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

10 In the Matter of the Appeal of: ) **HEARING SUMMARY**  
11 ) **FRANCHISE AND INCOME TAX APPEAL**  
12 **FRANCES C. DANDY AND** ) Case No. 924692  
13 **ESTATE OF STANFORD DANDY (DEC'D)<sup>1</sup>** )

	<u>Years</u>	<u>Proposed Assessments</u>
	2009	\$149,637
	2010	\$141,064
	2011	\$146,176

18 Representing the Parties:

19 For Appellants: Craig A. Houghton, Esq.  
20 For Franchise Tax Board: Maria Brosterhous, Tax Counsel III

22 QUESTIONS: (1) Whether the Franchise Tax Board (FTB or respondent) properly determined that  
23 appellant-wife's wages and per capita distributions are not exempt from California  
24 income tax.

25 (2) Whether appellants have shown that they are entitled to interest abatement.

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28 <sup>1</sup> Although Stanford Dandy is deceased, he was alive during the tax years at issue and, therefore, we will refer to Mr. Dandy individually as appellant-husband, and to Ms. Dandy and Mr. Dandy collectively as appellants.

1 HEARING SUMMARY

2 Background

3 Appellant-wife is an enrolled member of the Table Mountain Rancheria Band of Indians  
4 Tribe (the Table Mountain Tribe), a federally-recognized tribe, and appellant-husband, who died on  
5 May 12, 2012, was an enrolled member of the North Fork Rancheria of the Mono Indians Tribe (the  
6 North Fork Tribe), a federally-recognized tribe. During the tax years at issues, appellants were married  
7 and resided together on the North Fork Reservation. During the tax years at issue, appellant-wife  
8 received wages as a board member of the Table Mountain Casino, and per capita distributions as a  
9 member of the Table Mountain Tribe. (Resp. Op. Br., pp. 1-2; Appeal Letter, pp. 5-6.)

10 For the 2009 tax year, appellant-wife received \$398,596 in wages and \$4,200 in other  
11 income from the Table Mountain Casino, and \$1,200,709 in per capita distributions from the Table  
12 Mountain Tribe. Appellants filed a joint 2009 tax return, reporting federal adjusted gross income  
13 (AGI) of \$1,662,036. Appellants subtracted \$1,654,635<sup>2</sup> of their income on Schedule CA of their  
14 California tax return, resulting in \$7,401 of reported California AGI. After applying itemized  
15 deductions of \$54,731, exemptions of \$294, and California income tax withholdings of \$31,926,  
16 appellants claimed a refund of \$31,926. (Resp. Op. Br., p. 2, Exhibit C.)

17 For the 2010 tax year, appellant-wife received \$309,250 in wages from the  
18 Table Mountain Casino, and \$1,172,889 in per capita distributions from the Table Mountain Tribe.  
19 Appellants filed a joint 2010 tax return, reporting federal AGI of \$1,535,849. Appellants subtracted  
20 \$1,529,820<sup>3</sup> of their income on Schedule CA of their California tax return, resulting in \$6,029 of  
21 reported California AGI. After applying itemized deductions of \$22,929, exemptions of \$297, and

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25 <sup>2</sup> This amount includes wages of \$398,596 and other income (“Indian Tribal D”) of \$1,204,909 (i.e., \$4,200 + \$1,200,709).  
26 This adjustment also included other amounts not taxable for California purposes: (1) a state refund amount of \$35,368; and  
27 (2) social security benefits of \$15,762.

28 <sup>3</sup> This amount includes wages of \$309,250 and other income (“Indian Tribal D”) of \$1,172,889. This adjustment also  
included other amounts not taxable for California purposes: (1) a state refund amount of \$31,926; and (2) social security  
benefits of \$15,755.

1 California income tax withholdings of \$27,109, appellants claimed a refund of \$27,109.<sup>4</sup> (Resp. Op.  
2 Br., p. 2, Exhibit D.)

3 For the 2011 tax year, it appears that appellant-wife received \$346,173 in wages from  
4 the Table Mountain Casino, and \$1,232,744 in per capita distributions from the Table Mountain Tribe.<sup>5</sup>  
5 Appellants filed a joint 2011 tax return,<sup>6</sup> reporting federal AGI of \$1,622,052. Appellants subtracted  
6 \$1,621,786<sup>7</sup> of their income on Schedule CA of their California tax return, resulting in \$266 of reported  
7 California AGI. After applying itemized deductions of \$17,237, exemptions of \$306, California  
8 income tax withholdings of \$29,675, and estimated tax payments of \$29,109, appellants claimed a  
9 refund of \$56,784 (i.e., \$29,675 + \$29,109). (Resp. Op. Br., pp. 2-3, Exhibit F.)

10 Appellants' tax returns were selected for examination. The FTB reportedly sent  
11 appellants an initial contact letter, dated August 9, 2013, followed by two letters when appellants did  
12 not reply, as well as a letter, dated December 2, 2013, notifying appellants that a Notice of Proposed  
13 Assessment (NPA) would be issued if appellants did not respond.<sup>8</sup> It appears that the auditor  
14 determined that, while appellants lived on the North Fork Reservation, appellant-wife received wages  
15 and per capital distributions from the Table Mountain Tribe, and, therefore, her wages and per capita  
16 distributions for each of the tax years at issue were improperly excluded from California income and  
17 were not exempt from state taxation. On January 7, 2014, the auditor reportedly sent appellants a letter  
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20 <sup>4</sup> Appellants also filed an amended joint 2010 tax return to include omitted gambling income and to amend reported rental  
21 income and expenses. The amended return did not result in a change to the reported wages, the per capita distributions, or  
the income amount subtracted on Schedule CA of appellants' California tax return. (Resp. Op. Br., p. 2, Exhibit E.)

22 <sup>5</sup> The Appeals Division notes that, while appellants contend that appellant-wife received \$1,172,889 in per capita  
23 distributions from the Table Mountain Tribe for the 2011 tax year, it is unclear to the Appeals Division, from the appeal  
24 record, if the entire reported other income ("Indian Tribal D") of \$1,232,744 was per capita distributions, or a portion  
thereof. At the oral hearing, both parties should be prepared to discuss, as necessary, whether appellant-wife received  
25 \$1,172,889 or \$1,232,744 in per capita distributions, and if the former, what amounts were used to calculate the reported  
other income ("Indian Tribal D") of \$1,232,744. (Resp. Op. Br., Exhibit F; Appeal Letter, p. 6.)

26 <sup>6</sup> Appellant-wife filed the couple's 2011 joint tax return as a surviving spouse.

27 <sup>7</sup> This amount includes wages of \$346,173 and other income ("Indian Tribal D") of \$1,232,744. This adjustment also  
28 included other amounts not taxable for California purposes: (1) a state refund amount of \$27,109; and (2) social security  
benefits of \$15,760.

<sup>8</sup> Copies of these letters are not in the appeal record.

1 notifying them that the examination was closed and that additional tax would be assessed on the wages  
2 and per capita distributions received during the tax years at issue.<sup>9</sup> (Resp. Op. Br., p. 3.)

