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

9  
10 In the Matter of the Appeal of: ) **HEARING SUMMARY**  
11 ) **PERSONAL INCOME TAX APPEAL**  
12 **MERVIN L. GEORGE, Sr., AND** ) Case No. 566204  
13 **LAURA LEE GEORGE<sup>1</sup>** )  
14 \_\_\_\_\_ )

<u>Year</u>	<u>Proposed Assessment</u>
2007	\$692 <sup>2</sup>

18 Representing the Parties:

19 For Appellants: Mervin L. George, Sr., and Laura Lee George  
20 For Franchise Tax Board: Natasha Sherwood Page, Tax Counsel III

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22 **QUESTION:** Whether appellants have shown error in respondent's determination that appellant's  
23 income in 2007 is not tax-exempt.

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26 <sup>1</sup> Appellants reside in Hoopa, Humboldt County, California.

27 <sup>2</sup> Respondent's opening brief listed an amount in dispute of \$758. It is unclear why respondent used this amount in its  
28 opening brief, but subsequent discussion in that brief and others clarifies that the amount at issue is the \$692 amount as listed on the Notice of Action.

1 HEARING SUMMARY2 Background

3 Appellant-husband is an enrolled member of the Hoopa Valley Tribe (the Tribe), which is  
4 a federally-recognized tribe. (Appeal Letter, p. 3 & exhibit A.) Appellant-wife is an enrolled member  
5 of the Karuk Tribe of California, a separate federally-recognized tribe. (*Ibid.*) Both are retired and  
6 reside on the Hoopa Valley Indian Reservation. (Appeal Letter, p. 3.) Prior to his retirement, appellant-  
7 husband worked for the City of Eureka, outside Indian country, and contributed to the CalPERS  
8 retirement system. (Resp. Response Br., p. 1.)<sup>3</sup> Prior to her retirement, appellant-wife worked for  
9 Humboldt State University (HSU) and Klamath-Trinity Joint Unified School District (KTJUSD).<sup>4</sup>  
10 (Resp. Reply Br., pp. 2-3.) State taxes were paid on the income from the City of Eureka and Humboldt  
11 State University while appellants resided and worked off the reservation. (*Id.* at pp. 3-4.)

12 During the year at issue, appellant-husband received \$16,714.20 from the California  
13 Public Employees Retirement System (CalPERS) (relating to his work for the City of Eureka), and  
14 appellant-wife received \$22,720.96 from CalPERS (relating to her work at HSU) and \$9,201.06 from  
15 the California State Teachers' Retirement System (CalSTRS) (relating to her work at KTJUSD).<sup>5</sup>  
16 (Appeal Letter, p. 3; Resp. Reply Br., p. 2 & exhibit B.) On appellants' joint California tax return for  
17 the year at issue, appellants subtracted all of their income on Schedule CA of their California tax return,  
18 claiming that it was exempt from tax because appellants were Native Americans living on an Indian  
19 reservation. Appellants also subtracted from Schedule CA small amounts of interest income, business  
20 losses and rents/royalty income, claiming that they were exempt because they were members of  
21 federally-recognized tribes living on the Hoopa Reservation. (Resp. Op. Br., p. 2.)

22 After reviewing the return, Franchise Tax Board (FTB or respondent) determined that  
23 appellants' income at issue did not meet the requirements to be considered non-taxable by California  
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25 <sup>3</sup> An amicus brief was filed in this matter by the Hoopa Valley Tribal Council on October 5, 2011. Respondent's response to  
26 the amicus brief, filed December 21, 2011, is referred to in this summary as Respondent's Response Brief.

27 <sup>4</sup> This school district is referred to by the parties as the Klamath-Trinity Unified School District.

28 <sup>5</sup> Appellants report that appellant-husband also received \$6,944 from Social Security, but this amount was not part of the  
calculations that led to the proposed assessment and is not at issue here. (Appeal Letter, p. 3.)

