



04.22.15

LEGAL RULING 2015-01

Subject: Determining Whether a Tribal Member Is "Living On" or "Living Off" His or Her Tribe's Reservation for California Personal Income Tax Purposes

BACKGROUND

Questions have arisen as to when an individual who is an enrolled member of a federally recognized Indian tribe (hereinafter "Tribal Member") is considered "living on" or "living off" his or her own tribe's reservation for purposes of the California personal income tax.¹ This legal ruling will address the following issues:

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"² a dwelling located on the tribe's reservation and owns, rents, or leases a second dwelling located off the tribe's reservation?
 - a. What documentation and evidence is sufficient to establish that a Tribal Member has the right to occupy a specific dwelling?
 - b. If a Tribal Member has the right to occupy two or more dwellings, what kind of documentation and evidence will be considered to determine the dwelling with which the Tribal Member has maintained his or her "closest connections"?
2. If a Tribal Member is "living on" his or her tribe's reservation, when should a temporary absence alter this status?

¹ The United States Supreme Court has used the terms "living on" and "residing on" synonymously (*Oklahoma Tax Comm'n v. Sac and Fox Nation* (1993) 508 US 114, 123); as "living on" is used in most FTB publications, including FTB 674 (Rev. 04-2010), "living on" will be used throughout this legal ruling.

² For purposes of this legal ruling, the term "granted the right to occupy," recognizes that in many circumstances a Tribal Member is prevented from owning, renting, or leasing property on his or her reservation, yet has been granted possession akin to the same. Furthermore, "granted the right to occupy" means more than being an invited guest of another person or occupying transient accommodations, as defined by California Civil Code section 1940. "Granted the right to occupy" infers a legitimate property right held by a Tribal Member.

FACTS

For purposes of the following scenarios, assume the Tribal Member is a member of a federally recognized Indian tribe and receives income from sources within the same Indian Country where he or she is a tribal member.

Situation 1: Tribal Member A currently has the right to occupy a residence on his tribe's reservation. He also owns a residence located outside of Indian Country. Tribal Member A has provided the following documents in relation to his closest connections:

- A utility bill indicating he has maintained an account with the company, but not indicating for which address;
- Mortgage documents such as a Truth in Lending Declaration or a Deed of Trust for the off-reservation property; and
- An insurance statement indicating coverage for the off-reservation property.

Assessor records indicate the off-reservation residence contains 5 bedrooms and 5 bathrooms. No information has been provided regarding the size of the reservation property, who resides there, or how many people reside there.

Situation 2: Tribal Member B currently has the right to occupy a residence on her tribe's reservation. She also owns a residence located outside of Indian country. Tribal Member B has provided the following documents in relation to her closest connections:

- Bank account statements addressed to the reservation property;
- Department of Motor Vehicles registration at the reservation address;
- A personal account of her regular participation in tribal activities on the reservation;
- A statement of fact signed under penalty of perjury from an individual who has personal knowledge she resided on the reservation during the time period at issue; and
- A homeowner's declaration on an insurance policy insuring the reservation property.

Situation 3: Tribal Member C currently resides on his tribe's reservation, but will be attending a university located off the reservation in the fall. He will be living near campus during the school year, but will be returning to the reservation during the summer.

Situation 4: Tribal Member D currently resides on her tribe's reservation, but makes plans to substantially renovate or rebuild her home. For a six-month period, due to the ongoing construction, the Tribal Member cannot inhabit the on-reservation home and therefore lives in a residence located outside of the tribe's reservation. Soon after the construction is completed, the Tribal Member moves back into the renovated home

located on the tribe's reservation.

LAW & ANALYSIS

Generally, a Tribal Member residing within the geographical boundaries of California is a California resident³ and is subject to California personal income taxes on his or her entire taxable income.⁴ However, under *McClanahan v. Arizona State Tax Commission* (1974) 411 U.S. 164, a Tribal Member who is "living on" his or her own tribe's reservation is exempt from paying a state's personal income tax on income earned from sources within the boundaries of his or her own tribe's reservation.⁵

Neither the courts nor the legislature has provided meaningful guidance as to how the Franchise Tax Board ("FTB") should determine whether a Tribal Member is "living on" his or her own reservation. This inquiry is further complicated when a Tribal Member has the right to occupy a dwelling on his or her reservation and owns, rents, or leases a second dwelling located off of his or her tribe's reservation (collectively referred to as "subject properties").

