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

REPLY BRIEF FOR PETITIONERS-APPELLANTS

MARGARET A. MURPHY
MARGARET A. MURPHY, P.C.
5354 Briercliff Drive
Hamburg, New York 14075
(716) 867-1536

– and –

GARY D. BOREK
GARY D. BOREK, ATTORNEY AT LAW
99 Victoria Boulevard
Cheektowaga, New York 14225
(716) 839-4321

Attorney for Petitioners-Appellants

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PRELIMINARY STATEMENT

On February 18, 2020, the Commissioner of Internal Revenue (the "Commissioner") filed a 61-page brief (cited as " CIR Br.") without acknowledging this appeal presents an issue of first impression. Only two courts, the United States District Court for the Western District of New York (the "District Court") and the United States Tax Court (the "Tax Court") from which this appeal is taken, have addressed the issue of the taxability of income derived from treaty-protected lands of the Seneca Nation of Indians ("Seneca Nation"). *Perkins v. United States*, 16-CV-495(LJV), WL 3326818, at *1 (W.D.N.Y. Aug. 4, 2017); *Perkins v. Commissioner of Internal Revenue*, 150 T.C. 119 (U.S. Tax Ct. 2018)(JA 142-171).

In two federal treaties, the United States promised 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, 1794, 7 Stat. 44, 45, art. III ("Canandaigua Treaty"); Treaty with the Senecas, May 20, 1842, 7 Stat. 586, 590, art. 9 ("1842 Treaty"). Contrary to federal case law, the Commissioner argues the "relevant inquiry in examining these treaties" is not "whether the parties to the treaties 'contemplated the *imposition* of federal income tax' or 'intended to *impose*' taxes under these treaties," but "whether either treaty creates an *exemption*" from federal taxation, particularly when "taxation is not referenced anywhere" in one of

the treaties. (CIR Br. at 20, 24). *But see Herrera v. Wyoming*, 139 S.Ct. 1686, 1699 (2019)("A treaty is 'essentially a contract between two sovereign nations.' [Citation omitted]. Indian treaties 'must be interpreted in light of the parties' intentions, with any ambiguities resolved in favor of the Indians, [Citation Omitted] . . . ."); *Squire v. Capoeman*, 351 U.S. 1, 6–7 (1956)(construing the General Allotment Act of 1887 to create an exemption for a not-yet-created federal income tax).

Instead of reading these treaties *in pari materia*, the Commissioner separated and isolated language in each treaty, construing each treaty narrowly rather than liberally. (CIR Br. At 14, 25, 37, 48-49). The Commissioner, like the Tax Court (JA 10, 21), claims these treaties do not confer rights on individual members of the Seneca Nation. (CIR Br. at 16, 34, 37, 49). The District Court reached a different conclusion. *Perkins v. United States*, 2017 WL 3326818, at *4 (denying the Government's motion to dismiss and finding the taxpayers have plausible treaty claims). Although conceding the 1842 Treaty "creates a tax exemption of some kind" (CIR Br. at 36), the Commissioner narrowly construed the exemption for state, not federal, taxation of land, and not income derived from land. (CIR Br. at 15, 16, 37, 41, 44-45, 48, 55).

Even if this Court were to find these treaties exempt income derived from land earned by members of the Seneca Nation, the Commissioner would further narrow

such an exemption to exclude Appellant Alice Perkins ("Alice Perkins") [1] and the gravel from which she earned her income.

First, the Commissioner alleges Alice Perkins is a mere licensee with no possessory ownership interest in the land from which sand and gravel was mined. He then argues the sand and gravel is owned by the Seneca Nation and therefore, Alice Perkins cannot claim income from the sale of such sand and gravel is exempt under these treaties. Finally, he argues once the sand and gravel is severed from the land, it is no longer exempt because the 1842 Treaty exempts only land, not the by-product severed from the land. In the words of the District Court, narrowing the treaty exemption to only the land, but not the sand and gravel extracted from the land, "cuts the baloney too thin," given the liberal rules for interpreting treaties. WL 3326818, at *5.

