19-2481-ag

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 TAX COURT, INTERNAL REVENUE SERVICE

BRIEF FOR PETITIONERS-APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case Authority

Tax Court Rulings

Constitutional and Statutory Authority

Other Authorities

[1] "Indian Citizenship Act of 1924" is also known as "The Act of June 2, 1924."

PRELIMINARY STATEMENT

This Court is presented with a question of first impression as to the taxability of income derived from the sale of gravel mined by an enrolled member of the Seneca Nation of Indians ("Seneca Nation") from Seneca Nation lands. *Perkins v. U.S.*, 16-CV-495(LJV), 2017 WL 3326818, at *1 (W.D.N.Y. Aug. 4, 2017). Specifically, the Court must examine the language in two federal treaties, promising not to disturb the "free use and enjoyment" of lands by the Seneca Nation and "their Indian friends residing thereon and united with them" and protecting these lands "from all taxes" for any purpose. Canandaigua Treaty of 1794, Nov. 11, 1974, 7 Stat. 44, 45, art. III ("Canandaigua Treaty"); Treaty with the Senecas, May 20, 1842, 7 Stat. 586, 590, art. 9 ("1842 Treaty").

The Appellants-Petitioners have already received conflicting decisions and orders from the United States District Court for the Western District of New York (the "District Court") and the United States Tax Court (the "Tax Court") on this issue. This appeal seeks a reversal of the Tax Court's opinion and order granting summary judgment in favor of the Commissioner of Internal Revenue ("Commissioner"), ruling no treaty exempts income earned by an enrolled member from the sale of gravel mined from the Seneca Nation territory (A-142-173, A-197). The District Court, on the other hand, refused to dismiss a refund complaint filed by the Appellants-Petitioners, finding the Appellants-Petitioners in this case

"have plausibly stated a claim for relief under two treaties with the Native American Seneca Nation." 2017 WL 3326818, at *1. This Court is now called upon to resolve this legal issue of first impression.

JURISDICTIONAL STATEMENT

On August 26, 2014, in accordance with 26 U.S.C. ("I.R.C.") § 6212(a), the Commissioner mailed a notice of deficiency to the Appellants-Petitioners for tax years 2008, 2009, and 2010. (A-6). The Appellants-Petitioners timely filed a petition with the Tax Court for alleged deficiencies in 2008 and 2009. The petition was lodged and filed by the Clerk of the Tax Court on November 26, 2014. (A-4).

The Tax Court had subject matter jurisdiction of this case under I.R.C. §§ 6213(a), 6214(a), and 7742. On May 30, 2019, the Tax Court entered a final decision resolving all issues. (A-197).

This Court has jurisdiction over appeals from the Tax Court under I.R.C. § 7482(a), and venue pursuant to I.R.C. § 7482(b), since the legal residence of the taxpayers is within the Western District of New York. On August 8, 2019, the notice of appeal was timely served on the Commissioner and mailed to the Clerk of the Tax Court pursuant to I.R.C. §§ 7483, 7502(a)(1) and Fed. R. App. P. 13. (A-199-200; A-203-204). The Clerk recorded the notice of appeal on August 15, 2019. (*Id.*). Because all issues considered in this case are matters of law, this court has plenary review. (A-147).

QUESTION PRESENTED

In 1794, the United States entered its third treaty with the Seneca Nation to reaffirm "all the land within" the treaty-defined territory:

> 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. (Emphasis added).

Canandaigua Treaty, 7 Stat. 45, art. III. After the Seneca Nation claimed its treaties had been breached and its sovereign rights violated when the State of New York sought to tax and foreclose upon its land, the United States and the Seneca Nation mutually agreed:

> 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 assessment ***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. (Emphasis added).

1842 Treaty, 7 Stat. 590, art. 9. Under the terms of these treaties, the Seneca Nation retains all rights to lands within its territories "until such lands shall be sold and conveyed" and possession has been relinquished by the Seneca people.[2] *Id.;* Canandaigua Treaty, 7 Stat. 45, art. III ("until they choose to sell the same, to the

[2] The 1842 Treaty referenced not only the "Seneca Nation" but also the "Seneca Indians." This treaty also gives certain rights to "any Indians" who surrenders possession of land occupied by him and his family. 7 Stat. 589, art. 5 and art. 6.

people of the United States, who have the right to purchase").

The question presented in this appeal is whether these treaties ratified by Congress evinces an intent not to disturb the free use and enjoyment of these aboriginal lands of the Seneca Nation by imposing federal income tax on income derived from such lands by an enrolled member.

STATEMENT OF THE CASE

A. Undisputed Facts

The Seneca Nation and its people still occupy and enjoy the treaty-defined land known as the Cattaraugus and Allegany Territories. *Ward v. New York.*, 03-CV-485S, 2003 WL 22384803, at *1 (W.D.N.Y. Sept. 19, 2003). The gravel pit at issue in this case is located on the Allegany Territory (A-39[¶6], A-91, A-144), and within the flood plain of the Kinzua Dam.[3]

Appellant-Petitioner Alice Perkins ("Alice") is an enrolled Seneca (A-38[¶1], A-94, A-143) whose childhood home was torn down by the United States when the U.S. Army Corps of Engineers built the Kinzua Dam.[4] She continues to live on the Allegany Territory with her husband (A-144), adhering to the customs, laws and traditions of the Seneca Nation.

[3] Alice J. Perkins Aff. at 8 ¶39, *Perkins v. U.S.*, No. 16-cv-00495(LJV) (W.D.N.Y. May 18, 2018), ECF No. 61-2.

[4] *Id.* at 8 ¶37.

As a sole proprietor, Alice operates A&F Trucking. (A-95-96). The Seneca Nation had given "Alice Perkins d/b/a A&F Trucking" permission and exclusive rights to mine and sell sand and gravel from land located on the Allegany Territory (A-91, A-130[¶23], A-144). On June 13, 2009, the Seneca Nation imposed a moratorium on all mining. (*Id.*). Alice immediately stopped her mining operations but was later given permission by the Seneca Nation to sell the stockpiles of sand and gravel mined prior to June 13, 2009. (*Id.*).