1 because the income at issue was not reservation-sourced income. (Resp. Op. Br., p. 2 & exhibit C.) On  
2 April 28, 2010, respondent issued a Notice of Proposed Assessment (NPA) adding the \$48,636 in  
3 pension and annuity income (i.e., \$16,714.20 + \$22,720.96 + \$9,201.06) to appellants' taxable income  
4 and proposed an additional assessment of \$692. (*Id.* at exhibit C.) After reviewing the Board's decision  
5 in appellants' prior appeal on similar issues for previous years, on February 2, 2011, respondent  
6 affirmed the NPA and issued a Notice of Action.<sup>6</sup> (*Id.* at exhibit D.) This timely appeal followed.

### 7 Contentions

#### 8 Appellants' Contentions

9 Appellants assert that they are exempt from state taxation for the following reasons:

10 (1) appellants' retirement pension income is exempt from California tax under Federal Public Law 104-  
11 95 (P.L. 104-95) because they live on the reservation, which is equivalent to being in another state;  
12 (2) appellant-wife is federally assigned to the Tribe's reservation and respondent does not have the  
13 power over tribal enrollment issues or Indian tax exemption criteria; and (3) the Tribe, not California,  
14 has taxation jurisdiction over appellants. (Appeal Letter.)

#### 15 *(1) Retirement pension under P.L. 104-95*

16 Appellants contend that P.L. 104-95, which provides that "[n]o State may impose an  
17 income tax on any retirement income of an individual who is not a resident or domiciliary of such  
18 State (as determined under the laws of such State)," is applicable to them and prevents California  
19 from taxing their pension income.<sup>7</sup> Appellants assert that the reservation is considered a "possession  
20 of the United States" and is equivalent to any other state. (Citing P.L. 104-95; Rev. & Tax. Code,  
21 § 25120; Treas. Reg. § 305.7871-1.) Therefore appellants' pension income, although mostly earned  
22 from jobs worked off the reservation, is received in a "state" other than California and cannot be  
23 taxed by California. Appellants also assert that all of appellant-wife's CalSTRS pension income and

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27 <sup>6</sup> Appellants filed a previous appeal for the 2002 through 2005 tax years based on proposed assessments asserting that their  
28 retirement income was exempt from taxation. That appeal was decided on March 17, 2009, prior to the issuance of the NPA  
in this appeal, and appellants' petition for rehearing for that appeal was denied on November 17, 2009.

<sup>7</sup> The concept introduced by Public Law 104-95 has been incorporated into California law through R&TC section 17952.5.

1 the last 12 months of her CalPERS pension income were earned on the Tribe's reservation. (Appeal  
2 Letter, pp. 2-4.)

3 (2) *Appellant-wife lived on her federally-assigned reservation*

4 Appellants contend that the U.S. Constitution, federal laws, and U.S. Supreme Court  
5 rulings all exempt Indians living on their own reservations from state taxation, and respondent is in  
6 error when it asserts that appellant-wife did not live on her own tribe's reservation. Appellants cite  
7 P.L. 100-580, the Hoopa/Yurok Settlement Act of 1988 (codified as amended at 25 U.S.C. section  
8 1300i, et seq. (2006)), as the determination by the Bureau of Indian Affairs that appellant-wife is an  
9 Indian of the Hoopa Valley Reservation. (Appeal Letter, p. 5 & exhibits B and C.) Appellants  
10 contend that appellant-wife is federally assigned to the Tribe's reservation, the State does not have  
11 authority over tribal enrollment issues or the assignment of any Indian's reservation status, and FTB  
12 is without the mandatory "expressed Congressional consent" to change Indian tax exemption  
13 criteria. (*Id.* at p. 2; App. Add'l Br., pp. 3-4.)

