

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF:     )  
   )  
B. HOUSMAN & B. PENA,                     ) OTA NO. 18010200  
   )  
   ) APPELLANT.  
\_\_\_\_\_  
   )

CERTIFIED COPY

TRANSCRIPT OF PROCEEDINGS

Sacramento, California

Tuesday, May 24, 2022

Reported by:

SARAH M. TUMAN, RPR  
Hearing Reporter

Job No.:  
36790 OTA(A)

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7                                    APPELLANT.   )  
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16               TRANSCRIPT OF PROCEEDINGS, taken at  
17   400 R Street, Sacramento, California,  
18   commencing at 9:05 a.m. and concluding  
19   at 12:00 p.m. on Tuesday, May 24, 2022,  
20   reported by Sarah M. Tuman, RPR,  
21   Hearing Reporter.  
22  
23  
24  
25

1 APPEARANCES:

2  
3 Panel Lead: ALJ JOSHUA LAMBERT

4  
5 Panel Members: ALJ CHERYL AKIN  
6 ALJ SARA HOSEY

7  
8 For the Appellant: JEFFREY M. VESELY  
9 ANNIE H. HUANG

10 For the Respondent: STATE OF CALIFORNIA  
11 FRANCHISE TAX BOARD  
12 BRADLEY W. KRAGEL  
13 RONALD HOFSDAL  
14  
15  
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APPELLANT'S WITNESS:	DIRECT	CROSS	REDIRECT	RECROSS
Bardia Housman	20	47		

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(Department's Exhibits A-EE were received at 7)

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1 Sacramento, California; Tuesday, May 24, 2022

2 9:05 a.m.

3  
4 ADMINISTRATIVE LAW JUDGE LAMBERT: We are now on  
5 the record in the Office of Tax Appeals oral hearing for  
6 the appeal of Bardia Housman and Beatriz Pena,  
7 Case No. 18010200. The date is May 24th, 2022, and the  
8 time is 9:05 a.m.

9 My name is Josh Lambert, and I am the lead  
10 administrative law judge for the purposes of conducting  
11 this hearing. My co-panelists today are Judge Akin and  
12 Judge Hosey.

13 I would like to have everyone introduce  
14 themselves for the record.

15 FTB, can you please introduce yourselves?

16 MR. KRAGEL: Yes, Judge. My name is Bradley  
17 Kragel, and I'm here with Ronald Hofsdal. We represent  
18 Respondent, Franchise Tax Board.

19 ADMINISTRATIVE LAW JUDGE LAMBERT: Okay. Thank  
20 you.

21 And Appellant and representatives, can you please  
22 introduce yourselves?

23 MR. VESELY: Yes. Jeffrey M. Vesely from  
24 Pillsbury Winthrop Shaw Pittman for Appellants.

25 (Reporter interrupted)

1 MR. VESELY: Not on? Now? No.

2 (Reporter interrupted)

3 ADMINISTRATIVE LAW JUDGE LAMBERT: There's a  
4 button you press to -- and you'll see the green light.

5 MR. VESELY: The green light is on.

6 ADMINISTRATIVE LAW JUDGE LAMBERT: Maybe just  
7 move it closer? That may help.

8 (Reporter interrupted)

9 MR. VESELY: Closer? All right. Is that better?

10 (Reporter interrupted)

11 MR. VESELY: Let's get it closer. All right.  
12 How about that?

13 (Reporter interrupted)

14 MR. VESELY: Okay.

15 Jeffery M. Vesely with Pillsbury Winthrop Shaw  
16 Pittman for Appellants.

17 MS. HUANG: Annie Huang with Pillsbury Winthrop  
18 Shaw Pittman for Appellants.

19 (Reporter interrupted)

20 MS. HUANG: It is on. But how about this?

21 (Reporter interrupted)

22 MS. HUANG: Okay. Super Close.

23 Annie Huang with Pillsbury Winthrop Shaw Pittman  
24 for Appellants.

25 ADMINISTRATIVE LAW JUDGE LAMBERT: Okay. Thank

1     you. I want to thank you all for attending.

2             The issues are whether Appellants were  
3 nonresidents on August 29, 2009 and, even if Appellants  
4 were residents of California August 29, 2009, whether  
5 Mr. Housman was entitled to a basis step-up as a result of  
6 a valid check-the-box election for federal and California  
7 income tax purposes.

8             FTB provides exhibits A through EE. Appellants  
9 provide exhibits 1 through 17. That evidence is now in  
10 the record.

11             (Appellant's Exhibit Nos. 1-17 were received in  
12 evidence by the Administrative Law Judge.)

13             (Respondent's Exhibit Nos. A-EE were received in  
14 evidence by the Administrative Law Judge.)

15             ADMINISTRATIVE LAW JUDGE LAMBERT: Now,  
16 Mr. Vesely, this will be your opportunity to present your  
17 case. And first, I'd like to swear in Mr. Housman so that  
18 he can testify during your presentation.

19             Mr. Housman, can you please raise your right  
20 hand.

21  
22                     BARDIA HOUSMAN,  
23 called as a witness on behalf of the Appellant, having  
24 first been duly sworn by the Administrative Law Judge.  
25     ///

1           MR. HOUSMAN: I swear to tell the truth, the  
2 whole truth, and nothing but the --

3           ADMINISTRATIVE LAW JUDGE LAMBERT: Okay. You can  
4 say yes.

5           MR. HOUSMAN: Yes.

6           ADMINISTRATIVE LAW JUDGE LAMBERT: Okay. Thank  
7 you.

8           And Mr. Vesely, you may now proceed.

9  
10                           OPENING STATEMENT

11 BY MR. VESELY, Attorney for Appellant:

12           Thank you, your Honor. Good morning, and thank  
13 you for the opportunity to present our appeal today.

14           This case has been a long journey for  
15 Mr. Housman, both literally and figuratively. As you  
16 know, the tax year involved is 2009. The FTB's audit of  
17 Mr. Housman commenced in 2012. Ms. Huang and I were hired  
18 in late 2014 to handle the protest. The appeal was filed  
19 in late 2017. And, over the four last -- past four years,  
20 four plus years, we have filed five briefs with this body.

21           Notwithstanding submitting three declarations  
22 under oath, Mr. Housman wanted to speak directly with you  
23 folks today and to tell a story. In fact, he has traveled  
24 from Australia; I heard it was a 14-hour flight just --  
25 just to be here today. And we welcome questions from this



1 panel.

2 ADMINISTRATIVE LAW JUDGE LAMBERT: Mr. Vesely,  
3 you could probably move the microphone even closer so we  
4 can really hear you well.

5 MR. VESELY: Still closer?

6 ADMINISTRATIVE LAW JUDGE LAMBERT: Yeah.

7 MR. VESELY: Okay. Sorry folks.

8 ADMINISTRATIVE LAW JUDGE LAMBERT: You've got to  
9 get pretty close to these.

10 MR. VESELY: All right.

11 ADMINISTRATIVE LAW JUDGE LAMBERT: Thanks.

12 MR. VESELY: Is that better? Got to work on that  
13 one.

14 As you know, there are two issues in this appeal.  
15 First, whether Mr. Housman was a California resident in  
16 2009, when he sold his 70 percent interest in Monkey Pty.  
17 Limited, an Australian Proprietary Limited Company. It is  
18 our position that Mr. Housman, who arrived in California  
19 from Australia on April 19, 2008, was not a California  
20 resident in 2009, when he sold his interest in Monkey;  
21 and, thus, none of his gain from the sale is taxable by  
22 the State.

23 Indeed, the evidence which has been presented in  
24 this case demonstrates the complete absence of the  
25 relevant indicators of residency for Mr. Housman during

1 2008, after he arrived, and 2009.

2 Now, the second issue is whether Monkey's  
3 check-the-box election to be classified as a partnership,  
4 which was approved by the Internal Revenue Service, which  
5 was effective April 1, 2008, is binding for California  
6 income and franchise tax purposes.

7 If it is binding, then Mr. Housman should receive  
8 a stepped-up basis in his Monkey stock as of April 1,  
9 2008. It is our position that, even if Mr. Housman was a  
10 California resident at the time of the sale, which we do  
11 not concede, there is absolutely no question that, under  
12 California law, Monkey's federal tax classification is  
13 binding on the FTB, and that Mr. Housman should receive a  
14 stepped-up basis in his Monkey stock.

15 Indeed, Revenue Taxation Code Section 23038(B) --  
16 as in boy -- (2)(B)(ii) is explicit. It states the  
17 classification of an eligible business entity, like  
18 Monkey, shall be the same as the classification of the  
19 entity for federal tax purposes.

20 Regulation 23038(b)-3(c)(1) could not be clearer.  
21 Even its heading says it all. It says, quote, federal tax  
22 classification is binding for California income and  
23 franchise tax purposes, unquote.

24 That section of the Regulation further provides,  
25 quote, the classification of an eligible business entity

1 for California income and franchise tax purposes shall be  
2 the same as the classification of the eligible business  
3 entity for federal tax purposes under Treasury Regulation  
4 Section 301.7701-3, unquote.

5 That Section goes on to provide, quote, the  
6 election of an eligible business entity to be classified  
7 as an association or partnership for federal tax purposes  
8 shall be binding for California income and franchise tax  
9 purposes.

10 Please note the word used in the statute and  
11 Regulation is "shall", not "may". In this case, the FTB  
12 is plainly bound by the federal check-the-box election,  
13 which was approved by the Internal Revenue Service.

14 Now, finally, as you know, this case involves an  
15 appeal of the FTB's denial of Appellants' claim for refund  
16 related to the residency issue. It also involves an  
17 appeal from the FTB's denial of Appellants' protest  
18 pertaining to the check-the-box and stepped-up basis  
19 issues.

20 Now, Ms. Huang will discuss the residency issue,  
21 and I will then address the check-the-box, stepped-up  
22 basis issues.

23 And thank you, again, for the opportunity to  
24 appear before you today.

25 ///

1 PRESENTATION

2 BY MS. HUANG, Attorney for Appellant:

3 Thank you, Jeff, your Honors.

4 As Jeff just noted, the question here --

5 (Reporter interrupted)

6 MS. HUANG: I'll -- I'll get this eventually.

7 How's this? Better?

8 (Reporter interrupted)

9 MS. HUANG: Okay.

10 So the -- the issue before us is whether  
11 Appellants, Mr. Housman and Ms. Pena, were nonresidents of  
12 California in 2009 and, obviously, then also in 2008.

13 And just for ease of discussion, I will just  
14 refer to Mr. Housman rather than Ms. Pena and Mr. Housman  
15 all the time.

16 But as discussed in our briefs, Mr. Housman, you  
17 know, grew up in Australia -- long-term Australian  
18 domiciliary; and, you know, his family lived there and  
19 always lived there; and, in this case, Ms. Pena as well;  
20 close-knit family, they -- they also lived in Australia.  
21 So there is no question that they were long-term  
22 California -- Australian domiciliaries when they came to  
23 California in 2008.

24 (Reporter interrupted)

25 MS. HUANG: Domiciliaries.

1 ADMINISTRATIVE LAW JUDGE LAMBERT: Maybe if  
2 you --

3 MS. HUANG: Uh-huh.

4 ADMINISTRATIVE LAW JUDGE LAMBERT: I think if you  
5 move you mic up even closer and maybe lift it up a  
6 little --

7 MS. HUANG: Is this -- oh. So I have to be right  
8 up to it?

9 ADMINISTRATIVE LAW JUDGE LAMBERT: Yes.

10 MS. HUANG: Got it.

11 (Reporter interrupted)

12 MS. HUANG: Okay. All right.

13 So -- so now, in -- now, in determining whether  
14 an individual domicile elsewhere is in this state for a  
15 transitory or temporary purpose, we look at the facts and  
16 the circumstances of the case.

17 So, here, Regulation 17014(b) also provides that  
18 if an individual is in this state to complete a particular  
19 transaction, he is here for temporary or transitory  
20 purpose.

21 The FTB itself, in its Residency and Sourcing  
22 Manual, also provides that the importance you give to  
23 particular facts must be put into perspective when viewed  
24 in conjunction with the overall activities of the  
25 taxpayer.

1           So in this case, when the relevant facts are  
2 considered within proper context, it is clear that  
3 Mr. Housman and Ms. Pena were nonresidents of California  
4 in 2008 and 2009.

5           So before I go into the residency facts, it is  
6 important to understand the events leading up to  
7 Mr. Housman coming to California on April 19, 2008. On  
8 February 21, 2000, when Mr. Housman was domiciled in, you  
9 know, in -- in Australia and living in Australia, Monkey  
10 was established.

11           As -- as Jeff noted, Monkey is an Australian  
12 Limited Propriety Company. So -- and then, Mr. Housman  
13 was the founder, CEO, and majority shareholder of Monkey.  
14 In 2004, Monkey launched and cofounded a software venture  
15 named Business Catalyst Systems Pty. Limited -- BCS for  
16 short. BCS was located in Sydney. It offered hosted  
17 software solutions for building and managing small  
18 businesses, or, you know, online businesses. Most of  
19 their clients were small businesses.

20           But as BCS grew globally, Mr. Housman and Mr.  
21 Broadway, his cofounder, decided BCS needed to establish  
22 satellite offices in the U.S. and Europe in order to  
23 expand globally. And it was decided Mr. Housman would be  
24 the one to take on this task.

