

BEFORE THE OFFICE OF TAX APPEALS
STATE OF CALIFORNIA
DOUGLAS BRAMHALL, HEARING JUDGE

In the Matter Appeal of:)
)
BARRY AND MARILYN HINDEN,) OTA No. 18011053
)
)
Appellant.)
_____)

TRANSCRIPT OF PROCEEDINGS
Los Angeles, California
Wednesday, March 20, 2019

Reported by:

Miranda L. Perez,
Hearing Reporter

Job No.:
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TRANSCRIPT OF PROCEEDINGS, taken at
PBC - Wells Fargo Center, 355 South Grand Avenue,
Suite 2450, 23rd Floor, Los Angeles, California,
commencing at 10:00 a.m. on Wednesday,
March 20, 2019, heard before DOUG BRAMHALL,
Hearing Judge, reported by Miranda L. Perez,
Hearing Reporter.

1 APPEARANCES:

2 PANEL LEAD: DOUGLAS BRAMHALL

3 PANEL MEMBERS: GRANT THOMPSON
4 DANIEL CHO

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1 Los Angeles, California; Wednesday, March 20, 2019

2 10:00 a.m.

3
4
5 JUDGE BRAMHALL: All right. We are on the
6 record. This is the appeal of Barry and Marilyn Hinden.
7 OTA Case 18011053. It's Wednesday, March 20th, 2019, at
8 10:05. I'm Doug Bramhall. I'll be the lead judge for
9 this hearing, and on the panel with me is Grant Thompson
10 and Daniel Cho.

11 We are co-equal decision makers on this
12 panel. And for the record, will the parties please
13 introduce yourselves.

14 MR. BERNSLEY: My name is Mark Bernsley. I am
15 the attorney for the appellants, Barry and
16 Marilyn Hinden.

17 JUDGE BRAMHALL: Thank you.

18 MR. HUNTER: David Hunter, tax counsel for the
19 respondent, Franchise Tax Board.

20 MR. GEMMINGEN: David Gemmingen, tax counsel
21 for Franchise Tax Board.

22 JUDGE BRAMHALL: Mr. Hunter, you will be the
23 primary presenter of FTB's case today; is that correct?

24 MR. HUNTER: Yes. That's correct,
25 Judge Bramhall.

1 JUDGE BRAMHALL: Thank you. The parties agree
2 that the record reflects the issue in this appeal to be
3 whether appellants have established that they are
4 entitled to a deduction for the difference between the
5 fair market value and adjust in basis of property
6 donated as a charitable contribution.

7 Parties have also agreed that the exhibit
8 index, the corrected one that I just handed out showing
9 appellant's exhibits marked 1 through 10. And FTB's
10 exhibits marked A through E and J are acceptable for the
11 record without objection.

12 I have an agreement on that?

13 MR. HUNTER: Agreed.

14 (Appellant's Exhibits 1 through 10 and
15 Respondent's Exhibits A through E and J
16 received into evidence.)

17 JUDGE BRAMHALL: Therefore, I'm going to admit
18 those exhibits into evidence at this time. FTB's
19 exhibits marked F, G, H, and I, are entered into the
20 record as arguments only.

21 (Respondent's Exhibits F, G, H, and I entered
22 into evidence.)

23 JUDGE BRAMHALL: Neither party has witnesses.
24 Both parties will have opening hearings, and if we don't
25 have any questions, Mr. Bernsley, are you ready to

1 begin?

2 MR. BERNSLEY: I am.

3 JUDGE BRAMHALL: Please proceed.

4

5 OPENING STATEMENT

6 MR. BERNSLEY: So this case addresses another
7 casualty of the 2008 recession. Unable to sell or lease
8 his business property after the former tenant went
9 bankrupt, Mr. Hinden was facing continuing costs of
10 potential liabilities as a result of the vacant
11 building, and he needed to stop the bleeding of money
12 that he was hit with.

13 So in 2012, he transferred the property
14 to Temple of Israel of Hollywood, a charitable
15 organization. Hinden's basis in the property was
16 \$2.34 million. He received \$10 in the transaction; and
17 therefore, the transaction resulted in a very real
18 \$2.3 million, less \$10 loss.

19 So on his return, Hinden's CPA reported
20 the transaction as a charitable contribution to the
21 extent of the fair market value of \$950,000 and the loss
22 on the sale to the extent of the balance.

23 The FTB has said that the charitable
24 contribution deduction is the sole tax relief that the
25 taxpayers are entitled to, but as this is business

1 property, the code doesn't say that.

2 I want to spend a minute or two on policy
3 because I think it provides some context for this issue.
4 It's interesting that Section 170 does not indicate the
5 amount of the deduction for a contribution of property.

6 In other words, it doesn't say in the
7 code itself whether you get a deduction, a deduction for
8 basis, or you get a deduction for fair market value.
9 That's actually found in the regs. And I suspect that
10 was at least in part of policy decision to encourage
11 philanthropy.

12 Interestingly, at least according to an
13 article, which I found very recently by Roger ColinvauX,
14 C-O-L-I-N-V-A-U-X, entitled "Charitable Contributions of
15 Property: Broken System We Imagined." That article
16 appears at 50 Harvard Journal and Legislation 263 in
17 2013. It was not always the case that the deduction was
18 for fair market value.

19 Now, I have to admit that I didn't have
20 the time since discovering the article to read it in its
21 entirety. But the author does go through and explains
22 that the regulations interpreting the original 1917
23 statute allowed a deduction for fair market value, but
24 after a reenactment in 1918, the regs. determined that
25 the allowable deduction was actually basis.

1 Then, years later, it switched back to
2 fair market value all without any change in the law
3 itself. So it's been to a revenue service that's really
4 decided it should be fair market value.

5 In 1938, the House of Representatives
6 voted the change the amount allowed to the donor's cost
7 basis, but the senate struck the provision on the ground
8 that doing so would discourage charitable giving.
9 Concern then apparently shifted to be making sure that
10 donors would be financially better off donating property
11 than selling it, because, you know, obviously, it was
12 used as a great tax shelter.

13 And that concern really only manifests
14 itself when dealing with property with an inherent
15 built-in gain. That is where the fair market value
16 exceeds basis. And that's the usual case that we think
17 of when we're dealing with contributions of property
18 under almost all of the cases you read. Not all of them
19 but almost all of them.

20 You've got a situation where fair market
21 value exceeds the basis. In other words, there's an
22 inherent built-in gain in the property that's being
23 contributed.