14 (3) *Taxation jurisdiction over appellants*

15 Appellants assert that the Tribe, not the State of California, has taxation jurisdiction  
16 over appellants. (Appeal Letter, p. 3.) Appellants contend that P.L. 100-580 is silent on taxation  
17 and therefore all Indians of the Tribe's reservation continue to have tax-exempt status. (*Id.* at p. 6.)  
18 Appellants allege that *Bugenig v. Hoopa Valley Tribe* upholds the sovereign rights confirmed under  
19 P.L. 100-580. (Appeal Letter, pp. 6-7; *Bugenig v. Hoopa Valley Tribe* (9th Cir. 2001) 266 F.3d  
20 1201.) Appellants assert that they are paid on the reservation to be retired, that the money paid for  
21 retirement comes from investments around the world, and that the taxing of the income is for the  
22 federal government and the Tribe, not for FTB. (Appeal Letter, p. 8; App. Add'l Br., p. 4; citing  
23 *Maryboy v. Utah State Tax Commission* (Utah 1995) 904 P.2d 662.)

24 Appellants assert that respondent erroneously considers Indians living on their  
25 reservations as California residents and disregards Revenue and Taxation Code (R&TC) sections  
26 25120 through 25133.<sup>8</sup> (App. Reply Br., p. 2.) Appellants contend that reservations are land held in  
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28 <sup>8</sup> R&TC sections 25120 through 25133 are located in Part 11 of the Revenue and Taxation Code regarding Corporation Tax Law and do not apply to individuals such as appellants.

1 trust by the federal government and that Indians on these lands do not have all the rights of  
2 California residents, such as home equity financing. (App. Add'l Br., p. 2.) Appellants also contend  
3 that respondent errs in determining that reservation-sourced income means tribal-sourced income  
4 rather than focusing on where the individual's service is performed, as required by R&TC section  
5 25133. Contrary to respondent's assertions, appellants allege that the issues in this appeal are not  
6 constitutional, despite the result of appellants' previous appeal for prior years. (App. Reply Br.,  
7 p. 2.) Appellants assert that California Indian law is complex and that court cases from other states  
8 do not apply. (App. Reply Br., p. 4; App. Add'l Br., p. 2.)

9 An amicus brief was filed on behalf of appellants by the Hoopa Valley Tribal Council.  
10 The amicus brief indicates that the Tribal Council previously supported appellants in their prior appeal  
11 on this same subject and reasserts its disagreement with the finding that the issues on appeal are  
12 constitutional issues. (Amicus Br., p. 1.) It asserts that appellant-husband is a member of the Tribe, and  
13 while appellant-wife is enrolled in the Karuk Tribe, she should be considered "an Indian of the Hoopa  
14 Valley Reservation" (which the Tribal Council contends is "essentially like members of the Tribe") for  
15 jurisdictional purposes. (*Ibid*; citing *Short v. United States* (1973) 486 F.2d 561.)<sup>9</sup> The Tribal Council  
16 contends that all of appellants' income is generated on the reservation or retirement income received  
17 while residing on the reservation and that the retirement income is sourced to the reservation since states  
18 cannot impose income tax on the retirement income of an individual who is not a resident or domiciliary  
19 of the state. (Amicus Br., p. 2.) Therefore, the Tribal Council asserts that the Board is not confronted  
20 with constitutional issues and that appellants' appeal should be granted. (*Ibid*.)

#### 21 Respondent's Contentions

22 Respondent cites R&TC section 17041 to support its assertion that California residents  
23 are subject to tax on all income, regardless of source, and contends that the income at issue in this appeal  
24 is not reservation-sourced income. (Resp. Op. Br., p. 3.) Respondent asserts that there is an exemption  
25 from taxation for Indians who live on their reservation and who derive income from reservation sources.  
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27 <sup>9</sup> There is a series of *Short* cases that led up to, and followed, the Hoopa-Yurok Settlement Act (discussed *infra*). The  
28 Amicus Brief references more than one iteration of the *Short* cases. Subsequent *Short* cases deal only with the payment of  
the settlement fund that was created with the enactment of the Settlement Act.

1 Respondent argues, however, that the income must be from “activities carried on within the boundaries  
2 of the reservation,” citing *Mescalero Apache Tribe v. Jones* (1973) 411 U.S. 145.<sup>10</sup> (*Ibid.*) Respondent  
3 asserts that appellants are receiving income from non-tribal employers for services performed outside  
4 the reservation. (*Id.* at p. 4.)

