language relied upon by the Lazores [e.g., *Hoptowit*] might be sufficient to support an exemption from a tax on income derived directly from the land." *Id.* It explained,

> In 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 such language.

Id. To be clear, *Lazore* only stands for the proposition that individual members of the Seneca Nation are *not* exempt from federal income tax under the Canandaigua Treaty and that the cases relied upon by the Lazores were inapposite. *Id.*

The Tax Court distinguished the dicta in *Lazore* and *Hoptowit* from Plaintiffs' case. The Tax Court observed that, "[n]either court explained what part of the treaty or caselaw led it to make these comments." *Perkins*, 2018 WL 1146343, at *5. Examining the basis for the *Lazore* and *Hoptowit* dicta, the Tax Court endeavored to "sort out this issue by going back to *Capoeman*." *Id.* In *Capoeman*, the Supreme Court held that the General Allotment Act of 1887, in which the United States promised to transfer allotted land to certain Native Americans "free of all charge or incumbrance whatsoever[,]" created a limited exemption for "income derived directly" from land that was allotted and still held in trust. *Id.* (citing *Capoeman*, 351 U.S. at 8-9). However, the GAA does not apply to the Seneca Nation, and Plaintiffs' gravel income did

not derive from allotted land, *see* ¶ 28; accordingly, the GAA's exemption does not apply. *Id.*; *see also Red Lake Band*, 861 F. Supp. at 845-46 ("No exemption may be found in a treaty's silence").

2. There is No General Tax Exemption for Income Derived From Indian Land.

The Tax Court refused to apply to Plaintiffs a general exemption or presumption of tax exemption just because their income allegedly derived directly from Seneca land. *Perkins*, 2018 WL 1146343, at *5. The fact that the gravel income "derived from Indian land" alone does not make it tax exempt; "*Capoeman* did not create a general exemption for all income derived from land." *Id.* at *5; *see also Kieffer v. Comm'r*, 1998 WL 281900, at *2-*3 (Tax 1998); *Red Lake Band*, 861 F. Supp. at 845-46. Instead, *Capoeman* recognized a tax exemption based on the GAA's text, which protected allotments of land to individual tribe members from "all charge or incumbrance whatsovever." *Perkins*, 2018 WL 1146343, at *5. Even then, "the *Capoeman* exemption applies only to income derived from *allotted* land." *Id.* (emphasis in original) (quoting *Jourdain v. Comm'r*, 671 T.C. 980, 990 (1979)). "Courts dealing with the taxability of income derived from common tribal lands, as opposed to allotted land, have consistently held such income to be taxable." *Tonasket v. Comm'r*, 50 T.C.M. (CCH) 489 (Tax 1985) (citing *United States v. Anderson*, 625 F.2d 910, 914 (9th Cir. 1980), *Fry*, 557 F.2d at 648, and *Wynecoop v. Comm'r*, 76 T.C. 101, 107 (Tax 1981)). Insofar as Plaintiffs contend that their income derived from gravel mined on Seneca land is tax exempt under *Capoeman*, they are not covered by the GAA and "this argument lacks merit because the exemption applies only to allotted land." *Kieffer*, 1999 WL 731060, at *1; *see also Red Lake Band*, 861 F. Supp. at 864.

To be clear, no other court has found that an individual member of the Iroquois enjoys *any* tax exemption under the Canandaigua Treaty. And the Tax Court – considering the same

law and allegations in prior years – found that Plaintiffs' gravel income was not exempt under the Canandaigua Treaty, and saw no general exemption for income "derived directly from land."

3. Plaintiffs' Gravel Income is Not Tax Exempt Under The 1842 Treaty.

Plaintiffs also have not established that the 1842 Treaty confers an income tax exemption. No other court has recognized such an exemption, or that any personal rights are conferred or preserved by the 1842 Treaty. Instead, the Second Circuit's decision in *United States v. Kaid* undermines such a claim. There, the appellants challenged their convictions for conspiracy to commit money laundering and trafficking in contraband cigarettes. *Kaid*, 241 F. App'x at 750. They urged, in part, that the United States was 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, stating that the 1842 Treaty "clearly prohibit[s] only the taxation of real property[.]" *Id.* New York State courts also have observed that the 1842 Treaty only recognizes a limited immunity from taxation. *See Snyder v. Wetzler*, 193 A.D. 2d 329, 331 (N.Y. App. Div. 1993) ("We find the [1842] Treaty clearly refers only to taxes levied upon real property or land"); *see also New York State Dep't of Taxation and Fin. v. Bramhall*, 667 N.Y.S.2d 141, 147-48 (N.Y. App. Div. 4th Dep't 1997) (the 1842 Treaty only "prohibits the State from taxing reservation land[.]").