[1] Throughout his brief, the Commissioners refers to income from "A&F Trucking" or the Perkinses' income. A&F Trucking is not a corporation or a partnership. Alice Perkins is a sole proprietor doing business under the name of A&F Trucking. (A-95-96). Alice, not her husband, operated A&F Trucking and reports her income from her business on a joint-tax return with her husband (A. 144).

ARGUMENT IN REPLY

I

NO DECISION OF THE UNITED STATES SUPREME COURT OR THE UNITED STATES COURT OF APPEALS HAS EVER RULED ON THE TAXABILITY OF INCOME DERIVED FROM THE TREATY-PROTECTED LANDS OF THE SENECA NATION

Throughout his brief, the Commissioner repeats the same theme. "The courts in other cases have consistently rejected Indian claims for tax exemption" based on "income derived from common tribal land, or land allotted to another Indian," or "based on the Canandaigua Treaty and other Indian treaties with similar language." (CIR Br. at 15, 27-29, 31-32, 33). To support these general assertions, the Commissioner relies only on cases involving the General Allotment Act (CIR Br. at 31-32) or cases in which exemptions based on the Canandaigua Treaty or 1842 Treaty related to income earned from wages or from the sale of goods or commodities brought onto the territories of the Seneca Nation (CIR Br. at 27-29, 33).

A. Because the General Allotment Act Specifically Excludes the Lands of the Seneca Nation, Income Found Taxable under this Act Would Not Preclude an Exempt Claim Based on Federal Treaties with the Seneca Nation.

In *Squire*, 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 trust by, the federal government for "non-competent" Indians. 351 U.S. at

6-7. 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.

Since *Squire*,[2] the federal appellate courts have only applied this exemption for noncompetent Indians whose income derived directly from lands allotted, to them, by the United States under the provisions of the General Allotment Act or under a federal statute with similar provisions like the General Allotment Act. *Accord* Rev. Rul. 67-284, 1967-2 C.B., 1967 WL 14945. However, absent any other statutory or treaty exemption, federal courts have rejected tax claims by the Indian taxpayers whose income is not directly derived from lands allotted to them by the federal government.

The Commissioner, for example, cites a decision from the United States Court of Appeals for the Ninth Circuit holding the General Allotment Act does not exempt income earned by a noncompetent Indian for cattle ranching, under a tribal license, on land allotted to another Indian. *United States v. Anderson*, 625 F.2d 910, 914

[2] In his brief, the Commissioner refers to the decision of the United States Supreme Court in *Squire v. Capoeman*, 351 U.S. 1 (1956) as *Capoeman.*

(9th Cir. 1980). Similarly, the Ninth Circuit held the General Allotment Act does not exempt from federal taxation, wages earned by an Indian employee of a logging company that logged on nonallotted land. *Fry v. United States*, 557 F.2d 646 (9th Cir. 1977).

The Eighth Circuit has held income, earned by a noncompetent Indian, from cattle grazing on common lands authorized by a tribal-issued permit was taxable. *Holt v. Commissioner*, 364 F.2d 38, 41 (8th Cir. 1966), *cert. denied* 386 U.S. 931 (1967). *See, also, Wynecoop v. Commissioner*, 76 T.C. 101 (1981) (income earned from dividends on mineral leases on tribal lands is taxable); *Red Lake Band of Chippewa Indians v. United States*, 861 F. Supp. 841, 845-46 (D. Minn. 1994) (income derived from logging activity was not exempt from federal income taxation, where income was not derived from lands allotted pursuant to the General Allotment Act and no treaty exempted such income).

The cases cited by the Commissioner has no applicability to the exemption claims raised in this appeal for two reasons. First, 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 2020]). Second, Congress never intended to narrow the protection given to the Seneca Nation and its people under federal treaties ratified prior to the enactment of the General Allotment Act of 1887. In this appeal,

the Court must consider whether the Canandaigua Treaty, read *in pari materia* with the 1842 Treaty, contain a textual basis to exempt income derived from farming, harvesting, mining, or otherwise working the treaty-protected lands of the Seneca Nation from federal taxation.

B. The Commissioner Has Not Cited and Cannot Cite Any Decision from the Tax Court or from a Federal Court Imposing a Federal Income Tax on an Enrolled Seneca Engaged in Farming, Mining, Harvesting or Otherwise Working the Treaty-Protected Lands of the Seneca Nation.

