

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
)
D. MITCHELL and D. BOUCHER,) OTA NO. 21057805
)
 APPELLANTS.)
)

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TRANSCRIPT OF ELECTRONIC PROCEEDINGS

State of California

Tuesday, March 22, 2022

Reported by:
ERNALYN M. ALONZO
HEARING REPORTER

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Transcript of Electronic Proceedings,
taken in the State of California, commencing
at 1:04 p.m. and concluding at 2:01 p.m. on
Tuesday, March 22, 2022, reported by
Ernalyn M. Alonzo, Hearing Reporter, in and
for the State of California.

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APPEARANCES:

Panel Lead: ALJ MIKE LE

Panel Members: ALJ EDDY LAM
ALJ AMANDA VASSIGH

For the Appellant: D. MITCHELL
D. BOUCHER

For the Respondent: STATE OF CALIFORNIA
FRANCHISE TAX BOARD

LEOANGELO CRISTOBAL
MARIA BROSTERHOUS

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I N D E X

E X H I B I T S

(Appellant's Exhibits 1-13 were previously received at the prehearing conference.)

(Appellant's Exhibit 14 was received at page 7.)

(Department's Exhibits A-I were previously received at the prehearing conference.)

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

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By Ms. Boucher 8

By Mr. Cristobal 23

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

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By Ms. Boucher 27

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California; Tuesday, March 22, 2022

1:04 p.m.

JUDGE LE: We are opening the record in the Appeal of Mitchell and Boucher. This matter is being held before the Office of Tax Appeals. The OTA Case Number is 21057805. Today's date is Tuesday, March 22nd, 2022, and the time is approximately 1:04 p.m. This hearing is being conducted electronically with the agreement of the parties.

Today's hearing is being heard by a panel of three Administrative Law Judges. My name is Mike Le and I will be the lead judge. Judge Amanda Vassigh and Judge Eddy Lam are the other members of this tax appeals panel. All three judges will meet after the hearing and produce a written opinion as equal participants. Although the lead judge will conduct the hearing, any judge on this panel may ask questions or otherwise take part to ensure that we have all the information needed to decide this appeal.

Now for introductions, for the record, will the parties please state their name and who they represent, starting with the representatives for Respondent Franchise Tax Board.

MR. CRISTOBAL: This is Leo Cristobal for

1 Franchise Tax Board.

2 JUDGE LE: Thank you, Mr. Cristobal.

3 MS. BROSTERHOUS: And Maria Brosterhous also of
4 the Franchise Tax Board.

5 JUDGE LE: Thank you, Maria Brosterhous.

6 And for Appellants, please state your name.

7 MS. BOUCHER: Dennis Boucher, Appellant.

8 JUDGE LE: Thank you, Ms. Boucher.

9 MR. MITCHELL: Dennis Mitchell, Appellant.

10 JUDGE LE: Thank you, Mr. Mitchell.

11 This is Judge Le. Let's move onto my minutes and
12 orders. As discussed with the parties at the prehearing
13 conference on March 1st, 2022, and notated in my minutes
14 and orders, the two issues in this matter are first,
15 whether gain deferred under IRC Section 1033 should be
16 reported for the year the gain was received or for the
17 year the IRC Section 1033 failed because of the
18 appropriate replacement property was not acquired. The
19 second issue is whether Appellants have established any
20 basis to abate interest.

21 Ms. Boucher and Mr. Mitchell will testify as
22 witnesses at this oral hearing. Appellants' Exhibits 1
23 through 13 were entered into the record in my minutes and
24 orders on March 11, 2022. Appellants timely submitted an
25 additional exhibit, which is a letter dated May 13, 2019.

1 Respondent did not submit an objection, so this exhibit
2 will be marked as Exhibit 14 and also entered into the
3 record.

4 (Appellants' Exhibit 14 was received in
5 evidence by the Administrative Law Judge.)

6 Respondents Exhibits A through I were also
7 entered into the record in my minutes and orders.

8 This oral hearing will begin with Appellants'
9 presentation slash testimony for up to 15 minutes. Does
10 anyone have questions before I swear in Ms. Boucher and
11 Mr. Mitchell as witnesses?

12 And starting with the Franchise Tax Board, do you
13 have any questions?

14 MR. CRISTOBAL: This is Leo from Franchise Tax
15 Board. No questions, Judge.

16 JUDGE LE: This is Judge Le. Thank you.

17 Turning to Appellants, Ms. Boucher and
18 Mr. Mitchell, do you have any questions before I swear you
19 both in as witnesses?

