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

10 In the Matter of the Appeal of:) **HEARING SUMMARY²**
11) **PERSONAL INCOME TAX APPEAL**
12 **DEAN MIKE AND THERESA MIKE¹**) Case No. 382833

Proposed Assessment

<u>Year</u>	<u>Tax</u>	<u>Penalty</u>
2002	\$61,800.00	\$2,832.53

16 Representing the Parties:

18 For Appellants: Keith A. Shibou, CPA

19 For Franchise Tax Board: Natasha Sherwood Page, Tax Counsel III

21 **QUESTIONS:** (1) Whether appellant-husband resided in Indian country during the years at issue so
22 that his reservation-sourced income is not subject to California tax.
23 (2) Whether appellant-husband's reservation-sourced income is exempt from
24 California tax even if he did not live on reservation land.

26 ¹ Appellants reside in Palm Springs, Riverside County.

27 ² This appeal was originally scheduled for the February 25, 2009 oral hearing calendar, but was deferred pending the
28 resolution of the *Angelina Mike v. Franchise Tax Board* case in the California Court of Appeal. (See *Angelina Mike v. Franchise Tax Board* (2010) 182 Cal.App.4th 817.)

1 (3) Whether the Board has jurisdiction over the post-amnesty penalty.

2 HEARING SUMMARY

3 Background

4 Appellant-husband is an enrolled member of the Twenty-Nine Palms Band of Mission
5 Indians (“the Tribe”), which is a federally recognized Tribe. (Appeal Letter, p. 2.) According to
6 property tax records, appellants’ residence is located in Section 13, Township 4S, Range 4E (“Section
7 13”).³ (Resp. Op. Br., exhibits H and I.) Appellants filed a timely, joint California tax return for 2002.
8 Appellant-wife received none of the income reported on appellants’ joint income tax return for 2002.⁴
9 In 2002, appellant-husband received \$537,314 of per capita distributions from the Tribe (*Id.* at exhibit
10 A), wages of \$141,974 from the Tribe (*Id.* at exhibit B), pension income of \$3,058 and gaming income
11 of \$3,757 (*Id.* at exhibit C). On the 2002 California tax return, Schedule CA (540), appellants subtracted
12 \$523,258 for the per capita distribution (netted with the partnership loss of \$14,056) and all wages to
13 determine California income. (*Id.* at exhibit C.) Appellants also subtracted pension income and added
14 back \$1,308 in capital losses.⁵

15 After reviewing appellants’ return, respondent determined that appellant-husband was a
16 California resident and did not meet the requirements for his income to be considered non-taxable by
17 California because he did not live on his Tribe’s reservation. (Resp. Op. Br., exhibit D.) Appellants
18 timely protested the proposed assessment. Respondent affirmed the assessment and sent appellants a
19 Notice of Action on October 18, 2006. (*Id.* at exhibit E.) Appellants filed this timely appeal.

20 Contentions

21 Appellants

22 Appellants argue that “Indian California residents are not subject to tax on all income
23 regardless of source.” (App. Supp. Br., p. 2.) Appellants contend that the Constitution vests the federal
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25 ³ Although appellants’ address is included in his opening brief, we are providing only the mapping information that may be
26 relevant to the issues presented in this appeal.

27 ⁴ Theresa Mike received income from the Tribe, but appellants are not claiming an exemption from state tax levied on her
28 salary. (App. Supp. Br., p. 1.)

⁵ Respondent states appellants no longer disagree with respondent’s adjustments of the pension income, gaming income and
capital losses. (Resp. Op. Br., p. 2, fn. 5; see also Appeal Letter, p. 2.)

1 government with the authority to allow the states to impose state taxes on Indian Tribes and individual
2 Indians, but that it has not often done so. (*Id.* at p. 3.)

3 Appellants contend that the reservation-source income is exempt from California taxation
4 because they reside in “Indian country,” as that term is defined in 18 U.S.C. section 1151 (“section
5 1151”). (App. Supp. Br., pp. 9-12.) They have submitted a letter from the Palm Springs office of the
6 federal Bureau of Indian Affairs dated May 14, 2002, which states:

7 Please be advised that Mr. Dean Mike’s residence is situated in Indian Country as defined
8 in 18 U.S.C. Section 1151. The residence is within the exterior boundaries of the
reservation.

