

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Victor C. & Jennie S. Twoguns : AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Personal Income :
Tax under Article(s) 22 of the Tax Law for the :
Year 1981. :
_____ :

State of New York :

ss.:

County of Albany :

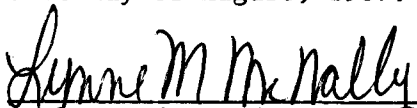
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 31st day of August, 1987, he/she served the within notice of Decision by certified mail upon Victor C. & Jennie S. Twoguns the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Victor C. & Jennie S. Twoguns
RR #1, Box 273
Longhouse Rd.
Lawtons, NY 14091

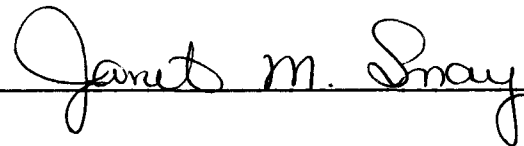
and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
31st day of August, 1987.



Authorized to administer oaths
pursuant to Tax Law section 174



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Victor C. & Jennie S. Twoguns : AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
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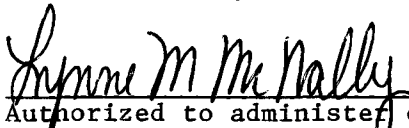
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 31st day of August, 1987, he served the within notice of Decision by certified mail upon Richard C. Wagner, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Richard C. Wagner
Miserendino, Krull & Foley, P.C.
964 Ellicott Square Bldg.
Buffalo, NY 14203

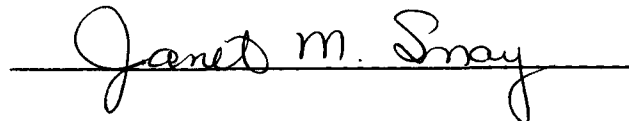
and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
31st day of August, 1987.



Authorized to administer oaths
pursuant to Tax Law section 174



STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

August 31, 1987

Victor C. & Jennie S. Twoguns
RR #1, Box 273
Longhouse Rd.
Lawtons, NY 14091

Dear Mr. & Mrs. Twoguns:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 690 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Audit Evaluation Bureau
Assessment Review Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 453-4301

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:
Richard C. Wagner
Miserendino, Krull & Foley, P.C.
964 Ellicott Square Bldg.
Buffalo, NY 14203

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
VICTOR C. TWOGUNS AND JENNIE S. TWOGUNS
for Redetermination of Deficiencies or for
Refunds of Personal Income Tax under Article 22 :
of the Tax Law for the Year 1981.

DECISION

Petitioners, Victor C. Twoguns and Jennie S. Twoguns, RR #1, Box 273, Longhouse Road, Lawtons, New York 14091, filed a petition for redetermination of deficiencies or for refunds of personal income tax under Article 22 of the Tax Law for the year 1981 (File No. 62412).

A hearing was held before Timothy J. Alston, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on March 10, 1987 at 9:15 A.M., with all briefs to be submitted by April 20, 1987. Petitioners appeared by Richard C. Wagner, Esq. The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUE

Whether the Audit Division properly taxed income of the petitioners, members of the Seneca Indian Nation and residents of the Cattaraugus Indian Reservation, earned in California during the year at issue.

FINDINGS OF FACT

1. Petitioners, Victor C. and Jennie S. Twoguns, timely filed a 1981 New York State personal income tax return. On said return, petitioners elected the filing status of "Married filing separately on one return".

2. On April 5, 1985, following an audit of petitioners' return, the Audit Division issued to petitioners two notices of deficiency for 1981 in amounts as follows:

<u>Assessment No.</u>	<u>Additional Tax Due</u>	<u>Interest</u>	<u>Total Amount Due</u>
A8503014021	\$785.81	\$282.07	\$1,067.88
A8503014022	17.50	6.28	23.78

3. Although both notices were issued in the name of both petitioners, the notice bearing Assessment No. A8503014021 reflected the tax asserted due from Victor C. Twoguns and Assessment No. A8503014022 reflected the tax asserted due from Jennie S. Twoguns.