As Judge Scott observed in his Report and Recommendation, the Second Circuit's plain language in *Kaid* recognizes the very narrow reach of the 1842 Treaty. Doc. No. 14 at 15. The Second Circuit read the whole phrase "taxation of real property" as the target of the modifier "only," thereby limiting the 1842 Treaty to one specific category of taxation. *Id.* "Plaintiffs' claims and arguments cannot survive against such a sharp limitation." *Id.* Of course, the Court has observed that the facts of *Kaid* may be distinguished from this case and that the Second

Circuit may not have intended its language to be broadly applied. *Id.*; Doc. No. 24 at 10. Moreover, *Kaid* is an unpublished opinion that does not bind the district courts of the Second Circuit. *See* Doc. No. 24 at 9; SECOND CIR. L.R 32.1.1; *see also* FED. R. APP. P. 32.1.

But "[w]hatever the merits of these arguments or others … [f]or this Court's purposes, *Kaid* says what it says." Doc. No. 14 at 15. The Second Circuit definitively stated that the 1842 Treaty prohibits only the taxation of real property. *Id.* at 14-15 (citing *Kaid*, 241 F. App'x at 750). While *Kaid* is not binding, it is quite pertinent to the Court's analysis. *Kaid* reflects the Second Circuit's only interpretation of the 1842 Treaty; no other Second Circuit case apparently has considered its reach. That is, the one Second Circuit case to consider whether the 1842 Treaty prohibited certain federal tax (on cigarette sales) instructs that it did not, and stated more broadly that the 1842 Treaty applies *only* to taxes upon real property. *Kaid*, 241 F. App'x at 750.

Courts in this Circuit repeatedly have explained that unreported cases are highly persuasive and may be useful to predict how the Second Circuit would decide a future case on the same question. *See Liana Carrier Ltd. v. Pure Biofuels Corp.*, 2015 WL 10793422, at *4 (S.D.N.Y. Aug. 14, 2015), *aff'd*, 2016 WL 7107481 (2d Cir. Dec. 6, 2016)); *Shady Records, Inc. v. Source Enterps., Inc.*, 371 F. Supp. 2d 394, 398, 398 n.1 (S.D.N.Y. 2005); *LaSala v. Bank of Cyprus Pub. Co.*, 510 F. Supp. 2d 246, 274 n.10 (S.D.N.Y. 2007); *Gorsira v. Loy*, 357 F. Supp. 2d 453, 458 n.7 (D. Conn.), *adhered to on reconsideration sub nom.*, 364 F. Supp. 2d 230 (D. Conn. 2005). "[A] district court must seek enlightenment as to the law where it finds it. If it is permissible to cite and to treat as persuasive authority the writings of law students in student-edited journals, the considered opinion of a panel of appellate judges ... uttered not in academic speculation but in entering judgment resolving a litigation ... must surely be considered a valuable source of wisdom." *Shady Records*, 371 F. Supp. at 398 n.1. *Id.*; *see also Bank v. Am.*

Home Shield Corp., 2013 WL 789203, at *1 (E.D.N.Y. Mar. 2013) ("Although [the decision] is only a summary order, and not binding precedent, there is no reason to think that the circuit court would reach a different conclusion in this case").

The Tax Court, too, determined that *Kaid* was persuasive authority to deny Plaintiffs' claim under the 1842 Treaty. *Perkins*, 2018 WL 1146343, at *6. The majority was "persuaded by the Second Circuit's reading of the 1842 Treaty[.]" *Id.* Accordingly, the Tax Court found that Plaintiffs' gravel income was not excepted from federal taxation under the 1842 Treaty. *Id.* Ten members of the Tax Court found that the 1842 Treaty does not apply for a different reason:

> [W]e conclude that article 9 of the 1842 Treaty does not confer immunity from Federal taxation and does not even address that subject. Like the rest of the 1842 Treaty, article 9 was intended to address one of the "divers questions and differences" that had arisen in the wake of the 1838 Treaty – namely, New York's attempt to impose road and highway taxes on the land comprising the Allegany and Cattaraugus reservations, ownership of which the 1842 Treaty re[-]vested in the Seneca. In article 9 the United States agreed to use its influence to prevent New York from taxing the land within those two reservations so long as the Seneca continued to occupy that land. That article accordingly has no application to Federal taxation.