Alice claims the revenue generated from the sale of sand and gravel extracted from this gravel pit prior to June 13, 2009 is exempt from federal taxation. (A-142-144). On federal income tax returns filed in 2008, 2009, and 2010[5], Alice reported her deductible business expenses as exceeding or equal to her taxable revenue. (A-64, A-75). Alice also reported revenue from the sale of sand and gravel mined from the Seneca Nation land as exempt income. (A-5[¶6], A-31-32[¶6], A-145). The Internal Revenue Service audited these returns, adjusting income and expenses for 2008 and 2009, but making an adjustment only to income in 2010. (A-9, A-11, A-42[¶3]). For each year, the Internal Revenue Service adjusted the business income to include revenue generated from the sale of sand and gravel, mined from the lands of the Seneca Nation. (A-11, A-19).

[5]2010 Federal Tax Return at 1-10, Perkins v. USA, No. 16-cv-00495 (W.D.N.Y. May 18, 2018), ECF No. 60-13.

After making these adjustments, the Commissioner sent Alice and her husband (collectively the "Perkinses") a notice of deficiency setting forth assessments for taxes, penalties and interest allegedly due for each tax year. (A-6, A-145). The Perkinses have challenged the assessment for 2008 and 2009 before the Tax Court. (A-4-5, A-146). The Tax Court denied the Perkinses' petition and granted summary judgment in favor of the Commissioner. (A-172).

For the 2010 tax year, the Perkinses paid the tax, interest and penalties demanded by the Commissioner, and then filed a timely claim for refund. (A-124[¶4], A-146). When more than eight months had passed without any response from the Internal Revenue Service as to their refund claim, the Perkinses timely commenced an action for refund in the District Court. (A-126, A-127[¶9]).

B. Course of the Proceedings and Dispositions Below

In this appeal, the taxpayer seeks a reversal of the Decision [and Order] of the Tax Court, entered May 30, 2019 (A-197)[6], which followed the filing of an Opinion on March 1, 2018. (A-142-171), an Order on March 5, 2018 (A-172-73) and a Joint Stipulation of Settled Issues on May 28, 2019 (A-195-96). In a split-Opinion, the majority ruled no treaty created a federal income tax exemption for income earned from gravel mined and sold by an enrolled Seneca with the Seneca Nation's permission from its sovereign lands. (A-142-169).

[6] The Joint Appendix will be cited as "A_."

The Tax Court majority rejected the Decision and Order of District Court Judge Lawrence J. Vilardo of the Western District of New York, which involved the same issue and parties. (A-151, A-156, A-159 referencing *Perkins*, 2017 WL 3326818, at *1). Unlike the District Court, the Tax Court majority found the Canandaigua Treaty and the 1842 Treaty conferred no personal rights on an enrolled Seneca to support an exemption claim from federal income tax, and the 1842 Treaty conferred rights only to the Seneca Nation relating to taxes imposed by the State of New York. (A-162).

Chief Judge Maurice B. Foley of the Tax Court issued a dissent, sharply critical of the majority for construing "the treaties narrowly rather than liberally" and for citing Black's Law Dictionary and an irrelevant nonprecedential summary order of this Court "as its only authorities." (A-170). The Chief Judge also took issue with the reasoning of five judges who found "[g]ravel wasn't attached to the land when it was sold, so the [taxpayers] aren't exempt from tax on the sale of gravel under the 1842 Treaty." District Court Judge Vilardo found this reasoning "cuts the baloney too thin." 2017 WL 3326818, at *11. Foley agreed with Vilardo's view. (A-170-71).

> Given the liberal principles of treaty construction that apply here, there is no reason to believe that one rule would apply to taxing the dirt, gravel, and foliage that make up the property and another to the property itself—if "the property" can even be distinguished from the dirt, gravel, and foliage that comprise it.

(A-171-72 *quoting Perkins*, 2017 WL 3326818, at *5).[7] Foley concluded, "the grant of summary judgment [was] not appropriate." (A-172).

STANDARD OF REVIEW

This Court reviews decisions of the Tax Court "in the same manner and to the same extent as decisions of the district courts in civil actions." I.R.C. § 7482(a)(1). Hence, the Court will review *de novo* the grant of summary judgment by the Tax Court. *See Eisenberg v. C.I.R.*, 155 F.3d 50, 53 (2d Cir.1998); *Williams v. C.I.R.*, 718 F.3d 89, 91 (2d Cir. 2013).

SUMMARY OF THE ARGUMENT

As stated in the dissent of its Chief Judge, the Tax Court erred by construing the Canandaigua Treaty and the 1842 Treaty "narrowly rather than liberally. . . ." (A-170). In violation of its constitutional and statutory duty, the Tax Court failed not only to apply the proper rule of construction for these treaties but also to give "due regard" to the "treaty obligation of the United States". U.S. Const. art. VI, cl. 2; I.R.C. § 894(a)(1).

In enacting the Internal Revenue Code, Congress expressed no intent to abrogate any federal treaties with the Senecas, but instead explicitly recognized

[7] The majority of the Tax Court agreed with the Chief Judge that summary judgment should not be based on a distinction of whether gravel once extracted from the land should be subject to taxation. (A-162, A-169). Since only a minority held this view, Appellants need not address this issue in this Brief since the Commissioner has not filed a cross-appeal.

I.R.C. provisions should be applied to a taxpayer "with due regard to any treaty obligation of the United States which applied to such taxpayer." I.R.C. § 894(a)(1). If the words of these treaties are susceptible to differing interpretations, then any doubts should be resolved in favor of the Seneca people. *Choate v. Trapp*, 224 U.S. 665, 675 (1912);

