

Franchise Tax Board Tribal Consultation Session Report
September 18, 2013

The Franchise Tax Board (FTB) requested Tribal Leader comments in response to the Initial Discussion Paper entitled "Approach to Determining Whether a Tribal Member is "Living On" or "Living Off" His or Her Tribe's Reservation for California Personal Income Tax Purposes." https://www.ftb.ca.gov/law/intParty/ipm_notice_tribal_leaders_091813.pdf

FTB received oral comments on the day of the consultation session and written comments during the 45-day period following the consultation session. Specific responses were received from seven tribes, California Indian Legal Services, and two representatives of tribal member interests, George Forman and Craig Houghton. The seven tribes are as follows: Elk Valley Rancheria; Ewiiapaayp Band of Kumeyaay Indians; Hoopa Valley Tribe; San Manuel Band of Serrano Mission Indians; Rincon Band of Luiseno Indians; Sherwood Valley Rancheria; and Shingle Springs Band of Miwok Indians. Mr. Forman indicated he provides counsel to the following tribes: the Morongo Band of Mission Indians, the Soboba Band of Luiseno Indians, the Chahuilla Band of Mission Indians, the Cachil Dehe Band of Wintun Indians of the Colusa Community, the Robinson Rancheria Band of Pomo Indians, and the Bear River Band of Rohnerville Rancheria.

The Initial Discussion Paper dealt with two issues:

1. When will a Tribal Member be treated as "living on" or "living off" his or her own tribe's reservation for purposes of imposing the California personal income tax if the Tribal Member has been "granted the right to occupy" a dwelling located on the tribe's reservation and owns, rents, or leases a second dwelling located off the tribe's reservation?
2. If a Tribal Member is "living on" his or her tribe's reservation, when should a temporary absence alter this status?

In consideration of these issues, the FTB requested Tribal Leader comments regarding two questions:

1. What documentation and evidence is sufficient to establish that a Tribal Member has the right to occupy a specific dwelling?
2. If a Tribal Member has the right to occupy two or more dwellings, what kind of documentation and evidence will be considered in order to determine the dwelling with which the Tribal Member has maintained his or her "closest connections"?

Tribal leaders and their representatives provided input that can be grouped into the following four major categories:

1. Requests for further dialogue;
2. Evidentiary concerns, and workability of the closest connection factors;

3. Matters pertaining to Publication 674 and requests for a form specific to Tribal Members; and
4. Opportunities for outreach and education.

Requests for Further Dialogue

Many of those providing comments indicated that they were pleased that FTB has opened this dialogue. They indicated FTB's attempt to provide clarification and consistency in the area of taxation of Tribal Members is a good first step. A number of Tribal Leaders expressed a desire for additional meetings and continued cooperation between the parties. At least one commenter was in favor of the formation of a working group of Tribal Leaders to deal with Tribal Member taxation issues.

While we are happy to meet with Tribal Leaders in regards to specific issues affecting their individual tribes, in matters of general application, in consideration of transparency and fairness, we feel it would be best to work with all tribes together.

FTB is also studying a number of other suggestions including examining the frequency of examinations of individual Tribal Members, additional training of staff members to include information received through the tribal comments, and the revision of audit procedures for tribal issues.

Evidentiary Concerns and the Workability of the Closest Connection Factors

The majority of the tribes expressed concern that a test derived from residency-based factors, such as the test enumerated in the State Board of Equalization decision in *Appeal of Stephen Bragg*, 2003-SBE-002, May 28, 2003,¹ would not be representative of the unique circumstances of those living in tribal communities. One commenter indicated he was in favor of the test and one tribe was concerned that an entirely new test was being created. FTB would like to clarify that a new test is not being created; rather, FTB intends to issue guidance regarding the factors considered on who resides on Tribal country for California income tax purposes, including those factors the Tribal Leader comments have encouraged FTB to consider.

The strongest message FTB received as to these factors was for the need for flexibility. It is evident that the types of documentation Tribal Members will be able to provide will vary greatly from tribe to tribe. We agree with this message, as the closest connections test is a facts and circumstances examination, and thus must be based upon the facts and circumstances of each individual Tribal Member.

Questions were also raised as to whether this test will create an additional recordkeeping burden upon Tribal Members. Specifically, a concern was raised that Tribal Members will have to maintain logs of their time on and off the reservation. FTB does not seek to require the recordkeeping burden of maintaining calendar logs by Tribal Members. Another specific concern is that document requests under the closest connections test will be more invasive. However, in eliciting Tribal Member comments, FTB is actually seeking to reduce requests

¹ The decision can be found at https://www.boe.ca.gov/legal/pdf/Bragg_rs.pdf.

for private information. This is because the Tribal Leaders' comments have given FTB a greater insight into the lives of Tribal Members and as a result have provided avenues for understanding and additional training regarding life on a reservation which should assist FTB in reducing the amount of unnecessary and unhelpful document requests.

Regarding specific factors, there was definitely a consensus in the comments that utility statements are often difficult to provide and may be irrelevant because utilities are often paid by the tribe and not the Tribal Member. There was also agreement that the extent to which Tribal Members often live in multigenerational homes should be taken into consideration. Also raised was the idea that cell phone records may not be an accurate reflection of a Tribal Member's place of residence due to their mobile nature. Many leaders indicated that a Tribal Member's correspondence address may not always be an accurate reflection of a Tribal Member's primary residency due to various delivery problems and the need to maintain a Post Office box off the reservation. There was also concern regarding the subjective nature of examining the comfort level of each home.

