

BEFORE THE OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
)
ENZO RICCIARDELLI,) OTA NO. 19014233
)
APPELLANT.)
)
_____)

TRANSCRIPT OF PROCEEDINGS
Cerritos, California
Wednesday, February 19, 2020

Reported by:
ERNALYN M. ALONZO
HEARING REPORTER

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Transcript of Proceedings, taken at
12900 Park Plaza Dr., Cerritos, California, 90703,
commencing at 2:03 p.m. and concluding
at 3:10 p.m. on Wednesday, February 19, 2020,
reported by Ernalyn M. Alonzo, Hearing Reporter,
in and for the State of California.

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APPEARANCES:

Panel Lead: ALJ ELLIOTT SCOTT EWING

Panel Members: ALJ JOHN JOHNSON
ALJ NGUYEN DANG

For the Appellant: SCOTT B. BURKHOLDER
DAVID C. HOLTZ

For the Respondent: STATE OF CALIFORNIA
FRANCHISE TAX BOARD
By: DAVID GEMMINGEN
CAROLYN KUDUK

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I N D E X

E X H I B I T S

(Appellant's Exhibits were received at page 10.)
(Department's Exhibits were received at page 10.)

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

	<u>PAGE</u>
By Mr. Holtz	12
By Mr. Gemmingen	18

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

	<u>PAGE</u>
By Mr. Burkholder	33

1 Cerritos, California; Wednesday, February 19, 2020

2 2:03 p.m.

3

4 JUDGE EWING: We're now on the record in the
5 Office of Tax Appeals oral hearing for the appeal of Enzo
6 Ricciardelli, Appeal Number 19014233. Today is
7 February 19th, and the time is approximately 2:03 p.m.,
8 and we are Cerritos, California.

9 My name is Elliott Scott Ewing. I'm the lead
10 Administrative Law Judge for this case. My fellow
11 co-panelist are Judge John Johnson and Judge Nguyen Dang.

12 JUDGE DANG: Good afternoon.

13 JUDGE EWING: We are all from the Office of Tax
14 Appeals, which is a completely independent body from the
15 Franchise Tax Board, and we will base our decision only on
16 what has been provided in the record in the appeal and the
17 discussions held at this meeting.

18 FTB, could you please identify yourselves for the
19 record, your title and role.

20 MR. GEMMINGEN: Good afternoon. I'm David
21 Gemmingen, tax counsel for the Franchise Tax Board. With
22 me is Eddie Kuduk [sic] also tax counsel for Franchise Tax
23 Board.

24 JUDGE EWING: Very well. Thank you and welcome.

25 And now for the Appellant.

1 MR. HOLTZ: I'm David Holtz. I'm an attorney
2 representing the Appellant.

3 MR. BURKHOLDER: Scott Burkholder representing
4 the Appellant.

5 JUDGE EWING: Very well. Thank you and welcome.

6 Okay. So the -- I want to make sure you all
7 received the prehearing minutes and orders and the exhibit
8 binder electronically. Do you have those?

9 MR. BURKHOLDER: Yes.

10 JUDGE EWING: Okay.

11 MR. GEMMINGEN: I have the material opposing
12 Counsel provided. Thank you.

13 JUDGE EWING: Okay. Very well.

14 Now, onto the issue. It's my understanding the
15 sole issue in this appeal is whether Appellant has shown
16 that he timely identified like-kind replacement property
17 within the 45-day statutory period in order to qualify for
18 non-recognition of gain treatment under Internal Revenue
19 Code Section 1031 for the 2012 tax year.

20 Do we have that correct?

21 MR. HOLTZ: Yes.

22 MR. GEMMINGEN: Yes.

23 JUDGE EWING: Okay. Very well. Now, onto the
24 evidence. The parties have previously exchanged exhibits.
25 The FTB has provided exhibits A through L, and Appellant

1 has provided Exhibits 1 through 7. We did not have any
2 objections to those at the prehearing conference. Do we
3 have objections to those today? Appellant?

4 MR. BURKHOLDER: Your Honor, this is Scott
5 Burkholder. Regarding an additional exhibit, there was
6 additional Exhibits 1 through 5 that were provided, I
7 believe, on --

8 MR. GEMMINGEN: The 10th.

9 MR. BURKHOLDER: -- February 10th. So one of
10 those exhibits, Exhibit Number 4, is a calendar which is
11 illustrating the lapse of time over the 45 days. It's
12 somewhat confusing in that it's a calendar from 2020, and
13 the tax year at issue is 2012. And so, therefore, the
14 days of the week don't actually line up to the days of the
15 week in 2012.

16 I just wanted to ask if we can stipulate that
17 July 5th, 2012, which is the 45-day date at issue, was on
18 a Thursday. That was Thursday July 5th, 2012, and the
19 other date of July 8, 2012 was on a Sunday.

20 JUDGE EWING: Okay. Are you referring to the
21 Respondent FTB's Exhibit K?

22 MR. BURKHOLDER: No, Your Honor. I'm responding
23 to additional exhibits which were --

24 JUDGE EWING: Okay. Okay. Yes. So those
25 exhibits were submitted after the second prehearing

1 conference.

2 MR. BURKHOLDER: Correct.

3 JUDGE EWING: Right. Okay. And so those
4 exhibits we will be numbering Exhibits I, J, K, and L.

5 MR. BURKHOLDER: Okay.

6 JUDGE EWING: I'm sorry about that. Yes, we will
7 be numbering those I, J, K, and L. And they are currently
8 numbered on the submission that we received from the
9 Franchise Tax Board. I think that may be resulting in the
10 confusion.

11 MR. BURKHOLDER: Okay. What I see is I have five
12 exhibits from the 10th. So would they be I, J, K, L, and
13 M?

14 JUDGE EWING: No. I'm sorry. I believe it's
15 H -- sorry about that. It's H, I, J, K, and L.

16 MR. BURKHOLDER: Okay.

17 JUDGE EWING: Yes. Because G was the letter
18 confirming the close of escrow on May 21st, 2012, which
19 was the last one you provided prior to that.

20 MR. BURKHOLDER: Yes. So it is -- it's Exhibit K
21 that I'm referring to.

22 JUDGE EWING: Okay. Yes. And we do have that
23 here in front of us. I'm sorry. If you could repeat the
24 concerns you have with that.

25 MR. BURKHOLDER: Yes, sir. If you notice, this

1 is an illustration by the FTB to -- to show that what the
2 45-day limit would be in 2012. However, it's on a
3 calendar from 2020, and so the days of the week don't
4 match up to the days of the week from 2012.

5 MR. GEMMINGEN: And if I may address that,
6 please?

7 JUDGE EWING: Please do.

8 MR. GEMMINGEN: That's fine if -- I'm happy to
9 enter into that stipulation. It's really -- it's a
10 distinction without a difference because we're really just
11 interested in determining the 45th day and the 48th day.
12 And there's no extra days -- there's no, like,
13 February 29th that pops in the difference in the year
14 between 2012 and 2020.

