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

10 In the Matter of the Appeal of: ) **HEARING SUMMARY**  
11 ) **PERSONAL INCOME TAX APPEAL**  
12 **FRANCES CUMMINGS AND** ) Case No. 437596  
13 **THOMAS CUMMINGS<sup>1</sup>** )

	<u>Years</u>	<u>Claims For Refund</u>
	2003	\$7,113
	2004	\$6,973

18 Representing the Parties:

19 For Appellant<sup>2</sup>: Keith A. Shibou  
20 For Franchise Tax Board: Judy F. Hirano, Tax Counsel III

22 QUESTION: Whether California may tax appellant's per capita Indian gaming distribution.

23 HEARING SUMMARY

24 I. Background

25 Appellant is a registered member of the Agua Caliente Band of Cahuilla Indians. (App.  
26

27 <sup>1</sup> Appellant's residence location is in dispute. This will be discussed in detail below.

28 <sup>2</sup> This hearing summary will refer to Frances Cummings as "appellant" because only her per capita income is at issue in this appeal.

1 Opening Br., exhibit A.) Her husband, Thomas Cummings, is not a member of the tribe. In 2003 and  
2 2004, appellant received her per capita distributions from the tribe in the amounts of \$148,514.58 and  
3 \$152,412.05, respectively, from revenues derived from gaming activities conducted by the tribe. (Resp.  
4 Opening Br., exhibit A.)

5 The location where appellant resided in 2003 and 2004 is in dispute. Three different  
6 addresses are shown for appellant and her spouse on various documents for the years at issue as follows:

- 7 • Magnolia Avenue<sup>3</sup>
  - 8 ○ 2003 Form 1099-MISC (Resp. Opening Br., exhibit A.)
  - 9 ○ 2004 Form 1099-MISC (*Ibid.*)
  - 10 ○ 2003 California Income Tax Return (Resp. Opening Br., exhibit C.)
  - 11 ○ 2003 Federal Income Tax Return (*Id.* at p. 5.)
- 12 • Piute Creek Drive
  - 13 ○ 2004 California Income Tax Return (Resp. Opening Br., exhibit G.)
  - 14 ○ 2004 Federal Income Tax Return (*Id.* at p. 8.)
  - 15 ○ 2004 Forms W-2G (*Id.* at pp. 4-5.)
- 16 • E. Vista Chino
  - 17 ○ 2003 and 2004 Amended California Income Tax Returns (Resp. Opening  
18 Br., exhibit I.)
  - 19 ○ 2003 and 2004 Federal Income Tax Returns attached to amended 2003  
20 and 2004 Amended California Income Tax Returns (Resp. Opening Br.,  
21 exhibit I.)
  - 22 ○ Letter responding to FTB request for documentation of physical residence,  
23 stating that appellant resided at this address in 2003 and 2004 (Resp.  
24 Opening Br., exhibit L.)

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26 \_\_\_\_\_  
27 <sup>3</sup> Complete address information is available in the record in this appeal. However, because hearing summaries are distributed  
28 publicly and to legal publishers, and in order to protect taxpayer information, this hearing summary provides only the  
information necessary to distinguish each address for purposes of discussion.

- 1                   ○ Respondent's letter of Denial of claims for refund (Resp. Opening Br.,
- 2                                   exhibit M.)
- 3                   ○ Correspondence with the Board regarding this appeal
- 4                   ○ A driver's license

5 The address on Magnolia Avenue appears to be a private mailbox address (Mail Boxes Etc.) (Resp.  
6 Opening Br., exhibit D.) Neither party has asserted that this address is located within Indian country.  
7 The home on Piute Creek Drive has apparently been owned by appellant and her husband since 1985.  
8 (Resp. Opening Br., p. 2.) Real property records indicate that the property is a four-bedroom, single  
9 family residence and that appellant and her spouse have claimed the homeowner exemption for an  
10 owner-occupied home at this address. (Resp. Opening Br., exhibit E.) There is no allegation that this  
11 address lies within Indian country. Finally, appellant asserts that during 2003 and 2004, she lived at her  
12 daughter's address on E. Vista Chino on the Agua Caliente Reservation. (App. Reply Br., pp. 2-3.)

