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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 APPEAL²**
12 **WAYNE L. HAUSE AND KELLY R. HAUSE¹**) Case No. 467603
13)

<u>Year</u>	<u>Proposed Assessment³</u>	<u>Penalty⁴</u>
2004	\$11,059.00	\$2,764.75

17 Representing the Parties:

18
19 For Appellants: Keith A. Shibou, CPA
20 For Franchise Tax Board: Judy F. Hirano, Tax Counsel III

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23 ¹ Appellants reside in Cathedral City, Riverside County.

24 ² This appeal was postponed from the September 22-24, 2009, Board calendar at appellants' representative's request and
25 recalendared on the February 23-24, 2010, Board calendar. This appeal was further postponed at appellant's request to the
26 June 15-18, 2010, Board calendar. This appeal was again postponed at appellant's request and placed on the October 19-22,
2010, Board calendar.

27 ³ Respondent should be prepared to provide the amount of interest accrued as of the hearing date.

28 ⁴ This penalty represents a failure to furnish information penalty; respondent has stated during the appeal that it will waive
the penalty. (Resp. Op. Br., p. 1, fn. 1.)

1 QUESTIONS: (1) Whether appellants resided in Indian country during the year at issue so that their
2 reservation-sourced income is not subject to California tax.
3 (2) Whether appellants' reservation-sourced income is exempt from California tax
4 even if they did not live in Indian country during 2004.

5 HEARING SUMMARY

6 Background

7 Procedural Background

8 Appellant is a member of the Agua Caliente Band of Cahuilla Indians (the Tribe).⁵ For
9 all of 2004, appellants lived in a residence on Wakefield Road, in Cathedral City, California, which
10 exists in “Section 15” of the city.⁶ Respondent indicates that appellants purchased the home in 1999
11 from a limited liability company registered in California. (Resp. Op. Br., p. 2 & exhibits E & F.) In
12 2004, appellant received \$162,365 in gaming revenue payments from the Tribe. (*Id.* at exhibit A.)

13 On appellants’ joint California income tax return, they reported a federal adjusted gross
14 income (AGI) of \$178,501, subtracted \$162,564 (including all of the gaming revenue payments), and
15 reported a California AGI of \$15,937. (Resp. Op. Br., exhibit G.) Appellants reported \$15,064 itemized
16 deductions, leaving them with \$873 in taxable income and \$9 of state income tax due, which was
17 reduced to zero after a \$170 exemption credit was applied. (*Ibid.*) Appellants were refunded \$205 of
18 state income tax withheld. (*Id.* at exhibit H) Respondent indicates that it subsequently examined
19 appellants' 2004 return and sent letters on September 25, 2007, and November 7, 2007, requesting
20 documents verifying that appellants lived in Indian country. (*Id.* at p. 3 & exhibit I.)

21 After receiving no reply, respondent issued a Notice of Proposed Assessment (NPA) on
22 March 24, 2008. The NPA determined that appellants did not live in Indian country, added \$162,365.00
23 to their taxable income, assessed \$11,059.00 in additional tax, plus a \$2,764.75 penalty for failure to
24 furnish information, and applicable interest. (Resp. Op. Br., exhibit J.) Appellants protested the NPA

26 _____
27 ⁵ Appellant Kelly R. Hause is a member of the Tribe; Wayne L. Hause is not. (Resp. Op. Br., pp. 1-2 & fn. 3.) References to
28 “appellant” in this summary will refer to Kelly R. Hause only, while references to “appellants” will refer to both appellants.

⁶ A “Section” is an area of land approximately one square mile in size. Neither party disputes that appellants’ residence for
all of 2004 was within Section 15. (Appeal Letter, p. 1; Resp. Op. Br., p.1.)