3 On January 22, 2014, the FTB issued NPAs for each of the tax years at issue. The 2009  
4 NPA increased appellants' reported taxable income by \$1,603,505 (i.e., \$398,596 + \$1,204,909), from  
5 -\$47,330 to \$1,556,175, and proposed an additional assessment of \$149,637, plus interest.<sup>10</sup> The 2010  
6 NPA increased appellants' reported taxable income by \$1,482,139 (i.e., \$309,250 + \$1,172,889), from  
7 -\$6,835 to \$1,475,304, and proposed an additional assessment of \$141,064, plus interest.<sup>11</sup> The 2011  
8 NPA increased appellants' reported taxable income by \$1,578,917 (i.e., \$346,173 + \$1,232,744), from  
9 -\$16,971 to \$1,561,946, and proposed an additional assessment of \$146,176, plus interest.<sup>12</sup> Appellants  
10 protested the NPAs in March of 2014. Following a protest hearing and review, the FTB issued Notices  
11 of Action (NOA) dated September 29, 2015, affirming the NPAs for tax years 2009,<sup>13</sup> 2010, and 2011.  
12 This timely appeal followed. (Resp. Op. Br., p. 3, Exhibits G-M; Appeal Letter, p. 9, Exhibit A.)

### 13 Applicable Law

#### 14 State Taxation of Indian Income

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

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

24 <sup>9</sup> A copy of this letter is not in the appeal record.

25 <sup>10</sup> The additional tax included a Mental Health Services Tax of \$5,562.

26 <sup>11</sup> The additional tax included a Mental Health Services Tax of \$4,753.

27 <sup>12</sup> The additional tax included a Mental Health Services Tax of \$5,619.

28 <sup>13</sup> Pursuant to R&TC section 19116, the 2009 NOA reflected interest suspension from October 15, 2013, to February 6,  
2014. (Resp. Op. Br., Exhibit K; Appeal Letter, Exhibit A.)

1 (*Nevada v. Hicks* (2001) 533 U.S. 353, 361-362 [internal quotes and cites omitted].) In other words, an  
2 individual does not cease to be a California resident merely by living on an Indian reservation that is  
3 within California's boundaries. However, the United States Supreme Court found that the reservation-  
4 sourced income of a member of a federally recognized Indian tribe who lived on her tribe's reservation  
5 was exempt from state income tax. (*McClanahan v. Arizona State Tax Commission* (1973) 411 U.S.  
6 164 (*McClanahan*)). This *McClanahan* exemption stems from principles of federal preemption and  
7 Indian sovereignty.

8           Looking to the exclusive authority of Congress and traditional Indian sovereignty, the  
9 Supreme Court in *McClanahan* created a three-part test when it held that a state may not impose  
10 personal income tax on (1) an Indian, (2) who lives on his own reservation, and (3) whose income  
11 derives from reservation sources. (*McClanahan, supra*, at pp. 172-178.) It is settled law that a state  
12 may tax all of the income, including reservation-source income, of an Indian residing within the state,  
13 but outside of his or her own tribe's Indian country. (*Oklahoma Tax Commission v. Chickasaw Nation*  
14 (1995) 515 U.S. 450 (*Chickasaw Nation*); *Appeal of Edward T. and Pamela A. Arviso*, 82-SBE-108,  
15 June 29, 1982 (*Arviso*); *Angelina Mike v. Franchise Tax Board* (2010) 182 Cal.App.4th 817  
16 (*Angelina Mike*); see also *LaRock v. Wisconsin Department of Revenue* (2001) 241 Wis.2d 87 [held  
17 tribal member not exempt from state income tax while living and working on land of tribe of which she  
18 was not a member]; *New Mexico Taxation and Revenue Department v. L.R. Greaves* (N.M. Ct. App.  
19 1993) 116 N.M. 508 [held income earned by Native Americans on reservation of tribe of which they  
20 are not members is taxable by state].)<sup>14</sup>

21           In *Oklahoma Tax Comm'n v. Sac and Fox* (1993) 508 U.S. 114, 123-125 (*Sac and Fox*),  
22 the Supreme Court stated that *McClanahan* created a presumption against state taxing authority which  
23 extends beyond the formal boundaries of the reservation, to "Indian country." The Court noted that  
24 Congress defined "Indian country" to include reservations, dependent Indian communities, and Indian

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28 <sup>14</sup> Board of Equalization cases (designated "SBE") may generally be found at:  
<http://www.boe.ca.gov/legal/legalopcont.htm>.

1 allotments. (*Id.* (citing 18 U.S.C. § 1151<sup>15</sup> and F. Cohen, Handbook of Federal Indian Law 34  
2 (1982 ed.) [“The intent of Congress, as elucidated by [Supreme Court] decisions, was to designate as  
3 Indian country all lands set aside by whatever means for the residence of tribal Indians under federal  
4 protection, together with trust and restricted Indian allotments.”]).)

5           In *Washington v. Confederated Tribes of the Colville Indian Reservation* (1980)  
6 447 U.S. 134, 161 (*Colville*), the Court held that the State of Washington has the power to apply its  
7 sales and cigarette taxes to Indians who are residents on a tribal reservation but are not enrolled in the  
8 governing tribe, i.e., Indian nonmember residents. With respect to the Indian commerce clause of the  
9 United States Constitution (Art I, 8, cl 3), the Court stated, “It can no longer be seriously argued that  
10 the Indian Commerce Clause, of its own force, automatically bars all state taxation of matters  
11 significantly touching the political and economic interests of the Tribes.” (*Id.* at p. 157 (citing *Moe v.*  
12 *Salish and Kootenai Tribes* (1976) 425 U.S. 463, 481, fn. 17).) Speaking to the issue of tribal  
13 sovereignty, the Court stated:

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

22 (*Id.* at p. 161.)

23           In the context of criminal jurisdiction, the Court in *Duro v. Reina* (1990) 495 U.S. 676,  
24 695-696 (*Duro*), distinguished between nonmember Indians residing on the lands of another tribe and

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25 <sup>15</sup> Title 18, section 1151 of the United States Code, states:

26           Except as otherwise provided in sections 1154 and 1156 of this title, the term “Indian country”, as used in  
27 this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the  
28 United States Government, notwithstanding the issuance of any patent, and, including rights-of-way  
running through the reservation, (b) all dependent Indian communities within the borders of the  
United States whether within the original or subsequently acquired territory thereof, and whether within or  
without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been  
extinguished, including rights-of-way running through the same.

1 tribal members on their own lands, by holding that tribal courts lack criminal jurisdiction over  
2 nonmember Indians. The Court stated, “If the present jurisdictional scheme proves insufficient to meet  
3 the practical needs of reservation law enforcement, then the proper body to address the problem is  
4 Congress, which has the ultimate authority over Indian affairs.” (*Id.* at p. 698.) Congress later  
5 overturned the *Duro* decision with legislation known as the “Duro fix,” which expressly restored tribal  
6 court criminal jurisdiction over nonmember Indians for crimes committed on tribal lands. (See,  
7 *United States v. Lara* (2004) 541 U.S. 193, 197-198; U.S.C. § 1301(2).)