## 13                   II. Procedural Background

14                   Appellant and her husband timely filed a joint California income tax return for 2003 on  
15 which they reported federal adjusted gross income (AGI) of \$154,811, California taxable income of  
16 \$124,988, a self-assessed tax liability of \$7,113 and an underpayment of tax penalty of \$218. (Resp.  
17 Opening Br., exhibit C.) Appellant and her husband paid the total amount shown due on their return.  
18 (Resp. Opening Br., p. 2.) Respondent determined the tax was \$7,113 and refunded \$218. (Resp.  
19 Opening Br., exhibit F.)

20                   Appellant and her husband timely filed a joint California income tax return for 2004 on  
21 which they reported federal AGI of \$158,937, \$158,863 in California adjusted gross income, taxable  
22 income of \$125,001 and a self-assessed tax of \$7,673. (Resp. Opening Br., exhibit G.) After deduction  
23 of \$700 in exemption credit, the return reported a tax due of \$6,973. (*Ibid.*) Appellant and her husband  
24 paid the total amount due.<sup>4</sup> (Resp. Opening Br., p. 2.)

25                   On April 15, 2007, appellant and her husband filed California amended returns for 2003  
26 and 2004. For 2003, they reported federal AGI of \$154,811, a California adjustment of \$148,515  
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28 <sup>4</sup> Appellant and her husband paid the tax due plus interest, penalty, and collection fee. (Resp. Opening Br., exhibit H.)

1 (subtracting appellant's per capita income), \$29,823 of itemized deductions, and zero taxable income.  
2 (Resp. Opening Br., exhibit I.) They reported no tax due and requested a refund of \$7,113 for tax  
3 previously paid. (*Ibid.*) A declaration was attached to the return stating that appellant resided within  
4 Indian country, within the boundaries of the Agua Caliente Reservation, in 2003. The declaration was  
5 dated April 12, 2007 and was signed by the appellant. (Resp. Opening Br., exhibit I, p. 13.) The 2004  
6 amended return reported federal AGI of \$158,937, a California adjustment of \$152,486 (subtracting the  
7 appellant's per capita income of \$152,412 plus \$74 in nontaxable interest income), \$33,862 in itemized  
8 deductions, and zero taxable income. (Resp. Opening Br., exhibit J.) Appellant and her husband  
9 reported no tax due and requested a refund of \$6,973. Attached to the return was a declaration,  
10 essentially identical in substance to the declaration attached to the 2003 amended return, but this  
11 declaration was undated and unsigned. (*Id.* at p. 16.)

12 Subsequently, respondent requested documentation of appellant's physical presence on  
13 her tribe's reservation. (Resp. Opening Br., exhibit K.) Appellant responded with a letter stating that in  
14 2003 and 2004, appellant resided on E. Vista Chino, within the exterior limits of the Agua Caliente  
15 Reservation. (Resp. Opening Br., exhibit L.) Appellant also stated in her letter that she had parcels of  
16 land on the reservation allotted to her under the General Allotment Act. (*Ibid.*) Appellant attached  
17 copies of Form 1099-Misc showing her per capita income in 2003 and 2004. (Resp. Opening Br.,  
18 exhibit A.)

19 Respondent denied appellant's claims for refund for 2003 and 2004. The denial letter  
20 stated that the address on appellant's 2003 and 2004 Forms 1099-Misc was outside the Agua Caliente  
21 Reservation. (Resp. Opening Br., exhibit K.) The letter also indicated that a real property record  
22 showed that Elizabeth Cummings owned the property on E. Vista Chino. (*Ibid.*) Appellant and her  
23 husband timely appealed from the denial of their claims for refund.

### 24 III. Applicable Law

#### 25 Jurisdiction to Tax California Residents

26 California imposes tax on a resident's entire income from all sources. (Rev. & Tax.  
27 Code, § 17041, subd. (a).) A California "resident" includes "every individual who is in this state for  
28 other than a temporary or transitory purpose." (Rev. & Tax. Code, § 17014, subd. (a)(1).)

