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7 **BOARD OF EQUALIZATION**
8 **STATE OF CALIFORNIA**

10 In the Matter of the Appeal of:

) **HEARING SUMMARY**

) **PERSONAL INCOME TAX APPEAL**

12 **CLIFFORD L. MARSHALL AND**

) Case No. 816195

13 **DEANNA R. MARSHALL**

	<u>Years</u>	<u>Proposed Assessments</u> ¹
	2004	\$6,828
	2005	\$6,301
	2006	\$6,838 ²
	2007	\$6,293

19 Representing the Parties:

20 For Appellants: Michelle Lapena, Attorney

21 For Franchise Tax Board: Maria Brosterhous, Tax Counsel

23 **QUESTION:** Whether the Franchise Tax Board (FTB or respondent) properly determined that
24 appellants' wages are not exempt from California income tax.

26 ¹ Respondent states that it will abate interest on the proposed assessments from January 13, 2011, to the date when the
27 Notices of Action (NOAs) for the appeal years were issued (i.e., May 5, 2014).

28 ² On appeal, respondent is reducing the proposed assessment for tax year 2006 from \$6,838 to \$6,635 due to a mathematical error.

1 HEARING SUMMARY2 Background

3 Appellant-husband is an enrolled member of the Hoopa Valley Tribe (the Hoopa Tribe), a
4 federally-recognized tribe, and appellant-wife is an enrolled member of the Karuk Tribe of California
5 (the Karuk Tribe), a federally-recognized tribe. During the tax years at issue, appellants were married
6 and resided together on the Karuk Indian Reservation.³ During the tax years at issue, appellant-husband
7 worked as the elected chairman of his tribe; his office was located on the Hoopa Indian Reservation.
8 Appellant-husband received wages of \$83,077, \$78,708, \$80,000, and \$77,200 from the Hoopa Valley
9 Tribal Counsel for tax years 2004, 2005, 2006, and 2007, respectively. During the tax years at issue,
10 appellant-wife worked for the Klamath-Trinity Joint Unified School District (KTJUSD) as a teacher at
11 the Hoopa Elementary School, which is situated on the Hoopa Indian Reservation. Appellant-wife
12 received wages of \$47,994, \$46,426, \$47,604, and \$52,025 from the KTJUSD for tax years 2004, 2005,
13 2006, and 2007, respectively. (Appeal Letter, p. 2; Resp. Opening Br., p. 1.)

14 On April 15, 2005, appellants filed a joint return for tax year 2004, reporting federal
15 adjusted gross income (AGI) of \$129,740. Appellants subtracted \$129,715 of their income on Schedule
16 CA of their California tax return, resulting in \$25 of reported California AGI. After applying a standard
17 deduction of \$6,330, personal exemptions of \$700, and California income tax withholdings of \$767,
18 appellants claimed a refund of \$767. (Resp. Op. Br., pp 1-2, exhibit A.)

19 On April 15, 2006, appellants filed a joint return for tax year 2005, reporting federal AGI
20 of \$124,841. Appellants subtracted \$124,020 of their income on Schedule CA of their California tax
21 return, resulting in \$821 of reported California AGI. After applying a standard deduction of \$6,508,
22 personal exemptions of \$718, and California income tax withholdings of \$718, appellants claimed a
23 refund of \$718. (Resp. Op. Br., p. 2, exhibit B.)

24 On April 15, 2007, appellants filed a joint return for tax year 2006, reporting federal AGI
25 of \$129,782. Appellants subtracted \$125,354 of their income on Schedule CA of their California tax
26 return, resulting in \$4,428 of reported California AGI. After applying a standard deduction of \$6,820,
27

28 ³ Since the tax years at issue, appellants are no longer married to each other.

1 personal exemptions of \$752, and California income tax withholdings of \$913, appellants claimed a
2 refund of \$804. (Resp. Op. Br., p. 2, exhibit C.)

3 On April 15, 2008, appellants filed a joint return for tax year 2007, reporting federal AGI
4 of \$128,608. Appellants subtracted \$126,975 of their income on Schedule CA of their California tax
5 return, resulting in \$1,633 of reported California AGI. After applying a standard deduction of \$7,032,
6 personal exemptions of \$776, and California income tax withholdings of \$866, appellants claimed a
7 refund of \$866. (Resp. Op. Br., p. 2, exhibit D.)

8 After reviewing appellants' joint returns for these tax years, respondent reportedly sent
9 appellants a position letter dated September 3, 2008, stating that appellants' income for each of the tax
10 years at issue was not exempt from tax because it was not reservation-sourced income.⁴ On
11 November 21, 2008, respondent issued Notices of Proposed Assessment (NPAs) for each of the tax
12 years at issue. The 2004 NPA increased appellants' reported taxable income by \$129,740 from -\$6,305
13 to \$123,435 and proposed an additional assessment of \$6,828 plus interest. The 2005 NPA increased
14 appellants' reported taxable income by \$124,841 from -\$5,687 to \$119,154 and proposed an additional
15 assessment of \$6,301 plus interest. The 2006 NPA increased appellants' reported taxable income by
16 \$129,782 from -\$2,392 to \$127,390 and proposed an additional assessment of \$6,838 plus interest. The
17 2007 NPA increased appellants' reported taxable income by \$128,608 from -\$5,399 to \$123,209 and
18 proposed an additional assessment of \$6,293 plus interest. (Resp. Op. Br., p. 2, exhibits E-H.)