20 MS. BOUCHER: No questions --

21 MR. MITCHELL: No questions.

22 MS. BOUCHER: -- from Denise Boucher.

23 MR. MITCHELL: -- and Dennis Mitchell. No
24 questions.

25 JUDGE LE: Thank you. This is Judge Le. At this

1 time would you both, Ms. Boucher and Mr. Mitchell, both
2 raise your right hand.

3

4 D. BOUCHER,

5 produced as a witness, and having been first duly sworn by
6 the Administrative Law Judge, was examined and testified
7 as follows:

8

9 D. MITCHELL,

10 produced as a witness, and having been first duly sworn by
11 the Administrative Law Judge, was examined and testified
12 as follows:

13

14 JUDGE LE: I heard "I do" from both Appellants.
15 Okay. Ms. Boucher and Mr. Mitchell, you have up to
16 15 minutes for your presentation and testimony starting at
17 1:08 p.m. Please proceed. Thank you.

18

19 PRESENTATION

20 MS. BOUCHER: Okay. I have a written prepared
21 statement that I would like to read, basically,
22 summarizing a little about our case. I'm assuming that
23 people have all the exhibits. First of all I want to
24 thank you for the opportunity to be heard. And, again, I
25 assume you've had the opportunity to review my

1 documentation for the returning of fines from the FTB,
2 whether it be called interest or penalty. And I consider
3 a penalty anything above what our annual taxes would
4 normally be due. So that's what I want to be, kind of,
5 clear about my terminology. My understanding is this is
6 about interest. Its penalty is different, but I use the
7 word penalty because it feels like a penalty.

8 A brief synopsis of our claim begins with the
9 loss of the property located at -- I won't divulge the
10 address specifically -- on the early morning of
11 October 9th, 2017, at approximately 2:00 a.m., known as
12 the North Bay Fires, the Tubbs Fire was one of the larger
13 fires that plagued the region and resulted in complete
14 destruction and loss of the property as it left debris,
15 and not only our property but the entire neighborhood,
16 community, and surrounding areas that burned until
17 October 31st, 2017, and destroyed just shy of 37,000 acres
18 in the Tubbs area and caused the deaths of 40-plus people.

19 Initially, after the shock and horror of this
20 devastating event, we began to search for a road to
21 recovery by one, claiming -- filing a claim with our
22 insurance company; two, seeking tax assistance and
23 guidance from tax professionals, which ultimately turned
24 out to be three CPAs and one tax attorney who would refer
25 us elsewhere when they were unable to help us.

1 I presume this is due to the complex nature of
2 our situation on the proper way to file our taxes that
3 were subject to the stipulations involved for a forced
4 conversion of a total loss of a 1031 exchange, which I
5 believe becomes a 1033. And this was all during a
6 federally mandated disaster.

7 And number three, we also began an arduous
8 journey on finding a contractor builder in an extremely
9 small labor pool to replace the house, now reduced to an
10 almost unrecognizable charred pile of rubble and burned
11 landscape blending in with the loss of areas all around
12 the once lovely area.

13 Our intention was to rebuild starting from late
14 2017. In and all of 2018 until May 13, 2019, when it
15 became abundantly clear that the -- that obtaining a
16 written contract -- excuse me -- including costs from an
17 overwhelmed pool of builders, it became clear that that
18 was not going to be happening for us. Please see the
19 letter dated 5/13/19 to Lafferty Communities terminating
20 our participation. Although our intentions were pursued
21 for over 18 months of extreme stress, duress, and
22 disappoints in not being able to get this rebuilding
23 contract to come to fruition, because our insurance
24 policy, essentially, was maxed out due to policy limits,
25 monies, and time.

1 Just as an added note here, our policy maxed out
2 on June the 9th, 2019, for any monies that we could
3 possibly receive. We were at the end of the line,
4 basically, with our insurance policy. As evidenced by us
5 terminating our relationship with the nonresponsive
6 builder at Lafferty Communities of San Ramon, we selected
7 them as a large group of neighbors while trying to get a
8 group discount. We came to the conclusion after
9 one-and-a-half-years, that we had to attempt to purchase a
10 replacement property instead.

11 Therefore, we did not pay capital gains for the
12 loss of the property from the monies received from our
13 insurance company until 2019 after our rebuilding efforts
14 were exhausted by maxing out our insurance proceeds. The
15 capital gains were paid in the year we sold the property
16 at -- property -- after we saw that we needed to sell the
17 empty lot on the property, and that was -- closed escrow
18 in late August of 2019. It was now simply an empty lot
19 cleared of the destruction and remaining debris left by
20 the Tubbs Fire.

21 Throughout 2017, 2018, until late 2019, I
22 continued to pay both the full homeowner association dues
23 and property taxes -- Sonoma County property taxes -- and
24 insurance on the empty lot until the property came under
25 the ownership of another builder, Silvermark of Fairfield,

1 which purchased the lot from us and built another house on
2 it in 2020.

