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10 **BOARD OF EQUALIZATION**
 11 **STATE OF CALIFORNIA**

12 In the Matter of the Appeals of:) **HEARING SUMMARY**
 13)
 14) **PERSONAL INCOME TAX APPEALS²**
 15)
 16 **EDMUND CHAD SIVA (DEC'D)¹**) Case Nos. 384247, 390860, 401330, 401331,
 17) 481024³

18	Year	Claim For Refund	Proposed Assessment ⁴	Penalty ⁵
19	2001	\$4,536.00	-	-
20	2002	\$11,109.00	-	-
21	2003	-	\$10,951.00	\$764.00
22	2004	-	\$11,260.00	\$2,815.00
23	2005	-	\$19,487.00	\$4,871.75

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26 ¹ Appellant became deceased during the briefing process. Appellant's representative now represents his estate for the years at issue. Appellant resided in Palm Springs, Riverside County.

27 ² These appeals were postponed from the September 22-24, 2009, Board calendar at appellants' representative's request and recalendared on the February 23-24, 2010, Board calendar. These appeals were further postponed at appellant's request to the June 15-18, 2010, Board calendar.

28 ³ These five appeals have been consolidated. Unless otherwise stated, citations to briefs refer to respondent's reply brief on the consolidated appeal dated December 19, 2007, and appellant's reply brief dated January 2, 2009.

⁴ Respondent should be prepared to provide the amount of interest accrued as of the hearing date.

⁵ The penalties for 2003 and 2004 represent late filing penalties (previously referred to as delinquent return penalties) assessed in the Notices of Proposed Assessment. (Resp. Reply Br., p. 2 & exhibit C.) These penalties were not specifically contested by appellant. For 2005, respondent has agreed to abate a \$4,871.75 failure to furnish information penalty, leaving the \$4,871.75 late filing penalty still at issue. (Resp. Op. Br., Case ID 481024, p. 1, fn. 1.) Appellant contests this penalty.

1 Representing the Parties:

2 For Appellant: Keith A. Shibou, CPA

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

- 4
- 5 QUESTIONS: (1) Whether appellant resided in Indian country during the years at issue so that his
6 reservation-sourced income is not subject to California tax.
- 7 (2) Whether appellant’s reservation-sourced income is exempt from California tax
8 even if he did not live on reservation land.
- 9 (3) Whether appellant has shown reasonable cause for the abatement of the late filing
10 penalties.

11 HEARING SUMMARY

12 Background

13 Procedural Background

14 Appellant is a member of the Agua Caliente Band of Cahuilla Indians (the Tribe). From
15 2001 through 2005, appellant lived in a residence on San Martin Circle, in Palm Springs, California,
16 which exists in “Section 19” of the city.⁶ Appellant received a total of \$785,936.95 in gaming revenue
17 payments from the Tribe from 2001 through 2005.⁷ (Resp. Reply Br., exhibit A; Resp. Op. Br., Case ID
18 481024, exhibit A.)

19 Appellant filed timely 2001 and 2002 California income tax returns. On these returns he
20 reported all of his income to California. Respondent indicates that it subsequently examined appellant’s
21 2001 and 2002 amended returns and sent letters on October 10, 2006, and December 6, 2006,
22 respectively, denying the claims for refund. (Resp. Reply Br., p. 2 & exhibit B.) Appellant appealed
23 these denials. Appellant did not file timely 2003 and 2004 income tax returns. Appellant filed late

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26 ⁶ A “Section” is an area of land approximately 1 square mile in size. Neither party disputes that appellant’s residence for all
27 years at issue was within Section 19.

28 ⁷ Appellant received gaming revenue from the tribe in the following amounts for the years at issue: \$83,891.00 for 2001;
\$150,028.68 for 2002; \$148,514.58 for 2003; \$152,412.05 for 2004, and \$251,090.64 for 2005. (Resp. Reply Br., exhibit A;
Resp. Op. Br., Case ID 481024, exhibit A.)