1 California law does not specifically set forth a test for determining whether someone  
2 resides at one place in California versus another place in California. However, the question is a factual  
3 question analogous to the question of whether someone resides within California or outside of  
4 California. The Board has set forth a non-exhaustive list of factors for addressing the latter question:

- 5 • The location of all of the taxpayer's residential real property, and the approximate  
6 sizes and values of each residence;
- 7 • The state wherein the taxpayer's spouse and children reside;
- 8 • The state where the taxpayer's children attend school;
- 9 • The state where the taxpayer claims the homeowner's property tax exemption on  
10 residences;
- 11 • The taxpayer's telephone records (to show the origination point of the taxpayer's  
12 telephone calls);
- 13 • The number of days and the type of days (vacation, business, etc.) the taxpayer  
14 spends in California versus the number and type of days the taxpayer spends in other  
15 states;
- 16 • The location where the taxpayer files her tax returns, both federal and state, and the  
17 state of residence claimed by the taxpayer on such returns;
- 18 • The location of the taxpayer's bank and savings accounts;
- 19 • The origination point of the taxpayer's checking account transactions and  
20 credit card transactions;
- 21 • The state wherein the taxpayer maintains memberships in social, religious,  
22 and professional organizations;
- 23 • The state wherein the taxpayer registers his or her automobiles;
- 24 • The state wherein the taxpayer maintains a driver's license;
- 25 • The state wherein the taxpayer maintains voter registration, and the taxpayer's  
26 voting participation history;
- 27 • The state wherein the taxpayer obtains professional services, such as doctors,  
28 dentists, accountants, and attorneys;
- The state wherein the taxpayer is employed;
- The state wherein the taxpayer maintains or owns business interests;
- The state wherein the taxpayer holds a professional license or licenses;
- The state wherein the taxpayer owns investment real property; and
- The indications in affidavits from various individuals discussing the  
taxpayer's residency.

21 (*Appeal of Stephen D. Bragg*, 2003-SBE-002, May 28, 2003.) Respondent's determinations of  
22 residency are presumptively correct, and the taxpayer bears the burden of showing error in those  
23 determinations. (*Ibid.*; *Appeal of Joe and Gloria Morgan*, 85-SBE-078, July 30, 1985.)

#### 24 Federal Power Over Indian Affairs

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

1 U.S. 685, 686-687.) As a result of the exclusive and plenary authority of the U.S. Congress over Indian  
2 affairs, a state may not impose personal income tax on an Indian who lives on his own reservation and  
3 whose income derives from reservation sources. (*McClanahan v. Arizona State Tax Commission* (1973)  
4 411 U.S. 164, 165 [*“McClanahan”*].) Looking to exclusive Congressional authority and traditional  
5 Indian sovereignty, the *McClanahan* Court held that a state may not impose personal income tax on  
6 “reservation Indians,” which were Indians residing on their own reservation and whose income derived  
7 from reservation sources. (*Id.*, at pp. 173-178.) *McClanahan* has become the seminal case in this area;  
8 over 25 years ago, the Board asserted that the taxation question turns on whether appellants are  
9 “reservation Indians” within the meaning of *McClanahan*. (*Appeal of Edward T. and Pamela A. Arviso*,  
10 82-SBE-108, June 29, 1982.)

11 The U.S. Supreme Court later stated that *McClanahan* created a presumption against state  
12 taxing authority, and the presumption extends to Indians residing in “Indian country,” which includes  
13 reservations, dependent Indian communities and Indian allotments. (*Oklahoma Tax Commission v. Sac*  
14 *& Fox Nation* (1993) 508 U.S. 114 [*“Sac & Fox”*].) However, a state may tax all the income, including  
15 reservation-source income, of an Indian residing in the state and outside of Indian country. (*Oklahoma*  
16 *Tax Commission v. Chickasaw Nation* (1995) 515 U.S. 450.)

