19-2481

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ALICE PERKINS, FREDRICK PERKINS,

Petitioners-Appellants

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee

ON APPEAL FROM THE DECISION OF THE
UNITED STATES TAX COURT

BRIEF FOR THE COMMISSIONER

RICHARD E. ZUCKERMAN
Principal Deputy
Assistant Attorney General

TRAVIS A. GREAVES
Deputy Assistant Attorney General

FRANCESCA UGOLINI **(202) 514-1882**
JACOB CHRISTENSEN **(202) 307-0878**
Attorneys
Tax Division
Department of Justice
Post Office Box 502
Washington, D.C. 20044

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STATEMENT OF JURISDICTION

On August 26, 2014, the Commissioner of Internal Revenue mailed a notice of deficiency, pursuant to § 6212 of the Internal Revenue Code ("I.R.C."), 26 U.S.C., to Alice and Fredrick Perkins determining federal income tax deficiencies and penalties for the years 2008, 2009, and 2010. (JA6–27.) On November 17, 2014, within 90 days after the mailing of the notice of deficiency, the Perkinses mailed a petition to the Tax Court for a redetermination of the tax deficiencies

and penalties asserted for the 2008 and 2009 years, but not for 2010. (JA4–28.) The petition was received and filed by the court on November 26, 2014, and is deemed to have been timely filed under I.R.C. §§ 6213(a) and 7502. The Tax Court had jurisdiction under I.R.C. §§ 6213(a) and 7442 to redetermine the tax and penalties for the 2008 and 2009 years.

On May 30, 2019, the Tax Court entered a final decision sustaining the Commissioner's deficiency determinations and certain of the penalties for both years. (JA197.) On August 19, 2019, within 90 days after entry of the decision, the Perkinses timely filed a notice of appeal. (JA206–209); *see* I.R.C. § 7483. This Court has jurisdiction under I.R.C. § 7482(a)(1).

STATEMENT OF THE ISSUE

Whether the Tax Court correctly held that neither the 1794 Treaty of Canandaigua, 7 Stat. 44 (Nov. 11, 1794), nor the 1842 Treaty with the Seneca, 7 Stat. 586 (May 20, 1842), exempts Alice Perkins, an enrolled member of the Seneca Nation of Indians, from having to pay federal income tax on revenue generated by her wholly-owned business from selling gravel mined from common tribal land in which another

tribe member owned the sole possessory right to use the surface of the land.

STATEMENT OF THE CASE

The Perkinses filed this case in the Tax Court seeking a redetermination of federal income tax deficiencies and penalties determined by the Commissioner with respect to the Perkinses' individual income tax years 2008 and 2009. The Perkinses claimed that income they earned from selling gravel mined from the Seneca Nation's land, pursuant to a mining permit issued by the Seneca Nation, was exempt from federal income tax under certain treaties.[1]

The Tax Court granted summary judgment to the Commissioner with respect to the tax deficiencies, holding that the Perkinses' gravel income was not exempt from federal income taxation. The court also sustained the Commissioner's imposition of late-filing penalties for both 2008 and 2009. (JA142–171, 197.)

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[1] The Perkinses filed a related tax refund suit with respect to their 2010 year in the United States District Court for the Western District of New York, which we address *infra*.

A. The relevant facts

Alice Perkins is an enrolled member of the Seneca Nation of Indians. (JA38, 94.) During 2008 and 2009, the years at issue, she resided with her husband, Fredrick Perkins, on the Allegany territory of the Seneca Nation located in the State of New York. (JA126.) Fredrick Perkins is not a member of the Seneca Nation. (JA89.)

In 1985, Alice formed A&F Trucking, a sole proprietorship that she registered with the Cattaraugus County Clerk's office in New York. (JA95.) In 2008, the Seneca Nation issued a permit authorizing A&F Trucking to mine gravel during 2008 and 2009 from certain land of the Seneca Nation located in the Allegany territory. (JA39, 91, 144.) In exchange for issuing the mining permit, the Seneca Nation required that A&F Trucking pay the Seneca Nation royalties from the proceeds of the company's gravel sales to customers. (JA130 (¶ 25).) Alice Perkins, through A&F Trucking, mined and sold gravel in both 2008 and 2009. In June 2009, the Seneca Nation withdrew A&F Trucking's mining permit, and A&F Trucking ceased its mining operations. (JA91, 103.)

In the proceedings below, the Perkinses admitted that the gravel at issue "was taken from land that is and was part of the common lands recognized by federal treaties to be the territories of the Seneca Nation." (JA39.) Under Seneca Nation law and custom, "all minerals, including sand and gravel, within any Seneca Nation lands is the sole and exclusive property of the Seneca Nation." (JA102); Seneca Nation of Indians, Sand & Gravel Permit Law § 301. The Perkinses also admit that "no individual [Seneca member] holds a fee simple deed to any lands within the territories of the Seneca Nation." (JA90.)

The Seneca Nation may grant to individual Seneca members a non-fee, lifetime possessory interest to use the surface of its tribal land, while retaining for the tribe a reversionary interest in the same. (JA90, 129.) Significantly, in this case, the possessory interest in the surface of the land from which the gravel at issue was mined was *not* owned by Alice Perkins (or her husband)—but by Alton Jimerson and, later, his granddaughter, Janice Crowe, both members of the Seneca Nation. *See* Plaintiffs' Response and Objections to Defendant's Rule 56 Statement of Undisputed Material Facts ¶¶ 8, 10, 42, *Perkins v. United States*, No.

16-cv-00495 (W.D.N.Y.), ECF No. 72-1 (filed Jun. 15, 2018) (accessible through PACER).[2]

Section 302 of the Seneca Nation's Sand & Gravel Permit Law prohibits the mining of gravel from Seneca Nation land without the consent of the surface landowner. (JA102); Seneca Nation of Indians, Sand & Gravel Permit Law § 302(B). As the surface owners of the land containing the gravel pit in this case, Alton Jimerson and, later, Janice Crowe, granted their permission for A&F Trucking to conduct mining operations on their land, from which the gravel at issue was extracted.

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[2] This Court may take judicial notice of the Perkinses' statements and representations in the cited document, which they filed with the district court in their related refund suit. *See infra* p. 8. Therein the Perkinses identified certain relevant facts that they agree are correct and are not in dispute, including that they did not own the possessory interest to use the surface of the land from which the gravel at issue was mined. The Perkinses' admissions in the cited document are not hearsay in this proceeding, Fed. R. Evid. 801(d)(2)(A), and may be considered by this Court after taking judicial notice of them, Fed. R. Evid. 201(b)(2), (d). Although this Court generally will not take judicial notice of a document filed in another court "for the truth of the matters asserted" therein, *Liberty Mutual Ins. Co. v. Rotches Pork Packers, Inc.*, 969 F.2d 1384, 1388 (2d Cir. 1992), it has done so where, as here, the accuracy of the statement is undisputed, *Young v. Selsky*, 41 F.3d 47, 50 (2d Cir. 1994); *cf.* Wright & Graham, Federal Practice & Procedure: Evidence 2d § 5106.4 (2d ed. 2005) ("Noticing hearsay might be justifiable for some nonhearsay purpose or where it falls within an exemption or exception.") (citing cases).

See Plaintiffs' Response and Objections to Defendant's Rule 56 Statement of Undisputed Material Facts ¶¶ 15–17, 38, *Perkins v. United States*, No. 16-cv-00495 (W.D.N.Y.), ECF No. 72-1. Janice Crowe, as the surface landowner during the years in question, received a share of the royalties from A&F Trucking's gravel sales in 2008 and 2009. *Id.* at ¶ 35.

B. The Perkinses' tax returns

In October 2011, well after the filing due dates, *see* I.R.C. § 6072(a), the Perkinses filed joint individual income tax returns for the years 2008 and 2009. (JA64–74, 75–85.) On their returns, the Perkinses claimed that the revenue generated from A&F Trucking's gravel sales during 2008 and 2009 was exempt from federal income tax under the General Allotment Act of 1887, 24 Stat. 388. (JA73–74, 84–85.) They made the same claim on their 2010 return with respect to gravel sales from leftover stockpiles in that year. (Appellants' Br. 5.)