Through federal treaties and statutes, Congress intended to secure and guarantee to the Seneca Nation and its people the right of possession and enjoyment of their lands, now and in the future, by making these lands inalienable. Taxing the income derived from these restricted lands would infringe upon the Seneca Nation's sovereignty and rights guaranteed and secured by federal treaties. "To tax them is so inconsistent with the purpose and object of the Government in its dealing with these Indians, and the relation that it maintains toward them and their property, that is cannot be assumed from the general provisions of the internal revenue laws, although broad in compass, that such was the intention of Congress." *Income Tax-Tom Pavatea, Hopi Indian*, 35 U.S. Op. Atty. Gen. 107, 109 (1926) Finally, the Canandaigua Treaty and the 1842 Treaty extend rights not only to the Seneca Nation but also to "its Indian friends" residing on its treaty-protected lands and "united" with the Seneca Nation and the other Six Nations. 7 Stat. 45, art. III. *See, generally, Fellows v. Blacksmith*, 60 U.S. (19 How.) 366 (1856). Imposing taxes on the income derived from farming, harvesting, mining, or otherwise

working these treaty-protected lands would be a burden, disrupting the free use and enjoyment of these lands to which the United States has promised not to tax for any purpose. 1842 Treaty, 7 Stat. 590, art. 9; *Income Tax-Restricted Lands of Quapaw Indians.*, 34 U.S. Op. Atty. Gen. 439, 444 (1925)("Because revenue laws impose burdens upon the public and restrict the use and enjoyment of property, they are not to be extended beyond the clear import of the words used. Congress is bound to express its intention to tax in clear and unambiguous language.")

ARGUMENT

I

INCOME DERIVED DIRECTLY FROM THE ABORIGINAL LAND OF THE SENECA NATION IS EXEMPT FROM FEDERAL INCOME TAX

A. The General Strict Construction Rule Applicable to Other Types of Tax Exemptions Must Give Way to the Liberal Construction Applicable to Exemptions Contained within Indian Treaties.

Indians have often been singled out for particular or special treatment. *Morton v. Mancari*, 417 U.S. 535, 554-55 (1974). Such treatment has been justified when rationally related "to the fulfillment of Congress' unique obligation toward the Indians," particularly when "the preference is reasonable and rationally designed to further Indian self-government." *Id.* at 555. Former Attorney General John G. Sargent wrote, "Indians have always been the subject of special legislation, and that general legislation, and especially revenue laws, which burden and restrict the use and enjoyment of property, should not be applied to Indian

wards unless Congress clearly so directs." *Income Tax-Tom Pavatea, Hopi Indian,* 35 U.S. Op. Atty. Gen. at 108-09.

The cardinal rule in the interpretation of federal statutes or treaties dealing with Indians is that ambiguities are to be resolved in favor of the Indians. *See, e.g., County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 268-269 (1992) ("[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.") *quoting Montana v. Blackfeet Tribe,* 471 U.S.759, 766 (1985); *McClanahan v. State Tax Commn. of Arizona*, 411 U.S. 164, 174 (1973) ("[I]n interpreting Indian treaties, . . . the general rule [is] '[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith'.") *quoting Carpenter v. Shaw*, 280 U.S. 363, 367 (1930).

The rule that ambiguous statutes and treaties are to be construed in favor of Indians applies to tax exemptions. *Trapp*, 224 U.S. at 675; *see, e.g., Squire v. Capoeman,* 351 U.S. 1, 6–7 (1956)(construing the General Allotment Act of 1887 to create exemption for not-yet-created federal income tax); *Hoptowit v. C.I.R.*, 709 F.2d 564, 566 (9th Cir. 1983) (construing the 1855 Treaty with the Yakima as creating a limited tax exemption for income derived directly from the land).

"Congress has passed neither a statute specifically abrogating the provisions of Indian treaties nor a statute of general application that has the effect of

abrogating Indian treaties." *Lazore v. C.I.R.*, 11 F.3d 1180, 1183 (3d. Cir. 1993). Even though the Internal Revenue Code is a general statute subjecting every individual to taxation based on "all income from whatever source derived," its provisions are to be applied to a taxpayer "with due regard to any treaty obligation of the United States which applied to such taxpayer." I.R.C. §§ 1, 61(a), 894(a)(1) (West 2019). Consequently, a Native American taxpayer is entitled to an exemption if it can be shown that specific language within a statute or a treaty ratified by Congress evinces a congressional intent to exempt certain income from federal income tax.

The "normal maxim," stated "every day" in opinions released by the Tax Court, is tax exemptions are matters of legislative grace and are strictly construed. (A-148). This strict construction maxim, however, has no applicability to special legislation or treaties dealing with Indians.

> The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years, and has been applied in tax cases.

Trapp, 224 U.S. at 675. These liberal rules of construction make it possible for a court to find language within a treaty or special statute to create a federal income tax exemption even though the ratification of the treaty or the enactment of special

statute took place long before the enactment of any federal statute imposing a federal income tax. *See, e.g., Squire*, 351 U.S. at 6-7; *Hoptowit*, 709 F.2d at 566.

B. The United States Supreme Court Has Liberally Construed Language within Federal Statutes to Exempt Income Derived from Restricted Land.

In *Squire*, the United States Supreme Court examined the language of the General Allotment Act of 1887 to determine whether Congress intended to tax income earned in 1943 from the sale of timber harvested from restricted land, allotted to Indians, but held in trust by the Government. 315 U.S. at 6-7. Although this 1887 statute has no applicability to the Seneca Nation, its enrolled members or its territory,[8] *Squire* does illustrate the liberal rules of construction favoring Indians in federal income tax cases.

In 1887, Congress enacted the General Allotment Act to allow "any Indian not residing upon a reservation or for whose tribes no reservation has been provided" to secure an allotment of public land from the federal government. General Allotment Act of 1887, ch. 119, 24 Stat. 389 § 4 (1887) (codified as amended at 25 U.S.C.A. §334 [West 2019]). The Act further provided title in trust to such allotment would be held by the federal government for 25 years, or longer if the President deems an extension desirable. 24 Stat. 389 § 5 (1887); Felix S.

[8] The General Allotment Act of 1887 "specifically excludes the Seneca Nation of New York from its provisions." *See* General Allotment Act of 1887, ch. 119, 24 Stat. 391 § 8 (1887) (codified as amended at 25 U.S.C.A, § 339 [West 2019]). We argue the Seneca Nation was specifically excluded from this Act because Congress never intended to narrow the protection given to the Seneca Nation and its people in federal treaties.