3 My husband Dennis researched intensely for a
4 proper resolution to filing the taxes, and we felt we
5 needed to amend the 2017 taxes to reflect the monies we
6 received starting in late 2017, from our insurance
7 company, and into 2019 until the insurance policy had paid
8 us in full. Upon seeking tax guidance from CPAs and being
9 referred from one CPA on to another, it was abundantly
10 clear they too also had difficulty understanding the
11 ramifications of the forced conversion of a 1031 exchange
12 of a property destroyed in a federally mandated disaster,
13 as well as the implications that it created, including how
14 and when to pay the capital gains.

15 To reiterate, per our guidance and understanding
16 that we did receive, whether it was online or from the
17 CPAs that were consulted, the capital gains are to be paid
18 the year the property is actually sold and the transfer of
19 ownership is documented. That was 2019. Please note, we
20 paid the capital gains along with any other of our tax
21 liabilities we had for years 2017, 2018, 2019, and 2020
22 and continued to do so for when we finalized our taxes in
23 2021.

24 There still continues to be uncertainty regarding
25 taxes in 2022 and the ability for the assessment of taxes

1 due, as the California State Senate is evaluating if and
2 how many potential monies awarded to fire victims by the
3 Fire Victims Trust, FVT, and any attorneys that may be
4 taxed or not. That bill is called AB 1249.

5 We have not received notice of determination yet
6 regarding the mass lawsuits most victims have joined. On
7 December 19th, 2019, I paid the FTB \$84,803 and the U.S.
8 treasure or IRS \$183,532, totaling \$268,335 to pay those
9 capital gains for 2019, for the loss of the property.
10 Only after late March 2020 we were informed and in shock
11 to receive these notices from the IRS, and shortly
12 thereafter the California Franchise Tax Board about
13 interest and penalties being assessed on us, literally, as
14 the entire country was shutting down for Covid and the
15 usual channels of communication were shutting down for any
16 guidance, assistance, or counseling or the ability to
17 reach anyone.

18 We acknowledge that the capital gains needed to
19 be paid for the sole property in late August 2019, and
20 paid them accordingly in the year the property was sold to
21 Silvermark. Granted, the property was a house on a lot
22 prior to October 8, 2017, it became nearly a burned-out
23 lot full of debris at approximately 2:00 a.m. on
24 October 9th, 2017. It became clear after 18 months of
25 attempting to move forward with rebuilding the house on

1 the property, this was not going to come to fruition.

2 Our attempts to obtain a builder and get a
3 written cost, including cost to rebuild, is no longer a
4 viable option for us as our insurance proceeds were maxed
5 out, capped off due to the policy limitation.

6 I have a question which I'm also using as a
7 statement trying to address the FTB. I want to know how
8 is it possible that we go back retroactively in time to
9 pay capital gains for the tax year '17, which they claim
10 is when it's due, all while we were attempting to move
11 forward throughout the remainder of 2017, all of 2018, and
12 midway through 2019, essentially, until May 13th, 2019,
13 with the plans of rebuilding the process all before we
14 knew this was going to happen. My point is we tried to
15 rebuild. We pursued it for a year and a half tirelessly,
16 and it was not going to happen.

17 So in hind -- what we did to address that was
18 amend the 2017 taxes. In good faith we one, acknowledged
19 we were being forced into an involuntary conversion of the
20 loss 1031 exchange of property; and number two, we paid
21 the taxes as we were actively planning to rebuild in 2019.
22 So that's why they were paid in 2019, the year that the
23 property was actually sold. Additionally, we have tried
24 on several occasions to contact the FTB and the IRS to
25 seek guidance and assistance in a timely manner, only not

1 to be responded to in a timely manner, especially true of
2 the IRS to this day, as we get occasional letters -- form
3 letters stating they need more time to research our case.
4 We are still in limbo with the IRS.

5 Regarding the FTB, specifically, I had to go
6 online to do an FTB online chat, and I was -- initially
7 tried with a person by the name of Manuela, an FTB
8 representative, on August 3rd, 2020, only to be
9 disconnected. And, again, another attempt for a chat was
10 made with a person by the name of Elijah, another rep, on
11 October 12th, 2020, only again to be disconnected again
12 and have them end the chat. I wanted to bring to your
13 attention that the FTB Section 19104 regarding interest
14 abatement and when that is consider appropriate, which I
15 strongly feel is in our situation.

16 I submitted an FTB claim for refund on
17 June 16, 2020, for abatement of interest along with
18 several letters, again, dated May 19th, 2020,
19 June 17th, 2020, August 4th, 2020, December 8th, 2020,
20 May 11th, 2021, August 19th, 2021, which was the letter
21 for appeals process with the FTB. As of March 27th, 2020,
22 when we just got the first actual IRS statement and then
23 the FTB follow shortly thereafter, we were notified of
24 additional fines, and here we are.