24 I found no evidence anywhere that anyone
25 anywhere ever identified a tax policy disocclude

1 (phonetic) the owners of property with built-in loss.
2 That is where the basis exceeded the fair market value.
3 Nor has anyone I've read made a cogent argument that
4 such is an unintended effect of the clear language of
5 the applicable statutes.

6 I want to spend a second talking about
7 the part sale and part gift rules. The purpose of those
8 rules prevents donors from essentially getting a
9 deduction for a gift where they have little or no skin
10 in the game.

11 In other words, where they get,
12 basically, most of their money back through the sale
13 portion, yet they get this really high inflated
14 deduction as a result of a higher fair market value.

15 To reduce this kind of practice, congress
16 provided for a basis allocation, which results in
17 taxable gain under those circumstances, and that's in
18 1011-B. But that allocation only applies if and when
19 there is and would be a gain that doesn't apply to a
20 loss.

21 Again, nothing here, evidence and
22 intention or a mechanical result to deny recognition of
23 an actual realized loss under circumstances where the
24 loss would only be recognized under the tax law. In
25 other words, a business loss. Obviously, personal

1 losses aren't deductible, anyway, under 165. Absent,
2 very special, and unidentified circumstances. But for
3 business losses, there's no evidence of any policy
4 whatsoever that a business law should evaporate.

5 So I guess if one wanted to explore what
6 would happen in a case like this, you would ignore
7 1011-B and use the entire basis to compute the loss.

8 Now, I've heard what you said, Judge
9 Bramhall, that you guys have read the briefs, as I'm
10 sure you have, and so I don't want to belabor the
11 arguments in the brief. But whether this transaction is
12 properly characterized as a sale, or charitable
13 contribution, or both, there's no statute requiring an
14 election on how this transaction could be treated.

15 In other words, there's no statute that
16 says if you treat it as a charitable contribution, there
17 is no sale component, in fact, the part sale, part gift
18 rules will sort of allow that kind of election theory
19 anyway.

20 So the proper tax result is what it is
21 regardless of how it was reported. So, you know, I tend
22 to think it was reported correctly, but I don't know
23 that -- I don't think that that's a necessary conclusion
24 to the taxpayer being entitled to the loss here.

25 I think also the accountant took the

1 charitable contribution deduction for the first, and
2 then allocated the balance to the loss on sale. I don't
3 even know if that's the correct order. There's so
4 little precedent on exactly how you treat this sort of
5 situation and how you put the pieces together. Is it
6 really entirely clear? What is clear that under the
7 statute, both pieces are allowed and neither piece is
8 disallowed.

9 Section 170 allows a deduction for
10 charitable contribution as I indicated that that
11 deduction was claimed for \$950,000 of the \$2.34 million
12 loss. I'm going to ignore the \$10 for now. We can talk
13 about that if you guys want to.

14 JUDGE BRAMHALL: Okay.

15 MR. BERNSELEY: But it's not really significant
16 in terms of the number. And as I said on brief, 1001
17 provides for how the gain or loss is computed. And note
18 that 1001 speaks both about the gain side and the loss
19 side in separate sentences and expressly.

20 So when the code speaks of gain, clearly
21 in this context it's not talking about gain or loss.
22 It's talking about gain. Similarly, Subsection C
23 provides that both gain or loss will be recognized in a
24 sale or other disposition except as otherwise provided.

25 So again, both gain or loss are

1 specifically addressed. So you can't assume that when
2 the code says "Gain" it means loss because it doesn't.
3 Because under statutory production, it's clear how the
4 terms are used in order to be consistent with the
5 statute, gain means gain, and loss means loss as we can
6 address them specifically and differently.

7 Section 165-A and C-1 specifically allow
8 a deduction for any loss incurred in the trade or
9 business. It did not dispute that this transaction was
10 part of the trade or business that he had. And so this
11 loss is deductible under the clear language of the
12 statute. Both pieces are deductible.

13 I want to address a little bit the FTB's
14 position, which is based on two ambiguities. The first
15 ambiguity is a regulation promulgated under Section 1001
16 that addresses a transaction that is part sale and part
17 gift and says that, "No loss is sustained if the amount
18 realized is less than at adjusted basis."

19 Now, as you know in my brief, I
20 hypothesized that this regulation was assuming that we
21 had a personal transaction. And therefore, that this
22 regulation could only apply to a personal transaction
23 and that otherwise, the regulation would be invalid.

24 As any regulation that's inconsistent
25 with the statute, as I explained, Section 1001 doesn't

1 disallow anything. It's not a disallowing section. It
2 recently occurred to me, and I have another hypothesis,
3 and you'll note that what's missing in that sentence of
4 the regulation is there's no mention of the fair market
5 value. And I think another clear assumption of that
6 regulation is that the fair market value is greater than
7 both the adjusted basis and the amount realized or the
8 consideration received.

9 Because under those circumstances, the
10 bargain sale rules of 1001-B would apply, and the
11 regulation would be correct. But as soon as you swap
12 the position of the fair market value of the property,
13 that whole piece falls apart.

14 So I think the regulation had to assume
15 that the fair market value is greater than both the
16 adjusted basis and the consideration.

17 Again, I think that regulation, at least
18 that sentence in the regulation, fails and would be
19 invalid in context because I don't think again, that
20 section or that regulation contemplated that a gift of
21 even loss property, I don't think it contemplated a gift
22 of loss property where the basis allocation rules
23 wouldn't apply.

24 The second ambiguity was the Withers
25 case. I find Withers problematic on a number of fronts.

1 But what's most significant, I think here, is the court
2 expressly disallowed the loss solely because the
3 taxpayer didn't establish that the loss was deductible
4 under any particular section of the internal revenue
5 code.

6 What the Court didn't say was that you
7 couldn't have a loss because there was a charitable
8 deduction, and which is essentially FTB's argument here.
9 And that's not what Withers stood for, nor did Withers
10 rely or cite, as I recall, 1001-1E in the regulation
11 that might just address them both.

12 So there's really no good statutory or
13 analytical basis for denying any of the deductions here
14 for the entire realized loss. And again, we're talking
15 about taxpayers who had a realized loss. I mean, this
16 loss was real.

17 And so the notice of action here and the
18 notices of code assessment should be overruled and
19 withdrawn.

20 JUDGE BRAMHALL: Okay. Thank you. And for
21 the record, I understand there's no dispute factually as
22 to basis or fair market value in this case; correct?