25           And I -- I should note, back in -- nowadays, we

1 have cloud services and, you know -- that you can -- you  
2 can access from anywhere in the world. But back in those  
3 days, a company like BCS would need to invest in data  
4 centers in locations closer to where their customers were.

5 And, you know, Mr. Housman can explain that later  
6 in terms of -- as to why that was necessary. So -- so  
7 they had data centers in Canada and in London.

8 So, now, turning to the -- the facts that we have  
9 presented in our briefs -- so I will not go into the  
10 detail -- the extent -- the extent of the details in the  
11 briefs, but here -- here are the facts, the basic facts.  
12 And these are facts that FTB has not disputed, you know,  
13 in -- in -- in their briefs because, you know, one of the  
14 things that we have, you know, submitted as  
15 declarations -- Mr. Housman and Ms. Pena submitted two  
16 declarations -- and, you know, in support of their  
17 residency issue. And, obviously, Mr. Housman is here,  
18 also, to answer any questions.

19 But -- but the facts are that on August -- I  
20 mean, on April 19, 2008, two weeks after he got married,  
21 Mr. Housman entered the U.S. under an E3 working visa.  
22 The E3 visa is a nonimmigrant intent visa for the  
23 applicant. You know, this is only for Australian  
24 nationals to come to the U.S. for employment purposes on a  
25 temporary basis. You know, if -- if Australians -- if

1 they wanted to immigrate to the U.S., it would be under a  
2 different visa.

3           So when Mr. Housman first arrived in California,  
4 you know, he stayed in a fully furnished executive  
5 apartment. And he brought with him only some of his  
6 clothes and a few personal items. And with -- when  
7 Ms. Pena flew to California on April 30, 2008, she did the  
8 same thing. She only came with some of her clothes and a  
9 few personal items. Neither Mr. Housman, nor Ms. Pena,  
10 shipped any of their other possessions from California --  
11 from -- from Australia to California prior to, or even  
12 after, their rival in California in April 2008. The  
13 overwhelming majority of their possessions remained in  
14 Australia the entire time.

15           So in May 2008, Mr. Housman and Ms. Pena moved  
16 into a fully furnished one-bedroom apartment on a one-year  
17 lease and, after expiration of that one-year lease, they  
18 were here -- they were there month-to-month. And, again,  
19 because it was fully furnished, you know, there was no  
20 need to buy new furniture.

21           And that is the thing -- that the entire, you  
22 know -- in 2008 and 2009, they did not buy one piece of  
23 furniture because they stayed at a fully furnished place  
24 that entire time and had no intention of staying here.

25           So -- and then, also, on top of being in a fully



1 furnished apartment, Mr. Housman, when he was trying to  
2 establish his, you know -- a satellite office here, he did  
3 not rent an office space. What he did was he rented a  
4 desk at a co-working space. And he simply added more  
5 desks when, you know, he hired more employees.

6 And when -- and on -- you know, in terms of the  
7 work life that he had, he wasn't -- when he was here, he  
8 worked extremely long hours. Because, not only was he  
9 responsible for establishing the satellite office in San  
10 Francisco, he was also still very heavily involved in the  
11 operations of BCS in Australia, where their management,  
12 their engineering, their marketing their production -- all  
13 still there in Sydney.

14 So Mr. Housman worked basically 17 or 18 hours a  
15 day. Started at -- with the California hours, and then  
16 ended, you know, 1:00 or 2:00 in the morning to  
17 accommodate the Australian hours -- and six days a week  
18 because our Sunday is their Monday.

19 So this was a very, very grueling schedule, as  
20 you can imagine. And it was simply not sustainable  
21 long-term. But he was willing to do it on a short-term  
22 basis.

23 So as we also provided in our briefs and the  
24 declarations of Mr. Housman and Ms. Pena, they intended to  
25 be in California only for a short period, as evidence by

1 the -- the fully furnished apartments; you know, the --  
2 the hours that were unsustainable; the fact that they only  
3 came with some of their clothes and a few personal items;  
4 that they never bought any furniture.

5 But, you know, here we have -- is that they were  
6 here to establish a satellite office. And then he was  
7 going to -- Mr. Housman was going to leave and leave the  
8 California office in the hands of a capable employee. And  
9 so everything they did in 2008 and 2009 is evidence of  
10 their intent for only a short stay.

11 So let me just summarize. I know we talked about  
12 this in our briefs, but I think it's very important for  
13 your Honors to -- to hear, again, what facts were there.

14 So consistent, you know, with their intent, like  
15 I said, they arrived with clothes -- just some clothes and  
16 personal belongings; they lived in fully furnished  
17 apartments on short-term basis; and they also did not own  
18 any real estate in California in 2008 or 2009; they did  
19 not own any, or lease any, vehicles in California in 2008  
20 or '9; they did not have any -- they did not have a  
21 California driver's license in 2008 or '9, instead they  
22 retained and renewed their Australian driver's license --  
23 both of them; they did not belong to any membership clubs  
24 or associations in California; they kept their same family  
25 doctor and dentist they always had in Australia; they kept

1 the same cell phone numbers during their stay in  
2 California, you know, the same Australian cell phone  
3 numbers; they still owned their house in Australia but  
4 rented it out initially for a one-year term and then  
5 month-to-month; you know, BCS did not have an office, but  
6 like I said, just, you know, rented a space in a  
7 co-working space; and Mr. Housman worked really long hours  
8 that, you know, nobody could keep up for a long-term -- on  
9 a long-term basis.

10 And, very important -- and, you know, I think it  
11 is -- if you guys, you know -- if your Honors haven't had  
12 a chance to review the video that we noted in  
13 Mr. Housman's declaration -- the Supplemental  
14 Declaration -- it would be good to review them.

15 Only because, in that video that was -- it was an  
16 interview in February of 2009 where Mr. Housman publicly  
17 stated that they were planning to move to London and open  
18 a London office in May of 2009. And to that end, in  
19 April 2009, Ms. Pena took a trip to London to look at  
20 areas where she and Mr. Housman could live once they moved  
21 there.

22 So, you know, we -- these are the facts. These  
23 are the facts that are undisputed, you know. And  
24 Mr. Housman can certainly answer any questions to those  
25 facts. And when we, you know -- case law directs us to

1 look at where the individual has their closest  
2 connections. And in this case, their closest connections  
3 were to Austria.

4 Mr. Housman and Ms. Pena maintained all their  
5 significant ties to Australia. They did not sever any of  
6 them. And they did not establish any meaningful  
7 connections to California in 2008 or 2009. And none of  
8 the required additional residency was present in -- in  
9 those years. So, therefore, their intent, as evidence by  
10 their actions, was to be in California for a temporary and  
11 transitory purpose.

12 So, now, if it's okay with your Honors, I will  
13 turn to Mr. Housman to provide some additional background.

14  
15 BARDIA HOUSMAN,  
16 having been called as a witness on behalf of the Appellant  
17 and previously sworn by the Administrative Law Judge, was  
18 examined and testified as follows:

19  
20 DIRECT EXAMINATION

21 BY MS. HUANG:

22 Q Okay. Mr. Housman, you heard what I just, you  
23 know -- the presentation I just made. Can you just  
24 provide us with more information?

25 Can you please explain to the judges why -- what

1 BCS did, and why you and Mr. Broadway felt 2008 was a good  
2 time to start establishing satellite offices?

3 A Mm-hmm.

4 Good morning and thank you.

5 Business Catalyst was an online  
6 Software-as-a-Service -- Software-as-a-Service company  
7 that small -- helped small businesses sort of have an  
8 online presence with sales/marketing tools. And we saw  
9 that through web designers. And that's kind of -- and  
10 that was kind of the business model.

11 In probably 2007, we started to get  
12 product-market fit, where the company started to grow  
13 quite rapidly. And, as a result, one of the biggest  
14 issues we faced was that the support we provided was  
15 always a day late because we were in Australia and that  
16 the user experience was slow because of the latency in  
17 accessing the servers to use the service -- the product.

18 And, because of that, we started to think about  
19 investing where our customers were and set up data centers  
20 in North America first. And then we set up data centers,  
21 which is racks and servers, in London to serve those  
22 customers better and have a team locally that could help  
23 people better.

24 Q Okay. And so when you said that, you know, 2008  
25 was a good time for you guys to come -- so when you

1 arrived in 2008, April 2008, what was the plan for BCS?

2 A Yeah. Look, the first thing we did was to set up  
3 the servers in -- in -- in Canada. And -- and then from  
4 that the momentum was to come out here and speak to  
5 customers in the right time zone -- respond to customers  
6 on the same day.

7 We used to -- one of our go-to-market strategies  
8 was to run a lot of webinars for our customers. And it  
9 was getting quite taxing to run that from Australia due to  
10 the different time zones. So it was to experiment with  
11 all of those things and validate the market and learn a  
12 little bit more about what it might be like to have an  
13 office in the United States.

14 Q Okay. And so, when you were here, can you please  
15 describe a typical day for you, what you did in 2008 as  
16 you were trying to establish the office in California?

17 A Sure. Yeah. Look, I mean, my day-to-day tasks  
18 were to do some of those things I mentioned. So speak to  
19 customers was mainly the main thing. We attended a lot of  
20 webinars -- sorry. We did a lot of webinars, we attended  
21 a lot of trade shows.

22 But I was the CEO, cofounder, and chief engineer  
23 of the company. So at the end of the day, around  
24 5:00 p.m. or 4:00 p.m., I would then start to work with my  
25 Sydney team -- and that would be on all business

1 functions -- my engineers or my marketing team or support  
2 team.

3 And that day, because the Sydney hours sort of  
4 follow on from San Francisco hours -- that would just get  
5 me late into the night. And then, again, the next morning  
6 I would wake up to do the U.S. hours.

7 Q Okay. And then, when you left Australia in 2008,  
8 how long did you think it would take to establish an  
9 office in California?

10 A Look, it's probably -- the time frame we thought  
11 about was 12 to 18 months just to come out and see, you  
12 know -- validate some of the ideas we had -- to try and  
13 find someone who might be able to run the U.S. office.  
14 And we interviewed one particular candidate quite  
15 extensively. But that was kind of the rough time frame.

16 Q Okay. Okay. And then -- so then, if you were  
17 just here to explore the market, maybe you can explain how  
18 did the Adobe transaction come about?

19 A Yeah. So what was unique about what we were  
20 doing is we had built a plug-in for Dreamweaver, which is  
21 an Adobe product. This goes back to sort of mid-2000s  
22 when that product was very big. And it was a very unique  
23 product because there was a lot of other plug-ins, but  
24 this plug-in sort of connected over the cloud to our  
25 servers.

1           So it was a -- it was something Adobe hadn't  
2   seen. And so I started to interact with their product  
3   managers just to show them and discuss partnership. And  
4   what we were ultimately looking for was to be able to  
5   distribute that plug-in with that product in a  
6   partnership.

7           And -- and, really, that's how Adobe and us  
8   started talking, was around this plug-in.

9           Q     Okay. And so then, if -- if the initial contact  
10   with Adobe was for partnership, how did that turn into --

11          A     Yeah. So I -- I met those guys in June of 2008.  
12   So I met at a product-manager level. And then, I think,  
13   just one thing led to another where we came and presented  
14   to a different team; and then, we presented to the  
15   executive team. And it always -- the context was  
16   partnerships.

17          But it was -- it wasn't until later that year  
18   when they rang us and said, "Hey we're not interested in a  
19   partnership. We're interested in acquiring the company."  
20   So that came out of the blue because that was still very  
21   early in our journey. And, you know, so it wasn't what --  
22   what we were thinking about. But that's kind of -- it  
23   sort of -- it evolved over several months and several  
24   meetings.

25          Q     Okay. And so, when they contacted you in late



1 2008 and talked about potentially exploring an  
2 acquisition, how long before you realized that this was --  
3 the transaction might go through? And how long did due  
4 diligence take?

5 A Yeah. I mean, look, it still took a long time  
6 from when they said they wanted to buy the company to when  
7 they gave us a term sheet. Term sheet came in March of  
8 2009.

9 And then the due diligence -- as you can imagine,  
10 selling your company to someone like Adobe, or a large  
11 technology company based in the Bay Area, is really quite  
12 extensive. So it was a -- you know, there was a lot of  
13 due diligence, and that -- so it took several months. And  
14 sort of -- the dates are what we presented, but it closed  
15 later on in 2009.

16 Q Okay. And so, while the due diligence was going  
17 on, was there any penalty for Adobe if they simply walked  
18 away?

19 A There was no penalty, no.

20 Q Okay. So at that time while due diligence was  
21 going on, what were you doing with BCS?

22 A Well, look, it was business as usual for us. I  
23 mean, there was really two -- two things going on.

24 One was to run the business. We had to -- we had  
25 already invested in the servers here and in Europe. We

1 had to serve those customers. We did -- we had to -- you  
2 know, we were speaking to them every day. We were growing  
3 very quickly.

4 I mean, I think some of that stuff has been  
5 presented. I think that was very exciting about the  
6 company -- is when we eventually found product-market fit.  
7 You know, going from selling to 50 customers a year to  
8 selling to 2,000 a month. It grew very quickly.

9 So it was business as usual. Nothing really  
10 changed while we also spoke to Adobe and did what they  
11 wanted us to do.

12 Q Okay. So then, in terms of your plans for  
13 Europe, because you mentioned that Europe was also  
14 growing, you know, it was growing globally. What -- what  
15 were your plans for -- for Europe, even during the due  
16 diligence with Adobe?