15 It's -- we're -- we're doing this for the purpose
16 of counting to 45 days, and the 45-day limit is a strict
17 limit set by the statute. So whether it's a Sunday or a
18 Thursday, in our opinion, irrelevant. But we're very
19 happy to make that stipulation because this is just done
20 to demonstrate the regulations example, which is top line.
21 And then on the bottom part of the date is the actual
22 timeline for the taxpayer here.

23 JUDGE EWING: Okay. We understand that. We can
24 talk further in your presentation about the distinction if
25 it's a Sunday or not. But it sounds like where the

1 parties are willing to stipulate that Thursday,
2 July 5th -- sorry -- July 5th, 2012 was a Thursday.

3 MR. BURKHOLDER: Correct.

4 JUDGE EWING: And July 8th, 2012 was a Sunday.

5 MR. BURKHOLDER: Correct.

6 JUDGE EWING: And, obviously, the relevance of
7 those dates we'll discuss later.

8 MR. BURKHOLDER: Correct.

9 JUDGE EWING: Okay. So that stipulation shall be
10 noted. Okay. Any other questions about the exhibits?

11 MR. BURKHOLDER: No, Your Honor.

12 JUDGE EWING: No?

13 MR. GEMMINGEN: No. Thank you.

14 JUDGE EWING: Okay. So I'll admit Exhibits 1
15 through 7, Franchise Tax Board's Exhibits A through L, and
16 Exhibits 1 through 7 from Appellant into the record.

17 (Department's Exhibits A-L were received in
18 evidence by the Administrative Law Judge.)

19 (Appellant's Exhibits 1-7 were received
20 in evidence by the Administrative Law Judge.)

21 JUDGE EWING: And we don't -- it doesn't seem
22 like we have anything else to bring us today or present
23 today?

24 MR. BURKHOLDER: That is correct.

25 JUDGE EWING: Okay. Very well. Thank you.

1 Okay. Regarding witnesses, we understand that
2 there will not be any witnesses. The presentations today
3 will be made by Appellant's counsel and the Franchise Tax
4 Board's counsel; is that correct?

5 MR. BURKHOLDER: Correct.

6 MR. GEMMINGEN: Yes, that's correct.

7 JUDGE EWING: Okay. Thank you.

8 So quickly, I'll go over the order of
9 proceedings. As I said during the prehearing conference,
10 there are two basic parts to the hearing; evidence and
11 arguments. We've got evidence in the record, and so now
12 I'll turn to the arguments.

13 We will begin with Mr. Burkholder's presentation,
14 which should not exceed 20 minutes. Then the FTB will
15 make its presentation not to exceed 20 minutes. Then
16 Appellant will be allowed approximately five minutes to
17 respond after FTB's arguments, if you wish. Then I and my
18 co-panelists will ask questions if we have them.

19 So any questions at that point?

20 MR. HOLTZ: No, Your Honor.

21 JUDGE EWING: Okay. So let's get started with
22 the presentations. Presentation for Appellant, go ahead.

23 MR. HOLTZ: It will David Holtz, if that's okay,
24 representing.

25 JUDGE EWING: Yes. Sorry.

1 MR. HOLTZ: That's fine.

2

3 PRESENTATION

4 MR. HOLTZ: So first of all, I wanted to say I am
5 so happy. I wanted to come to one of these hearings. You
6 guys have had the job for months or have been practicing
7 for months. I have already seen that this is an
8 improvement in the process. So I'm very proud that we
9 have this new process, and that you guys got this great
10 gig, all of -- each one of you judges.

11 And I've seen now a couple of the procedures
12 firsthand in the back, and I am just very pleased and
13 proud the State of California has improved this situation.
14 Our firm has been litigating and exclusively litigating
15 taxes for -- since -- I don't know. It's been 15 years
16 together. So we've been there and back.

17 And congratulations to all the judges here for
18 getting a great gig and for doing this job and giving us
19 the time. I'm sure, before you got this job, I'm
20 wondering did you have any idea how hard it would be to
21 have the required patience to sit and listen each day to
22 each one of these.

23 Because I'm sitting in the back, and I'm a tax
24 geek, and yet, I found myself thinking I'm so happy I'm
25 not one of those judges everyday doing this. But thank

1 you for, you know, being here.

2 So our presentation on this case is that this
3 case for us is about the effective and appropriate
4 administration of tax law. Now, our firm is special. And
5 I'm a special attorney in the sense that we did work at
6 IRS counsel as attorneys hired by the IRS, and we manage
7 the administration of tax law. And when we were
8 trained at the administration of tax law -- or excuse me.

9 When we were trained at the IRS, they told us a
10 bunch of things. The policies of how to administrator the
11 tax law. They came in and told us at my level to always
12 wear the white hat. They told -- made it clear to us we
13 were there only to collect and assess the correct tax. We
14 were to administer -- effectively administer the tax law
15 in a fair amount of manner balancing the interest of the
16 government and the taxpayer when we did this.

17 The goal was not perfect compliance. It was
18 making sure that the taxpayers had substantial compliance.
19 And this was important because we have a voluntary tax
20 system. Even though when you go to law school and
21 somebody says that, you laugh at first. You go -- because
22 you say to yourself it's voluntary, but if I don't
23 volunteer, I go to jail. Isn't that right?

24 But it's voluntary because it depends upon each
25 of us who are in the system, especially, the people at the

1 government, to carry out their duties in a way that gives
2 the public confidence that they're going to be treated
3 fairly. Because when it doesn't happen -- and I've been
4 there on both sides. I worked for the government, and I
5 am now, of course, on the other side.

6 When the government does not behave in such a way
7 that carries that goal out, the response in a voluntary
8 system is people stop volunteering. And when it stops
9 volunteering, eventually, we'll have to get another
10 system; another type of tax that doesn't require voluntary
11 compliance. But this is the system we have.

12 I remember back in that day too; we would even
13 joke about it. That phrase better off dead, where the
14 little kid that was delivering papers was chasing the guy,
15 and he kept saying, "I want my two dollars." And even at
16 the IRS my boss and my mentor, if I or somebody in the
17 office was doing something where we thought they were
18 pushing it to the -- you know, looking too far, holding
19 somebody to the penny, they would laugh. And we would
20 say, "I want my two dollars."

21 So the thing I want to point out about this case
22 is in the policy of this 1031. And it's identified in the
23 case Southern Pacific Trans Company v Commissioner, where
24 they indicated that the basic reason for allowing
25 non-recognition of gain or loss on the exchange of

1 like-kind property is that the taxpayer's economic
2 situation after the exchange is fundamentally the same as
3 it was before the transaction.

4 And the idea behind this is to encourage the
5 taxpayers to maintain investments. It's good for the
6 country, and that's why we're giving the incentive. So
7 our -- generally, what I'm going to be saying in our
8 presentation here is this taxpayer, our client, has been
9 motivated by this rule; has complied overwhelmingly with the
10 rule. We will be talking about a potential problem that
11 occurred, but the problem that occurred was not the fault
12 the taxpayer.

13 It was because of the qualified intermediary who
14 gave him bad advice, and the amount is tiny. The amount
15 of day or days that occurred are very short. So let's
16 talk about the rules that we have. They're in the 1031
17 rule, the rules that matter for this case. There are
18 really two. One of them is that you are required, if you
19 want to get this treatment, to identify properties that
20 you will buy, replacement property within 45 days.