23 MR. HUNTER: Not at all.

24 JUDGE BRAMHALL: Thank you. Okay. Any
25 questions?

1 MR. THOMPSON: No.

2 MR. CHO: I don't have any questions at this
3 point.

4 JUDGE BRAMHALL: I don't either at this point.
5 Thank you.

6 Mr. Hunter, are you ready to proceed?

7 MR. HUNTER: Yes, Mr. Bramhall, I am. And we
8 appreciate this panel's time and reading the briefs, and
9 examining everything before we begin. I've taken the
10 time to select just four exhibits from the record,
11 already entered into without objection. And just so the
12 panel has it in front of you, I'd like you to have them.
13 I made 10 copies.

14 JUDGE BRAMHALL: Okay. Do you have a copy for
15 the --

16 MR. HUNTER: Yep.

17 JUDGE BRAMHALL: Okay.

18

19 OPENING STATEMENT

20 MR. HUNTER: May I please the panel? The
21 theme of this case is: You can't have it both ways.
22 This case involves a charitable donation.

23 Here are the rules: If a taxpayer
24 donates property with a fair market value that is more
25 than the taxpayer's basis in the property, the deduction

1 is limited to the taxpayer's basis therein.

2 If the taxpayer donates property with the
3 fair market value that is lower than the taxpayer's
4 basis in the property, then the deduction is limited to
5 the fair market value.

6 This case involves the latter of the two.
7 And we've heard a position taken that this is a novel
8 theme in life and under the law, when in reality, it
9 happens all the time.

10 The example I've been using in preparing
11 for this case is I purchased a desk from IKEA. It cost
12 me \$100. I use it -- I work from home. I use it to
13 trade or business. Five years later, I donate it to
14 Goodwill, and the write-off is -- the deduction amount
15 is \$30. That's the fair market value of a used desk at
16 the time I donated it to a charitable organization. I
17 don't take a \$70 loss in terms of my basis in the
18 property. It just doesn't happen.

19 In 2005, appellant acquired a commercial
20 property located in Orlando, Florida. At the end of the
21 year it issued in 2012. At the time, the property's
22 appraised fair market value was \$950,000. This
23 appraisal was obtained by Hinden. Appellant's basis in
24 the property was \$2.7 million.

25 Appellant made a charitable contribution

1 of the property to his temple, a charitable
2 organization. Appellant reported this charitable
3 contribution on his 2012 tax return. And that's the
4 first exhibit, Exhibit A to respondent's opening brief,
5 which is his federal form A-2, A-3.

6 He describes the buildings with an
7 appraised fair market value of \$950,000 and he attached
8 the appraisal report. The next exhibit is Exhibit B to
9 respondent's opening brief where appellant takes the
10 deduction on schedule A of his form 1040 for the tax
11 year at issue, 2012.

12 Next, please note that temple
13 acknowledged appellant's charitable donation. And
14 that's the next exhibit, Exhibit 6 to appellant's -- I'm
15 sorry. Yeah, appellant's opening brief where the Temple
16 indicates as follows, and I quote, "Thank you for your
17 donation of the real property and building located at
18 7344 West Colonial Drive Orlando, Florida, with the
19 transfer effective December 27, 2012."

20 Next, please note that appellant
21 submitted his declaration signed by himself, attached as
22 Exhibit 4 to appellant's opening brief, wherein he
23 confirms that he donated the property to the Temple.

24 Now, despite this acknowledgment,
25 appellant also and properly claimed ordinary loss in the

1 amount of \$1.3 million, which was the remainder of his
2 tax basis on the property over the donated amount. And
3 that's Exhibit C to respondent's opening brief. It
4 should be the last exhibit before you on the panel.

5 And here, the taxpayer reports a gross
6 sales price of \$950,000 for this property. This is a
7 phantom receipt of cash for the amount of \$950,000 for
8 the property, which wasn't disposed of. It wasn't sold.
9 It was donated to this charity.

10 So the result was appellant took an
11 ordinary loss in the amount of \$1.3 million. And if you
12 look at this form, it says, "Gross sales price
13 \$950,000." That is not supported anywhere in the
14 record. If anything, we went back and forth over \$10,
15 and that's not even at issue.

16 The appellant did not receive \$950,000 in
17 cash for a sale of this property. A sale or exchange of
18 this property simply did not occur. Now, we must note
19 that these are irreconcilable positions taken on the
20 same tax return.

21 Appellant reported on one form that he
22 made a contribution of the property to the Temple with
23 clear donated intent under no consideration, and the
24 Temple confirmed that.

25 And appellant turned around and reported

1 a sale or exchange of the same property for
2 consideration that was never received in order to
3 generate an ordinary loss. Respondent properly accepted
4 appellant's charitable contribution donation amount in
5 the amount of \$950,000 and properly disallowed
6 appellant's claim loss in the amount of \$1.3 million.

7 Again, the law provides that appellant's
8 charitable contribution deduction is limited to the
9 property's fair market value and that's Internal Revue
10 Code Section 170 and Treasury Reg Section 1.70A-C1
11 and C2.

12 Respondent's action is confirmed by the
13 decision of the tax board of Withers, the commissioner,
14 which decided in its opening brief, and it's still good
15 law. It's an old case, but it still holds truth.

16 In Withers, the taxpayers contributed
17 shares of corporate stock to a charity. The fair market
18 value of the stock was \$3,500, and their basis was
19 \$10,600. Again, the fair market value was lower than
20 their basis.

21 The taxpayers took the full amount of
22 their basis in the stock or \$10,600 as a charitable
23 contribution deduction. The IRS limited the charitable
24 contribution deduction to \$3,500 or the fair market
25 value, just as respondent did in this case.

1 In Withers, the taxpayers argued that the
2 amount of their charitable contribution deduction was
3 their cost basis in their stock as judged by their
4 initial investment, but the law provides, and the Court
5 held, that their deduction was limited to the fair
6 market value of their donation, which was less than
7 their basis in the stock.

8 Just like in this case, appellant is
9 claiming that he is entitled to an ordinary loss for the
10 remainder of his basis in the Orlando property over and
11 above the charitable contribution deduction that he
12 received.

13 The taxpayers in Withers did not cite to
14 a statute or case in point that allowed them to take
15 their tax reporting position. And just like in this
16 case, appellant says he can't find -- I'm sorry.
17 Appellant offers no statutory authority on point to
18 support his position.

19 Now we're talking about assumptions about
20 what the regulation had to assume, but we're going back
21 to 1918. We are bound by the rules that are in play at
22 the present day.

23 The Withers Court drew a clear
24 distinction between a charitable contribution deduction
25 and a sale or exchange of an asset on the business side

1 and held, quote, "The claim loss recognition issue
2 arises here in conjunction with a charitable
3 contribution deduction and consistent with a charitable
4 contribution concept, taxpayers receive no consideration
5 in return for their contribution."