17 A Well, I mean, the plans for Europe were -- were  
18 exactly as they were before because we had already  
19 invested in the data centers. And we needed -- we knew  
20 that we needed to speak to those customers in the same  
21 time zone.

22 It was -- and, in fact, Europe is, given its  
23 geography -- it's -- the time-zone distance to Australia  
24 or to the West Coast is terrible. You just can't run  
25 Europe from those geographies. It's just too much of a

1 time difference.

2 So the plan was to go to Europe. And -- and --  
3 and I think it's evident in what we were saying, or what  
4 we were doing -- is that we were very interested in  
5 setting up office there. And we had already set up the  
6 data center. That had already -- already been done.

7 Q So then when you -- how long did you intend to  
8 stay in California when you first arrived in April 2008?

9 A As I mentioned, it was 12 to 18 months to see --  
10 to figure -- to get answers to a lot of these things that  
11 we were already doing in Australia --

12 Q Mm-hmm.

13 A -- and what that might look like here.

14 How difficult was it to hire people? What did  
15 it -- I don't know. What did partnerships look like?  
16 Where are the customers based? What does the trade show  
17 schedule look like?

18 So there was just a bunch of open questions that  
19 we needed to explore and understand. But I think we could  
20 have done it in 12 to 18 months.

21 Q Okay. So then I -- the -- the other question is,  
22 you know, after the Adobe acquisition, did you have to  
23 work for Adobe? And where did they require you to work  
24 for them? And did they require -- did they dictate where  
25 you worked?

1           A     No.  So, I mean, there was -- the acquisition  
2 didn't have a requirement for me to work anywhere in  
3 particular.  My employment contract was at-will.

4                 So it was really for me to provide a mandate --  
5 there was no mandate.  It was for me to provide a plan to  
6 say how I wanted to run my company.

7                 Really importantly is that, when the Adobe  
8 acquisition happened, I had two teams.  One team was in  
9 Australia, and the second team that was assigned to me by  
10 Adobe was in Bucharest, Romania.  I was given a -- quite a  
11 large -- Adobe has a very large campus there, and my  
12 engineering team would be done out of Bucharest in  
13 Romania.

14                So they were the two teams I needed to optimize  
15 for -- so my main team in Sydney and my new engineering  
16 team in Bucharest.  So it was for me to come back with a  
17 plan.

18           Q     Okay.  Okay.

19                And so in -- in -- you know, in late 2009, by  
20 this time you were working for Adobe even though, like you  
21 said, you weren't required to work for them and employment  
22 was at-will.  Did you -- did you consider living in  
23 California long-term?  Or were you considering other  
24 locations?  Or, you know, since you just said that, you  
25 know, you weren't given a mandate by Adobe, so --

1           A       Yeah, look, I mean, the plan was to go and set up  
2 this London office. And -- and, in fact, I -- I brought  
3 a -- something we can share. My wife and I made a final  
4 trip to London in December of 2009, and I've got passport  
5 pages and stamps of that visit. It was to have one last  
6 look and decide how we wanted to -- where we wanted to  
7 live or how we wanted to run the company.

8                   Essentially, I needed to run my company under new  
9 stewardship of Adobe. And I -- and I think it was earlier  
10 in the following year where we discovered that we were  
11 pregnant, expecting a baby, that we just decided to stay  
12 in California.

13                  But up until then, you know, it was -- yeah. We  
14 were still exploring moving to -- to London.

15           Q       Okay. Okay.

16                  Well, thank you, Mr. Housman.

17                  If -- if your Honors have any questions? If not,  
18 I will turn this over to Mr. Vesely for the check-the-box  
19 issue.

20                  MR. VESELY: Before I start on this, I'm going  
21 to -- I think it might be helpful -- I brought copies of  
22 two key regulations; which, you folks probably have them  
23 handy yourselves, but it might be easy to go along with  
24 it.

25                  One is the Treasury Regulation 301.7701-3 and the

1 California counterpart of 23038(b)-3. And, if you would  
2 like, I could hand these out -- if that would be helpful  
3 to your Honors -- because I'm going to make reference to  
4 them during my -- during my presentation.

5 ADMINISTRATIVE LAW JUDGE LAMBERT: We can just  
6 look on our computers. We can look it up.

7 MR. VESELY: You sure?

8 ADMINISTRATIVE LAW JUDGE LAMBERT: Yeah.

9 MR. VESELY: Okay.

10 ADMINISTRATIVE LAW JUDGE LAMBERT: Thanks. Thank  
11 you, though.

12  
13 PRESENTATION

14 BY MR. VESELY, Attorney for Appellant:

15 So as -- as noted in -- in my opening statement,  
16 and throughout the briefs in this proceeding, Monkey's  
17 classification for federal tax purposes is binding on the  
18 Franchise Tax Board for California and franchise tax  
19 purposes in this appeal. Let me go through some of the  
20 language in the various regulations and other documents  
21 that have been presented.

22 So I mentioned before, the legislature enacted  
23 23038(b)-2(B)(ii), which provides the classification of an  
24 eligible business entity as a partnership or association  
25 taxable as a corporation under California law shall be the

1 same as the classification of the entity for federal tax  
2 purposes. That's a statute -- is what we got.

3 Under FTB's Regulations, 23038(b)-3(C), the  
4 heading, as I mentioned before and federal tax  
5 classification binding for California income, franchise  
6 tax purposes. That Regulation Section goes on to say the  
7 classification of an eligible business entity for  
8 California income and franchise tax purposes shall be the  
9 same as the classification of the eligible business entity  
10 for federal tax purposes under Treasury Regulation Section  
11 301.7701-3, unquote.

12 That section goes on to provide, quote, the  
13 election of an eligible business entity to be classified  
14 as an association or a partnership for federal tax  
15 purposes shall be binding for California income and  
16 franchise tax purposes, unquote.

17 Now, the FTB's rulemaking file underlying these  
18 regulations is replete with various statements and reasons  
19 for making the California regulations consistent with the  
20 federal check-the-box regulations. Some of the -- some of  
21 the statements throughout the rulemaking file is to avoid  
22 confusion and uncertainty, to prevent potential  
23 inconsistent treatment under federal and state tax laws,  
24 to ensure taxpayers and their representatives and the  
25 state of California --

1 I'm sorry about that.

2 -- have consistent guidance regarding the  
3 classification of business entities for tax purposes.

4 The Franchise Tax Board's Multistate Audit  
5 Technique Manual Section 3087 provides, quote, under the  
6 check-the-box regime, an eligible business entity can  
7 elect how it will be classified for federal tax purposes.  
8 The California classification will follow the federal  
9 classification, unquote.

10 Now, here, Monkey had a default classification as  
11 an association. That's under the Treasury Regulations, as  
12 well as under California Regs. prior to April 1, 2008. It  
13 filed Form 8832 and elected to be classified as a  
14 partnership, effective April 1, 2008. That's Appellant's  
15 Exhibit 12 in the record.

16 This is an election and effective date which was  
17 approved by the IRS on February 8, 2010. And that  
18 document is Exhibit 4 -- Appellant's Exhibit 4.

19 The IRS's approval of Monkey's election is,  
20 simply, binding on the FTB. And actually, notably, the  
21 FTB even conceded the same in its July 3, 2020, submission  
22 in this appeal. In that document the FTB wrote in  
23 response to the OTA's request for additional briefing,  
24 quote, regarding whether, and to what extent, the Internal  
25 Revenue Service's approval of the Entity Classification



1 Election, Form 8832, for Monkey was valid and is binding  
2 upon the FTB in this proceeding -- that's the question  
3 they were answering.

4 The FTB stated, quote, the evidence presented  
5 indicates that the IRS approved Monkey's election as a  
6 foreign eligible entity to be classified as a partnership.

7 And they continued -- and after quoting  
8 Regulation 23038(b)-3(c) stated, quote, thus the federal  
9 classification is binding for California income and  
10 franchise tax purposes. These are the FTB's own words.

11 In all, Monkey's federal tax classification as a  
12 partnership, effective April 1, 2008, is binding on the  
13 FTB and this proceeding.

14 So, thus, even if without conceding Mr. Housman  
15 somehow was a California resident on the date the Monkey  
16 stock was sold in 2009, Mr. Housman is entitled to a  
17 stepped-up basis in his Monkey stock equal to its fair  
18 market value as of April 1, 2008, the date Monkey's  
19 check-the-box election was effective for federal and  
20 California tax purposes.

21 In his California return for 2009, Mr. Housman  
22 reported the gain from the sale of the Monkey stock based  
23 upon this stepped-up basis. On audit, the FTB ignored  
24 Monkey's check-the-box election, which the IRS approved,  
25 and disallowed the associated basis step-up in Mr.

1 Housman's Monkey stock as required by federal and  
2 California tax law.

3 Now, let's go ahead and see how that all worked,  
4 exactly. We said it in the briefs before, but I think  
5 it's important to repeat today.

6 The transactions which are deemed to occur under  
7 the regulations, federal and state, pursuant to the  
8 check-the-box election are mandated by the IRS Treasury  
9 Regs. and the FTB's own regulations.

10 Pursuant to Treasury Regulation Section  
11 301.7701-3(g) -- as in girl -- (1)(ii), the change in  
12 Money's entity classification to a partnership, pursuant  
13 to its check-the-box election, is deemed to be a  
14 liquidation of Monkey and a distribution of its assets to  
15 its shareholders, including Mr. Housman, who immediately  
16 contribute such assets to Monkey as a newly formed  
17 partnership.

18 That's all spelled out in the regulations,  
19 federal and state.

20 These deemed transactions are deemed to occur  
21 immediately before the close of the day before the  
22 election is effective. Treasury Reg. Section  
23 301.7701-3(g)(3)(i) is very explicit in that regard. FTB  
24 conforms to that Regulation in 23038(b)-3(g)(3) -- sorry  
25 about all the parens -- and (A).

1           Now, because of that and because of the April 1,  
2   2008 effective date, Monkey was deemed to have completely  
3   liquidated on March 31 -- the day before -- 2008;  
4   distribute its assets to its shareholders; and immediately  
5   following the deemed liquidation, Monkey shareholders,  
6   including Mr. Housman, were deemed to have contributed  
7   Monkey's assets received in the deemed liquidation, which  
8   were principally the stock in BCS -- the company you've  
9   just heard Mr. Housman talk about -- to a newly formed  
10   partnership.

11           As I indicated, the California Regulation that  
12   conforms to the entire, I'll call, "deemed transactions"  
13   here is 23038(b)-3(g) --

14           (Reporter interrupted)

15           MR. VESELY: Okay. Let me -- I'll read it again.

16           (Reporter interrupted)

17           MR. VESELY: No problem.

18           So California Regulation 23038(b)-3(g)(1)(B).

19           Sorry about these. I didn't put these together.

20           (Reporter interrupted)

21           MR. VESELY: So -- now, so how does this all play  
22   out? Well, the way this works, and we've spelled it out  
23   in the briefs before, you look to Internal Revenue Code  
24   Section 331, to which California conforms, and it says  
25   that amounts received by a shareholder in distribution and

1 complete liquidation of a corporation shall be treated as  
2 in full payment and exchange for the stock.

3 Now, Mr. Housman owned 70 percent of Monkey at  
4 this time. And Monkey itself owned approximately  
5 70 percent of BCS. There was a separate entity that was  
6 owned by Mr. Broadway, Mr. Housman's cofounder that owned  
7 the balance, essentially, of BCS.

8 IRC Section 334(a) provides, if property received  
9 in a distribution and complete liquidation, and if gained  
10 or loss is recognized on receipt of such property, then  
11 the basis of the property in the hands of the distributee,  
12 Mr. Housman, shall be the fair market value of such  
13 property at the time of the distribution.

14 Here, gain was recognized because the  
15 nonrecognition provisions of IRC Section 332(a) do not  
16 apply. That provision indicates gain or loss is not  
17 recognized when the liquidating corporation is 80 percent,  
18 or more, owned by another corporation. That's not our  
19 situation here. And California's conformity to these  
20 various provisions are in Revenue Tax Code Section 17321  
21 and 24451.

22 So once you play through all of this, all of the  
23 shareholders, including Mr. Housman, the basis and the  
24 assets of Monkey that were deemed to be received in the  
25 deemed liquidation of Monkey was equal to the fair market

1 value of such assets. Now, the FTB has not disagreed with  
2 the mechanics of how this all works under the  
3 check-the-box election.

4 Now, question arises -- is Mr. Housman entitled  
5 to a stepped-up basis at April 1, 2008, when he's a  
6 nonresident of California? He hadn't even come to  
7 California yet. And the answer is yes. But with  
8 transactions like this, basis step-up is effective for  
9 California personal income tax purposes, with respect to  
10 transactions which occur while a taxpayer may be a  
11 nonresident, like Mr. Housman, or maybe even not subject  
12 to U.S. federal income tax purposes -- taxation.

13 Exhibit 5, too, that we've provided, is FTB's  
14 Publication 1100. And in that document, the FTB notes  
15 that basis-generating transactions which occurred prior to  
16 an individual moving to California are respected. Page  
17 5 -- page 29 of that Exhibit is very clear with the  
18 examples they've got.

19 Indeed, the auditor in this case recognized that  
20 Mr. Housman did have a basis in his Monkey stock  
21 attributing -- attributable to events that occurred in  
22 2000. Now, he didn't come until 2008. So in the  
23 calculation of the amount of the proposed tax, the auditor  
24 did give effect to transactions that occurred outside of  
25 California and occurred before he became a resident --

1 properly did so, I may add.