19 Appellants filed a protest letter dated January 20, 2009, for each of the tax years at issue.
20 In a determination letter dated January 9, 2014,⁵ respondent stated that the wages paid to appellant-
21 husband by his tribe during the tax years at issue are not exempt from tax because he did not live on his
22 tribe's reservation and the wages paid to appellant-wife by KTJUSD during the tax years at issue are not
23 exempt from tax because she earned the wages while working on another tribe's reservation. In
24 addition, respondent stated that accrued interest would be abated from January 13, 2011, to the date
25 when the NOAs would be issued due to the unduly delay in resolving this protest. Respondent issued
26

27 ⁴ A copy of respondent's September 3, 2008 position letter is not in the appeal record.

28 ⁵ Respondent inadvertently states that this determination letter is dated March 6, 2014. (Resp. Opening Br., p. 3, exhibit J.)

1 NOAs dated May 5, 2014, affirming the NPAs for tax years 2004, 2005, 2006, and 2007. (Resp. Op.
2 Br., pp. 2-3, exhibits I-N.)

3 This timely appeal followed.

4 Applicable Law

5 Burden of Proof

6 Once respondent has met its initial burden of showing that its assessment is reasonable
7 and rational, the assessment is presumed correct and an appellant has the burden of proving it to be
8 wrong. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Michael E. Myers*, 2001-SBE-001,
9 May 31, 2001.) Unsupported assertions are not sufficient to satisfy an appellant's burden of proof.
10 (*Appeal of Aaron and Eloise Magidow*, 82-SBE-274, Nov. 17, 1982.) In the absence of uncontradicted,
11 credible, competent, and relevant evidence showing error in respondent's determinations, such proposed
12 assessments must be upheld. (*Appeal of Oscar D. and Agatha E. Seltzer*, 80 SBE-154, Nov. 18, 1980.)

13 State Taxation of Indian Income

14 California imposes tax on a resident's entire income from all sources. (Rev. & Tax.
15 Code, § 17041, subd. (a); Cal. Code Regs., tit. 18, § 17014.) A California "resident" includes "every
16 individual who is in this state for other than a temporary or transitory purpose." (Rev. & Tax. Code,
17 § 17014, subd. (a)(1).) The United States Supreme Court stated:

18 State sovereignty does not end at a reservation's border. Though tribes are often referred
19 to as sovereign entities, it was long ago that the Court departed from
20 Chief Justice Marshall's view that the laws of [a State] can have no force within
21 reservation boundaries. Ordinarily, it is now clear, an Indian reservation is considered
22 part of the territory of the State.

23 (*Nevada v. Hicks* (2001) 533 U.S. 353, 361-362 [internal quotes and cites omitted].) In other words, an
24 individual does not cease to be a California resident merely by living on an Indian reservation that is
25 within California's boundaries. Against this backdrop, California law purports to tax the entire income
26 of any person who resides on an Indian reservation that is within California's borders. It is axiomatic,
27 however, that California cannot confer upon itself the ability to tax income in violation of the
28 United States Constitution or federal law.

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Appeal of Clifford L. Marshall
and Deanna R. Marshall

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Board review. It does not represent the Board's decision or opinion.

1 The United States Congress has plenary and exclusive powers over Indian affairs.
2 (*Washington v. Confederated Bands and Tribes of Yakima Indian Nation* (1979) 439 U.S. 463, 470-471;
3 *United States v. Lara* (2004) 541 U.S. 193, 200.) Throughout the history of our nation, Congress
4 generally has permitted Indians to govern themselves, free from state interference. (*Warren Trading*
5 *Post Co. v. Arizona Tax Comm'n* (1965) 380 U.S. 685, 686-687.) States may exercise jurisdiction
6 within Indian reservations only when expressly allowed to do so by Congress. (*McClanahan v.*
7 *Arizona State Tax Commission* (“*McClanahan*”) (1973) 411 U.S. 164, 170-171.) Likewise, “. . . unless
8 and ‘until Congress acts, the tribes retain’ their historic sovereign authority.” (*Michigan v. Bay Mills*
9 *Indian Cmty.* (2014) -- U.S. --, 134 S.Ct. 2024, 2030 (quoting *United States v. Wheeler* (1978) 435 U.S.
10 313, 323).)

11 Looking to the exclusive authority of Congress and traditional Indian sovereignty, the
12 Supreme Court in *McClanahan, supra*, (1973) 411 U.S. at p. 172, created a three-part test when it held
13 that a state may not impose personal income tax on (1) an Indian, (2) who lives on his own reservation,
14 and (3) whose income derives from reservation sources. (*Id.* at pp. 173-178.) *McClanahan* has become
15 the seminal case in this area; approximately 30 years ago, the Board asserted that the taxation question
16 turns on whether an appellant is a “reservation Indian” within the meaning of *McClanahan*. (See *Appeal*
17 *of Edward T. and Pamela A. Arviso*, 82-SBE-108, June 29, 1982.) It is settled law that a state may tax
18 all of the income, including reservation-source income, of an Indian residing within the state, but outside
19 of his own tribe’s Indian country. (*Oklahoma Tax Commission v. Chickasaw Nation* (“*Chickasaw*
20 *Nation*”) (1995) 515 U.S. 450; *Appeal of Edward T. and Pamela A. Arviso, supra*; *Angelina Mike v.*
21 *Franchise Tax Board* (“*Angelina Mike*”) (2010) 182 Cal.App.4th 817.)

22 In *Oklahoma Tax Comm’n v. Sac and Fox* (“*Sac and Fox*”) (1993) 508 U.S. 114, 123-
23 125, the Court explained that a tribal member need not live on a formal reservation to be exempt from
24 state income taxes under *McClanahan*; it is enough that the member live in “Indian country.” The Court
25 noted that Congress defined “Indian country” to include reservations, dependent Indian communities,
26 and Indian allotments. (*Id.* (citing 18 U.S.C. § 1151 and F. Cohen, Handbook of Federal Indian Law 34
27 (1982 ed.) (“The intent of Congress, as elucidated by [Supreme Court] decisions, was to designate as
28 Indian country all lands set aside by whatever means for the residence of tribal Indians under federal

1 protection, together with trust and restricted Indian allotments.”))