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

17           In light of the *McClanahan*, *Colville*, and *Duro* decisions, the California Court of  
18 Appeal in *Angelina Mike* determined that “the courts appear unanimous” in holding that “when an  
19 Indian moves away from the lands reserved for the exclusive use of the tribe in which he or she is  
20 enrolled,” the Indian loses “the tax exemption for income afforded to that Indian under *McClanahan*,”  
21 even when “the new residence might qualify as ‘Indian lands’ for other purposes or other persons.”  
22 (*Angelina Mike*, at p. 829.) The court rejected Mike’s argument that, as a result of the *Duro* fix, “the  
23 courts should disregard *Colville*’s distinction between member and nonmember Indians and instead  
24 hold that nonmember Indians residing on a reservation are entitled to be treated identically to members  
25 for tax purposes.” (*Ibid.*) The court specifically held that there was no merit to Mike’s argument for  
26 the following reasons: 1) “Congress did precisely what the Supreme Court invited it to do in *Duro*;  
27 there was no question that Congress was within its authority in passing such legislation;” 2) “Congress  
28 has not acted to overturn *Colville*, which[,] unlike *Duro*, is within the context of the present case-state

1 taxation;” and 3) 14 years after *Duro*, the Supreme Court reiterated in *Strate v. A-1 Contractors* (1997)  
2 520 U.S. 438, 459, that “[a tribe’s inherent power does not reach] beyond what is necessary to protect  
3 tribal self-government or to control internal relations.” (*Id.* at pp. 830-831, all brackets in original.)

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

13           The court also stated Mike’s reliance on *Sac and Fox* was not persuasive. The court,  
14 noting Mike’s argument that the *Sac and Fox* Court held that the *McClanahan* exception applies to all  
15 Indians residing within Indian country, regardless of tribal membership, stated that the *Sac and Fox*  
16 Court evaluated a claim brought by the Sac and Fox Nation, on behalf of itself and “all residents of its  
17 territorial jurisdiction.” (*Angelina Mike*, at p. 831, fn. 11 (citing *Sac and Fox*, *supra*, at p. 120).) The  
18 court noted that “both the trial court and the appellate court, which both held the state could collect  
19 state income tax on the income nonmembers of the Tribe earned from tribal employment on trust lands,  
20 but not on the income tribal members earned from tribal employment on trust lands, reached their  
21 conclusions without looking ‘to where the tribal members resided’ but instead examined only the  
22 source of the income.” (*Id.* (citing *Sac and Fox*, *supra*, at pp. 121-122).) The court stated that the  
23 Court’s “repeated references to tribal membership suggests it had no intent to disturb the lower court’s  
24 ruling that the state could collect state income tax on the income nonmembers of the tribe earned,  
25 which persuades us that *Sac and Fox* has no relevance to the taxation of nonmembers.” (*Ibid.*)

26           In addition, the court rejected Mike’s arguments to the effect that “tribal membership is,  
27 or should be deemed, irrelevant for taxation purposes.” The court stated that it “may not disregard  
28 *Colville*’s clear instruction that tribal affiliation and membership *does* matter in determining the

1 circumstances under which the state may levy and collect taxes for persons residing on a reservation.”  
2 The court indicated that it lacked jurisdiction over matters involving a tribe’s right to define its own  
3 membership for tribal purposes. (*Angelina Mike*, at pp. 832-833, italics in original.) *Angelina Mike*  
4 clearly states that tribal members living outside of their own tribe’s Indian country, are precluded from  
5 claiming the exemption from California’s income taxation provided under the *McClanahan* line of  
6 cases, even if they live within the Indian country of another tribe.

### 7 Board Jurisdiction

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

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

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

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

1 *Fred R. Dauberger, et al.*, 82-SBE-082, March 31, 1982.) In the *Appeal of Aimor Corporation, supra*,  
2 the Board stated:

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

7 Interest Abatement

8 Interest is not a penalty but is merely compensation for the taxpayers' use of the money.  
9 (Rev. & Tax. Code, § 19101, subd. (a); *Appeal of Amy M. Yamachi, supra*; *Appeal of Audrey C. Jaegle*,  
10 76-SBE-070, June 22, 1976.) Under R&TC section 19104, respondent may abate all or a part of any  
11 interest on a deficiency to the extent that interest is attributable in whole or in part to any unreasonable  
12 error or delay committed by respondent in the performance of a ministerial or managerial act.<sup>16</sup> (Rev.  
13 & Tax. Code, § 19104, subd. (a)(1).) An error or delay can only be considered when no significant  
14 aspect of the error or delay is attributable to the appellant and after respondent has contacted the  
15 appellant in writing with respect to the deficiency or payment. (Rev. & Tax. Code, § 19104, subd.  
16 (b)(1).) There is no reasonable cause exception to the imposition of interest. (*Appeal of Audrey C.*  
17 *Jaegle, supra.*)

18 This Board's jurisdiction in an interest abatement case is limited by statute to a review  
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21 <sup>16</sup> In the *Appeal of Michael and Sonia Kishner*, 99-SBE-007, decided on September 29, 1999, the Board adopted the  
language from Treasury Regulation section 301.6404-2(b)(2), defining a "ministerial act" as:

22 [A] procedural or mechanical act that does not involve the exercise of judgment or discretion, and that  
23 occurs during the processing of a taxpayer's case after all prerequisites to the act, such as conferences and  
review by supervisors, have taken place. A decision concerning the proper application of federal tax law  
(or other federal or state law) is not a ministerial act.

24 The Board has not yet adopted a definition for the term "managerial act." However, when a California statute is  
25 substantially identical to a federal statute (such as with the interest abatement statute in this case), the Board may consider  
federal law interpreting the federal statute as highly persuasive. (*Appeal of Michael and Sonia Kishner, supra*, (citing  
26 *Douglas v. State of California* (1942) 48 Cal.App.2d 835).) In this regard, Treasury Regulation section 301.6404-2(b)(1)  
defines a "managerial act" as:

27 [A]n administrative act that occurs during the processing of a taxpayer's case involving the temporary or  
28 permanent loss of records or the exercise of judgment or discretion relating to management of personnel. A  
decision concerning the proper application of federal tax law (or other federal or state law) is not a  
managerial act.

1 of respondent's determination for an abuse of discretion. (Rev. & Tax. Code, § 19104, subd.  
2 (b)(2)(B).) To show an abuse of discretion, an appellant must establish that, in refusing to abate  
3 interest, respondent exercised its discretion arbitrarily, capriciously, or without sound basis in fact or  
4 law. (*Woodral v. Commissioner* (1999) 112 T.C. 19, 23.) Interest abatement provisions are not  
5 intended to be routinely used to avoid the payment of interest, thus interest abatement should be  
6 ordered only "where failure to abate interest would be widely perceived as grossly unfair." (*Lee v.*  
7 *Commissioner* (1999) 113 T.C. 145, 149.) The mere passage of time does not establish error or delay  
8 that can be the basis of an abatement of interest. (*Id.* at p. 150.)