Application of the Closest Connection Test

The FTB will apply the "closest connections test" articulated in numerous Board of Equalization ("BOE") decisions, including the *Appeal of Stephen Bragg*, 2003-SBE-003, May 28, 2003, to determine whether a Tribal Member is "living on" or "living off" his or her own tribe's reservation. The *Appeal of Stephen Bragg* involved a taxpayer who filed as a California resident through 1992. Beginning in 1993, appellant and his wife filed as Arizona residents. He later amended his 1993, 1994, and 1995 returns to reflect California residency status. Appellant was born in California and married in 1970. He and his wife built a custom home in Temecula in 1985, which he conceded he attempted to sell in 1992. They had two children who attended California schools, and appellant worked in his family's business in Long Beach from 1965 until 1988, when he sold his interest in the family business in anticipation of becoming a rancher. Appellant began ranching operations in California and Arizona in 1989. On April 1, 1993, he moved to an Arizona ranch property. At the same time he maintained real

³ See *Nevada v. Hicks* (2001) 533 US 353, 361-362 ("[I]t is now clear [that] an Indian reservation is considered part of the territory of the State"). Also, it is important to note that a Tribal Member who resides in California, regardless of whether he or she lives on a reservation, is a California resident and must file a California Resident Tax Return on Form 540. If he or she has tribal income which is exempt from California tax, that income should be excluded using Schedule CA.

⁴ Native Americans who are members of the Armed Forces are subject to special rules under California Revenue and Taxation Code section 17140.5, which provides that the military wages of a Tribal Member are exempt from California personal income tax when the income is compensation paid to an active member of the Armed Forces where the Tribal Member's residence was within his or her tribe's "Indian Country" at the time of entering service, and the Tribal Member has not elected to abandon such residence.

⁵ *McClanahan*, at 168, frames the issue as "may [a State] tax a reservation Indian for income earned exclusively on the reservation."

property interests in California and Arizona, as well as bank accounts and business interests in both states. He returned to California for all personal services provided by, among others, doctors, dentists, accountants, and lawyers. He also worked 70- to 90-hour weeks on the ranch and conceded that ranching was his full-time employment.

The question before the Board was whether appellant, who clearly had ties to both states, remained a California resident; specifically, was his presence in Arizona for other than a temporary or transitory purpose under Revenue and Taxation Code section 17014(a). Case law indicates that it is not enough to look to an individual's subjective intent. Instead, the FTB must examine the objective facts.⁶ Moreover, when an individual has contacts with more than one state, the state with which the individual maintains the closest connections is the state of residency.⁷ These contacts are important objective indications of whether the individual's presence in or absence from a state is for a temporary or transitory purpose.⁸ In *Bragg*, the Board provided a list of connections which may be helpful, but is not exhaustive. *Bragg* instructs that the weight to be applied to any particular contact should be based on the totality of the circumstances.

The Board determined that, beginning in 1988, appellant was laying the ground work for a permanent move to Arizona to achieve his lifelong dream of becoming a rancher. Although his family joined him briefly in 1993, they returned to California in 1994. He stayed in Arizona and filed for divorce from his wife. He originally filed for federal and state purposes as an Arizona resident for 1993. He maintained bank accounts, real property, and business connections in both states. However, he indicated he went to Arizona for a 120-day period to work on the ranch and there was no evidence he returned to California or intended to do so. Further, he indicated ranching was his exclusive employment in 1993. Thus, based upon an analysis of appellant's connections and specific circumstances, he had stronger contacts with Arizona and was found to be outside California for other than temporary or transitory purposes in 1993.

The facts in *Bragg* may be considered analogous to the issue of whether a Tribal Member is "living on" his or her reservation, or once it is determined that a Tribal Member is "living on" his or her own tribe's reservation, whether the Tribal Member will continue to be treated as "living on" his or her own tribe's reservation while "temporarily" absent from his or her tribe's reservation.

Issue One: "Living on" the Reservation

Under *McClanahan*, a Tribal Member qualifies for an exemption from state personal income taxation when the three following conditions are satisfied:

⁶ *Appeal of Zupanovich*, 76-SBE-002, Jan. 6, 1976.

⁷ Cal. Code Regs., tit. 18, section 17014, subd. (b); *Appeal of Berner*, 2001-SBE-006-A, Aug. 1, 2002.

⁸ *Appeal of Broadhurst*, 76-SBE-036, Apr. 5, 1976.

- 1) The individual must be a Tribal Member of a federally recognized Indian tribe;
- 2) The individual must live in his or her tribe's Indian Country (which includes reservations, dependent Indian communities, and Indian trust allotments);⁹ and
- 3) The income must be from sources within the same Indian country where the taxpayer lives and where he or she is a tribal member.

However, as mentioned above, neither *McClanahan* nor its progeny consider whether or not a Tribal Member is living on his or her reservation when he or she has been granted the right to occupy a home located on his or her reservation and also owns, leases, or rents a home located off of his or her reservation. Further, there is no California statute or case that provides a test for determining in which of two or more California dwellings the Tribal Member resides. To resolve this question, as discussed above, the FTB will apply a "closest connections test." The factors relevant in determining a Tribal Member's closest connections, to the extent they are probative, may be evidenced by whichever of the following are present individually or in combination:

- The location of all residential property that the Tribal Member either owns or has been granted the right to occupy, and the approximate sizes and values of each of the residences;
- The address used for correspondence with government agencies, financial institutions, and the like;
- Utility and service provider usage, if applicable;
- Declarations as defined by section 116.130 of the California Code of Civil Procedure specifically, a written statement signed by an individual which includes the date and place of signing, and a statement under penalty of perjury under the laws of this state that its contents are true and correct.
- The location wherein the taxpayer's spouse and children reside;
- The location wherein the taxpayer's children attend school;
- The origination point of the taxpayer's checking account and credit card transactions;
- The location wherein the taxpayer maintains memberships in social, religious, and professional organizations;
- The address at which the taxpayer registers his or her motor vehicles; and
- The address at which the taxpayer maintains a driver's license.