1 returns for these years.⁸ These returns did not include the gaming revenue in the total for California
2 taxable income. After reviewing appellant's 2003 and 2004 amended returns, respondent issued Notices
3 of Proposed Assessment (NPA's) on December 11, 2006. The NPA's determined that appellant did not
4 live in Indian country, added the gaming revenue to his taxable income, and assessed additional tax plus
5 late filing penalties and applicable interest. (Resp. Reply Br., exhibit C.) Appellant protested the NPA's
6 and respondent affirmed the NPA's with Notices of Action (NOA's) issued on March 6, 2007. (Resp.
7 Reply Br., exhibit D.)

8 Respondent indicates that appellant filed his 2005 income tax return on
9 December 15, 2006, after the standard filing deadline of April 15, 2006, and did not report any of his
10 income on this return. (Resp. Op. Br., Case ID 481024, p. 2.) Respondent determined that appellant
11 incorrectly calculated his taxable income and issued an NPA on September 30, 2008. (*Id.* at exhibit B.)
12 Appellant protested the NPA and respondent affirmed the NPA with a NOA on December 8, 2008.⁹ (*Id.*
13 at exhibit C.) These appeals followed.

14 History of the Tribe

15 The Pacific Railway Act of 1862 was enacted to assist in the construction of a continuous
16 railway across America. The act, and subsequent amendments in 1864, 1866 and 1869, granted
17 alternating sections of land on alternating sides of the railroad track to the railroad companies.¹⁰ (12
18 Stat. 489.) Congress authorized the President to set aside four tracts of public land in California for
19 Indian reservations in an 1864 act. (10 Stat. 39.) One of the reservation tracts set aside was for the
20 Mission Indians (see *Mattz v. Arnett* (1973) 412 U.S. 481, 493-494), and subsequently its parts were set
21 aside for the individual bands of Mission Indians, of which the Tribe is one (26 Stat. 712; see also
22 *Arenas v. United States* (1944) 322 U.S. 419, 420). President Grant, in an executive order in 1876, set
23 aside Section 14 and parts of Section 22 of township 4 south, range 5 east, San Bernardino meridian for
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25 ⁸ Appellant filed these returns in the form of amended returns (Form 540X).

26 ⁹ The 2005 NOA affirmed the 2005 NPA in its entirety, including a \$4,871.75 failure to furnish penalty, which respondent
27 has since agreed to abate. (Resp. Op. Br., Case ID 481024, p. 2.)

28 ¹⁰ Respondent indicates that the Southern Pacific Railroad received land in this manner under the 1866 amended statute, and
that the patents to the land were granted in 1891. (Resp. Reply Br., p. 5 & exhibit G.)

1 the Agua Caliente Reservation. President Hayes, in an executive order in 1877, added all the even-
2 numbered and unsurveyed portions of the general area around Section 19, except Sections 16 and 36,
3 and any tracts for which title had already passed out of the United States Government's control. The
4 executive branch retained the power to add to or diminish the four reservations as deemed necessary.¹¹
5 (See *Donnelly v. United States* (1913) 228 U.S. 243, 255-259; *Mattz, supra*, 412 U.S. at 494, fn. 15.)

6 The Agua Caliente reservation was created in a checkerboard fashion, with the odd
7 numbered sections having already been granted to the railroad by the time the reservation was
8 established, and with the reservation consisting of only even numbered sections.¹² (*Arenas, supra*, 322
9 U.S. at 431; see also *Burke v. Southern Pacific R. Co.* (1914) 234 U.S. 669, 680-682; *United States v.*
10 *Southern Pacific R. Co.* (1892) 146 U.S. 570, 571-573; see also Resp. Reply Br., exhibit G.) Under the
11 General Allotment Act of 1887, tribal land was allotted to individual members of the Tribe, held in trust
12 by the United States for 25 years or longer, and with limited rights of alienability. (24 Stat. 388.)
13 Through subsequent acts, the allotment policy ended but the lands already allotted were still held in trust
14 by the United States.

15 Applicable Law

16 State Taxation of Indian Income

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

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

25 ¹¹ 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 19.