21 You can do that in two ways. You can do that by
22 identifying and giving a list of the qualified
23 intermediary, or you can do that by also contracting for
24 the purchase. The other rule that I believe is important
25 here -- our position is important -- is that you also have

1 to have purchase a property, a replacement property,
2 within 180 days.

3 So I think the facts -- we could have probably
4 stipulated to everything, and maybe in another day we will
5 do that for you. But I think the facts are probably not
6 in dispute between the parties. We have the client hiring
7 a qualified intermediary. The qualified intermediary, in
8 two different written places, advise and instructed this
9 taxpayer of the deadline for identifying qualified
10 parties.

11 And our taxpayer, I believe, it's not disputed.
12 But the taxpayer, my client, identified the properties
13 timely in compliance with the qualified intermediary's
14 instructions. However, the qualified intermediary was of
15 off. Picked the wrong date. Wrote instead of July 5th on
16 a Thursday, he said the deadline would be July 8th on a
17 Sunday.

18 The reason why the days of the week are -- we
19 believe that in our presentation -- are important because
20 we're not talking just about -- we're talking about three
21 calendar days. But we're also talking about one business
22 day for a business transaction, which I think is
23 significant.

24 Let's see. So the properties that were
25 identified within by -- pursuant to the instructions on

1 July 8th, there were three. But the ones that mattered to
2 us are the Topanga property and another one, the Channel
3 Road property. The Topanga property is the one that was
4 picked that also technically qualifies in the 45-day rule.

5 I believe that the parties won't dispute that
6 this qualifies because it was -- because that property was
7 under contract and meets the 45-day rule because it was
8 part of -- it was involved in a contract for sale. In
9 fact, this -- our client intended to purchase that
10 property. But like many transactions, it fell through.

11 So ultimately, within the 180 days, he closed on
12 the Channel Road property, a property that is in that list
13 that was given to the qualified intermediary on July 8th,
14 a Sunday, technically complying with the instructions. So
15 except for the sole problem in this case, except for the
16 fact that the qualified intermediary wrote down, for two
17 times in writing, an instruction that included a date, one
18 business day -- that would cause him to be one business
19 day late or three business days of calendar days late, we
20 wouldn't be here.

21 And in fact, in my point of view, the effect of
22 administration of tax, we shouldn't be here. This is a
23 case where -- and we've been working these cases for
24 years. I've done these similar cases with the government.
25 This is a chase where a right way to administrator the tax

1 in this case, is someone at the Franchise Tax Board should
2 have looked at this and said we have enough. This is
3 enough.

4 It's overwhelming compliance, not just
5 substantial compliance. And that they should have said,
6 yes, let's let this one go. It's not worth it. It's a
7 waste of time for administrating it this way. And it's a
8 waste of time for -- and also the client has participated
9 properly in this arrangement and should be rewarded by the
10 delay of the taxes.

11 Let's see. And I'm happy to say we don't really
12 have much more to say. So this isn't going to be one of
13 the, you know, cases that from our point, which will make
14 you fall asleep. If you haven't already, with all due
15 respect. So that will be the end of my presentation.

16 JUDGE EWING: Very well. Mr. Holtz, thank you so
17 much.

18 Franchise Tax Board.

19

20 PRESENTATION

21 MR. GEMMINGEN: Thank you. David Gemmingen,
22 Franchise Tax Board.

23 And to begin with, it's very clear from the
24 Franchise Tax Board's brief that we do not agree that the
25 Topanga property was properly identified within the 45-day

1 period. For one, the property never identified itself in
2 a written document signed by the taxpayer as potential
3 replacement property. While the code does allow a
4 property which is actually purchased in a completed and
5 closed sale within the 45-day period to be considered to
6 be have been identified -- actually, excuse me.

7 It's a regulation, which is 1.1031K-1c4II, which
8 if the property which is under contract is actually
9 purchased, then that qualifies as identified property.
10 But since this property was never purchased, Counsel is
11 wrong on the opposing side, that that property is properly
12 identified. No property is identified within the required
13 45-day period.

14 In addition, it's interesting to note in the
15 taxpayer's appeal brief, they referred to the Ocmulgee
16 Fields case twice in their case. Within the Ocmulgee
17 Fields case, which dealt with the 1031, the court notes in
18 that decision 1031 is an exception to the general rule the
19 taxpayer immediately recognized gains from disposition of
20 property. See Internal Revenue Code Section 1001(c).
21 Thus, we strictly construe exceptions to the general rule
22 immediate recognition.

23 Thus, we afford non-recognition treatment to the
24 exchange, only if the exchange is one which satisfies both
25 specific restrictions in the code and the underlined

1 purpose for the exchange is accepted from the general
2 rule.

3 In addition, Footnote 6 of the Ocmulgee Fields
4 case, which we view later, states, the statute imposes
5 time limits identifying and acquiring a replacement
6 property in order to qualify for the non-recognition
7 treatment under Section 1031(a). The taxpayer must
8 identify the replacement property within 45 days when he
9 transfers his property.

10 The statute imposes time limits in identifying and
11 acquiring the replacement property to reduce the amount of
12 flexibility the taxpayer has to find and purchase
13 replacement property. Footnote 6 goes on to state, in
14 order to qualify for non-recognition treatment, under
15 Section 1031, the taxpayer must identify the replacement
16 property within 45 days. Thus, the 45-day mandatory I.D.
17 period is confirmed twice in this opinion closing Counsel
18 cites.

19 And so as we're here dealing with an accountable
20 45-day compliance inquiry, let's review some of the
21 primary rules necessary to accomplish this decision on
22 this property in California that recognize the gain on the
23 transaction.

24 First, Internal Revenue Code Section 1031(a)(1)
25 provides no gain or loss shall be recognized on the

1 exchange of property held for productive use in a trade or
2 business or for investment if the property is exchanged
3 solely for property of like-kind, which is to be held for
4 productive use in trade or foreign investment.

5 So we not only exchange trade or business
6 property or investment property, the property exchange
7 must be like-kind. Like-kind means trucks for trucks,
8 jets for jets, real property for real property. In other
9 words, personal property cannot be exchanged for reel
10 property in spite the fact that they might both be trade
11 or business properties.

12 Internal Revenue Code Section 1031(a)(3) provides
13 with respect to identification requirements, any property
14 received by the taxpayer shall be treated as property
15 which is not like-kind property if such property is not
16 identified on or before the 45th day after the taxpayer
17 transfers a relinquished property.

18 And finally, Treasury Regulation
19 1.1031K-1(d)(ii), as provided in Respondent's hearing
20 Exhibit J provided last week, the replacement property
21 must be substantially the same as the identified to be
22 made. The replacement property received must be
23 substantially the same as the identified replacement
24 property to be considered received with in the 180 day
25 acquisition period.

1 Thus, only like-kind property is eligible to be
2 exchanged in a non-recognition transaction. And if the
3 property ultimately acquired is not identified
4 unambiguously in writing, the 45-day identification
5 period, the property by law is not like-kind property
6 regardless of whether the property is also real estate.

