

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF, )  
 )  
J. ACOSTA and M. CASTRO, ) OTA NO. 20116978  
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 )  
 APPELLANT. )  
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TRANSCRIPT OF ELECTRONIC PROCEEDINGS

State of California

Wednesday, February 23, 2022

Reported by:  
ERNALYN M. ALONZO  
HEARING REPORTER

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Transcript of Electronic Proceedings,  
taken in the State of California, commencing  
at 9:33 a.m. and concluding at 10:15 a.m. on  
Wednesday, February 23, 2022, reported by  
Ernalyn M. Alonzo, Hearing Reporter, in and  
for the State of California.

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APPEARANCES:

Panel Lead: ALJ KENNY GAST

Panel Members: ALJ JOSHUA LAMBERT  
ALJ CHERYL AKIN

For the Appellant: J. ACOSTA  
M. CASTRO

For the Respondent: STATE OF CALIFORNIA  
FRANCHISE TAX BOARD  
  
ERIC BROWN  
MARIA BROSTERHOUS

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I N D E X

E X H I B I T S

(Appellant's Exhibits 1-20 were received at page 6.)  
(Department's Exhibits A-M were received at page 7.)

P R E S E N T A T I O N

	<u>P A G E</u>
By Mr. Acosta	9
By Mr. Brown	21

C L O S I N G S T A T E M E N T

	<u>P A G E</u>
By Mr. Acosta	29
	33
By Mr. Brown	31

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California; Wednesday, February 23, 2022

9:33 a.m.

JUDGE GAST: This is the appeal of Acosta and Castro, OTA Case Number 20116978. Today is February 23rd, 2022, and the time is approximately 9:33 a.m. We are holding this hearing electronically with the agreement of all the parties.

My name is Kenny Gast, and I'm the lead Administrative Law Judge for this appeal. With me today are Administrative Law Judges Josh Lambert and Cheryl Akin.

I'm going to turn over to the parties. Can you please identify yourselves by stating your name for the record, beginning with Appellants.

MR. ACOSTA: Judge Gast, this is Juan Acosta, Appellant.

JUDGE GAST: And I'd like to ask Ms. Castro as well to state her name.

MS. CASTRO: Yes. This is Michelle Castro, also an Appellant.

JUDGE GAST: Thank you.  
And Franchise Tax Board.

MR. BROWN: I'm Eric Brown tax counsel with Franchise Tax Board.

1 MS. BROSTERHOUS: I'm Maria Brosterhous for the  
2 Franchise Tax Board.

3 JUDGE GAST: Okay. Thank you very much.

4 Now, I'm going to restate the issue.

5 And, Mr. Acosta, I understand you submitted what  
6 you believe is the issue statement. The panel will  
7 consider that, but I'm going to just state the issue as  
8 I've stated in the minutes and orders just for purposes of  
9 our hearing today.

10 So the issue today is whether OTA has  
11 jurisdiction to decide whether 49 USC Section 11502(a), a  
12 federal statute, preempts or otherwise prohibits  
13 California from taxing resident Appellant-wife's community  
14 property share of nonresident Appellant-husband's  
15 out-of-state railroad wages 2016, 2017, and 2018 tax  
16 years; and, if OTA has jurisdiction, whether California is  
17 preempted.

18 Now, the parties submitted exhibits for this  
19 appeal. The Appellants submitted Exhibits 1 through 20,  
20 and FTB did not object to the admissibility of these  
21 exhibits. Therefore, these exhibits are entered into the  
22 record.

23 (Appellant's Exhibits 1-20 were received  
24 in evidence by the Administrative Law Judge.)

25 And FTB provided Exhibits A through M.

1 Appellants have not objected to the admissibility of these  
2 exhibits. Therefore, these exhibits are entered into the  
3 record as well.

4 (Department's Exhibits A-M were received in  
5 evidence by the Administrative Law Judge.)

6 Okay. Now, moving on to the parties present --

7 Okay. Mr. Acosta?

8 MR. ACOSTA: Yes. I have a question concerning  
9 the exhibits. When I submitted my alternative statement  
10 of the issue of the case, I also submitted an additional  
11 exhibit, which we had not discussed during your  
12 preconference hearing, the preconference meeting. It is a  
13 decision from the Worker's Compensation Appeal Board,  
14 Enrique versus Couto Dairy and Zenith Insurance Company.  
15 But I did submit a copy of that in my submission to the  
16 additional exhibits that we had discussed, as well as a  
17 restatement of the issues in the case.