### 9 Mental Health Services Tax

10 R&TC section 17043 provides that, for each taxable year beginning on or after  
11 January 1, 2005, an additional tax is imposed at the rate of one percent on the portion of a taxpayer's  
12 taxable income in excess of one million dollars (\$1,000,000).

### 13 Contentions

#### 14 Appellants' Appeal Letter<sup>17</sup>

15 Appellants contend that, during the tax years at issue, they resided "on an Indian  
16 allotment held by the United States of America in trust for the lineal decedents of Mr. Dandy's parental  
17 grandfather that qualified as part of the 'Indian country' of the North Fork Tribe."<sup>18</sup> Appellants assert  
18 that appellant-wife is a member of the Table Mountain Tribe and that, during the tax years at issue, she  
19 received wages and other compensation from the Table Mountain Casino, which is owned and operated  
20 by the Table Mountain Tribe and located on the Table Mountain Reservation, in connection to her  
21 services as a board member of the Table Mountain Casino, and that she also received, as a member of  
22 the tribe, per capita distributions and other income from the Table Mountain Tribe. Appellants assert  
23

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24 <sup>17</sup> The Appeals Division notes that while appellants provide information regarding properties they own in Madera,  
25 California, and Auberry, California (neither of which appear to be within Indian country of the Table Mountain Tribe), it  
26 does not appear that the FTB contests that appellants lived on the North Fork Reservation/Indian country during the tax  
27 years at issue, or that the North Fork Tribe is a federally-recognized tribe. As such, the additional information is not  
28 included in this hearing summary. (Appeal Letter, pp. 5 & 8-9; Resp. Op. Br., p. 1.)

<sup>18</sup> The Appeals Division notes that while appellants provide a detailed history of the parcel of land on which they resided, as  
noted above, it does not appear that the FTB contests that appellants lived on the North Fork Reservation/Indian country  
during the tax years at issue, or that the North Fork Tribe is a federally-recognized tribe. As such, the additional information  
is not included in this hearing summary. (Appeal Letter, pp. 1, 4 & 9; Resp. Op. Br., p. 1.)

1 that, due to appellant-wife's position as a board member of the Table Mountain Casino, they chose to  
2 reside on their property at the North Fork Reservation. (Appeal Letter, pp. 5-6.)

3 Appellants contend that, since appellant-wife resided within Indian country during the  
4 tax years at issue, the income she received from the Table Mountain Casino and the Table Mountain  
5 Tribe is exempt from state taxation. Appellants assert that, while California generally imposes income  
6 tax on the income of California residents and on the income from California sources, special rules  
7 apply to Indians who live in "Indian country," as defined in Title 18, section 1151 of the United States  
8 Code, located within California. Appellants contend that the Supreme Court in *McClanahan* stated that  
9 certain Federal legislation clearly supports Congress' intent to maintain the tax-exempt status of  
10 reservation Indians, and that the Court was unable to find any Federal statute that authorized a state to  
11 impose state income tax on an Indian who resides on an Indian reservation. Appellants assert that the  
12 Supreme Court later, in *Sac and Fox*, rejected the state's argument that a tribal member must be a  
13 "reservation Indian" and live on a formal reservation in order to qualify for the exemption from state  
14 income taxation, and the Court held that the presumption against state taxing authority applies to all  
15 Indian country, and not just to reservations. Appellants contend that the *Sac and Fox* Court did not  
16 limit its rule to the Indian country of specific Indians or to the Indian country of a specific Indian tribe.  
17 In addition, appellants assert that the Board in the *Appeal of Edward T. and Pamela A. Arviso, supra*,  
18 held that the taxpayers were not exempt "reservation Indians" because they did not reside on a  
19 reservation or, as appellants assert, within the Indian country of any Indian tribe, and that the Board in  
20 the *Appeal of Samuel L. Flores, supra*, confirmed that the residency of the tribal member,<sup>19</sup> not his or  
21 her status as a "reservation Indian," is the proper inquiry. (Appeal Letter, pp. 9-16.)

22 Appellants assert that it is their understanding that, according to the FTB, in order to be  
23 exempt from California income tax, the following requirements must be met: (1) the taxpayer must be  
24 an enrolled member of a Federally-recognized Indian tribe; (2) the income at issue must be derived  
25 from reservation sources of the Indian tribe in which the taxpayer is a member; and (3) the taxpayer  
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28 <sup>19</sup> The Appeals Division notes that appellants provide legal authority relating to domicile, residence, and determining the  
residence of an Indian for California purposes. As noted above, it does not appear that the FTB contests that appellants lived  
on the North Fork Reservation/Indian country during the tax years at issue, or that the North Fork Tribe is a federally-  
recognized tribe. Therefore, the additional information is not included in this hearing summary. (Appeal Letter, pp. 16-19.)

1 must reside within the Indian country of the Indian tribe in which the taxpayer is a member. Appellants  
2 assert that the FTB concluded that, while appellant-wife satisfied the first two requirements, she did not  
3 satisfy the third requirement since she was living on the North Fork Reservation, rather than within  
4 Indian country of the Table Mountain Tribe, and, therefore, the income was not exempt from California  
5 income taxation. Appellants contend that, during the protest hearing, the FTB agreed that the only  
6 remaining issue<sup>20</sup> was whether appellant-wife was required to live within the Indian country of Table  
7 Mountain (of which she is a tribal member), in order for the income she received from the Table  
8 Mountain Casino and the Table Mountain Tribe to be exempt from state taxation, or if she could live  
9 within the Indian country of any Indian tribe. Appellants, citing *McClanahan, supra*, contend that it is  
10 enough that the member live in Indian country, and that the definition of Indian country, as defined in  
11 Title 18, section 1151 of the United States Code, is not limited to the reservation of a tribal member's  
12 own Indian tribe. Appellants contend that, since appellant-wife resided within the Indian country of the  
13 North Fork Tribe during the tax years at issue, she satisfied the residency requirement and the income  
14 at issue is exempt from state income tax. (Appeal Letter, pp. 9, 19-22.)

15 Appellants contend that *Angelina Mike*, which appellants agree held that, in order to  
16 qualify for the exemption from state income taxation the tribal member must live within the Indian  
17 country of the Indian tribe in which the taxpayer is a member, is not controlling. Appellants assert that  
18 the *Angelina Mike* court erroneously concluded that the *McClanahan* court limited the exemption from  
19 state income taxation to tribal members who reside within his or her own Indian tribe's Indian country  
20 and that, in reaching its conclusion, the *Angelina Mike* court "ignored the clear and unambiguous  
21 ruling" of *Sac and Fox*, which was decided by the Supreme Court after the cases relied upon by the  
22 *Angelina Mike* court. Appellants also assert that the *Angelina Mike* court improperly read the definition  
23 of "Indian country," as defined in Title 18, section 1151 of the United States Code, to be limited to the  
24 land/dependent Indian communities/Indian allotments of the Indian tribe in which such tribal member  
25 is a member, and that the *Angelina Mike* court's interpretation is "clearly contrary to the express, clear  
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28 <sup>20</sup> Appellants contend that, during the protest hearing, the FTB agreed that during the tax years at issue: (1) appellants were each members of a federally-recognized tribe; (2) the land appellants lived on was a portion of the North Fork Tribe's "Indian country;" and (3) the income appellants claimed as exempt was income appellant-wife received from the Table Mountain Casino and the Table Mountain Tribe, of which appellant-wife is a member.