2 In *Washington v. Confederated Tribes of the Colville Indian Reservation* (“Colville”)
3 (1980) 447 U.S. 134, 161, the Court held that the State of Washington has the power to apply its sales
4 and cigarette taxes to Indians who are residents on a tribal reservation but are not enrolled in the
5 governing tribe, i.e., Indian nonmember residents. With respect to the Indian commerce clause of the
6 United States Constitution (Art I, 8, cl 3), the Court stated, “It can no longer be seriously argued that the
7 Indian Commerce Clause, of its own force, automatically bars all state taxation of matters significantly
8 touching the political and economic interests of the Tribes.” (*Id.* at p. 157 (citing *Moe v. Salish and*
9 *Kootenai Tribes* (1976) 425 U.S. 463, 481, fn. 17).) With respect to federal statutes, the Court also
10 stated, “Federal statutes, even given the broadest reading to which they are reasonably susceptible,
11 cannot be said to pre-empt [the State of] Washington’s power to impose its taxes on Indians not
12 members of the Tribe.” (*Id.* at p. 160.) The Court also stated, “Similarly, the mere fact that
13 nonmembers resident on the reservation come within the definition of ‘Indian’ for purposes of the
14 Indian Reorganization Act of 1934, 48 Stat. 988, 25 U. S. C. § 479, does not demonstrate a
15 congressional intent to exempt such Indians from state taxation.” (*Id.* at p. 161.) As for the issue of
16 tribal sovereignty, the Court stated (at p. 161):

17 Nor would the imposition of Washington’s tax on these purchasers contravene the
18 principle of tribal self-government, for the simple reason that nonmembers are not
19 constituents of the governing Tribe. For most practical purposes those [nonmember
20 resident] Indians stand on the same footing as non-Indians resident on the reservation.
21 There is no evidence that nonmembers have a say in tribal affairs or significantly share in
22 tribal disbursements. We find, therefore, that the State’s interest in taxing these
23 purchasers outweigh any tribal interest that may exist in preventing the State from
24 imposing its taxes.

25 In the context of criminal jurisdiction, the Court in *Duro v. Reina* (“Duro”) (1990)
26 495 U.S. 676, 695-696, distinguished between nonmember Indians residing on the lands of another tribe
27 and tribal members on their own lands, by holding that tribal courts lack criminal jurisdiction over
28 nonmember Indians. The Court stated, “If the present jurisdictional scheme proves insufficient to meet
the practical needs of reservation law enforcement, then the proper body to address the problem is
Congress, which has the ultimate authority over Indian affairs.” (*Id.* at p. 698.) Congress later

1 overturned the *Duro* decision with legislation known as the “Duro fix,” which expressly restored tribal
2 court criminal jurisdiction over nonmember Indians for crimes committed on tribal lands. (See e.g.,
3 (*United States v. Lara* (2004) 541 U.S. 193, 197-198; U.S.C. § 1301(2).)

4 In *Angelina Mike, supra*, 182 Cal.App.4th 817, the California Court of Appeals held that
5 California has the power to impose income taxes on income received by an enrolled member of an
6 Indian tribe from her tribe’s reservation activities because she resided on the reservation of a different
7 tribe. During 2000, Angelina Mike, an enrolled member of the Twenty-Nine Palms Band of Mission
8 Indians, received a per capital distribution in excess of \$385,000 from her tribe’s gaming operations
9 while she resided on the reservation of another tribe, the Agua Caliente Band of Cahuilla Indians (Agua
10 Caliente Band), which is situated approximately 18 miles from Mike’s tribe’s reservation. Mike filed a
11 California income tax return for tax year 2000, claiming a refund of the amounts her tribe withheld from
12 her per capita distribution for California income tax.

13 As relevant to this appeal, the court stated, “There was testimony from experts that,
14 although [Mike’s] Tribe and the Agua Caliente band are distinct political units, they shared many
15 historical, familial, social, and genetic ties.” (182 Cal. App.4th at p. 820, fn. 3.) The court described
16 Mike’s tribe as having only 12 members over the age of 18 and that the reservation consists of two plots
17 that are miles apart. One plot is 240 acres (which includes a casino and parking lot) and the second plot
18 is 160 acres (which is undeveloped desert that has no developed roads or infrastructure). (*Id.* at p. 820.)

19 In light of the *McClanahan*, *Colville*, and *Duro* decisions, the court in *Angelina Mike*
20 determined that “the courts appear unanimous” in holding that “when an Indian moves away from the
21 lands reserved for the exclusive use of the tribe in which he or she is enrolled,” the Indian loses “the tax
22 exemption for income afforded to that Indian under *McClanahan*,” even when “the new residence might
23 qualify as ‘Indian lands’ for other purposes or other persons.” (182 Cal.App.4th at p. 829.) The court
24 rejected Mike’s argument that, as a result of the *Duro* fix, “the courts should disregard *Colville*’s
25 distinction between member and nonmember Indians and instead hold that nonmember Indians residing
26 on a reservation are entitled to be treated identically to members for tax purposes.” (*Id.*) The court
27 specifically held that there was no merit to Mike’s argument for the following reasons: 1) “Congress did
28 precisely what the Supreme Court invited it to do in *Duro*; there was no question that Congress was

1 within its authority in passing such legislation;” 2) “Congress has not acted to overturn *Colville*,
2 which[,] unlike *Duro*, is within the context of the present case-state taxation;” and 3) 14 years after
3 *Duro*, the Supreme Court reiterated in *Strate v. A-1 Contractors* (1997) 520 U.S. 438, 459, that “[a
4 tribe’s inherent power does not reach] beyond what is necessary to protect tribal self-government or to
5 control internal relations.” (*Id.* at pp. 830-831.)