After an audit, the IRS issued a notice of deficiency to the Perkinses, determining income tax deficiencies for the years 2008, 2009, and 2010. (JA6–27.) The tax deficiencies determined by the IRS were based, in part, on the Commissioner's determination that the revenue

generated each year from A&F Trucking's gravel sales was not exempt from federal income tax, as well as adjustments to various other items reported on the Perkinses' joint returns. (*See* JA18–23.) The IRS also imposed a late-filing penalty under I.R.C. § 6651(a)(1) and an accuracy-related penalty under I.R.C. § 6662(a) for each of the three years. (JA6, 23–26.)

C. The Tax Court proceedings

1. The parties' positions

In November 2014, the Perkinses filed a petition in the Tax Court challenging the Commissioner's determinations with respect to the 2008 and 2009 years. (JA4–28.) A year and a half later, in June 2016, the Perkinses filed a separate tax refund suit in the United States District Court for the Western District of New York with respect to the year 2010.[3] *Perkins v. United States*, No. 16-cv-00495 (W.D.N.Y.). In both cases, the Perkinses challenged the Commissioner's determination

[3] "Federal income taxes are levied on an annual basis; each year is the origin of a new liability and a separate cause of action." *Bush v. Commissioner*, 175 F.2d 391, 392 (2d Cir. 1949) (citing *Commissioner v. Sunnen*, 333 U.S. 591, 598 (1948)).

that their income from A&F Trucking's gravel sales was not exempt from federal income tax.

During the Tax Court proceedings below, the Perkinses—apparently recognizing that the General Allotment Act (on which they had relied to claim tax exemption on their returns and in their Tax Court petition) did not apply to the Seneca Nation—asserted a new theory for tax exemption based instead on two federal treaties: the 1794 Treaty of Canandaigua, 7 Stat. 44 (Nov. 11, 1794), and the 1842 Treaty with the Seneca, 7 Stat. 586 (May 20, 1842). (JA104, 149–150.) Specifically, the Perkinses invoked Article 3 of the Canandaigua Treaty, which 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: but it shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

Treaty of Canandaigua, art. 3, 7 Stat. 44, 45; (JA113). The Perkinses also relied on Article 9 of the 1842 Treaty, which 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.

1842 Treaty with the Seneca, art. 9, 7 Stat. 586, 590; (JA110). After conducting discovery, the Commissioner filed a motion for summary judgment contending that neither treaty exempted the Perkinses' gravel income from federal income taxation and that the Perkinses were also liable for the asserted penalties. (Doc. 14, 16.)

2. The Tax Court's opinion

The Tax Court, in a reviewed opinion, held that neither the Canandaigua Treaty nor the 1842 Treaty exempted the Perkinses from having to pay federal income tax on their gravel income and, accordingly, granted the Commissioner's motion for summary judgment on the issue of taxability.[4] *Perkins v. Commissioner*, 150 T.C. 119 (2018); (JA142–171, 172–173). Writing for the court, Judge Holmes

[4] Aside from challenging the taxability of the gravel income in question, the Perkinses' petition in the Tax Court did not contest any of the other adjustments to tax that the IRS made in the notice of deficiency for the 2008 and 2009 years. The Tax Court, accordingly, deemed the Perkinses as having conceded those adjustments under Tax Court Rule 34(b)(4). (JA146 n.3.)

held that the Canandaigua Treaty's promise not to "disturb" the Seneca Nation in the "free use and enjoyment" of its lands merely secured the tribe's right to the possession and enjoyment of its lands and did not create a personal tax exemption for individual members of the Seneca Nation. (JA150–157.) The court further held that the 1842 Treaty prohibited only the taxation of real property and, therefore, did not extend to income from the sale of gravel that had been severed from the Seneca Nation's land through A&F Trucking's mining operations. (JA157–159.) The court also rejected the Perkinses' contention that the Supreme Court's decision in *Squire v. Capoeman*, 351 U.S. 1 (1956), somehow created a general exemption for all income "derived directly" from Indian land. (JA153–156.)

In reaching these conclusions, the Tax Court disagreed with the district court's conclusions in an interlocutory order denying the Government's motion to dismiss the Perkinses' related refund suit for failure to state a claim. *See Perkins v. United States*, 120 A.F.T.R.2d 2017-5412, 2017 WL 3326818 (W.D.N.Y. 2017). In that interlocutory order, the district court relied on dicta from two circuit court cases to conclude that "taxing income from gravel mined on land that is part of

the Seneca territory interferes with 'the free use and enjoyment' of that land," in violation of the Canandaigua Treaty. 2017 WL 3326818, at *3. The district court also ruled that the 1842 Treaty's tax exemption for land included the "gravel . . . that make[s] up" the land, so that the 1842 Treaty also prohibited taxation of the Perkinses' income from gravel-mining operations. *Id.* at *5.[5]

Judges Lauber and Pugh authored a concurring opinion for the Tax Court, which was joined by eight other judges. (JA162–169.) The concurring judges agreed with the Tax Court's lead opinion that the Canandaigua Treaty did not exempt the Perkinses from having to pay federal income tax on the revenue generated from A&F Trucking's gravel sales. (JA162.) With respect to the 1842 Treaty, however, the concurring opinion concluded that summary judgment for the Commissioner was appropriate on grounds different from those relied on by the court: "first, that the 1842 Treaty, like the Canandaigua treaty, did not confer rights on individual members of the Seneca Nation, and second, that the 1842 Treaty addresses exemption only

[5] The parties in the district court proceeding subsequently filed cross-motions for summary judgment, which are now pending before the district court judge.

from State, not Federal, taxes." (JA162.) Chief Judge Foley dissented because, according to him, "the opinion of the Court fail[ed] to address the requisite legal and factual issues" regarding taxability under the 1842 Treaty and, therefore, summary judgment was not appropriate. (JA170–171.)

On the issue of penalties, the Tax Court sustained the Commissioner's imposition of a late-filing penalty under I.R.C. § 6651(a)(1) and granted the Commissioner summary judgment as to that penalty for both tax years. (JA159–160, 172–173.) But the court denied summary judgment with respect to the accuracy-related penalty under I.R.C. § 6662(a), finding that the Commissioner had not met his burden of production with respect to that penalty. (JA160–161, 172–173.) The Commissioner subsequently stipulated that the Perkinses were not liable for accuracy-related penalties under § 6662(a) for either tax year at issue, thus resolving the sole remaining issue in the case. (JA195–196.)

On May 30, 2019, the Tax Court entered a final decision sustaining income tax deficiencies in the amounts of $198,696 and $203,355 and late-filing penalties in the amounts of $49,645 and

$50,837 for the 2008 and 2009 years, respectively, as had been determined by the Commissioner. (JA197.)

SUMMARY OF ARGUMENT

Indians, as citizens of the United States, are subject to the same requirement to pay federal taxes as are other citizens, unless specifically exempted by a treaty or act of Congress dealing with Indian affairs. The Perkinses concede they are not exempt from federal income tax under any act of Congress, and the Tax Court correctly held that neither the Canandaigua Treaty nor the 1842 Treaty with the Seneca exempts them from having to pay federal income tax on the revenue generated from A&F Trucking's gravel sales at issue in this case.

1. The Canandaigua Treaty's guaranty not to "disturb" the Seneca Nation in the "free use and enjoyment" of its land cannot reasonably be construed as creating an exemption from federal taxation. The meaning of this treaty provision is merely to secure the Seneca Nation's right to the peaceful use and possession of its lands, a meaning that is confirmed by the treaty's historical context and narrow purpose. Because the Canandaigua Treaty cannot reasonably be

construed as creating a tax exemption, the canon of liberally construing treaties in favor of the Indians does not apply in this context.

Even if the Canandaigua Treaty were construed as creating an income tax exemption for individual Seneca members, it still would not exempt the Perkinses' income from selling gravel extracted from tribal land in which they had no ownership interest. Other than the outlier ruling by the district court in the Perkinses' related refund suit, the courts have consistently rejected claims that income derived from common tribal land, or land allotted to another Indian, is exempt from federal income taxation. To conclude otherwise in this case would be to grant an exemption to the Perkinses solely because Alice Perkins is a member of the Seneca Nation, a proposition that is contrary to Supreme Court precedent.