Cohen, *Handbook of Federal Indian Law* 78 (1942 ed.). During this trust period, encumbrances or conveyances were deemed void. *Id.*

Pursuant to an amendment to the Act, the Secretary of the Interior had the authority to transfer these allotted lands in fee "free of all charge or incumbrance whatsoever" if the Indian allottees could show they were "competent and capable of managing" their affairs. *Squire,* 315 U.S. at 6-7. The Supreme Court acknowledged these statutory provisions "were not couched in terms of nontaxability," but found "the general words 'charge or incumbrance' might well be sufficient to include taxation." *Id.*

The Court further noted that once these lands were transferred in fee the statute directed "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 [fee] patent . . . " *Id.* at 7. The Court found this statutory language "evinces a congressional intent to subject an Indian allotment to all taxes *only after a patent in fee is issued to the allottee***.**" *Id.* at 8 (emphasis added). Consequently, the Supreme Court held income from the sale of timber from restricted lands was exempt from federal income tax because to impose such a tax under such a circumstance would be "at the least, a sorry breach of faith with these Indians." *Id.* at 10 (internal quotation removed).

The General Allotment Act has no application to the exemption sought in this case, but it is not the only legal source or authority for seeking a federal income exemption for income derived from tribal land. Neither the Tax Court nor the Commissioner have any reason to reject the Perkinses' petition based on a federal statute from which they claim no exemption, and which has no applicability to the income derived from the gravel mined from the Allegany Territory. The Court must instead consider whether the Canandaigua Treaty and/or the 1842 Treaty contain a textual basis for an exemption from federal income tax.

C. Language within Federal Treaties with the Seneca Nation Clearly Exempts Income Derived from Its Sovereign Land.

The Seneca Nation is one of the Six Nations known as the Haudenosaunee or Iroquois Confederacy and is a successor-in-interest to a series of treaties with the United States of America. *Lazore.*, 11 F.3d at 1182. The first federal treaty with the Senecas and other Haudenosaunee Nations predates the United States Constitution. Treaty with the Six Nations, 1784, Oct. 22, 1784, 7 Stat. 15 ("1784 Treaty of Fort Stanwix"). In 1789, the Constitution of the United States was ratified and declared, "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . ." U.S. Const. art. VI, cl. 2.

In the 1784 Treaty of Fort Stanwix, the Haudenosaunee agreed to concede to the United States claims to these western territories including lands within the

Ohio territory and a vast area in Western Pennsylvania. *Id.*, 7 Stat. 15-16, art. III. The United States and the Haudenosaunee formed a treaty alliance, exchanging mutual promises of non-interference in the other's sovereign affairs and establishing jurisdictional boundaries between these sovereign nations. *Lazore*, 11 F.3d at 1186. These mutual promises of non-interference were re-confirmed in subsequent federal treaties, after the ratification of the United States Constitution in 1789. [9] *See* Fort Harmar Treaty, January 9, 1789, 7 Stat. 33, Canandaigua Treaty, November 11, 1794, 7 Stat. 44).

Before ascertaining what treaty rights the Seneca Nation and its enrolled members possess today, the Court must first examine what rights they possessed at the time these federal treaties were executed and ratified. From there, the Court must examine whether Congress has subsequently abrogated these treaty rights by statute.[10]

[9] During the negotiation of these treaties, representatives of the United States and the Haudenosaunee had to rely upon interpreters, many of whom were inefficient. Nonetheless, the Haudenosaunee had its own method of recording the treaties. The Haudenosaunee's understanding of the treaty was embodied in the Two-Row Wampum, a belt consisting of two parallel rows of dark colored beads on a background of lighter colored beads. *Lazore*, 11 F.3d at 1186. The two rows signify the two peoples-Indian and European-coexisting peacefully, neither imposing their laws or religion on the other. *Id.*

[10] In 1877, Congress declared, by statute, "[n]o Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; ***but no obligation of any treaty lawfully made and ratified with such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired***." 25 U.S.C.A. § 71 (West 2019) (Emphasis added).

Under these treaties, the Seneca and other Haudenosaunee nations were recognized as "distinct and separate political communities capable of managing their internal affairs as they had always done." Felix S. Cohen, *Handbook of Federal Indian Law* 419 (1942 ed.). Due to the mutual promises of non-interference, the Haudenosaunees claimed or possessed no rights to United States citizenship or to representation within the government of the United States or its several States. *Accord Elk v. Wilkins,* 112 U.S.94, 100 (1884). Further evidence of this historic fact can be found in the Indian Citizenship Act of 1924[11], Pub. L. No. 68-175, 43 Stat. 253.[12]

As the United States Supreme Court has repeatedly held, treaties must "be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Jones v. Meehan,* 175 U.S. 1, 11 (1899); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658, 676 (1979); *Choctaw Nation v. Oklahoma,* 397 U.S. 620, 631 (1970) ("treaties with the Indians must be

[11] "Indian Citizenship Act of 1924" is also known as "The Act of June 2, 1924."

[12] In 1924, Representative Homer Snyder of New York introduced a bill, signed into law by President Calvin Coolidge, declaring "all non-citizen Indians born within the territorial limits of the United States . . . to be citizens of the United States . . ." Indian Citizenship Act of 1924, Pub. L. No. 68-175, 43 Stat. 253. The Fourteenth Amendment already defined citizens any person born in the United States, but only if "subject to the jurisdiction thereof." This latter provision was thought to exclude Haudenosaunee citizens as "citizens of the United States and of the State wherein they reside." *See Elk v. Wilkins,* 112 U.S.94, 100 (1884).

interpreted as they would have understood them, and any doubtful expressions in them should be resolved in the Indians' favor"). In determining "the sense in which treaties would naturally be understood" by Native Americans, the United States Supreme Court has looked "beyond the written words to the larger context that frames the treaty, including 'the history of the treaty, the negotiations, and the practical construction adopted by the parties'." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) (quoting *Choctaw Nation v. United States*, 318 U.S. 423, 432 (1943).

1. Congress Never Sought to Tax Either the Seneca Nation, its People or its Land in the Canandaigua Treaty.

In the Canandaigua Treaty, the Government expressly acknowledged "all the land within" the Seneca Nation territories, including the land from which Alice Perkins operated her gravel business "to be the property of the Seneca Nation." Canandaigua Treaty, 7 Stat. 45, art. III. *See, also, The New York Indians*, 72 U.S. (5 Wall.) 761, 767 (1866). It further promised not to "disturb" the Seneca Nation or "their Indian friends residing . . . and united with them, in the free use and enjoyment" of their aboriginal lands." Canandaigua Treaty, 7. Stat. 45, art. III. At the time these promises were made, neither the United States nor the Senecas would have contemplated the Government's ability to tax these tribal lands or income derived from these tribal lands.