6 The court found that there was no need to refine the term “reservation Indians” in
7 *McClanahan* because the case involved only the Navajo tribe “in which the taxpayer was both enrolled
8 and on whose reservation he resided.” The *Angelina Mike* court stated that in *Colville* however, “the
9 Supreme Court was presented with the issue of taxation of nonmembers” and it “*did* predicate its
10 preemption analysis with reference to the distinction between resident nonmembers and resident
11 members, and ultimately concluded that, while members could not be taxed, “[f]ederal statutes, even
12 given the broadest reading to which they are reasonably susceptible, cannot be said to pre-empt [the
13 State of] Washington’s power to impose its taxes on Indians not members of the Tribe.”
14 (182 Cal.App.4th at pp. 831-832 (citing *Colville*, *supra*, 447 U.S. at p. 160).)

15 In addition, the court rejected Mike’s arguments to the effect that “tribal membership is,
16 or should be deemed, irrelevant for taxation purposes.” The court stated that it “may not disregard
17 *Colville*’s clear instruction that tribal affiliation and membership *do* matter in determining the
18 circumstances under which the state may levy and collect taxes for persons residing on a reservation.”
19 The court indicated that it lacked jurisdiction over matters involving a tribe’s right to define its own
20 membership for tribal purposes. (182 Cal.App.4th at pp. 832-833.)

21 In the *Appeal of Edward T. and Pamela A. Arviso*, *supra*, the Board held that, under
22 *McClanahan*, California has the power to impose tax on the income of enrolled Indians who earn
23 income on their reservation but reside in California off of their reservation. In this appeal, appellant-
24 husband was an enrolled member of the Rincon tribe, appellant-wife was an enrolled member of the
25 Pala tribe, and both spouses’ income was wholly derived from sources within the Rincon reservation.
26 The FTB denied the couple’s claims for refund for tax years 1975-1977 on the grounds that the income
27 was not exempt from tax within the meaning of *McClanahan*. The Board sustained the action of the
28 FTB after determining that “residency on the reservation is necessary to qualify an enrolled Indian as an

1 exempt “reservation Indian” within the meaning of *McClanahan*.” The Board expressly relied on the
2 court’s reasoning in *Dillon v. State of Montana* (D. Mont. 1978) 451 F.Supp. 168, revd. on other
3 grounds, (9th Cir. 1980) 634 F.2d 463. The Board stated, “Federal preemption of a state’s taxing power
4 must be found in the laws and treaties of the United States as construed by the courts; and the subjective
5 opinions of the taxpayers and members of their community are immaterial.”

6 Board Jurisdiction

7 Article III, section 3.5, subsections (a) and (b), of the California Constitution precludes
8 the Board from declaring a California statute unconstitutional unless an appellate court has made the
9 determination that the statute is unconstitutional. Subsection (c) of Article III, section 3.5 of the
10 California Constitution precludes the Board from refusing to enforce a California statute on the basis
11 that federal law or federal regulations prohibit the enforcement of the California statute, stating in
12 relevant part:

13 An administrative agency, including an administrative agency created by the Constitution
14 or an initiative statute, has no power . . . (c) To declare a statute unenforceable, or to
15 refuse to enforce a statute on the basis that federal law or federal regulations prohibit the
16 enforcement of such statute unless an appellate court has made a determination that the
17 enforcement of such statute is prohibited by federal law or federal regulations.

18 The Board’s authority to hear and decide appeals from respondent’s actions is set forth in
19 this Board’s Rules for Tax Appeals (Cal. Code Regs., tit. 18, § 5000 et seq.). Regulation 5412 specifies
20 when the Board has jurisdiction. Of relevance to this discussion, the Board has determined that it lacks
21 jurisdiction to consider “[w]hether a California statute or regulation is invalid or unenforceable under the
22 Federal or California Constitutions, unless a federal or California appellant court has already made such
23 a determination.” (Cal. Code Regs., tit. 18, § 5412, subd. (b)(1).)

24 The Board also has a well-established policy of abstention from deciding constitutional
25 issues in appeals involving proposed assessments of additional tax. (*Appeal of Aimor Corp.*,
26 83-SBE-221, Oct. 26, 1983.) This policy is based upon the absence of any specific statutory authority
27 which would allow the FTB to obtain a judicial review of a decision in such cases and the Board’s belief
28 that judicial review should be available for questions of constitutional importance. (*Appeals of*
Fred R. Dauberger, et al., 82-SBE-082, March 31, 1982.) In the *Appeal of Aimor Corporation, supra*,

1 the Board stated:

2 This policy is based upon the absence of any specific statutory authority which would
3 allow the Franchise Tax Board to obtain judicial review of a decision in such cases and
4 upon our belief that judicial review should be available for questions of constitutional
5 importance. Since we cannot decide the remaining issues raised by appellant,
6 respondent's action in this matter must be sustained.

6 Contentions

7 Appellants' Contentions

8 As discussed more fully below, appellants argue that respondent erroneously determined
9 that their earned income during the tax years at issue is not exempt from California income tax.

10 Appellants contend that they satisfy the tax exemption requirements of *McClanahan, supra*, 411 U.S.
11 164, because both of them lived and worked in their Indian country during the tax years at issue. They
12 assert that respondent incorrectly relies on *Angelina Mike, supra*, 182 Cal.App.4th 817, and *Colville,*
13 *supra*, 447 U.S. 134. Appellants contend that the Hoopa and Karuk Tribes are indistinguishable for tax
14 purposes because of California's unique history with respect to California Indians. Lastly, appellants
15 contend that they should be afforded all of their rights as Indians because they were married to each
16 other and lived and worked in their Indian country. (Appeal Letter, pp. 1-11.)