2. The 1842 Treaty likewise does not create an exemption from federal income taxes for the Perkinses' gravel income, and summary judgment for the Commissioner was appropriate. First, the 1842 Treaty expressly exempts only the Seneca Nation's "lands" from tax, and that exemption does not extend to income derived from the land, including the Perkinses' gravel income in this case. Second, the treaty's

tax exemption for land does not confer an exemption on individual Seneca members, like Alice Perkins, with respect to land in which they have no possessory ownership interest. Third, the treaty's exemption prohibits only state, not federal, taxation, and thus does not exempt the Perkinses' gravel income from federal income taxation. The Perkinses' arguments to the contrary are unavailing.

3. The Perkinses' opening brief does not address the late-filing penalties imposed for the 2008 and 2009 years; therefore, they have waived any challenge to those penalties. The Tax Court correctly determined that the Perkinses also conceded the other adjustments to tax made in the IRS's notice of deficiency by not raising them in their Tax Court petition.

The Tax Court's decision is correct and should be affirmed.

ARGUMENT

The Tax Court correctly held that the Perkinses are subject to federal income tax on the revenue generated from A&F Trucking's gravel sales

Standard of review

This Court reviews *de novo* the Tax Court's grant of summary judgment. *Williams v. Commissioner*, 718 F.3d 89, 91 (2d Cir. 2013); *see also* I.R.C. § 7482(a)(1). The interpretation and application of a

treaty to the underlying facts are questions of law that are also reviewed *de novo*. *Blondin v. Dubois*, 238 F.3d 153, 158 (2d Cir. 2001). This Court "may affirm summary judgment on any ground supported by the record." *McElwee v. County of Orange,* 700 F.3d 635, 640 (2d Cir. 2012).

A. Individual Indians are subject to federal taxes unless specifically exempted by a treaty or act of Congress dealing with Indian affairs

The Constitution grants Congress "plenary power to legislate in the field of Indian affairs," *United States v. Lara*, 541 U.S. 193, 200 (2004); *see* U.S. Const., art. 1, § 8, cl. 3; and "[t]he right of tribal self-government is ultimately dependent on and subject to the broad power of Congress," *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). Congress also has the "comprehensive" power to lay and collect taxes. *Steward Mach. Co. v. Davis*, 301 U.S. 548, 581–582 (1937). And the federal government, unlike state governments, is not subject to restrictions on the taxation of commercial activity on Indian reservations. *See, e.g.*, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973).

Since 1924, all American Indians have been citizens of the United States. Indian Citizenship Act of 1924, ch. 233, 43 Stat. 253. And it has long been established that generally-applicable federal tax statutes apply to Indians, as they do other citizens, without the necessity for any explicit language to that effect. *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 116–17 (1960); *Superintendent of Five Civilized Tribes v. Commissioner*, 295 U.S. 418, 419–20 (1935); *Choteau v. Burnet*, 283 U.S. 691, 694–95 (1931). As relevant here, the Internal Revenue Code taxes "every individual" on "all income from whatever source derived," I.R.C. §§ 1, 61(a), unless the income is specifically excluded elsewhere in the Code, *see* I.R.C. §§ 101–140. The federal tax laws must nevertheless be applied "with due regard to any treaty obligation of the United States which applies to [the] taxpayer." I.R.C. § 894(a)(1).

Accordingly, Indians are subject to the same requirement to pay federal income taxes as are other American citizens, unless exempted by a treaty or separate act of Congress dealing with Indian affairs. *Squire v. Capoeman*, 351 U.S. 1, 6 (1956) ("in the ordinary affairs of life, not governed by treaties or remedial legislation, [Indians] are subject to

the payment of income taxes as are other citizens"); *United States v. King Mountain Tobacco Co., Inc.*, 899 F.3d 954, 960 (9th Cir. 2018) ("Indians—like all citizens—are subject to federal taxation unless expressly exempted by a treaty or congressional statute.").

In this case, the Perkinses do not contend that their income from A&F Trucking's gravel sales during the years at issue is exempt from tax under any provision of the Internal Revenue Code or other act of Congress. As the Perkinses now concede (Br. 13), the General Allotment Act has no application here because it specifically excluded "the reservations of the Seneca Nation of New York Indians in the State of New York" from its provisions. General Allotment Act of 1887, § 8, 24 Stat. 388, 391 (codified at 25 U.S.C. § 339). And, to the extent the Perkinses are relying on Article 1, § 2, cl. 3 of the United States Constitution, which refers to "Indians not taxed," as providing a tax exemption (*see* Br. 20), such argument is entirely without merit. *Lazore v. Commissioner*, 11 F.3d 1180, 1187–88 (3d Cir. 1993).

Instead, the Perkinses contend, as they did in the Tax Court, that their income from A&F Trucking's gravel sales is exempt from federal income tax under the Canandaigua Treaty and the 1842 Treaty. (Br. 3–

4.) Contrary to the Perkinses' argument, however, the relevant inquiry in examining these treaty claims is *not* whether the parties to the treaties "contemplated the *imposition* of federal income tax" or "intended to *impose*" taxes under those treaties. (Br. 20 (emphases added).) Rather, because the general taxing statute applies to the Perkinses as to other citizens, *see* I.R.C. §§ 1, 61(a), the issue instead is whether either treaty creates an *exemption* from the tax that covers the Perkinses' gravel income in this case. *King Mountain*, 899 F.3d at 960. The Tax Court correctly held that neither treaty creates such an exemption and, therefore, that the Perkinses must pay federal income tax on the revenue generated from A&F Trucking's gravel sales.

B. The Canandaigua Treaty does not exempt the Perkinses' gravel income from federal income taxation

1. The relevant rules of treaty construction

In construing Indian treaties, courts "may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431–32 (1943). With regard to Indian treaty-based tax exemptions, the Supreme Court has instructed that

such an exemption must "derive plainly" from the treaty itself. *Superintendent of Five Civilized Tribes*, 295 U.S. at 420. "[T]o be valid, exemptions to tax laws should be clearly expressed." *Capoeman*, 351 U.S. at 6; *see also Choteau*, 283 U.S. at 696 ("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."); *Lazore*, 11 F.3d at 1184 ("an exemption must be rooted in the text of a treaty"). Moreover, the Supreme Court has "repeatedly said that tax exemptions are not granted by implication[,] [and it] has applied that rule to taxing acts affecting Indians as to all others." *Mescalero Apache Tribe*, 411 U.S. at 156.

On the other hand, Supreme Court precedent also instructs that Indian treaties "should be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) (internal citations omitted). This principle, however, "comes into play only if [the] treaty contains language which can reasonably be construed to confer income exemptions." *Holt v. Commissioner*, 364 F.2d 38, 40 (8th Cir. 1966); *accord Lazore*, 11 F.3d at 1185; *Chickasaw Nation v. United*

States, 208 F.3d 871, 884 (10th Cir. 2000), *aff'd*, 534 U.S. 84 (2001); *cf. Ramsey v. United States*, 302 F.3d 1074, 1078–79 (9th Cir. 2002) ("[W]hen reviewing a claim for a federal tax exemption, we do not engage the canon of construction favoring the Indians unless express exemptive language is first found in the text of the statute or treaty. Only if such language exists, do we consider whether it could be 'reasonably construed' to support the claimed exemption.").[6]

Even in cases in which the canon of construction regarding the resolution of ambiguities in favor of Indians applies, however, that canon "does not permit reliance on ambiguities that do not exist." *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 506 (1986); *see also Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001) (canons of construction, including the Indian canon, "are not mandatory rules"). Thus, "even Indian treaties cannot be rewritten or expanded beyond

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[6] In *Ramsey*, the Ninth Circuit elaborated on its requirement that a treaty include "express exemptive language" to support a federal tax exemption, stating that the treaty language "need not explicitly state that Indians are exempt from the specific tax at issue; it must only provide evidence of the federal government's intent to exempt Indians from taxation." 302 F.3d at 1078. Thus, it appears that the Ninth Circuit's formulation, as clarified in *Ramsey*, and that adopted by the Third, Eighth, and Tenth Circuits are substantially similar in substance.

their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties." *Choctaw Nation of Indians*, 318 U.S. at 432.

2. The Canandaigua Treaty cannot reasonably be construed as creating a federal tax exemption for the Perkinses' gravel income

The Perkinses argue, as they did in the Tax Court, that Article 3 of the Canandaigua Treaty exempts them from having to pay federal income tax on the revenue generated from A&F Trucking's gravel sales. Specifically, the Perkinses contend that the treaty's guaranty not to "disturb" the Seneca Nation in the "free use and enjoyment" of its land includes a tax exemption for income derived directly from the land. (Br. 3–4, 10, 18.) The Tax Court properly rejected this contention. (JA150–157.)