25 So according to the FTB website from my research,

1 I found this form. I don't know whether it's a form or
2 section, the 19104. These -- I call them penalties or
3 fines or interest for paying the capital gains of the
4 property -- may be waived if there was failure due to
5 reasonable cause and not willful neglect. Those are two
6 points that I want to emphasis because we had worked
7 tirelessly to do the right thing in a very complex
8 difficult situation.

9 In total we are being penalized penalty and/or
10 interest for monies that our insurance company paid us for
11 the complete destruction of our house. Our house, our
12 neighborhood, community and surrounding areas resulted in
13 the death of over 40 people and nearly 37,000 acres burned
14 and destroyed in the Tubbs area alone. In total, the FTB
15 interest was \$7,531.51, plus the IRS is -- we paid
16 \$17,957.12, for a total of \$25,488.63, which has been
17 paid.

18 I have a summary that I would like to use at the
19 end after the FTB apparently speaks. Thank you.

20 JUDGE LE: This is Judge Le. Thank you,
21 Ms. Boucher. Does this conclude your presentation and
22 witness testimony for both you and Mr. Mitchell?

23 MS. BOUCHER: Well, I have -- my understanding is
24 I have an opportunity to respond --

25 JUDGE LE: Yup. You do.

1 MS. BOUCHER: -- after the FTB, and it kind of
2 continues on. It's a summary of what my points are.

3 JUDGE LE: Okay. As of right now you're done for
4 now, but you will have a rebuttal after the FTB presents
5 their arguments?

6 MS. BOUCHER: Yes.

7 MR. MITCHELL: Yes.

8 JUDGE LE: Okay. Thank you. This is Judge Le.
9 Let me turn to the Franchise Tax Board.

10 Do you have any questions for Appellants?

11 MR. CRISTOBAL: This is Leo Cristobal. Franchise
12 Tax Board does not have any questions for Appellants.

13 JUDGE LE: Thank you.

14 This is Judge Le. Let me turn to my panel to see
15 if they have any questions for Appellant. We're starting
16 with Judge Vassigh.

17 Do you have any questions?

18 JUDGE VASSIGH: This is Judge Vassigh. I do not
19 have any questions at this time.

20 JUDGE LE: Thank you, Judge Vassigh.

21 Turning now to Judge Lam. Do you have any
22 questions for Appellants?

23 JUDGE LAM: This is Judge Lam. I do not have any
24 questions at the moment.

25 JUDGE LE: Thank you, Judge Lam.

1 This is Judge Le. I do have a question for
2 Appellants. Looking at the amended return for the 2017
3 tax year it seems that Appellants seem to indicate that
4 they received their insurance proceeds in 2017. But what
5 I'm hearing now is that you actually received the
6 insurance proceeds in 2017 through 2019; is that correct?

7 MS. BOUCHER: This is Denise Boucher speaking.
8 What we got was in 2017 the insurance company provided us
9 with the basic dwelling. That was in November of 2017. I
10 didn't even know what to do with the check at the time.
11 Everything was just overwhelming. At that time, we also
12 received loss of use. So every -- probably two or
13 three -- couple of months probably, they sent us different
14 amounts of money for the break downs of their loss of use,
15 personal possessions. There was a little bit of, like,
16 landscape, incidental cost.

17 And they provided a -- this loss of use is a --
18 something that went on until it would cap off to the
19 maximum, which would have been June the 9th, 2019. So,
20 therefore, all of 2018 money was coming in, and there was
21 some money still coming in to wrap up, basically, in full
22 by June the 9th. But on May the 13th, we were, you know,
23 less than a month away from the total cap. We -- I'm
24 sorry. I'm getting a little nervous here. We received
25 that money. So that's why the money trickled in over

1 time.

2 JUDGE LE: Okay. Thank you. This is Judge Le.
3 So let me just follow up here. So the entire money that
4 you received from 2017 to 2019, you reported that entire
5 amount all in your 2017 amended return?

6 MR. MITCHELL: Yeah.

7 MS. BOUCHER: No. Well, I thought it was more --
8 well he did the tax. Excuse me. This is Denise speaking.
9 Dennis did the taxes. I sign the taxes, but we paid in
10 2019. But he can answer the question.

11 JUDGE LE: Okay.

12 MR. MITCHELL: Yes. To answer your question, we
13 received the initial amount for our property in 2017, and
14 then when we purchased another home in 2019, we did
15 receive the final settlement from our insurance company.
16 So yes. And then that money that we received was also
17 then paid on our 2017 taxes as a lump sum -- the whole --
18 the lump sum of our insurance settlement on the dwelling.
19 We also -- separately, the land, the lot was sold in 2019,
20 and that was reported separately in 2019. You know we
21 paid taxes on the land portion.