17 (1) The *McClanahan* Exemption Applies to this Appeal

18 Appellants argue that, under *McClanahan, supra*, 411 U.S. 164, the income at issue is
19 exempt from California tax because they are both reservation Indians who resided in Indian country and
20 both of their incomes were derived from reservation sources during the tax years at issue. Appellants
21 state, "All that is required is that the tribal member live and work in Indian country, which Congress has
22 defined to 'include formal and informal reservations, dependent Indian communities, and Indian
23 allotments, whether restricted or held in trust by the United States.'" Appellants assert that their earned
24 income during the tax years at issue is exempt from California tax because they "lived in Indian country
25 of one spouse and worked within the other spouse's Indian country." They also assert that the basis for
26 the exemption of their income from California tax is strengthened by the fact that they were married to
27 each other "and one spouse worked in the other spouse's Indian Country, while the other spouse lived in
28 the other spouse's Indian Country[.]" Appellants state, "If a marriage means that they become one

1 entity under the tax laws, then they should also be treated as such by the FTB for purposes of the Indian
2 exemption to personal income tax.” (Appeal Letter, pp. 3-5; App. Reply Br., p. 9.)

3 Appellants contend that respondent improperly relies on *McClanahan* for the proposition
4 that members of an Indian tribe must reside within the Indian county of their tribe and earn income from
5 sources within their tribe’s Indian country to be exempt from California income tax. Appellants state
6 that *McClanahan* does not contain any language referencing “their tribe” or “their tribe’s Indian
7 country.” Appellants contend that respondent incorrectly interprets phrases in the Oklahoma tax cases⁶
8 such as “nontribal members” to mean “Indians from other tribes.” According to appellants, the Supreme
9 Court used the term “nontribal members” in the Oklahoma tax cases “to define ‘non-Indians’ or ‘people
10 that are *not* tribal members,” and it did not invoke the term “non-member Indian” because it reviewed
11 “the facts in light of the backdrop of tribal sovereignty, which would include the historical intermarriage
12 and interrelationships between members of different tribes.” (Appeal Letter, pp. 5-6.)

13 (2) The *Angelina Mike* holding is limited to income derived from tribal per capita
14 distributions of gaming revenue.

15 Appellants argue that *Angelina Mike*, *supra*, 182 Cal.App.4th 817, is not controlling in
16 this appeal. They assert that the case is factually distinguishable from this appeal because it involved a
17 per capita distribution of tribal gaming revenue that the taxpayer received “solely based on her status as
18 a member of the 29 Palms Band of Mission Indians.” Appellants contend that respondent incorrectly
19 argues that earned income and per capita distribution income from gaming should be treated the same
20 because they both constitute gross income. According to appellants, a per capita distribution from tribal
21 gaming revenue is miscellaneous income subject to federal tax under Internal Revenue Code section
22 3402(r), which is reported on Internal Revenue Service Form 1099-MISC. They state that
23 “miscellaneous income would not be considered earned income derived from reservation sources.”
24 Appellants assert that both the Internal Revenue Service and the FTB treat regular income from
25 employment differently than 1099-MISC income. Appellants state, “The fact that net gaming revenue is
26

27 ⁶ *Chickasaw Nation*, *supra*, 515 U.S. 450, *Sac and Fox*, *supra*, 508 U.S. 114, and *Oklahoma Tax Comm’n v. Potawatomi*
28 *Tribe* (“*Potawatomi*”) 498 U.S. 505, are collectively known as the “Oklahoma tax cases.” (Bradford D. Cooley, *The Navajo*
Uranium Ban: Tribal Sovereignty v. National Energy Demands, 26 J. Land Resources & Envtl. L. 393, 414 (2006).

1 a windfall to the person receiving the income rather than earned income should highlight the need for
2 greater care when determining the eligibility of the Indian income tax exemption.” According to
3 appellants, the California Court of Appeals in *Angelina Mike* “did not consider many of the issues that
4 are raised by this Appeal and thus we seek a more careful review here.” (Appeal Letter, pp. 6-7.)

5 Appellants contend that in *Sac and Fox*, the United States Supreme Court held that if, on
6 remand, the Court of Appeals finds that the tribal members lived in Indian country, it “must analyze the
7 relevant treaties and federal statutes against the backdrop of Indian Sovereignty.” Quoting *Sac and Fox*,
8 *supra*, 508 U.S. at p. 115, appellants state, “Unless Congress expressly authorized state tax jurisdiction
9 in Indian country, the *McClanahan* presumption counsels against finding such jurisdiction.” Appellants
10 assert that they lived in Indian country and the relevant treaties and statutes must therefore be analyzed.
11 (Appeal Letter, p. 7.)

12 Appellants contend that, in *Angelina Mike*, Mike admitted that she was not a reservation
13 Indian as that term is described in *McClanahan*, *Sac and Fox*, and *Potawatomi*. Furthermore, appellants
14 assert that Mike “did not allege any significant tribal contacts and support for claiming that her residence
15 on the Agua Caliente Indian Reservation justified her claim to exemption from personal income tax.”⁷
16 In this appeal, however, appellants contend that they are Indians who lived and worked on two
17 reservations and they both “availed themselves to the civil jurisdiction of these respective tribes and they
18 should be afforded all of the benefits grant[ed] them as married reservation Indians living in their Indian
19 country.” (Appeal Letter, pp. 7-8; App. Reply Br., p. 10.)

20 (3) *Colville* is not controlling in this appeal.