9 (Appeal Letter, exhibits.) Appellants maintain that respondent has no basis to dispute the determination
10 of the Bureau of Indian Affairs. Appellants discuss the history of the lands that now comprise the Agua
11 Caliente Indian Reservation and appear to argue that their residence is within Indian country because it
12 is within the exterior boundaries of the reservation. Appellants maintain that their interpretation of
13 Indian country is consistent with the Supreme Court precedent because it avoids impractical
14 checkerboard jurisdiction that results in illogical application of tax law. Appellants also submitted maps
15 that apparently are intended to show their residence is located on the Agua Caliente Indian Reservation
16 in Palm Springs. (App. Supp. Br., exhibits B & D.)

17 Appellants contend it is not relevant that appellant-husband did not reside on his own
18 Tribe’s reservation; they argue that the exemption from state income taxation extends to all Indians
19 residing in Indian country, regardless of Tribal affiliation. Appellants argue that California
20 Administrative Ruling No. 399, dated January 19, 1977, stated that “the reservation source state tax
21 exemption will be allowed to any reservation Indian, residing on a reservation.” (App. Supp. Br., p. 13.)
22 Appellants maintain that the courts have held the only two critical factors are status as a reservation
23 Indian, and situs on a reservation to determine whether the tax exemption is applicable. (Citing *Mary*
24 *Joe Fox v. Bureau of Revenue*, 87 N.W. 261, cert.den. 88 N.M. 318 (1975) and *John C. Moe et al. v. The*
25 *Confederated Salish of Kootenai Tribes* 96 S.Ct. 16534 (1976).) (*Ibid.*)

26 Appellants also contend that California taxation of appellant-husband’s per-capita
27 distributions is preempted by federal statutory and constitutional law, regardless of where they live.

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1 They maintain that the Indian Gaming Regulatory Act (IGRA),⁶ interpreted together with the Tribe’s
2 gaming compact (“the Compact”), prohibit state income taxation. (App. Supp. Br., pp. 3-9.) Appellants
3 argue that in *California v. Cabazon Band of Mission Indians* (1986) 480 U.S. 202, the Supreme Court
4 held that California could not impose its gaming regulations or taxes on an Indian Tribe. Appellants
5 maintain that after *Cabazon*, the Ninth Circuit Court of Appeals noted that if there is any ambiguity in
6 the law, the interpretation is in favor of the Indians. (*Artichoke Joes California Grand Casino, et al v.*
7 *Norton, et al.*, 353 F.3d 712 (2003).) (*Ibid.*)

8 Appellants contend that the Tribe has the tax characteristics of a partnership, not a
9 corporation. (App. Supp. Br., pp. 6-7.) Appellants argue that because the Per Capita Distributions are
10 received by a partnership under the Revenue Allocation Plan, the distributions must retain their tax
11 characteristics, and are thus tax exempt to the recipient. Thus, appellants maintain that even if
12 appellant-husband is found to be a California resident, he is still not subject to income tax on his Per
13 Capita Distributions or wages as Tribal Chairman.

14 Finally, appellants assert that taxation in this case would violate the Commerce Clause
15 and the Equal Protection Clause of the United States Constitution. (App. Supp. Br., pp. 13-15.)
16 Appellants maintain that, contrary to respondent’s assertion, a higher standard of review applies in the
17 equal rights analysis because appellants are members of a suspect classification; ethnicity or national
18 origin and that it is an “as applied” violation to the Tribe and member, rather than a facial challenge.
19 Specifically, appellants argue that respondent’s determination to tax reservation-source income of
20 Indians who do not reside on their own Tribe’s reservation discriminates against those members of
21 Tribes that do not have housing on their own reservations. Appellants assert that it is impossible for
22 them to live on the Twenty-Nine Palms Band of Mission Indians Reservation because there is no
23 housing available for anyone to live on this reservation. (*Ibid.*) Appellants have provided an aerial map
24 of the reservation to show that, because of the reservation’s location in the Coachella Valley Stormwater
25 Channel, there is no place on the Tribe’s Reservation suitable for residential housing. (Appeal Letter,
26 p. 6 & exhibits.) Appellants argue that the only way the Tribe could obtain an exemption from state
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⁶ Title 18, United States Code, section 1166 et seq. and Title 25, United States Code, section 2701 et seq.

1 taxation would be to obtain, under great difficulty and cost, additional lands and apply to have such
2 lands included in a federal trust as part of an expanded reservation. Thus, appellants conclude that the
3 action of the respondent results in a direct interference with the self governance of the Tribe.
4 (App. Supp. Br., p. 15.)

5 Respondent

6 Respondent contends appellant-husband's reservation-source income is taxable in
7 California because he is a California resident who does not reside in Indian country. Respondent argues
8 appellants' residence is not located on the Twenty-Nine Palms Indian reservation or the Agua Caliente
9 Band of Cahuilla Indians' Reservation, nor in Indian country as defined by section 1151.