6 Just like in this case, appellant
7 received no consideration for his donation to the
8 Temple. The Withers Court ruled that any business loss
9 cases cited by the taxpayers were irrelevant, given that
10 they chose to make a charitable contribution and are
11 thus, bound by that choice.

12 The IRS also provides guidance to
13 taxpayers in publication 526, charitable contributions,
14 which makes it clear, quote:

15 "If you contribute property with a fair market
16 value that is less than your basis in it, your
17 deduction is limited to its fair market value.
18 You cannot claim a deduction for the
19 difference between the property's basis and
20 its fair market value," end-quote.

21 In this case, the record clearly shows
22 that appellant made a charitable contribution of the
23 property at issue that's plain and simple. He reported
24 this donation as a charitable contribution. The other
25 party to this transaction, contemporaneous with the

1 transaction, the Temple acknowledged this donation in
2 writing. And there's no provision under the law that
3 allows appellant to then deduct the remainder of his tax
4 basis as an ordinary loss after he already reported a
5 charitable contribution of the same property.

6 That's your case, and that's where the
7 analysis should end. At this point in time, we should
8 not engage in hypotheticals or attempt to recast the
9 transaction different than the tax reporting position.

10 The appellant is bound by his tax
11 reporting position. In the board of equalization, which
12 rulings are binding on this panel, has long acknowledged
13 that many opinions that appellant is bound by the tax
14 consequences of what he actually did, which was a
15 donation of the property to the Temple, and he made a
16 charitable contribution.

17 He may not now enjoy the benefits of some
18 other path he might have chosen to follow, but did not.
19 And that's commissioner of the National Alfalfa
20 Dehydrating case is at 417 U.S. 134.

21 JUDGE BRAMHALL: I'm sorry, just the name?

22 MR. HUNTER: National Alfalfa Dehydrating.

23 (Interruption in the proceedings)

24 MR. HUNTER: So appellant's attempt to now
25 impute a sale transaction of this Orlando property,

1 which never occurs to (inaudible) out to retroactive tax
2 planning.

3 And appellant donated the property in
4 December 2012. He filed his tax return in the following
5 year and attempted to recast a transaction as a sale on
6 the same return that he reports the charitable deduction
7 is a sale as a transaction which we know did not occur.

8 We are here to judge what actually
9 occurred, not what appellant now contends may have
10 occurred, or the substantial equivalent to what may have
11 occurred.

12 So again, in summary, in this case you
13 can't have it both ways. Appellant decided to donate
14 his property to the Temple. He made a charitable
15 contribution and is entitled to this deduction in the
16 amount of the fair market value of the property.

17 The Temple confirmed that he made this
18 deduction and respondent allowed it. Appellant is not
19 entitled to claim the loss for the remainder of his tax
20 basis in the property. Thank you very much.

21 JUDGE BRAMHALL: Okay. Any questions?

22 MR. THOMPSON: No questions here.

23 JUDGE BRAMHALL: No questions either?

24 MR. CHO: No.

25 JUDGE BRAMHALL: Okay. Rebuttal?

1 MR. BERNSELEY: Yes. So I disagree with just
2 about everything except that the tax consequences of the
3 transaction are the tax consequences of the transaction
4 that we agree with.

5 I want to address several things. But
6 first of all, another thing that I disagree with is that
7 at least from my point of view, the taxpayer has been
8 the only one that has been able to point to specific
9 legal authority allowing the deduction's claim that is
10 clearly in the briefs as well, but Section 170 for the
11 charitable contribution and the remainder of the loss
12 under 1001 and any other applicable statutes dealing
13 with the disposition of property resulting in a loss.

14 It has been the FTB that has had to
15 contrive its argument based on ambiguities in both a
16 single regulation where a statute does not say what the
17 regulation says, either directly or implicitly.

18 So let me deal with the example that
19 Mr. Hunter gave where he donated his \$100 desk to a
20 charitable organization, which had a fair market value
21 of \$30, and he said that the \$70 loss was gone, and he
22 would not have a loss for \$70.

23 And I agree that he would not have a loss
24 for \$70, but the reason he would not be able to deduct a
25 loss for \$70 is that under Section 165, that would be a

1 personal loss, which is not allowed expressly by the
2 provisions of the code, not because he donated the desk.

3 So while the result is correct, the
4 reasoning that is implied is not correct. Mr. Hunter
5 also said that the property here was --

6 JUDGE BRAMHALL: Can I interrupt for a second?

7 MR. BERNSLEY: Yeah. Absolutely.

8 JUDGE BRAMHALL: I just want to ask a
9 question.

10 MR. BERNSLEY: Please.

11 JUDGE BRAMHALL: So if Mr. Hunter used that
12 desk --

13 MR. BERNSLEY: Right.

14 JUDGE BRAMHALL: In this office for business
15 purposes.

16 MR. BERNSLEY: Right.

17 JUDGE BRAMHALL: Would he be entitled to
18 deduct the difference according to --

19 MR. BERNSLEY: If it was a -- I don't want to
20 get into all the nuances, but I think, arguably, if it
21 was actual business property that was disposed of, and
22 it was given to a charitable contribution, there is a
23 provision and a form. I forget what it is,
24 45-something. I don't know.

25 When you sell, let's say you've

1 depreciated certain business property and now the fair
2 market value, and you either abandon it, you throw it
3 away -- and it still has a remaining basis -- or you
4 sell it. There is a form by which you can deduct the
5 loss.

6 And I think if instead of selling it, you
7 donated it, then I think, yes, if it was business
8 property, you would be able to file on the same form.

9 JUDGE BRAMHALL: Okay.

10 MR. BERNSLEY: And claim that business loss.

11 JUDGE BRAMHALL: Okay, because I think his
12 facts were a little different than your facts. I just
13 wanted to get the same facts out there. That's good.
14 Thank you.

15 MR. BERNSLEY: Sure. But clearly this case is
16 unusual, because you don't see that very frequently. I
17 don't remember a case where that actually happened
18 where -- I mean, I would imagine it has, but I haven't
19 seen one in my practice where a business had donated
20 their essentially loss property where the basis exceeded
21 fair market value, because that has to be the -- the
22 basis has to exceed.

23 Because going back to your example, if it
24 would have been a business property, if the desk would
25 have been used in business, the most likely scenario

1 would be that that desk would have depreciated or
2 written off.

3 So the net adjusted basis would have been
4 zero and you wouldn't have those facts. But if for some
5 reason it was a more expensive desk, and even after
6 depreciation, the basis still exceeded whatever it is.

7 JUDGE BRAMHALL: Okay. Good point.

8 MR. BERNSELEY: I'm confused now of which has
9 to be higher or which has to be lower. But if it was
10 essentially a loss on the donation, then, yeah, I think
11 you would be able to claim it the same way on it,
12 whether it would be just a different form for it.