Id. at *10. The concurrence interpreted the history and language of the 1842 Treaty (to "solicit the influence of the Government of the United States") as covering only taxes imposed by New York. *Id.* at *8. The ten judges therefore "would grant summary judgment for [the IRS] because article 9 of the 1842 Treaty conferred rights on the Seneca Nations, not its constituent members, and because immunity from Federal taxation was not among the rights conferred." *Id.* at *10.

B. Plaintiffs Soon Will Be Collaterally Estopped From Contending That Their Gravel Income Was Tax Exempt.

This Court certainly has jurisdiction to consider Plaintiffs' request for a refund of taxes paid for 2010, even though the lawsuit relies on the same legal and factual basis as Plaintiffs' earlier-filed Tax Court case challenging their 2008 and 2009 tax assessments. *See, e.g., Bush v. Comm'r,* 175 F.2d 391, 392-93 (2d Cir. 1949) ("each year is the origin of a new liability and a

separate cause of action"). Plaintiffs are allowed their day in each court. But just because Plaintiffs may invoke the jurisdiction of two forums to litigate identical issues does not relieve them of the effects of estoppel. Plaintiffs soon will be barred from raising their claim of treaty-based tax exemption because that claim is "identical in all respects with that decided in the first proceeding and … the controlling facts and applicable legal rules remain unchanged." *Id.* at 393.

This lawsuit will be "redundant litigation of the identical question of the statute's application to the taxpayer's status." *Sunnen*, 333 U.S. at 598. Plaintiffs' claims of tax exemption are identical in both suits – the controlling facts and the applicable legal rules that apply to Plaintiffs' failed challenges to IRS deficiency notices for 2008 and 2009 are essentially, if not entirely, identical to their claims for 2010. In short, the Tax Court's rejection of Plaintiffs' theory of tax exemption, once finalized by judgment, will bar Plaintiffs' claims in their entirety.

C. Plaintiffs' Gravel Income Did Not Derive Directly From Seneca Land.

The Report and Recommendation concluded that Plaintiffs plausibly stated a claim under the Canandaigua Treaty because, based upon Plaintiffs' allegations, "this lawsuit potentially fills in the case law with a rare demonstration of how a direct connection to Indian land would actually look." Doc. No. 14 at 13. The Court agreed that Plaintiffs stated a claim for relief because they plausibly alleged that the United States levied a tax upon Seneca land by taxing Plaintiffs' gravel income. Doc. No. 24 at 11. The Court essentially found that a tax on Plaintiffs' gravel profit actually might constitute a tax upon their land. *Id.* ("the distinction between taxing land and taxing the gravel that makes up that land cuts the baloney too thin").

However, the summary judgment evidence shows that Plaintiffs' tie to the Seneca land from which the gravel derived was attenuated; their income simply did not "derive directly from the land." Therefore, Plaintiffs cannot benefit from the tax exemption that they propose.

1. Plaintiffs Did Not Own or Occupy the Surface or Subsurface Land.

The most salient fact of this case is that the Jimerson Pit – and the gravel within it – did not belong to Alice or Fredrick Perkins. Any tax upon their income was not a tax on their land.

The land on which the Jimerson Pit sits was owned by Alton Jimerson and, after his death, by Janice Crowe. (¶ 8 & ¶ 10.) Plaintiffs' company only extracted and sold gravel from the Jimerson Pit with the approval of the surface landowners, Jimerson and Crowe. (¶¶ 15-17 & ¶¶ 38-40.) A & F Trucking essentially purchased the right to extract and sell gravel from the Jimerson Pit from Jimerson and Crowe through royalties from A & F Trucking's gravel sales. (¶¶ 35 & 53.) In its Sand and Gravel Permit Applications to the Seneca Nation, A & F Trucking stated that Crowe alone was the "surface landowner." (¶¶ 38-40.) The Seneca Nation Council never permitted A & F Trucking to extract and sell gravel from Plaintiffs' own surface land. (¶¶ 42 & 49.)