7 The Appellant also is not considered to actually
8 timely acquired the replacement property within 180 day
9 period in this case as well, since the property purchased
10 is not substantially the same as the property which was
11 reportedly identified. As no property was identified --
12 or even if we consider the Topanga Boulevard property
13 identified, that same property in substantial form was not
14 received by the Appellant. So thus, the Appellant fails
15 both the 45-day test and the 180-day test.

16 Accordingly, the non-recognition provision of
17 Section 1031 does not apply to this matter in gain that is
18 recognized, included the taxable income pursuant to IR --
19 Internal Revenue Code Section 1001(c). In addition, I
20 would like to briefly review the exhibits FTB provided to
21 this panel in their opening brief.

22 First, Exhibit A, the federal 1031 exchange
23 reporting form 8824 submitted with Appellant's 2012
24 California tax return, which Appellant at line 5
25 erroneously claimed to have identified this Channel Road

1 property on May 21st, 2012. A fact that we all know is
2 incorrect.

3 Second, Appellant's California real estate
4 broker's license has confirmed, he has professional
5 experience in real estate sales and closings. Third,
6 Exhibit C, Appellant's final statement -- settlement
7 statement truly states the May 21st closing date. Fourth,
8 at Exhibit D, Appellant's Designation Form signed by
9 Appellant on July 8th and was received, actually, on July
10 9th by the exchange company, but it was signed three days
11 after the identification period terminated.

12 And fifth at Exhibits E, F, and G, we have
13 further documentation. It's a federal reporting form
14 1099S, mortgage full payment confirmation, and escrow
15 statement, each clearly stating the May 21st date of West
16 Hollywood Crescent Heights property, including the letter
17 dated May 22nd from Appellant's former mortgage holder
18 HSBC.

19 Thus, Appellant had multiple documents confirming
20 the May 21st sales date. The Appellant's receipt of its
21 May 22nd mortgage payoff confirmation letter from HSBC is
22 yet another notice that Appellant's property did not close
23 on May 24th. In addition and equally as important, in
24 Appellant's written April 30th, 2012, exchange agreement
25 ANI X31, which is found at Appellant's Exhibit 1 -- and I

1 believe they were renumbered -- but which was provided
2 earlier this month in a new group of Appellant's exhibits.

3 Paragraph 5 of the exchange agreement begins with
4 the sentence, "The taxpayer," that is Appellant, "shall
5 have a sole duty and obligation to identify replacement
6 property." Thus, Appellant agreed in writing to be solely
7 responsible for the replacement property identification.
8 And the exchange agreement in the preceding paragraph,
9 Paragraph 4, which you can see has been provided to you --

10 JUDGE EWING: Mr. Gemmingen, can I pause you for
11 a moment there?

12 MR. GEMMINGEN: Yes.

13 JUDGE EWING: Can you point us to exactly where
14 you're looking?

15 MR. GEMMINGEN: So the exchange --

16 JUDGE EWING: Yes. That's Exhibit --

17 MR. GEMMINGEN: So Paragraph 5.

18 JUDGE EWING: Appellant's Exhibit 1.

19 MR. GEMMINGEN: Paragraph 5.

20 JUDGE EWING: Yeah.

21 MR. GEMMINGEN: So the first sentence there.

22 JUDGE EWING: Okay. Okay.

23 MR. GEMMINGEN: And then Paragraph 4, which is
24 preceding paragraph to that identifies the 45-day period.

25 JUDGE EWING: Okay.

1 MR. GEMMINGEN: And so that's also important too,
2 because the Appellant was aware of the 45-day period back
3 in April. And the Appellant in May was aware of the
4 closing date. The Appellant is a real estate broker, a
5 real estate professional. And the Appellant in Paragraph
6 5 undertakes the sole duty and responsibility for ensuring
7 compliance with the identification of the property.

8 In addition, the exchange agreement goes on to
9 provide the exchange. The accommodator is not providing
10 tax advice.

11 Any other questions, Judge?

12 JUDGE EWING: I don't have any questions.

13 MR. GEMMINGEN: I'm sorry. I'm not finish. Just
14 on that?

15 JUDGE EWING: On that point, no.

16 MR. GEMMINGEN: Okay.

17 JUDGE EWING: Go ahead.

18 MR. GEMMINGEN: All right. Thanks.

19 Thus, we're here today due to the taxpayer's
20 failure to timely identify as well as receive potential
21 replacement property under requirements Internal Revenue
22 Code Section 1031 and regulations as incorporated in
23 California tax law. As I mentioned earlier, Respondent
24 disagrees that Appellants even identified the Topanga
25 property as potential replacement property for purposes of

1 Section 1031.

2 And Appellant provided the purchase offer for the
3 Topanga property in recently submitted exhibits,
4 Exhibit 4. But a thorough review of that document
5 disclose absolutely no statements that this property is
6 being identified by the Appellant as potential 1031
7 replacement property, which is ultimately irrelevant,
8 since the Topanga property is never acquired.

9 I believe if we step back for a moment to
10 consider exactly what the Appellant is really saying, and
11 that's okay to identify property A during the 45-day
12 identification period, then not purchase that property A,
13 and purchase some other property, property X, which is not
14 identified during the 45-day period, we can truly
15 understand why Appellant's argument is erroneous and
16 absolutely violates the pre-property identification rule
17 set forth in Internal Revenue Code Section 1031.

18 If one were to allow to identify any property,
19 say property A, within the 45-day period but not purchase
20 it, and then treat the exchange as compliant with 1031 as
21 Appellant proposes here today, by purchasing some other
22 unidentified property, then we have to ask ourselves, why
23 you are qualifying to be here is to even bother with
24 identification forms in compliance with the 45-day period.

25 That's to say, why doesn't every exchange

1 accommodator throughout the country qualify intermediary
2 already prepare preprinted forms which identify the New
3 York Empire State Building as an intended replacement
4 property, have the taxpayer sign that form on the first
5 day of the 45-day period or first week of that 45-day
6 period to ensure compliance to the 45-day identification
7 deadline.

8 This Empire State Building example highlights the
9 fallacy of Appellant's position. Since if his position
10 were accepted, it would be foolish for any taxpayer to
11 wait and determine the actual replacement property before
12 identifying it. Suppose simply listing the Empire State
13 Building, since Appellant maintains any other property can
14 later be substituted for identified property.

15 Appellant's position actually opens up every
16 single trade or business property across the nation as
17 eligible replacement property, notwithstanding that
18 none -- no other of those properties were ever identified
19 within the 45-day period so long as some property such as
20 the Empire State Building was identified. This wide-open
21 eligibility as any property across the nation, obviously,
22 violates the three-property rule.

23 Internal Revenue Code Section 1031(a)(3) was
24 added to the code in 1984 setting out the 45 and 180-day
25 timelines. Congress was concerned that the greater the

1 discretion the taxpayer has to vary a replacement property
2 that will ultimately be received in transaction, the more
3 the transaction appears to be a sale rather than an
4 exchange. This is set forth in the House of
5 Representatives of the 90th Congress, the explanation of
6 the Deficit Reduction Act in 1984.