22 MS. BOUCHER: So the property at X address did
23 not actually -- was not actually sold until 2019, to be
24 clear. We -- the house was gone, but the land was there.
25 And I sold it to, again, to a different -- actually, a

1 competing builder, Silvermark, and it closed escrow the
2 end of August 2019. So there was some differentiation
3 there between what had happened, you know, between '17,
4 '18, and '19, obviously.

5 JUDGE LE: Okay. This is Judge Le. So what I'm
6 hearing is when you received the insurance proceeds of
7 2017, that's the amount you reported on the 2017 amended
8 return? So let me rephrase it. For the insurance
9 proceeds that you received in 2018 or 2019, did you report
10 that on the 2017 amended return too?

11 MR. MITCHELL: I'm sorry, Judge. Can you repeat
12 that? I'm a little hard of hearing.

13 JUDGE LE: Okay. So what I understand is you
14 received proceeds from the insurance company throughout
15 all three years, 2017, 2018, and 2019; is that correct?

16 MR. MITCHELL: That's correct.

17 JUDGE LE: Okay. On your 2017 amended return,
18 did you only report the proceeds that you received in
19 2017, or did you also report the insurance proceeds that
20 you received in 2018 and 2019?

21 MR. MITCHELL: Well, I reported the insurance
22 payments that we received for 2017 in 2019. In 2018 there
23 were insurance payments, but it was for --

24 MS. BOUCHER: Loss of use.

25 MR. MITCHELL: -- loss of us --

1 MS. BOUCHER: And other incidentals.

2 MR. MITCHELL: -- which is like, you know,
3 receiving rent. So I reported it as rent income. So
4 aside from that, it was only -- the actual dwelling
5 payments for the property that was destroyed was in 2017.

6 MS. BOUCHER: The basic -- basic --

7 MR. MITCHELL: 2017 was the basic, and then we
8 received an extended payment in 2019 and those two -- it
9 was all reported on the 2017. Because, frankly, I didn't
10 know how to combine those and report them separately. You
11 know, I'm just an average guy, you know, trying to do my
12 own taxes.

13 MS. BOUCHER: Turbo tax.

14 MR. MITCHELL: Yeah -- I use turbo tax. And I
15 tried to research it, you know, and it was very difficult
16 to find information about it. So I ended up reporting it
17 that way thinking that maybe that was the best way to make
18 it clear, you know, that everything would work out, you
19 know, with the 1031 and -- and that part of it. You know,
20 we're talking about three years now, you know, and some of
21 this is getting a little fuzzy to me. But I hope that's
22 going to clear what I'm trying to tell you how I did it.

23 JUDGE LE: This is Judge Le. Thank you for
24 answering my question.

25 MS. BOUCHER: May I add a little something extra.

1 I want to kind of clarify something, if it's not
2 abundantly clear. In 2017 the check that we received was
3 for the basic dwelling, which meant just the building. I,
4 fortunately, had extended coverage, 50 percent extended
5 coverage, and my policy was relative -- less than two
6 years old when it burned down. It burned down literally
7 on 22 months when it burned.

8 But that additional money that we received
9 through 2018 and 2019 was also sent out at that time.
10 Because when you have the extended 50 percent coverage on
11 your insurance, that is supposed to be like a buffer for
12 rebuilding. Because when something like this happens,
13 there's --

14 MR. MITCHELL: Replacement.

15 MS. BOUCHER: -- for replacement property.
16 There's overruns. When a catastrophe like this happens,
17 materials become extremely scarce. The cost of rebuilding
18 becomes extremely high, and it -- that extended
19 coverage -- that 50 percent extended coverage covers you
20 for that. And thank God we had that. So I just wanted to
21 clarify so they understand where this money come -- where
22 the 2017 money came in, when the 2018 money came in, and
23 2019 money came in. I hope that's more clearer. It's my
24 understanding of how it works.

25 JUDGE LE: This is Judge Le. Thank you so much

1 for explaining.

2 At this point let me now turn to the Franchise
3 Tax Board. It is their turn for their presentation.

4 Mr. Cristobal, you have up to 10 minutes starting
5 at 1:36 p.m. Please proceed. Thank you.

6

7 PRESENTATION

8 MR. CRISTOBAL: Good afternoon my name is Leo
9 Cristobal, and I represent Respondent Franchise Tax Board.

10 This issue here is whether Appellants have
11 established any basis to abate interest for the 2017 tax
12 year on appeal. In the presidential opinion of Appeal of
13 Moy, the Office of Tax Appeals confirmed that interest is
14 not a penalty. Interest is mandatory compensation for
15 money that should have been paid to the State, and there
16 is no reasonable cause exception to the imposition of
17 interest.