13 But yes, it would just be unusual for
14 personal property like that because of the depreciation.
15 But a charitable donation is a disposition. I think
16 clearly, arguably it's not a sale. But clearly under
17 the law it is a disposition.

18 I think another thing that might have
19 been problematic with Withers -- and Mr. Hunter raised
20 it -- is that the taxpayer originally took a charitable
21 contribution for the full amount of his basis. And I
22 don't think there's any argument that under 170 or the
23 regulation under 170, you are limited to the fair market
24 value for the charitable deduction.

25 So the Court faced a taxpayer who was

1 clearly claiming a deduction that wasn't allowed under
2 the regulation. And then the taxpayer came back after
3 the fact and said, well, what about this?

4 I think when it comes up, when an issue
5 comes up as an afterthought, the Court is always --
6 well, I don't know always, but frequently a little
7 skeptical of where this argument came from.

8 In this case, it was a claim from the
9 beginning. And yes, there is no disagreement that the
10 \$950,000 was under the amount received in cash, but
11 there was a tax benefit that the taxpayer got as a
12 result of the charitable contribution to the extent of
13 the fair market value.

14 So an accountant trying to prepare a
15 return saying, how do I put together both sides of this
16 transaction, both pieces of this loss on the tax return,
17 this is a way he did it.

18 Now, if you go back and say, how would it
19 have been reported before the 1011, the basis
20 adjustments? If there wasn't anything like that, I
21 think under those circumstances, you have the amount
22 realized in either zero or \$10 or whatever in the full
23 basis. And then the question comes: Would the taxpayer
24 be entitled to deductions totaling more than the loss?

25 And that may have been the tax shelter

1 concern that congress had when enacted 1011B. I don't
2 know, I was very young in 1930-whatever, when all of
3 that was done.

4 But, I mean, there was clearly a large
5 tax shelter component as the potential as a result of
6 contributing appreciated property. But here we have a
7 loss. And the real question is: Does that loss really
8 disappear? And under the code, it doesn't.

9 So I think the best thing I can do at
10 this point is to try to answer any of your questions or
11 any analytical issues or problems or things that you're
12 wrestling with because again, it's the unusual
13 circumstance.

14 JUDGE BRAMHALL: Okay. Any questions?

15 MR. THOMPSON: I guess I do have a few
16 questions. So let's change the base back and forth in
17 the briefing about whether this is a part sale or not.
18 I think I heard it stated in the briefing that it was
19 not a part sale, that it was a part sale, and that
20 doesn't matter either way.

21 So I'm wondering if you can clarify to me
22 appellant's prospective on that? And I would like to
23 get FTB's prospective on that.

24 MR. BERNSELEY: Yeah, I'll try. I'm not sure
25 how much I'm actually going to clear it up, but I'll try

1 to give you my thoughts on the this. I think when we
2 talk about part sale, okay, all of the cases regarding
3 part sale are really addressing a situation where the
4 consideration received is significant.

5 In other words, the taxpayer isn't really
6 making a complete donation of the property. He's
7 getting a substantial amount of consideration that
8 probably, in many cases, is coming close to if not
9 exceeding his basis.

10 So the amount that he's really
11 contributing is something less than the entire value of
12 the property. And again, you see this in most cases
13 where you're dealing with a gain property.

14 Okay. There's an inherent built-in gain,
15 and the taxpayer wants a certain amount of money out of
16 the transaction, and so he makes, essentially, a bargain
17 sale. And then the effect is how much is really being
18 contributed versus how much is really being sold. And
19 so you got these rules around part sale.

20 In this case, I don't know that the \$10
21 is really significant. I think that it does justify if
22 somebody wants to or analytically call it "a sale."
23 There was a transaction where some consideration was
24 received; however, you know, let's face it, who really
25 cared about the \$10?

1 So, you know, I'm not going to sit here
2 and try to make an argument that no, no, no, this was a
3 sale, he really sold it for \$10. You know, you have to
4 be realistic. And so that's why it is muddy, but you
5 have to put it in the context of what the law is really
6 trying to get at.

7 And again, it's usually almost all these
8 situations are where the fair market value is greater
9 and the taxpayer is getting a certain amount of money,
10 and then the rules have to deal with the allocation of
11 basis. And you have a gain or loss and how much, what's
12 the donated intent.

13 Because if you don't do that, you get
14 into these situations where the taxpayer is really not
15 making a donation at all, and he's gotten his money out,
16 and it's the government that's really making the
17 contribution by loss taxes.

18 And the article that I cited, it even
19 speaks to that issue.

20 MR. THOMPSON: Okay.

21 MR. BERNSELY: So what do I think? I think
22 it's really a contribution. But there is a
23 transactional exchange component because there was
24 really some consideration received. So it's not if one
25 wanted to analyze this as a sale, it would not be a pure

1 fiction.

2 MR. THOMPSON: Okay. Thank you. Now let's
3 hear from the Franchise Tax Board.

4 MR. HUNTER: Thank you. If I may, could I
5 respond to Judge Bramhall question from earlier? It
6 involved another factual scenario where I tried to
7 highlight that loss property is donated, and there's no
8 loss realized when the charitable contributions
9 deductions was capped at their fair market value.

10 Internal Revenue Code Section 170 and the
11 regulations thereunder don't have a car val (phonetic)
12 for the property that's used in trade or business. And
13 if you are a corporate entity and the corporate entity
14 elects to make a charitable contribution, they would be
15 in the same positions as the appellant.

16 We have nothing in the record that shows
17 years and years of depreciation to even speak of. This
18 was a charitable donation, which is acknowledged by the
19 letter from the Temple. And there's nothing muddy here.
20 Also I'd like to point out that who made this charitable
21 donation? It was appellant through his revocable trust.

22 It's a grantor trust, which is a
23 disregarded entity for federal income tax purposes. And
24 it's disregarded such that the grantor is treated as the
25 owner of what the trust owns. He made the donation, the

1 individual. He received a benefit from the charitable
2 contribution deduction. So let's -- if we can cap that.

3 Now, Judge Thompson, initially we
4 accepted the position as our audit department looked at
5 the consideration stated when the property was
6 transferred, and there's \$10 stated as consideration
7 received for the property.

8 We all know that that really was done to
9 satisfy the Peppercorn Rule because without any
10 consideration, you have to have that new transfer of
11 property in the chain of title; however, it's of no
12 consequence because the regulation under Section 1001 --
13 it's 1.1001-E says that regulation really addresses
14 capital gain property.