7 As explained in the 1999 Price Waterhouse
8 Cooper's Article by Adam Handler and Stephanie Tran to the
9 extent that taxpayer is able to defer completion of the
10 transaction retains the right to designate the property to
11 be received at some future time, the transaction resembles
12 a sale more than an exchange.

13 In other words, the greater the taxpayer's
14 discretion to vary particular property be received in the
15 exchange, the relinquished property, to vary the date on
16 which such property is to be received, the more
17 transaction is appropriately treated as a sale and not a
18 like-kind exchange. The Price Waterhouse article then
19 cited to the Joint Committee of Taxation's general
20 explanation of Tax Reform Act of 1984, pages 243 to 247.

21 And we know the taxpayer may encounter practical
22 difficulties trying to identify a replacement property the
23 taxpayer will ultimately receive. The identification
24 rules provided by the regulations balance these competing
25 concerns in several ways. Under these rules, the maximum

1 number of replacement properties that a taxpayer may
2 identify is three properties within a fair-market value,
3 which is the three-property rule; or any number of
4 properties as long as their aggregate fair-market value at
5 the end of the identification period does not exceed 200
6 percent the value of the linked property. In other words,
7 double the value of the sales property of the linked
8 property.

9 The methodology proposed by Appellant to allow
10 the identification of property A, but then ignore this
11 identification, not only circumvents the pre-property by
12 the 200 percent rule, it blows them out of the water.
13 Clearly, that's not the intent of Congress, and that's not
14 the expectation of the general public that the tax laws be
15 complied with when there are other members of the public
16 who are actually complying with the tax law.

17 The basic premise of Section 1031 is that there's
18 an exchange of properties allowing the taxpayer to avoid
19 the -- and allowing the taxpayer to avoid the
20 identification rules, as proposed by the Appellant in this
21 matter, destroy the purpose of the stated of policy above
22 and take the Appellant's transaction outside the element
23 of an exchange.

24 Moreover, an additional defect in Appellant's
25 argument arises since it conflicts with Treasury

1 Regulation Section 1.1031K-1(d), to proceed in identifying
2 a present property. A copy of this regulation is provided
3 to the OTA and the Appellant last week, and is now
4 entitled Exhibit J.

5 And this regulation provides for purposes of this
6 section the identified replacement properties received
7 before the end of the exchange period. In other words,
8 the identified properties are considered before the
9 180-day period only if the taxpayer receives a replacement
10 property before the end of the exchange period, and the
11 replacement property received is substantially the same
12 property as identified.

13 Now, the regulations have examples about what
14 does "substantially the same" mean. And there is an
15 example of property being identified and then the owner at
16 that time builds a fence on the property, and then the
17 taxpayer later acquires that property. The property of
18 the fence is substantially the same as the property
19 identified.

20 However, another example which does not qualify
21 is the taxpayer identifies two acres of which there is a
22 barn and a house sitting up within the two acres, and then
23 the taxpayer later amends the purchase offer and only buys
24 the house -- the footprints of the house and the barn, and
25 the rest of the property is not purchased. The regulation

1 state that that property is not substantially the same
2 even though it's located at the same street address.

3 So when we talk about substantially the same,
4 we're talking about the property that's been located and
5 identified with the I.D. letter in comparison of what was
6 identified versus what was actually purchased.

7 JUDGE EWING: And you're just at about
8 15 minutes. We just need to keep on time here.

9 MR. GEMMINGEN: Okay. Thank you.

10 Thus, it's clear to anyone that the Channel Road
11 property in Santa Monica, a boarded up restaurant which
12 Appellant claims is a replacement property is not
13 substantially the same property as the Topanga Canyon
14 Boulevard property in the San Fernando Valley, a
15 discount-mattress store, which is the property the
16 Appellant claims he identified.

17 Because of this material discrepancy, Appellant's
18 exchange, yet again, fails this basic substantially
19 similar 1031 criteria under regulation set forth in
20 Respondent's recent Exhibit J. The reported identified
21 property is not, under applicable regulations, considered
22 received before the end of the 1031 day exchange period.
23 And thus, again, the non-recognition provisions do not
24 apply.

25 So please recall the May, June, July calendars

1 earlier discussed, which FTB submitted last week, and
2 consider Appellant's May 21st, 2012 closing date of the
3 sale. Under the methodology provided in example one
4 Treasure Regulation, also illustrated on that -- on those
5 calendars -- the 45th-day deadline to make a timely
6 identification replacement property was July 5th, which we
7 now know is a Thursday, which makes compliance with that
8 even easier because it was an open-general business day.
9 But Appellant failed to make and identification of
10 property by that July 5th date.

11 Moreover, while Appellant ultimately purchased
12 property on Channel Road, Santa Monica, this Channel Road
13 property was not identified within 45-days. Appellant
14 still had his Crescent Heights property and is by law
15 considered eligible not like-kind -- is not considered
16 eligible like-kind property.

17 In conclusion, this is a very simple appeal, we
18 met the criteria which the taxpayer failed a very
19 mechanical test to apply. The taxpayer, it's required by
20 statute found in Section 1031(a)(3), is obligated within
21 the 45-days of relinquishing his Crescent Heights property
22 to identify in an unambiguous writing replacement property
23 was received in the exchange as provided by Treasury
24 Regulations 1031K-1(d).

25 He must receive substantially the same property,

1 a property that should have been identified within the
2 45-day period. Appellant failed both these requirements.
3 Therefore, as provided in Section 1031 in Treasury
4 Regulations, any property which taxpayer might purchase be
5 treated by law is property which is not like-kind property
6 and, thus, results in the full recognition of gain, the
7 taxpayer's sale of the Crescent Heights property as
8 properly determined by the Franchise Tax Board.

9 Thank you.

10 JUDGE EWING: Thank you, Mr. Gemmingen.

11 Mr. Holtz or Mr. Burkholder, you get the last
12 word.

13 MR. BURKHOLDER: Oh, thank you. Yes, Your Honor,
14 this is Scott Burkholder for the Appellant.

15

16 CLOSING STATEMENT

17 MR. BURKHOLDER: Let's start with the
18 regulations. I just want to point out that the FTB's
19 argument regarding regulations having to do with the
20 45-day rule can only identify -- identification is only if
21 the -- either, the properties are identified and given to
22 the qualified intermediary in this case before the end of
23 the 45 -- 45th days, or property is actually purchased and
24 transferred within that 45 days.

25 In section -- Regulation Section 1.1031k-1 --

1 MR. GEMMINGEN: I'm sorry. Can you repeat that,
2 please?

3 MR. BURKHOLDER: Sure. It's actually your
4 Exhibit J.

5 MR. GEMMINGEN: Thank you.

6 MR. BURKHOLDER: Or is it J? No. I'm sorry, H.
7 It's Exhibit H. It's on the second page. So basically,
8 it's -- in that it's Section B. Oh, sorry, Section C-2(i).
9 It's in the middle of the second page.

10 MR. GEMMINGEN: Okay. Thank you.

11 MR. BURKHOLDER: So basically down towards the
12 bottom it indicates that an identification of replacement
13 property made in a written agreement for the exchange of
14 properties signed by all the parties thereto, before the
15 end of the identification period, will be treated as
16 satisfying the retirements of Paragraph C-2.