All of A & F Trucking's mining and extraction of gravel from the Jimerson Pit took place from the subsurface of land that was owned by Jimerson and Crowe. (¶ 42.) None of the stockpiled gravel or sand sold in 2010 was extracted from surface land owned by Plaintiffs themselves. (*Id.*) Because Jimerson's lands (including the pit) were on a flood plain, no one could reside or office at that location. (¶¶ 11 & 18.) Indeed, the Jimerson Pit does not have electricity. (¶ 12.) Excavation and sales only took place during nine months of the year. (¶ 50.) Plaintiffs lived five miles away. (¶ 19.) A & F Trucking's corporate office, through which Alice Perkins managed the gravel project, was at or near her home. (¶¶ 20 & 51.) In sum, Plaintiffs did not sell gravel from their own land; instead, their pit was located on Alton Jimerson's property and their business was run from a remote location.

The sand and gravel, too, did not belong to the Plaintiffs. (¶ 9.) All sand and gravel located in the Allegany Territory is the sole and exclusive property of the Seneca Nation. (*Id.*) Because the Seneca Nation maintains the ownership rights to all of the subsurface of the Allegany Territory, including the gravel in the Jimerson Pit, A & F Trucking was required to obtain permission to mine gravel from the Jimerson Pit. (¶ 28.) Under the Sand and Gravel Permit Law, enacted in 1999, gravel extraction and sales of sand and gravel from the Seneca Nation require a yearly written application and the submission of an application fee. (¶ 29.) A & F Trucking essentially bought the right to extract and sell sand and gravel on the Allegany Territory through the payment of monthly royalties to the Seneca Nation. (¶ 34.)

In fact, A & F Trucking's property interest in the gravel that it sold in 2010 was even more attenuated than in prior years. A & F Trucking was denied a 2009-2010 permit to excavate and sell sand and gravel. (¶ 56.) As of June 13, 2009, A & F Trucking ceased gravel extraction and processing from the Jimerson Pit. (¶ 57.) The Sand and Gravel Law barred sale of the gravel that A & F Trucking had stockpiled at the Jimerson Pit. (¶ 31.) A & F Trucking eventually received verbal (but not written) permission to sell the business inventory that it had stockpiled at the Jimerson Pit. (¶ 58.) All sand and gravel that A & F Trucking sold in 2010 was mined prior to June 13, 2009. (¶ 59.)

There simply was not a close connection between A & F Trucking's mining gravel and the "free use and enjoyment of the [Seneca] land" cited in the Canandaigua Treaty. Plaintiffs were not the owners of the "land" that allegedly was taxed – that was the Seneca Nation itself. And Plaintiffs did not "reside thereon," since the surface land was owned by Alton Jimerson and, later, Janice Crowe. In 2010, Plaintiffs simply enjoyed verbal permission to sell their business inventory for which they paid royalties to the Seneca Nation and Janice Crowe. The United

States neither taxed the land, nor taxed the gravel that once made up that land; it taxed personal income from commercial activities of A & F Trucking not directly connected to any land.

2. Plaintiffs Excavated and Sold Gravel Through A & F Trucking, a Diversified Commercial Entity.

A & F Trucking's commercial sale of its business inventory in 2010 cannot reasonably be deemed to be an activity "in which a fairly modest amount of income came so directly from Seneca land that, in a sense, they were selling a part of the physical land itself." Doc. No. 14 at 12. Alice Perkins did not, for example, "sell the gravel in front of her house the way some people cut their own timber from their backyards and sell firewood on the shoulder of the road in front of their houses[.]" *Id.* Instead, Greg Vanderweghe, an employee of Plaintiffs' diversified, million-plus dollar trucking business, sold the remaining inventory of processed gravel to supplement A & F Trucking's profitable business.

In 2010, A & F Trucking engaged in a wide range of construction-related tasks such as paving, site development, installing septic systems, excavating, hauling, trucking, snow removal, gravel sales, and building roads in and around the Seneca Nation's Allegany Territory. (¶ 5.) The company reported total gross receipts of nearly $1.5 million in 2008 and $1.7 million in 2009; its gross income in 2010 was nearly $1 million. (¶ 6.) The company employed seven individuals in 2010. (¶ 7.) Alice and Fredrick Perkins initially agreed to mine and sell gravel from Alton Jimerson's pit in order to supply A & F Trucking's other business projects. (¶ 21.) Gravel sales soon became an independent source of profit for A & F Trucking, as the company's gravel mining operation supplied the reconstruction of the expressway from Steamburg to Salamanca and furnished boulders, crushed stone, crushed gravel, and backfill to customers including townships, contractors, the Seneca Nation, and individuals in and around Salamanca, New York. (¶¶ 22, 46, & 47.) Plaintiffs' income was not "modest." (¶ 6.)