5 Respondent contends that, contrary to appellants’ assertion, California is not prevented  
6 from taxing pension income. (Resp. Op. Br., p. 4.) Respondent argues that the services that gave rise to  
7 the pension income occurred outside of Indian country. In addition, respondent argues that it is not  
8 prohibited from taxing pension income because appellants now reside on the Tribe’s reservation.  
9 Respondent maintains that, although appellants may be residents of the Tribe’s reservation for tribal law  
10 purposes, they remain residents of California and the United States. (Citing *Cotton Petroleum Corp. v.*  
11 *New Mexico* (1989) 490 U.S. 163, 188.) Contrary to appellants’ contention, respondent asserts that the  
12 reservation is not deemed to be a state for purposes of preventing double-taxation of pension income by  
13 two states. (Resp. Op. Br., p. 4.) Respondent states that P.L. 104-95 only applies to nonresidents, and is  
14 therefore not applicable here since California is seeking to tax its own residents. (Resp. Reply Br., p. 4.)  
15 Respondent cites case law which indicates that tribal reservations are not states and asserts that  
16 appellants improperly cite to a tax code applicable to corporations (R&TC section 25120, subd. (g)) and  
17 have not shown that a reservation is a “possession of the United States.” (*Ibid.*)

18 Respondent also states that appellants’ reference to Internal Revenue Code section 7871  
19 is improper, since it refers to how tribal governments are treated for tax purposes and not how  
20 reservations are treated for residency concerns. Furthermore, respondent refers to a recent Eighth  
21 Circuit case as support for the finding that a state may tax pension income of an Indian living on a  
22 reservation when the income is earned elsewhere, including when the pension is from out-of-state  
23 sources. (Resp. Rely Br., p. 5; Citing *Fond du Lac Band of Lake Superior Chippewa v. Frans* (8th Cir.  
24 2011) 649 F.3d 849.)

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27 <sup>10</sup> *Mescalero Apache Tribe, supra*, dealt mainly with gross receipts tax, property tax, and use tax; however, this quoted  
28 portion references *McClanahan, supra*, and concerns the law for the state taxation of Indian income from activities taking  
place on the reservation.

1 Respondent asserts that all of appellant-husband's services were performed outside of the  
2 Tribe's reservation. (Resp. Reply Br., p. 3.) Respondent contends that most of appellant-wife's income  
3 was earned off the Tribe's reservation and, regardless, appellant-wife did not live on her tribe's  
4 reservation (Yurok). Therefore, even income she earned while living on the Tribe's reservation and  
5 working on the Tribe's reservation is still taxable income by California because appellant-wife is not a  
6 member of the Tribe. (Resp. Reply Br., p. 6.) Respondent asserts that, even though the Tribe may treat  
7 appellant-wife "like a member" for certain tribal jurisdictional purposes, the Tribe concedes that  
8 appellant-wife is not an enrolled member, and this is not enough to make her exempt from California  
9 income taxation. (Resp. Response Br., p. 2; citing *Angelina Mike v. Franchise Tax Board* (2010) 182  
10 Cal.App.4th 817.) Respondent contends that appellants admit to paying taxes (as they should have) on  
11 the wages as they received the wages, and their pension income is likely taxable since they are still  
12 residents of California. (Resp. Op. Br., p. 4; Resp. Response Br., p. 2.)

13 Respondent contends that it has applied principles of tribal sovereignty in tandem with  
14 federal preemption because the cases consistently apply both approaches. Further, respondent asserts  
15 that an analysis under federal preemption would yield the same result. (Resp. Op. Br., pp. 4-5.)  
16 Respondent maintains that this appeal involves a question of federal preemption, which is a  
17 constitutional issue. Respondent asks the Board to abstain from deciding the constitutional issue and to  
18 sustain its assessment. Appellants then can file a refund suit and seek a remedy in court. (Resp. Op. Br.,  
19 pp. 6-7.) Respondent indicates that appellants have raised the same issues on appeal here in a previous  
20 appeal to the Board, and the Board properly determined that appellant-wife's income is not sourced to  
21 her tribe's reservation, and the remaining issues on appeal were constitutional. Therefore, respondent  
22 asserts that its action in this appeal should likewise be sustained. (*Id.* at p. 7.)