In this appeal, Alice Perkins claims the Canandaigua Treaty and the 1842 Treaty protect enrolled Senecas, like herself, who adhere to the Nation's customs, laws and traditions and reside on the Seneca Nation territories, from any burden imposed under federal law of general applicability, which would interfere with the free use and enjoyment of the Nation's lands, including the imposition of any tax on such lands or on income earned from working these lands. No court has ever ruled income, earned by an enrolled Seneca from working the lands of the Seneca Nation, is subject to federal taxation. *Perkins*, 2017 WL 3326818, at *1,

As the District Court has already noted, "circuit courts have suggested in dicta that 'income derived directly from the land' might be exempt from taxation under such treaties," but "did so to distinguish that scenario from cases where an exemption was sought for income earned in ways that do not relate to the land itself." *Perkins*, 2017 WL 3326818, at *1 (citing *Lazore v. C.I.R.*, 11 F.3d 1180 (3d Cir. 1993) and

Hoptowit v. C.I.R., 709 F.2d 564 (9th Cir. 1983)). This appeal "presents the very issue about which those courts speculated." 2017 WL 3326818, at *1.

Nonetheless, three circuit courts, former Commissioners of Internal Revenue 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. *See Hoptowit*, 709 F.2d at 566; *Lazore*, 11 F.3d at 1187; *Cook v. United States*, 86 F.3d 1095, 1097-98 (Fed. Cir. 1996); *Sylvester v. C.I.R.*, 77 T.C.M. (CCH) 1346 (Tax 1999); *Income Tax-Tom Pavatea, Hopi Indian*, 35 U.S. Op. Atty. Gen. 107, 108-109 (1926)("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.").

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 sand and 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 that case, however, the Ninth Circuit found wages earned by a member of the Tribal Counsel was not *exempt* under the treaty at issue.[3]

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

[3] This appeal would not require the Court to rule either the Canandaigua Treaty or the 1842 Treaty give blanket exemption from federal income tax for wages earned on or off the territory of the Seneca Nation or from income earned from the sales of commodities brought onto the territory. *See Nephew v. C.I.R.*, 56 T.C.M. (CCH) 1122 (1989)(the wages of an enrolled Seneca employed as a journeyman was taxable); *George v. C.I.R*, 57 T.C.M. (CCH) 1168 (1989)(income earned by an enrolled member of the Onondaga Indian Nation as an off-the-reservation construction worker was taxable); *Maracle v. C.I.R*, 61 T.C.M. (CCH) 2083 (1991)(income earned by a Mohawk, residing on an reserve in Canada and working as a construction worker in the United States was taxable); *Sylvester v. C.I.R.*, 77 T.C.M. (CCH) 1346 (Tax 1999)(wages earned by a Seneca off-the-territory was taxable).

employment wages were 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 a blanket exemption for wages earned from on- and off-the- reservation employment. *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 suggested "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[4] 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 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.*

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

Sand and 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. *Choate v. Trapp*, 224 U.S. 665, 675 (1912); *Choctaw Nation v. Oklahoma,* 397 U.S. 620, 631 (1970).

II

THE COURT MUST EXAMINE THE LANGUAGE AND THE HISTORICAL CONTEXT OF THE TREATIES TO DETERMINE WHETHER CONGRESS INTENDED TO TAX INCOME DERIVED FROM WORKING THESE TREATY-PROTECTED LANDS

In his brief, the Commissioner argues the "relevant inquiry" is not whether the parties to a treaty "contemplated the *imposition* of a federal tax" or "intended to *impose*" any tax on treaty-protected lands or the income derived from such lands. (CIR Br. at 20). Felix S. Cohen, an acknowledged expert in Indian law, wrote in 1942:

> In considering federal taxation of Indian income, one finds the courts concerned not, as in the case of the state, with the question of whether the state may tax, but with the question of whether the Federal Government has intended to tax.

Felix S. Cohen, *Handbook of Federal Indian Law* 265 (1942 ed.). *See, also, 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.")