2 For federal income tax purposes, a basis step-up  
3 by a foreign entity is appropriate, even where such entity  
4 is not subject to U.S. taxing jurisdiction.

5 We provided Exhibit 6 to our opening brief that,  
6 basically, was a Chief Counsel Memorandum that was  
7 provided by the IRS that spells out in a 338 election, how  
8 that would work out.

9 So, now, the next question is, "Well, what was  
10 the fair market value of Monkey stock on April 1, 2008?"  
11 And what -- what Mr. Housman did was he, through advice of  
12 his accountant at the time, got two -- two appraisals from  
13 Lorenzo Heart, was one; and the second one was from Burr,  
14 Pilger & Mayer. Both of those are attached as exhibits to  
15 our opening brief.

16 The Burr, Pilger & Mayer --and I'm going to say  
17 "BPM" just for short -- which is Exhibit 7, was used. And  
18 it was a -- actually, a conservative approach because it  
19 was a lower appraisal of the value of the Monkey stock as  
20 of April 1, 2008. Now, I say conservative because it  
21 was -- resulted in larger gain. That appraisal was what  
22 was used in filing the tax returns for federal purposes  
23 and for California purposes, here, on sale.

24 Now, in looking at Burr, Pilger -- BPM's  
25 appraisal, it was comprehensive. It was based on rigorous

1 evaluation methods under applicable federal tax standards,  
2 including Revenue Ruling 5960, which is Appellant's  
3 Exhibit 14; and they used the various approaches,  
4 including income, asset, and market approaches.

5         They addressed various historical revenues that  
6 Mr. Housman alluded to earlier -- that in 2007 the company  
7 was really start to grow, BCS. This is an appraisal of  
8 really looking at, really, the value of the stock, which  
9 was principally holding the BCS assets. So that's what  
10 the focus was on the appraisal.

11         And so the appraisal actually looked at,  
12 interestingly, the growth of the sales of BCS -- in 2006  
13 fiscal and 2007, were 163 percent and 101 percent,  
14 respectively. It took into consideration implementation  
15 risks, pages 25 to 30 of the appraisal.

16         Now, the appraisal was done after the fact, which  
17 is what happens on appraisals of virtually everything that  
18 we do in tax. I mean, if you do any kind of property tax,  
19 ever, you know they're always done after the fact.  
20 Federal tax purposes, very clearly, when you're doing  
21 transfer pricing cases, appraisals are done well after the  
22 fact.

23         We cited some case law that says that's not an  
24 issue, of course. And the fact of the matter is the FTB,  
25 now, also does not really take that on, as I understand it

1 from their last briefs on this whole thing, about it not  
2 being done, not necessarily, contemporaneously.

3           Importantly, there is no evidence to counter the  
4 BPM appraisal in the record presented by the FTB. So  
5 Mr. Housman has sustained his burden of proof showing his  
6 fair market value of the Monkey stock at the time of the  
7 actual of the sale -- at the time it became effective  
8 4/1/08 -- April 1, 2008.

9           Now, one issue that the FTB has argued about in  
10 this appeal that needs to get cleared up, here, and this  
11 is about relevancy. Now it's -- it's a concept that's --  
12 that's a -- unique to this whole check-the-box regime, if  
13 you will. The FTB has argued that Monkey did not have an  
14 entity classification prior to April 1, 2008. The FTB's  
15 completely wrong in that regard.

16           Pursuant to Treasury Regulation 301.7701-3(b)(2)  
17 and Internal Revenue Manual Entity Classification  
18 Section 4.61.5.3.1(9), Monkey had a default classification  
19 as an association prior to April 1, 2008. The Manual  
20 provides an entity that was formed after December 31, 1996  
21 and before October 21, 2003, has a classification, even if  
22 it was not relevant. Monkey was formed in the year 2000,  
23 so right within that time frame.

24           Exhibit 11, that we've provided, is a copy of the  
25 Internal Revenue Manual provisions. Now, a concept that's



1 in the federal regulations and in the California  
2 regulations, which we have addressed in the briefs, but  
3 what has not been addressed by the FTB is something called  
4 "deemed relevance".

5 Treasury Regulation Section  
6 301.7701-3(d)(1)(ii)(A) provides the following: Deemed  
7 relevance, general rule, for purposes of this Section,  
8 except as provided in paragraph (d)(1)(ii)(B) of this  
9 Section, the classification for federal tax purposes of a  
10 foreign eligible entity -- like Monkey -- that files Form  
11 8832, the Entity Classification Election -- like Monkey --  
12 shall be deemed to be relevant only on the date the Entity  
13 Classification Election is effective.

14 As we've indicated, Monkey filed this Entity  
15 Classification Election with an effective date of April 1,  
16 2008, which the IRS approved as I noted; thus, under the  
17 Treasury Regulations -- and I'll give you the California  
18 cite, as well, for you -- Monkey was deemed relevant on  
19 April 1, 2008 for federal and California tax purposes,  
20 contrary to what the FTB has argued here. California  
21 Regulation, which conforms to the Treasury Regs., is  
22 23038(b)-3(d)(1)(B)(1) conforms to the Treasury  
23 Regulation. And I won't give you that cite again like  
24 that.

25 Now, a recent development has occurred, which I

1 do have a copy of this if your Honors would like to see  
2 it. But I will give you what it is. And it's another  
3 Chief Counsel Memorandum that was issued by the IRS just  
4 about a year ago. And it is AM -- cap A, cap M, as in  
5 miles -- 2021-002. And I have a copy, if you'd like it.

6 Would you folks?

7 ADMINISTRATIVE LAW JUDGE LAMBERT: Could you  
8 repeat the -- the --

9 MR. VESELY: I could give you the cite again, and  
10 I'm happy to provide a copy if you'd like.

11 ADMINISTRATIVE LAW JUDGE LAMBERT: Okay. Thanks.

12 MR. VESELY: It's A, as in able; M, as in  
13 Michael -- those are caps -- 2021-002.

14 And this -- this actually is -- is a very  
15 interesting document because it basically confirms  
16 everything I have just said. And I will read you some  
17 excerpts from it.

18 Again, I'm -- if you'd like it, I've got them for  
19 you.

20 ADMINISTRATIVE LAW JUDGE LAMBERT: We'll just  
21 look on our computers.

22 MR. VESELY: Okay.

23 ADMINISTRATIVE LAW JUDGE LAMBERT: Thanks.

24 MR. VESELY: That's fine.

25 This was issued in March 25, 2021 -- 2021.

1           Tell you what, let me do this. FTB, would you  
2 like it?

3           The issue that's addressed here is does a foreign  
4 eligible entity, the classification of which has never  
5 been relevant as defined in Treasury Reg. Section  
6 301.7701-3(d)(1) have a federal tax classification,  
7 pursuant to Treasury Reg. Section 301.7701-3, during the  
8 period in which its classification is not relevant.

9           And the answer is yes. A foreign eligible entity  
10 is classified, pursuant to Treasury Regulation Section  
11 301.00 -- .7701-3(b)(2), otherwise known as the default  
12 classification provision, during the period in which its  
13 classification is not relevant. This determination is  
14 made when the classification of the entity first becomes  
15 relevant, in our case April 1, 2008; but the  
16 classification applies during the nonrelevant period,  
17 which is the period before April 1, 2008.

18           In the Chief Counsel Memorandum the -- it is  
19 stated in the absence of an election -- this is at page  
20 three -- a foreign eligible entity is classified for  
21 federal tax purposes, pursuant to the default  
22 classification provision, (ii), as an association, if all  
23 of the entities members have limited liability. Monkey  
24 was a -- an association. Its default classification was  
25 as an association prior to April 1, 2008.

1           The Memorandum goes on to actually describe  
2 Treasury Reg. 301.7701-3(g), which provides the tax  
3 treatment resulting from an election to change the  
4 classification. This is a provision that we've  
5 referred -- I've referred to already.

6           Treasury Reg. Section 301.7701-3(d)(2) provides  
7 that the classification of a foreign eligible entity, the  
8 classification of which has never been relevant, will  
9 initially be determined pursuant to the default  
10 classification provision when the classification of the  
11 entity first becomes relevant. This initial determination  
12 requires a classification of the entity not only when it  
13 becomes relevant, but also the pre-relevancy  
14 classification of the entity and any changes in  
15 classification.

16           At page 4, the Chief Counsel Memorandum also  
17 refers to the deemed relevance provisions. It says,  
18 additionally, classification may be deemed to be relevant  
19 on the date its entity classification election is  
20 effective. And it cites to the Treasury Reg. Section that  
21 I've mentioned.

22           And finally, it says an entity has a  
23 classification for federal tax purposes at all times,  
24 including during periods when it's classification is not  
25 relevant and regardless of whether the classification has

1 ever been relevant.

2 What this Chief Counsel Memorandum does is it  
3 just confirms what we've already been arguing all the way  
4 through this case, here. Fact of the matter is, as of  
5 April 1, 2008 -- that is the key date here -- that's --  
6 that's the effective date of the check-the-box election.

7 So the FTB's reference to Monkey being  
8 quote/unquote irrelevant is completely baseless. There is  
9 no concept of irrelevance in the federal check-the-box  
10 regulations or in the California regulations.

11 In any event, as the Chief Counsel Memorandum  
12 indicates, any foreign eligible entity, like Monkey, may  
13 elect to change it's default classification, as was done  
14 in the instant case.

15 So in sum, even if, without conceding Mr. Housman  
16 somehow was a California resident on the date the Monkey  
17 stock was sold in 2009, Mr. Housman is entitled to a  
18 stepped-up basis in his Monkey stock equal to its fair  
19 market value as of April 1, '08, the date that Monkey's  
20 check-the-box election was effective for federal and  
21 California tax purposes.

22 That fair market value was proven by use of the  
23 BPM appraisal, the only evidence before this board.

24 So Appellants protest with respect to the  
25 check-the-box election and the stepped-up basis -- and

1 must be sustained here. And the FTB's notice of action  
2 that refused to follow it must be reversed.

3 And that's all I have right now. I'm welcome to  
4 questions if you'd like. If not, I would reserve the  
5 balance of the time for our --

6 ADMINISTRATIVE LAW JUDGE LAMBERT: Sure. Well,  
7 you have about 12 minutes left. So we'll reserve that.

8 MR. VESELY: Okay.

9 ADMINISTRATIVE LAW JUDGE LAMBERT: And we'll ask  
10 questions after FTB gives--

11 MR. VESELY: Okay.

12 ADMINISTRATIVE LAW JUDGE LAMBERT: -- has the  
13 opportunity to ask questions of Mr. Housman.

14 So, Mr. Housman, could you please sit down, and  
15 we'll have FTB ask you questions, if that's okay.

16 MR. HOUSMAN: Sure.

17 ADMINISTRATIVE LAW JUDGE LAMBERT: Thank you.

18 MR. VESELY: Oh, okay. No, you stay.

19 Sorry. I didn't hear you very clearly.

20 ADMINISTRATIVE LAW JUDGE LAMBERT: Mr. Hofsdal,  
21 you can proceed with your questions. We give you  
22 50 minutes.

23 Thanks.

24 MR. KRAGEL: Thank you, Judge.

25 ///

1 CROSS-EXAMINATION

2 BY MR. KRAGEL:

3 Q Mr. Housman, my name is Bradley Kragel. I  
4 represent the Franchise Tax Board. Do you understand  
5 that?

6 A Yes, I do.

7 Q Thank you.

8 In 2008, you formed a company called Business  
9 Catalyst Systems LLC, which was a Delaware Limited  
10 Liability Company; true?

11 A Yes, I did.

12 Q And that was a separate company from BCS;  
13 correct?

14 A It was, yes.

15 Q And you were the sole owner of BCS LLC; correct?

16 A Correct.

17 Q That company was located in San Francisco,  
18 California; correct?

19 A Correct.

20 Q And -- and your company, BCS LLC, entered into a  
21 management agreement with an Australian Company called  
22 BCS, where your company agreed to set up and operate an  
23 office in San Francisco; correct?

24 A I think -- Yes, correct.

25 Q Okay.

1           MR. KRAGEL: And does MR. HOUSMAN have access to  
2 the exhibits?

3           MR. HOUSMAN: I don't know.

4           MR. KRAGEL: Okay. Well, I can probably --

5           MS. HUANG: Well, we do have -- yes. We have  
6 them. I can provide --

7           MR. KRAGEL: There's just a couple I wanted to  
8 have him have an opportunity to look at.

9           MS. HUANG: No, no, no. I -- yeah.

10          MR. HOUSMAN: I have the management agreement.  
11 Is that what you wanted to go through?

12          MR. KRAGEL: Yes.

13          MS. HUANG: Which -- can you tell me --

14 Hold on.

15 It's probably easier to go with exhibit is  
16 your --

17          MR. KRAGEL: Exhibit -- Respondent's A, please.

18          MS. HUANG: Okay.

19          MR. VESELY: Just in case.

20          MS. HUANG: Yeah so if you prefer --

21          ADMINISTRATIVE LAW JUDGE LAMBERT: Also, just  
22 to -- just to note, we have to be really close to these  
23 microphones to -- for the YouTube audience to hear. And,  
24 also, speak into the microphone instead of to each other.  
25 Otherwise, it's hard to hear what you're saying.