18 JUDGE GAST: Yes. The panel has received that  
19 case. We will consider it when we decide the case here.  
20 I didn't mark it as an exhibit because you hadn't done  
21 that, but it will be considered by the panel. So we have  
22 that.

23 MR. ACOSTA: Thank you. Thank you, Your Honor.

24 JUDGE GAST: Thank you.

25 Okay. Why don't we move on to the parties'

1 presentations. In my minutes and orders I said that I  
2 would go for five minutes. I'm almost about up here. And  
3 then I will turn it over to Appellants who will have 15 to  
4 20 minutes, and then FTB will have 5 to 10 minutes. Then  
5 I'll turn it over to the panel with any questions, and  
6 then Appellants will have a rebuttal for about 5 minutes.  
7 And then I'll turn it over again to the panel before  
8 concluding the hearing if they have any questions.

9 Before we begin, though, Mr. Acosta, you had  
10 mentioned that you will not be testifying to any facts  
11 here, and same with Ms. Castro; is that correct? The  
12 reason I ask is -- so I don't need to swear you in?

13 MR. ACOSTA: I think that's correct. I think the  
14 one fact that could have been possibly at issue is  
15 stipulated to by the Franchise Tax Board and that is the  
16 issue of my domicile and residency, and I don't contest to  
17 that --

18 JUDGE GAST: Okay.

19 MR. ACOSTA: -- as I understand it.

20 JUDGE GAST: Okay. So I'm not going to swear you  
21 in. If you do start talking about facts, I might stop you  
22 and ask you if you want to be sworn in. But for now if  
23 you're just presenting legal argument, I'm not going to  
24 swear you in. And whenever you're ready, please begin.  
25 You will have 15 to 20 minutes.



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MR. ACOSTA: Thank you, Judge Gast.

PRESENTATION

MR. ACOSTA: Let me first cover the five topics that I'll present to you today. First would be the Amtrak Act, of course, the primary federal statute in this case, and Senate Bill 1142, otherwise known as Revenue & Taxation Code 17951(b)(2). Thirdly, I will discuss FTB's misinterpretation and misreading of Section 17951(b)(2) and explain how they have misread the statute. Fourthly, we'll take a deeper dive into the Office of Tax Appeals' jurisdiction and authority over this matter, and then lastly, some final thoughts.

So let's first look at the Amtrak Act because it is an integral aspect of the issue of jurisdiction, as well as integral to understanding the law and its relation to OTA's jurisdiction. In adopting the Amtrak Act, Congress made clear that no part of protected railroad compensation could be subject to the tax laws of any state except the railroad employee's state of residence. The language of the statute is clear and unambiguous without any exception for any state's rule of assignment or tax scheme.

In relevant part, USC Title 49 Section 11502(a) says, quote, "No part of the compensation paid by a rail

1 carrier to an employee who performs regularly assigned  
2 duties in more than one state, shall be subject to the  
3 income tax laws of any state other than the state of the  
4 employee's residence."

5 The Amtrak Act legislative history makes it  
6 abundantly clear that Congress was concerned about the  
7 prior system and practice of the federal rule of  
8 assignment, which was confusing and subjected railroad  
9 workers to a variety of state tax assignment schemes and  
10 liability undermining the clear legislative interest that  
11 Congress has in railroad economics and, specifically in  
12 this instance, railroad compensation. So in *Hisquierdo*  
13 versus *Hisquierdo*, the U.S. Supreme Court highlighted this  
14 concern in a case involving claims against railroad  
15 retirement benefits based on community -- California  
16 community property law.

17 The court underscored that Congress explicitly  
18 protected railroad retirement benefits against garnishment  
19 and tax laws without exception for claims based on  
20 community property law. And to read the law otherwise  
21 would undermine Congress' strong interest in railroad  
22 worker compensation. So Revenue & Taxation Code  
23 Section 17951(b)(2), which if I may, I'll refer to as SB  
24 1142, because the other thing is a mouthful. SB 1142,  
25 says, quote, "The gross income of a nonresident taxpayer

1 does not include income not subject to the personal income  
2 tax law by operation of the following federal law," and it  
3 cites the Amtrak Act.

4 So FTB construe 17951(b) (2) to simply say  
5 compliance with the Amtrak Act means only that California  
6 cannot tax me as a nonresident and that FTB is, therefore,  
7 in compliance with SB 1142, and as much as it is only  
8 taxing my wife's community property share of that railroad  
9 compensation. So there's several problems with the FTB's  
10 contorted interpretation of the statute.