"A treaty is 'essentially a contract[5] between two sovereign nations.' " *Herrera*, 139 S. Ct. at 1699, *quoting Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658, 675 (1979). Indian treaties "must be interpreted in light of the parties' intentions, with any ambiguities resolved in favor of the Indians." *Id., quoting Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 206 (1999). Words of a treaty must be construed " 'in the sense in which they would naturally be understood by the Indians.' " *Herrera*, 139 S.Ct. at 1699, *quoting Fishing Vessel Assn.*, 443 U.S. at 676. Finally, the Court must "look beyond

[5] As this Court recognized in *Seneca Nation of Indians v. New York*, 383 F.3d 245, 259 (2d Cir. 2004), "treaties are construed more liberally than private agreements and the history, negotiations, and practical construction adopted by the parties are all relevant to treaty interpretation."

the written words to the larger context that frames [these treaties], including 'the history of the treaty, the negotiations, and the practical construction adopted by the parties.'" *Mille Lacs Band*, 526 U.S. at 196, *quoting Choctaw Nation v. United States*, 318 U.S. 423, 432 (1943).

A. Based on Relevant Historic Facts, No Evidence Exist to Show Congress Intended to Impose a Tax on Land or Income Derived from Land of the Seneca Nation.

The first federal treaty with the Seneca Nation and other Haudenosaunee Nations predates the United States Constitution. Treaty with the Six Nations, 1784, Oct. 22, 1784, 7 Stat. 15. 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. After ratification of the United States Constitution, the United States negotiated and ratified the Canandaigua Treaty and the 1842 Treaty.

In 1794, President George Washington sent an envoy, Timothy Pickering, to negotiate the terms of the Canandaigua Treaty "with the Six Nations for the purpose of removing from their minds all causes of complaint, and establishing a firm and permanent friendship with them." Canandaigua Treaty, Nov. 11, 1794, 7 Stat. 44. The United States agreed to cede "a substantial part of what is now western New York." *Seneca Nation of Indians v. New York*, 382 F.3d 245, 257 (2d Cir. 2004). Pursuant to Article VI of the Canandaigua Treaty, the United States purchases and

delivers cloth each year "to the Six Nation and the Indians of other nations residing among and united with them." Canandaigua Treaty, Nov. 11, 1794, 7 Stat. 44, 46, art.VI. This annual practice is evidence that the Treaty remains in effect.

The 1842 Treaty reaffirms the promises made by the United States in the Canandaigua Treaty. In the 1842 Treaty, the parties agreed the Seneca Nation would "continue in the occupation and enjoyment of the whole of the said two several tracts, called the Cattaraugus Reservation, and the Allegany Reservation with the same rights and title in all things as they possessed therein immediately before the date" of an indenture given to the Ogden Land Company. 1842 Treaty, May 20, 1842, 7 Stat. 586. In 1838, Thomas Ludlow Ogden and Joseph Fellows secured an indenture[6] over tracts of land within the Cattaraugus, Allegany, Buffalo Creek and Tonawanda reservations. *Fellows v. Blacksmith,* 60 U.S. (19 How.) 366, 369 (1856); *The New York Indians,* 72 U.S. (5 Wall.) 761, 763 (1866). The 1842 Treaty restored to the Senecas not only the title of the Allegany and Cattaraugus Territories, but also

[6] Ogden and Fellow secured the indenture "by means of forgery, bribery, and alcohol." Joy Bilharty, *The Changing Status of Seneca Women* in *Women and Power in Native North America* 101.109 (Laura F. Klein and Lillian A. Ackerman, ed. University of Oklahoma Press 1995). In a message to the Senate, dated January 13, 1940, President Martin van Buren advised, "the assent of the Seneca Tribe had not been given, nor could it be obtained to it" and that "there was every reason to believe that improper means had been employed to obtain the assent of the Seneca Chiefs." Aided by the Quakers and Daniel Webster, the Senecas were able to negotiate a compromise treaty in 1842 to restore to them the possession of the Allegany and Cattaraugus Territories.

the same rights "to the occupation and enjoyment" of lands within the Allegany and Cattaraugus Territories as they possessed prior to 1838. The right of "free use and enjoyment" secured under the Canandaigua Treaty, therefore, continued under the 1842 Treaty. More importantly, the United States promised "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*** . . . ." 1842 Treaty, May 20, 1842, 7 Stat. 590.