17 So if a property is identified in a contract of
18 sale, for example, which is what is have provided in our
19 Exhibit 4, which is dated July 5th. That would qualify
20 under this provision of the regulation, so I just wanted
21 to point that out first. So I believe we do have a solid
22 recognition identification of the property, which is
23 evidenced by our Exhibit 4, the purchase agreement from
24 July 5th, 2012.

25 I don't think it's disputed that July 5th was

1 within the 45 days. Let's see.

2 So that would -- that would identify -- that
3 would say that properties had been identified within the
4 45 days. Now, the thing that's not disputed and that we
5 feel is overwhelming compliance and not the fault of the
6 taxpayer, is the fact that the other properties, which he
7 identified, he identified within the rules -- within the
8 dates that he was provided with by his qualified
9 intermediary. That is in our Exhibit 6.

10 You will see that in Exhibit 6 there are three
11 properties identified. The first property is the Topanga
12 Canyon property, which he was under contract to purchase.
13 The second one is Hacienda Place, which is not relevant.
14 And then the third one is 100 West Channel Road, which is
15 the property they actually purchased within the 180 days
16 that is provided by statute. He did everything that he
17 needed to do in terms of the information that was he was
18 provided with by a qualified professional to identify the
19 properties within the time frame.

20 Now, in terms of the FTB's reference to the
21 contract between the taxpayer and the qualified
22 intermediary in paragraph 5 of Exhibit 1, it does say that
23 the taxpayer has the sole obligation to identify the
24 property. It does not say that it is the taxpayer's
25 responsibility to make sure that his representative gives

1 him the correct date.

2 This is not a non-delegable duty. This is not a
3 non-delegable duty such as the responsibility to file a
4 tax return. He can rely on his -- on his qualified
5 intermediary who is an expert in this. He is not -- our
6 client, Mr. Ricciardelli, is not a tax expert. He's not a
7 CPA. He's not a tax lawyer. And yes, he is a real estate
8 agent. But as a real estate agent he's not the one that
9 would take care of the 1031.

10 So I believe that the identification by the FTB
11 is misplaced, that it was his sole duty under contract to
12 keep track of those dates. Not only that, but the
13 hyperbole in which the FTB presents the Empire State
14 analogy, I think, is misplaced here because what we have
15 is, we don't have somebody who is trying to gain the
16 system.

17 We have somebody who ended up in the exact same
18 place that he started. He took his investment. He put
19 his investment into another commercial property and all of
20 the -- you know, all of these properties were virtually
21 the same. He's exchanging a business property -- a rental
22 property for another business property, which would also
23 be a rental property, except to a business and not to an
24 individual.

25 This is -- he's identified exactly the correct

1 things. He identified three properties. He bought one of
2 them that was on the list. He contracted for the first
3 one on the list even before -- even before he turned in
4 the list to his qualified intermediary, and he
5 purchased -- he closed the sale on one of those properties
6 within the 180 days.

7 He's not trying to gain the system. He's not
8 trying to say, you know, write down a list of things on
9 the first day and say Empire State Building and then buy
10 something that's complete a complete canard. This is a
11 man who was following everything that he thought. I mean,
12 in our Exhibit 7 -- oh, no. I'm sorry not Exhibit 7. Oh,
13 sorry.

14 JUDGE EWING: Just a reminder. You're getting
15 close to the agreed upon time.

16 MR. BURKHOLDER: Okay. In exhibit 2 -- in
17 Exhibit 2, you'll find that there's a letter to
18 Mr. Ricciardelli dated June 5th, which is a month before
19 the actual date. It says, "Close of 1424 North Crescent
20 Heights, 5/24/12."

21 And so if he looked at that, and he calculated 45
22 days from that date, he would come up with the 8th. And
23 that's the 45th day.

24 JUDGE EWING: I'm sorry. You're looking at your
25 Exhibit 5?

1 MR. BURKHOLDER: I'm sorry. Exhibit 2.

2 JUDGE EWING: Exhibit 2. Okay. I'm sorry.

3 MR. BURKHOLDER: Sorry about that.

4 And then later in Exhibit 3, Mr. Ricciardelli
5 does his due diligence, and he asks his qualified
6 intermediate, "Are you sure that we have until Sunday?"

7 And she says, "Yes, Sunday."

8 And then we have his list signed on the 8th on a
9 Sunday, which he provided to his qualified intermediary.
10 So I think that the idea that finding in favor of the
11 taxpayer in this case would be the undermining of the
12 Empire State Building, I think is overstated. And I don't
13 think that's really something we're in danger of here by
14 finding for the taxpayer. And, again, he ended up in
15 exactly the position that Congress anticipated that
16 somebody who did the right thing would.

17 He ended up taking all of the money he got from
18 the sale of the property and investing it into another
19 property. There was no cash. There's no boot. There's
20 nothing that he profited on from there. And so -- and so
21 having his tax deferred is actually the correct thing to
22 do in this case.

23 MR. HOLTZ: With your permission, I want to make
24 this quick?

25 JUDGE EWING: Briefly. Thank you.

1 MR. HOLTZ: Very good. Okay.

2 Very quickly, one thing I want to mention,
3 there's only two issues. One thing I want to mention is
4 opposing Counsel indicated that Appellant by reason, I
5 guess, of the exhibit of the contract was aware of the
6 closing date of the other one. I don't think that's a
7 fact.

8 He has -- there's no information in the record
9 that shows he was aware or would have known and had
10 awareness of that day. He's implying that on the fact
11 that there was a contract just as a matter of fact. The
12 second thing is I do -- the reason why I made the
13 presentation about this being a case about the
14 administration of tax law is we have other strict --
15 they're suggesting this is strict compliance.

16 We have lots of areas in tax law where one would
17 say we have strict law requirement for substantiation.
18 For instance, 274(d) for meals and entertainment. I've
19 worked at the IRS. I've worked for years now on the other
20 side. Do you -- you and I'm sure many of you have been in
21 the practice of tax, you know, audit, defense and so forth
22 on both sides.

23 The rule for strict substantiation is that we
24 have to prove contemporaneous evidence to prove meals and
25 entertainment. So who in the universe would ever get a

1 deduction unless they kept a calendar for everyone in the
2 state? Now, the way it is been administered fairly and
3 correctly by the Internal Revenue Service and many
4 administrations, and the way I see it day and day out
5 again, is that there is still this attempt to apply a fair
6 result.

7 I don't have to tell my clients that if they
8 don't have a calendar, they don't have perfect proof of
9 their meals and entertainment they're not going to get it.
10 No. I tell them that don't worry. We're going to get a
11 fair result here because the government, the IRS, is going
12 to achieve that.

13 And in particular, when I was a young attorney,
14 one of my first cases in front of a judge at the U.S. Tax
15 Court, I had a case where the person had no documents of
16 any of their Schedule C expenses. And I went to the judge
17 with a lot of power and feelings of this is going to be a
18 great case for me. And I said, "Your Honor" -- they asked
19 me what the position is.

20 The client has no documents for their Schedule C
21 business. The judge leaned over to me and said, "Do you,
22 sir, are you taking the position that there is no
23 business?"

24 I said, "No."

25 "Are you taking the position that he had no

1 business expenses?"