Article 3 of the Canandaigua Treaty does not expressly create, and cannot reasonably be construed as creating, a federal tax exemption. The meaning of the treaty's guaranty not to "disturb" the Seneca Nation in the "free use and enjoyment" of its lands is to secure to the tribe only its right to the peaceful possession and use of its lands, the boundaries of which were redefined by the treaty. As the Tax Court correctly

stated, "[b]y its express terms, the treaty protects the Seneca Nation's lands from being 'disturbed,' which is different from creating a tax exemption." (JA152.) Indeed, taxation is not referenced anywhere at all in the Canandaigua Treaty.

Moreover, the Tax Court's conclusion that this provision does not create a tax exemption is strongly supported by the rest of the sentence: "but it shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase." Treaty of Canandaigua, art. 3. As the Tax Court explained (JA152), the language on which the Perkinses rely, read in context with the rest of the sentence, makes no sense as a tax-exemption provision; it only makes sense when interpreted as merely securing to the Seneca Nation its claim to, and the right to the peaceful possession and use of, its treaty-defined lands.

The Tax Court's reading of the treaty is further confirmed by the treaty's historical context. "[T]he history, negotiations, and practical construction adopted by the parties are all relevant to treaty interpretation." *Seneca Nation of Indians v. New York*, 382 F.3d 245, 259 (2d Cir. 2004). Indian treaties also "are to be construed, so far as

possible, in the sense in which the Indians understood them." *Id.* (quotation omitted). The purpose of the Canandaigua Treaty was to address the Seneca's dissatisfaction with the land boundary drawn by the 1784 Treaty of Fort Stanwix and to establish a permanent peace between the United States and the Six Nations of the Iroquois Confederacy—the Senecas in particular. *See id.* at 256; *see generally Seneca Nation of Indians v. New York*, 206 F. Supp. 2d 448, 484–93 (W.D.N.Y. 2002). Thus, the primary focus of the treaty was to resolve the Seneca's land-boundary complaint. This was accomplished by redefining a mutually-agreeable boundary for the Seneca Nation's lands, while also acknowledging the lands previously reserved to the other Iroquois Nations. Treaty of Canandaigua, arts. 2, 3. The Perkinses concede in their brief that, through this treaty, "Congress intended to secure and guarantee to the Seneca Nation and its people the right of possession and enjoyment of their lands . . . by making these lands inalienable." (Br. 35.) And they have pointed to nothing in the surrounding history or negotiations suggesting that either party would have understood the treaty to encompass the entirely different matter of taxation. *Cf. Superintendent of Five Civilized Tribes*, 295 U.S.

at 421 ("Non-taxability and restriction upon alienation are distinct things.").

The Perkinses assert that the Seneca's understanding of the Canandaigua Treaty was "embodied in the Two-Row Wampum," which they say "signif[ied] the two peoples–Indian and European—coexisting peacefully, neither imposing their laws or religion on the other." (Br. 16.)[7] The Perkinses thus contend that "[t]axing the income derived from [Seneca Nation] lands would infringe upon the Seneca Nation's sovereignty . . . ." (Br. 9, 35.) This argument is without merit.

In *Chickasaw Nation*, 208 F.3d 871, the Tenth Circuit found no merit to the tribe's contention in that case that it was "a sovereign political entity immune from federal taxation." *Id.* at 880. The court stated that "[i]t is well settled that 'the right of tribal self-government is ultimately dependent on and subject to the broad power of Congress.' " *Id.* (quoting *White Mountain Apache Tribe*, 448 U.S. at 143). The court further noted that "the Supreme Court has never held unconstitutional a federal tax applied to Indians." *Id.* Moreover, the Third Circuit has

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[7] The Perkinses did not submit any record evidence to establish the Seneca's purported understanding of the Canandaigua Treaty, including any evidence related to the Two-Row Wampum.

specifically rejected the argument that the Two-Row Wampum supports a tax exemption under the Canandaigua Treaty. *Lazore*, 11 F.3d at 1186–87. The tribe members in that case, like the Perkinses here, argued that the Two-Row Wampum reflects the Iroquois Nations' understanding that the Canandaigua Treaty "recognizes them as a separate nation over which the United States has no power, of taxation or otherwise." *Id.* at 1186. But the Third Circuit held that the tribe's asserted understanding of the treaty was insufficient to create an exemption from federal income tax "in the absence of some textual support" in the treaty itself. *Id.* at 87. The Perkinses' arguments here fail for the same reasons.

The courts in other cases have consistently rejected Indian claims for tax exemption based on the Canandaigua Treaty and other Indian treaties with similar language. In *Cook v. United States*, 86 F.3d 1095 (Fed. Cir. 1996), *aff'g*, 32 Fed. Cl. 170 (1994), the Federal Circuit held that the Canandaigua Treaty's guaranty not to disturb the Seneca Nation "in the free use and enjoyment" of its lands—the same language on which the Perkinses rely here—could not reasonably be construed as conferring an exemption from federal excise tax. In *Lazore*, 11 F.3d

1180, *aff'g in relevant part*, T.C. Memo 1992-404 (T.C. 1992), the Third Circuit similarly held that the Canandaigua Treaty did not exempt from federal income tax the wages earned by members of the Mohawk Nation, another party to the treaty. And, in *Jourdain v. Commissioner*, 617 F.2d 507 (8th Cir. 1980), *aff'g*, 71 T.C. 980 (T.C. 1979), the Eighth Circuit held that the Treaty of Greenville, which secured an Indian tribe's right "quietly to enjoy [their lands], hunting, planting, and dwelling thereon so long as they please, without any molestation from the United States," 71 T.C. at 989–90, meant only the right to be free from "interference with the rights of Indians to hunt and otherwise enjoy their land, not the 'right' to be free from federal taxation." 617 F.2d at 509; *see also Red Lake Band of Chippewa Indians v. United States*, 861 F. Supp. 841 (D. Minn. 1994) (extending the holding in *Jourdain* to conclude that the Treaty of Greenville also did not create a tax exemption for income "derived directly" from tribal land).

The Eighth Circuit's decision in *Jourdain* strongly supports the Tax Court's decision in this case by drawing a clear distinction between a tribe's right to the "quiet enjoyment" of its lands "without molestation" (guaranteed by the treaty in that case) from the very

different right to be free from federal taxation. Similarly, here, the Canandaigua Treaty secures to the Seneca Nation the right not to be "disturb[ed]" "in the free use and enjoyment" of its lands, but the treaty is perfectly silent about taxation—an entirely different matter. To our knowledge, aside from the district court's interlocutory order in the Perkinses' refund suit, no court has ever held that the Canandaigua Treaty creates an exemption from federal taxes.

Because the Canandaigua Treaty cannot reasonably be construed as creating a federal tax exemption, the canon of liberally construing treaties in favor of the Indians is of no moment here, and the Perkinses' reliance on it (Br. 24) is misplaced.

3. The Perkinses' assertion that their gravel income was "derived directly" from the land makes no difference

The Tax Court properly rejected the Perkinses' argument that the Canandaigua Treaty exempts them from tax on their gravel income because it was "derived directly" from Seneca Nation land. (JA153–156.) As we demonstrated above, the Canandaigua Treaty cannot reasonably be construed as creating any exemption at all from federal taxes—not for the land itself, let alone for income derived from the land.

This is especially true in this case, however, where the Perkinses did not even own the surface rights to the land from which the gravel at issue was derived, which rights were instead owned by another tribe member.

The land from which the Perkinses mined the gravel at issue in this case was "part of the common lands recognized by federal treaties to be the territories of the Seneca Nation." (JA39.) And, under Seneca Nation law and custom, "all minerals, including sand and gravel, within any Seneca Nation land is the sole and exclusive property of the Seneca Nation." (JA102); Seneca Nation of Indians, Sand & Gravel Permit Law § 301. Moreover, as the Perkinses have admitted, the non-fee, possessory interest to use the surface of the land from which the gravel at issue was extracted in this case was owned by another tribe member—not by the Perkinses. (JA90, 129); Plaintiffs' Response and Objections to Defendant's Rule 56 Statement of Undisputed Material Facts ¶¶ 8, 10, 42, *Perkins v. United States*, No. 16-cv-00495 (W.D.N.Y.), ECF No. 72-1. Alice Perkins apparently owned the non-fee, possessory right to use the surface of the land located adjacent to the

gravel pit, but not the land on which the gravel pit itself was situated.[8] *Id.* ¶ 36.