At the time of these treaties, Congress had no authority under the Constitution to impose a federal tax on land or income. *Pollock v. Farmers' Loan & Trust Co.,* 158 U.S. 601 (1895). Prior to 1913, Congress only had the constitutional power to impose and collect a "direct Tax . . . apportioned among the several States." Members of the Seneca Nation were referenced as "Indians not taxed"[7] or counted for purposes of this apportionment. U.S. Const. art. I, § 2, cl. 3. Members of the Seneca Nation were not even considered citizens of the United States or subject to its jurisdiction until 1924.[8] Consequently, neither the Senecas nor the United States

[7] Contrary to the Commissioner's assertion (CIR Br. at 19), Alice Perkins does not claim Article 1, § 2, cl. 3 of the United States Constitution provides an exemption from taxation. However, the context of the constitutional provisions gives a historical perspective to the treaties at issue.

[8] 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

contemplated a federal tax on land, or income derived from land, on the Seneca Nation territories.

In 1913, the Sixteenth Amendment gave Congress the "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. The Commissioner has made no assertions that the ratification of the Sixteenth Amendment affected any federal treaty with an Indian nation or a foreign government.

With the Internal Revenue Code of 1954, Congress established the treaties with tax exemption provisions should prevail over provisions of the Code. David Sachs, *Is the 19th Century Doctrine of Treaty Override Good Law for Modern Day Tax Treaties?*, 47 Tax Law. 867, 870 (1994), Thus, I.R.C.§ 894[9] initially provided generally that income exempted by treaty should be exempt under the Code. *Id.*

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).

[9] Contrary to the Commissioner's claim (CIR Br. at 59), § 849 was enacted prior to 1988. Appellants have not researched when the provision was first added, but one treatise indicates the provision was present in the Internal Revenue Code of 1954. David Sachs, *Is the 19th Century Doctrine of Treaty Override Good Law for Modern Day Tax Treaties?*, 47 Tax Law. 867, 870 (1994).

I.R.C.§ 7852(d) further provided, and still provides, for priority of treaties "in effect on the date of enactment of this title."

> No provision of this title (as in effect without regard to any amendment thereto enacted after August 16, 1954) shall apply in any case where its application would be contrary to any treaty obligation of the United States in effect on August 16, 1954.

I.R.C.§ 7852(d)(2)(West 2020). Since the treaties at issue in this appeal were in effect on August 16, 1954, any treaty provisions protecting either the land or income derived from such land from federal taxation would be controlling, unless Congress abrogates such treaty provisions.

Last year, the United States Supreme Court reaffirmed a treaty provision is enforceable, as the supreme law of the land, unless there is "'clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.' " *Herrera v. Wyoming*, 139 S. Ct. at 1698 (quoting *United States v. Dion*, 476 U.S. 734, 739–40 (1986) and citing *Mille Lacs Band*, 526 U.S. at 202-203. The Commissioner offered no evidence to the Tax Court to show Congress intended to abrogate the promises made to the Seneca Nation and its people by the United States in the Canandaigua Treaty and the 1842 Treaty.

In those treaties, the United States promised 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." The plain

language of these treaties demonstrates the parties never intended Congress to burden the Seneca Nation or the "Indian friends residing" on these lands and "united" with the Seneca Nation with any form of taxation.

Since the ratification of the Sixteenth Amendment in 1913, "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,* 11 F.3d at 1183). Instead, Congress has explicitly recognized provisions of the Internal Revenue Code 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).

In his brief, the Commissioner claims any reference to I.R.C.§ 849(a)(1) to show congressional intent would pose a "glaring problem" because the provision "was not enacted until 1988, well over a century after the execution" of the subject treaties. (CIR Br. at 59). The 1954 version of § 849, nonetheless, exempted from federal taxation "income of any kind,[10] to the extent required by any treaty obligation." The current version of § 849(a)(1) required the Commissioner to give "due regard of any treaty obligation of the United States which applies to such

[10] The Commissioner argues the 1954 version exempts only income and not land and argues the 1842 Treaty exempts land from taxation, not income derived from land. (CIR Br. at 59).

taxpayer." In any case, the income for which exemption is sought was earned after 1988, allowing this Court to apply the current, broader version of § 848(a)(1).