17 In deciding a case involving the application of an inheritance tax, the California Court of  
18 Appeal for the Third District stated that “[in] the special area of state taxation, absent cession of  
19 jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing  
20 Indian reservation lands or Indian income from activities carried on within the boundaries of the  
21 reservation, and *McClanahan v. Arizona State Tax Comm'n, supra*, lays to rest any doubt in this respect  
22 by holding that such taxation is not permissible absent congressional consent.” (*Estate of Johnson*  
23 (1981) 125 Cal.App.3d 1044, 1048 [quoting *Mescalero Apache Tribe v. Jones* (1973) 411 U. S. 145,  
24 148].)

25 The U.S. Supreme Court has yet to address a state’s ability to impose income tax where  
26 an Indian resides on another tribe’s reservation and receives income derived from his own reservation.  
27 However, the Court has addressed a state’s attempt to impose sales tax on purchases made by Indians  
28 residing on another tribe’s reservation. In *Washington v. Confederated Tribes of the Colville Indian*

1 *Reservation* (1980) 447 U.S. 134 [“*Colville*”], the Court recognized that the state’s ability to tax  
2 individuals or transactions on an Indian reservation depends upon a balancing of interests:

3       The principle of tribal self-government, grounded in notions of inherent sovereignty and  
4       in congressional policies, seeks an accommodation between the interests of the Tribes  
5       and the Federal Government, on the one hand, and those of the State, on the other. . . .  
6       While the Tribes do have an interest in raising revenues for essential governmental  
7       programs, that interest is strongest when the revenues are derived from value generated  
8       on the reservation by activities involving the Tribes and when the taxpayer is the  
9       recipient of tribal services. The State also has a legitimate governmental interest in  
10       raising revenues, and that interest is likewise strongest when the tax is directed at off-  
11       reservation value and when the taxpayer is the recipient of state services. (*Colville*, at pp.  
12       156-157 [citations omitted].)

13 Applying that balancing test, the Court held that Washington could impose sales tax on purchases made  
14 by non-member Indians on the tribe’s reservation:

15       [T]he imposition of Washington’s tax on these purchasers [does not] contravene the  
16       principle of tribal self-government, for the simple reason that nonmembers are not  
17       constituents of the governing Tribe. For most practical purposes those Indians stand on  
18       the same footing as non-Indians resident on the reservation. There is no evidence that  
19       nonmembers have a say in tribal affairs or significantly share in tribal disbursements. We  
20       find, therefore, that the State’s interest in taxing these purchasers outweighs any tribal  
21       interest that may exist in preventing the State from imposing its taxes. (*Id.*, at p. 161.)

22 The Court also addressed the applicability of *McClanahan*, stating that it was clear after *McClanahan*  
23 that sales tax could not be applied to reservation purchases by tribal members. The Court then agreed  
24 with Washington’s contention that the *McClanahan* exemption does not extend to nonmembers of the  
25 governing tribe. (*Id.*, at p. 160.)

26       Prior to *Colville*, state courts in New Mexico, Montana, and Minnesota had all held that  
27 *McClanahan*’s presumption against state taxation applied to the reservation-sourced income of Indians  
28 who lived on another tribe’s reservation. (*Fox v. Bureau of Revenue* (N.M. App. 1975) 87 N.M. 261;  
*LaRoque v. State of Montana* (Mont. 1978) 178 Mont. 315; *Topash v. Commissioner of Revenue* (Minn.  
1980) 291 N.W.2d 679.) However, none of those cases are still good law because each state revisited its  
reasoning in light of *Colville*. In New Mexico, *Fox* was overruled by *New Mexico Taxation & Revenue*  
*Dept. v. Greaves* (N.M. App. 1993) 116 N.M. 508. In Montana, *LaRoque* was superseded by  
administrative regulation section 42.15.121(1) (which has been re-numbered to section 42.15.220). In  
Minnesota, the reasoning in *Topash* was abrogated by *Minnesota v. R.M.H.* (Minn. 2000) 617 N.W.2d  
55.