Thus, even if the Canandaigua Treaty created an exemption from federal income taxes applicable to individual Seneca members (it does not), it still would not exempt the *Perkinses* from having to pay federal income tax on *their* gravel income. As the Tax Court explained (JA154–55), the courts have consistently rejected claims that income derived from common tribal land, or land allotted to another Indian under either the General Allotment Act or other similar act or treaty, is exempt from tax. *See United States v. Anderson*, 625 F.2d 910 (9th Cir. 1980) (income from cattle ranching, under a tribal license, on tribal land allotted to other Indians was taxable); *Fry v. United States*, 557 F.2d 646 (9th Cir. 1977) (income from logging on reservation land was taxable); *Holt v. Commissioner*, 364 F.2d 38 (8th Cir. 1966) (income from farming and ranching on tribal land, under a tribal grazing permit, was taxable); *Red Lake Band of Chippewa Indians*, 861 F. Supp.

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[8] The Perkinses' brief states that "Alice Perkins had been allotted land on the Seneca Nation territory" and that she "had a right of possession superior to all others . . . ." (Br. 33–34.) The Perkinses' brief, however, fails to clarify for this Court that such land did not include the land from which the gravel at issue was extracted.

841 (D. Minn. 1994) (income from logging activity on tribal land, pursuant to a permit issued by the tribe, was taxable); *Wynecoop v. Commissioner*, 76 T.C. 101 (1981) (dividends from stock received in exchange for mineral leases of tribal lands were taxable).

Similarly, the Perkinses' position that their gravel income is exempt from federal income tax simply because of Alice Perkins's status as a member of the Seneca Nation, and because they extracted the gravel from Seneca Nation land (in which they had no ownership interest) pursuant to a tribal mining permit, is unavailing. The Perkinses admit there was no requirement that a permittee be a member of the Seneca Nation in order to obtain a license to mine gravel from Seneca land. Plaintiffs' Response and Objections to Defendant's Rule 56 Statement of Undisputed Material Facts ¶ 32, *Perkins v. United States*, No. 16-cv-00495 (W.D.N.Y.), ECF No. 72-1. Plainly, the income derived by a non-Indian from mining gravel from Seneca Nation land pursuant to a tribal permit would be subject to federal income taxation. *See Holt*, 364 F.2d at 41. So, too, is the Perkinses' gravel income in this case. To conclude otherwise would be to grant a tax exemption solely because of Alice Perkins's status as a member of the Seneca Nation—a

proposition that Supreme Court precedent plainly prohibits. *Choteau*, 283 U.S. at 694–95.

The district court in the Perkinses' refund suit, in concluding otherwise, relied heavily on dicta in *Lazore*, 11 F.3d 1180, and *Hoptowit v. Commissioner*, 709 F.2d 564 (9th Cir. 1983). *See Perkins*, 2017 WL 3326818, at *3. *Hoptowit*, however, involved a different treaty with very different language. 709 F.2d at 565–66 (land was "set apart . . . for the exclusive use and benefit of" the tribe). And, in *Lazore*, the Third Circuit speculated that the Canandaigua Treaty "*might* create an exemption from taxation on income derived directly from the land." *Lazore*, 11 F.3d at 1185 (emphasis added). As the Tax Court pointed out (JA153–154), however, the *Lazore* court did not explain what part of the treaty or case law led it to make that comment.

As we demonstrated above, the courts have consistently rejected claims that income derived from common tribal land, or land allotted to another Indian, is exempt from federal tax. *See* cases cited *supra* pp. 31–32. The district court erroneously believed that the mere fact the Perkinses had a tribal license to mine gravel on Seneca land was sufficient to confer on them a tax exemption under the treaty,

notwithstanding that they had no ownership interest in the land from which the gravel was extracted. *Perkins*, 2017 WL 3326818, at *3–4. The Indians in most of the cited cases also had a tribal permit to use the land (*e.g.*, for ranching, grazing, or logging) for which they, like the Perkinses here, paid a royalty, but none of those courts found that fact significant in rejecting their claims for tax exemption. *See* cases cited *supra* pp. 31–32. Nor does the reference in Article 3 of the treaty to the Seneca Nation's "Indian friends residing [on Seneca land] and united with them" somehow support the district court's conclusion. The Tax Court correctly interpreted this language as a reference to other tribes living among and united with the Seneca Nation, and not as a reference to individual Seneca members. (JA151); *cf.*, *e.g.*, 1838 Treaty at Buffalo Creek, art. 10, 7 Stat. 550 (Jan. 15, 1838) ("It is agreed with the Senecas that they shall have for themselves and their friends, the Cayugas and Onondagas, residing among them . . .").

Finally, the Supreme Court's decision in *In re New York Indians*, 72 U.S. 761 (1866), also does not support the Perkinses' position. There, the Court invalidated New York State laws that authorized the assessment of a highway tax and a road tax on land that had

constituted the Allegany and Cattaraugus reservations of the Seneca. Those laws permitted the state authorities to enter upon those reservations to survey and lay out roads (and bridges) across the reservations, to construct and repair those roads, and to survey the land for the purpose of making tax assessments designed to meet the expenses of constructing and maintaining the roads. *Id.* at 768. If the taxes were not paid, the State could impose liens and levy on the reservation land occupied by the Seneca. *Id.* at 764. The Court held that this "interference" with the Seneca's "possession and occupation" of the land was prohibited by federal treaties, including the Canandaigua Treaty. *Id.* at 768–69. The Court, therefore, invalidated the tax assessments at issue in that case.

Unlike the state highway and road taxes at issue in *In re New York Indians*, the federal income taxation of the Perkinses' personal income from A&F Trucking's mining operations does not involve entering upon Seneca land or disturbing the Seneca's possession and occupation of their lands through the construction of roads and bridges. And, because the Perkinses had no specific ownership interest in the land from which the gravel at issue was mined, possessing instead only

a tribal mining permit with respect to that land, taxing their income could not possibly result in a lien or levy on the land in connection with any efforts to collect the tax by the IRS.

In sum, requiring the Perkinses to pay federal income tax on their personal income from A&F Trucking's gravel-mining operations on Seneca land in which they had no specific ownership interest cannot possibly result in any burden on "the free use and enjoyment" of the land, within the meaning of the Canandaigua Treaty. The Tax Court correctly held that the Canandaigua Treaty does not exempt the Perkinses' gravel income from federal income taxation.

C. The 1842 Treaty likewise does not exempt the Perkinses' gravel income from federal income taxation

The Tax Court also correctly held that the 1842 Treaty does not exempt the Perkinses' gravel income from federal income taxation. Unlike the Canandaigua Treaty, the 1842 Treaty includes an explicit reference to taxes. 1842 Treaty, art. 9, 7 Stat. 586, 590. While it is thus clear that the treaty creates a tax exemption of some kind, the question is whether that exemption applies to the Perkinses' gravel income at issue here.

The Tax Court's holding that the 1842 Treaty does not create a tax exemption for the Perkinses' gravel income was correct for three independent reasons: (1) the treaty expressly exempts only the Seneca Nation's "lands" from tax and, therefore, does not extend to income derived from the land; (2) the treaty's tax exemption for land does not confer rights upon individual Seneca members with respect to land in which they have no possessory ownership interest; and (3) the treaty's exemption prohibits only state, not federal, taxation.

1. The historical context of the 1842 Treaty

The Tax Court's concurring opinion set forth the relevant history of the 1842 Treaty, which we will briefly summarize here. (JA162–65.) In 1838, the Seneca sold all of their territorial land in the State of New York (including the Buffalo Creek, Cattaraugus, Allegany, and Tonnewanda territories) to private businessmen, Thomas Ogden and Joseph Fellows, for $202,000. In the 1838 Treaty at Buffalo Creek, 7 Stat. 550 (Jan. 15, 1838), executed concurrently with the deed of sale, it was agreed that the Seneca would move to the west of the Mississippi River within five years after the proclamation of the treaty. 1838 Treaty, arts. 2, 3, 10. Under the 1838 Treaty, $100,000 of the purchase

price (representing the consideration for the underlying land) was to be held in trust and invested by the federal government for the Seneca Nation, with the income to be paid annually to the Seneca at their new permanent home. *Id*. at art. 10. The remaining $102,000 (representing the consideration for improvements on the land) was to be paid severally to the individual Indians who were the "owners of the improvements," in proportion to the appraised value of the improvements. *Id*.