1 Thank you.

2 MS. HUANG: Mr. Kragel, you said Exhibit A?

3 MR. KRAGEL: Yes, please.

4 MR. HOUSMAN: I have it here.

5 BY MR. KRAGEL:

6 Q Okay. You're looking at Exhibit A. Could you  
7 take a look at page 16, please? And, Mr. Housman, page 16  
8 contains a list of the services that BCS LLC was to  
9 provide for BCS in California; correct?

10 A Correct. Yeah.

11 Q And I'm going to paraphrase a bit here. That  
12 included setting up and operating a satellite office in  
13 San Francisco, hiring employees according to company's  
14 approved business plan, selling and collecting payments  
15 for the Business Catalyst platform, maintaining accurate  
16 accounting records, and submission of tax filings, all  
17 those things; correct?

18 A Yes, correct.

19 Q Okay. And -- and --

20 ADMINISTRATIVE LAW JUDGE LAMBERT: Mr. Kragel,  
21 could you please move your microphone closer?

22 BY MR. KRAGEL:

23 Q And you performed all those tasks for BCS LLC  
24 during 2008 and 2009; correct?

25 A Yeah. Well, I mean, we were here to try those

1 things out.

2 Q Correct. And do you recall how many employees  
3 you hired for BCS LLC in 2008?

4 A In 2008, it wouldn't have been a lot. Maybe a  
5 couple? But, yeah, maybe a handful by the end.

6 Q And how -- how many times -- how many employees  
7 did you have for BCS LLC by the -- by the time that BCS  
8 sold its shares to Adobe?

9 A Oh, sub ten.

10 Q Less than ten?

11 A Less than ten.

12 Q More than five?

13 A Yeah. Including my wife and I, probably more  
14 than five. Yeah.

15 Q Okay. Thank you. And the management agreement  
16 itself stated you would perform the services called for in  
17 the agreement; correct?

18 A Well, they were the services this company was  
19 going to provide, yes.

20 Q Okay. And among the other services you performed  
21 was making sure tax filings were timely made and accurate;  
22 correct?

23 A Sure. Yeah.

24 Q Okay. And the management agreement stated that  
25 you were, as the agreement says, the consultant's

1 representative in California; correct?

2 A Correct.

3 Q And could you look at page four?

4 A Mm-hmm. Got it.

5 Q And -- and there it states words to the effect,  
6 the consultant's representative will be Bardia Housman,  
7 who will perform the services under the agreement. In the  
8 event the representative is an employee of the company,  
9 then, for as long as this agreement is in effect, the  
10 representative shall rescind all active duties at the  
11 company; correct? That's what it says?

12 A Correct. Yes.

13 Q And the company referred to there is BCS back in  
14 Australia; correct?

15 A Right.

16 Q Okay.

17 A You want me to clarify that point?

18 Q You can clarify it if you want to.

19 A Okay. So that point was put in there just so  
20 there was a delineation between who would pay my wages.  
21 Clearly, I was the CEO, cofounder, and chief engineer of  
22 the company. So I remained to be that CEO. But from a  
23 clean-cut operational point of view, this company was  
24 going to pay me. And that was a requirement for my E3  
25 visa. So that's why we put that point in there.

1 Q Okay. Thank you.

2 MS. HUANG: If I could, Mr. Housman, maybe you  
3 should -- because you said, "this company/that company",  
4 when you said, "This company was going to pay you," did  
5 you mean --

6 MR. HOUSMAN: Yeah. So -- Business Catalyst LLC  
7 sponsored me to come to the U.S. and that -- under that  
8 visa, I needed to be paid. So what that is saying -- that  
9 point is saying that BCS LLC and not the Australia BCS  
10 company. And that's all that's saying. My duties as CEO  
11 did not change across the two companies.

12 BY MR. KRAGEL:

13 Q Okay. And as part of your duties for BCS LLC,  
14 you filed its tax return for 2008; correct?

15 A I did, yes.

16 Q And you filed a California Limited Liability  
17 Company Return; correct?

18 A I did, yes.

19 Q And according to that return, BCS LLC began doing  
20 business in California on March 1, 2008; is that correct?

21 A Correct.

22 Q And -- and, let's see, BCS LLC opened a bank  
23 account at Wells Fargo Bank in San Francisco in April  
24 2008; is that correct?

25 A Correct. Yes.

1 Q And BCS leased office space in 2008; correct?

2 A I mean, we rented co-working space. So I got two  
3 desks and one desk, initially, and then we just expanded  
4 as we needed to.

5 Q When you initially got a desk, was that on a  
6 leased basis?

7 A It was on a month-to-month.

8 Q Okay. Month-to-month lease.

9 A Yeah.

10 Q And did that ever change through 2009?

11 A It did not, no.

12 Q Okay. And in 2008, you resigned your employment  
13 in Australia; is that correct?

14 A Yes, I did, just because of my visa requirements.  
15 I needed to be employed by the new company. So we just  
16 felt that was the best way of doing it.

17 Q And your wife also resigned from her employment  
18 in 2008; correct?

19 A She was not employed by the company at that time.  
20 So when she came across, we decided that it would make  
21 sense for her to help me.

22 Q She had separate employment in Australia in 2008,  
23 did she not?

24 A I -- I don't recall that. Certainly, she -- she  
25 was helping me when she came across here.

1 MS. HUANG: Mr. Kragel, if I could ask if you  
2 could clarify, Ms. Pena was not employed by BCS; right? I  
3 think that's what you were asking? In Australia?

4 MR. KRAGEL: No. I was asking a general question  
5 about general employment. Was she employed --

6 MR. HOUSMAN: No, she was not.

7 BY MR. KRAGEL:

8 Q Do you recall responding to Respondent's  
9 information and document requests in about December of  
10 2013 or January of 2014 -- some questions that the FTB  
11 sent to you?

12 A You know, there's just been a lot of  
13 communications. Yeah.

14 Q According to one of your responses --

15 MS. HUANG: Mr. Kragel, if I could I ask, are you  
16 looking at an Exhibit?

17 MR. KRAGEL: Yes.

18 MS. HUANG: Which Exhibit, please?

19 MR. KRAGEL: Could you take a look at Exhibit B,  
20 page 8, please?

21 MR. HOUSMAN: Mm-hmm. Got it. Yep.

22 BY MR. KRAGEL:

23 Q And if you look at the response to 2-E, the  
24 question there in the exhibit is, "Describe taxpayers  
25 employment in Australia and U.S. during 2008."

1           And, as part of this responsive paragraph, it  
2       says, "Beatriz Pena Alda was employed by TSA Management  
3       until March 31, 2008."

4           A     Yep.

5           Q     Do you see where it says that?

6           A     Sure.

7           Q     Was that an accurate answer at the time?

8           A     Yeah. I mean, that's exactly what I'm saying  
9       here.

10          Q     Okay. And did she resign her employment with TSA  
11       Management in 2008?

12          A     Yes. Yes, she did. That was a company in  
13       Australia that she was working for as an architect.

14          Q     Okay.

15          A     Yeah. So then, when she moved across here, we  
16       both worked for Business Catalyst LLC.

17          Q     Okay. Thank you.

18          A     The American company.

19          Q     And you said earlier, you entered the United  
20       States under an E3 visa; correct?

21          A     Correct. That's right.

22          Q     Did your wife enter under an E3 visa as well?

23          A     So the E3 comes with a -- what's called an "E3  
24       Dependent" and -- which grants her working rights. So she  
25       came as a dependent on my visa.

1 Q Okay. Thank you.

2 And in order to qualify for an E3 visa, you have  
3 to have employment already arranged in the United States;  
4 is that correct?

5 A That's correct.

6 Q And can you tell me what employer sponsored your  
7 E3 visa application?

8 A My company, Business Catalyst Systems LLC,  
9 sponsored me as the CEO, and that is why I changed my  
10 employment to the new entity.

11 Q And did your employer file a labor conditions  
12 application?

13 A Yes -- yes, it did.

14 Q And who filled out that application?

15 A I don't remember, now -- might have been me,  
16 might have been somebody else. Yeah.

17 Q Okay. Well, did you have any employees, other  
18 than yourself, in April 2008?

19 A No.

20 Q And, as part of the E3 application, you had to  
21 present proof that you had a job waiting for you in the  
22 United States; true?

23 A I did, yes.

24 Q And you also had to agree that you would -- you  
25 would return to Australia when your employment ended;



1 true?

2 A It's -- it's a non-immigration visa. So it was  
3 always on a temporary basis.

4 Q And you actually were in California for about six  
5 and a half years following your initial visa; correct?

6 A I was. Correct.

7 Q And were you in compliance with your E3 visa  
8 throughout the six and a half years you were in  
9 California?

10 A Correct. E3 can be perpetually renewed for  
11 two-year terms.

12 Q Do you recall -- do you recall filling out the  
13 application yourself?

14 A The original application?

15 Q Yes, sir.

16 A Yes. It would have been me.

17 Q Okay. And do you recall, the application would  
18 have included a line for intended employment; correct?

19 A We're going back 14 years, but if you can  
20 clarify, I can try and remember.

21 Q Do you know who your intended -- on the  
22 application, do you know who you would have stated was  
23 your intended employer?

24 A Yes. It would have been Business Catalyst  
25 Systems LLC. That company sponsored me to come to the

1 U.S. to be its CEO.

2 Q And do you recall whether the application  
3 included a section where you stated the starting date and  
4 ending date of your employment?

5 A I don't recall that. I'm not sure if that's part  
6 of the application. The visa is for two-year terms.

7 Q Okay. Do you recall how long of a term you  
8 initially put on the application for the visa?

9 A Does the application have that field? I don't  
10 recall that field. But if it --

11 MS. HUANG: Mr. Kragel, I think Mr. Housman is  
12 saying he doesn't remember, but if you have something that  
13 he can look at --

14 MR. HOUSMAN: I don't know that that's part of  
15 the application is what I'm trying to say. Maybe it is?  
16 I mean, I applied for that quite a few years ago. But I  
17 don't know that it is.

18 MR. KRAGEL: Well, give me a moment. I'll think  
19 about that as we finish this up.

20 BY MR. KRAGEL:

21 Q And did at -- well, at any time, while you  
22 were -- when -- when Adobe purchased BCS and Monkey, what  
23 became of BCS LLC?

24 A It was shut down.

25 Q Okay. Prior to the -- prior to Adobe's purchase

1 of Monkey and BCS, do you recall having had to renew the  
2 E3 visa application?

3 A I -- that didn't need to be renewed until 2010.

4 Q Okay. So the first time you renewed the  
5 application was 2010?

6 A Well, I don't remember exactly the date, but it  
7 was for two years. It would have had to be renewed before  
8 that two-year term was up. I don't remember. Unless --

9 MS. HUANG: Yeah. Unless --

10 MR. HOUSMAN: I mean, I could have brought my  
11 documents, but it would have been in that vicinity.

12 BY MR. KRAGEL:

13 Q Okay. Thank you.

14 Over the course of your being in California for  
15 six years, did -- do you recall how many times you renewed  
16 the visa?

17 A Oh, a number of times.

18 Q Do you know if it was two, three, or four?

19 A A number of times it was renewed. Yeah.

20 Q Okay. Okay. Thanks.

21 How soon after arriving in California did you  
22 begin employment at BCS LLC?

23 A Immediately.

24 Q And you remained working at BCS LLC in California  
25 through the remainder of 2008; correct?

1           A     Correct.

2           Q     And you continued working for them until BCS and  
3 Monkey purchased by Adobe; correct?

4           A     Correct.

5           Q     Your wife also was also employed at BCS LLC?

6           A     Correct.

7           Q     She worked for the company in San Francisco;  
8 correct?

9           A     Correct.

10          Q     And did she work for the company, continuously,  
11 until it was purchased by Adobe?

12          A     Correct.

13          Q     And following Adobe's purchase of BCS, did you  
14 begin work for Adobe?

15          A     No.

16          Q     At some point did you begin work for Adobe after  
17 it was purchased by BCS?

18          A     Yes, I did. There was an employment contract  
19 that was offered to me.

20          Q     Okay. And when did you begin working for Adobe?

21          A     Soon after the acquisition.

22          Q     Okay. Do you recall when the acquisition --  
23 acquisition was?

24          A     The acquisition was August/September of 2009.

25          Q     Okay. And would you have begun to work for Adobe

1 in September of 2009?

2 A Yes.

3 Q Okay. And how long did you work for Adobe  
4 thereafter?

5 A I left Adobe in 2011, May.

6 Q And did your wife go to work for Adobe after it  
7 purchased BCS?

8 A She did for a period of time, and then she left.  
9 She left to have a child.

10 Q Okay. Do you recall when she ceased working for  
11 Adobe?

12 A She might have left middle of 2010?

13 Q Okay. I believe earlier you said you -- you  
14 yourself, moved to California on April 19, 2008; correct?

15 A Correct. Yes.

16 Q And your wife moved to San Francisco, California  
17 on April 30, 2008?

18 A That's correct.

19 Q You and your wife both continued to live in San  
20 Francisco from April 2008 through November 2014?

21 A Correct.

22 Q As I understand it, in May 2010, you and your  
23 wife purchased a single-family residence located at 587  
24 Jersey Street in San Francisco; correct?

25 A Correct.

1 Q And sold the home in May 2014; correct?

2 A No. We sold it in May of 2014.

3 Q Okay. And were you absent from California for  
4 any period more than a month during 2009?

5 A 2009 for more than a month? Potentially. Yes.  
6 I -- we -- I traveled quite -- to South America, I  
7 traveled to Romania, I traveled to London.