2 I said, "No. I'm just taking the position that
3 he doesn't documents to substantiate."

4 And he says, "Mr. Holtz, I want you to go back
5 there and work this out, because you're going to make me
6 have to guess this because I'm here for justice. I'm here
7 to administrator the tax law."

8 So if you see -- if you're able to see this case
9 from my perspective, and even if you are unable to achieve
10 the result that we're seeking, I hope that you'll put
11 memorandum in the case, if you can, if you see fit, to
12 instruct this taxing agency to act reasonably in the
13 future.

14 It's about fairness of our taxing system and
15 about us going forward and dealing with our opposing
16 counsel and all the people in the system to create a
17 system that works better for everybody. That is fairly
18 administered and administered in the right way.

19 And that's all I have say. Thank you for the
20 extra time.

21 JUDGE EWING: Thank you, Mr. Holtz and
22 Mr. Burkholder. So that comes to the conclusion of the
23 presentations. Do my co-panelists have any questions for
24 the Appellant or the FTB?

25 JUDGE DANG: I do have some quick questions for

1 Appellant in this matter.

2 Mr. Burkholder, you had mentioned that the
3 taxpayer had identified the property as evidence by
4 Exhibit 4. Is there a particular language in Exhibit 4
5 that might demonstrate that this has been identified as
6 replacement property?

7 MR. BURKHOLDER: Your Honor, no. There's --
8 there's nothing in the -- in the contract that indicates
9 that this is a property for a 1031 exchange. However, I
10 don't believe that the regulation, as I read it to you,
11 requires that.

12 JUDGE DANG: Okay. Thank you. My second
13 question is for Mr. Holtz. I don't want to put words in
14 your mouth, but it sounded to me that you were making
15 argument almost as if we should apply substance over form
16 in this case, treating this as an exchange transaction
17 even though the strict requirements of the statute in the
18 regulation have not been met. Is there any authority
19 anywhere, any federal authority that you might be aware of
20 where a taxpayer succeeded or prevailed where they had not
21 met all the requirements -- certain requirements of the
22 law?

23 MR. HOLTZ: Regarding 1031?

24 JUDGE DANG: Correct.

25 MR. HOLTZ: I am not aware of one pro or against

1 that in this case -- in situations like this. I would
2 suggest that you have a first impression case. Have you
3 ever seen one this close? In other words, have you ever
4 seen one slide by that close? And that's why I'm saying,
5 and mean it with passion, that we shouldn't be here.
6 Somebody at the FTB -- and that's what I'm hoping you'll
7 send the signal, even if you can't have control over us.

8 They should have just said, "No, don't go after
9 the two dollars." Enough is enough. This is not just
10 substantial compliance. This is overwhelming compliance
11 missed. The barely missed. And that's our case.

12 JUDGE DANG: Thank you.

13 JUDGE EWING: Judge Johnson?

14 JUDGE JOHNSON: Yes. Thank you, Judge Ewing.

15 For Appellant, I think one item that's been
16 raised, and I don't know if we got your opinion it or
17 discussion regarding it. Was the Form 8824 with the
18 claimed identification date of May 1st, 2012, can you
19 explain why that date was used on that form?

20 MR. BURKHOLDER: No, Your Honor. I didn't -- I
21 wasn't referring to the tax return or any of the forms
22 that were filed -- that were filled out later. Really,
23 our focus is on what happened at the time when the 45-day
24 period passed and then when the 180-day period passed.

25 JUDGE JOHNSON: Okay. And it may not have any

1 bearing here, but do you know if there was an inspection
2 by the IRS on this transaction?

3 MR. BURKHOLDER: There wasn't, no.

4 JUDGE JOHNSON: Okay. Separate question now.
5 For the Topanga Property, I know you made the argument
6 that the -- entering into the agreement to make the
7 purchase, that qualifies for identification of replacement
8 property even though the Topanga property is ultimately
9 never acquired?

10 MR. BURKHOLDER: Correct.

11 JUDGE JOHNSON: And maybe this goes towards FTB's
12 points they made during the arguments. Is that to suggest
13 that you can meet the identification qualification or
14 requirements with one property while purchasing different
15 property later on?

16 MR. BURKHOLDER: This is, as Dave was saying,
17 this is a case -- I haven't seen this fact pattern before
18 where you have the actual identification of a property
19 that is on the list of three properties that was, you
20 know, that was getting to the qualified intermediary
21 72 hours after the deadline, but provided with the full
22 confidence that he was doing so in a timely manner.

23 So it's not like -- it's not like he identified
24 the Topanga Property by contract and then, you know, three
25 months later or five months later there was another

1 property which he liked better then dropped the Topanga
2 Property and picked up the one had not been identified at
3 all. This one had been identified. It was just
4 identified late.

5 And I understand, you know, I understand the
6 FTB's point in terms of -- in terms of the strictness of
7 the statute. But I haven't found a case that's -- that's
8 this enclose. I haven't found a case that has ruled on
9 this particular fact pattern.

10 As I look at the exhibits that the FTB has
11 provided, the extra exhibits, when I'm looking at their
12 Exhibit L, Kunkel v. Commission, they're citing a case
13 where a property was identified and then it fell out, and
14 then there was another property that they purchased 410,
15 or 470 days later that then they tried to get 1031
16 treatment for. This is not that case.

17 This is a case of, you know, this is like, you
18 know, like a case where the property was identified within
19 the time frame that the taxpayer thought was -- was within
20 the statute and had been provided that information more
21 than once in writing, and then request with good faith,
22 proceeded to purchase one of those three properties within
23 the 180 period.

24 JUDGE JOHNSON: And to clarify, when the
25 incorrect date was given by the qualifying intermediary,

1 you're not suggesting that actually extended the notations
2 under IRC 1031; you're just saying that it goes towards a
3 reasonable attempt to comply by the taxpayer; is that
4 correct?

5 MR. BURKHOLDER: That is correct.

6 JUDGE JOHNSON: Okay. If you could look at
7 Exhibit H, which is the Treasury Regulation from Franchise
8 Tax Board.

9 MR. BURKHOLDER: Yes.

10 JUDGE JOHNSON: And just speaking towards to the
11 closeness, a number of days, 72 hours that you mentioned
12 here. If we look at -- lets see -- Exhibit H, the IRC --

13 MR. BURKHOLDER: Yes.

14 JUDGE JOHNSON: Under page 3 there are several
15 examples. So that example provided there, C(7) example
16 one, it provides an identification period that expired
17 July 1st, 1991. And then in example one, they provide the
18 identified identification on July 2nd, 1991, one day
19 later. Do you see example 1?

20 MR. BURKHOLDER: I'm sorry. I'm a little lost.

21 JUDGE JOHNSON: Sure. It's the final page,
22 page 3.

23 JUDGE EWING: Page 3.

24 MR. BURKHOLDER: All right.

25 JUDGE JOHNSON: In the middle there is example

1 one.