In 1840, the New York legislature imposed a highway tax, and in 1841 it imposed a road tax, on the land (then owned by Ogden and Fellows) that had constituted the Allegany and Cattaraugus reservations. Act of May 9, 1840, 63d sess., ch. 254, secs. 1, 2; Act of May 4, 1841, 64th Sess., ch. 166, secs. 1, 3. As noted, the taxes were to defray the expenses of constructing and maintaining roads across those reservations, and if either tax went unpaid, the State could impose liens and seize land on which the Seneca were then residing and on which they had the right to reside until 1845. Litigation relating to these taxes and their enforcement mechanisms ensued, and the Supreme

Court ultimately invalidated the state taxes. *See In re New York Indians*, 72 U.S. 761 (1866).

Numerous disagreements about this and the parties' other rights under the 1838 Treaty arose before the expiration of the five-year removal period. The 1842 Treaty, which essentially replaced the 1838 Treaty, was intended to "settle, compromise, and finally terminate" those differences. 1842 Treaty, preamble & art. 7. It restored to the Seneca their ownership of the Allegany and Cattaraugus territories, while Ogden and Fellows retained ownership of the Buffalo Creek and Tonnewanda territories. *Id*. at arts. 1, 2, 3.

Under the 1842 Treaty, the $100,000 representing the price of the lands of all four territories under the 1838 Treaty was, after being reduced to account for the release of the Allegany and Cattaraugus territories, to be paid "to the Seneca nation" as the purchase price for the "lands" within the Buffalo Creek and Tonnewanda territories. 1842 Treaty, art. 3. Similarly, the $102,000 representing the price of the "improvements" on all four territories under the 1838 Treaty was, after being reduced, to be paid under the 1842 Treaty "to each individual Indian" owning improvements on the Buffalo Creek and Tonnewanda

territories. *Id*. at arts. 3, 4. Article 6 of the treaty further provided that any Seneca "owning improvements" in the Cattaraugus or Allegany territories, who thereafter removed from the State of New York pursuant to a federal treaty (surrendering the improvements to the Seneca Nation), would likewise be paid the value of such improvements from Seneca Nation funds. *Id*. at art. 6.

Article 9 of the 1842 Treaty, on which the Perkinses rely for their tax-exemption claim, 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.

1842 Treaty, art. 9, 7 Stat. 586, 590 (emphases added).

The Tax Court correctly held that this provision does not exempt the Perkinses from having to pay federal income tax on their gravel income.

2. The 1842 Treaty expressly exempts only the Seneca Nation's "lands" from taxation

First, the tax exemption created by the 1842 Treaty expressly—and unambiguously—prohibits only the taxation of the Seneca Nation's "lands." It does not extend to income derived from the land, including the Perkinses' gravel income in this case. "The canon of construction regarding the resolution of ambiguities in favor of Indians . . . does not permit reliance on ambiguities that do not exist," *Catawba Indian Tribe*, 476 U.S. at 506, and "even Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties," *Choctaw Nation of Indians*, 318 U.S. at 432.

a. Taxation of the Perkinses' income from selling gravel mined from the Seneca Nation's land is not a tax on the land itself

In *United States v. Kaid*, 241 Fed. Appx. 747, 750–51 (2d Cir. 2007), this Court stated that the 1842 Treaty "clearly prohibit[s] only the taxation of real property . . . ." Although *Kaid* is a non-precedential opinion, the Tax Court's opinion below (joined by five judges on this part) agreed with *Kaid's* reading of the 1842 Treaty and concluded that summary judgment was appropriate because a tax on the Perkinses'

income from gravel sales was not a tax on the land itself. (JA158–59.) The judges joining the concurring opinion agreed that the treaty's tax exemption applied "only to taxes levied upon real property or land." (JA165–66.) But they, like the dissent, believed (incorrectly) that there were "unresolved factual and legal issues as to whether gravel mined from Indian land is *part of* Indian land," rendering summary judgment on that theory inappropriate in their view. (JA162 (emphasis added).)

Unresolved "legal" issues, however, are no bar to summary judgment. And neither the concurring opinion nor the dissent specified what "factual" issues remained that they believed precluded summary judgment on this ground. (*See* JA162, 170–71.) In fact, as the opinion of the Tax Court concluded, there were no genuine issues of material fact, and summary judgment on this ground was appropriate. (JA158–59.)

The dissent, like the district court's interlocutory order in the Perkinses' refund suit, questioned whether real property "can even be distinguished from the dirt, gravel, and foliage that comprise it." (JA170–71 (quoting *Perkins*, 2017 WL 3326818, at *5).) But the Perkinses do not dispute that the gravel in question was severed from

the land through A&F Trucking's mining operations or that the gravel was not attached to the land when it was later sold. *Cf. In re Briggs Ave. in New York*, 89 N.E. 814, 816 (N.Y. 1909) (a building that is severed from real property becomes personal property). Whether, for purposes of the treaty, the severed gravel could somehow still be part of the land from which it was extracted could, at most, present only a legal question. It should make no difference, for example, how the mining operations were conducted, or how long the gravel sat in the stockpiles before being sold. All that matters is that the gravel was severed from the land through mining operations and was subsequently sold to customers.

The dissent argued that the opinion of the Tax Court "ignores the complexities relating to mineral rights and property law" and thus "fails to address the requisite legal and factual issues." (JA171.) A review of the cases cited by the dissent for that proposition, however, does not reveal any *factual* questions that must be dealt with in this context. Rather, each of the cases cited by the dissent involved a question of statutory interpretation, which is a legal issue. *See Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 37–38 (1983) (whether gravel constituted a

"mineral" under the Stock-Raising Homestead Act of 1916); *Tyonek Native Corp. v. Cook Inlet Region, Inc.*, 853 F.2d 727, 728 (9th Cir. 1988) (whether sand and gravel reserves were part of the "surface" or "subsurface" estate, as those terms were used in the Alaska Native Claims Settlement Act); *Resource Conservation Group, LLC v. United States*, 96 Fed. Cl. 457, 464 (2011) (whether embedded sand and gravel constituted "real property" within the meaning of 10 U.S.C. § 6976(a)(2)(A)); *Bedroc Ltd., LLC v. United States*, 541 U.S. 176, 178 (2004) (whether sand and gravel deposits constituted "valuable minerals" within the meaning of the Pittman Underground Water Act of 1919).

Squire v. Capoeman, 351 U.S. 1, is instructive on this point. The issue in that case was whether income from the sale of timber logged off allotted Indian timberland was exempt from tax under the General Allotment Act. The Court recognized, as the government argued in that case, that a tax on the sales of harvested timber did not constitute a tax on the land itself, but was instead a "tax on the income derived from the land," and that "a tax on such income is not the same as the tax on the source of the income, the land." *Id.* at 6. The Court ultimately held

that the General Allotment Act created a tax exemption that extended to income "derived directly" from the land, including the timber sales in that case. *Id.* at 9–10.

It follows from *Capoeman* that if a tax on the income generated from selling timber logged off Indian land is not a tax on the land itself, but is rather a tax on income derived from the land, then neither is a tax on income from selling gravel mined from Indian land a tax on the land itself. *See* Revenue Ruling 67-284, 1967-2 C.B. 55 (income "derived directly" from the land includes "proceeds from the sale of the natural resources of the land"). Therefore, the tax imposed here on the Perkinses' income from selling gravel that they mined from the Seneca Nation's land is not a tax on the land itself.

Indeed, the Perkinses do not even contend in their opening brief—and have thereby waived any such argument—that the tax imposed in this case is prohibited by the 1842 Treaty as a tax on the land itself; they argue instead that the treaty prohibits taxation of their income, claimed to have been "derived directly" from the land. (Br. 4, 10, 15.) The Perkinses' own position thus tacitly acknowledges that federal

income taxation of their gravel income does not constitute a tax on the land itself.

b. The 1842 Treaty's tax exemption for "lands" does not extend to income derived from the land

As noted, the 1842 Treaty expressly prohibits only the taxation of the Seneca Nation's "lands." 1842 Treaty, art. 9; *see Kaid*, 241 Fed. Appx. at 750–51. That exemption does not extend to income derived from the land, including the Perkinses' gravel income in this case.