A & F Trucking reported gravel income of nearly $900,000 during the final year that it was permitted to extract gravel from the Jimerson Pit. (¶ 25.) It reported nearly $650,000 of gravel income in 2009. (¶ 26.) Even when A & F Trucking only sold from its remaining inventory of bank materials in 2010, it reported nearly $200,000 in gravel-related income. (¶¶ 27 & 59.) Sales of products from the Jimerson Pit represented around 20% of A & F Trucking's receipts in 2010; 80% of sales were much less connected to Seneca land. (¶¶ 27 & 67.)

3. Plaintiffs Did Not Personally Mine the Gravel.

The summary judgment evidence shows that Alice Perkins did not, herself, extract and sell gravel; she was not personally involved in the extraction process at the Jimerson Pit. (¶ 51.) Instead, she acted as a business manager for the project, keeping track of the paperwork, payroll, and insurance, and coordinating oversight by the Seneca Nation. (*Id.*) A & F Trucking employee Greg Vanderweghe was responsible for running the gravel mining and sales operation at the Jimerson Pit. (¶ 50.) Vanderweghe normally was the only worker in the pit during the nine months of the year during which mining and sales took place. (*Id.*). Sometimes Alice Perkins would go to the Jimerson Pit in the evenings to "make sure everything was okay." (¶ 51.) Fredrick Perkins occasionally helped Vanderweghe if he got behind in his work at the Jimerson Pit. (¶ 52.)

A tax on Plaintiffs' gravel income, then, does not tax the labor of extracting gravel from the Allegany Territory. Greg Vanderweghe, not Plaintiffs, earned income from the extraction process. Alice Perkins oversaw that work as business manager of the project.

4. The Gravel Products A & F Trucking Created from the Jimerson Pit Do Not Constitute "Land."

The tax assessment related to Plaintiffs' 2010 income was not a tax on "income derived directly from the land" for another reason. The gravel products that A & F Trucking sold in

2010 were the final result of excavation and processing from the raw bank gravel contained in the Jimerson Pit. That is, Plaintiffs were not directly selling "the land," but an end product that resulted from a four-step method that was conducted by A & F employee Greg Vanderweghe.

Alton Jimerson originally sold raw gravel out of the bank of his mine pit to contractors who had the equipment to load it and haul it out. (¶ 13.) Essentially, Alton Jimerson may be deemed to have directly sold "the land" for supplemental income. But A & F Trucking sold products from 1991 through 2010 that were the result of a more extensive process – a permitted, four-stage mining plan. (¶ 43.) First, A & F Trucking cleaned the surface of the land of trees, stumps, topsoil, vegetation, and other overburden. (¶ 44.) Then, A & F Trucking utilized power shovels, draglines, front-end loaders, and bucket wheel excavators to scoop material from the pit bank. (¶ 45.) A & F Trucking fed the bank materials into a large bulk processing machine that separated and processed the materials into stockpiles of sand and various grades of gravel (boulders, crushed stone, crushed gravel, and backfill). (¶ 47.) Indeed, Alice Perkins reported to the Seneca Nation that the mined land project required on-site processing of mining products, such as crushing, screening, and washing. (¶ 54.)

By the time A & F Trucking sold stockpiled gravel products in 2010, those materials were not the same "land" that it first encountered. Plaintiffs were not selling the Seneca land, but instead selling a final product that their business had manufactured from raw materials contained in the land. There is a clear and meaningful distinction between taxing Alton Jimerson's sale of raw bank gravel, for example, and taxing A & F Trucking's business profits from selling its stockpiled inventory of boulders, crushed stone, crushed gravel, and backfill.