21 Appellants argue that *Colville*, *supra*, 447 U.S. 134, is not controlling in this appeal
22 because the facts and analysis are completely different. Appellants assert that “the determination of the
23 incidence of sales tax on the purchase of cigarettes” in *Colville* “involves an analysis of the infringement
24 on tribal sovereignty verses the right of the state to impose the tax,” whereas this appeal involves the
25 analysis of income tax based on the “location employment in Indian country” and “residency in Indian
26

27 ⁷ Appellants argue that *Angelina Mike* “could have been decided merely on the fact that it was controlled by an applicable
28 statute, the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 et seq. and its implementing regulations,” there is no
statute authorizing the assessment at issue in *Angelina Mike*, and the decision “is bad case law that should be limited in its
application to per capita distributions of tribal gaming revenue under the IGRA.”

1 country.” According to appellants, the State of Washington and the Colville Confederated Tribes
2 announced on July 1, 2009, “that they entered into an agreement in which the Tribe will impose its own
3 cigarette tax in lieu of state and local taxes.” Appellants state, “Because the tax regimes involve
4 different tests, they are bound by different standards and thus are distinguishable.” (Appeal Letter, p. 8;
5 App. Reply Br., pp. 9-10.)

6 Appellants contend that the only part of the *Colville* decision that may provide guidance
7 in this appeal is the Supreme Court’s analysis of the burden of the taxes on the tribe against the interest
8 of the state in imposing the taxes. Appellants state that the state “has no interest in regulating married
9 Indians who live and work in their Indian country, and thus an attempt to restrict the Indian income tax
10 exemption in this case overreaches into matters of tribal self-government.” In contrast, appellants assert
11 that “both the Hoopa Valley Tribe and the Karuk Tribe have significant interest in the inter-marriage of
12 their members and the continuation of their respective cultural and political identities.” Appellants state
13 “that both tribes operate tribal courts and assert primary jurisdiction over family relations within their
14 respective tribes because tribal member family units are of paramount concern to the longevity of the
15 Tribe.” Appellants assert that they obtained a divorce “by decree of the Hoopa Valley Tribal Court, a
16 body with jurisdiction over the family and the Parties’ marital status.” In addition, they assert that “the
17 Hoopa Valley Tribal membership elected Mr. Marshall as its Chairman, while he was residing on Karuk
18 tribal lands, because it is not uncommon for Hoopa and Karuk tribal members to marry one another and
19 such marriages are embraced because of taboos regarding marrying one’s own kin.” Appellants state,
20 “History between these two tribes is not only one of kinship and moiety, as described in the
21 *Angelina Mike* decision, but one of survival as self-governing Indian tribes.”⁸ (Appeal Letter, pp. 8-9.)

22 (4) The Hoopa and Karuk Tribes are indistinguishable for tax purposes.

23 Appellants contend that California Indians are a unique class in the history of California
24 and “it is not workable to evaluate tribal residency and income without looking at the larger story.”
25 According to appellants, it is undisputed “that the Hoopa and Karuk tribes have lived adjacent to one
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27 ⁸ Appellants state that if their appeal is not decided in their favor, they “will request that their respective tribes be granted the
28 right to intervene so that the impact to the Tribes’ rights to self-governance is adequately represented.” They also state,
“The hardship that has been imposed on the Appellants here should not be allowed to continue for other members who are
similarly situated.” (Appeal Letter, p. 9.)

1 another for thousands of years and that the modern separation between them is a relatively recent
2 construct of settlement by non-Indians in the area.” Appellants contend that “as recently as 1974,
3 California Indians were considered a unique class who were verified as the “Indians of California” in the
4 Indian Land Claims Commission, and census rolls were created that named each member of that class.”
5 Appellants contend that California Indians are distinguishable from tribes in other states. (Appeal
6 Letter, pp. 9-10.)

7 According to appellants, “Indians and Indian property in Indian country are not subject to
8 State taxation except by virtue of express authority conferred upon the State by act of Congress.” Citing
9 *Worcester v. Georgia* (1832) 31 U.S. 515, appellants contend that Congress has the power to regulate
10 commerce with the Indian tribes pursuant to the Indian commerce clause of the United States
11 Constitution (Art. I, 8, cl. 3) and, in the absence of Congressional authorization, “no state has the
12 authority to tax an Indian tribe or an individual living on a reservation.” Appellants assert that Public
13 Law 280 (18 U.S.C., § 1162, 28 U.S.C., § 1360) grants criminal and civil jurisdiction to California and
14 several other states over Indian reservations in certain situations. Appellants state that, “except where
15 Congress has expressly provided that State laws shall apply,” tribal Indians living in Indian country
16 generally are not subject to state laws. (Appeal Letter, pp. 9-10.)

17 (5) Appellants should be afforded all of their rights as Indians because they were
18 married to each other and lived and worked in their Indian country.

19 Appellants contend that respondent erroneously determined that appellant-wife’s earned
20 income is subject to California tax because the Hoopa Elementary School is located on her husband’s
21 reservation, rather than her reservation. Appellants indicate that appellant-wife had less than an
22 eight-mile commute from her residence on the Karuk reservation to the Hoopa Elementary School on
23 the Hoopa reservation. Appellants state, “The area is a tribal area composed of lands of three
24 neighboring tribes, the Hoopa Valley Tribe, the Karuk Tribe and the Yurok Tribe.” They assert that it
25 can be assumed “that there is a high degree of inter-marriage between members of the three tribes and
26 that it would not be uncommon for spouses from different tribes to work on the other’s reservation.”
27 Appellants contend that respondent’s determination in this appeal is “effectively restrict[ing] the rights
28 afforded married Indian couples by denying the Indian income tax exemption where one spouse lives on

1 the other spouse's reservation, and one spouse works on the other spouse's reservation." Citing *Morton*
2 *v. Mancari* (1974) 417 U.S. 535, 551-555, appellants assert that an Indian's status is a political, rather
3 than racial, classification. Appellants state, "The backdrop of Indian sovereignty favors the exemption
4 being granted because the Parties are married Indians residing and working on their reservations and
5 they are protected from being treated unfairly as a result of their race." (Appeal Letter, pp. 10-11.)