10 Respondent asserts appellant's residence was not in Indian country, as defined in section
11 1151(a), because it was not part of the original reservation set-aside. (Resp. Op. Br., p. 6.) Respondent
12 states that at the time the reservation was established, the odd-numbered sections had already been
13 granted to the Southern Pacific Railroad. Only the even-numbered sections were included in the
14 executive order that created the Agua Caliente Reservation. Respondent further asserts that section 13,
15 the location of appellants' residence, is not "within the limits" of the reservation. Respondent contends
16 that appellants' residence was subject to county property taxes, including special city and school district
17 assessments. (*Id.* at p. 7 & exhibit H.) Respondent argues that this shows the State had jurisdiction over
18 the land. With respect to appellants' letter from the Bureau of Indian Affairs, respondent contends that
19 the language of the letter is ambiguous and, in any event, should not overcome clear evidence of the
20 actual reservation boundaries. (*Id.* at pp. 7-8.)

21 Respondent contends that appellants' land is not a dependent Indian community pursuant
22 to section 1151(b) because a dependent Indian community only exists where the land was specifically
23 set aside for the use of Indians as Indian land by the federal government and is under federal
24 superintendence. Respondent contends section 13 was never set aside for the use of Indians as Indian
25 lands and was not under federal superintendence. Thus, respondent argues that appellants' residence
26 cannot be considered as within a dependent Indian community. Respondent also asserts appellants'
27 residence was not within Indian country pursuant to section 1151(c) as an Indian allotment. (Resp. Op.
28 Br., p. 6.)

1 In the alternative, respondent argues that, even if the Board determines appellants' home
2 was within Indian country, the income at issue is nevertheless not exempt from state taxation because
3 appellant-husband was not a member of the governing tribe. (Resp. Op. Br., pp. 8-11.) Respondent,
4 citing *McClanahan*, argues that the exemption extends only to those Indians who reside within their own
5 tribe's Indian country. (See *McClanahan v. Arizona State Tax Commission* (1973) 411 U.S. 164,
6 170-171 [*McClanahan*].) Respondent maintains that taxation of appellants' income does not interfere
7 with the tribal sovereignty of the Agua Caliente Band of Cahuilla Indians, even if appellants' residence
8 were located in its Indian country because appellants are not a member of the governing tribe. In this
9 regard, respondent contends that, just as the federal government taxes tribal members while not taxing
10 the tribes themselves, the state may tax a tribal member living outside Indian country without interfering
11 with a Tribe's sovereignty. Thus, respondent notes that while the Internal Revenue Service (IRS) has
12 taken the position that "income tax statutes do not purport to tax the political entity embodied in the
13 concept of an Indian tribe . . . ,"⁷ the IRS does tax the per capita distributions made to members of a
14 tribe. Further, the IGRA specifically provides that such distributions are taxable.

15 With regard to appellants' contention that they do not have "equal protection" and have
16 suffered from racial discrimination because respondent's action discriminates against those whose tribes
17 do not have housing available on the reservation, respondent maintains that California has not engaged
18 in discrimination in its application of the Revenue and Taxation Code. Respondent contends that a
19 rational basis test is used in cases such as this involving economic legislation. Respondent explains that
20 all residents of California are subject to income tax and the absence of a federal preemption does not
21 cause discrimination. Respondent asserts the payment of income tax is not a penalty.

22 Respondent contends the IGRA is not pertinent to this appeal because it applies only to
23 Tribes and does not divest California of the power to tax resident individuals. (Resp. Op. Br., pp.
24 12-13.) Respondent argues that the IGRA provides protection from state taxation and regulation of
25 gaming activities only to Indian Tribes and "any other person or entity authorized by an Indian Tribe to
26 engage in Class III activity." (*Id.* at p. 13.) An individual, respondent maintains, is not included in this
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28 ⁷ Respondent cites GCM 38853 (May 17, 1982) (General Counsel Memorandum) attached to Respondent's Supplemental Brief as exhibit A.

1 definition. (*Id.* at p. 13.) Respondent maintains that Congress did not choose to prohibit state taxation,
2 but instead precluded a state from relying on the IGRA for its power to tax. Respondent contends that
3 the states have retained the right to tax its residents. Respondent argues that the IGRA provisions
4 pertaining to a tribe's Revenue Allocation Plan are required because a tribe is relinquishing its control
5 over the funds that it distributes.