18 In this case, Appellants had a rental that
19 unfortunately was destroyed by fire and involuntarily
20 converted into insurance proceeds in 2017. Appellants
21 made an election under Internal Revenue Code 1033 on their
22 2017 tax return to defer the realized gain from the
23 insurance proceeds. This election to defer the gain from
24 the proceeds was contingent on using the proceeds to
25 purchase similar replacement property.

1 However, as it has been discussed, the Appellants
2 ultimately changed course and filed an amended 2017 tax
3 return. On that return, Appellants admitted that they did
4 not use their insurance proceeds to purchase proper
5 replacement property. They also withdrew their request to
6 defer gain under Internal Revenue Code Section 1033, and
7 they recomputed their 2017 tax liability to report the
8 gain from the insurance proceeds from 2017.

9 Accordingly, since Appellants did not pay all of
10 their 2017 tax on time, the Franchise Tax Board imposed
11 interest on the amount that was paid late. Now, in
12 opposition to the imposition of interest, Appellants have
13 offered reasonable cause arguments related to the fire and
14 also the pandemic. And while Respondent recognizes the
15 severity of the California fires and the Covid-19
16 pandemic, regrettably, there is simply no reasonable cause
17 exception to the imposition of interest and, therefore,
18 Appellants have not established a basis to abate interest
19 for the 2017 tax years, and the Franchise Tax Board's
20 denial of Appellants' claim for refund is proper and
21 should be sustained.

22 Now, additionally, the Office of Tax Appeals has
23 asked Respondent to address what happens when an election
24 to defer gain under Internal Revenue Code Section 1033
25 fails and what year the gain should be recognized. Code

1 of Federal Regulation Section 1.1033(a)(2) provides proper
2 guidance. Subsection (c)(2) states that if converted
3 property is not timely replaced or a decision is made not
4 to replace the tax liability for the year the election was
5 made, shall be recomputed in the form of an amended
6 return.

7 Furthermore, all of the details in connection
8 with any gains shall be reported in the year any such gain
9 is realized. Thus, when an election to defer gain under
10 Internal Revenue Code Section 1033 fails, the gain is
11 recognized through an amended return in the year the
12 election was made, which in this case was 2017. That is
13 what Appellants did here. They made a decision not to
14 replace. They recomputed their tax liability for the year
15 they had made the election, which is 2017, and they
16 properly filed an amended 2017 return reporting the gain
17 from the insurance proceeds they received after they lost
18 their rental in 2017.

19 As a final note, Appellants submit that in 2019
20 they were able to sell the land where their rental
21 previously stood. It must be emphasized that the sale of
22 the land is not the same as the aforementioned insurance
23 proceeds that Appellants received after their rental was
24 destroyed in 2017. To be clear, any gain Appellants got
25 from selling the land in 2019 is separate income from the

1 gain from the insurance proceeds that they failed to defer
2 under Internal Revenue Code Section 1033 for the 2017 tax
3 year.

4 Thank you, and I'm happy to answer any questions
5 you may have.

6 JUDGE LE: Thank you.

7 This is Judge Le. Let me now turn to my ALJ
8 panel to see if they have any questions for the Franchise
9 Tax Board.

10 Turning first to Judge Vassigh, do you have any
11 questions for Franchise Tax Board?

12 JUDGE VASSIGH: This is Judge Vassigh. I do not
13 have any questions.

14 JUDGE LE: Thank you.

15 This is Judge Le. Turning now to Judge Lam. Do
16 you have any questions for the Franchise Tax Board?

17 JUDGE LAM: This is Judge Lam. I have no
18 questions for the Franchise Tax Board.

19 JUDGE LE: Thank you, Judge Lam.

20 This is Judge Le. Let's now turn to Appellants
21 to hear their rebuttal to the Franchise Tax Board's
22 argument. You have up to five minutes, starting at
23 1:42 p.m. Please proceed. Thank you.

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1 those capital gains, and only getting probably -- well,
2 you know, I think you get 20 percent a year until you're
3 totally vested after five years is my understanding about
4 a 1031. It was very complicated. So we were willing to
5 step up and pay those capital gains, and we did that.
6 Like, again, said I paid the homeowners due. I paid
7 everything on the property until it was sold.

8 Also, the statute, I want emphasize again, we did
9 not willfully neglect our tax obligations to the FTB or
10 the IRS, as far as we're concerned, as documented by the
11 form Section 19104. We tried in vain trying to get
12 assistance and all we got was passed around from CPA to
13 CPA because we had a hell of a time getting information.
14 And we tried to decode, you know, understand what we were
15 doing -- trying to get this done. Okay.