6 In their reply brief, appellants contend that respondent is improperly interpreting "the
7 term Indian country very narrowly, to mean that it only applies to each Indian and [his or her]
8 reservation." According to appellants, Congress interprets the term "Indian country" to include "formal
9 and informal reservations, dependent Indian communities and Indian allotments, whether restricted or
10 held in trust by the United States." They contend that this "broad definition would not be workable if it
11 limited reservation Indians to a specific tribe or reservation." Appellants state that "an allotted Indian
12 might not be a member of a tribe at all, or might be allotted on public domain, outside of any Indian
13 reservation." Appellants contend that the definition of Indian country must therefore be interpreted
14 broadly enough "to encompass the aboriginal area of the affected Indian." According to appellants, their
15 "income would be taxable if they lived on, say, the Agua Caliente Indian Reservation, far from their
16 Indian country and the source of their income." Appellants contend, however, that "they did not live
17 outside of their Indian country." They state that "they lived in the wife's Indian country as a married
18 couple, and they travelled a very short commute to the husband's Indian country for work." Appellants
19 also state that there is a clear nexus "between the married Indians and their Indian country as the source
20 of their incomes and the place of their residence." (App. Reply Br., pp. 3-4.)

21 Appellants contend that respondent's reliance on *Duro, supra*, is misplaced because
22 Congress reversed the decision by statute known as the "*Duro* fix." They state, "Tribal criminal
23 jurisdiction was restored under the *Duro* fix, and tribal civil jurisdiction has not been abridged by
24 Congress." Appellants contend that respondent improperly disregards "the larger framework of tribal
25 jurisdiction and tribal sovereignty" by distinguishing tribal members from non-tribal members. (App.
26 Reply Br., pp. 4-5.)

27 Appellants contend that *Colville* and *Duro* "viewed the distinction of member Indians
28 compared with non-member Indians in a manner that is different than the facts in this case, and which

1 has later been fixed by either the State of Washington or Congress.” They assert that, in these two cases,
2 the Supreme Court “looked at ‘Indians generally’ versus tribal members.” Appellants state, “This is not
3 a case of limited contact between the Indians and their tribes, but the most significant contacts that one
4 could have.” Appellants state, “A California Indian should not expect to be covered by any tax
5 exemptions granted to Arizona Indians if they lived in Arizona,” but they “are not ‘Indians’ in just the
6 most general sense,” but instead they “are members of two inter-related tribes with adjacent Indian
7 lands” and, as described in *McClanahan*, they are reservation Indians with income from reservation
8 sources. In addition, appellants contend that this appeal is factually distinguishable from *Colville*
9 because it involves tax on the income of members of the Karuk and Hoopa Tribes who are intermarried,
10 whereas *Colville* involved the tax on the sale of cigarettes by Indian retailers. Appellants argue that the
11 Karuk Tribe’s sovereign immunity “is greatly impacted when the State attempts to assess personal
12 income taxes on the Hoopa Valley Tribal Chairman who resides with his wife on the Karuk Tribe’s
13 Indian lands, and on the Karuk teacher at the Hoopa Valley Elementary School who resides with her
14 husband on her tribal lands.” Citing *Chickasaw Nation, supra*, 515 U.S. at p. 458, appellants contend
15 that, if the Board “does not determine this appeal purely on the impacts to tribal sovereignty,” it should
16 apply the incidence test in determining whether appellants’ income is exempt from tax, which questions
17 “whether the tax falls on tribes or on Indians within Indian country.” (App. Reply Br., pp. 6-8.)

18 Respondent’s Contentions

19 Respondent argues that R&TC section 17041 provides that California residents are
20 subject to tax on all income, regardless of source, and income derived from California sources of
21 nonresidents and part-year residents of California are also subject to tax. Citing the *Appeal of Arviso*,
22 *supra*, respondent contends that “Native Americans who reside outside of Indian country and within
23 California are subject to tax on all income, even income from reservation sources.” (Resp. Op. Br., p. 3.)

24 Citing *McClanahan, supra*, 411 U.S. 164, and *Angelina Mike, supra*, 182 Cal.App.4th
25 817, respondent asserts that there is a limited exemption from taxation for Indians who live on their
26 reservation and who derive income from reservation sources, even though the reservation is located
27 within California. Respondent states that this exemption is based on principles of federal preemption
28 and Indian sovereignty. Citing *Sac and Fox, supra*, 508 U.S. 114, respondent states that “[t]his

1 longstanding exemption has been expanded to include income of Native Americans who live in “Indian
2 country” (as defined in Title 18, section 1151 of the United States Code) derived from Indian country
3 sources.” (Resp. Op. Br., p. 3.)

4 Respondent contends that in *McClanahan*, the Supreme Court held “that a state may not
5 impose tax on tribal members who reside on their tribe’s lands and derive income from their tribe’s
6 lands.” Citing *LaRoque v. State of Montana* (1978) 178 Mont. 31, 324; *Topash v. Comm’r of Revenue*
7 (Minn. 1980) 291 N.W.2d 679, 680-681; and *Moe v. Salish & Kootenai Tribes* (1976) 425 U.S. 463,
8 480, respondent asserts that subsequent court decisions “drew distinctions between member and
9 nonmember tribal members, which provided for a more expansive reading of who is a reservation Indian
10 under *McClanahan*.” (Resp. Op. Br., pp. 3-4.)