8 Q Okay. Was it -- so it would be an accumulated  
9 days of 30 days?

10 A I would say roughly 30 days, yeah.

11 Q Okay. Were you absent for a 30-day period at any  
12 time at any point in time in 2009, a continuous period?

13 A No.

14 Q Okay. And was your wife absent from California  
15 for a continuous-month period during 2009?

16 A Not continuous, but she probably would have done  
17 a month as well.

18 Q And during the period you were living in  
19 California from 2008 to 2014, were you ever absent for  
20 a -- any place for a continuous-month period?

21 A Sure. Yeah. We did very long stints in  
22 Australia every year -- six weeks, eight weeks.

23 Q Okay. How many weeks were in you in Australia in  
24 2009 after you moved to California?

25 A In 2009, none. But in 2010, at least six weeks

1 every year -- at least. And other countries.

2 Q Okay. And where did you stay when you were in  
3 Australia?

4 A I generally stayed with my parents.

5 Q And according to your declarations, you had a  
6 house in Australia?

7 A I do, yes.

8 Q And that was located on -- was it the Curb --  
9 Curb --

10 A Kurraba Road.

11 Q Kurraba Road?

12 A Yes.

13 Q When did you purchase that house?

14 A 2004.

15 Q And do you recall -- and then, when you moved to  
16 San Francisco to run BCS LLC, you leased that property?

17 A I did, yes. We leased it for a year.

18 Q And then what did you do with it after -- do you  
19 know when the lease started?

20 A It started let's say 1 May 2008, when my wife  
21 moved out.

22 I believe I provided all of those -- the lease  
23 stuff to you guys.

24 Q Yeah. I don't think it's part of the record, but  
25 my recollection is that you had a -- a contract with an

1 agency that was going to operate --

2 A Yeah.

3 Q -- the lease?

4 A Yeah. Thereabouts. I mean, I leased it for a  
5 year, and I've still got the same tenant in that place  
6 today.

7 Q And has that tenant been leasing that property,  
8 continuously, since May 2008?

9 A Yeah. It's on a month-to-month. It's been on a  
10 month-to-month for over a decade.

11 Q So it would be accurate to say that you and your  
12 wife never returned to that residence; correct?

13 A No, we didn't. We -- no, we didn't.

14 Q And, if I understand from one of your earlier  
15 declarations, your wife had lived and in worked in the  
16 U.S. for two years, July 2003 to July 2005; correct?

17 A Correct. In Kansas City. Prior to -- we met --  
18 prior to us meeting.

19 Q Did she -- did she have employment there?

20 A She did. She was an architect. She was doing  
21 work there.

22 Q Do you know where she lived before she lived in  
23 Missouri?

24 A She lived in Australia.

25 Q Okay. And do you know when she -- let's see,



1 when she left Missouri in approximately July 2005, do you  
2 know where she lived after that?

3 A She moved back to Australia.

4 Q Do you recall -- did your wife happen to have a  
5 Missouri driver's license?

6 A She did, yes.

7 Q And that was issued in 2004; correct?

8 A I'm -- I'm not sure when it was issued, but she  
9 had one.

10 Q Do you recall that it expired in December 2010?

11 A I don't recall. I do know that when we -- when  
12 she eventually decided to have a California license, it  
13 was a much easier transition for her, where I had to do  
14 the driving test and whatnot.

15 Q Got you. Do you recall when you met your wife?

16 A In 2005.

17 Q And if you recall earlier, you were married  
18 approximately two weeks before you were traveled to  
19 California?

20 A I did, yes.

21 Q So it would have been, approximately, early April  
22 2008?

23 A It was end of March, yeah.

24 Q Okay. And did your wife ever live at the Kurraba  
25 Road house?

1           A     Sure. Yeah. We lived together.

2           Q     How long did you live there together?

3           A     She moved back middle of 2005, so let's call it

4 three years -- just under.

5           Q     And I take it, when you moved to California, you

6 had no children; correct?

7           A     Correct.

8           Q     And your first child was born in 2010?

9           A     September 2010.

10          Q     And your child was born in California; correct?

11          A     Correct.

12          Q     And your other two children were also born, also,

13 in California?

14          A     Correct.

15          Q     Do your children hold U.S. passports?

16          A     No.

17          Q     And it -- in approximately August 2009, do you

18 recall you filed a California resident income tax return

19 for tax year 2008?

20          A     I think it's part of the records. I mean, yeah.

21          Q     Do you recall doing so? Do you want --

22          A     I mean, my accountant was doing all that. Yes,

23 we did that.

24          Q     Okay.

25          A     Yeah.

1           Q     And you also filed a joint U.S. individual income  
2 tax return for tax year 2008, which reported your address  
3 at 2140 Taylor Street in San Francisco; correct?

4           A     Correct.

5           Q     And in October 2009, after you sold your Monkey  
6 stock, you filed amended tax returns for tax year 2008;  
7 correct?

8           A     Correct.

9           Q     The original and amended tax returns for tax year  
10 2008 both reported your address at 2140 Taylor Street;  
11 correct?

12          A     Correct.

13          Q     And so, as of October 2009, you and your wife had  
14 been living at that address for approximately 18 months?

15          A     Correct. That was the executive apartment, fully  
16 furnished, we were living at. Yeah.

17          Q     Right. Do you know who paid the rent on that  
18 apartment?

19          A     I paid the rent. We paid together.

20          Q     The amended 2008 tax return was a California  
21 non-resident or part-year resident income tax return;  
22 correct?

23          A     Correct.

24          Q     And isn't it true that the amended return stated  
25 that the taxpayer and the taxpayer's wife entered the

1 United States and California on April 19, 2008, and  
2 April 30, 2008, respectively, at the start of their U.S.  
3 and California residency?

4 A Correct.

5 Q And the amended return also stated that the  
6 taxpayer and the taxpayer's wife should each be filing a  
7 part-year resident married filing separately return on a  
8 California Form 540NR; correct?

9 A Correct.

10 Q The amended California return reported that you  
11 became a California resident on April 19, 2008, and that  
12 you spent 240 days in California?

13 A Correct.

14 Q The U.S. -- the amended federal tax return for  
15 2008 stated, in part, that the taxpayer and taxpayer's  
16 wife entered the United States on April 19, 2008, and  
17 April 30, 2008, respectively, at the start of their U.S.  
18 residency; correct?

19 A Correct. Yeah.

20 Q And your amended 2008 tax returns included a  
21 federal Form 8832. That was the form used to reclassify  
22 Monkey; correct?

23 A Correct.

24 Q And that -- and then it included an attachment  
25 entitled "Declaration and Reasonable Cause Statement";

1 correct?

2 A Correct. Yes.

3 Q And that stated on April 19, 2008, Bardia arrived  
4 in the United States and commenced his U.S. residency,  
5 which created a U.S. filing requirement for Bardia and  
6 Monkey Pty.. Ltd. Prior to April 19, 2008, entity  
7 classification was not relevant for Monkey Pty.. Ltd. as  
8 defined under Regulation 301.7701-3(d) --

9 (Reporter interrupted)

10 MR. KRAGEL: Did you get me?

11 (Reporter interrupted)

12 MR. KRAGEL: 301.7701-3(d).

13 Did you follow that?

14 MR. HOUSMAN: Correct. Yeah. I've read all --

15 BY MR. KRAGEL:

16 Q That's what the return said; correct?

17 A Yes, it did. Yeah. I mean, I can clarify all of  
18 those when you're ready.

19 Q Let me finish.

20 A Okay.

21 Q And then starting in July 2010 you filed --  
22 well --

23 Strike that.

24 In July 2010, you filed a California resident  
25 income tax return for tax year 2009, which reported an

1 address at 587 Jersey Street in San Francisco; correct?

2 A Correct. Yes.

3 Q And you also filed a U.S. return for 2009, which  
4 reported the same address; correct?

5 A For 2009 -- well, I wouldn't have had that  
6 address in 2009.

7 Q Well, your returns were filed July 2010 for 2009?

8 A Right. Then, yes, I would have used the same  
9 address.

10 Q Sure. And then you also filed California  
11 residence income tax returns and U.S. individual returns  
12 for tax years 2010 through 2012 showing the Jersey Street  
13 address in San Francisco; correct?

14 A Correct. Yes.

15 Q And then in April 2009, you filed a California  
16 Limited Liability Company Return on behalf of BCS LLC;  
17 correct?

18 A Correct.

19 Q And in March 2010, you filed a California Limit  
20 Liability Company Return for tax year 2009 on behalf of  
21 BCS LLC; correct?

22 A Correct.

23 Q And on both of those returns you responded "no"  
24 to the question, "Does the LLC have any foreign  
25 (non-U.S.) --

1           A     Correct.

2           Q     -- non-resident members?

3           A     Correct.

4           Q     Correct?

5           A     Correct.

6           Q     And both included California Schedule K-1 issued  
7 to you; correct?

8           A     Mm-hmm. Correct.

9           Q     And on both K-1s, you replied "no" to the  
10 question, "Is this member a foreign member?" Correct?

11          A     Correct.

12          Q     And isn't it true that you had personal checking  
13 and savings accounts in banks in California in 2008 and  
14 2009?

15          A     That was offered to me when I went to set up my  
16 business merchant accounts, and it had a very small limit.  
17 And I just didn't want to have to pay international fees  
18 when I bought coffee and sandwiches. But it was not a --  
19 something I relied on.

20          Q     Okay. But you had a -- you had a personal  
21 checking account in California; correct?

22          A     Well, I did. But, yeah.

23          Q     In 2008 and 2009?

24          A     Correct. Yeah.

25          Q     And you had -- also have a savings account -- a

1 personal savings account?

2 A I -- I don't recall a savings account. I had a  
3 credit card, and I had a checking account. Yes.

4 Q Okay. And you also maintained California bank  
5 accounts for your business; correct?

6 A Correct. Yes.

7 Q Yes. And when Adobe purchased the business, the  
8 transfer of funds, the \$20 million, went through your  
9 business account -- it would -- did it go -- well, let  
10 me --

11 A It went through the checking account.

12 Q It went through your personal account in  
13 California; correct?

14 A Right. Correct.

15 Q Yeah. And you indicated earlier that you stopped  
16 working for Adobe in -- sometime in 2011?

17 A May of 2011, yes.

18 Q And were you an employed in California in 2011,  
19 other than --

20 A I was not.

21 Q -- adobe?

22 A No.

23 Q Were you employed in -- did you have real estate  
24 investments in California?

25 A I've made some investments. I -- the first time



1 I had some money, I bought some investments.

2 Q Do you recall a company called Housman Weir  
3 Investments LLC?

4 A Yeah. It was a holding company for one of the  
5 investments.

6 Q Okay. And that was a real estate investment  
7 company?

8 A Correct.

9 Q And you invested that in May of 2011?

10 A Correct.

11 Q Okay. And what about San Francisco Harrison LLC?

12 A Yeah. I mean, all of those entities are just  
13 holding companies for various -- where I just put some  
14 money into an investment.

15 Q All real estate investment companies?

16 A All real estate.

17 Q It was all California real estate?

18 A Yes.

19 MR. KRAGEL: Okay.

20 I think that's all I have. I appreciate your  
21 time.

22 MR. HOUSMAN: No problem. Thank you.

23 ADMINISTRATIVE LAW JUDGE LAMBERT: Thank you,  
24 Mr. Kragel and Mr. Housman.

25 Mr. Kragel, you used up your time. You have

1 about 18 minutes left. I could add it to your time later  
2 if you'd like.

3 MR. KRAGEL: You can add it to my time later. I  
4 don't -- I don't necessarily know that I'll use it, but I  
5 would appreciate having the opportunity.

6 ADMINISTRATIVE LAW JUDGE LAMBERT: Okay. You  
7 don't have to use the time.

8 At this -- at this point I'll just -- before we  
9 take a break, I'll just turn to the panel and see if they  
10 have any questions for Appellant or his representatives.

11 MR. VESELY: Do you want Mr. Housman --

12 ADMINISTRATIVE LAW JUDGE LAMBERT: Maybe we could  
13 ask -- we could ask Mr. Housman questions, first, if we  
14 have any.

15 Thank you, Mr. Housman. I'll turn to my panel.

16 Judge Akin, did you have any questions?

17 ADMINISTRATIVE LAW JUDGE AKIN: Thank you. Yes.  
18 I do have a couple of quick questions.

19 So if my understanding of the facts are correct,  
20 you were here in California from April 2008 through  
21 November 2014?

22 MR. HOUSMAN: Correct.

23 ADMINISTRATIVE LAW JUDGE AKIN: Okay. And during  
24 any of those years, did you file nonresident returns, or  
25 did you file resident, or part-year resident, returns for

1 each of those tax years? That would be 2008 through 2014.

2 MR. HOUSMAN: Can I just say -- if I can sort of  
3 expand on that, when I was coming to the U.S., the advice  
4 I received was that if I was going to spend 183 days or  
5 more in the U.S., I would need to file taxes and pay  
6 income taxes here. So that was the advice I came in on.

7 So when my very first tax return was filed  
8 through my bookkeeper, he asked me that question. I said,  
9 "Yes, I'm going to be a tax resident."

10 I think this conversation seems to be going to  
11 something else. But that's -- that was the theme of my  
12 decision making -- is that I would be spending 183 days,  
13 and so we continued that all the way through to the  
14 answer.

15 So the answer is, yes, we did file as a tax  
16 resident. But I don't know that that takes away from  
17 being temporary in the state.