15 Here we have a loss situation. It says
16 on a contribution that is on part sale or part gift, no
17 loss shall be recognized. It's of no consequence here.

18 Now, We're clear that we're dealing with
19 a charity contribution, that falls under Section 170,
20 which clearly states that under the reg. that charitable
21 contribution deduction is limited to the fair market
22 value of the property. So we are, as discussed during
23 the prehearing conference and throughout this hearing,
24 we are at the same place.

25 Appellant received a charitable

1 contribution in the amount of \$950,000.

2 MR. THOMPSON: Can you say again -- did you
3 say 1.1001 Subdivision E is not applicable even if it's
4 a part sale?

5 MR. HUNTER: No. The REG, it stated that
6 there -- no loss should be recognized on a sale --
7 sorry. A contribution of a sale that's part sale and
8 part gift.

9 MR. THOMPSON: So in your position, would that
10 be applicable here?

11 MR. HUNTER: Well, appellant's counsel
12 represented that this is not a sale or exchange. This
13 is a charitable contribution deduction. The question
14 was raised in the briefs, both scenarios were addressed.
15 So initially that was our position if this transaction
16 was seen as a part sale, part gift. We're past that.
17 This is a charitable contribution of the property. 170
18 of the rule.

19 MR. THOMPSON: Okay. So your view is not part
20 sale, part gift at this point?

21 MR. HUNTER: It's a contribution of real
22 property made to a religious organization that wrote
23 back to the taxpayer that said, "Thank you very much."
24 And that's where it ends.

25 MR. GEMMINGEN: Okay. I think, if I may

1 answer your question, Judge Thompson? Our position is
2 that Section 1001-C from the code itself, which talks
3 about recognition of gain or loss, which requires a sale
4 or exchange to occur in order to recognize a loss. That
5 the intent of the parties here is that this is not a
6 sale or exchange, but this is a donation event.

7 As counsel acknowledged earlier when he
8 mentioned and referred to this being a charitable
9 disposition, he said, "Clearly, this is not a sale." He
10 also acknowledged that there was no amount received or
11 returned, and that is reflected also in the intent of
12 the party reflected by the Temple's letter here,
13 acknowledgment of only a charitable donation.

14 There's no specification or
15 acknowledgment of any consideration paid or exchanged by
16 the Temple for this property. And 1001 requires a sale
17 or exchange of property, which connotes the reciprocal
18 exchange of property.

19 And in this case, in order to have a
20 disinterested charitable donation, one has to do that
21 without an expectation of receipt of anything. So this
22 being a charitable donation, when it's doing that
23 without the receipt of anything, which takes us out of
24 the 1001-C because there is no sale or exchange. There
25 is no receipt of the property.

1 MR. THOMPSON: Okay. Did we get an affidavit
2 on this point? Didn't you submit an affidavit of
3 someone saying that they thought the consideration was
4 given? Is that my disposition?

5 MR. BERNSLEY: Yeah, the \$10.

6 MR. THOMPSON: Yeah.

7 JUDGE BRAMHALL: I might be able to help a
8 little bit here, and we discussed this in a prehearing
9 conference. The initial Franchise Tax Board position
10 was focused on the \$10 stated consideration, which made
11 it a part gift, part sale. And the parties had agreed
12 that that was not an issue.

13 Now, whether that was part-sale/part-gain
14 for some other reason, that's what we can talk about,
15 but the original position was that based on that \$10.

16 MR. THOMPSON: Well, yes, and then surely
17 before the hearing, we also got an affidavit stating
18 that the \$10 was submitted. So that led me to wonder
19 that that's still the position? And I think --

20 JUDGE BRAMHALL: Well --

21 MR. THOMPSON: Listen, I don't want to -- I've
22 heard the parties' perspectives on this.

23 JUDGE BRAMHALL: Okay.

24 MR. BERNSLEY: If I may? And I think one of
25 the things -- and I did address this in the brief and it

1 does relate to 1001-C, and that's why I said in my brief
2 what flips depending on whether you view this as a sale
3 or exchange or other transaction, is that if you have a
4 sale or exchange under 1001-C, it is recognized unless
5 there is provision specifically disallowing it.

6 If it is not a sale or exchange, then it
7 is not allowable unless there is a specific provision
8 allowing it. And as I put in my brief, in this case, it
9 doesn't really matter because under 165, as a business
10 loss it is allowable, and that's why it matters whether
11 it's a business loss or a personal loss, because a
12 personal loss would not be deductible, whereas a
13 business loss is deductible.

14 And there's a specific code section 165
15 that does allow a deduction for business losses.

16 MR. THOMPSON: So another question if I might,
17 Mr. Bramhall?

18 JUDGE BRAMHALL: Sure.

19 MR. THOMPSON: So I understand your position
20 is that Withers may have been wrongly decided or as
21 distinguishable. Is that a fair characterization?

22 MR. BERNSELEY: Maybe. I think arguably under
23 Withers, I mean, you can look at it a couple different
24 ways because it was a property transaction, so it was
25 whether it's a transaction entered into for profit.

1 Okay?

2 So losses and transactions entered into
3 for profit are deductible. So we normally think of
4 stock sales, for example, as a transaction entered into
5 for profit. So I suppose one could look at that and
6 say, well, it was a stock sale, so it was a transaction
7 entered into for profit; therefore, it would be deducted
8 under 165.

9 But then you could also look at that as
10 it wasn't part of the business; so you don't look at it
11 in the overall context, you look at it at the
12 transaction level.

13 And the donation of the stock was not
14 entered into for profit; therefore, this specific
15 transaction did not give rise to a loss, a deductible
16 loss. Whereas, in this case, it was part of a business,
17 and it was a business decision. And so it was a
18 business loss as opposed to a transactional loss.

19 So in a business context, you look at the
20 business. On a transactional level, you look at a
21 transaction. And therefore, maybe the Judge was right
22 in Withers in saying that the taxpayers had a
23 nondeductible loss.

24 But there was no discussion in this
25 particular issue. So we don't know whether the Judge

1 Was taking a shortcut, or whether the taxpayer never
2 really made the argument that it should have been
3 deductible on this basis.

4 So there's a lot that you really can't
5 tell in Withers except for what the Court does say is
6 that it wasn't allowed because the taxpayer did not
7 point to any provision of the law under which the loss
8 would be recognized.

9 So, you know, it wasn't for any one of
10 these reasons. It wasn't for what the Franchise Tax
11 Board was saying here is that because you took it as a
12 charitable contribution, you don't have a business loss
13 here. The Judge didn't say that.