11 First, the legislative history of 17951(b) (2)  
12 makes clear that the California legislature understood  
13 full compliance with the federal law, included adherence  
14 to the supremacy clause of the United States Constitution,  
15 a recognition of the Amtrak Act barred the application of  
16 state tax law to any part of the nonresident railroad  
17 compensation. So it's not simply that the FTB is barred  
18 from taxing me, rather, the federal law as acknowledged by  
19 the California legislature, bars FTB from subjecting  
20 nonresident railroad compensation to any aspect of  
21 California tax law.

22 SB 1142 is expressed recognition this  
23 compensation is not subject to California personal income  
24 tax law. The reference in RTT 17951(b) (2) to income not  
25 subject to personal income tax law by operation of federal

1 law, relates directly to and acknowledges the operative  
2 portion of the federal law that which says no part of the  
3 protected railroad compensation shall be subject to the  
4 income tax laws of any state other than the state of my  
5 residence.

6 So FTB misreads -- grossly misreads the import of  
7 SB 1142 by asserting the statute is inapplicable to Castro  
8 because she is not a nonresident. However, by its own  
9 terms, 17951(b)(2) recognizes any railroad compensation  
10 covered by the act is income not subject to California  
11 personal income tax law. So here is the key point. The  
12 Amtrak Act protects the compensation paid to the  
13 nonresident railroad employee from application of state  
14 tax law. 17951(b)(2) acknowledges that compensation is  
15 protected from California personal income tax law.

16 Castro's residency is immaterial. And FTB's  
17 reading of the statute to the contrary would essentially  
18 create an exception to the Amtrak Act's broadly and  
19 clearly stated directive that no part of the railroad  
20 compensation is subject to California tax law. So FTB's  
21 argument depends on a fictitious community property law  
22 exception to the Amtrak Act, which is nowhere to be found  
23 in the statute in which they have created, based on  
24 California tax law.

25 The operative portion of the Amtrak Act protects

1 the railroad compensation. It defines the character of  
2 the railroad compensation covered by the law, and makes  
3 clear that no part of such compensation can be subjected  
4 to the tax laws of the state, other than the state of the  
5 railroad employee's residence. So FTB's argument implies  
6 that it is in compliance with the Amtrak Act inasmuch as  
7 it's not taxing Acosta's share of railroad compensation,  
8 but Section 17951(b) (2) requires greater fidelity to the  
9 federal law than this tired old contrivance that they've  
10 argued since November of 2019. That's how long this case  
11 has been going on.

12 So further, FTB's argument in its June 8, 2021,  
13 brief concerning 17951(b) (2) effectively concedes the  
14 issue of whether OTA has jurisdiction to determine the  
15 applicability of Amtrak Act as much as it engages an  
16 interpretation of the statute, which makes obeisance to  
17 the Amtrak Act by way of RTC 17951(b) (2) required of the  
18 FTB. So the issue, therefore, becomes how to properly  
19 read 17951(b) (2) and Amtrak Act together in light of what  
20 Congress and the legislature intended.

21 FTB's -- if FTB's reading of 17951(b) (2) is  
22 correct, then the Amtrak Act is fairly meaningless. Thus,  
23 SB 1142 references the operation of federal law, which  
24 clearly states no part of the compensation paid to the  
25 rail -- to the nonresident railroad employee may be

1       subjected to California personal income tax law. The  
2       federal law does not say, as FTB argues, that the  
3       nonresident railroad worker's community property share of  
4       protected railroad compensation cannot be taxed. This  
5       narrow misreading of the statute ignores the plain meaning  
6       and operation of the Amtrak Act.

7               The FTB's position is a circular bootstrap  
8       argument which ignores both the directive of the Amtrak  
9       Act and SB 1142. The FTB position depends on the  
10      application of California tax law to protect the railroad  
11      compensation relying on California Code of Regulation  
12      18501 as a rule of assignment to advance the erroneous  
13      argument that it's complying with the Amtrak Act and SB  
14      1142 by not taxing me but rather my wife's half of my  
15      railroad compensation as community property.

16             But it's plain to see that the FTB must first  
17      subject part of the railroad compensation to the operation  
18      of a California regulatory provision of rule of assignment  
19      to make this argument. FTB, essentially, rewrites the  
20      Amtrak Act ignoring the federal statute, what it actually  
21      says, to maintain this pretense that it's compliance with  
22      SB 1142. But here's the key point on that.

23             FTB argues it's in compliance because it's not  
24      taxing my community property share of wages, but FTB can  
25      only do so by subjecting part of the protective railroad

1 compensation to state tax law. This violates the Amtrak  
2 Act and ignores SB 1142's acknowledgment that no part of  
3 the protective railroad compensation by operation of the  
4 Amtrak Act is subject to California tax law.