5. Conclusion – Plaintiffs' Gravel Income Did Not Derive Directly From Seneca Land.

The theory behind the dicta in *Lazore* and *Hoptowit*, as interpreted by this Court, is that income may be so directly connected to Seneca land as to be protected from the generally-applicable income tax. *See* Doc. No. 24 at 11. That is, a tax on the Plaintiffs' income actually could be a tax on Seneca land. *Id.* Even if that is the case, though, Plaintiffs' gravel income does not qualify. Plaintiffs' profits did not accrue due to their ownership of surface land on the Allegany Territory – the owner was Janice Crowe. And Plaintiffs did not earn royalties because they owned the bank gravel from which the boulders, crushed stone, crushed gravel, and backfill originated – the owner was the Seneca Nation itself. Moreover, Plaintiffs did not directly profit from working at the Jimerson Pit – almost all labor was expended by their employee, Greg Vanderweghe. In actual fact, A & F Trucking was not selling "the land," but instead, it earned income from manufactured products that resulted after it had separated, crushed, screened, and washed the bank materials using large machines.

Plaintiffs appear to seek to create, without statutory basis, a tax exemption for income *indirectly* earned from Native American lands. That is, in essence, the theory that was roundly rejected by the Ninth Circuit in *Hoptowit*, where the plaintiffs unsuccessfully argued that since income from certain Indian lands may be tax exempt, the payment of that income to tribal members in exchange for services must be non-taxable. *Hoptowit*, 709 F.3d at 566. Moreover, the natural extension of Plaintiffs' argument is that, as an enrolled Seneca, Alice Perkins should enjoy an exemption from income tax if that income is somehow connected to common Seneca land. If that is true, though, Alice Perkins will be "exempt from income tax solely because of her status as an Indian." *Capoeman*, 351 U.S. at 617 n.19. She does not argue, for example, that the non-Seneca corporation currently mining on the Allegany Territory is tax exempt. The Supreme

Court has found that no tax exemption exists solely on the basis of status. *Id.* (citing *Choteau*, 283 U.S. at 693-96).

Plaintiffs' attenuated connection to the land, and the extraction of materials from that land, makes it impossible to conclude a tax on A & F Trucking's gravel income constituted a tax on Seneca Nation land. By 2010, A & F Trucking was a thriving, diversified business with seven employees and a seven-figure income. One of its employees sold surplus inventory from a dormant gravel work site on the property of Janice Crowe. Crowe and the Seneca Nation both received monthly royalty payments from A & F Trucking for the use of their property. This is not, in the end, how a direct connection to Indian land looks.

D. Plaintiffs Under-Reported Their 2010 Income, So They Are Not Entitled to a Tax Refund.

Plaintiffs' refund claim fails for a more basic reason. Plaintiffs appear to concede that they inadvertently under-reported the gross receipts for A & F Trucking on their 2010 income tax return. (¶ 67.) A & F Trucking's total income in 2010 actually amounted to over $950,000 – not the $711,457 they reported to the IRS. (*Id.*) Because Plaintiffs under-reported their gross receipts by $240,785.92, they still would not be entitled to a refund even if they succeed on their claim that $184,552 of gravel income was tax exempt. That is, even if Plaintiffs' gravel income was non-taxable under the theory they propose, they have failed to establish that they overpaid the amount they actually owed to the IRS for 2010. Thus, they cannot prevail in a refund case.

The basic premise of a refund action is that a plaintiff must establish that she overpaid her taxes in order to prevail, no matter the underlying legal basis of her refund claim. *Lewis*, 284 U.S. at 283. "[T]he ultimate question presented for decision, upon a claim for refund, is whether taxpayer has overpaid his tax. This involves a redetermination of the entire tax liability. While no new assessment can be made, after the bar of the statute has fallen, the taxpayer, nevertheless,

is not entitled to a refund unless he has overpaid his tax." *Id.* There is no case or controversy where a plaintiff is correct about the legal issue for which she sues, but can establish no resulting damages. *Id.* That is, Plaintiffs cannot obtain an advisory opinion establishing that some of their income is tax exempt where they cannot prevail on the primary issue of whether they are due a refund of income taxes. *See United States v. Janis*, 428 U.S. 433, 440 (1976) ("It is not enough for him to demonstrate that the assessment of the tax for which refund is sought was erroneous in some respects.") The United States has not waived sovereign immunity for a declaratory judgment in tax cases that a taxpayer *would otherwise* be entitled to a refund (if not for the fact that she has not actually overpaid the amount due).