First, the United States did not set aside or reserve land from its own public domain but allowed the Senecas to remain in "ancient possession and occupancy" of their aboriginal territory, as they had prior to the existence of the United States. *The New York Indians*, 72 U.S. (5 Wall.) at 770. As the United States Supreme Court held in *The New York Indians* case, the Senecas' right of occupancy created "an indefeasible title" to these lands "that may extend from generation to generation and will cease only by the dissolution of the tribe, or their consent to sell to the party possessed of the right of pre-emption." *Id.* at 771.

At the time of the Canandaigua Treaty, the United States wanted to remove from the minds of the Seneca "all causes of complaint, for the purpose of establishing a firm and permanent friendship with them. . ." Canandaigua Treaty, 7 Stat. 44, Preamble. The Senecas would have had cause for complaint if the United States sought to regulate or tax these aboriginal lands for which the United States acknowledged to be the "property of the Seneka [sic] nation" and promised never to claim or disturb the same. 7 Stat. 45, art. III.

The United States also had no federal income tax in 1784 or 1842. Prior to the ratification of the Sixteenth Amendment to the United States Constitution in 1913, Congress had no "power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." U.S. Const. XVI amend. *See Pollock v.*

Farmers' Loan & Trust Co., 158 U.S. 601 (1895). Article 1, §2, cl. 3 of the U.S. Constitution provided the only means for the federal government to collect revenue. It provides in relevant part:

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and ***excluding Indians not taxed***, three fifths of all other Person. (Emphasis added).

Enrolled Senecas residing within borders of New York State were among those "Indians not taxed." who were not counted in the U.S. census prior to 1900.[13] Consequently, neither the United States nor the Senecas would have contemplated the imposition of federal income tax on income derived from farming, harvesting, mining, or otherwise working these treaty-protected lands.

Another relevant historic fact was noted in the Tax Court's opinion. [A-147]. Prior to 1924, enrolled Senecas were not citizens of the United States and therefore, could not vote or hold public office in the state or federal government. The United States won its independence to overcome the tyranny of being British subjects who were taxed without any representative within the British Parliament. These historic facts would prove the United States never intended to impose taxes

[13] According to the National Archives, Indians were not identified in the 1790-1840 censuses. National Archives, *American Indians in the Federal Decennial Census, 1790-1930*, (Nov. 10, 2019, 9:25 p.m., https://www.archives.gov/research/census/native-americans/1790-1930.html.

on the Seneca Nation, its people or its land since its people and land were considered outside of the political boundaries of the United States.

2. The Canandaigua Treaty and 1842 Treaty Must Be Read *In Pari Materia.*

Next the Court should examine the provisions of the 1842 Treaty with the Senecas. In that treaty, the United States promised "to protect such of the lands of the Seneca Indians" from "all taxes" until such lands are "sold and conveyed by the said Indians and the possession" of these lands "has been relinquished by them." 1842 Treaty, 7 Stat. 590, art. 9.

The 1842 Treaty reaffirms the promises made by the United States in the Canandaigua Treaty. In the Canandaigua Treaty, the United States promised not to disturb the Seneca Nation or "their Indian friends residing" on its territory and "in the free use and enjoyment" of lands within its treaty-defined territory. Canandaigua Treaty, 7 Stat. 45, art. III. After the State of New York sought to tax and foreclose upon these lands, the Government stepped in to assure the Seneca Nation that no one would interfere with "the free use and enjoyment" of its aboriginal lands and promised "to protect such of the lands of the Seneca Indians . . . ***from all taxes***" for whatever purpose such tax might be imposed. 1842 Treaty, 7 Stat. 590, art. 9. The 1842 Treaty and the Canandaigua Treaty, therefore, should be interpreted *in pari materia.*

Tax Court Judges Lauber and Pugh, with whom eight other judges

concurred, erroneously held the 1842 Treaty has an "extremely narrow focus." (A-166). In their separately written opinion, they wrote:

> All parties to the 1842 Treaty expected the Seneca[s] would eventually move west of the Mississippi River. If the Seneca[s] had been concerned about the possible future appearance of a Federal property tax, they presumably would not have agreed to limit the Federal exemption to property within New York.

(A-163). These stunningly misinformed historic claims were offered without any support or citation.

In 1838, a deed of conveyance was given to Thomas Ludlow Ogden and Joseph Fellows over tracts of land within the Cattaraugus, Allegany, Buffalo Creek and Tonawanda reservations. *Fellows*, 60 U.S. (19 How.) at 369; *The New York Indians*, 72 U.S. (5 Wall.) at 763. The first article of the 1842 Treaty confirms the Seneca Nation and its people would "continue in the occupation and enjoyment of the whole of the said two several tracts of land, called the Cattaraugus Reservation, and the Allegany Reservation with the same right and title in all things, as they had and possessed therein immediately before" a deed of conveyance. *Fellows*, 60 U.S. (19 How.) at 369; *The New York Indians*, 72 U.S. (5 Wall.) at 767.

As the Supreme Court held in *The New York Indians* case, the Senecas' right of occupancy created "an indefeasible title" to these tribal lands "that may extend from generation to generation and will cease only by the dissolution of the tribe, or their consent to sell to the party possessed of the right of pre-emption." *The New*

York Indians, 72 U.S. (5 Wall.) at 771. Consequently, no one, including the United States Supreme Court, expected the Seneca Nation to abandon the Cattaraugus or Allegany Territories and eventually move west of the Mississippi River.

The *Fellows* case is important for another reason. The Tax Court held neither the Canandaigua Treaty nor the 1842 Treaty bestowed rights to individual Senecas. [A-162]. Its holding is in conflict with the holding in *Fellows*.