In *Mescalero Apache Tribe*, 411 U.S. 145, the Court stated that "a statutory tax exemption for 'lands' may, in light of its context and purposes, be construed to support an exemption for taxation on income derived from the land." *Id.* at 155–56 (citing *Squire v. Capoeman*, 351 U.S. 1). The Court clarified, however, that "absent clear statutory guidance, courts ordinarily will not imply exemptions [for income] simply because the land from which it is derived, or its other source, is itself exempt from tax." *Id.* at 156.

In *Capoeman*, 351 U.S. 1, the Court held that income from timber harvesting on land allotted to an individual Indian under the General Allotment Act, and held in trust for him by the federal government, was

exempt from federal income tax. Under that Act, the Court explained, Indians were to be allotted lands on their reservations to be held in trust for them by the federal government for a defined period of time, after which they were to receive their allotted land "in fee, discharged of said trust and free of all charge or incumbrance whatsoever." 351 U.S. at 3. The Court construed this language, together with that of a subsequent amendment to the Act that explicitly referenced taxes,[9] as reflecting congressional intent that "the allotment shall be free from all taxes" until after a patent in fee issued to the allottee. *Id.* at 7–8.

The Court determined that the exemption created by the General Allotment Act extended to income "derived directly" from allotted land

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[9] The amendment added the following proviso to Section 6 of the General Allotment Act, including an explicit reference to taxation:

> That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter *all restrictions as to sale, incumbrance, or taxation of said land shall be removed* and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent . . . .

Capoeman, 351 U.S. at 7 (quoting the amendment) (emphasis added); *see* 25 U.S.C. § 349.

while it was still held in trust. *Id.* at 8–9. Noting that the timber in the case before it constituted "the major value" of the Indian's allotted land, *id.* at 10, the Court determined that, to avoid frustrating the purpose of the Act "to prepare the Indians to take their place as independent, qualified members of the modern body politic," it was "necessary to preserve the trust *and income derived directly therefrom*." *Id.* at 9 (emphasis added).

Here, the context and purpose of the 1842 Treaty do not support broadening its explicit tax exemption for "lands" to also include income derived from the land. The 1842 Treaty, unlike the General Allotment Act, did not have as its purpose the assimilation of the Seneca into modern American society. In fact, as the Tax Court observed, the Seneca vehemently opposed allotment of their lands. (JA150 n.6.) Thus, the stated need to preserve both the "trust *and* income derived directly therefrom" that led to the Supreme Court's ruling in *Capoeman*, *see* 351 U.S. at 9 (emphasis added), does not pertain to the 1842 Treaty. That same rationale, accordingly, does not justify extension of the limited tax exemption created by the 1842 Treaty for the "lands" of the Seneca. Nor would the "very narrow purpose" (JA162) of the 1842

Treaty—namely, to resolve disagreements that had arisen under the Treaty at Buffalo Creek of 1838, 7 Stat. 550—be frustrated by federal taxation of income derived from the land (as opposed to a direct tax on the land itself). (*See* JA162–64); *see generally In re New York Indians*, 72 U.S. at 762–64, 767–68.

Because the tax exemption created by the 1842 Treaty expressly and unambiguously prohibits only the taxation of the Seneca Nation's "lands," 1842 Treaty, art. 9; *see Kaid*, 241 Fed. Appx. at 750–51, it does not include the Perkinses' personal income derived from the land through A&F Trucking's mining operations, and summary judgment on this ground was appropriate.

3. The 1842 Treaty's tax exemption for land does not confer rights upon individual Seneca members with respect to land in which they have no possessory ownership interest

In addition, the 1842 Treaty's tax exemption for land does not confer rights upon individual Seneca members with respect to land in which they have no possessory ownership interest, as was the case here. First, as the Tax Court's concurring opinion concluded, the 1842 Treaty's tax exemption for land did not create an exemption for individual Seneca members. Second, even if it did, such exemption

would not apply to the Perkinses' gravel income because they had no possessory ownership interest in the land from which the gravel was mined, such interest being owned instead by another tribe member.

a. The 1842 Treaty did not create a tax exemption for individual Seneca members

The Tax Court's concurring opinion correctly concluded that the 1842 Treaty, when read in view of its historical context, "did not create a tax exemption for individual members of the Seneca Nation." (JA165.) Rather, the concurring judges explained, "the parties agreed that the remaining tribal lands—*i.e.*, the lands comprising the Allegany and Cattaraugus reservations—would be protected only as long as those lands remained in the Seneca's possession." (*Id.*); *see* 1842 Treaty, art. 9. And, since the Perkinses mined and sold the gravel to generate income for themselves, not for the Seneca Nation, the 1842 Treaty does not apply.

The concurring opinion's conclusion in this respect is confirmed by the fact that "the lands of the Seneca Indians" that were protected from tax under Article 9 of the treaty were presumably all owned in fee at the time (as they are now) by the Seneca Nation, rather than by individual Seneca members. Because of this, the portion of the

purchase money representing the consideration for "the value of all the lands" was to be paid "to the Seneca nation" under Article 3 of the treaty. Conversely, the consideration for the "improvements" on the lands was to be paid "to each individual Indian" owning such improvements. 1842 Treaty, arts. 3, 4; *see also id.* at art. 6. It is difficult to fathom how the treaty's tax exemption for "lands" under Article 9 could confer rights on individual Seneca members if only the Seneca Nation owned those underlying lands.

The Perkinses nevertheless argue (Br. 23) that the concurring opinion's conclusion conflicts with the decision in *Fellows v. Blacksmith*, 60 U.S. 366 (1856), which they contend demonstrates that the 1842 Treaty did in fact confer individual rights. *Fellows*, however, was not a tax case and did not address the issue whether the 1842 Treaty created a *tax exemption* for individual Seneca members. That case shows only that the treaty protected individual Senecas from being forcibly removed from the Indian territories. The Perkinses, moreover, mischaracterize the Tax Court's concurring opinion as concluding that *no* individual rights were conferred by the treaty; what the concurring opinion actually states, however, is that the treaty "did not create a *tax*

exemption for individual members of the Seneca Nation." (JA165 (emphasis added).) The concurring opinion was not concerned with whatever non-tax rights may or may not have been conferred by the treaty.

b. In any event, the 1842 Treaty's tax exemption for "lands" does not apply to the Perkinses' gravel income because they did not own the gravel and they had no possessory ownership interest in the land from which the gravel was mined

Even if the 1842 Treaty did create a tax exemption for individual Senecas with respect to the land, it would not exempt the Perkinses' gravel income here because they did not own the gravel and they had no possessory ownership interest in the land from which the gravel was mined, such interest being owned instead by another tribe member.

A careful reading of the 1842 Treaty confirms that it employs the terms "Seneca nation" and "Seneca Indians" interchangeably when referring to the Nation itself. *See* 1842 Treaty, arts. 3, 5. Article 3, for instance, refers to the "Seneca nation" as the recipient of that part of the purchase price representing the consideration for "the value of all the lands," while Article 6, in discussing the mechanics for actual payment of that same "consideration for the release and conveyance of

the said lands," refers to the "Seneca Indians" as the recipient. It follows that the reference to the "Seneca Indians" in Article 9 of the treaty—on which the Perkinses rely—is likewise a reference to the Nation as such, and not a reference to individual Seneca members. This supports the conclusion that the treaty does not create a tax exemption for individual Seneca members, as the Tax Court's concurring opinion concluded.

But even if the reference to the "Seneca Indians" in Article 9 of the treaty refers instead to individual Seneca members, and therefore is construed as conferring a tax exemption on individual Seneca members as the Perkinses contend, such exemption still would not cover the Perkinses' gravel income in this case. That is because Article 9, so construed, would still protect only the lands in the *possession* of such individual Seneca member. The treaty, by its express terms, only "protect[s] *such of the lands of the* Seneca Indians . . . as may from time to time remain *in their possession* from all taxes . . . until such lands shall be sold and conveyed by the said Indians, and the *possession* thereof shall have been relinquished by them." 1842 Treaty, art. 9 (emphasis added). We can illustrate this point by substituting the

phrase "individual Seneca member" for the term "Seneca Indians" where it appears in this provision. In that case, for the sake of argument, the treaty would read as protecting only "such of the lands of the [individual Seneca member] . . . as may from time to time remain in [the individual Seneca member's] possession from all taxes." Accordingly, even construing the treaty as conferring a tax exemption to individual Seneca members would not help the Perkinses in this case.