### 23 Applicable Law

#### 24 Proposed Assessment of Tax

25 The United States Congress has plenary and exclusive powers over Indian affairs.  
26 (*Washington v. Confederated Bands and Tribes of Yakima Indian Nation* (1979) 439 U.S. 463,  
27 470-471.) Throughout the history of our nation, Congress generally has permitted Indians to govern  
28 themselves, free from state interference. (*Warren Trading Post Co. v. Arizona Tax Comm'n* (1965) 380

1 U.S. 685, 686-687.) States may exercise jurisdiction within Indian reservations only when expressly  
2 allowed to do so by Congress. (*McClanahan v. Arizona State Tax Commission* (1973) 411 U.S. 164,  
3 170-171.)

4 California imposes tax on a resident's entire income from all sources. (Rev. & Tax.  
5 Code, § 17041, subd. (a); Cal. Code Regs., tit. 18, § 17014.) A California "resident" includes "every  
6 individual who is in this state for other than a temporary or transitory purpose." (Rev. & Tax. Code,  
7 § 17014, subd. (a)(1).) The United States Supreme Court has stated that:

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

11 (*Nevada v. Hicks* (2001) 533 U.S. 353, 361-362 [internal quotes and cites omitted].) In other words, an  
12 individual does not cease to be a California resident merely by living on an Indian reservation that is  
13 within California's boundaries. Against this backdrop, California law purports to tax the entire income  
14 of any person who resides on an Indian reservation that is within California's borders. The United  
15 States Supreme Court also held that a state "may tax the income (including wages from tribal  
16 employment) of all persons, Indian and non-Indian alike, residing in the State outside Indian  
17 country. . . . [T]he rule . . . [is] that a sovereign may tax the entire income of its residents." (*Oklahoma*  
18 *Tax Commission v. Chickasaw Nation* (1995) 515 U.S. 450, 453.)

19 An exception to the State's taxation of Indians does exist, however. The reservation-  
20 derived income of a member of a federally-recognized Indian tribe who lives on his tribe's reservation is  
21 exempt from state income tax. (*McClanahan, supra*, at pp. 173-178.) This exemption stems from  
22 principles of federal preemption and Indian sovereignty. *McClanahan* became the seminal case in this  
23 area; over 25 years ago, the Board asserted that the taxation question turns on whether appellants are  
24 "reservation Indians" within the meaning of *McClanahan*. (*Appeal of Edward T. and Pamela A. Arviso*,  
25 82-SBE-108, June 29, 1982.) The Supreme Court later stated that *McClanahan* created a presumption  
26 against state taxing authority which extends beyond the formal boundaries of the reservation, to "Indian  
27 country." (*Oklahoma Tax Commission v. Sac & Fox Nation* (1993) 508 U.S. 114.) Congress defined  
28 "Indian country" to include reservations, dependent Indian communities, and Indian allotments. (*Id.*; 18

1 U.S.C. 1151.) The California appellate court in *Angelina Mike* held that a state may impose income  
2 taxes on income received by an enrolled member of a tribe from his or her tribe's reservation activities  
3 when that member resides on the reservation of a different tribe. (*Angelina Mike v. Franchise Tax*  
4 *Board, supra.*)

5           In *Maryboy v. Utah State Tax Commission, supra*, the Utah Supreme Court discussed the  
6 state's right to impose income tax on a married couple who were Indians, who lived and worked on their  
7 own tribe's reservation, and who were employed by entities other than the tribe. The wife was an  
8 employee of the state government, while the husband was a local county commissioner (i.e., an elected  
9 official). After discussing numerous federal cases, including *McClanahan*, the Utah Supreme Court  
10 concluded that Utah's income tax was preempted with regard to the wife, but not with regard to the  
11 husband. While the state's interests in the wife's employment were no more than any private employer  
12 with an employee performing similar duties, the state had a compelling interest in the husband's  
13 employment as an elected official. The Court found that distinction sufficient to support a state interest  
14 in taxing the husband's income, but not the wife's. (*Maryboy, supra*, at pp. 669-670.)