5 So one last point on this. It makes no sense to  
6 read 17951(b) (2) the way FTB asserts. So consider the  
7 following hypothetical. A single unmarried nonresident  
8 railroad worker from Texas pays no California income tax  
9 on railroad compensation, even if he works a good portion  
10 or a majority of the year in California. California's  
11 rules of assignment and apportionment do not apply by  
12 operation of the Amtrak Act and 17951(b) (2). Yet,  
13 according to FTB, a nonresident railroad employee from  
14 Texas who has not worked a day in California but is simply  
15 married to a California resident would under the FTB  
16 possession not only see his railroad compensation subject  
17 to California tax law, but FTB would also lay claim to  
18 taxing half of that protected compensation by applying  
19 California Code of Regulation 18051(d), even if he did not  
20 work a single day in California.

21 So given the legislative history of both the  
22 Amtrak Act and 17951(b) (2), it would make no sense to  
23 believe that either Congress or the California legislature  
24 would allow the worker in the first instance to avoid the  
25 application of California tax law regarding the assignment

1 of income by a nonresident working in California while  
2 subjecting the second railroad worker's protected  
3 compensation to California tax law and assigning half of  
4 it to a taxable California source.

5 Again, the key point here is that there's no  
6 exception in the Amtrak Act creating one treatment for a  
7 single nonresident railroad worker's compensation and a  
8 different treatment and result for the exact same  
9 compensation paid to a nonresident railroad worker married  
10 to a California resident.

11 Now, let's delve into the issue now more deeply  
12 of OTA jurisdiction. This is not a case where the OTA  
13 must violate California Constitution Article 3 Section 3.5  
14 to rule in favor of the Appellants. Rather, OTA need only  
15 harmonize 17951(b)(2) and the Amtrak Act inasmuch as  
16 17951(b)(2) essentially directs FTB to fully comply with  
17 the Amtrak Act.

18 The legislative history of SB 1142 makes it  
19 abundantly clear the California legislature was fully  
20 aware of Article 3 Section 3.5(c), yet, the legislature  
21 explicitly determined to give way to federal supremacy,  
22 noting both the provisions of the U.S. Constitution  
23 Supremacy Clause, as well as an admonition from the  
24 California Attorney General that, quote, "Regarding  
25 federal preemption of State statutes, Article 3



1 Section 3.5 of the California Constitution, must fail  
2 because of federal supremacy," end quote.

3 So while the legislative history speaks at length  
4 to the general preemptive effect of federal law, it also  
5 makes clear the legislature intended to ensure that  
6 California law conforms to federal law without the need  
7 for expensive and time-consuming litigation. Sound  
8 familiar? It's no coincidence this echoes the legislative  
9 history and congressional intent for the Amtrak Act. When  
10 the legislature enacted SB 1172, the committee analyses in  
11 both houses noted that FTB understood. I repeat, that FTB  
12 understood the bill would require FTB's full compliance  
13 with the requirements of the federal and California  
14 Constitution.

15 So full compliance plainly required by the Amtrak  
16 Act means FTB cannot subject any part of the railroad  
17 compensation paid to a nonresident to California personal  
18 income tax law. Again, the key point here on harmonizing  
19 state and federal law as I've already noted, SB 1142  
20 includes acknowledgment of the operative portion of the  
21 Amtrak Act. The prime directive of the Amtrak Act is  
22 clear. No part of the protective railroad compensation  
23 shall be subject to the income tax laws of any state,  
24 other than the employee's state of residence.

25 So one last point on jurisdiction. California

1 Constitution Article 3 Section 3.5(c) applies only to  
2 statutes. Regulation 18501(d) is a rule of assignment in  
3 California Regulation, and it is fully within OTA's  
4 authority to determine that it is preempted by federal  
5 law. See, for example, the Enrique versus Couto Dairy and  
6 Zenith Insurance Case. That's an opinion from the  
7 Worker's Comp Board that I referenced earlier. It's an  
8 example of a state agency exercising jurisdiction to  
9 declare a state regulation preempted by federal law,  
10 notwithstanding Article 3 Section 3.5(c).

11 A very simple but important reminder about this  
12 dispute, this is not a community property dispute. This  
13 is about the applicability of state law. So while every  
14 state has an interest in how property is divided upon  
15 dissolution of marriage, a determination, a particular as  
16 it is community property under the laws of one state  
17 cannot by its own terms transform the asset into a  
18 separate property interest taxable by another state. More  
19 is required. The application of state tax law.