1 by letter dated March 24, 2008. (*Id.* at exhibit K.) Appellants also sent letters and attachments on
2 May 2, 2008; July 8, 2008; and August 4, 2008. (*Ibid.*) Respondent sent appellants a Notice of Action
3 on August 18, 2008, affirming the NPA based on the finding that appellants did not live on the Tribe's
4 reservation in 2004. (*Id.* at exhibit L.) This timely appeal followed.

5 History of the Tribe & Area

6 The Pacific Railway Act of 1862 was enacted to assist in the construction of a continuous
7 railway across America. The act, and subsequent amendments in 1864, 1866 and 1869, granted
8 alternating sections of land on alternating sides of the railroad track to the railroad companies. (12 Stat.
9 489.) Around the same time, Congress authorized the President to set aside four tracts of public land in
10 California for Indian reservations in an 1864 act. (10 Stat. 39.) One of the reservation tracts set aside
11 was for the Mission Indians (see *Mattz v. Arnett* (1973) 412 U.S. 481, 493-494), and subsequently its
12 parts were set aside for the individual bands of Mission Indians, of which the Tribe is one (26 Stat. 712;
13 see also *Arenas v. United States* (1944) 322 U.S. 419, 420). President Grant, in an executive order in
14 1876, set aside Section 14 and parts of Section 22 of township 4 south, range 5 east, San Bernardino
15 meridian for the Agua Caliente Reservation. President Hayes, in an executive order in 1877, added all
16 the even-numbered and unsurveyed portions of the general area around Section 15, except Sections 16
17 and 36, and any tracts for which title had already passed out of the United States Government's control.
18 The executive branch retained the power to add to or diminish the four reservations as deemed
19 necessary.⁷ (See *Donnelly v. United States* (1913) 228 U.S. 243, 255-259; *Mattz, supra*, 412 U.S. at
20 494, fn. 15.)

21 The Agua Caliente reservation was created in a checkerboard fashion, with the odd
22 numbered sections having already been granted to the railroad by the time the reservation was
23 established, and with the reservation consisting of only even numbered sections.⁸ (*Arenas, supra*, 322
24

25 ⁷ Beyond the expansion by President Hayes in 1877, the record does not indicate that the reservation was ever further
26 expanded or diminished, or that it ever included Section 15.

27 ⁸ The Agua Caliente website provides a brief overview of the Tribe's history. Its timeline states that the odd numbered
28 sections were given to the railroad in the 1860s, and then the reservation was created by President Grant in 1870, when only
the even numbered sections were still available. (Resp. Op. Br., exhibit C, p. 4, pars. 8-9; Agua Caliente, *History & Culture*
<<http://www.aguacaliente.org/HistoryCulture/tabid/57/Default.aspx>> [as of July 29, 2009].)

1 U.S. at 431; see also *Burke v. Southern Pacific R. Co.* (1914) 234 U.S. 669, 680-682; *United States v.*
2 *Southern Pacific R. Co.* (1892) 146 U.S. 570, 571-573; see also Resp. Op. Br., exhibit C, p. 6.) Under
3 the General Allotment Act of 1887, tribal land was allotted to individual members of the Tribe, held in
4 trust by the United States for 25 years or longer, and with limited rights of alienability. (24 Stat. 388.)
5 Through subsequent acts, the allotment policy ended but the lands already allotted were still held in trust
6 by the United States. (See Resp. Op. Br., p. 5.)

7 Applicable Law

8 State Taxation of Indian Income

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

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

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

24 The United States Congress has plenary and exclusive powers over Indian affairs.
25 (*Washington v. Confederated Bands and Tribes of Yakima Indian Nation* (1979) 439 U.S. 463, 470-
26 471.) Throughout the history of our nation, Congress generally has permitted Indians to govern
27 themselves, free from state interference. (*Warren Trading Post Co. v. Arizona Tax Comm'n* (1965) 380
28 U.S. 685, 686-687.) States may exercise jurisdiction within Indian reservations only when expressly
allowed to do so by Congress. (*McClanahan v. Arizona State Tax Commission* (1973) 411 U.S. 164,
170-171 ["*McClanahan*"].) Looking to the exclusive authority of Congress and traditional Indian