4. Subsequent to the issuance of the notices, the Audit Division agreed to the adjustment of Mr. Twoguns' tax liability to \$723.81 to reflect \$62.00 in credit for nonresident income tax paid to the State of California during the year at issue.

5. Petitioners did not take issue with the amount of additional taxable income attributed to them on audit, nor did they contest the Audit Division's computations of additional tax due; rather, they contended that the additional taxable income attributed to them on audit was not properly subject to New York personal income tax.

6. Petitioners are Seneca Indians. They were during the year at issue, and are currently, duly enrolled members of the Seneca Nation of Indians. They have maintained a place of residence on the Cattaraugus Indian Reservation in Lawtons, New York, from a point in time prior to the year at issue through the present time. They consider their residence on the Cattaraugus Reservation to be their permanent place of abode.

7. Early in 1981, petitioners moved to California temporarily to take advantage of an employment opportunity available to Mr. Twoguns. Mr. Twoguns

worked in California for approximately three months during 1981. At no time did petitioners intend to remain in California permanently and, in accordance with this intention, at the completion of Mr. Twoguns' employment, petitioners returned to New York and again took up residence at their home on the Cattaraugus Indian Reservation.

8. The income earned by Mr. Twoguns in California is the subject of dispute in the instant matter. The Audit Division determined that, inasmuch as Mr. Twoguns was a New York resident in 1981, the income earned by Mr. Twoguns in California was properly included as part of Mr. Twoguns' total New York income. Petitioners contended that the income earned outside of New York was not subject to tax given their status as Seneca Indians residing on the Cattaraugus Reservation.

CONCLUSIONS OF LAW

A. That, in view of Finding of Fact "7", petitioners were domiciled on the Cattaraugus Reservation during the year at issue (20 NYCRR 102.2[d]).

B. That, pursuant to 8 USC § 1401 and under the Fourteenth Amendment to the United States Constitution, Indians are citizens not only of their respective Indian Nations and of the United States, but also of the state in which their reservation is geographically located (see Wisconsin Potowatomies v. Houston, 393 F Supp 719, 730; Deere v. New York, 22 F2d 851, 852). Accordingly, given petitioners' maintenance of a home on the Cattaraugus Reservation, they were citizens of New York in 1981.

C. That petitioners were resident individuals of New York during 1981 for purposes of Article 22 of the Tax Law (Tax Law § 605[a]; 20 NYCRR 102.2[a]), and the Audit Division therefore properly included the income earned by Mr. Twoguns in California as part of petitioners' total New York income. In reaching this

conclusion, we do not dispute the unique relationship which has traditionally existed between the Indian Nations and the United States and the unique rights possessed by Indians as a result thereof (see, e.g., Worcester v. Georgia, 31 US 515). Moreover, we also note this State's lack of authority to impose a tax on income earned on a reservation by Indians residing on the reservation (see McClanahan v. Arizona State Tax Commission, 411 US 164; 1978 Opns Atty Gen 79; 1977 Opns Atty Gen 76). It is our opinion, however, that the facts set forth herein do not fall within the rule of McClanahan, for the income in question was not earned by petitioners on the reservation, but was earned beyond the boundaries of such reservation. The taxation of this income, therefore, fits within the long-standing principle enunciated in Mescalero Apache Tribe v. Jones, 411 US 145, to the effect that:

"Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." Id. at 148-149.

Accordingly, Mr. Twoguns' California income was properly subject to tax under Article 22 of the Tax Law (see also, Powless v. State Tax Commission, 16 NY2d 946, cert denied 383 US 911).

D. That the petition of Victor C. Twoguns and Jennie S. Twoguns is in all respects denied and the notices of deficiency dated April 5, 1985, as adjusted (Finding of Fact "4"), are sustained.

DATED: Albany, New York

STATE TAX COMMISSION

AUG 31 1987

Roderick W. Allen
PRESIDENT

Francis R. Kolny
COMMISSIONER

Michael J. O'Neil
COMMISSIONER