1 and unequivocal wording of the statute.” Appellants contend that “Indian country” covers the Indian  
2 country of all Indians and all Indian tribes, including the Indian country of an Indian tribe in which a  
3 tribal member’s spouse is a member, and that it is not limited to specific Indians or to a specific Indian  
4 tribe. (Appeal Letter, pp. 22-24.)

5 Appellants also contend that the *Angelina Mike* court, in requiring that the tribal member  
6 must reside within the Indian country of the Indian tribe in which he or she is a member, violates  
7 multiple constitutional rights of the tribal member, including the right to travel, the right to marry, and  
8 the freedom of association. Appellants contend that, while a violation of these constitutional rights  
9 arguments were not asserted by Mike or considered by the *Angelina Mike* court,<sup>21</sup> appellants state that  
10 they, as an alternative argument in support of their position that the income at issue is exempt from  
11 state income taxation, contend that the FTB’s “erroneous position . . . violates multiple constitutional  
12 rights of [appellants].” Appellants contend that denying their ability to live where they chose violates  
13 their right to intrastate travel, and that denying people the ability to live with their family is equivalent  
14 to denying people the right to marry, as well as their right to freedom of association. Appellants assert  
15 that the FTB “chose to blindly follow” *Angelina Mike*, rather than consider appellants’ arguments as to  
16 why *Angelina Mike* is not controlling. (Appeal Letter, pp. 24-27.)

17 Appellants state that they are appealing “any interest, penalties, addition to tax, and/or  
18 additional amounts that may accrue.”<sup>22</sup> (Appeal Letter, p. 3.)

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20 <sup>21</sup> The Appeals Division notes that the *Angelina Mike* court did address the constitutional right to equal protection and held  
21 that the tax did not violate Mike’s right to equal protection. Mike argued that the tax was discriminatory because her tribe’s  
22 reservation lands were small compared to those of other tribes and it was impossible for her to reside on her tribe’s  
23 reservation because neither the tribe nor Mike elected to spend any of the gaming revenues to build housing on its  
24 reservation. The court treated Mike’s argument as a challenge to the income tax on equal protection grounds, and found that  
25 there is a rational basis for treating Indians who have left their own tribe’s reservation like all other taxpayers in California,  
26 because “[f]or most practical purposes those Indians stand on the same footing as non-Indians resident on the reservation.”  
(*Angelina Mike* at p. 833, (citing *Colville, supra*, at p. 161).) The court, citing *Edward W. Jefferson, et al., Relators v.*  
*Commissioner of Revenue* (Minn. 2001) 631 N.W.2d 391, 395-397 (rejecting equal protection challenge to propriety of  
taxing Indians who left reservation and concluding their reasons for leaving reservation were irrelevant to analysis), stated  
that Mike cited no authority suggesting her reasons for changing her residence render an otherwise proper tax a violation of  
equal protection, and the court was not persuaded by this argument. (*Angelina Mike* at p. 833.)

27 <sup>22</sup> The assessments for 2009, 2010, and 2011 include the assessment of the Mental Health Services Tax, which applies to  
28 amounts of taxable income over \$1,000,000. (Rev. & Tax. Code, § 17043.) As discussed below, should appellants prevail  
in whole or in part on the State Taxation of Indian Income issue, the Mental Health Services Tax will be adjusted  
accordingly. Regarding penalties, the Appeals Division notes that the assessments for 2009, 2010, and 2011 did not include  
penalties. As such, there are no penalty amounts to dispute. (Appeal Letter, Exhibits A, B, & C.)



1 fix,” 25 U.S.C. § 1301(2), which provides Indian tribes with criminal jurisdiction over crimes  
2 committed by nonmember Native Americans on tribal lands. Citing *Angelina Mike*, the FTB contends  
3 that the distinction between nonmember Indians on the lands of another tribe and tribal members on  
4 their own lands remains valid in court decisions following the “*Duro fix*.” (Resp. Op. Br., pp. 4-5.)

5 The FTB asserts that appellant-wife, like the plaintiff in *Angelina Mike*, is a tribal  
6 member receiving wages for services performed on her tribe’s reservation while residing on another  
7 tribe’s lands. The FTB asserts that the *Angelina Mike* court examined *McClanahan* and *Colville*,  
8 finding that the taxation of a nonmember Native American does not violate concepts of tribal  
9 sovereignty and self-determination because, by taxing a nonmember Native American living on another  
10 tribe’s reservation, the state is not interfering with the tribe’s governance over its own members. The  
11 FTB contends that appellant-wife’s tribal wages are thus not exempt from California taxation, pursuant  
12 to the holding of *McClanahan*. (Resp. Op. Br., pp. 5-6.)

13 The FTB contends that there is no merit to appellants’ argument that *Angelina Mike* is  
14 not controlling because the court failed to address constitutional rights. With regard to appellants’  
15 argument that the *Angelina Mike* decision does not consider a tribal member’s right to travel, right to  
16 marry, and freedom of association, the FTB asserts that appellants have not substantiated their  
17 argument with any applicable facts. In addition, the FTB asserts that appellants’ argument does not  
18 reconcile with the established law provided by *McClanahan*, as clarified by *Sac and Fox*, which sets  
19 forth that tribal members must reside in Indian country for their income to be excluded from state  
20 income taxation. The FTB contends that taxpayers’ argument, if extended to its logical conclusion,  
21 could result in the argument that *McClanahan* is unconstitutional because the rights of tribal members  
22 who choose to reside off of the reservation to live with nontribal member spouses are violated. The  
23 FTB notes that *McClanahan* is well established law set forth by the Supreme Court. (Resp. Op. Br.,  
24 pp. 6-7.)

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1                    Appellants' Reply Brief

2                    Appellants contend that the FTB misstates the issue in this appeal.<sup>23</sup> Appellants assert  
3 that the FTB incorrectly “attempts to recharacterize and limit the issue to the interpretation of the rule  
4 established by [*McClanahan*], set forth by [*Angelina Mike*].” Appellants reiterate their contentions that  
5 they disagree with the *Angelina Mike* holding, and that *Angelina Mike* is not controlling in this appeal.  
6 Appellants assert that it would be “inconsistent for [appellants] to limit the issue in this case to the  
7 incorrect interpretation of the rule” established by the Supreme Court in *McClanahan*, set forth by the  
8 California Court of Appeals in *Angelina Mike*, “as opposed to the clear and unequivocal rule  
9 established” by the Supreme Court in both *McClanahan* and *Sac and Fox*. Appellants assert that the  
10 FTB “has no authority to attempt to limit or restrict [a]ppellants’ right to have the correct issue  
11 considered” by the Board. (App. Reply Br., pp. 2-3.)