As we have explained, *supra* pp. 5–7, the Perkinses did not own any of the gravel that they mined from the Seneca Nation's land in this case. They had only a license to mine the gravel and sell it in exchange for royalties to the Seneca Nation. Under Seneca Nation law and custom, the gravel was the sole and exclusive property of the Seneca Nation, (JA102); Seneca Nation of Indians, Sand & Gravel Permit Law § 301, and the Perkinses were required to pay royalties to the Seneca Nation from A&F Trucking's gravel sales to customers (JA130 (¶ 25)). Nor did the Perkinses own even the possessory interest to use the surface of the land from which the gravel at issue was mined. The possessory interest was owned during the years at issue by Janice Crowe, whose permission was also required to conduct the mining

operations and who, by virtue of her possessory interest, received a share of the royalties. *See supra* pp. 5–7.

Therefore, even if the 1842 Treaty created a tax exemption with respect to land for individual Seneca members, it would not exempt the Perkinses' gravel income from tax because the Perkinses did not own the gravel and they had no possessory ownership interest in the land from which the gravel was mined.

4. The 1842 Treaty prohibits only state, not federal, taxation

Finally, the Tax Court's concurring opinion persuasively demonstrates that Article 9 of the 1842 Treaty addresses only state, not federal, taxation, and that the "taxes" to which the treaty refers are taxes imposed by the State of New York. (JA165–169.) As the concurring opinion explained, this conclusion is compelled when the treaty's language "is read against the historical context." (JA165); *see Choctaw Nation of Indians*, 318 U.S. at 431–32 (1943) (in construing Indian treaties, the court "may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties"); *Seneca Nation of Indians*, 382 F.3d at 259 ("the history, negotiations, and practical construction adopted by the

parties are all relevant to treaty interpretation"). The Perkinses have not pointed to any surrounding history or negotiations suggesting that either party would have understood Article 9 of the treaty to encompass federal taxation.[10]

First, the Tax Court's concurring opinion correctly points out that the 1842 Treaty refers only to taxes levied on real property or land, and in 1842 there was no federal tax on real property or land, and none had existed during the previous 26 years. (JA165–66 & n.2.) Thus, it is highly unlikely that the parties intended to prohibit a federal tax that did not then exist and that had not existed for a generation. Rather, the clear aim of Article 9 of the treaty was to address the objectionable highway and road taxes that had been recently imposed by the State of New York in 1840 and 1841. As the concurring opinion observed, had the Seneca been concerned with federal taxation, then they presumably would not have agreed to limit the protection conferred by Article 9 to the lands of the Seneca "within the State of New York," given that

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[10] The Seneca Nation's website describes the 1842 Treaty's provisions as "prohibit[ing] New York State from taxing Indian Reservation activities." *See* https://sni.org/culture/treaties/ (last accessed on February 18, 2020).

provisions had already been made for their removal to the west of the Mississippi River. (JA166.)

The Perkinses dispute the Tax Court's "historic claims" in this respect. (Br. 22.) They argue that the Seneca Nation's retention of the Allegany and Cattaraugus territories in the 1842 treaty demonstrates that "no one . . . expected the Seneca Nation to abandon the Cattaraugus or Allegany Territories and eventually move west of the Mississippi River." (Br. 22–23.) The 1842 Treaty, however, clearly contemplated, and made specific provision for, the removal of at least some Seneca to the west of the Mississippi. *See* 1842 Treaty, art. 6 (making provisions for "such of the said Seneca nation, as shall remove from the State of New York, under the provisions of any treaty"); *id.* at art. 1 (reserving to Ogden and Fellows the "right of pre-emption" with respect to the Allegany and Cattaraugus territories). In *Fellows*, 60 U.S. 366, the Supreme Court stated that most of the provisions in the 1838 Treaty "remained in force" after execution of the 1842 Treaty, including "[t]he assignment by the Government of a large tract of country for the New York Indians west of the Missouri—the special tract therein assigned to this *Seneca Nation—their agreement to remove*

to their new homes, and the large appropriation to aid in their removal . . . ." 60 U.S. at 370 (emphasis added). This shows that, contrary to the Perkinses' argument, the Tax Court's concurring opinion was perfectly accurate in its historic claims regarding the Seneca's anticipated removal to the west of the Mississippi.

The Tax Court's concurring opinion also found significant the introductory words of Article 9 of the 1842 Treaty, whereby "[t]he parties . . . mutually agree to solicit the influence of the Government of the United States to protect . . . the lands of the Seneca Indians" from taxation. (JA167.) The concurring opinion correctly concluded that "the natural interpretation of these introductory words is that the United States would exercise its influence to prevent New York from taxing the Seneca's land, as the New York Legislature had sought to do in 1840 and 1841." (JA168.)

The Perkinses respond to this point by asserting that what the parties meant by these introductory words was that "the parties would solicit Congress to pass legislation to prevent the land of the Seneca Nation from any tax or assessment for any purpose," and they cite I.R.C. § 894(a)(1) as evidencing the culmination of that purported

intention.[11] (Br. 25.) The glaring problem with that theory is that I.R.C. § 894(a)(1), which directs the IRS to give "due regard to any treaty obligation of the United States which applies to such taxpayer," was not enacted until 1988, well over a century after execution of the 1842 Treaty. Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, Title I, § 1012(aa)(6), 102 Stat. 3342, 3533 (1988). Before that, § 894 of the Internal Revenue Code of 1954 made no reference to the taxation of land at all, which is the type of tax addressed by the 1842 Treaty, but instead exempted from taxation only "*income* of any kind, to the extent required by any treaty obligation." Internal Revenue Code of 1954, Pub. L. No. 83-591, § 894, 68A Stat. 284 (1954) (emphasis added). Therefore, § 894 does not evince any intention to prohibit federal taxation of Seneca lands under the 1842 Treaty, and the Perkinses offer no other support or citation for their interpretation. On the other hand, further supporting the Tax Court's interpretation, the campaign to prevent the *State of New York* from taxing Seneca reservation land succeeded in 1857, not long after the treaty was

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[11] The fact that the Tax Court is a "specialized" court does not mean it is unqualified to opine on the meaning of the treaty, as the Perkinses suggest. (Br. 24.)

signed, when New York abolished the 1840 highway tax and the 1841 road tax. *See In re New York Indians*, 72 U.S. at 771.

The Tax Court's concurring opinion correctly concluded that the 1842 Treaty addresses only state, not federal, taxation. Therefore, the treaty does not exempt the Perkinses' gravel income from federal income taxation for that additional reason.

D. The Perkinses waived any challenge to the penalties and the Commissioner's other adjustments to tax for the years 2008 and 2009

As noted, the Tax Court sustained the late-filing penalties imposed by the Commissioner under I.R.C. § 6651(a)(1) for the 2008 and 2009 years. (JA159–160, 172–173.) The Perkinses do not address the penalties in their opening brief and, therefore, have waived any challenge to them.

The Tax Court also correctly determined that the Perkinses conceded the other adjustments to tax made in the IRS's notice of deficiency, aside from the gravel income at issue, by not raising those other adjustments in their Tax Court petition. (JA146 n.3); *see* Tax Court Rule 34(b)(4).

CONCLUSION

The decision of the Tax Court was correct and should be affirmed.

Respectfully submitted,

RICHARD E. ZUCKERMAN
Principal Deputy
Assistant Attorney General

TRAVIS A. GREAVES
Deputy Assistant Attorney General

/s/ Jacob Christensen

FRANCESCA UGOLINI (202) 514-1882
JACOB CHRISTENSEN (202) 307-0878
Attorneys
Tax Division
Department of Justice
Post Office Box 502
Washington, D.C. 20044

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Attorney for the Commissioner of Internal Revenue

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I certify that, on February 18, 2020, the foregoing brief was electronically filed with the Court using the appellate CM/ECF system and 6 paper copies were mailed to the Clerk of the Court. Counsel for all participants in this case are registered CM/ECF users, and service on them will be accomplished by the appellate CM/ECF system.

/s/ Jacob Christensen
JACOB CHRISTENSEN
Attorney