20 Yet, the Amtrak Act and by extension, 17951(b) (2)  
21 prohibit the application of California tax law to any part  
22 of the compensation paid to a nonresident railroad  
23 employee with no exception for community property,  
24 Hisquierdo verse Hisquierdo. Given the enactment of  
25 17951(b) (2), OTA need only harmonize federal and state law

1 and read the two statutes together. OTA does not have to  
2 decide whether federal law on its own preempts or  
3 invalidates California. Rather, reading federal and state  
4 law together, the OTA can determine the FTB cannot subject  
5 any part of the railroad compensation covered by the  
6 Amtrak Act to California tax law.

7 Now, FTB, I'm sure, will keep insisting the same  
8 argument they've made in every filing made before this  
9 panel and during the audit, same argument, they'll insist  
10 they are only applying California tax law to Michelle's  
11 share of the railroad compensation as community property.  
12 But the only way they can get there is by applying  
13 California tax law Regulation 18501(d) to the protective  
14 railroad compensation to conclude that because Texas is a  
15 community property state, half the railroad compensation  
16 must be sourced to Michelle as her half of community  
17 property. Yet, again, by operation of the Amtrak Act, no  
18 part of railroad compensation can be made subject to  
19 California tax law.

20 So to repeat, FTB's argument is simply that it's  
21 not taxing my share of the railroad compensation, it is  
22 taxing my wife's community property share of the protected  
23 railroad compensation. But for FTB to do that, it must  
24 characterize half of that compensation, which the Amtrak  
25 Act clearly protects from California tax law as California

1 income by applying California tax law. Yet, federal and  
2 state statutes prescribe FTB from making that  
3 characterization. No statute regulation must be  
4 invalidated for us to prevail.

5 So in conclusion, thank you for your patience.  
6 Contrary to the FTB's argument by enacting 17951(b)(2),  
7 the California legislature declared the statutes and  
8 regulation cited by the FTB unenforceable by operation of  
9 the Amtrak Act. 17951(b)(2) provides OTA with expressed  
10 authority and direction to prohibit application of  
11 Revenue & Taxation Code 17041 and California Code of  
12 Regulation 18501(d) to railroad compensation. Whatever  
13 presumption of correctness FTB is normally entitled to in  
14 these cases cannot be sustained in this matter.

15 Both federal and state law prohibit the FTB from  
16 claiming its determination of the tax owed is reasonable,  
17 inasmuch as the Amtrak Act and SB 1142 make clear that no  
18 part of the nonresident railroad compensation can in any  
19 manner be subject to California personal income tax law.  
20 There could be nothing reasonable or rational about an  
21 allocation, assignment, or characterization of income  
22 barred under both federal and state law.

23 So for the reasons I've stated today as well as  
24 our prior submissions to the OTA, I request that the panel  
25 rule in our favor and determine the FTB's audit findings

1 in error, that there's no deficiency in any of the tax  
2 years at issue, and FTB's assignments -- or assessments,  
3 rather, for the tax years 2016, '17, and '18 are in error.

4 Thank you.

5 JUDGE GAST: Thank you, Mr. Acosta.

6 FTB, whenever you are ready, you may present.

7

8 PRESENTATION

9 MR. BROWN: Thank you. Good morning. My name is  
10 Eric Brown, Tax Counsel with the Franchise Tax Board. My  
11 co-counsel is Maria Brosterhous, also Tax Counsel with the  
12 Franchise Tax Board.

13 The issues are that Appellant has failed to show  
14 error in FTB's proposed assessment of tax, and the OTA has  
15 no jurisdiction to determine whether the federal Amtrak  
16 Act preempts Revenue & Taxation Code Section 17041(a)'s  
17 requirement that a California resident's taxable income  
18 includes income from all sources. The facts are not in  
19 dispute. Appellant is a Texas resident who works for a  
20 railroad company. Appellant-spouse is a California  
21 resident. California and Texas are both community  
22 property states.

23 For all tax years at issue, Appellant omitted  
24 Ms. Castro's community property share of Mr. Acosta's  
25 wages from Ms. Castro's taxable income. Thereafter, the

1 FTB issued proposed assessments for all years adding back  
2 Ms. Castro's community property share of Mr. Acosta's  
3 railroad worker income to Ms. Castro's taxable income and  
4 recalculated Appellant's tax for each year.

5 Issue Number One is Ms. Castro's income includes  
6 her community property share of her spouse's income. It  
7 is important to distinguish from the outset that the  
8 Franchise Tax Board is not taxing Mr. Acosta's portion of  
9 the couple's community income attributable to his Texas  
10 source wages, but rather is taxing only Ms. Castro's  
11 community property share of the couple's income.