6 Respondent asserts that appellants' remaining arguments are constitutional in nature and
7 beyond the Board's authority to consider. (Resp. Op. Br., pp. 13-15.) With respect to the post-amnesty
8 penalty, respondent argues that the Board does not have jurisdiction over a question relating solely to an
9 un-paid post-amnesty penalty. Respondent contends that once paid, appellants may file a claim for
10 refund on the limited grounds that the amount paid to satisfy the penalty "was not properly computed by
11 the Franchise Tax Board." (*Id.* at pp. 15-16.)

12 Applicable Law

13 State Taxation of Indian Income

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

18 State sovereignty does not end at a reservation's border. Though tribes are often referred
19 to as sovereign entities, it was long ago that the Court departed from Chief Justice
20 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.

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

27 The United States Congress has plenary and exclusive powers over Indian affairs.
28 (*Washington v. Confederated Bands and Tribes of Yakima Indian Nation* (1979) 439 U.S. 463,

1 470-471.) Throughout the history of our nation, Congress generally has permitted Indians to govern
2 themselves, free from state interference. (*Warren Trading Post Co. v. Arizona Tax Comm'n* (1965) 380
3 U.S. 685, 686-687.) States may exercise jurisdiction within Indian reservations only when expressly
4 allowed to do so by Congress. (*McClanahan v. Arizona State Tax Commission, supra.*) Looking to the
5 exclusive authority of Congress and traditional Indian sovereignty, the *McClanahan* Court held that a
6 state may not impose personal income tax on an Indian who lives on her own reservation and whose
7 income derives from reservation sources. (*Id.*, at pp. 173-178.) *McClanahan* has become the seminal
8 case in this area; over 25 years ago the Board asserted that the taxation question turns on whether
9 appellant is a “reservation Indian” within the meaning of *McClanahan*. (See *Appeal of Edward T. and*
10 *Pamela A. Arviso*, 82-SBE-108, June 29, 1982.)

11 The Supreme Court later stated that *McClanahan* created a presumption against state
12 taxing authority which extends beyond the formal boundaries of the reservation, to “Indian country.”
13 (*Oklahoma Tax Commission v. Sac & Fox Nation* (1993) 508 U.S. 114.) Congress defined “Indian
14 country” to include reservations, dependent Indian Communities and Indian allotments. (*Ibid.*; 18
15 U.S.C. 1151.) It is settled law, however, that a state may tax all the income, including reservation-
16 source income, of an Indian residing within the state and outside of Indian country.⁸ (*Oklahoma Tax*
17 *Commission v. Chickasaw Nation* (1995) 515 U.S. 450; *Appeal of Edward T. and Pamela A. Arviso*,
18 *supra.*)

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

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28 ⁸ The California appellate court in its opinion in *Angelina Mike* held that a state may impose income taxes on income
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, supra.*) The court did not reach the issue of the
meaning of “Indian Country.”

1 Indian Country

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

4 [t]he term ‘Indian country’ . . . means (a) all land within the limits of any Indian
5 reservation under the jurisdiction of the United States Government, notwithstanding the
6 issuance of any patent, and, including rights-of-way running through the reservation, (b)
7 all dependent Indian communities within the borders of the United States whether within
8 the original or subsequently acquired territory thereof, and whether within or without the
9 limits of a state, and (c) all Indian allotments, the Indian titles to which have not been
10 extinguished, including rights-of-way running through the same.

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

17 Section 1151(a) includes in Indian country “all land within the limits of any Indian
18 reservation . . . notwithstanding the issuance of any patent.”⁹ The term “Indian reservation” in section
19 1151(a) refers to land that the federal government has expressly set aside for the residence or use of
20 tribal Indians. (*Donnelly v. United States* (1913) 228 U.S. 243, 269; *Cohen’s Handbook of Federal*
21 *Indian Law* (2005) § 3.04(2)(c)(ii).) When called upon to interpret that language, the Supreme Court
22 stated that section 1151 was intended to prevent “an impractical pattern of checkerboard jurisdiction.”
23 (See *Seymour v. Superintendent of Washington State Penitentiary* (1962) 368 U.S. 351, 358.) The court
24 decided that criminal jurisdiction was not based on ownership of the land, but whether the land had been
25 set aside by congress as Indian reservation land, notwithstanding any subsequent transfer of ownership
26 as long as congress had not subsequently separated the land from the reservation. (*Ibid.*)

27 Once the boundaries of a reservation are established, all tracts therein “remain a part of
28 the reservation until separated therefrom by Congress.” (*Seymour v. Superintendent, supra*, at p. 359;
See also *Solem v. Bartlett* (1984) 465 U.S. 463, 470.) Even granting title of reservation lands to non-

⁹ “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* (1962) 368 U.S. 351, 357-358.)