18 ADMINISTRATIVE LAW JUDGE AKIN: Okay. Thank you.

19 Did you ever amend any of your tax returns to  
20 report yourself as a nonresident for any of those tax  
21 years, besides the claim for refund for the 2009 tax year,  
22 that is?

23 MR. HOUSMAN: No. I believe everything's --  
24 we've never done that.

25 ADMINISTRATIVE LAW JUDGE AKIN: Okay.

1 MR. HOUSMAN: Yeah.

2 ADMINISTRATIVE LAW JUDGE AKIN: And I know your  
3 testimony was that you were here to set up the business in  
4 California. You anticipated that would be, you know, 12  
5 to 18 months.

6 MR. HOUSMAN: Mm-hmm.

7 ADMINISTRATIVE LAW JUDGE AKIN: I guess I'm  
8 wondering kind of the reasoning why that extended beyond  
9 into the, you know, approximately six years.

10 MR. HOUSMAN: Well, I mean that's a good  
11 question. I mean, up until the end of 2009 -- I sort of  
12 explained to you, before, what was going on with the  
13 business. The Adobe thing took us by surprise. It really  
14 wasn't part of the agenda. So -- to sell the company  
15 then. You know, maybe eventually when the company was  
16 bigger? You know, we were sort of full throttle trying to  
17 sort of serve these customers.

18 A few things happened, sort of. Expecting a  
19 child happened. But I think what's really also important  
20 about 2010 onwards is the fact that at every visit to  
21 Australia, we tried to buy a family home. We tried to buy  
22 a family home in 2000 -- March of '11, before I left for  
23 Adobe. And I quit Adobe a couple of months later.

24 Then we tried -- and we've got records, wires of  
25 deposits being sent across. We tried to buy a house,

1 again, December of 2011. And, eventually, the following  
2 year, we bought a house. And that's the house we now live  
3 in -- have lived in for over seven years.

4 So I guess, you know, I -- I quit Adobe. There  
5 was not a lot of urge -- kids were small. We didn't need  
6 to go back. But at every effort, we were trying to buy a  
7 family home. And we were eventually successful. And now  
8 we live in that family home.

9 So the thing that always goes through my mind is  
10 if we had -- were successful with the first family home  
11 purchase, would we have gone back earlier?

12 And, you know, I think the answer is probably  
13 yes. But we weren't successful until the third try.

14 ADMINISTRATIVE LAW JUDGE AKIN: Okay. Thank you.  
15 Just one moment.

16 I think that's all of my questions for now.  
17 Thank you.

18 MR. HOUSMAN: Thank you.

19 ADMINISTRATIVE LAW JUDGE LAMBERT: Judge Hosey,  
20 did you have any questions?

21 ADMINISTRATIVE LAW JUDGE HOSEY: Yes.

22 Can you hear me?

23 MR. HOUSMAN: Sure. Yes.

24 ADMINISTRATIVE LAW JUDGE HOSEY: Okay. Thank you  
25 for your time.

1 I just have one clarifying question.

2 MR. HOUSMAN: Okay.

3 ADMINISTRATIVE LAW JUDGE HOSEY: Judge Akin got  
4 some responses from you.

5 But you said that you had traveled to London, I  
6 believe. Was that at the end of 2009?

7 MR. HOUSMAN: I traveled at the end of 2009 with  
8 my wife, but she had already been there earlier that year,  
9 as well.

10 ADMINISTRATIVE LAW JUDGE HOSEY: Right. You said  
11 you had, like, passport stamps? I don't need to see that.

12 MR. HOUSMAN: Yeah. We do have --

13 ADMINISTRATIVE LAW JUDGE HOSEY: I just wanted to  
14 clarify that was at the end --

15 MR. HOUSMAN: Yes, we do.

16 ADMINISTRATIVE LAW JUDGE HOSEY: -- of 2009.

17 MR. HOUSMAN: Yeah. December 2009, we went back  
18 again to sort of just get a feel.

19 ADMINISTRATIVE LAW JUDGE HOSEY: Okay.

20 MR. HOUSMAN: Yeah. I mean, it was a -- it was a  
21 new world for me, and for her, selling the company and  
22 being relatively senior in this new company and setting up  
23 a --

24 But what's really interesting about my company,  
25 that was one of the very first SaaS acquisitions that

1 Adobe had done. Software as a service was a relatively  
2 new thing. So I was being brought in as one of the many  
3 experts to help.

4 And so, you know, I would then come back -- it's  
5 how I would interact with the Romanian team, how I would  
6 interact with my Australian team, and so on. So --

7 ADMINISTRATIVE LAW JUDGE HOSEY: So the travel  
8 was to London to establish a satellite office there?

9 MR. HOUSMAN: Well, that was always the plan.  
10 Correct.

11 ADMINISTRATIVE LAW JUDGE HOSEY: Right.

12 MR. HOUSMAN: Yeah.

13 ADMINISTRATIVE LAW JUDGE HOSEY: But that was --  
14 that was in November or December?

15 MR. HOUSMAN: The -- the -- we went to London in  
16 December of 2009.

17 ADMINISTRATIVE LAW JUDGE HOSEY: December.

18 MR. HOUSMAN: 2009.

19 ADMINISTRATIVE LAW JUDGE HOSEY: And you found  
20 out you were expecting a child which was born in --

21 MR. HOUSMAN: The child --

22 ADMINISTRATIVE LAW JUDGE HOSEY: September?

23 MR. HOUSMAN: -- was born in September. So,  
24 yeah. Just earlier that year --

25 ADMINISTRATIVE LAW JUDGE HOSEY: Okay.

1           MR. HOUSMAN:  -- we discovered, and that really  
2 changed the plans.  And I think every year we did want to  
3 go back.  When we were ready, I sold the company.

4           There was no mandate that I had to stay with  
5 Adobe.  That was not a requirement.  Obviously, that was  
6 strongly wanted by -- by them and by both parties.  I  
7 mean, I wanted my company to be successful.  But -- and I  
8 had a team, and I had an office in Australia, as well.  So  
9 I could be anywhere.

10          ADMINISTRATIVE LAW JUDGE HOSEY:  Okay.  Great.  I  
11 just wanted to clarify that.

12          Thank you, very much.

13          ADMINISTRATIVE LAW JUDGE LAMBERT:  Thank you.

14          So -- let me think.

15          I guess maybe you already talked about this,  
16 but -- kind of -- but -- so why did you file a resident  
17 tax return?  Did you say it's because you were advised to  
18 do that?

19          MR. HOUSMAN:  Well, I mean, I think even -- even  
20 today, when I talk to fellow entrepreneurs who are coming  
21 across, and they might reach out to me for advice --  
22 although, my advice might be a lot better now -- is that  
23 it's this 183-day rule where you're under U.S.  
24 jurisdiction for filing taxes.

25          I mean, if I didn't need to be employed by BCS



1 LLC, I probably would have just gotten paid in Australia,  
2 and I probably wouldn't have been part of -- on the radar,  
3 I guess, in some ways. But -- so coming here, I knew I  
4 would be employed by an American company, I would have to  
5 pay income taxes, and I would have to pay -- file taxes.

6 So the -- the impression I had was that 183 days,  
7 if I was -- looks like I was going to stay here -- is I  
8 would have to do that, which is, actually, I believe it's  
9 true that -- so that -- that was the logic in filing "tax  
10 residency" -- is what I would call it -- just -- is -- is  
11 how I was thinking about it.

12 ADMINISTRATIVE LAW JUDGE LAMBERT: Okay. Thank  
13 you for clarifying that.

14 And just -- just briefly, so you purchased a home  
15 in San Francisco in 2010, and what was the -- I believe,  
16 maybe, it was after you discovered your wife was pregnant.  
17 What was the purpose of purchasing that home? Were you  
18 deciding to stay longer in San Francisco? Or --

19 MR. HOUSMAN: Well, I think -- I think the better  
20 way of thinking about the home is that I made a number of  
21 investments; of which, one was a single-family home, and  
22 some others were more commercial buildings; of which, I  
23 was a partner in these buildings.

24 That one was -- I -- so I bought that in  
25 May 2010. I also bought into a commercial office building

1 in San Francisco in June of 2010. And I made other --  
2 sorry. 2011. That was in -- sorry. 2010.

3 So it was a bunch of investments that I was  
4 making.

5 ADMINISTRATIVE LAW JUDGE LAMBERT: Okay. Thank  
6 you.

7 And just one final question.

8 You and your spouse, in Australia, there was a  
9 house that perhaps was owned by your family. And did you  
10 both live there prior to coming to San Francisco? Or was  
11 there another home that you had in San Francisco -- in  
12 Australia?

13 MR. HOUSMAN: We lived in a house we owned, which  
14 is not the house my parents owned.

15 ADMINISTRATIVE LAW JUDGE LAMBERT: Okay. There  
16 was a separate house?

17 MS. HUANG: It might be easier --

18 MR. HOUSMAN: Two -- two separate --

19 MS. HUANG: -- if you said the address.

20 MR. HOUSMAN: Yeah. I lived in the house. We --  
21 I -- my -- we owned a house at Kurraba Road, Neutral Bay,  
22 which we lived in. And that was our house. But every  
23 time we went back for visits, we would stay with my  
24 parents house because that house was rented out.

25 ADMINISTRATIVE LAW JUDGE LAMBERT: I see.

1 MR. HOUSMAN: Yeah.

2 ADMINISTRATIVE LAW JUDGE LAMBERT: Thank you.

3 That's all the questions I have for you. So  
4 appreciate, Mr. Housman.

5 MR. HOUSMAN: Thank you, your honor.

6 ADMINISTRATIVE LAW JUDGE LAMBERT: And I'll just  
7 ask my panel if they have any questions for Appellant's  
8 representatives.

9 Judge Akin, did you have any further questions?

10 ADMINISTRATIVE LAW JUDGE AKIN: I think so. Give  
11 me just a moment to look at my notes.

12 Okay. Can everyone hear me okay?

13 MR. VESELY: Yes.

14 ADMINISTRATIVE LAW JUDGE AKIN: Okay.

15 So Internal Revenue Code Section 331(a) -- it  
16 provides that if property is received in a distribution in  
17 complete liquidation, and if gain or loss is recognized on  
18 receipt of such property, then the basis of the property  
19 in the hands of the distributee shall be the fair market  
20 value of such property at the time of the distribution.

21 I guess my question is -- the part that says "if  
22 gain or loss is recognized", did Appellant report any gain  
23 on this -- on the distribution?

24 MR. VESELY: No. There was no -- no reporting of  
25 the gain. For federal tax purposes? Or for California?

1 Or what?

2 ADMINISTRATIVE LAW JUDGE AKIN: And that --

3 MR. VESELY: Because when that happened, he was  
4 not a U.S. resident or anything else. That was April 1,  
5 2008.

6 ADMINISTRATIVE LAW JUDGE AKIN: Okay. So if I  
7 understand Appellants' position correctly, it -- it's  
8 considered recognized because it wasn't a  
9 nonrecognition -- nonrecognition transaction when it was  
10 distributed?

11 MR. VESELY: That's correct.

12 ADMINISTRATIVE LAW JUDGE AKIN: Okay. Is there  
13 any distinction, you think, in the language of IRC 331(a),  
14 in that it uses "recognized" as opposed to "recognizable."

15 MR. VESELY: No. I think -- I think the -- the  
16 use of the word "recognized" is, you know -- there are a  
17 lot of nonrecognition provisions throughout the code, as  
18 you know. So that -- the idea that whether a gain is  
19 recognized or not does not necessarily mean it's going to  
20 be taxable under federal income tax law or under  
21 California tax law.

22 And so that's really the, you know -- the dates  
23 are very important here. April 1 is an important date  
24 because clearly Mr. Housman was not here yet. And, you  
25 know, he was not a U.S. tax resident, as he indicated. He

1 was not a California resident, whatsoever, even then.  
2 Even FTB has to agree to that.

3 So I think the issue here is recognition does not  
4 mean that it is automatically taxable because of the  
5 nonrecognition provisions.

6 ADMINISTRATIVE LAW JUDGE AKIN: Okay. Thank you.

7 And I do have one additional question.

8 Did Appellant report the same -- did the  
9 Appellants report the same step-up in basis on their  
10 federal return for 2009?

11 MR. VESELY: Yes, they did. And that was never  
12 adjusted by the service.

13 You know, Mr. Housman was actually audited the  
14 following year, unrelated to the Monkey transaction, in a  
15 no-change audit. And so, no, that stood. And he paid a  
16 lot of tax to the federal government on that.

17 And, yeah. There was no adjustments, whatsoever,  
18 federally.

19 ADMINISTRATIVE LAW JUDGE AKIN: And just to  
20 clarify, the IRS didn't look at or examine Appellant's  
21 2009 return?

22 MR. VESELY: They did not, as far as I remember.

23 Mr. Housman?

24 No, they did not. They did his 2010, though.  
25 They looked at it.

1 ADMINISTRATIVE LAW JUDGE AKIN: Okay.

2 I think that's all of my questions.

3 Thank you.

4 ADMINISTRATIVE LAW JUDGE LAMBERT: Judge Hosey,  
5 did you have any questions?

6 ADMINISTRATIVE LAW JUDGE HOSEY: Not at this  
7 time. I'm going to reserve them for later, though.

8 ADMINISTRATIVE LAW JUDGE LAMBERT: Okay.

9 And I'll save my questions for later, if I have  
10 any.

11 And let's take a break for ten minutes and go off  
12 the record and come back around 11:00 a.m.

13 MR. VESELY: Okay.

14 ADMINISTRATIVE LAW JUDGE LAMBERT: Okay. Thanks.

15 MR. VESELY: Thank you.

16 (Off the record)

17 ADMINISTRATIVE LAW JUDGE LAMBERT: Okay. I  
18 will -- we can go back on the record now.

19 And we'll move on to FTB's presentation.

20 We'd agreed to around 30 minutes. And you could  
21 see if you can do it within that amount of time or not.  
22 And you could use some extra time because you didn't use  
23 it in -- as your witness -- during your witness  
24 questioning. But hopefully we can keep it down so we can  
25 end for lunch.