In order to prevail on their claim for refund, Plaintiffs first must make an affirmative showing, based on specific evidence, that they are entitled to the exclusion. *LaBow v. Comm'r*, 763 F.2d 125, 131-32 (2d Cir. 1985). Then, Plaintiffs must demonstrate that they paid more than "the amount which might have been properly assessed and demanded." *Lewis*, 284 U.S. at 283. Because Plaintiffs under-reported their gross income, the IRS was permitted to assess taxes on nearly $250,000 of additional business income and demand payment. This amount is higher than the exemption of gravel income they claim here. To date, Plaintiffs have not pointed to any evidence of overpayments sufficient to entitle them to a refund.

Plaintiffs reported on their 2010 tax return that A & F Trucking earned $711,457 in total gross receipts in 2010. (¶ 65.) The IRS determined that the $184,552 in gravel income that Plaintiffs reported as tax exempt was, in fact, taxable. (*Id.*; ¶ 72.) Accordingly, Plaintiffs were assessed an additional $6,113 in income tax. (¶ 72.) After review of their bank records for 2010, Plaintiffs appear to concede that they inadvertently under-reported A & F Trucking's total gross receipts by nearly $250,000. (¶ 67.) Alice Perkins does not known how the figure $711,457

came to be reported on her 2010 income tax return. (*Id.*) Plaintiffs were not involved in the determination of how income and expenses were reported by their income tax preparer on their 2010 income tax return. (¶ 68.) Alice Perkins simply "assumed that he was doing what was supposed to be done." (*Id.*) The $711,457 figure appears on a summary sheet that Alice Perkins did not prepare, and she cannot identify its author or explain how it was created. (¶ 71.)

Plaintiffs also cannot establish that they are due a refund because of accuracy-related penalties, late filing penalties, and interest. Plaintiffs' self-reported income tax was not accurate. (*E.g.*, ¶ 67.) And Plaintiffs did not timely file their 2010 income tax return. (¶ 64.) In any case, Plaintiffs did not challenge the accuracy-related penalties, failure-to-file penalties, or interest in their refund claim to the IRS. (Doc. No. 7 at ¶ 8 & Ex. A.) So Plaintiffs have failed to exhaust administrative remedies with regard to $3,750.68 of the amount they seek in this lawsuit, and are barred from recovering that amount. (*Id.* & ¶ 72; *see also* 26 U.S.C. § 7422(a).)

Plaintiffs have asserted that they are entitled to a refund of exactly $9,863.68 because $184,552 of their income was improperly categorized by the IRS as taxable. *See, e.g.*, Doc. No. 7, Ex. A. The summary judgment evidence establishes that Plaintiffs' gross income was over 33% higher than they reported to the IRS. (¶ 67.) To date, over three months after the close of discovery, Plaintiffs have not identified additional non-taxable income or business expenses in 2010 that entitle them to a refund, since they should have paid income tax on an additional $240,785.92. Plaintiffs have not supplemented their disclosures to provide a factual basis to show that they overpaid their tax obligation.[5] That is, the summary judgment evidence shows

[5] Plaintiffs should be barred from providing evidence in their summary judgment motion or response to the United States' summary judgment motion that was not provided in discovery.

that Plaintiffs under-reported their gross income by an amount far greater than the income they claim to be tax exempt. Accordingly, Plaintiffs cannot meet their burden in this litigation – to show that they paid more in income taxes than actually was due.

V. Conclusion

Judgment in favor of the United States is required for three separate reasons. First, the Canandaigua Treaty and 1842 Treaty do not convey or preserve a tax exemption for an individual's income "derived directly from the land" on Seneca Nation territories, and there is no general exemption presumed in the law. No other court has found the tax exemption that Plaintiffs propose, and the Tax Court rejected Plaintiffs' identical claims for prior tax years.

Second, A & F Trucking's gravel income in 2010 manifestly was not "derived directly from the land" so as to satisfy any such test. The material facts are undisputed, and show that Plaintiffs did not own the surface land, did not own the gravel they sold, and their gravel income was not "directly derived" from the Allegany Territory. Finally, the summary judgment evidence establishes that Plaintiffs under-reported their gross income in 2010, so they are not entitled to a refund even if they prevail on the legal basis of their claim. Plaintiffs under-reported their income by nearly $250,000, so they cannot recover a refund in this lawsuit.

For these three separate reasons, summary judgment is appropriate and judgment should be entered in favor of the United States.

Respectfully Submitted,

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