2 MR. BURKHOLDER: Yes, I see it.

3 JUDGE EWING: So up above the prior paragraph
4 where it laid out the fact pattern, it showed that the
5 45-day identification period expired on July 1st. It's
6 the very last sentence of the previous page. And then
7 they provided identification on July 2nd, so literally the
8 next day. And then the answer there in the small two i's.
9 Is that -- that identification is late and, therefore,
10 does not identified as like-kind, that property. Do you
11 care to discuss that example on how it may apply to this
12 situation?

13 MR. BURKHOLDER: Certainly. This example is
14 similar to what we're talking about, except for the fact
15 that there's no indication that the -- that the time
16 period had been provided to them by a qualified
17 intermediary as incorrect, and that you can't rely on
18 that. That doesn't say that you can't rely on the advice
19 of an expert professional.

20 I mean, I understand the point here. But the --
21 this is, at least I guess, assuming that they knew what
22 the actual date was. It doesn't say they mistakenly
23 provided the list on the second -- excuse me -- that they
24 didn't know what the actual date was.

25 MR. GEMMINGEN: Excuse me?

1 JUDGE JOHNSON: I'll just get to FTB in a second.
2 Or it could also be just strict reading that they're
3 requirements with no intent or assumed knowledge, kind of,
4 imparted in the application of the law. Can that also be
5 true?

6 MR. BURKHOLDER: Yes.

7 JUDGE JOHNSON: Okay. And Franchise Tax Board,
8 you wanted to speak to anything?

9 MR. GEMMINGEN: I beg your pardon, but I'd just
10 like to address a comment made that the taxpayer had no
11 indication of the incorrect date. And, actually, at
12 Exhibit 2 of the taxpayer's recent submissions, which is
13 the ANI X31 letter, which is dated June 5th, which was
14 provided two weeks ago. Do you have that available?

15 So within that letter it list in the middle of
16 the page the closing date, the 45th date, and the 180th
17 date. And we're talking about property identification
18 here and the need to submit the identification form. But
19 if we read along further, the underlined last sentence
20 says, "Please complete and date and scan back enclosed
21 Notice of Identification on or before November 20th,
22 2012."

23 Anyone reading this letter would have obviously
24 noticed that two different dates were provided for that
25 identification. And so the taxpayer did have notice as to

1 faulty identification date and should have done corrective
2 work and measure.

3 And contrary to the opposing Counsel's statement
4 they had no notice, this clearly sets forth notice of the
5 inconsistent dates and, thus, taxpayer did have notice
6 that the dates provided by the exchange company were
7 questionable as to what -- but as we briefed it, intent is
8 not enough to satisfy the essential requirements. Thank
9 you.

10 JUDGE JOHNSON: Thank you.

11 MR. GEMMINGEN: Thank you.

12 JUDGE EWING: All right.

13 MR. BURKHOLDER: Can I respond to that?

14 JUDGE JOHNSON: I'll respond really quick and
15 I'll come back to you.

16 It certainly does show that perhaps there was a
17 clerical mistake made in the underline part, perhaps. It
18 does draw the entire document into question. Although,
19 I'm not sure if you would take one clerical mistake and
20 then assume that other numbers might also be off for
21 different reasons. But I tend to agree that when dealing
22 with important dates and deadlines, that you should be
23 careful.

24 I'll get be to the Appellants. You may respond.

25 MR. HOLTZ: Real quick. If he was addressing my

1 comment, my comment was that he stated, and it would seem
2 to be he was stating a fact that my client was aware of
3 the deadlines. And my point is --

4 MR. GEMMINGEN: I was evidencing Mr. Burkholder's
5 comments.

6 MR. HOLTZ: Okay. Good.

7 MR. BURKHOLDER: Yes. In terms of that if we're
8 talking about the taxpayer being careful and proceed with
9 due diligence, I believe that Exhibit 3, the e-mail in
10 which he confirms, again, the date of July 8th, would put
11 that to rest.

12 JUDGE JOHNSON: So what I see are, perhaps,
13 mistakes made at the qualified intermediary position.
14 It's sort of a reasonable reliance and a substantial
15 compliance in the kind of situations that are set forth
16 here. And I don't mean to reiterate what Judge Dang has
17 already asked, but is there case law or regulations to
18 substantiate or authority that says any of those mistaken
19 facts, or at least substantial compliance but not full
20 compliance, any of those kinds of elements, is there loss
21 pointing to that that would allow you satisfy an otherwise
22 incorrect identification period?

23 MR. BURKHOLDER: As I said before, I have not
24 been able to find any fact pattern that is -- that is like
25 this where you have -- where you have the identification

1 of the property to contract. And then you have a list
2 that is being -- that's dependent on the expert advice of
3 the qualified intermediary that's been decided by a court.
4 No, I haven't been able to find that.

5 JUDGE JOHNSON: Okay. Thank you.

6 Judge Ewing, one more question if I may?

7 JUDGE EWING: Sure.

8 JUDGE JOHNSON: I'm sorry to take so much time.

9 Franchise Tax Board, in the account you provided
10 I think you make a clarification regarding something
11 mentioned on page 5 of your brief? See if you can find
12 that again.

13 MR. GEMMINGEN: Yeah, we mentioned July 6th as
14 the 45th date, and then July 8th as the 48th date. And I
15 just wanted to correct the date as July 5th date. And
16 that's the reason why I included the regulations example
17 to show how the regulation calculated 45 days on this
18 calendar, and then also calculated for the taxpayer. I
19 just wanted to correct our misstatement of July 6th being
20 the 45th day.

21 JUDGE JOHNSON: All right. So essentially move
22 everything back one day?

23 MR. GEMMINGEN: Yes, sir.

24 JUDGE JOHNSON: And then we do have -- it looks
25 like it's May 17th, is a regulation. It says transfer

1 date May 17 and then the 18th would be day one. Is that
2 related to the facts here, or is that your example?

3 MR. GEMMINGEN: No, that's not my example. It's
4 examples from the regulations. The regulation gives the
5 dates, and that's how I did the count down.

6 JUDGE JOHNSON: Okay. Thank you.

7 MR. GEMMINGEN: And then -- pardon me. The
8 regulation is found at the -- up there in the
9 mid-calendar. I had the regulation cited 1031k-1C(7), you
10 know, the example, example one. So it's found in the
11 regulations.

12 JUDGE JOHNSON: Thank you.

13 JUDGE EWING: Anymore questions? No. Well, with
14 that, we thank all you very much for your time.
15 Mr. Burkholder and Mr. Holtz, Mr. Gemmingen, Ms. Kuduk,
16 thank you very much for your time today, and we'll be in
17 touch with you soon.

18 Thank you.

19 MR. BURKHOLDER: Thank you.

20 JUDGE EWING: And this closes the record on this
21 case.

22 (Proceedings adjourned at 3:10 p.m.)

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HEARING REPORTER'S CERTIFICATE

I, Ernalyne M. Alonzo, Hearing Reporter in and for the State of California, do hereby certify:

That the foregoing transcript of proceedings was taken before me at the time and place set forth, that the testimony and proceedings were reported stenographically by me and later transcribed by computer-aided transcription under my direction and supervision, that the foregoing is a true record of the testimony and proceedings taken at that time.

I further certify that I am in no way interested in the outcome of said action.

I have hereunto subscribed my name this 20th day of March, 2020.

ERNALYN M. ALONZO
HEARING REPORTER