12 It is a red hearing to argue that Mr. Acosta's  
13 wages are not taxable to California because his wages are  
14 considered railroad worker income and, therefore,  
15 protected under the federal Amtrak Act. As a Texas  
16 resident, Mr. Acosta's Texas source wage income is not  
17 taxable to California regardless of whether wages are  
18 earned as a railroad worker or in any other industry.  
19 17951 expressly applies to nonresidents, not residents.

20 Since Mr. Castro is a California -- Ms. Castro is  
21 a California resident, her taxable income includes her  
22 community property share of Mr. Acosta's income. It is  
23 well settled that if one spouse is a resident of  
24 California and the other spouse is domiciled in a  
25 community property state outside of California, the

1 California resident spouse is liable for California income  
2 tax on his or her one-half community property interest in  
3 the other spouse's earnings. See Appeal of Misskelley  
4 that's cited in Respondent's opening brief.

5 This point is reiterated in Appeal of O. Cremel  
6 and E. Koepfel, which issued in May 2021 after FTB filed  
7 its reply brief to this appeal. See also Appeal of Brown,  
8 a BOE case from 1975, also cited in Cremel California  
9 Family Code Section 1760 broadly defines community  
10 property. Quote, "All property, real or personal,  
11 wherever situated acquired by a married person during the  
12 marriage while domiciled in this state is community  
13 property." Texas Family Code Section 3.002 has a similar  
14 and broader definition. Community property consist of the  
15 property other than separate property acquired by either  
16 spouse during marriage. Clearly, Ms. Castro's community  
17 property share of the couple's income includes Mr.  
18 Acosta's wage income.

19 Issue Number Two, the OTA lacks jurisdiction to  
20 determine whether the federal law preempts California law.  
21 By seeking to exclude Ms. Castro's community property  
22 share of Mr. Acosta's income from Ms. Castro's taxable  
23 income, Appellant relies on federal preemption argument  
24 that would override Revenue and Taxation Code  
25 Section 17041(a)'s requirement that a California

1 resident's entire taxable income for all sources must be  
2 considered for purposes of taxation.

3 Article 3 Section 3.5(c) of the California  
4 Constitution and OTA's own regulation Title 18 California  
5 Code of Regulations Section 30104(a), expressly prohibits  
6 the OTA from determining whether a California law is  
7 invalid or unenforceable on federal law unless the  
8 California or Federal Appellate Court has already made a  
9 determination. No federal or California Appellate Court  
10 has determined Revenue & Taxation Code Section 17041(a)  
11 excludes a California resident's community property share  
12 of the nonresident's federal Amtrak Act railroad worker  
13 income.

14 In conclusion, California law requires inclusion  
15 of Ms. Castro's community property share of Mr. Acosta's  
16 income in her taxable income. Number Two, the OTA lacks  
17 jurisdiction to determine whether the Amtrak Act renders  
18 Section 17041(a) unenforceable in whole or in part.

19 Thank you.

20 Judge, you're muted.

21 JUDGE GAST: I'm sorry about that. Thank you,  
22 Mr. Brown, for your presentation.

23 At this point, I'm going to turn it over to the  
24 panel to see if they have any questions. So,  
25 Judge Lambert, before we --



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MR. ACOSTA: Judge?

JUDGE GAST: Go ahead, Mr. Acosta.

MR. ACOSTA: I thought you had mentioned I had a brief rebuttal opportunity.

JUDGE GAST: Yeah. That will come after panel questions at this point. You'll have the last word on this for 5 to 10 minutes.

MR. ACOSTA: I beg your pardon, Judge Gast. I'm sorry.

JUDGE GAST: No problem.

Judge Lambert, do you have any questions for the parties?

JUDGE LAMBERT: Hi. This is Judge Lambert. Yeah, I have a couple of questions. For FTB, I just had a question as to clarify that, like, in the exhibits there's legislative history that states that, you know, the purpose or the intent of the statute is to be in conformity with the federal law and to ensure there's no preemption issue. And you were saying that, you know, if we were to follow this federal statute -- you said the federal statute does override, you know, the California statute.

So are you saying that it can't -- that there is actually a conflict in this statute, and that the intent to make there be no preemption issue, like, wasn't

1 actually carried out?

2 MR. BROWN: Thank you, Judge. I wonder if your  
3 question refers to our interpretation of Revenue &  
4 Taxation Code Section 17951 or 17041? We maintain that  
5 17041 is the controlling statute, and that there is a  
6 conflict that is irreconcilable with regard to whether the  
7 federal statutes override or make irrelevant or invalid  
8 17041(a). And I think perhaps the statute you are  
9 referring to may have been 17951, and that, by its own  
10 language, expressly refers to nonresidents. And we don't  
11 have a quarrel with not taxing nonresidents regarding  
12 their taxable income. We contend that's not at issue  
13 here.