1 Expressly applying *Colville* to a state income tax, the courts in Wisconsin and New  
2 Mexico have now held that a state may tax the reservation-sourced income of an Indian who lived and  
3 worked on another tribe's reservation. (*LaRock v. Wisconsin Dept. of Revenue* (2001) 241 Wis.2d 87;  
4 *New Mexico Taxation & Revenue Dept. v. Greaves, supra.*) Similarly, the Oregon Supreme Court has  
5 affirmed a ruling that the state may tax income earned outside the state by an Indian who resided on  
6 another tribe's reservation. (*Esquiro v. Dept. of Revenue* (1998) 328 Ore. 37.)

7 California's initial application of *Colville* was in the context of a criminal prosecution.  
8 (*People v. McCovey* (1984) 36 Cal.3d 517.) In that case, two Indians were convicted of catching and  
9 selling salmon on the Hoopa Valley Indian Reservation in violation of the Fish and Game Code. One of  
10 the Indians was a member of the reservation's governing tribe and the other was not. The California  
11 Supreme Court reversed the conviction of the Indian who was a member of the Hoopa Valley tribe  
12 because the exercise of state jurisdiction was preempted by federal law. (*Id.*, at pp. 530-533.) However,  
13 citing the above-quoted holding in *Colville*, the Court upheld the conviction of the Indian who was not a  
14 member of the Hoopa Valley tribe. (*Id.*, at p. 536.)

15 The Ninth Circuit Court of Appeals recently considered the implications of *Colville* in the  
16 context of state sales tax. (*Barona Band of Mission Indians v. Yee* (9<sup>th</sup> Cir. 2009) 528 F.3d 1184.) In  
17 that case, the Barona Band of Mission Indians marketed a sales tax exemption to non-Indians as part of a  
18 business strategy during the expansion of their casino complex. The tribe entered into a lump-sum  
19 contract with a non-Indian general contractor to construct the expansion. Under the terms of the prime  
20 contract, the tribe purported to allow subcontractors to avoid sales tax by scheduling deliveries of  
21 construction materials to occur on tribal lands. (*Id.* at p. 1187.) Applying the principles of *Colville*, the  
22 court declined to extend the preemption doctrine to cloak the tribe's business practice. The court  
23 reasoned that the preemption balance shifted toward the state's interests. The court explained that the  
24 right of territorial autonomy is significantly compromised by the tribe's invitation to the non-Indian  
25 subcontractor to theoretically consummate purchases on its tribal land for the sole purpose of receiving  
26 preferential tax treatment. (*Id.* at 1191.) In *Barona*, the court ultimately found that, in the factual  
27 context presented, the general state interests of raising revenue and consistent application of its tax laws  
28 trump the weak interest of the tribe and federal government. (*Id.* at p. 1193.)

1 In the *Appeal of Samuel L. Flores* (2001-SBE-004), decided on June 21, 2001, the Board  
2 addressed the nature of a per capita income distribution. The Board rejected the Franchise Tax Board's  
3 argument that an Indian tribe is like a partnership and instead concluded that a tribe is like a corporation.  
4 The Board held that per capita distributions from a tribe are income from an intangible sourced to the  
5 residence of the tribal member.

6 Board Jurisdiction: Federal Preemption

7 Article III, section 3.5, subsection (b), of the California Constitution precludes the Board  
8 from declaring a California statute unconstitutional. Subsection (c) of Article III, section 3.5 of the  
9 California Constitution precludes the Board from refusing to enforce a California statute on the basis  
10 that federal law or federal regulations prohibit the enforcement of the California statute, unless an  
11 appellate court has made a determination that the enforcement of the statute is prohibited by federal law  
12 or federal regulations. In addition, the Board has a well-established policy of abstention from deciding  
13 constitutional issues in appeals involving proposed assessments of additional tax. (*Appeal of Aimor*  
14 *Corp.*, 83-SBE-221, Oct. 26, 1983.) This policy is based upon the absence of any specific statutory  
15 authority which would allow the FTB to obtain judicial review of a decision in such cases and the  
16 Board's belief that judicial review should be available for questions of constitutional importance.  
17 (*Appeals of Fred R. Dauberger, et al.*, 82-SBE-082, March 31, 1982.)