16 And we feel -- I strongly feel that we tried to
17 resolve this nightmare -- and I call it punishment
18 inflicted on us -- because it was an impossible situation
19 to deal with from the get go. And then with Covid I tried
20 repeatedly with the FTB, as stated in the previous
21 testimony, to try to get this resolved. That's why I'm
22 asking for the OTA to intervene and make a judgment to
23 resolve what I consider an injustice and incorrect
24 taxation of us.

25 I believe we are -- we should be -- get the

1 abatement of our interest because we did everything
2 humanly possible, bending over backwards, trying to do the
3 right thing. And it was not easy. Not easy at all. And
4 I just want to emphasis that. And I don't know what else
5 more I can say or do. You know, I'm sorry. I'm just, you
6 know, I'm just a little overwhelmed here right now.

7 And I just can't believe that I can be penalized
8 like this for a property that, you know, we had we owned
9 it outright. Thank God because I struggled to pay for it
10 and pay the whole thing off, and then get taxed on it
11 again because I received money for something that burned
12 down.

13 Thank you.

14 JUDGE LE: This is Judge Le. Thank you for your
15 rebuttal there.

16 Let me turn to my ALJ panel to see if they have
17 any final questions for either party.

18 Judge Vassigh, any final questions for either
19 party?

20 JUDGE VASSIGH: This is Judge Vassigh. I do not
21 have any questions. Thank you.

22 JUDGE LE: This is Judge Le. Thank you.

23 Turning to Judge Lam, do you have any final
24 questions for either party?

25 JUDGE LAM: This is Judge Lam. I do not have any

1 questions at this time. Thank you.

2 JUDGE LE: Thank you, Judge Lam.

3 This is Judge Le. I do have a question for
4 Respondent Franchise Tax Board. This goes -- this
5 question sort of centers around what Appellants' testified
6 to today. They stated that they received some of the
7 insurance proceeds in 2019 but reported that on their 2017
8 amended return. Does -- if that fact was true and they
9 can prove that fact, does that change the FTB's interest
10 calculation?

11 MR. CRISTOBAL: This is Leo Cristobal from the
12 Franchise Tax Board. If Appellants believed that they
13 reported income from a different tax year on the 2017
14 return, you know, they would be more than welcome to file
15 an amended return to reflect that change. But as far as
16 it relates to what they reported in their 2017 amended
17 return, it does not change the interest calculation that
18 has been made.

19 JUDGE LE: So let me just follow up here. For
20 the 2017 amended return, they stated that they reported
21 both insurance proceeds that they received in 2017 and
22 also the insurance proceeds that they might have received
23 in 2019. For that portion of the insurance proceeds that
24 they receive in 2019, should interest be calculated
25 differently?

1 MR. CRISTOBAL: This is Leo Cristobal from
2 Franchise Tax Board. Again, if the Appellants reported
3 income from a previous or for a different year on their
4 2017 amended returns, and, yes, assuming that they can
5 show that it was from a different year and they
6 incorrectly reported it on their amended return, they
7 would have to amend that return to show that change.

8 And then if that were the case, then the interest
9 calculation would change depending on that being true.
10 But as I said, as it stands, Franchise Tax Board took what
11 they reported in their amended return, and that's how the
12 interest was calculated.

13 MS. BOUCHER: Do you have any questions?

14 MR. MITCHELL: This is Dennis Mitchell. Can I
15 speak?

16 JUDGE LE: Yes. Go ahead.

17 MR. MITCHELL: I have a question. Am I
18 understanding that we would have to amend once again the
19 2017 taxes and then also the 2019, because that's where
20 the money actually belongs, I guess, the way it sounds?

21 JUDGE LE: This is Judge Le. That's -- I believe
22 that's FTB's position. But let me continue asking the FTB
23 some follow-up questions at this time.

24 Turning to the Franchise Tax Board, do insurance
25 companies report insurance payments to the FTB, like

1 through a 1099?

2 MR. CRISTOBAL: This is Leo Cristobal from
3 Franchise Tax Board. The question of whether insurance
4 companies report it to FTB, the answer is no. The FTB can
5 request federal information from the IRS and receive that
6 sort of information.

7 And I also want to note, my colleague Maria
8 Brosterhous from FTB, she's having technical issues. But
9 she's, I think, being forced to exit.