Under the "closest connections test," if it is determined that a Tribal Member's closest connections are with a dwelling or dwellings on his or her own tribe's reservation, he or she will be deemed to be "living on" his or her tribe's reservation. But if a Tribal Member's closest connections are with a dwelling located outside his or her own tribe's reservation, then he or she will be deemed to be "living off" the tribe's reservation.

⁹ 18 U.S.C. § 1151.

Where a Tribal Member is "living off" the tribe's reservation, all of the Tribal Member's income, including the income from sources on a reservation, is subject to California personal income tax.

It should also be emphasized that the types of documentation Tribal Members will be able to provide will vary greatly from tribe to tribe. As the closest connections test is a facts and circumstances examination, it will be based upon the facts and circumstances of each individual Tribal Member.

Issue Two: Temporary Absences

If a Tribal Member is determined to be "living on" his or her tribe's reservation, he or she will continue to be treated as "living on" his or her tribe's reservation even when temporarily absent from the tribe's reservation. However, if the Tribal Member leaves his or her tribal reservation for other than a temporary purpose, he or she thereupon ceases to be "living on" his or her reservation. Similarly, should a Tribal Member be determined to be "living off" his or her tribe's reservation, he or she will continue to be treated as "living off" his or her tribe's reservation as long as his or her presence on the tribe's reservation is for a temporary purpose. This treatment is consistent with the treatment of a California resident under California Code of Regulations, title 18, section 17014, subsection (a).

Furthermore, a Tribal Member's absence for a temporary purpose for any part of the taxable year can include, but is not limited to, "passing through" land outside the tribe's reservation or an absence from the tribe's reservation for a brief rest, a vacation, or to complete a particular transaction, perform a particular contract, or perform a particular engagement. This treatment is consistent with the treatment of a California resident under California Code of Regulations, title 18, section 17014, subsection (b).

Analysis

Situation 1: Tribal Member A has only provided documents, specifically insurance and mortgage documents, demonstrating closest connections to the off-reservation home. He has not provided any information regarding his connections to the reservation property. He has also provided a utility statement lacking a service address. This document does not demonstrate a connection to either address.

Situation 2: Tribal Member B has provided documents demonstrating she receives important correspondence at the address located on the reservation. (FTB acknowledges that not all tribal members will be able to provide utility bills or any correspondence addressed to the reservation address because either their tribe provides utilities for all members or the reservation does not have street addresses or reliable mail service. In such cases, this factor will not be examined.)

By providing as many of the above-listed documents pertaining to her particular circumstances as she can, Tribal Member B has provided evidence establishing her

closest connections to the reservation home, such as the receipt of important correspondence at the reservation address, a regular presence and continued tie to the reservation home due to activities on the reservation, and/or a sworn statement provided with sufficient detail by an individual to establish that he or she has personal knowledge of the location of the taxpayer's actual residence during the year(s) at issue .

Situation 3: Tribal Member C's closest connections are with the home located on his tribe's reservation, and therefore he is properly considered "living on" his tribe's reservation. Tribal Member C's departure from the tribe's reservation during the school year is treated as a temporary absence, so that he is properly treated as "living on" the reservation during the school year. As a result, Tribal Member C's income received from his tribe is not subject to California personal income tax.

Situation Four: Tribal Member D's closest connections are with the home located on her tribe's reservation and, therefore, she is considered "living on" her tribe's reservation. Tribal Member D's departure from the tribe's reservation during the period of construction is treated as a temporary absence. As a result, Tribal Member D is properly treated as "living on" the reservation during the renovation period and the income received from her own tribe is not subject to California personal income tax. A situation that would be treated similarly is one in which a Tribal Member receives medical care off the reservation.

HOLDINGS

Situation 1: Tribal Member A's closest connections are not to the reservation residence. Tribal Member A's income received from his tribe is subject to California personal income tax.

Situation 2: Tribal Member B's closest connections are to the reservation residence. Tribal Member B's income received from her tribe is not subject to California personal income tax.

Situation 3: Tribal Member C's closest connections are to the reservation residence. Tribal Member C's income received from his tribe is not subject to California personal income tax.

Situation 4: Tribal Member D's closest connections are to the reservation residence. Tribal Member D's income received from her tribe is not subject to California personal income tax.

DRAFTING INFORMATION

The principal author of this ruling is Maria Brosterhous of the Franchise Tax Board Legal Division. For further information regarding this ruling, contact Ms. Brosterhous at the Franchise Tax Board Legal Division, P.O. Box 1720, Rancho Cordova, California 95741-1720.