18 IV. Contentions

19 Appellant's Contentions

20 Appellant contends that California cannot tax her per capita distributions, regardless of  
21 whether she lived on the tribe's reservation for the entire time during the 2003 and 2004. In this regard,  
22 appellant argues that the federal Indian Gaming Regulatory Act (IGRA), when interpreted together with  
23 the California State Gaming Compact (Compact), which the tribe entered into with the State of  
24 California, preempts any state taxation of appellant's per capita distributions. Appellant relies on *White*  
25 *Mountain Apache Tribe v. Bracker* (1980) 448 U.S. 136 ["*Bracker*"], in support of her argument that

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1 respondent's imposition of tax on appellant's per capita distributions is preempted by federal law.<sup>5</sup>

2 In the alternative, appellant contends that California cannot tax her per capita  
3 distributions because she is a registered member of the tribe who resided in the tribe's Indian country for  
4 the entire time during the 2003 and 2004. Appellant contends that the E. Chino Vista home is her  
5 principal residence and that the property is located on the Agua Caliente Reservation. Appellant has  
6 provided a site map showing the location of her property (App. Reply Br., exhibit B) and a letter from  
7 the Bureau of Indian Affairs (BIA) confirming that the E. Chino Vista residence is located on the Agua  
8 Caliente Indian Reservation. (App. Reply Br., exhibit E.) Appellant has also provided a copy of her  
9 California driver's license showing the E. Chino Vista address. Appellant acknowledges that title to the  
10 property is in her daughter's name. Appellant asserts that she made an inter-vivo transfer of the property  
11 to her daughter because appellant has been in poor health for a number of years and she wanted to avoid  
12 federal probate because it can take over three years to complete. Appellant explains that she transferred  
13 the property to her daughter because trust land cannot be bequeathed to a non-Indian spouse. Appellant  
14 has provided a copy of a property detail report<sup>6</sup> showing her daughter Elizabeth Cummings as the owner  
15 and the deed as an "interspousal deed transfer." (App. Rep. Br., exhibit C.)

16 Appellant asserts that the property on Piute Creek is used as a summer home to obtain  
17 relief from the summer heat in Palm Springs. Appellant explains that there is no mail service to the rural  
18 area where the Piute Creek home is located so she and her husband had their mail delivered to a P.O.  
19 box on Magnolia Avenue. Appellant contends that the couple files their tax returns in the summer  
20 months when they are vacationing at Piute Creek. Appellant maintains this address is shown on tax  
21 documents because they were directed to Piute Creek for convenience in preparing returns. Appellant  
22 contends that neither she nor her husband recall applying for the homeowner's exemption for Piute  
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24 <sup>5</sup> In *Bracker*, the State of Arizona sought to impose motor vehicle license and use fuel taxes on the logging and hauling  
25 operations of a non-Indian timber company that were conducted on BIA and tribal roads within the reservation. The Court  
26 stated that the state's assertion of its authority over nonmembers on a reservation is preempted by the operation of federal law  
27 when it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake  
are adequate to justify the assertion of state authority. (*Bracker, supra* at p. 145.) Applying this balancing test, the Court  
ruled that the taxes could not be imposed.

28 <sup>6</sup> The property detail report was apparently obtained through [www.realquest.com](http://www.realquest.com). It appears to staff that RealQuest.com is a  
private company that provides real estate information for a fee.

1 Creek and believe the escrow company did this when the home was purchased. Appellant contends the  
2 E. Chino Vista residence has a higher appraised value than the Piute Creek residence supporting the  
3 conclusion that the E. Chino Vista home was more likely to be the more permanent of the two  
4 properties.

5 Finally, appellant argues that the organizational structure of the tribe is like a partnership  
6 for tax purposes and, therefore, the per capita distributions constitute a “flow through” of tax exempt  
7 amounts to the member/partner. Appellant also argues that if her per capita distributions were subject to  
8 California tax it would result in an additional indirect tax against the tribe’s Class II and Class III  
9 gaming revenues, contrary to the spirit and intent of the Compact. Appellant asserts that the tribe paid  
10 all required state taxes and fees from its gaming activities, pursuant to a Revenue Allocation Plan (RAP)  
11 approved by the federal BIA, prior to paying the per capita distributions.