27 ¹² 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. Reply Br., exhibit M, p. 4, pars. 2-3; Agua Caliente, *History &*
Culture <<http://www.aguacaliente.org/HistoryCulture/tabid/57/Default.aspx>> [as of December 28, 2009].)

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

7 The United States Congress has plenary and exclusive powers over Indian affairs.
8 (*Washington v. Confederated Bands and Tribes of Yakima Indian Nation* (1979) 439 U.S. 463, 470-
9 471.) Throughout the history of our nation, Congress generally has permitted Indians to govern
10 themselves, free from state interference. (*Warren Trading Post Co. v. Arizona Tax Comm'n* (1965) 380
11 U.S. 685, 686-687.) States may exercise jurisdiction within Indian reservations only when expressly
12 allowed to do so by Congress. (*McClanahan v. Arizona State Tax Commission* (1973) 411 U.S. 164,
13 170-171 [*McClanahan*]). Looking to the exclusive authority of Congress and traditional Indian
14 sovereignty, the *McClanahan* Court held that a state may not impose personal income tax on an Indian
15 who lives on his own reservation and whose income derives from reservation sources. (*Id.* at pp. 173-
16 178.) *McClanahan* has become the seminal case in this area; over 25 years ago the Board asserted that
17 the taxation question turns on whether appellant is a "reservation Indian" within the meaning of
18 *McClanahan*. (See *Appeal of Edward T. and Pamela A. Arviso*, 82-SBE-108, June 29, 1982.)

19 The Supreme Court later stated that *McClanahan* created a presumption against state
20 taxing authority which extends beyond the formal boundaries of the reservation, to "Indian country."
21 (*Oklahoma Tax Commission v. Sac & Fox Nation* (1993) 508 U.S. 114.) Congress defined "Indian
22 country" to include reservations, dependent Indian Communities and Indian allotments. (*Ibid.*; 18 U.S.C.
23 1151.¹³) It is settled law, however, that a state may tax all the income, including reservation-source
24 income, of an Indian residing within the state and outside of Indian country.¹⁴ (*Oklahoma Tax*
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26 ¹³ Hereafter, 18 U.S.C. section 1151 will be referred to simply as "section 1151."

27 ¹⁴ 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 *Commission v. Chickasaw Nation* (1995) 515 U.S. 450; *Appeal of Edward T. and Pamela A. Arviso*,
2 *supra.*)

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

9 Indian Country

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

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

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

25 Section 1151(a) includes in Indian country “all land within the limits of any Indian
26 reservation . . . notwithstanding the issuance of any patent.”¹⁵ The term “Indian reservation” in section
27 1151(a) refers to land that the federal government has expressly set aside for the residence or use of
28 tribal Indians. (*Donnelly v. United States* (1913) 228 U.S. 243, 269; *Cohen’s Handbook of Federal*
Indian Law (2005) § 3.04(2)(c)(ii).) When called upon to interpret that language, the Supreme Court

¹⁵ “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 stated that section 1151 was intended to prevent “an impractical pattern of checkerboard jurisdiction.”
2 (See *Seymour v. Superintendent of Washington State Penitentiary* (1962) 368 U.S. 351, 358.) The court
3 decided that criminal jurisdiction was not based on ownership of the land, but whether the land had been
4 set aside by congress as Indian reservation land, notwithstanding any subsequent transfer of ownership
5 as long as congress had not subsequently separated the land from the reservation. (*Id.*)

6 Once the boundaries of a reservation are established, all tracts therein “remain a part of
7 the reservation until separated therefrom by Congress.” (*Seymour v. Superintendent, supra*, at p. 359;
8 See also *Solem v. Bartlett* (1984) 465 U.S. 463, 470.) Even granting title of reservation lands to non-
9 Indians “does not, by itself, affect the exterior boundaries of the reservation” and all such lands within
10 the exterior boundaries remain part of Indian country. (*United States ex rel. Condon v. Erickson* (8th
11 Cir. 1973) 478 F.2d 684, 688-689.)