B. The Canandaigua Treaty and the 1842 Treaty Must Be Read *In Pari Materia,* Applying Liberal Canons of Construction Applicable to Indian Treaties.

The Commissioner's narrow interpretation of the language contained in these treaties is not supported by the liberal canons of construction applicable to doubtful expressions found in Indian treaties. *Trapp*¸ 224 U.S. at 675; *Choctaw Nation,* 397 U.S. at 631. Under these canons, words within an Indian treaty are read, not according to the technical meaning of such words by learned lawyers, but as such words would have been 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*, 397 U.S. at 631 (1970) ("treaties with the Indians must be interpreted as they would have understood them, and any doubtful expressions in them should be resolved in the Indians' favor"); *Mille Lacs Band,* 526 U.S. at 196 (1999) (quoting *Choctaw Nation,* 318 U.S. at 432)(treaties may be interpreted by "the practical constructions adopted by the parties").

1. Congress did not intend to impose a tax burden on land or income derived from the land of the Seneca Nation.

As to the Canandaigua Treaty, the Commissioner narrowly construes its language because "taxation is not referenced anywhere at all" in the treaty. (CIR Br. at 24, 29). "[A]ll Indian treaties were entered into long before the passage of the

income tax, the fact that the parties to a treaty did not negotiate with the federal income tax in mind is immaterial." *Lazore*, 11 F.3d at 1184.

> Thus, short of a provision creating an exemption from all taxation, there would appear to be no way for a treaty to contain language that could support an exemption from the income tax.

Id. Nevertheless, the United States Supreme Court has adopted liberal rules of construction for interpreting federal treaties with Indians, making "it possible for language that could not have been concerned with the [federal] income tax to . . . create an exemption from it." *Id. Accord Squire*, 351 U.S. at 6-7.[11] (*Contra* CIR Br. at 56).

In the Commissioner's view, "requiring the Perkinses to pay federal income tax" on income derived from mining sand and gravel "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." (CIR Br. at 36, emphasis added). To the contrary, any promise "not to disturb" is the same as "not to burden" the "free use and enjoyment" of these treaty-protected lands. A federal tax on land or income derived from land is a burden. "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

[11] See discussions on pages 4-5 of this Reply Brief.

language." *Income Tax-Restricted Lands of Quapaw Indians.*, 34 U.S. Op. Atty. Gen. 439, 444 (1925). In considering the "practical constructions adopted by the parties," *Mille Lacs Band*, 526 U.S. at 196, to a treaty that "is perfectly silent about taxation," (CIR Br.at 29), the Court should rule Congress never intended to impose such taxation. Former Attorney General John G. Sargent cautioned, "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.

In the 1842 Treaty, the United States promised "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*** . . . ." 1842 Treaty, 7 Stat. 590, art. 9. The language of the 1842 Treaty could not be more explicit. When the 1842 Treaty is read in conjunction and *in pari materia* with the Canandaigua Treaty, they show conclusively Congress's intent to protect the Seneca Nation or its people from all forms of taxation relating to land or income derived from the land. *Accord Shanks v. Dupont*, 28 U.S. 242, 254 (1930); *Frost v. Wenie*, 158 U.S. 46, 60 (1895); *Blight's Lessee v. Rochester*, 20 U.S. (1 Wheaton) 535, 541-42 (1822). Because Congress has taken no action to abrogate these treaties, Alice Perkins is entitled to a federal income tax exemption for the income derived from working the land on the Seneca Nation Allegany Territory.