15           Public Law 104-95 provides, in pertinent part, that no state may impose an income tax  
16 upon any retirement income of an individual who is not a resident or domiciliary of such state (as  
17 determined under the laws of that state). Public Law 104-95 further provides that the term "retirement  
18 income" includes income from a pension plan as well as from certain other retirement arrangements.  
19 R&TC section 17952.5, subdivision (a), provides, in pertinent part, that the gross income of a  
20 nonresident from sources within California shall not include "qualified retirement income" received on  
21 or after January 1, 1996, for any part of the taxable year during which the taxpayer was not a resident of  
22 California. R&TC section 17952.5, subdivision (b), provides that "qualified retirement income"  
23 includes income from a pension plan as well as from certain other retirement arrangements.

24           In *Fond du Lac Band of Lake Superior Chippewa v. Frans, supra*, an Eighth Circuit  
25 decision from 2011, the Court of Appeals decided an issue very similar to the one in this appeal. In that  
26 appeal, the Minnesota Department of Revenue taxed Band members' pension income earned in Ohio but  
27 received on the reservation. The court confirmed that federal law provides Indians living on  
28 reservations are considered residents of the state in which they live (even if on a reservation) for taxation

1 purposes. The court affirmed the lower court decision, finding that a state could tax the out-of-state  
2 pension income, even though it was received while Band members lived on the reservation, since the  
3 income was earned off the reservation, citing *McClanahan, supra*.

#### 4 Hoopa-Yurok Settlement Act

5 In 1876, President Grant approved the establishment of the Hoopa Valley Reservation as  
6 a 12-mile by 12-mile square on the Trinity River (known colloquially as the “Square”), primarily  
7 populated by the Tribe. In 1891, President Harrison enlarged the reservation by connecting it to the  
8 Pacific Ocean through an additional two-mile wide strip of land flanking the Trinity River (known as the  
9 “Extension”), which was populated mostly by Yurok Indians. (*Bugenig, supra*, at pp. 1204-1205.)<sup>11</sup>  
10 Despite the fact that neither executive order granted governing rights over the reservation land to a  
11 particular tribe, the Bureau of Indian Affairs (BIA) governed the reservation as if the Square was a  
12 reservation for the Tribe and the Extension was a reservation for the Yurok tribe. Since the Square was  
13 a source of more substantial revenue from the sale of natural resources (mostly timber), and that revenue  
14 was only divided among the Tribe, the Yurok tribe brought suit seeking a share of this revenue. (*Id.* at  
15 1206.) The resulting case concluded that all of the “Indians of the reservation” were entitled to the  
16 revenue from the sale of natural resources within the Square. (*Short v. United States, supra*, at pp. 567-  
17 568.)<sup>12</sup>

18 In 1988, Congress formed the Hoopa-Yurok Settlement Act to settle disputes regarding  
19 the administration of the reservation lands. The Settlement Act partitioned the reservation by making  
20 the Square the Hoopa Valley Reservation, held in trust by the United States for the Tribe, and the  
21 Extension became the Yurok Reservation, held in trust for the Yurok tribe. (*Bugenig, supra*, at p. 1207.)  
22 A settlement fund was also established by Congress in 1988 and a roster was created of all persons who  
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26 <sup>11</sup> The history of the Hoopa-Yurok reservations is recounted in the *Bugenig* appeal, as well as other cases, government documents, and resources such as the Hoopa Valley Tribe site: <http://www.hoopa-nsn.gov/culture/history.htm>.