14 What he said was you didn't point to the
15 provision of the code that allows the loss. And so the
16 other thing problematic with Withers where I do think
17 the Judge was wrong is making the distinction between --
18 what were the terms? Realized and sustained.

19 MR. THOMPSON: Sustained.

20 MR. BERNSELEY: Yeah. I think the Judge was
21 just out to lunch on that. There's no support. And no
22 case has ever cited Withers for the propositions that
23 are being argued here.

24 MR. THOMPSON: Well, let me ask you about
25 that. Well, let's assume for the sake of the argument,

1 whether it was assumed or whether it was
2 distinguishable: Are there any revenue ruling,
3 regulations, private letter rulings, tax court
4 decisions, or authorities that follow the statutory path
5 that view that as to allow both deduction and the
6 charitable contribution?

7 MR. BERNSLEY: I'm not aware of any direct
8 authority one way or another on this particular issue.
9 I mean, if I could -- believe me, I looked, and if it
10 was there, I'd cited it. But there isn't anything on
11 the other side either. And, as you know, as tax
12 lawyers, you start with the code. I mean, that's --

13 MR. THOMPSON: It makes life interesting;
14 right?

15 MR. BERNSLEY: Yeah.

16 MR. THOMPSON: So I appreciate that. I want
17 to make sure that I give the Franchise Tax Board also a
18 chance.

19 MR. BERNSLEY: If I can just finish my
20 thought. And I think one of the things that you guys
21 will get to think about is what makes the most sense
22 from a policy standpoint here?

23 I mean, what policy is going to be
24 advanced by saying if you donate business property that
25 has an inherent loss, you get screwed.

1 So if you want to do that, you better
2 think of a way to make it look like a sale, get the loss
3 and then give the money away. I mean, what tax policy
4 gets advanced by that? I mean, it's just nonsense.

5 And it wouldn't be deductible that way.
6 And there isn't any code section that specifically says,
7 you know, oops, this is just mechanically the way. It
8 falls out, sorry. But we don't have that either. It's
9 just now you've got to invent the policy that does that.
10 Why? Doesn't make sense.

11 JUDGE BRAMHALL: Okay.

12 MR. THOMPSON: Thank you.

13 JUDGE BRAMHALL: You want to get FTB's
14 perspective?

15 MR. BERNSLEY: Yeah. It would be fair to hear
16 from both sides. There's just a lot we've heard.

17 JUDGE BRAMHALL: Okay.

18 MR. THOMPSON: Did you like to add to that?

19 MR. HUNTER: Sure. From respondent's position
20 is that Withers is still a good low, controlling. And I
21 recall that there were a couple of examples that the
22 taxpayers of Withers offered to the Court and said what
23 we want is a taxpayer transferred stock to an employee
24 benefits plan, and there was a loss or there was
25 something in the stock, and that taxpayer was able to

1 recognize that loss or was sustained.

2 But that was not a -- the Court made it
3 clear, well, that was not a donation. That was not
4 reported as a charitable contribution. And again,
5 Withers stands for: What's in your heart, taxpayer?
6 Are you donating this property with a good cause without
7 any expectation or consideration received on the back
8 end, or are you entering into a business deal?

9 And in that case it was clear. The
10 taxpayers donated the property just like in this case.
11 Appellant donated the property. Again, as mentioned in
12 the briefs, taxpayer did not have to make a charitable
13 contribution of this property.

14 He could have sold the property on an
15 open market, despite the downturn of the economy,
16 despite anything else. It was his prerogative to sell
17 it, and he chose not to. And that's where we are. A
18 policy perspective --

19 MR. GEMMINGEN: Can I address it?

20 MR. HUNTER: Well, just if I can. A policy
21 which is also -- I want to say codified, but confirmed
22 in case law is a taxpayer is bound by their reporting
23 position. And we have cases where taxpayers make
24 mistakes on their tax returns all the time. But you
25 cannot go back in time and change the form of the

1 transaction.

2 You can also -- sorry. A taxpayer also
3 cannot receive the benefit of taking inconsistent and
4 unreconcilable positions on the same tax return
5 involving the same property. Those are much stronger
6 policies that must be adhered to. And again, this case
7 is turning on the law, not policy.

8 MR. GEMMINGEN: And I'd also like to address
9 the policy that the purpose of charitable contribution
10 is in part to ensure that the property goes to intent of
11 the beneficiary and goes to a potential use that
12 benefits the charity.

13 Oftentimes, especially with a location
14 like here in Los Angeles, it might be very difficult to
15 obtain property nearby a temple or nearby a school that
16 could use that property and to require a taxpayer to
17 sell the property, you might not get that property back
18 to be put to use in the proximate location for it's
19 intended use.

20 And the benefit that arises is that the
21 taxpayer is able to claim an appraised fair market value
22 amount. And we're not disputing the fair market value
23 amount today in this case. But the fair market value
24 that was provided here by the appraisal is \$950,000.
25 Taxpayer got a benefit of a \$950,000 charitable

1 donation.

2 The Temple actually ultimately sold the
3 property for \$650,000. And so by allowing the donation
4 to occur in a uniform manner across the country,
5 oftentimes a building can be donated near the location,
6 next to the adjoining location of the intended
7 beneficiary, and it's not put on the open market
8 required to be sold, which could have been done to
9 obtain the loss. It wasn't.

10 And so the tradeoff between obtaining a
11 business loss by selling the property, as opposed to
12 being able to be used as a charitable contribution and
13 ensure that the property is available for the intended
14 beneficiary is that the person is able to obtain the
15 fair market value donation amount supported by an
16 appraisal, which may or may not ultimately be the amount
17 that the property was even sold for, but it represents a
18 fair market value at the time of donation.

19 But it also ensures that the property, at
20 times, can be used by the intended beneficiary. But
21 once it's sold in the open market to obtain the loss,
22 it's forever loss to the organization that could have
23 used it.

24 JUDGE BRAMHALL: All right. I just want to
25 know that part of the factual statement you made is not

1 in the record. So --

2 MR. BERNSELEY: And I don't know that I
3 necessarily agree or accept something that assume policy
4 considerations there. I do want to address one thing
5 that. And I think I mentioned it in my brief as well is
6 that during the recession, this property became vacant
7 and it was costing Hinden a lot of money to, you know,
8 keep it safe and keep the air conditioning on and keep
9 vandals out and then, you know, all those things.

10 And with certain property, particularly
11 business property, you can abandon the property and
12 realize and recognize a loss for abandoning the
13 property. You can't abandon real estate. You can't. I
14 mean, because your name is on title and until it goes to
15 someone else, it's yours. So if something happens
16 there, they're knocking on your door. So you can't
17 abandon real property.