2. The Canandaigua Treaty and 1842 Treaty confers tights to enrolled members of the Seneca Nation.

The Canandaigua Treaty guarantees the Seneca Nation and its "Indian friends" will have "the free use and enjoyment" of the treaty-protected lands of the Seneca Nation. 7 Stat. 45. The 1842 Treaty secures the same rights guaranteed under the Canandaigua Treaty "to continue in the occupation and enjoyment of the whole of the said two several tracts, called the Cattaraugus Reservation, and the Allegany Reservation" 7 Stat. 586. Alice Perkins, as enrolled Seneca residing on the Allegany Territory and united with the Seneca Nation and the other Haudenosaunee nations, have treaty rights as an "Indian friend."

Without citing any legal authority for its assertions, both the Tax Court (JA 151) and the Commissioner (CIR Br. at 34) give a narrow interpretation to the promise not to "disturb the Seneka nation, nor any of the Six Nations, or of their Indian friends residing thereon, and united with them." In the Commissioner's view:

> 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. (JA 151).

(CIR Br. at 34). This position cannot be supported by either history or federal case law.

In *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 880 (2d Cir. 1996), this Court recognized Indian nations "are distinct political entities retaining inherent powers to manage internal tribal matters." *Citing Cherokee Nation v.*

Georgia, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832). "Recognition that tribes 'retain' certain aspects of sovereignty. . . has led to repeated judicial acknowledgements" of an Indian nation's "to determine questions of membership" and "to control the use of their natural resources," 85 F.3d at 880 (citation omitted).

The Court must interpret the promise not to "disturb the Seneka nation, nor any of the Six Nations, or of their Indian friends residing thereon, and united with them" as the Seneca and the Haudenosaunee nations would have understood its meaning at the time of the Canandaigua Treaty. Historically, membership within one of the Haudenosaunee nations was determined by blood or "adoption." *See Encyclopedia of the Haudenosaunee (Iroquois Confederacy)* 3-7 (Bruce Elliot Johansen & Barbara Alice Mann, eds., Greenwood Press 2000). The man or woman whose mother is a blood Seneca is a member of the Seneca Nation and entitled to reside on its territories and subject to its protection and jurisdiction. The Senecas and other Haudenosaunee nations adopted members from other tribal nations who were either conquered or sought their protection. *Id.* The adoption ritual allowed an individual, a group or an entire nation to be accepted into Haudenosaunee society. *Id.* Consequently, the Seneca Nation would have understood the promise not to disturb "their Indian friends residing thereon, and united with them" to mean an

individual who, by birth or by adoption, was accepted into its society and the society of other Haudenosaunee nation.

As a practical consideration, an Indian nation exists only for the benefit of its people. It is the people of the Seneca Nation that benefit from treaties that promises the "free use and enjoyment" and the right of "occupation and enjoyment" of the common lands of the Seneca Nation. The Seneca Nation has the right to make laws governing its lands and the use of its lands.

Under these treaties, the Seneca people remain 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. *The New York Indians*, 72 U.S. (5 Wall.) at 770-71. Although Seneca members do not "own" land within the territory, they do have the right to possess land, either a quitclaim deed allotting land or by a lease assigning land. (A-129 ¶18).

Contrary to Commissioner's position, this appeal does not turn on whether Alice Perkins "owns" land or has a "possessory ownership interest in land." At the time of these treaties, the Seneca and other Haudenosaunee nations did not recognize the Anglo-European concept of "ownership." *In Defense of* Property, 118 Yale L. J. 1022, 1066 (April 2009). These treaties recognized the Seneca Nation have "aboriginal title," meaning the continuous, exclusive use of said land over a long

period of time. Instead of ownership, the Seneca and Haudenosaunee nations embraced the notion of stewardship. *Id.* Therefore, it would be antithetical to interpret any rights under these treaties based on ownership.

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
March 10, 2020

MARGARET A. MURPHY, P.C.

By /s/ Margaret A. Murphy .
Margaret A. Murphy, of counsel
5354 Briercliff Drive
Hamburg, New York 14075
Telephone No.: (716) 662-4186

GARY D. BOREK, LLC
Gary D. Borek, of counsel
99 Victoria Blvd.
Cheektowaga, NY 14225-4321
Telephone No.: (716) 839-4321

Attorneys for Appellants-Petitioners
Fredrick Perkins and Alice J. Perkins

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By /s/ Margaret A. Murphy .
Attorney for the Appellants Alice Perkins and Fredrick Perkins