In *Fellows*, John Blackstone, an enrolled Seneca residing and working on the Tonawanda reservation, brought an action for trespass after Blackstone was forcibly removed by Joseph Fellows and his servant from Blackstone's home and sawmill. 60 U.S. (19 How.) at 367. The New York Court of Appeals issued a decision in Blackstone's favor, from which Fellows sought review by the United States Supreme Court. *Id.* at 366. The High Court affirmed the decision of the New York Court of Appeals, finding Fellows had no cause to remove Blackstone, since neither the 1842 Treaty nor the 1838 Treaty from which Fellows acquired a deed of conveyance contained any provision "as to the mode or manner in which removal of the Indians or surrender of the reservations was to take place." *Fellows*, 60 U.S. (19 How.) at 370. If the U.S. Supreme Court had taken the same view as the Tax Court in this case, Blackstone would have been denied the relief he sought in his trespass action.

The words of the 1842 Treaty are explicit and are not limited to only state taxation. Nonetheless, the Tax Court gave an "extremely narrow" interpretation to these words.

In the 1842 Treaty, the parties "mutually agree to solicit the influence of the Government of the United States to protect . . . the lands of the Seneca Indians" from taxation. The Tax Court found this provision "extremely odd" because "a sovereign Government cannot 'influence' itself." (A-167). Without any legal support, the Tax Court asserted the following:

> The State of New York was not a party to the 1842 Treaty, and principles of sovereign immunity would have prevented the United States from attempting to interfere with an otherwise-constitutional New York tax. The best that United States could do was to pledge to use its influence to dissuade New York from taxing Seneca reservation land while the Seneca[s] continued to occupy it.

(A-168). These statements prove the very point made by a former IRS Commissioner, who was reported to say, "It's important to leave some tax decisions to generalist judges. You don't want the tax law pointy heads running the world." Fred T. Goldberg, former IRS Commissioner, *Wall Street Journal*, Dec. 20, 1989, A1, col. 5 (opposing a proposal to eliminate the jurisdiction of the federal district courts over tax cases). This appeal is one which is highly suited for an appellate court possessing a wealth of legal experience relating to Indian jurisprudence in the area of taxation, in contrast to the specialized limited experience of the Tax Court with such matters.

The phrase "to solicit the influence of the Government of the United States" used in the 1842 Treaty means the parties would solicit Congress to pass legislation to prevent the land of the Seneca Nation from any tax or assessment for any purpose. Consistent with its treaty obligations, Congress has expressly directed the Internal Revenue Service to give "due regard to any treaty obligation of the United States." I.R.C. § 894(a)(1) (West 2019).

3. This Court Has Never Rendered a Decision Specifically Addressing the Treaty Issue Presented in this Appeal.

The words of the 1842 Treaty are explicit and are not limited to only state taxation. Nonetheless, the Tax Court gave an "extremely narrow" interpretation to these words, based on a summary order issued by this Court involving the evasion of state cigarette taxes. (A-158 *citing United States v. Kaid*, 241 F. App'x, 747, 750 [2d Cir. 2007]).

In *Kaid,* this Court issued a summary order, citing two decisions issued by the State of New York Supreme Court Appellate Division. *Snyder v. Wetzel*, 193 A.D.2d 329 (3d Dep't 1993), *aff'd* 84 N.Y.2d 941 (1994) and *New York State Dep't of Taxation and Finance v. Bramhall*, 235 A.D.2d 75 (4th Dep't 1997). The Tax Court held it was precluded from finding the language within the 1842 Treaty supported an exemption from federal income tax. (A-158-59).

In *Kaid*, *Snyder*, and *Bramhall*, the courts were asked to decide whether the 1842 Treaty prohibits the State of New York from taxing cigarettes and motor fuel

sold on Indian reservations to non-tribal members. None of these courts were asked as to decide whether the 1842 Treaty prohibited the taxation of income derived directly from tribal lands. Imposing sale and excise taxes on a commodity manufactured or produced outside of a reservation and sold to non-tribal members is not in the category of "income derived directly from the land." *Cook v. United States*, 86 F.3d 1095, 1098 (Fed. Cir. 1996). In each of these cases, the courts held the State had the authority to impose a tax on cigarettes sold on an Indian reservation to *non-Indian* purchasers who intended to use or re-sell these cigarettes off the reservation. Because the facts and issues presented in these three cases are so distinct from the facts and issues presented in this case, they cannot be viewed as persuasive or instructive to resolve the treaty issue now pending before this Court for the first time.

4. The Court May Look to Dicta to Determine Whether Specific Language within a Treaty Can Reasonably Be Construed to Confer a Tax Exemption.

While the Court is directed by the principle of *stare decisis* to construe liberally any ambiguous provisions within a treaty in favor of the Indians, there are no cases or decisions in which a federal court or the Tax Court have been asked to determine whether language within either the Canandaigua Treaty or the 1842 Treaty confer an income tax exemption for income derived from farming, harvesting, mining, or working these treaty-protected lands. Nonetheless, three

circuit courts, former IRS Commissioners and a former United States Attorney General have all suggested the "free use and enjoyment" language within the Canandaigua Treaty could reasonably be construed to confer a federal tax exemption for income derived from farming, harvesting, mining or working treaty-protected lands. If the phrase "free use and enjoyment" can be construed to confer such an exemption, then the promises to protect these lands "from all taxes" for whatever purpose should be accorded the same interpretation. The dicta contained within these legal authorities is sufficient, as a matter of law, to permit this Court to rule that the language contained in the 1842 Treaty and the Canandaigua Treaty can reasonably be construed to confer a federal tax exemption for income earned from the sale of gravel mined on the Seneca Nation territory.

In *Hoptowit*, an Indian taxpayer sought an exemption based on the Treaty with the Yakimas of 1855. 709 F.2d at 565. The treaty set aside certain tracts of land "for the exclusive use and benefit of said confederated tribes and bands of Indians." *Id.* at 566. The Commissioner conceded the treaty gave a limited exemption for "income produced directly [from] reservation land." *Id.* The United States Court of Appeals for the Ninth Circuit agreed and held the "exclusive use and benefit" language did not create a blanket exemption for all income earned on the reservation, but did create a limited exemption from "income derived directly from the land." *Id.*

In *Lazore,* the United States Court of Appeals for the Third Circuit examined the "free use and enjoyment" provision of the Canandaigua Treaty. 11 F.3d at 1187. In that case, enrolled members of the St. Regis Mohawk Tribe assert their income was exempt from federal taxation. *Id.* Citing to the Ninth Circuit's decision in *Hoptowit*, the Third Circuit held the "free use and enjoyment" provision "might be sufficient to support an exemption from a tax on income derived directly from the land," but was insufficient to create blanket exemption for all income earned on and off the reservation. *Id. See, also, Sylvester v. C.I.R.*, 77 T.C.M. (CCH) 1346 (Tax 1999)(the Tax Court found the taxpayer was not exempt based on his status as a member of the Seneca Nation, but suggesting "income derived directly or indirectly from the use of Indian land" might be exempt); *Income Tax-Tom Pavatea, Hopi Indian*, 35 U.S. Op. Atty. Gen. at 108-09.