#### 12 Respondent’s Contentions

13 Respondent contends that under *McClanahan, supra*, reservation-derived income of a  
14 member of a federally recognized tribe is only exempt from state tax when the tribe member lives on her  
15 own tribe’s reservation. Citing *Chickasaw Nation, supra*, and *Appeal of Edward T. and Pamela A.*  
16 *Arviso, supra*, respondent contends that appellant’s per capita gaming distributions are subject to  
17 California’s income tax, because appellant resided in California outside of the tribe’s reservation in 2003  
18 and 2004. Respondent argues that appellant and her husband have not shown they resided on the Agua  
19 Caliente Reservation. Respondent agrees that property records show the E. Chino Vista residence is  
20 owned in fee-simple by Elizabeth Cummings, appellant’s daughter. However, respondent contends that  
21 information provided by the Riverside County Assessor’s Office shows that Elizabeth Cummings  
22 bought the property from an unrelated third-party with a mortgage from Long Beach Mortgage  
23 Company. In addition, respondent argues that it is unlikely appellant and her family lived at the E.  
24 Chino Vista residence because it is owned by Elizabeth Cummings and it is a smaller (3 bedroom)  
25 home. Respondent believes it is more likely that appellant and her family lived in the larger Piute Creek  
26 home. Respondent also disagrees with appellant’s use of her driver’s license as proof of her residence at  
27 E. Chino Vista because the license was renewed in 2005 and therefore it does not tend to show where  
28 appellant lived in 2003 and 2004. Finally respondent contends that the letter from the BIA shows only

1 that the E. Vista Chino home is located on the Agua Caliente Reservation, but it does not support  
2 appellant's assertion that she lived in this home in 2003 and 2004.

3           Respondent maintains that the available evidence shows that appellant, her husband and  
4 their two children resided in the four-bedroom, single family residence they owned at Piute Creek in  
5 2003 and 2004. Respondent asserts that the Piute Creek residence is located approximately 60 miles  
6 away from the tribe's reservation and is not within the boundaries of the tribe's reservation. Respondent  
7 further asserts that Riverside County property tax records indicate that appellant and her husband have  
8 owned this property since 1985, and they take the homeowner's property tax exemption on the property,  
9 which only applies for an owner-occupied residence.<sup>7</sup> Respondent contends that its records show that,  
10 contrary to appellant's assertion that the couple filed returns during the summer months, the couple filed  
11 the 2003 and 2004 California returns in April of the year each return was due. Thus, respondent  
12 maintains that appellant's explanation of why the Piute Creek address was used on their 2003 and 2004  
13 California returns is not supported by the actual filing date of the returns. Instead, respondent argues  
14 that it is more likely that appellant and her husband resided at the Piute Creek address and filed their  
15 returns from this address when such returns were due. In addition, respondent further asserts that the  
16 Piute Creek address is shown on the 2004 Forms W-2G, reporting gambling winnings occurring in April  
17 and October 2004, and not in the summer months, further supporting a conclusion that appellant resided  
18 at this address. Finally, respondent maintains that appellant's tax preparer properly used the Piute Creek  
19 address on the couple's 2003 and 2004 returns because they, like the taxpayers, signed the returns under  
20 penalty of perjury. Thus, respondent concludes, all available evidence shows that appellant and her  
21 husband resided at the Piute Creek home.

22           Respondent contends that neither IGRA nor the Compact expressly prohibit or preempt  
23 income tax on per capita distributions when members of tribes reside within the state outside of their  
24 tribe's reservations. Respondent asserts that *Bracker, supra*, acknowledges nondiscriminatory state law  
25 applies to Indians outside of the reservation, absent express contrary federal law. Respondent further  
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27 <sup>7</sup> Respondent dismisses appellant's assertion that she did not apply for the homeowner's exemption. Respondent maintains  
28 that although appellant and her husband may not have applied for it, they should have been aware of they were receiving the  
exemption because it was shown on the annual property tax statement.