27 <sup>12</sup> As discussed following, The Hoopa-Yurok Settlement Act was enacted to overrule *Short, supra*, and to create a final  
28 resolution of the matter. (See *Karuk Tribe v. United States* (Fed. Cir. 2000) 209 F.3d 1366, 1372.) The discussion in *Short, supra*, is illustrative of the intentions of the Settlement Act in providing a share of revenue to the Indians who lived on the original reservation, but the case has been superseded by the Settlement Act.

1 could be considered “Indians of the Reservation,” as discussed in *Short, supra*.<sup>13</sup> (*Ibid.*) The purpose of  
2 the roster was to designate which individuals were entitled to a share of the revenue made from the lands  
3 of the entire reservation.<sup>14</sup> (*Short, supra*, at pp. 987-988.)

4 In *Bugenig v. Hoopa Valley Tribe, supra*, the Ninth Circuit looked at the issue of whether  
5 the Tribe has the authority to regulate logging by a non-Indian on allotted fee land that she owns located  
6 within the Square. Relevant to this appeal, the court determined that the non-Indian’s allotted land was  
7 under federal jurisdiction for regulations purposes, which was properly delegated to the Tribe by the  
8 Hoopa-Yurok Settlement Act, and therefore the Tribe had the authority to regulate the logging by  
9 plaintiff on her land. This case upheld the result of the Hoopa-Yurok Settlement Act and the tribal  
10 jurisdiction of the reservation after the partition.<sup>15</sup>

#### 11 Board Jurisdiction

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

18 An administrative agency, including an administrative agency created by the Constitution  
19 or an initiative statute, has no power . . . (c) To declare a statute unenforceable, or to  
20 refuse to enforce a statute on the basis that federal law or federal regulations prohibit the

21 <sup>13</sup> It appears the settlement fund was created as a one-time settlement payment to the tribes and unaffiliated Indians based on  
age and population, and has been fully paid out. (*Short v. United States* (1995) 50 F.3d 994 [*Short 1995*].)

22 <sup>14</sup> Appellants provide a roster list dated 1988 containing appellant-wife’s name as part of the “Hoopa-Yurok Settlement  
23 Roll,” which appears to be part of the settlement fund, and not a designation of tribal membership. After a series of cases, the  
settlement fund was eventually distributed between the Tribe, the Yurok Tribe, and individuals not electing membership in  
24 either of those two tribes (the category which appellant-wife appears to belong). (See *Hoopa Valley Tribe v. United States*  
(2010) 597 F.3d 1278.)

25 <sup>15</sup> The Hoopa-Yurok Settlement Act is mostly silent as to any implications it has to appellant-wife’s tribe, only mentioning  
26 the Karuk tribe when amending another act regarding the restoration of the Klamath River Basin. Subsequent court cases  
were brought, not to challenge the Settlement Act, but to assert that it constituted a 5th Amendment taking, and the plaintiffs,  
27 including the Karuk tribe, contended that they were entitled to compensation for their loss in a right to the land. The courts  
concluded that there were no vested rights in the land until the Settlement Act gave permanent property rights to the Tribe  
28 and the Yurok Indians for their respective portions of the reservation, and denied the Karuk tribe’s complaint. (*Karuk Tribe*  
*v. United States, supra*.)

1 enforcement of such statute unless an appellate court has made a determination that the  
2 enforcement of such statute is prohibited by federal law or federal regulations.

3 The Board also has a well-established policy of abstention from deciding constitutional  
4 issues in appeals involving proposed assessments of additional tax. (*Appeal of Aimor Corp.*, 83-SBE-  
5 221, Oct. 26, 1983.) This policy is based upon the absence of any specific statutory authority which  
6 would allow the FTB to obtain a judicial review of a decision in such cases and the Board's belief that  
7 judicial review should be available for questions of constitutional importance. (*Appeals of Fred R.*  
8 *Dauberger, et al.*, 82-SBE-082, March 31, 1982.) In the *Appeal of Aimor Corporation, supra*, the Board  
9 stated:

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

#### 13 STAFF COMMENTS

14 This appeal contains the same fact patterns as presented before the Board in appellants'  
15 previous appeal, which covered tax years 2002 through 2005. The Board in that non-precedential appeal  
16 decided that the appeal raised Constitutional issues, and denied the appeal on the basis of the abstention  
17 doctrine.<sup>16</sup> Additional facts and case law, including *Angelina Mike, supra*, have been presented on this  
18 appeal which allow for a more detailed analysis of the issues, but the facts remain essentially the same.