12                    Appellants assert that the FTB misstates the rule established by *McClanahan*.  
13 Appellants, agreeing that the taxpayer in *McClanahan* was a member of the Navajo Tribe, resided on  
14 the Navajo Reservation, and that the income at issue was derived from within the Navajo Reservation,  
15 contend that the FTB’s assertion<sup>24</sup> that the *McClanahan* Court held that the tribal member must reside  
16 on her tribe’s land in order to qualify for the exemption from state income tax is unsupported.  
17 Appellants, citing, *McClanahan*, contend that the court stated that since *McClanahan* “is an Indian and  
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19 <sup>23</sup> A summary of the issue that appellants contend the FTB asserts:

20                    Appellant-wife is a member of the Table Mountain Tribe, and appellant-husband was a member of the  
21 North Fork Tribe. During the tax years at issue, appellants resided on the North Fork Reservation and  
22 appellant-wife received wages and per capita distributions from the North Fork Tribe. In view of *Angelina  
Mike*, are appellant-wife’s per capita distributions and wages subject to taxation under *McClanahan*?

23 A summary of the issue, as asserted by appellants:

24                    Whether appellant-wife, a member of the Table Mountain Tribe, who lived with appellant-husband within  
25 the Indian country of the North Fork Tribe (of which appellant-husband was a member), qualifies during  
26 the tax years at issue for exemption from California income tax with regard to per capita payments and  
27 other income that she received from the Table Mountain Tribe, and wages and other compensation that she  
28 received from the Table Mountain Casino (an Indian casino owned and operated by the Taxable Mountain  
Tribe) under the rule established in *McClanahan* and *Sac and Fox*. (App. Reply Br., p. 2.)

<sup>24</sup> Appellants refer to the following sentence in the FTB’s opening brief:

In *McClanahan*, the Court determined that a state may not impose tax on tribal members who reside on  
their tribe’s lands and derive income from their tribe’s lands. (App. Reply Br., p. 4; Resp. Op. Br., p. 4.)

1 since her income is derived wholly from reservation sources, her activity is totally within the sphere  
2 which the relevant treaty and statutes leave for the Federal Government and for the Indians  
3 themselves,” and held that “[t]he tax is therefore unlawful as applied to *reservation Indians* with  
4 income derived wholly from *reservation sources*.” (Emphasis added by appellants.) Appellants assert  
5 that the FTB incorrectly attempts to characterize “the clear, unequivocal language” used by the  
6 Supreme Court as requiring a tribal member to reside “on their tribe’s land,” as opposed to being a  
7 “reservation Indian.” (App. Reply Br., pp. 4-5.)

8 Appellants contend that the FTB “virtually ignores the expansion of the rule established  
9 by the Supreme Court in [*McClanahan*] by [*Sac and Fox*].” Appellants assert that, prior to the Court’s  
10 decision in *Sac and Fox*, several taxing authorities, including the Oklahoma Tax Commission,  
11 attempted to limit the exemption from state income taxation, as established by *McClanahan*, to  
12 “reservation Indians” and to income derived by Indians from “reservation sources.” Appellants, citing  
13 *Sac and Fox*, state that the Court found that “a tribal member need not live on a formal reservation to  
14 be outside the State’s taxing jurisdiction; it is enough that the member live in “Indian country,” and  
15 held that the “*McClanahan* presumption against state taxing authority applies to *all Indian country*, and  
16 not just formal reservations.” (Emphasis added by appellants.) Appellants contend that the FTB “fails  
17 to point out” that cases, such as *Colville* and *Duro*, which were relied upon by the FTB in *Angelina*  
18 *Mike*, and adopted by the California Court of Appeals, were decided prior to *Sac and Fox*. Appellants,  
19 contending that the *Sac and Fox* Court chose not to limit the definition of “Indian country” for purposes  
20 of the state income tax exemption it had established in *McClanahan*, assert that no such limitation  
21 should be imposed in this appeal. (App. Reply Br., pp. 5-7.)

22 Appellants assert that *Angelina Mike, supra*, is not controlling in this appeal because  
23 appellants have raised issues that were not raised by *Mike*, the California Court of Appeals in  
24 *Angelina Mike* “virtually ignored” the Supreme Court’s decision in *Sac and Fox*, and because both the  
25 California Court of Appeals and the FTB misinterpret relevant authorities cited in *Angelina Mike*, such  
26 as *Colville* and *Duro*. Appellants contend that neither of the opinions in *Colville* and *Duro* supports the  
27 conclusion that tribal members must reside on their own tribe’s reservation to be exempt from state  
28 taxation. Appellants contend that, in *Duro*, the issue did not involve state taxation and that the *Duro*

1 Court looked to the distinction between tribal members and nonmembers, and its relationship to self-  
2 governance in other areas of Indian law. Appellants assert that, in *Duro*, the focus “is on the  
3 relationship between a tribe and its tribal members, and that a nonmember does not have a say in the  
4 tribal affairs or share in the tribal disbursements of a tribe in which he or she is not a member,” and that  
5 *Duro* does not state that the nonmember residing on a reservation, or within the Indian country, of a  
6 tribe other than his/her own tribe is a relevant factor. (App. Reply Br., pp. 7-12.)

7 In addition, appellants contend that, in *Colville*, the issue was the imposition of excise  
8 tax and sales tax on products sold on the reservation to nonmembers, and that the Court concluded that  
9 the legal incidence of the taxes at issue was on the purchaser in the transaction, not on the Indian seller.  
10 Appellants assert that, as a result, the Supreme Court later held in *Chickasaw Nation* that the imposition  
11 of excise tax and sales tax was to be evaluated under a balancing test, balancing the interest of the tribe  
12 against the interest of the state. Appellants contend that the issue in this appeal is “income tax, the  
13 incidence of which is borne by [appellant-wife], an Indian living on [an] all Indian allotment located  
14 within the Indian country of the North Fork Tribe,” and, therefore, the income tax at issue is to be  
15 treated as per se invalid. Appellants also contend that, in *Colville*, the key fact was that the purchasers  
16 did not have the status as members of the selling tribe and, therefore, the imposition of the taxes on the  
17 nonmember purchasers did not “contravene the principal of tribal self-government, for the simple  
18 reason that nonmembers are not constituents of the governing Tribe,” citing *Colville*, and not,  
19 appellants assert, because the purchasers were not residing within their own tribe’s Indian Country.  
20 Appellants also contend that one of the key concerns of the *Colville* Court was that the tribe was  
21 marketing their tax exemption to nonmembers, and that, here, neither appellant-wife, the Table  
22 Mountain Tribe, nor the North Fork Tribe, are attempting to market their tax exemption to  
23 nonmembers. (App. Reply Br., pp. 7-12.)