In *Cook*, owners of a diesel fuel truck stop within the Onondaga[14] Indian Territory sought a refund on federal excise tax on the sale of diesel fuel. 86 F.3d at 1096. The Circuit found the Canandaigua Treaty granting the Onondaga Indians the "free use and enjoyment" of their land and securing their "peaceful possession" of those lands. *Id.* at 1097. However, it held these provisions "applies to the use of land," and not to "the sale of a commodity." The Court further found that an excise tax on fuel is not a tax on income derived directly from the land. *Id.* at

[14] The Onondaga Indian Nation is a Haudenosaunee (Six Nations) member and a party to the Canandaigua Treaty.

1098. Citing to *Squire,* the court defined "income derived from the land" as "income from activities that exploit the land, such as the sale of timber from the Indian land." *Id.* Gravel mined from tribal land would fall within this definition. *Accord* Rev. Rul. 70-116, 1970-1 C.B. 11, 1970 WL 20654 (exempting income from mineral rights); Rev. Rul. 67-284, 1967-2 C.B., 1967 WL 14945 at *2 (providing list of income derived directly from the land, including "proceeds from the sale of the natural resources of the land.").

Given the dicta in these decisions and opinions, the Court may reasonably conclude the Canandaigua Treaty and the 1842 Treaty contain language evincing a congressional intent to exempt certain income from federal income tax, particularly when the liberal rules of construction requires any doubtful expressions in them to be resolved in the Indians' favor. *Trapp¸* 224 U.S. at 675; *Choctaw Nation,* 397 U.S. at 631.

II

ALICE PERKINS HAS A POSSESSORY INTEREST TO LAND ON THE SENECA NATION TERRITORY, ENTITLING HER TO A FEDERAL TAX EXEMPTION FOR INCOME EARNED DIRECTLY FROM THOSE LANDS

The majority of Tax Court judges agreed the dispositive legal question to be answered in this appeal was whether these treaties even provide "rights to individual Indians, rather than to the Nation as such." (A-151). This issue could have been resolved if the Tax Court had considered the Supreme Court's holding

in *Fellows,* 60 U.S. (19 How.) 366. In *Fellows*, the Court agreed with the New York Court of Appeals a Seneca living on the Tonawanda reservation could not be removed from his home and business because he had not relinquished possession to land allotted to him by the Seneca Nation and therefore, was entitled to the free use and enjoyment of such lands. *Id.* at 370-73.

The Tax Court continues to reject the notion that individual members of the Six Nations are exempt from federal income tax. (A-151-52). *See, e.g., Maracle v. C. I. R.*, 61 T.C.M. (CCH) 2083 (Tax 1991) (finding a Mohawk Indian could not claim federal treaties exempt income earned from off his reservation as a construction worker); *George v. C.I.R.*, 57 T.C.M. (CCH) 1168 (Tax 1989) (finding an Onondaga Indian could not claim federal treaties exempt income earned as a construction worker employed off the reservation); *Nephew v. C.I.R.*, 56 T.C.M. (CCH) 1122 (Tax 1989)(finding a Seneca employed off the reservation as a journeyman could not claim a federal income tax exemption based on federal treaties).

Alice Perkins, however, does not claim she is exempted from federal income tax due to her status as an enrolled Seneca. Her claims are not based on the sale of a commodity brought onto the Seneca Nation territory or on income not derived from Seneca land. Instead, she "presents the very issue about which [two circuit courts] speculated," *Perkins*, 2017 WL 3326818 at *1, and has given "an unusual

opportunity for two courts to analyze the same question about the same taxpayers at the same time." (A-147).

Taxing Indians is always a question of federal law. Issues relating to federal taxation focus on whether Congress has the *intention* to tax Indians while issues relating to state taxation focus on whether a state has the *authority* to tax Indians. Felix S. Cohen, *Handbook of Federal Indian Law* 265 (1942 ed.). Contrary to the Opinion of the Tax Court (A-157), the language of a federal treaty or statute does not have to use specific words to show an exemption from taxation.

For example, in *Squire*, 351 U.S. at 6-7, the U.S. Supreme Court found the General Allotment Act of 1887 evinced *no congressional intent* to tax income derived from the land allotted to, and held in by trust for, "non-competent" Indians by the federal government. The Court acknowledged the Act was "not couched in terms of nontaxability," but found "the general words 'charge or incumbrance' might well be sufficient to include taxation." *Id.* More importantly, the Court found income earned in 1942 from harvesting timber was exempt for federal income tax, *id.* at 3-5, even though the statute "was antedated the federal income tax by 10 years," a fact the Court found "irrelevant." *Id.* at 7.

The Court has also held States lack the *authority* to tax reservation land or income from activities carried within the boundaries of a reservation absent congressional consent. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148

(1973); *McClanahan*, 411 U.S. at 18. Consequently, as an enrolled Seneca, Alice is not subject to state income tax on income earned on the reservation.

The Perkinses, however, do not claim all income earned by Alice on the Seneca Nation territories should be exempt from federal income tax. They only claim income derived from these restricted lands to which an enrolled Seneca has a right of possession superior to all others, except the Seneca Nation, be exempt from federal income tax. By excluding members of the Seneca Nation from the provisions of the General Allotment Act, Congress intended the broader protection given by federal treaties with the Seneca Nation not be abrogated by an act giving lesser protection to Indians whose tribal nations surrendered both their lands and their sovereignty. The liberal rules of construction given to the General Allotment Act should be equally applicable to the federal treaties protecting the Seneca Nation, its people and its sovereign lands.