14 JUDGE LAMBERT: Okay. Yeah. Yeah, I was  
15 referring to 17951. And just a question, like, you know,  
16 and that's in 17951, it states the gross income. It's  
17 talking about a nonresident, but say it's the gross income  
18 of nonresident taxpayer does not include income not  
19 subject to the personal income tax law by operation of  
20 11502.

21 So even though it deals with just nonresidents,  
22 that particular statement states that the income is not  
23 subject to the personal income tax law. I mean, so could  
24 it be -- I know it states it applies to nonresidents only,  
25 but that particular statement taken by itself, you know,

1 doesn't that appear to state that income is not subject to  
2 personal income tax at all?

3 MR. BROWN: Well, I think there's the conflict.  
4 Because Revenue & Taxation Code 17041(a) specifically says  
5 that a California resident -- and we're talking about  
6 Ms. Castro's community property share -- that a California  
7 resident's taxable income includes the entire taxable  
8 income from all sources.

9 So if there's a conflict, it is 17041(a) that  
10 says taxable income from all sources -- and it doesn't  
11 provide an exception for railroad worker income or  
12 anything else. And interpretation of 17951, which is by  
13 its own expressed terms, is inapplicable here because  
14 Ms. Castro is a resident, not a nonresident.

15 JUDGE LAMBERT: Okay. Thank you, Mr. Brown. I  
16 appreciate it. That's all I have.

17 JUDGE GAST: This is Judge Gast speaking.  
18 Judge Akin, do you have any questions for the parties?

19 JUDGE AKIN: Thank you, Judge Gast. I do have  
20 one question for Appellants. Early on in your  
21 presentation, you cited to -- I think it was a U.S.  
22 Supreme Court case.

23 Are you having trouble hearing me?

24 JUDGE GAST: Judge Akin, yeah, we're having  
25 trouble hearing you.

1           JUDGE AKIN: I'll try leaning in more. Is that  
2 better?

3           JUDGE GAST: Yes. That's better.

4           JUDGE AKIN: Okay. Appellants, you cited to a  
5 case early on in your presentation. I think you said it  
6 was a U.S. Supreme Court case. I was just wondering if  
7 you could repeat what case that was and if you happen to  
8 have the citation.

9           MR. ACOSTA: Yes, Judge Akin. That's Hisquierdo.  
10 I'll spell it for you, H-i-s-q-u-i-e-r-d-o versus  
11 Hisquierdo. The citation is 4389 U.S. 572. It's a 1979  
12 case. And I would direct your attention, Judge Akin, to  
13 the section specifically that I think is instructive. I  
14 mean, obviously, you want to read the entire case, but the  
15 section I was referring to starts on page 439 U.S. 582 and  
16 moves onward. It is very instructive with respect to  
17 Congress's interest in railroad worker compensation, and a  
18 similar statute under the Railroad Retirement Act for  
19 railroad workers which bar the application of any state  
20 law, tax law or otherwise.

21           It was very broad. And although there was no  
22 specific reference of community property law, the clear  
23 and broadly stated intent of the statute in Hisquierdo is  
24 very similar to the broad and very clearly intent of the  
25 statute in the Amtrak Act which bars the application of

1 any state tax law to the railroad worker -- or nonresident  
2 railroad worker's compensation.

3 And I would just remind you, Judge Akin, that  
4 despite what Mr. Brown says, the Amtrak Act doesn't use  
5 the word taxable or subject to tax. The specific mandate  
6 of the Amtrak Act is that it bars the application of any  
7 state tax law to the nonresident railroad worker's  
8 compensation.

9 JUDGE AKIN: Okay. Thank you. And I don't have  
10 any further question.

11 JUDGE GAST: This is Judge Gast speaking. Thank  
12 you, Judge Akin.

13 The co-panelists had all the questions I was  
14 going to ask. So I'm going to turn it back to you,  
15 Mr. Acosta, for your rebuttal. You will have five  
16 minutes. Thank you.

17 MR. ACOSTA: I'll be brief, Judge Gast. Thank  
18 you.

19

20 CLOSING STATEMENT

21 MR. ACOSTA: First, let me address Mr. Brown's  
22 point concerning a conflict or the lack of conflict. It  
23 was not clear -- exactly clear what he was trying to point  
24 out. But I think he is trying to make the argument that  
25 there's a conflict between the federal law and 17041, the

1 California Revenue & Taxation Code. The problem with that  
2 argument or that point is that Section 17951(b)(2)  
3 establishes or applies to the entirety of California  
4 personal income tax.