19 Statutory and case law state that Indians who live in California, even when living on their  
20 own tribe's reservation, are still considered residents of California. R&TC section 17952.5, subdivision  
21 (a), and P.L. 104-95 prevent California from taxing the pension income of nonresidents.<sup>17</sup> Appellants  
22 should be prepared to discuss how their pension income, received as residents of California, is not  
23 taxable. It is undisputed that appellant-husband's pension and at least most of appellant-wife's pension  
24 were earned while working outside of Indian country. The parties should be prepared to discuss whether  
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27 <sup>16</sup> Appellants' petition for rehearing contended irregularity in the Board proceedings based on a temporary absence by a  
28 Board Member during the presentation and asserted that the decision was contrary to law. The petition for rehearing was  
denied.

<sup>17</sup> Although appellants provide an analysis of how the Tribe regards its own jurisdiction, P.L. 104-95 explicitly states that it is  
the residence determination of the taxing state that is important, which in this case is California.

1 pension income can be sourced to the reservation and not the location of the employment, and whether  
2 appellants can avoid California residency by living on the reservation. If the Board reaches the  
3 substance of appellants' arguments, but determines that the income at issue is not derived from  
4 reservation sources, then respondent appears correct in taxing the income at issue.

5 A brief pertinent history of the reservation upon which appellants live appears to be as  
6 follows. The court in *Short, supra*, looked at the problem of several tribes living on one large  
7 reservation, including the unequal distribution of revenue from natural resources, and decided that  
8 Indians living on the reservation are "Indians of the reservation," and entitled to a share of the revenue.  
9 The Hoopa-Yurok Settlement Act superseded the *Short* decision and, instead of attempting to share the  
10 reservation amongst all residing Indians, partitioned the reservation into the Tribe's reservation (the  
11 Square) and the Yurok tribe's reservation (the Extension). A settlement roll was also created to include  
12 the names of Indians who were entitled to receive a share of the revenue from the sale of natural  
13 resources (mostly timber), as contemplated in *Short*. Appellant-wife, a member of the Karuk tribe,  
14 appears to be listed on the settlement roll as an Indian not belonging to the Yurok tribe or the Tribe.  
15 Appellants should be prepared to show that appellant-wife is a member of the Tribe in light of the  
16 foregoing history summary and not merely entitled to a portion of the settlement, or to support  
17 alternative interpretations of the reservation's history with current law. Appeals Division staff knows of  
18 no appellate-level decision which allows the State to not enforce R&TC section 17041 based on  
19 appellant-wife's fact pattern.

20 Appellants' previous appeal on this issue was denied on the basis of abstention. Since  
21 that appeal, the decision in *Angelina Mike, supra*, has verified that Indians must reside on their own  
22 tribe's reservation in order to exempt from taxation reservation-sourced income. At issue in this appeal  
23 is whether appellant's pension income is exempt under P.L. 104-95 based on appellants' contentions that  
24 Indians living on a reservation are not residents of California and that pension income is sourced to  
25 where they currently live on the reservation. Appellants also contend, based on the theory that pension  
26 income is sourced to where they live, that their pension income is exempt because they are living on  
27 their reservation. This theory requires an additional finding that appellant-wife is a member of the  
28 Tribe, which was at issue in appellants' prior appeal. If the Board determines that appellants have no

1 viable arguments other than possible preemption arguments, it should sustain the FTB’s action in  
2 applying R&TC section 17041, which on its face imposes a tax on both the wage and pension income at  
3 issue, following the policy of abstaining from deciding constitutional issues. Appellants could then pay  
4 the tax and file a refund suit so that the courts could decide the issue.

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