The Perkinses concede no enrolled Seneca holds a fee simple title to lands within the Seneca Nation territories. (A-129 ¶18). Due to these federally imposed restrictions on alienation and encumbrance, no individual can hold fee simple title to land within the territories of the Seneca Nation. (A-129 ¶18). Instead, the Seneca Nation has allotted land by restricted conveyances to enrolled members who may only pass or transfer possession of such lands to other enrolled Senecas by quitclaim deeds or by leases. (*Id.*). The Seneca Nation continues to hold the

legal title to these lands, ensuring these lands do not pass to non-enrolled members and out of its control, and are preserved for future generations of enrolled members. (*Id.*). *See The New York Indians*, 72 U.S. (5 Wall.) at 770-71(finding the Seneca Nation remains in their ancient possession of aboriginal lands entitling them to the undisturbed enjoyment of such lands and creating "indefeasible title" to such lands "that may extend from generation to generation" until the Seneca People surrenders such lands). These restrictions on alienation and encumbrance run with the land.

If anyone did hold a fee simple title to any such lands, then such lands would no longer be "restricted land" or under the jurisdiction of the Seneca Nation as part of its aboriginal territory.[15] Consequently, if the Perkinses had a fee simple title to such lands, Alice would have no grounds to seek a tax exemption for income derived from unrestricted land, no longer protected by federal treaties.

But contrary to the Tax Court's findings (A-156), Alice Perkins had been allotted land on the Seneca Nation territory. Although these lands were not

[15] Federal statute further restricts the alienation of lands within the Seneca Nation territories. *See* 25 U.S.C. § 177 ("No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity . . . unless the same be made by treaty or convention entered into pursuant to the Constitution."). Because Congress has not authorized the alienation of any land within the Seneca Nation territories, no individual has the authority to alienate or encumber Seneca Nation land in a manner which would remove these treaty-protected lands from the Seneca Nation's jurisdiction and control. Consequently, enrolled Senecas may not encumber these lands with mortgages or other liens to secure their debts. Due to these federally imposed restrictions on alienation and encumbrance, no individual holds a fee simple title to land within the territories of the Seneca Nation.

allotted by the United States, these lands were allotted by the customs, laws and traditions of the Seneca Nation. (A-129 ¶18).

Nonetheless, the Tax Court failed to recognize Alice had a right of possession superior to all others, except the Seneca Nation, and no one other than Alice could have been given permission to extract gravel from these lands. By residing on the territory and holding a superior right of possession to all others, except the Seneca Nation, Alice was united in interest with the Seneca Nation in the free use and enjoyment of these lands and entitled to the same tax exemption as the Seneca Nation for income earned from such lands.

At the time these federal treaties were made, neither the United States nor the Senecas would have contemplated the taxation of these tribal lands or income derived from such lands. In a footnote (A-166), the Tax Court noted Congress had enacted a series of revenue statutes to collect a federal tax on real property. *See Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533, 542-543 (1869). These statutes were enacted after the ratification of the Canandaigua Treaty. *Id.* Nevertheless, the Seneca Nation lands were never subject to the federal real property tax, a fact not addressed by the Tax Court.

When these revenue statutes were enacted, Congress only had the constitutional power to laid direct taxes "apportioned to the several States, according to their respective numbers of inhabitants, as ascertained by the last

preceding census." *Id.* at 541. Since Indians were not taxed or counted as part of the census, the United States never sought to impose a federal tax on lands held by an Indian nation.

Through federal treaties and statutes, Congress intended to secure and guarantee to the Seneca Nation and its people the right of possession and enjoyment of their lands, now and in the future, by making these tribal lands inalienable. Taxing the income derived from these restricted lands would infringe upon the Seneca Nation's sovereignty and rights guaranteed and secured by federal treaties.

If its enrolled members are to be taxed on income derived from the land, then enrolled members may well abandon the Seneca Nation territories to pursue higher income work off its territories. Enrolled Senecas would be removing their families not only their aboriginal lands of their ancestors, but also the community from which their history, customs, laws and traditions are preserved and handed to the next generations. By taxing income of "Indian friends" residing and united with the Seneca Nation, the United States would be infringing upon the Seneca Nation's sovereignty.

The Canandaigua Treaty promised the United States will not disturb either the Seneca Nation or "its Indian friends residing" on its treaty-protected land and "united with them." 7 Stat. 45, art. III. Although the District Court found this

language creates individual rights for the Perkinses, the Tax Court disagreed, finding the treaty could not be "reasonably . . . read as creating personal rights." (A-151). Later in the Opinion, the Tax Court found the phase "Indian friends residing thereon and united with them" to give the Seneca Nation the right "to choose who is a member of the Nation and perhaps even . . . a promise not to use non-Seneca Indians as putative sellers of Seneca land." (A-152). Even with this concession, the Tax Court narrowly read the Canandaigua Treaty to protect only the lands of the Seneca Nation from being disturbed, which is different from creating a tax exemption." (A-152). The cardinal rule of resolving any ambiguities in a federal treaty or statute in favor of the Indians, therefore, should guide the Court in rejecting the Tax Court's narrow interpretation of these federal treaties.

CONCLUSION

As set forth in the Decision of the Tax Court, entered May 30, 2019 (A-197), all issues raised by the pleadings in the Tax Court were resolved by a Joint Stipulation (A-195-96) other than the issue of whether the subject revenue was exempt from federal taxation (and associated computational adjustments). The Tax Court, in its Opinion dated March 1, 2018 (A-142-171), ruled upon the Commissioner's motion for summary judgment, finding the subject income was not exempt from taxation. Based on the Joint Stipulation of the parties (A-195-

96), the Tax Court entered its calculated Decision on May 30, 2019 (A-197), which is the subject of this appeal.

For the reasons set forth above, Appellants-Petitioners respectfully request a reversal of the Decision of the Tax Court, entered May 30, 2019 (A-197), to the extent that it was premised on the Tax Court's Opinion of March 1, 2018. (A-142-171), and remand to the Tax Court for entry of a Decision calculated with the exemption of the subject income from federal income taxation (and the associated computational adjustments).

Dated: Hamburg, New York
November 19, 2019

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November 19, 2019

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