1 Indians “does not, by itself, affect the exterior boundaries of the reservation” and all such lands within
2 the exterior boundaries remain part of Indian country. (*United States ex rel. Condon v. Erickson* (8th
3 Cir. 1973) 478 F.2d 684, 688-689.) The courts have stated that when the laws are ambiguous, the issues
4 should be determined in favor of the Indian community.¹⁰

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

7 [a] limited category of Indian lands that are neither reservations nor allotments, and that
8 satisfy two requirements--first, they must have been set aside by the Federal Government
9 for the use of the Indians as Indian land; second, they must be under federal
superintendence.

10 (*Venetie*, at p. 527.) The Court explained its holding by stating:

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

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

20 *Venetie*’s federal set-aside requirement calls for more than just tribal ownership or close
21 proximity or importance to a tribe. (*Blunk v. Arizona Dept. of Transportation* (9th Cir. 1999) 177 F.3d
22 879, 884; 83 Ops.Cal.Att’y.Gen. 190 (1999).) In addition, *Venetie*’s superintendence requirement
23 implies some active federal control over the subject land. (*Venetie, supra*, 522 U.S. at p. 533; 83
24 Ops.Cal.Att’y.Gen. 190 (1999).) Some federal courts examine “the entire Indian community,” not just a
25 particular tract of land, to determine whether the *Venetie* set-aside and superintendence requirements are
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28 ¹⁰ 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 (1985) 471 U.S. 759, 766, *McClanahan, supra*, 411 U.S. at p. 174.)

1 satisfied. (*United States v. Arrieta* (10th Cir. 2006) 436 F.3d 1246, 1250-1251; *HRI, Inc. v.*
2 *Environmental Protection Agency* (10th Cir. 2000) 198 F.3d 1224, 1248-1249.)

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

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

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

9 Federal Preemption

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

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

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

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

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

24 It is true that we have occasionally asserted that right [to question the constitutionality of
25 a statute]. But this has been only under circumstances wherein such action on our part
26 was necessary in order to protect the revenues of the state and get the problem before the
27 Courts In the instant case, and in all others like it before us, the taxpayers will have
28 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.

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

2 STAFF COMMENTS

3 The California Court of Appeal in *Angelina Mike* held that a state may impose income
4 taxes on income received by an enrolled member of a tribe from his or her tribe's reservation activities
5 when that member resides on the reservation of a different tribe. (*Angelina Mike v. Franchise Tax*
6 *Board, supra.*) Therefore, it appears that even if appellants lived on Agua Caliente land, as they
7 contend, appellant-husband's income would still be taxable in California since he is a member of the
8 Twenty-Nine Palms Band of Mission Indians and not living on his own tribe's land. For this reason, it
9 appears to staff that the Board does not need to address the question of whether appellants' residence in
10 Section 13 was within the boundaries of Agua Caliente land such that it could be considered Indian
11 country.¹¹

12 In addition, it appears to staff that the question of whether Section 13 is "Indian country"
13 for purposes of determining whether the state is preempted from taxing appellant-husband's income
14 pursuant to R&TC section 17041 is a federal preemption question. The issue of whether a state statute
15 is preempted by federal law is a constitutional issue. (U.S. Const., art. VI, cl. 2.) The California
16 Constitution prohibits the Board from refusing to enforce a statute on the basis that it is preempted by
17 federal law, unless an appellate court has already made such a determination, and the Board has a long-
18 established policy of declining to consider such issues. (Cal. Const., art. III, § 3.5; *Appeal of Aimor*
19 *Corporation, supra.*) It does not appear to staff that there is an appellate court decision prohibiting the
20 enforcement of R&TC section 17041 under the circumstances present in this appeal such that the Board
21 could refuse to enforce that statute. Appellants' other contentions, including assertions regarding the
22 IGRA, the Compact, impedance on tribal self-governance, equal protection, and the commerce clause,
23 also appear to be questions of federal preemption that the Board cannot reach. (See U.S. Const., art. VI,
24 cl. 2; Cal. Const., art. III, § 3.5; *Appeal of Aimor Corporation, supra.*)

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28 ¹¹ Although staff believes the issue is moot, staff notes that it does not appear as though Section 13 is currently, or ever was,
part of the tracts of land specifically set aside for the Agua Caliente Reservation. The Tribe's website contains a map that
shows Section 13 as not being a "Reservation Section." (Agua Caliente, *Land Status*
<http://www.aguacaliente.org/downloads/Land_Status_Aerial.pdf> [as of May 9, 2011].)

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It does not appear to staff that the Board has jurisdiction to review whether respondent properly imposed the amnesty penalty because the penalty remains unpaid and appellants have not filed a claim for refund disputing the correctness of the calculation of the penalty.

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