1 sovereignty, the *McClanahan* Court held that a state may not impose personal income tax on an Indian
2 who lives on her own reservation and whose income derives from reservation sources. (*Id.*, at pp. 173-
3 178.) *McClanahan* has become the seminal case in this area; over 25 years ago the Board asserted that
4 the taxation question turns on whether appellant is a “reservation Indian” within the meaning of
5 *McClanahan*. (See *Appeal of Edward T. and Pamela A. Arviso*, 82-SBE-108, June 29, 1982.)

6 The Supreme Court later stated that *McClanahan* created a presumption against state
7 taxing authority which extends beyond the formal boundaries of the reservation, to “Indian country.”
8 (*Oklahoma Tax Commission v. Sac & Fox Nation* (1993) 508 U.S. 114.) Congress defined “Indian
9 country” to include reservations, dependent Indian Communities and Indian allotments. (*Ibid.*; 18
10 U.S.C. 1151.⁹) It is settled law, however, that a state may tax all the income, including reservation-
11 source income, of an Indian residing within the state and outside of Indian country.¹⁰ (*Oklahoma Tax*
12 *Commission v. Chickasaw Nation* (1995) 515 U.S. 450; *Appeal of Edward T. and Pamela A. Arviso*,
13 *supra.*)

14 In the *Appeal of Samuel L. Flores* (2001-SBE-004), decided on June 21, 2001, the Board
15 addressed the nature of per capita gaming distributions. The Board rejected the argument that an Indian
16 tribe is like a partnership and instead concluded that a tribe is like a corporation. The Board held that
17 per capita distributions from a tribe are income from an intangible sourced to the residence of the tribal
18 member. The Board elaborated by stating that if the per capita distributions were received by a tribal
19 member residing in California, but not on the reservation, it is taxable by California.

20 Indian Country

21 Section 1151 appears to contain the most comprehensive and frequently cited federal
22 definition of “Indian country.” Section 1151, which is found in the federal criminal code, states:

23 [t]he term ‘Indian country’ ... means (a) all land within the limits of any Indian
24 reservation under the jurisdiction of the United States Government, notwithstanding the
25 issuance of any patent, and, including rights-of-way running through the reservation, (b)

26 ⁹ Hereafter, 18 U.S.C. section 1151 will be referred to simply as “section 1151.”

27 ¹⁰ The California appellate court in its recent opinion in *Angelina Mike* held that a state may impose income taxes on income
28 received by an enrolled member of a tribe from his or her tribe's reservation activities when that member resides on the
reservation of a different tribe. (*Angelina Mike v. Franchise Tax Board* (2010) 182 Cal.App.4th 817.) The court did not
reach the issue of the meaning of “Indian Country”.

1 all dependent Indian communities within the borders of the United States whether within
2 the original or subsequently acquired territory thereof, and whether within or without the
3 limits of a state, and (c) all Indian allotments, the Indian titles to which have not been
4 extinguished, including rights-of-way running through the same.

5 Although section 1151 expressly deals with criminal jurisdiction, the Supreme Court has recognized that
6 it also applies to questions of civil jurisdiction. (*De Coteau v. District County Court for Tenth Judicial*
7 *Dist.* (1975) 420 U.S. 425.) As relevant here, the Court has expressly referenced section 1151 in the
8 context of state income taxation. (*Oklahoma Tax Commission v. Sac & Fox Nation, supra*, 508 U.S. at
9 p. 123.) Under section 1151, “Indian country” includes places such as Indian reservations, dependent
10 Indian communities, and Indian allotments, which in turn have their own definitions and usages.