24 Appellants contend that the FTB’s “narrow and improper interpretation of ‘Indian  
25 country’” to include the Indian country of the Indian tribe in which the taxpayer is a member, as  
26 opposed to the Indian country of all Indian tribes, as stated in *Sac and Fox*, violates multiple  
27 constitutional rights of appellants. Appellants contend that while Mike did not raise constitutional  
28 issues in *Angelina Mike*, and, therefore, it is not unreasonable that the California Court of Appeals did

1 not address them, appellants do raise constitutional violation issues. Appellants contend that appellant-  
2 wife chose to live with her husband on his tribe's Indian country and that, by doing so, the FTB  
3 contends that she does not qualify for the state income tax exemption. Appellants contend that "the  
4 'toll charge' for [appellant-wife] choosing to live with her husband is substantial." Appellants contend  
5 that, in *Zablocki v. Redhail* (1978) 434 U.S. 374, the Supreme Court acknowledged the constitutional  
6 right to marry, found a statute requiring certain individuals to obtain a court approval to marry as  
7 unconstitutional, and held that "even those who can be persuaded to meet the statute's requirements  
8 suffer a serious intrusion into their freedom of choice in an area in which we have held such freedom to  
9 be fundamental."<sup>25</sup> Appellants assert that appellant-wife, in choosing to marry appellant-husband and  
10 to live with him in Indian country within the North Fork Tribe, was exercising her fundamental rights,  
11 such as: (1) the right to marry, including the right to establish a home with appellant-husband and the  
12 right to the society with him, citing *In re Marriage Cases* (2008) 43 Cal.4th 757, 827;<sup>26</sup> (2) the right to  
13 the freedom of association, including the right to establish a family home to live with appellant-  
14 husband, citing *Griswold v. Connecticut* (1965) 381 U.S. 479;<sup>27</sup> and (3) the right to intrastate travel,  
15 citing *In re Marriage of Fingert* (1990) 221 Cal.App.3d 1575.<sup>28</sup> With regard to the FTB's contention  
16 that taxpayers' argument, if extended to its logical conclusion, could result in the argument that  
17 *McClanahan* is unconstitutional, appellants assert that they have made no contention that the  
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19 <sup>25</sup> In *Zablocki v. Redhail*, *supra*, a class action lawsuit was brought challenging a Wisconsin statute, which provided that any  
20 resident having minor issue not in his custody that he was under an obligation to support by any court order or judgment  
21 may not marry without court approval, as violative of the equal protection and due process clauses and seeking declaratory  
22 and injunctive relief. The Supreme Court held that: (1) since the right to marry is of fundamental importance and since  
23 statutory classification significantly interfered with the exercise of that right, a critical examination of state interests  
24 advanced in support of the classification was required; and (2) since the means selected by the state for achieving its  
25 interests in providing an opportunity to counsel applicants as to the necessity of fulfilling prior support obligations and  
26 protecting welfare of out-of-custody children unnecessarily impinged on the right to marry, statute could not be sustained.

27 <sup>26</sup> The California Supreme Court, in the consolidated appeals of *In re Marriage Cases*, *supra*, ruled that California law  
28 prohibiting same-sex marriage was invalid. This decision was subsequently superseded, after California voters approved  
Proposition 8, by a constitutional amendment which was later found to be unconstitutional and legally authorized same-sex  
marriages in California then resumed.

<sup>27</sup> *Griswold v. Connecticut*, *supra*, the Supreme Court, held that the Connecticut law forbidding the use of contraceptives  
unconstitutionally intruded upon the right of marital privacy.

<sup>28</sup> *In re Marriage of Fingert*, *supra*, the California Court of Appeals held that the mother, who was the primary custodial  
parent, could not be required to relocate to an area where the father resided in order to facilitate his visitation.

1 requirement in *McClanahan* that a tribal member live within Indian country in order to qualify for the  
2 exemption from state income taxation violates appellants' constitutional rights. Appellants assert that  
3 they argue that it is the FTB's "improper limitation on the scope of 'Indian country,'" in light of  
4 *Sac and Fox* and Title 18, section 1151 of the United States Code, that violates appellants'  
5 constitutional rights. (App. Reply Br., pp. 12-15.)

6 Appellants also contend that the FTB ignores the fact that the Board has already adopted an  
7 interpretation of the term "Indian country" for California sales and use tax purposes that is consistent  
8 with appellants' interpretation of both "Indian country" and *Sac and Fox*. Appellants assert that under  
9 California Sales and Use Tax Regulation 1616, subdivision (d)(2), a "[r]eservation" includes  
10 reservations, rancherias, and any land held by the United States in trust for any Indian tribe or  
11 individual Indian," and that according to BOE Publication 146 ("Sales to American Indians and Sales  
12 in Indian Country"),<sup>29</sup> under the Sales and Use Tax Law, "reservation" generally has the same meaning  
13 as "Indian country" as defined in Title 18, section 1151 of the United States Code. Appellants contend  
14 that BOE Publication 146, especially in the cases of sales to Indians by off reservation retailers, sales  
15 by "on-reservation" Indian retailers, and sales by "on-reservation" non-Indian retailers, uses the same  
16 interpretation of "Indian country" as appellants (i.e., that "Indian country" includes the Indian country  
17 of all Indians and all Indian tribes). Appellants assert that "[u]nless the Board adopts the interpretation  
18 of 'Indian country' maintained by [appellants], the Board will conclude that there are two, different  
19 definitions of 'Indian country' for California tax purposes: one definition for California sales and use  
20 tax purposes that is consistent with the clear, unequivocal language stated by the [Supreme Court in  
21 *Sac and Fox* and in Title 18, section 1151 of the United States Code], and another definition for  
22 California income tax purposes that is not." (App. Reply Br., pp. 15-18.)

23 In addition, appellants contend that they object to certain exhibits attached to the FTB's  
24 opening brief. Appellants assert that, since the parties "have agreed to the relevant facts relating to this  
25 appeal," appellants see no reason for making appellants' 2009, 2010, and 2011 tax returns part of the  
26 public record in relation to this appeal and, therefore, appellants object to the corresponding exhibits in  
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28 <sup>29</sup> Available at: <https://www.boe.ca.gov/pdf/pub146.pdf>.

1 the FTB's opening brief. Appellants also assert that the FTB provided only a portion of the protest and  
2 that a full copy of the protest should be part of the administrative record. (App. Reply Br., p. 18; Resp.  
3 Op. Br., Exhibits C, D, E, F, & J.)

4 Respondent's Reply Brief

5 The FTB contends that appellants' analysis of *Sac and Fox* improperly implies a broader  
6 application than is stated in the holding of the case. The FTB, citing *Sac and Fox*, asserts that the  
7 following is the court's holding: "Additional congressional enactments support our conclusion that the  
8 *McClanahan* presumption against state taxing authority applies to all Indian country, and not just  
9 formal reservations," and that, when taken into context, the holding "explains why appellants[']  
10 analysis is incorrect." The FTB contends that, in *Sac and Fox*, the Court of Appeals stated that it (i.e.,  
11 the Court of Appeals): (1) need not examine whether the tribe's right to self-governance could operate  
12 independently of its territorial jurisdiction; (2) was not reaching the issue of nonmembers residing on  
13 another tribe's reservation; and (3) that on remand it was for the lower court to determine whether the  
14 relevant tribal members lived in Indian country. (Resp. Reply Br., pp. 1-2.)