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

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

18 The Court explained its holding by stating:

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

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

Venetie’s federal set-aside requirement calls for more than just tribal ownership or close
proximity or importance to a tribe. (*Blunk v. Arizona Dept. of Transportation* (9th Cir. 1999) 177 F.3d

1 879, 884; 83 Ops.Cal.Att’y.Gen. 190 (1999).) In addition, *Venetie’s* superintendence requirement
2 implies some active federal control over the subject land. (*Venetie, supra*, 522 U.S. at p. 533; 83
3 Ops.Cal.Att’y.Gen. 190 (1999).) Some federal courts examine “the entire Indian community,” not just a
4 particular tract of land, to determine whether the *Venetie* set-aside and superintendence requirements are
5 satisfied. (*United States v. Arrieta* (10th Cir. 2006) 436 F.3d 1246, 1250-1251; *HRI, Inc. v.*
6 *Environmental Protection Agency* (10th Cir. 2000) 198 F.3d 1224, 1248-1249.)

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

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

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

13 Federal Preemption

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

15 An administrative agency, including an administrative agency created by the Constitution
16 or an initiative statute, has no power (a) [t]o declare a statute unenforceable, or refuse to
17 enforce a statute, on the basis of it being unconstitutional unless an appellate court has
18 made a determination that such statute is unconstitutional; (b) [t]o declare a statute
19 unconstitutional; (c) [t]o declare a statute unenforceable, or to refuse to enforce a statute
20 on the basis that federal law or federal regulations prohibit the enforcement of such
21 statute unless an appellate court has made a determination that the enforcement of such
22 statute is prohibited by federal law or federal regulations.
23 (See also Cal. Code Regs., tit. 18, § 5412, subd. (b).)

24 In addition, the Board has a long-established policy of declining to consider constitutional issues. In the
25 *Appeal of Aimor Corporation* (83-SBE-221), decided on October 26, 1983, the Board stated:

26 This policy is based upon the absence of any specific statutory authority which would
27 allow the Franchise Tax Board to obtain judicial review of a decision in such cases and
28 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.

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

31 It is true that we have occasionally asserted that right [to question the constitutionality of
32 a statute]. But this has been only under circumstances wherein such action on our part
33 was necessary in order to protect the revenues of the state and get the problem before the

1 Courts In the instant case, and in all others like it before us, the taxpayers will have
2 the opportunity of taking the question to the Courts for decision. . . . It might be argued
3 that, if the law is plainly unconstitutional, why should taxpayers be put to that trouble and
4 expense? However, there is diversity of opinion as to the constitutionality of the Act, and
5 it seems to us desirable that this controversy should be settled by the Courts, whose
6 authority to hold acts of the Legislature invalid cannot be questioned.

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

8 Late Filing Penalty

9 California imposes a penalty for the failure to file a return on or before the due date,
10 unless it is shown that the failure is due to reasonable cause and not due to willful neglect. (Rev. & Tax.
11 Code, § 19131.) To establish reasonable cause, the taxpayer “must show that the failure to file timely
12 returns occurred despite the exercise of ordinary business care and prudence, or that cause existed as
13 would prompt an ordinary intelligent and prudent businessman to have so acted under similar
14 circumstances.” (*Appeal of Howard G. and Mary Tons*, 79-SBE-027, Jan. 9, 1979.)

15 Contentions

16 Several facts are not in contention in this appeal. Both parties agree that appellant was a
17 member of the Tribe for all years at issue. It is uncontested that appellant’s address is located in
18 Township 4 South, Range 5 East, Section 19 in Palm Springs. (Resp. Reply Br., exhibit F.) The parties
19 agree that \$785,936.95 of appellant’s income during the years at issue was per capita distributions
20 derived from the Tribe’s gaming activities and is reservation-sourced income.¹⁶ (App. Reply Br., p. 1;
21 Resp. Reply Br., exhibit A.)