11 Section 1151(a) includes in Indian country “all land within the limits of any Indian
12 reservation . . . notwithstanding the issuance of any patent.”¹¹ The term “Indian reservation” in section
13 1151(a) refers to land that the federal government has expressly set aside for the residence or use of
14 tribal Indians. (*Donnelly v. United States* (1913) 228 U.S. 243, 269; *Cohen’s Handbook of Federal*
15 *Indian Law* (2005) § 3.04(2)(c)(ii).) When called upon to interpret that language, the Supreme Court
16 stated that section 1151 was intended to prevent “an impractical pattern of checkerboard jurisdiction.”
17 (See *Seymour v. Superintendent of Washington State Penitentiary* (1962) 368 U.S. 351, 358.) The court
18 decided that criminal jurisdiction was not based on ownership of the land, but whether the land had been
19 set aside by congress as Indian reservation land, notwithstanding any subsequent transfer of ownership
20 as long as congress had not subsequently separated the land from the reservation. (*Ibid.*)

21 Once the boundaries of a reservation are established, all tracts therein “remain a part of
22 the reservation until separated therefrom by Congress.” (*Seymour v. Superintendent, supra*, at p. 359;
23 See also *Solem v. Bartlett* (1984) 465 U.S. 463, 470.) Even granting title of reservation lands to non-
24 Indians “does not, by itself, affect the exterior boundaries of the reservation” and all such lands within
25 the exterior boundaries remain part of Indian country. (*United States ex rel. Condon v. Erickson* (8th
26 Cir. 1973) 478 F.2d 684, 688-689.) The courts have stated that when the laws are ambiguous, the issues

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28 ¹¹ “Patent” is an outdated term for parcels of land held in fee by Indians and non-Indians within the reservation’s limits. (See *Seymour v. Superintendent of Washington State Penitentiary, supra*, at pp. 357-358.)

1 should be determined in favor of the Indian community.¹²

2 In *Alaska v. Native Village of Venetie Tribal Gov't*. (1998) 522 U.S. 520 (“*Venetie*”), the
3 Supreme Court held that “dependent Indian community,” as used in section 1151(b), refers to:

4 [a] limited category of Indian lands that are neither reservations nor allotments, and that
5 satisfy two requirements--first, they must have been set aside by the Federal Government
6 for the use of the Indians as Indian land; second, they must be under federal
7 superintendence. (*Venetie*, at p. 527.)

8 The Court explained its holding by stating:

9 [t]he federal set-aside requirement ensures that the land in question is occupied by an
10 ‘Indian community’; the federal superintendence requirement guarantees that the Indian
11 community is sufficiently ‘dependent’ on the Federal Government that the Federal
12 Government and the Indians involved, rather than the States, are to exercise primary
13 jurisdiction over the land in question. (*Id.* at p. 531.)

14 While the *Venetie* Court disapproved of a Ninth Circuit six-factor test for determining a “dependent
15 Indian community,” the Court expressly stated that some of the Ninth Circuit’s factors were still relevant
16 in determining whether the federal set-aside and the federal superintendence requirements are met,
17 including: “the degree of federal ownership of and control over the area, and the extent to which the area
18 was set aside for the use, occupancy, and protection of dependent Indian peoples.” (*Id.* at p. 531, fn 7.)

19 *Venetie*’s federal set-aside requirement calls for more than just tribal ownership or close
20 proximity or importance to a tribe. (*Blunk v. Arizona Dept. of Transportation* (9th Cir. 1999) 177 F.3d
21 879, 884; 83 Ops.Cal.Att’y.Gen. 190 (1999).) In addition, *Venetie*’s superintendence requirement
22 implies some active federal control over the subject land. (*Venetie, supra*, 522 U.S. at p. 533; 83
23 Ops.Cal.Att’y.Gen. 190 (1999).) Some federal courts examine “the entire Indian community,” not just a
24 particular tract of land, to determine whether the *Venetie* set-aside and superintendence requirements are
25 satisfied. (*United States v. Arrieta* (10th Cir. 2006) 436 F.3d 1246, 1250-1251; *HRI, Inc. v.*
26 *Environmental Protection Agency* (10th Cir. 2000) 198 F.3d 1224, 1248-1249.)