5 The mandate in 17951(b)(2) to FTB and the OTA is  
6 to bar the application of any state tax law by operation  
7 of the Amtrak Act. It references the operation of the  
8 Amtrak Act. So the only way that 17951(b)(2) works is to  
9 reference the operation of the Amtrak Act. The Amtrak Act  
10 by operation bars the application of any state tax law to  
11 nonresident railroad worker compensation.

12 I pointed out that he consistently used the term  
13 taxable or tax. That's not in the language of the Amtrak  
14 Act. The language in the Amtrak Act is much broader. It  
15 applies to all application of any state tax law. And the  
16 difference between the cases he cited and this situation  
17 is that there is a federal statute and a state statute  
18 that stand in the way of those cases and the application  
19 of those regulations cited in those cases.

20 Again, I remind you this is not a community  
21 property dispute. He went on at length to describe the  
22 community property law in California and Texas. I don't  
23 quibble with that. As I said, community property law is  
24 community property law. That in and of itself does not  
25 turn a community property asset into a taxable asset. So

1 a community property law, a classification of an asset in  
2 one state does not in turn allow for or create on its  
3 terms create taxable community property asset. You have  
4 to apply state tax law, and that's what the FTB is  
5 proposing here.

6 And lastly -- well, I guess I covered everything.  
7 I don't want to take up more of the panel's time. You've  
8 been very patient, and I appreciate it.

9 JUDGE GAST: This is Judge Gast speaking. Thank  
10 you very much.

11 I'm going to ask the panel one more time if they  
12 have any questions for the parties, and I'll start with  
13 Judge Lambert.

14 JUDGE LAMBERT: This is Judge Lambert. I have no  
15 questions. Thanks.

16 JUDGE GAST: Thank you.

17 And Judge Akin?

18 JUDGE AKIN: No questions for me either. Thanks.

19 JUDGE GAST: And I don't have any questions  
20 myself. So this will --

21 FTB, Mr. Brown, go ahead.

22

23 CLOSING STATEMENT

24 MR. BROWN: Just a couple of responses based on  
25 what Mr. Acosta was saying.

1           First of all, there was reference to a case  
2 regarding -- or a statute regarding treatment of  
3 retirement income -- railroad worker retirement income,  
4 and that is not at issue here. So statutes governing and  
5 controlling regarding retirement income of railroad  
6 workers is not at issue. There is no 1099 R, which would  
7 report retirement income, but a W-2.

8           Also, 17951(a) reads, for purposes of computing,  
9 quote, "Taxable income of a nonresident or part year  
10 resident," and it goes on from there. And it specifically  
11 excludes, as we all agree, Section 11502 of Title 49 U.S.  
12 Code. That pertains to nonresident and just simply  
13 inapplicable in this case. 17041(a), which determines  
14 that the entire taxable income of a California resident,  
15 that is what is at issue here.

16           The conflict is this. If the OTA exceeds its  
17 jurisdiction by saying that the Amtrak Act renders invalid  
18 in whole or in part -- unenforceable in whole or in part  
19 17041(a)'s retirement that the entire taxable income of a  
20 California resident, if that is the holding, there is a  
21 conflict there. And that exceeds OTA's jurisdiction in  
22 order to make such a determination.

23           JUDGE GAST: This is Judge Gast. Thank you,  
24 Mr. Brown.

25           And, Mr. Acosta, would you like to briefly



1 respond to any of that?

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FURTHER CLOSING STATEMENT

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MR. ACOSTA: Thank you, Judge Gast.

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Again, Mr. Brown is mistaken. 17951(b)(2) is a directive by the California legislature to FTB and OTA to recognize that California personal income tax law in its entirety is barred, cannot apply any portion of California personal income tax law to a nonresident railroad worker's compensation. The statute is clear. It is broad. It embraces every component of California personal income tax.

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It references the federal statute to the extent of the Amtrak Act bars the application of any state law other than the state of my residence. And the railroad compensation I have been paid, the 17951(b)(2) acknowledges that and embraces that. That is the basis of the statute. It voids or prohibits the application of any component of California personal income tax law to compensation paid to nonresident railroad worker. It's that simple.

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JUDGE GAST: This is Judge Gast speaking. Thank you, Mr. Acosta.

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And with that, this will conclude the hearing for today. And I want to thank the parties for your

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presentations.

We will meet and decide the case based on the arguments and documents presented. We will issue our written decision no later than 100 days from today. The case is submitted and the record is now closed.

(Proceedings adjourned at 10:15 a.m.)

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