FTB would like to thank the Tribal Leaders for their input and their willingness to work together with us so that FTB may reach the right result. A great example of this was one tribe's suggestion that an additional factor be added that reflects a Tribal Member's involvement in the tribal community.

Re: Temporary Absence

Additional comments were received regarding the issue of temporary absences. Tribal Leaders would like clarification regarding lengths of absences and which situations qualify as temporary. Tribal Leaders referenced particular situations such as Tribal Members who must leave the reservation for medical attention that is not available on the reservation, Tribal Members who are away for school, and Tribal Members who are incarcerated.

Matters Pertaining to Publication 674 and Requests for a Form Specific to Tribal Members

The Tribal Leader comments also contained a number of references to Publication 674 and to the need for a new form specific to Tribal Members. One commenter indicated Publication 674 provides adequate guidance, while another stated it requires burdensome recordkeeping. Several commenters expressed an interest in the development of a new form somewhat like Department of Motor Vehicles Form REG 256A.

In relation to the burden of proof regarding primary residency, a number of tribes stated they are in favor of an individual self declaration, some stated this statement should be made under penalty of perjury, and another stated that the self declaration could be rebuttable using the closest connections factors. The majority of the commenters indicated some form of tribal certification should be sufficient to verify primary residence on the reservation. One commenter argued that if a tribal declaration is in question, then the FTB should look to the closest connection factors. Another commenter asserted that no additional examination should occur once FTB receives a tribal declaration.

FTB is currently in the process of developing a Tribal Member specific form that would allow authorized Tribal Members to certify Tribal Member's primary residence on the reservation. It is anticipated that a draft of the form will be released to Tribal Members and other interested parties for review and comment prior to its finalization.

Opportunities for Outreach and Education

Some comments were received suggesting FTB follow particular courses of action that either do not comply with the law FTB is required to administer or involve matters that do not fall within FTB's authority. This has revealed to us areas in which we need to increase our outreach and education efforts. One such example is the recent addition to our website of a page featuring information specific to Tribal Members.

(https://www.ftb.ca.gov/individuals/Native_Americans/index.shtml)

There appears to be some disagreement about the requirements set forth in *McClanahan v. Arizona State Tax Commission* (1974) 411 U.S. 164. As is well established by this decision of the United States Supreme Court, a Tribal Member must reside on his or her reservation to be exempt from taxation. Yet, some commenters disagree that a Tribal Member must live in Indian Country at all to be exempt from state taxation, and others disagree that *McClanahan* is the only source of authority for this exemption. Further, one commenter disagreed with FTB's interpretation that a Tribal Member must primarily reside on the reservation to be exempt from taxation. Instead, it was suggested that the exemption should also extend to Tribal Members whose secondary address is on the reservation.

On a related issue, there were a number of calls for the creation of some form of a rebuttable presumption. The types of presumptions varied, but some examples included a presumption in favor of the Tribal Member living on the reservation unless there is evidence otherwise, a presumption with proof of tribal enrollment, and a presumption in favor of the primary residence on the reservation if a form is completed in which the Tribal Member certifies Tribal Membership, primary residence on the reservation, and that the income is reservation-source.

Additionally, concern was expressed for Tribal Members who are unable to reside on a reservation due to insufficient land or lack of housing. One suggestion was that the standard for the exemption be extended to those who live near the reservation.

Also raised was the requirement that Tribal Members reside within the boundaries of their own tribe's reservation. In particular, one commenter indicated disagreement with the California Court of Appeal's decision in *Mike v. Franchise Tax Bd.* (2010) 182 Cal. App. 4th 817, and other commenters would like additional considerations made for Tribal Members who have resided on their spouse's reservation.

FTB lacks the authority to ignore legal precedent as established by the United States Supreme Court, the California Supreme Court, or courts of appellate jurisdiction. As a result, FTB is required to follow generally accepted interpretations of *McClanahan* and *Mike*. Furthermore, as an administrative agency, FTB does not have the authority to appropriate the powers of the Legislature and create new law, including any possible changes to the

Court's ruling in *McClanahan*, or to create presumptions. FTB is only authorized to enforce the law as it is currently written. Statutory changes such as those suggested by some commenters are the province of the Legislature.

The issue of what has been deemed double taxation was raised at both the consultation session and in the comments. In researching this matter, FTB contacted the Governor's Senior Advisor for Tribal Negotiations, Joe Dhillon. Mr. Dhillon explained that Tribes may make payments to the State subject to their individual gaming compacts, but these payments are not taxes. Compacts are voluntary agreements that are approved by the Federal government to be consistent with federal law, which prohibits the State from imposing taxes on Tribes in exchange for the right to offer Class III games.² Compacts may involve, and have involved, payments from the Tribe to the State which have been determined by the Department of the Interior to be permissible and something other than a tax.³

Next Steps

- FTB will draft a Legal Ruling on the two specific issues discussed in the September 2013 session which are the subject of this Report
- FTB will draft a Declaration Form which would allow authorized Tribal Leaders to certify Tribal Member's primary residence on the reservation
- Hold Tribal Consultation Session to answer questions about the draft Legal Ruling and to solicit feedback and comment on the draft Declaration Form and its use
- Seek comments from the tribal community on other topics of interest for future Consultation Sessions with the FTB

² 25 U.S.C. § 2710(d)(4).

³ See Department of Interior 2004 Amended Compact Approval Letter.