27 Finally, section 1151(c) includes in Indian country:

28 ¹² The Supreme Court has stated when faced with two reasonable interpretations, the choice between them follows a “deeply
rooted” principle that “statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to
their benefit.” (*County of Yakima v. Confederated Tribes & Bands of Yakima Indians* (1992) 502 U.S. 251, 269, citing
Montana v. Blackfeet Tribe of Indians, supra, 471 U.S. at p. 766, *McClanahan, supra*, 411 U.S. at p. 174.)

1 [a]ll Indian allotments, the Indian titles to which have not been extinguished, including
2 rights-of-way running through the same.

3 “Allotments” are land that is either owned by individual Indians with restrictions on alienation, or held
4 in trust by the United States for the benefit of individual Indians. (*Yankton Sioux Tribe v. Gaffey* (8th
5 Cir. 1999) 188 F.3d 1010, 1022; *Cohen’s Handbook of Federal Indian Law* (2005) § 3.04(2)(c)(iv).)

6 Federal Preemption

7 Section 3.5 of article III of the California Constitution states:

8 An administrative agency, including an administrative agency created by the Constitution
9 or an initiative statute, has no power (a) [t]o declare a statute unenforceable, or refuse to
10 enforce a statute, on the basis of it being unconstitutional unless an appellate court has
11 made a determination that such statute is unconstitutional; (b) [t]o declare a statute
12 unconstitutional; (c) [t]o declare a statute unenforceable, or to refuse to enforce a statute
on the basis that federal law or federal regulations prohibit the enforcement of such
statute unless an appellate court has made a determination that the enforcement of such
statute is prohibited by federal law or federal regulations.

13 (See also Cal. Code Regs., tit. 18, § 5412, subd. (b).) In addition, the Board has a long-established
14 policy of declining to consider constitutional issues. In the *Appeal of Aimor Corporation* (83-SBE-221),
15 decided on October 26, 1983, the Board stated:

16 This policy is based upon the absence of any specific statutory authority which would
17 allow the Franchise Tax Board to obtain judicial review of a decision in such cases and
18 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.

19 This policy was in place long before the enactment of article III, section 3.5. As far back as 1930, the
20 Board stated:

21 It is true that we have occasionally asserted that right [to question the constitutionality of
22 a statute]. But this has been only under circumstances wherein such action on our part
23 was necessary in order to protect the revenues of the state and get the problem before the
24 Courts In the instant case, and in all others like it before us, the taxpayers will have
25 the opportunity of taking the question to the Courts for decision. . . . It might be argued
that, if the law is plainly unconstitutional, why should taxpayers be put to that trouble and
expense? However, there is diversity of opinion as to the constitutionality of the Act, and
it seems to us desirable that this controversy should be settled by the Courts, whose
authority to hold acts of the Legislature invalid cannot be questioned.

26 (*Appeal of Vortex Manufacturing Co.*, 30-SBE-017, Aug. 8, 1930 [internal citations omitted].)

27 Contentions

28 Several facts are not in contention in this appeal. Both parties agree that appellant was a

1 member of the Tribe for all of 2004. Based on the location of appellants' residence, it appears
2 uncontested that appellants' address is located in Section 15 of Cathedral City. The parties agree that
3 \$162,365 of appellant's 2004 income was per capita distributions derived from the Tribe's casino
4 generated earnings, or reservation-sourced income.¹³ (Appeal Letter, p. 1; Resp. Op. Br., exhibit A.)