11 Respondent argues that the decision in *Angelina Mike*, *supra*, 182 Cal.App.4th 817, is
12 controlling in this appeal. Respondent states that, based on the holdings of *Colville*, *supra*, 447 U.S.
13 134, *Duro*, *supra*, 495 U. S. 676, and *McClanahan*, *supra*, 411 U.S. 164, the California Court of
14 Appeals determined in *Mike* that the taxpayer, who was an enrolled member of the Twenty Nine Palms
15 Band of Mission Indians and a resident on the reservation lands of the Agua Caliente Band of Cahuilla
16 Indians, did not meet the three requirements set forth in *McClanahan* and her per capita gaming
17 distributions from her tribe was therefore not exempt from California tax. Respondent states that “the
18 *Colville* and *Duro* Courts made clear that a tribal member’s descent and residence on tribal lands are
19 insufficient criteria to exempt a tribal member’s income from state taxation” and “the taxation of
20 nonmember Native Americans does not interfere with tribal self-governance.” Respondent asserts that
21 Congress responded to the *Duro* decision by passing legislation commonly referred to as the “*Duro* fix,”
22 25 U.S.C. § 1301(2), which provides Indian tribes criminal jurisdiction over crimes committed by
23 nonmember Native Americans on tribal lands. Citing *Angelina Mike*, 182 Cal.App.4th at pp. 830-831,
24 respondent argues that the distinction between nonmember Indians on the lands of another tribe and
25 tribal members on their own lands, remains valid in court decisions following the “*Duro* fix.” (Resp.
26 Opening Br., pp. 4-5.)

27 Respondent asserts that appellant-husband, like the plaintiff in *Angelina Mike*, “is a tribal
28 member receiving wages for services performed on his tribe’s reservation while residing on another

1 tribe's lands." Respondent states, "The *Mike* court examined *McClanahan* and *Colville*, finding that the
2 taxation of a nonmember Native American does not violate concepts of tribal sovereignty and
3 self-determination because, by taxing a nonmember Native American living on another tribe's
4 reservation, the State is not interfering with the tribe's governance over its own members." Respondent
5 contends that appellant-husband's tribal wages are thus not exempt from California tax pursuant to the
6 holding of *McClanahan*. With respect to appellant-wife, respondent states, "Just as the State may tax a
7 nonmember Native American residing on another tribe's reservation, the taxation of appellant-wife, a
8 nonmember Native American receiving wages from another tribe, does not impede the Karuk tribe's
9 right to self-governance and determination." (Resp. Opening Br., p. 6.)

10 Respondent argues that there is no merit to appellants' argument that *Angelina Mike* is
11 distinguishable from this appeal. First, respondent contends that it is irrelevant to the court analysis of
12 *McClanahan*, *Colville*, and *Angelina Mike* whether the individual's income is earned or received as a
13 result of tribal gaming distributions. Respondent asserts that this issue was not examined or considered
14 by the courts "because the characterization of income has no bearing on the key issue in these decisions:
15 particularly whether state taxation of a tribal member violates tribal sovereignty and self-determination."
16 Second, respondent contends that appellants erroneously argue "that under *Sac and Fox*, *supra*, 508 U.S.
17 114, tribal members are not required to live on or derive income from their own tribe's lands."
18 Respondent asserts that the decision in *Sac and Fox* "did not address whether a tribal member must live
19 on his or her own reservation/Indian country for tribal income to be exempt." Respondent quotes from
20 footnote 11 of the *Angelina Mike* decision concerning *Sac & Fox*, "The court's repeated references to
21 tribal membership suggest it had no intent to disturb the lower court's ruling that the state could collect
22 state income tax on the income [that] nonmembers of the tribe earned, which persuades us that *Sac and*
23 *Fox* has no relevance to the taxation of nonmembers." (Resp. Opening Br., pp. 6-7.)

24 STAFF COMMENTS

25 It is undisputed that appellant-husband and appellant-wife are members of two different,
26 albeit interrelated and geographically proximate, tribes, the Hoopa Tribe and the Karuk Tribe. The chart

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1 below itemizes the facts related to each appellant:

2 Appellant-Husband		Appellant-Wife
3 Hoopa Tribe	Member of	Karuk Tribe
4 Karuk reservation	Residence	Karuk reservation
5 Hoopa Tribe	Income source/Employer	School district
6 Hoopa reservation	Income source/Employer location	Hoopa reservation

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8
9 Based on the findings in *McClanahan*, *Chickasaw*, *Angelina Mike*, and *Arviso*, Indians
10 must reside on their own tribe's reservation in order for their reservation-sourced income to be exempt
11 from California tax. As for appellant-husband, while he is a member of the Hoopa Tribe, and has
12 reservation-sourced income from the Hoopa reservation, he resides on the Karuk reservation.
13 Appellants argue that *Angelina Mike* is not controlling because among other things it involves a per
14 capita distribution, which is treated as miscellaneous income, whereas the present appeal involves
15 earned income. Yet, appellants fail to provide supporting authority for their apparent argument that per
16 capita distributions and earned income should be treated differently for purposes of analyzing the Indian
17 sovereignty doctrine and the issue of preemption. The other arguments that appellants present in this
18 appeal appear to be resolved by the court's analysis in *Angelina Mike*.

19 As for appellant-wife, while she is a member of the Karuk Tribe, and resides on the
20 Karuk reservation, her income is sourced from an employer on the Hoopa reservation. The court in
21 *McClanahan* held that a state may not impose personal income tax on an Indian, who has reservation-
22 sourced income, and who resides on his own tribe's lands (i.e., reservation). Here, appellant-wife's
23 income is derived from the Hoopa reservation, not the Karuk reservation.

24 The Board may find that making a determination in this appeal, relating to appellant-
25 wife, comes down to a decision of whether income exclusion for "reservation-sourced income" is
26 limited (1) to income from the individual's own tribe's reservation or (2) to income earned at any
27 reservation. If this occurs, staff recommends that the Board abstain from deciding this constitutional
28 issue, which will effectively result in sustaining the Franchise Tax Board's assessment. Appellants

1 could then pay the tax and file a refund suit so that the courts can resolve this legal issue.

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