10 But to answer your question, no, we don't receive
11 it directly, but it's information we can request.

12 JUDGE LE: Thank you. Would you like us to wait
13 for a few minutes for Ms. Brosterhous?

14 MR. CRISTOBAL: Let me -- give me about a minute,
15 and let me confirm with her.

16 JUDGE LE: This is Judge Le. Okay. Thank you.

17 MS. BOUCHER: We did not receive a 1099 either.

18 MR. CRISTOBAL: This is Leo Cristobal from
19 Franchise Tax Board. So because my colleague, Maria,
20 Brosterhous, is having technical issues, I think she had
21 to restart her whole system. I propose we wait maybe a
22 minute, maybe another additional minute. But I also am
23 fine if we proceed without her here at the moment, and
24 then if she comes on, we can proceed as well.

25 MS. BOUCHER: May I speak? Denise Boucher.

1 JUDGE LE: Let's -- we're going to wait a minute
2 or two for Ms. Brosterhous to try to get on. If not, then
3 we'll continue on. At this point we'll take a break for
4 two minutes. Thank you.

5 (There is a pause in the proceedings.)

6 JUDGE LE: Okay. This is Judge Le. Thank you,
7 Mr. Cristobal.

8 Appellants did you have a response that you
9 wanted to state?

10 MS. BOUCHER: Yes. Denise Boucher speaking.
11 Yes. I just want to be clear that we did not get a 1099.
12 In fact, I recall my husband asking about that to the
13 insurance company, and we did not receive a 1099. And,
14 again, regarding the abatement -- going back to the
15 abatement and it not being reported, we again did not
16 willfully neglect or try to do anything underhanded by
17 so-called cheating the government of those taxes.

18 We reported them, and when we went to the third
19 attorney who happened to also be a CPA -- the third CPA
20 who also happen to be a tax attorney, and he told -- I
21 didn't go to these visits because I'm a 24-hour caregiver
22 for my 99-year-old mother. He was told that you pay the
23 capital gains on the property when it is sold. I
24 understand what Mr. Cristobal has said, and apparently,
25 they are separate. But, apparently, anybody that we never

1 spoke to ever told us that.

2 We were under the impression that we were selling
3 the property because I paid for it just like I would if
4 there was a two-story house on it. I paid dues, property
5 taxes, insurance on it. So we paid them in 2019. And if
6 we wanted to be cheating the government in any way, shape,
7 or form, I wouldn't have reported the income, and that
8 would have been a foolish thing to do. And we stepped up
9 and paid what we did.

10 I'm just asking for OTA and hopefully maybe even
11 the FTB to look at this and say, this is maybe -- maybe
12 things got into the wrong tax years somehow, but the
13 monies were paid. Again, I paid over \$268,000 in capital
14 gains in 2019 when that property no longer became mine. I
15 no longer paid homeowners dues on that property. I no
16 longer had an insurance policy on it, and I didn't pay
17 property taxes on that empty lot.

18 So that's just, you know, my response. And I
19 just hope that, you know, they realize that when we tried
20 to amend the taxes in 2019 -- amend the 2017 taxes for
21 2000 -- in the year 2019, perhaps things may not have gone
22 in the right spot so to speak. And as we said, we
23 struggled to get that information with the IRS, and the
24 FTB, three CPAs, and a tax attorney, not to mention
25 countless hours of research trying to do the right thing.

1 And I'm the one -- I'm the more emotional one here, but I
2 really feel that this is wrong to be penalized again for
3 this because we did everything humanly possible to file
4 our taxes properly.

5 You know, I -- I never want it -- to have
6 problems with the IRS or the Tax Board. I know they wield
7 big guns, you know, and I don't want to have a problem.
8 So I -- we did everything we could to do it right. That's
9 all I can say. I'm sorry I'm getting a little emotional
10 about it again. It's just been a very, very difficult
11 four-plus years. Thank you.

12 JUDGE LE: Thank you, Ms. Boucher. This is
13 Judge Le. Does that conclude your final remarks for this
14 hearing?

15 MS. BOUCHER: Do you have anything else?

16 MR. MITCHELL: No. I think you summed it up.

17 MS. BOUCHER: Okay. I guess I got the last word.
18 This is Denise getting the last word.

19 JUDGE LE: This is Judge Le. Thank you.

20 So there appears to be outstanding issues on when
21 Appellants received their insurance proceeds that they
22 reported on their 2017 amended return. I would like to
23 confer with my ALJ panel after this hearing to see if we
24 should request additional information from the parties.
25 So we will hold the record open, so we confer after the

1 hearing. After this hearing, we will issue a post-hearing
2 order which will either close the record or dictate when
3 the record will close. And so we're ready to complete
4 this hearing today. As I said I will issue an order after
5 this hearing is over. Thank you everyone for coming in
6 today.

7 Today's hearing in the Appeal of Mitchell and
8 Boucher is now adjourned.

9 (Proceedings adjourned at 2:01 p.m.)

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I further certify that I am in no way interested
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I have hereunto subscribed my name this 1st day
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