22 Appellant's Contentions

23 Appellant contends that his residence is within the exterior boundaries of the Tribe’s
24 reservation, and is therefore within Indian country for purposes of section 1151(a). (App. Reply Br., pp.
25 2-5.) Appellant supports his contention by providing a letter from the Bureau of Indian Affairs (BIA)
26 that includes a diagram showing the outermost boundaries of the Tribe’s reservation to be a boundary
27 encompassing all of the federally designated tracts as well as any sections, including Section 19, not

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¹⁶ See footnote 6 for a year-by-year breakdown of reservation-sourced income. (Resp. Reply Br., exhibit A.)

1 federally designated as reservation land but being surrounded by reservation land.¹⁷ (App. Reply Br.,
2 exhibit C, p. 3.) Appellant also cites case law stating the discouragement of "an impractical pattern of
3 checkerboard jurisdiction," and noting that even if reservation lands are granted to non-Indians, all such
4 lands within the exterior boundaries remain part of Indian country. (App. Reply Br., pp. 4-5; e.g.
5 *Seymour v. Superintendent of Washington State Penitentiary* (1962) 368 U.S. 351; *United States ex rel*
6 *Condon v. Erickson* (8th Cir. 1973) 478 F.2d 684, 688-689.)

7 Appellant contends that since he is a member of the Tribe, the revenue in question is
8 reservation-sourced, and he resides in Indian country, the per capita distributions are tax exempt.
9 Appellant also contends that California taxation is preempted by the Indian Gaming Regulatory Act
10 (IGRA), when the IGRA is read and interpreted together with the Tribe's state gaming compact. (App.
11 Reply Br., pp. 6-8.) Appellant asserts that when the laws are ambiguous, the issues should be
12 determined in favor of the Indian community.¹⁸ (App. Reply Br., p. 9.)

13 Appellant contends that the per capita payments were derived from Class III Gaming
14 Revenues, and therefore are not taxable based on their source, regardless of his status. (App. Reply Br.,
15 p. 6.) Appellant presents arguments that equate the Tribe to a partnership. He claims that the pass-
16 through taxation nature of the Tribe means that the revenue is earned by the Tribe, not him, and that he
17 is not required to pay taxes on income that the Tribe would not have to pay taxes on. (Appeal Letter,
18 Case No. 384247, p. 7.)

19 Appellant contends that the late filing penalty for 2005 should not be imposed since there
20 is reasonable cause for abatement. Appellant died intestate on January 7, 2008, and had been ill for
21 "quite some time." (App. Op. Br., Case ID 481024, p. 7.) Appellant indicates that the estate was
22 subject to a federal probate, which did not result in a probate order until October 21, 2008. Appellant
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26 ¹⁷ In his presentation of supporting case law, appellant quotes the dissenting opinion in *De Coteau* to argue against the
checkerboard jurisdiction. This dissenting opinion is not precedent. (*De Coteau, supra*, 420 U.S. at pp. 467-468.)

27 ¹⁸ The Supreme Court has stated when faced with two reasonable interpretations, the choice between them follows a "deeply
28 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 contends that since the NPA for 2005 was issued on September 30, 2008, while the estate was in
2 probate, there is reasonable cause for the abatement of the penalty. (*Ibid.*)

3 Respondent's Contentions

4 Respondent contends that appellant's reservation-sourced income is taxable in California
5 because he was a California resident and did not live in Indian country. (Resp. Reply Br., pp. 5-7.)
6 Respondent states appellant's interpretation of Indian country under section 1151(a) would convert non-
7 reservation lands into reservation land, but notes that only Congress and the President have the power to
8 create or enlarge reservation land. (Resp. Reply Br., pp. 6-7; See *Donnelly v. United States, supra*, 228
9 U.S. at 255-259.) Respondent notes that Section 19 was never set aside as Indian reservation land, and
10 contends that the U.S. Supreme Court has stated that an Indian reservation may not be contiguous, and,
11 therefore, it is an untenable notion that we should force all reservations into contiguous reservations.
12 (Resp. Reply Br., pp. 6-7; *Mescalero Apache Tribe v. Jones* (1973) 411 U.S. 145.) Respondent contends
13 that to follow appellant's approach would be to assert that all of the land and residents of the odd-
14 numbered sections would be within the limits of power or jurisdiction of the Tribe and subject to its
15 control merely by virtue of the fact they are surrounded by reservation land. (Resp. Op. Br., Case ID
16 481024, p. 6.)