15 The FTB asserts that appellants ignore the impact of a later case, *Angelina Mike*, which,  
16 the FTB contends, reaches the question *Sac and Fox* left unresolved: whether tribal members must  
17 reside in their own tribe's Indian country. The FTB, asserting that it is bound by applicable case law,  
18 contends that, in *Angelina Mike*, the California Court of Appeals established that *McClanahan* is  
19 limited to tribal members residing on their own tribe's reservations. (Resp. Reply Br., p. 2.)

20 Concerning appellants' constitutional arguments, the FTB contends that the Board has  
21 held that it is most appropriate that such matters be clarified by the courts, citing the *Appeal of Aimor*  
22 *Corporation*, 83-SBE-221, decided on October 26, 1983. The FTB also contends that, to the extent  
23 there is any ambiguity regarding the application of *McClanahan* and *Angelina Mike*, the FTB must look  
24 to the courts for the interpretation of any such ambiguities.

25 With regard to appellants' contention that their tax returns not be a part of the appeal  
26 record, the FTB asserts that it is unable to remove the items from the record, "as they are the foundation  
27 of what is at issue here." The FTB contends that appellants' tax returns establish appellants' position as  
28 to the taxability of their income and are essential to this matter. (Resp. Reply Br., pp. 2-3.)



1 (5) “Indian country,” as defined in Title 18, section 1151 of the United States Code, covers the Indian  
2 country of all Indians and all Indian tribes, which is why the *Sac and Fox* Court stated that the  
3 *McClanahan* presumption against taxing authority applies to all Indian country, not just formal  
4 reservations; (6) appellants have raised issues in this appeal that were not raised by Mike nor addressed  
5 by the *Angelina Mike* court; and (7) the *Angelina Mike* holding violates multiple constitutional rights  
6 of tribal members, including appellants. (App. Supp. Br., pp. 2-3, 6-10.)

7 Appellants contend that the Board need not decide the Constitutional issues in this  
8 appeal to rule in favor of appellants. Appellants assert that “because the Board has already stated its  
9 view of the proper definition and interpretation of ‘Indian country’ for California sales and use tax  
10 purposes, a definition and interpretation that is consistent with the clear and unequivocal rule stated by”  
11 the *Sac and Fox* Court, and “the clear and unequivocal language set forth in 18 U.S.C. Section 115[1],  
12 there is no rational basis” for the Board to accept or approve the FTB’s “narrow and inconsistent  
13 definition of ‘Indian country’ for California income tax purposes.” Appellants assert that their  
14 constitutional rights will be violated if the Board adopts the “narrow and inconsistent definition of  
15 ‘Indian country’ for California income tax purposes proposed by the [FTB].” Appellants contend that,  
16 if the Board adopts the definition of “Indian country” that is consistent with *Sac and Fox*, and already  
17 adopted by the Board for sales and use tax purposes, the Board can conclude that the income/per capita  
18 distributions at issue are exempt from state income taxes and “thus the Board need not address the  
19 constitutional violations that would occur by maintaining the position proposed by the [FTB].” (App.  
20 Supp. Br., pp. 10-11.)

21 Appellants reiterate their objection to their tax returns being included in the FTB’s  
22 exhibits. Appellants contend that since “all of the relevant facts are undisputed and were stipulated”  
23 during protest, appellants see no reason why a copy of their tax returns need to be included as exhibits.  
24 (App. Supp. Br., p. 12.)

## 25 STAFF COMMENTS

### 26 State Taxation of Indian Income

27 It is undisputed that during the tax years at issue: (1) appellant-wife was an enrolled  
28 member of the Table Mountain Tribe; (2) appellant-husband was an enrolled member of the North Fork

1 Tribe; (3) appellants were married and resided together on the North Fork Reservation; and  
2 (4) appellant-wife received wages as a board member of the Table Mountain Casino, and per capita  
3 distributions as a member of the Table Mountain Tribe.

4 Based on the findings in *McClanahan*, *Chickasaw*, and *Angelina Mike*, Indians must  
5 reside on their own tribe's reservation in order for their reservation-sourced income to be exempt from  
6 California tax. While appellant-wife is a member of the Table Mountain Tribe, and has reservation-  
7 sourced income from the Table Mountain Reservation, she resided on the North Fork Reservation. As  
8 such, appellant-wife does not meet the requirement that she reside on her own tribe's reservation.

9 Appellants contend that, for reasons discussed above, they disagree with the *Angelina*  
10 *Mike* holding and believe that the holding is not controlling in this appeal. Appellants contend that the  
11 *Angelina Mike* court: (1) misinterpreted relevant authorities it cited; (2) "virtually ignore[d]" the  
12 *Sac and Fox* decision; (3) improperly read the definition of "Indian country;" and (4) reached a holding  
13 that violates multiple constitutional rights of tribal members. Nevertheless, *Angelina Mike*, which held  
14 that income from activities on a taxpayer's tribe's reservation, earned while the taxpayer resided on  
15 another reservation, was taxable, is a published California appellate decision that is legal precedent  
16 from a court of competent jurisdiction.

17 The Board is strictly prohibited by Article III, section 3.5, of the California Constitution  
18 from declaring a statute unenforceable or unconstitutional. The task of determining whether the  
19 enforcement of a statute is prohibited by federal law or regulations belongs to the courts, and there is no  
20 California appellate court decision which authorizes the Board to exclude the income at issue received  
21 by appellant-wife from taxation. If the Board finds that *Angelina Mike* is not controlling here, as  
22 appellants contend, and that there is a constitutional question at issue in this appeal, the Appeals  
23 Division recommends that the Board abstain from deciding the constitutional issue, which will  
24 effectively result in sustaining the Franchise Tax Board's assessment. Appellants could then pay the  
25 tax and file a refund suit so that the courts can resolve this legal issue.

#### 26 Interest Abatement

27 Appellants request the abatement of interest without stating the grounds for such relief.  
28 As noted above, California law only permits the abatement of interest in certain limited circumstances.

1 There is no reasonable cause exception to the imposition of interest.

2 Mental Health Services Tax

3 The increase of AGI reflected in the FTB's proposed assessments resulted in the  
4 imposition of the Mental Health Services Tax, which is imposed at the rate of one percent on the  
5 portion of a taxpayer's taxable income in excess of one million dollars. Should appellants prevail in  
6 whole or in part on the state taxation of the income at issue in this appeal, the Mental Health Services  
7 Tax will be adjusted accordingly.

8 Additional Evidence

9 Pursuant to California Code of Regulations, title 18, section 5523.6, if either party has  
10 any additional evidence to present, they should provide their evidence to the Board Proceedings  
11 Division at least 14 days prior to the oral hearing.<sup>30</sup>

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<sup>30</sup> Evidence exhibits should be sent to: Khaaliq Abd'Allah, Appeals Analyst, Board Proceedings Division, State Board of Equalization, P.O. Box 942879 MIC:80, Sacramento, California 94279-0080.