1 contends that appellant’s argument of implied preemption is without merit because IGRA only applies to  
2 tribes, not members of tribes. With respect to section 10.3(c) of the Compact, respondent asserts that it  
3 is expressly limited to gaming facility employees, provides for limited tax withholding of employees  
4 who are not tribe members, and does not address the tax exempt status of per capita distributions.

5 Respondent further argues that neither IGRA nor any other statute expressly exempts per  
6 capita distributions to tribe members from state taxation. Respondent also argues that the Board has  
7 determined that a tribe is an association taxable as a corporation, and the per capita distributions  
8 constitute income from an intangible sourced to the residence of the tribe members.

9 Respondent also argues that subjecting tribe members who live in California outside of  
10 their respective tribe’s reservation to state income tax does not interfere with the self-governance of the  
11 tribes. With regard to appellant’s argument that subjecting members of the tribe who live outside of  
12 their reservation to tax on their per capita distributions results in unequal payments to tribe members in  
13 violation of the RAP, respondent argues that the RAP does not require each member of the tribe to  
14 receive equal *net* payments. Respondent further argues that if appellant’s net payments are less than that  
15 of a member of the tribe who resides on the tribe’s reservation, that is the result of appellant’s place of  
16 residence, rather than from any state interference with tribal self-governance. Lastly, respondent argues  
17 that income tax imposed on the per capita distributions of tribe members residing outside of their  
18 reservations does not constitute an “indirect tax” on the tribe, because it is not imposed on the tribe itself  
19 or all members of the tribe.

20 Respondent notes that appellant and her husband have claimed that federal laws render  
21 R&TC section 17041 unenforceable as applied to appellant. Respondent contends that, under  
22 Section 3.5 of Article III of the California Constitution, and the Board’s precedents, the Board cannot  
23 declare that R&TC section 17041 is unenforceable due to the application of the U.S. Constitution or the  
24 application of federal laws, unless an appellate court rules otherwise.

#### 25 STAFF COMMENTS

26 Staff notes that this appeal presents the factual issue of whether appellant resided on her  
27 tribe’s reservation during the years at issue. It appears to staff that respondent has provided a rational  
28 basis for its determination that appellant resided outside of the reservation during the period in question.

1 As a consequence, appellant has the burden of demonstrating that respondent erred in determining that  
2 appellant resided outside of the reservation.

3 Appellant also argues that her per capita distributions should not be subject to tax, even if  
4 she resided outside of her tribe's reservation. However, in the opinion of Appeals Division staff,  
5 *Chickasaw Nation, supra*, and related decisions indicate that, if appellant resided outside of her tribe's  
6 reservation, her income is subject to tax.

7 The issue of whether a state statute is preempted by federal law is a constitutional issue.  
8 (U.S. Const., art. VI, cl. 2.) As noted in Applicable Law, the California Constitution prohibits this  
9 Board from refusing to enforce a statute on the basis that it is preempted by federal law, unless an  
10 appellate court has already made such a determination, and this Board has a long-established policy of  
11 declining to consider such issues. (Cal. Const., art. III, § 3.5; *Appeal of Aimor Corporation, supra*.)  
12 Both parties should be prepared to discuss this provision of the California Constitution and this Board's  
13 policy of declining to consider such issues. In this connection, the parties should be prepared to discuss  
14 whether an appellate court decision has made a determination that the enforcement of R&TC  
15 section 17041 under the circumstances present in this appeal is preempted by federal law. The parties  
16 may wish to discuss whether there is any decision or other authority that has permitted a state agency to  
17 refuse to enforce a state statute on the basis of an appellate court decision that did not expressly rule on  
18 the specific state statute in question. If the Board determines that no appellate court decision prohibits  
19 the enforcement of R&TC section 17041 in the circumstances that the Board finds to be present in this  
20 appeal, the Board must sustain the FTB's action. Appellant could then pay the tax and file a refund suit  
21 so that the courts could decide the issue.

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