5 Appellant's Contentions

6 Appellants contend that their residence is within the exterior boundaries of the Tribe's
7 reservation, and is therefore within Indian country for purposes of section 1151(a). Appellants support
8 their contention by providing a letter from the Bureau of Indian Affairs (BIA) that includes a diagram
9 showing the outermost boundaries of the Tribe's reservation to be a boundary encompassing all of the
10 federally designated tracts as well as any sections, including Section 15, not federally designated as
11 reservation land but being surrounded by reservation land. (Appeal Letter, exhibits G & H.) Appellant
12 also cites case law stating the discouragement of "an impractical pattern of checkerboard jurisdiction,"
13 and noting that even if reservation lands are granted to non-Indians, all such lands within the exterior
14 boundaries remain part of Indian country. (Appeal Letter, exhibits C, p. 8 & I, p. 9; e.g. *Seymour v.*
15 *Superintendent of Washington State Penitentiary* (1962) 368 U.S. 351.)

16 Appellant contends that since she is a member of the Tribe, the revenue in question is
17 reservation-sourced, and she resides in Indian country, the per capita distributions are tax exempt.
18 Appellants also contend that California taxation is preempted by the Indian Gaming Regulatory Act
19 (IGRA), when the IGRA is read and interpreted together with the Tribe's state gaming compact.
20 (Appeal Letter, pp. 4-8.)

21 Appellants contend that the per capita payments were derived from Class III Gaming
22 Revenues, and are not taxable based on their source, regardless of appellant's status. (Appeal Letter.)
23 Appellants present arguments that equate the Tribe to a partnership. Appellant claims that the pass-
24 through taxation nature of the Tribe means that the revenue is earned by the Tribe, not her, and that she
25 is not required to pay taxes on income that the Tribe would not have to pay taxes on. (*Id.* at p. 7.)

26 Respondent's Contentions

27 Respondent contends that appellant's reservation-sourced income is taxable in California
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¹³ Appellants' appeal letter and Respondent's exhibit A show the exact amount to be \$162,365.01.

1 because she was a California resident and did not live in Indian country. (Resp. Op. Br., pp. 6-14.)
2 Respondent states appellants' interpretation of Indian country under section 1151(a) would convert non-
3 reservation lands into reservation land, but notes that only Congress and the President have the power to
4 create or enlarge reservation land. (*Id.* at pp. 7-10; see *Donnelly v. United States, supra*, 228 U.S. at
5 255-259.) Respondent concedes that once a land is lawfully set aside by the federal government as part
6 of an Indian reservation, then only Congress can revoke that status. (Resp. Op. Br., p. 9; *Solem v.*
7 *Bartlett* (1984) 465 U.S. 463, 470.) However, respondent notes that Section 15 was never set aside as
8 Indian reservation land, and contends that the congressional intent in enacting section 1151(a) was not to
9 convert checkerboard reservations into a contiguous reservation. (Resp. Op. Br., pp. 9-14.)

10 Respondent states that the language of the BIA letter contradicts the diagram.

11 Respondent notes that the letter states that the “outermost boundaries of the reservation are considered to
12 be the outermost boundary of **those sections included in the above stated Executive Orders**”
13 (emphasis added), and notes that the sections described are the checkerboard tracts (not including the
14 odd numbered sections). Respondent contends that this describes the outermost boundary as being the
15 boundaries around the individual tracts, and not a widespread boundary encompassing reservation and
16 non-reservation tracts. (Resp. Op. Br., pp. 12-13.) Respondent also notes that the BIA letter does not
17 indicate that it is referring to subsection (a), and that the legislative intent and cited case law do not
18 support appellants' interpretation of section 1151(a). (*Ibid.*) Respondent references the evidence and
19 arguments provided by appellants as well as its own evidence to contend that appellants' residence is not
20 located on the Tribe's land. (Resp. Op. Br., p. 6, exhibits D & N.) Respondent asserts that appellants
21 have not provided sufficient evidence to show that their residence qualifies as being in Indian country
22 under section 1151. (Resp. Op. Br., pp. 7-14.)