18 So we had to convey it to somebody if he
19 wanted to get it out of his name, and we all know what
20 was going on during the recession. if you wanted to
21 sell something, it could take, you know, a long time and
22 a lot of the investigations.

23 And, you know, for business property,
24 you've got the environmental stuff that you have to go
25 through, and it's a nightmare. And I'm not saying that

1 Mr. Hinden wasn't generous and didn't have a donative
2 intent at all because clearly this was a business
3 decision too. He wanted to get out of this property.
4 And so he had a business motivation as well as a
5 philanthropic motivation to transfer this.

6 And so I -- you know, to say it's not
7 business related, I think it's generally --

8 JUDGE BRAMHALL: Okay. Any other questions?

9 MR. THOMPSON: I'm good. Thank you.

10 JUDGE BRAMHALL: Are you good?

11 MR. CHO: Yes.

12 JUDGE BRAMHALL: We need to wrap up. We've
13 kind of run our course. I'll give each a final minute
14 for a closing statement, if you like?

15 MR. BERNSELEY: He go first, I go last?

16 JUDGE BRAMHALL: You go first. Last --

17 (Indicating Mr. Hunter)

18 MR. BERNSELEY: Oh, I get a rebuttal. Okay.
19 So you've heard everything, and I think the thing that's
20 most important is that statutorily there are two
21 sections that allow, collectively, a deduction for the
22 entire realized loss. 170 for the charitable
23 contribution and 1001 in the disposition rules and
24 Section 165 primarily, where the 1001 is computational
25 on the losses actually allowed under 165.

1 So under those two sections the entire
2 realized loss is recognizable for tax purposes. The
3 code is really unambiguous when it comes to this, and
4 you really have to get into this mindset of what happens
5 in the normal personal loss space to really find the
6 confusion here.

7 But under the code, both parts of the
8 loss are allowable. And there are good policy reasons
9 for that being the case here as well. So we ask you to
10 find in the taxpayer's favor and if you want to make the
11 \$10 adjustment. I mean, obviously that makes sense.

12 JUDGE BRAMHALL: Okay. Thank you.
13 Mr. Hunter?

14 MR. HUNTER: Thank you. We believe -- I'm
15 sorry. Respondent's position is that this case is a
16 simple one. Appellant made a charitable donation of the
17 property. Appellant took the time to obtain a fair
18 market value appraisal of the property. He reported the
19 fair market value as the amount of charitable donation,
20 which was acknowledged by the Temple and this deduction
21 was properly allowed by respondent.

22 When a taxpayer has an asset of property,
23 and despite whatever may be going on in the
24 circumstances, the taxpayer decides to dispose of the
25 property, the taxpayers has a decision to make. There's

1 a fork in the road.

2 And, in this case, appellant took
3 charitable contribution street, and he has to take it
4 all the way to the end. There is no doubling back to go
5 on the other side of the fork and then also receive a
6 loss on a phantom sale or exchange of the property,
7 which did not occur, which appellant now concedes did
8 not occur for the remainder of the basis of the
9 property.

10 While this is an interesting academic
11 discussion, we all know that deductions under the code
12 are a matter of legislative grace. And there is no law,
13 statute, nor the code, which allows appellant to take
14 the tax-reporting position that he did. The remaining
15 loss in the \$1.3 million was properly disallowed. Thank
16 you.

17 JUDGE BRAMHALL: Thank you.

18 MR. BERNSLEY: So back to me? Respondent
19 keeps saying there is no law, and I keep telling him
20 exactly what law we're citing. I think you get that.
21 There's no law that says there's a for in the road.
22 There's no law that says you have to choose one, you
23 can't have both.

24 I think there is a longstanding precept
25 that you can't double down and get more than the total

1 realized loss; although even that's not statutory. I
2 think that's -- so I don't know. I could be wrong
3 there.

4 But in the event, the taxpayer is not
5 trying to do that here. We're only trying to deduct the
6 realized loss, not something in excess of the realized
7 loss. I think if you did the straight statutory
8 computation without this hypothetical realization with
9 \$950,000, you would end up with a loss that was greater
10 than the actual realized loss. We're not trying to do
11 that.

12 And I'm not trying to argue that we
13 should be able to do that. So there's no there no fork
14 in the law. The thing you'll notice in the 1001 REG,
15 and again this was in the brief, that it is the only
16 sentence that gives any credence, whatsoever, to the
17 FTB's argument where that regulation speaks of a loss
18 not being allowable.

19 Every example given following that
20 regulation is a personal transaction where the loss
21 would not be allowable under 165. So 1001 is not a loss
22 disallowance section. It has to be referring to another
23 section of the code, namely and most specifically 165,
24 and while the regulation is correct with respect to all
25 of its examples and under a personal contribution

1 perspective.

2 And I don't think -- although I can't say
3 this for sure from memory, the gifts that the code is
4 talking about or the regulation is referring to, I
5 think, are personal gifts. It's not even talking about
6 a charitable contribution.

7 So there's really no statutory or even
8 regulatory authority for the Franchise Tax Board's
9 position. It's really just based on this longstanding
10 result of personal transactions not a business
11 transaction.

12 JUDGE BRAMHALL: Thank you. Any last
13 questions?

14 MR. CHO: None here.

15 MR. THOMPSON: I'm good. Thank you.

16 JUDGE BRAMHALL: Okay. Then I'm going to
17 close the record in this appeal and conclude this
18 hearing. The case is submitted for decision on
19 March 20th, 2019.

20 Mr. Bernsley, Mr. Hunter, thank you.
21 Panel will discuss your presentations and the
22 documentation, and we have the files. We will issue a
23 written submission. Our intention is to submit that
24 within a hundred days, and we're closed and adjourned.
25 Thank you.

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MR. BERNSLEY: Thank you.

MR. GEMMINGEN: Thank you.

MR. HUNTER: Thank you.

(Proceedings adjourned at 11:15 a.m.)

1 HEARING REPORTER'S CERTIFICATION

2 * * * * *

3
4 I, Miranda L. Perez, a Hearing Reporter in and for
5 the State of California, do hereby certify:

6 That the foregoing transcript of proceedings was
7 taken before me at the time and place herein set forth;
8 that any witnesses in the foregoing proceedings, prior
9 to testifying, were duly sworn; that a record of the
10 proceedings was made by me using machine shorthand,
11 which was thereafter transcribed under my direction;
12 that the foregoing transcript is a true record of the
13 testimony given.

14 I further certify that I am in now way interested
15 in the outcome of said action.

16 I have hereunto subscribed my name this 28th day of
17 March, 2019.

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20 Miranda Perez,
21 Hearing Reporter

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