17 Respondent asserts that appellant has not provided sufficient evidence to show that his
18 residence qualifies as being in Indian country under section 1151. (Resp. Reply Br., p. 6.) Respondent
19 indicates that appellant's residence is subject to county property tax, showing that the state has
20 jurisdiction over the land. (Resp. Reply Br., p. 7 & exhibit E.)

21 Respondent contends that taxation is not preempted by the IGRA because the issue at
22 hand involves the state taxation of per capita distributions to individuals and not gaming in Indian
23 country, and, in any event, the Board is precluded from reaching the federal preemption question.
24 (Resp. Reply Br., pp. 7-9.) Respondent asserts that the Board has repeatedly recognized a well-
25 established policy of abstention in issues like the one present in this appeal. (*Id.* at p. 10.) Respondent
26 notes that the Board's practice of abstention allows the matter to be handled by Courts, where
27 respondent has the ability to seek judicial review of a decision and the authority to hold acts of the
28 Legislature invalid rests. (Resp. Reply Br., p. 10; *Appeal of Vortex Manufacturing Co., supra.*)

1 Respondent asserts that the late filing penalty for 2005 is properly imposed. (Resp. Op.
2 Br., Case ID 481024, p. 10.)

3 STAFF COMMENTS

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

22 However, should the Board determine that there is an appellate court decision prohibiting
23 the enforcement of R&TC section 17041 under the circumstances present in this appeal, then the Board
24 may determine whether appellant lived in Indian country. In that event, staff notes that it does not
25 appear as though Section 19 is currently, or ever was, part of the tracts of land specifically set aside for
26 the Agua Caliente Reservation.¹⁹ The index to Federal Land Records provided by respondent shows the
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28 ¹⁹ The Tribe’s website contains a map that shows Section 19 as being “Off Reservation,” or non-reservation land. (Agua Caliente, *Land Status* <http://www.aguacaliente.org/Portals/0/Land_Status_Jan-09.pdf> [as of July 24, 2009].)

1 owner of section 19 to be Southern Pacific Railroad since at least 1891, while even-numbered sections,
2 like section 20, are owned by the Agua Caliente Band from at least 1911. (Resp. Reply Br., exhibit G.)
3 Appellant should be prepared to provide any evidence showing that Section 19 was ever part of the
4 tracts of land designated as the Tribe’s reservation. The parties should be prepared to discuss the correct
5 interpretation of section 1151(a), and whether appellant’s residence, which apparently was never
6 specifically designated by the federal government as Indian country, can be labeled as being in Indian
7 country for purposes of California income tax. In particular, the parties should be prepared to discuss
8 the meaning of “all land within the limits of any Indian reservation,” and whether this should be
9 interpreted broadly to include tracts of land never set aside by the federal government as Indian
10 reservation land strictly due to their being surrounded by Indian reservation land, as appellant suggests.

11 The late filing penalty imposed for 2005 appears to be properly imposed.²⁰ The penalty
12 is imposed when a taxpayer is required to file a tax return and does not do so timely. The deadline to
13 file an income tax return for the 2005 tax year is April 15, 2006. Appellant filed his return on
14 December 15, 2006. Appellant’s representative has not yet argued reasonable cause exists for
15 appellant’s late filing. To demonstrate reasonable cause for the abatement of the late filing penalties,
16 appellant’s representative should provide evidence and legal arguments to show that appellant was
17 unable to file timely returns despite the exercise of ordinary business care and prudence, or that cause
18 existed as would prompt an ordinary intelligent and prudent businessman to have so acted under similar
19 circumstances.

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28 ²⁰ Appellant did not raise any arguments against the late filing penalties imposed for 2003 and 2004. These late filing penalties also appear to be properly imposed.