23 Respondent contends that taxation is not preempted by the IGRA and, in any event, the
24 Board is precluded from reaching the federal preemption question. (Resp. Op. Br., pp. 14-16.)
25 Respondent asserts that the Board has repeatedly recognized a well-established policy of abstention in
26 issues like the one present in this appeal. (*Id.* at p. 19.) Respondent notes that the Board's practice of
27 abstention allows the matter to be handled by Courts, where respondent has the ability to seek judicial
28 review of a decision and the authority to hold acts of the Legislature invalid rests. (*Ibid; Appeal of*

1 *Vortex Manufacturing Co., supra.*) Respondent contends that the Tribe is not like a partnership, and,
2 rather, appellant is liable for tax on the per capita income because she lived on non-reservation land in
3 California. (Resp. Op. Br., pp. 16-17.) Respondent has stated on appeal that it will waive the penalty
4 associated with this appeal. (Resp. Op. Br., fn. 1.)

5 STAFF COMMENTS

6 It appears to staff that the question of whether Section 15 is “Indian country” for
7 purposes of determining whether the state is preempted from taxing appellant’s income pursuant to
8 R&TC section 17041 may be a federal preemption question. The issue of whether a state statute is
9 preempted by federal law is a constitutional issue. (U.S. Const., art. VI, cl. 2.) The California
10 Constitution prohibits this Board from refusing to enforce a statute on the basis that it is preempted by
11 federal law, unless an appellate court has already made such a determination, and this Board has a long-
12 established policy of declining to consider such issues. (Cal. Const., art. III, § 3.5; *Appeal of Aimor*
13 *Corporation, supra.*) The parties cite Title 18, United States Code section 1151, and federal case law
14 interpreting the federal statute, in support of their arguments with respect to whether Section 15 is Indian
15 country. The parties should be prepared to discuss whether an appellate court decision prohibits the
16 enforcement of R&TC section 17041 under the circumstances present in this appeal such that the Board
17 could refuse to enforce that statute by granting this appeal. The parties should also discuss whether
18 there is any decision or other authority that has permitted a state agency to refuse to enforce a state
19 statute on the basis of an appellate court decision that did not expressly address the state statute in
20 question. Should the Board determine that no appellate court decision prohibits the enforcement of
21 R&TC section 17041, the Board must sustain the FTB’s action on the basis of abstention from deciding
22 constitutional issues. Appellants could then pay the tax and file a refund suit so that the courts could
23 decide the issue.

24 However, should the Board determine that there is an appellate court decision prohibiting
25 the enforcement of R&TC section 17041 under the circumstances present in this appeal, then the Board
26 may determine whether appellants lived in Indian country. In that event, staff notes that it does not
27 appear as though Section 15 is currently, or ever was, part of the tracts of land specifically set aside for
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1 the Agua Caliente Reservation.¹⁴ Appellants should be prepared to provide any evidence showing that
2 Section 15 was ever part of the tracts of land designated as the Tribe’s reservation or the larger Mission
3 Reservation. The parties should be prepared to discuss the correct interpretation of section 1151(a), and
4 whether appellants' residence, which apparently was never specifically designated by the federal
5 government as Indian country, can be labeled as being in Indian country for purposes of California
6 income tax. In particular, the parties should be prepared to discuss the meaning of “all land within the
7 limits of any Indian reservation,” and whether this should be interpreted broadly to include tracts of land
8 never set aside by the federal government as Indian reservation land strictly due to their being
9 surrounded by Indian reservation land, as appellants suggests.

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¹⁴ The Tribe’s website, as of July 29, 2009, contains a map that shows Section 15 as being “Off Reservation,” or non-reservation land. (Resp. Op. Br., pp. 1-2, fn. 8, & exhibit C; Agua Caliente, *Land Status* <http://www.aguacaliente.org/Portals/0/Land_Status_Jan-09.pdf> [as of July 24, 2009].)