1           So, Mr. Kragel, you can proceed.

2  
3                               PRESENTATION

4       BY MR. KRAGEL, Attorney for Respondent:

5           Thank you, Judge and members of the panel. My  
6       name is Bradley Kragel. I'm here on behalf of Respondent,  
7       Franchise Tax Board.

8           This case raises two issues. Both issues arise  
9       out of Appellant -- Appellants' sale of stock in a foreign  
10      entity.

11          The sale occurred in 2009, when Appellants were  
12      living in San Francisco, California. Appellants initially  
13      claimed that they were entitled to a step-up in basis in  
14      stock at the time of the sale.

15          After selling the stock, Appellants retroactively  
16      reclassified the entity from an association to a  
17      partnership and claimed a step-up in basis of  
18      \$13.8 million. Their claim was based on the deemed  
19      treatment provisions in the federal check-the-box  
20      regulations, and California had similar regulations as  
21      well, if not identical.

22          At audit and protest, Respondent determined that  
23      Appellants' retroactive reclassification had no tax effect  
24      because Appellants, and the corporation, were not relevant  
25      for tax purposes on the day the deemed treatment occurred.

1 Respondent determined --

2 Strike that.

3 At protest, Appellants contended, for the first  
4 time, that the gain on the sale of their stock was not  
5 taxable in California because they were not residents of  
6 California at the time of the sale.

7 Respondent determined that California -- that the  
8 Appellants were residents of California at the time of the  
9 sale. The evidence submitted supports Respondent's  
10 determinations.

11 Among other things, the evidence shows that  
12 Appellants lived and worked in California for over six  
13 years and, throughout the time, filed California and U.S.  
14 tax returns which stated, or indicated, that they were  
15 California residents from April 2008 to November 2014.

16 In 2000, Appellant Housman formed an Australian  
17 company called Monkey Limited. In 2004, Monkey cofounded  
18 a software company called Business Catalyst Systems, which  
19 I'll refer to as BCS. In 2008, Appellant Housman formed a  
20 company called Business Catalyst Systems LLC, which I'll  
21 call BCS LLC.

22 ADMINISTRATIVE LAW JUDGE LAMBERT: Mr. Kragel,  
23 could you speak up a little --

24 MR. KRAGEL: Yes.

25 ADMINISTRATIVE LAW JUDGE LAMBERT: -- closer to



1 the mic.

2 MR. KRAGEL: BCS -- BCS entered into a management  
3 agreement with BCS LLC; whereby, the latter agreed to set  
4 up and operate an office in San Francisco.

5 In April 2008, both Appellants moved to San  
6 Francisco and became -- and began working for BCS LLC.

7 About a little over a year later, in August 2009,  
8 Adobe Systems purchased all of the shares of BCS. As part  
9 of the transaction, Adobe paid Appellants \$22.5 million  
10 for their shares of the Monkey stock.

11 After the sale, Appellants continued to live and  
12 work in California until November 2014, or, as testified,  
13 Appellant -- Mrs. Appellant, just worked here until 2010.  
14 Throughout that time they filed California resident tax  
15 returns, or, in one year, a nonresident tax -- non-year --  
16 part-year resident return.

17 Shortly after the sale, in August 2009,  
18 Appellants filed amended California tax returns for tax  
19 year 2008; whereby, they retroactively reclassified Monkey  
20 from an association to a partnership and claimed a step-up  
21 in basis of \$13.8 million. They then used the stepped-up  
22 basis to reduce the amount of their gain on the sale of  
23 stock reported in their tax return for tax year 2009.

24 Although they did not raise the residency issue  
25 at audit, Appellants contend, now, that they owed no

1 California tax on the transaction because they were not  
2 California residents at the time of this sale.

3 Based on the facts in evidence presented,  
4 Appellants have failed to establish Respondent erred in  
5 treating Appellants as California residents in  
6 October 2009. The law provides that Respondent's  
7 determinations of residency are presumptively correct.  
8 And the taxpayer bears the burden of showing error in  
9 those determinations.

10 California law further provides that the term  
11 "resident" includes every individual who was in this state  
12 for other than a temporary or transitory purpose. The  
13 purpose of the definition of resident is to include in the  
14 category of individuals, who are taxable upon their entire  
15 net income, all individuals who are physically present in  
16 California and enjoying the benefit and protection of its  
17 laws and government.

18 The Office of Tax Appeals, and its predecessor,  
19 have used a variety of objective factors in determining  
20 the residency issue. One of the objective factors used in  
21 determining residency is the address used and the state of  
22 residence claimed on federal and state tax returns.

23 In August 2009, Appellants filed a joint  
24 California income tax return for tax year 2008, which  
25 reported their address at 2140 Taylor Street in San

1 Francisco. They also filed a U.S. individual tax return  
2 for tax year 2008.

3 In October 2009, after the sale of the stock,  
4 Appellants filed amended tax returns for tax year 2008,  
5 which also reported an address in San Francisco. The  
6 amendment in return was a California nonresident, or  
7 part-year resident, income tax return for 2008.

8 The amended California return stated in part  
9 that, quote, the taxpayer or the taxpayer's wife entered  
10 the United States in California on April 19, 2008, and  
11 April 30, 2008, respectively, the start of their U.S. and  
12 California residency.

13 The explanation page further stated that, quote,  
14 the taxpayer or the taxpayer's wife should each be filing  
15 a part-year resident married filing separate return on a  
16 California Form 540NR.

17 ADMINISTRATIVE LAW JUDGE LAMBERT: Mr. Kragel,  
18 you can step -- now, you can go back -- back a little from  
19 the microphone just a little bit.

20 MR. HOFSDAL: You need that sweet spot.

21 MR. KRAGEL: Okay. I'll keep trying.

22 The amended California return reported that  
23 Appellant Housman became a California resident on  
24 April 19, 2008. The amended federal return stated that,  
25 quote, the taxpayer, or the taxpayer's wife, entered the

1 United States on April 19, 2008, and April 30, 2008,  
2 respectively, the start of their U.S. residency.

3 The amended federal return reported that  
4 Appellant Housman's current non-immigrant status and date  
5 of change was, quote, resident alien 04/19/08.

6 The amended returns included federal Form 8832  
7 and an attachment entitled "Declaration and Reasonable  
8 Cause Statement". It stated, in part, quote, on April 19,  
9 2008, Bardia arrived in the United States and commenced  
10 his U.S. residency, which created a U.S. filing  
11 requirement for Bardia and Monkey Pty. Ltd.

12 Prior to April 19, 2008, entity classification  
13 was not relevant for Monkey Pty. Ltd. as defined under  
14 Regulation 301.7701-3(d). The declaration further stated  
15 that an Appellant Housman took the following activities,  
16 after arriving in the U.S., to establish the LLC's  
17 business: Engaged a bookkeeper to process payroll and  
18 maintain books and records for the LLC, met with a CPA to  
19 discuss operating an LLC in the United States, located  
20 office space for the LLC, interviewed and hired employees  
21 for the LLC.

22 In July 2010, Appellants filed a joint California  
23 resident income tax return for tax year 2009, which  
24 reported an address at 587 Jersey Street in San Francisco.  
25 They also filed a joint U.S. individual income tax return

1 for 2009, which reported the same address.

2 In addition to their individual returns,  
3 Appellants filed California business returns for their  
4 BC -- BS -- BCS LLC. BCS LLC filed California Limited  
5 Liability Company Returns for tax years 2008 and 2009.

6 Both LLC returns included the question, "Does the  
7 LLC have any foreign (non-U.S.), nonresident members?"  
8 The "no" box was checked.

9 Both returns included a California Schedule K-1  
10 issued to Appellant Housman, which asked, "Is this member  
11 a foreign member?" The "no" box was checked on both  
12 returns.

13 In addition to the statements in their tax  
14 returns, which were signed under penalty of perjury,  
15 Appellants made representations during audit about their  
16 residency status in response to information and document  
17 requests. When asked when they became residents of the  
18 United States, Appellant stated that Bardia Housman became  
19 a resident on April 19, 2008, and Beatriz Pena Alda on  
20 April 30, 2008.

21 When asked to summarize trips taken in the United  
22 States between 2007 and 2008, Appellant stated, in part --  
23 refer to paragraph A above -- four overseas trips taken  
24 while residing in the United States.

25 When asked to produce the rental agreements for

1 their San Francisco residences, Appellants replied, in  
2 part, by stating that 2140 Taylor Street #301 was the  
3 taxpayer's primary residence from May 2008 to April 2010.

4 Even after Appellants raised the residency issue  
5 during protest, they continued to report on their -- on  
6 their tax returns that they were residents during 2009.  
7 Appellants filed their protest in April --

8 Strike that.

9 -- in December 2014; wherein, they argued, for  
10 the first time, that if this Entity Classification  
11 Election was not effective, then the gain from the sale of  
12 the stock should not be taxed because the taxpayers were  
13 not residents at the time of the sale.

14 Ten months later, in October 2015, Appellants  
15 filed a California nonresident, or part-year resident,  
16 income tax return for tax year 2014. That return stated  
17 that Appellant Housman was a California resident from  
18 April 19, 2008, to November 2, 2014, and that Appellant  
19 Pena was a California resident from April 30, 2008, to  
20 November 2, 2014.

21 In October 2016, Appellants filed an amended  
22 California nonresident, or part-year resident, income tax  
23 return for tax year 2014. It stated the same. Both of  
24 those returns stated that Appellants were domiciled in  
25 California during 2014.

1           Another factor considered in determining  
2           residency is place of employment. Appellant Pena was  
3           employed in Australia until March 31, 2008. Appellant  
4           Housman was employed in Australia by BCS. Effective  
5           May 31, 2008, Appellant Housman resigned from his  
6           employment in Australia. In June 2008 both Appellants  
7           become -- became employed with BCS LLC in San Francisco.

8           Appellants' California resident income tax return  
9           for 2008 reported wages received by both Appellants from  
10          BCS LLC, located in San Francisco. During 2009, both  
11          Appellants were employed by BCS LLC in California for part  
12          of the year and by Adobe systems in California for the  
13          remainder of the year; thus, both Appellants quit their  
14          jobs in Australia and became employed in California.

15          Another objective factor relevant to residency is  
16          the taxpayer's maintenance and ownership of business  
17          interests. As noted, Appellant Housman was the sole owner  
18          of BCS LLC, which began doing business in California in  
19          March 2008.

20          In April 2008, Appellants Housman -- Appellant  
21          Housman's Delaware Limited Liability Company entered into  
22          a management agreement with BCS. The management agreement  
23          stated that the services to be provided included setting  
24          up and operating an office -- a satellite office in  
25          California -- for the company in San Francisco; hiring

1 employees, according to the business plan; sale and  
2 collection of payments of Business Catalyst Platform; et  
3 cetera.

4 Another factor considered in determining  
5 residency is origination point of taxpayer's checking  
6 account and credit card transactions. In this case, the  
7 proceeds of the sale in question were transmitted to  
8 Appellant's California accounts.

9 In September 2009, Adobe transmitted \$20 million  
10 to Appellant's money market savings account at Wells Fargo  
11 bank. Two weeks later, Appellants transmitted funds  
12 totaling 3.7 million to the former shareholders of Monkey  
13 from Appellant Housman's bank at Wells Fargo -- bank  
14 account at Wells Fargo. In February 2011, Adobe  
15 transmitted \$2.3 million to Appellant Housman's prime  
16 checking account at Wells Fargo in California.

17 Several other factors typically considered in  
18 determining residency for tax purposes include the number  
19 of days spent in California versus other locations, the  
20 residents of the taxpayer's spouse and children, and the  
21 location of residential real property.

22 In the present case, the evidence indicates that  
23 both spouses continuously lived and worked in San  
24 Francisco from April 2008 to November 2014. Their tax  
25 returns for 2008 show an address at 2140 Taylor Street,



1 San Francisco. Their returns for 2009 through 2012 show  
2 an address of 587 Jersey Street in San Francisco.

3 In May 2010, Appellants purchased a single-family  
4 residence located at 587 Jersey Street. Their amended  
5 returns for 2008 reported that Appellant Housman was  
6 present in the United States for 240 days during 2008.

7 Appellant's, as testified, lived in their  
8 residence they purchased at Jersey Street until they moved  
9 back to Australia in November 2014. They and their  
10 children lived there together.

11 Another factor sometimes considered in  
12 determining residency is the  
13 presence/connections/residency as indicated by third-party  
14 declarations. In the present case, the Appellants have  
15 filed no third-party declarations regarding their  
16 connections to Australia. Appellant's own declarations  
17 should be given little weight because they are  
18 inconsistent with prior conduct and representations.  
19 Appellants did not file any declarations during audit or  
20 protest.

21 During audit, which lasted November 2012 to  
22 October 2014, there was no dispute that Appellants were  
23 residents of California for tax purposes. During protest,  
24 which lasted from December 2014 to February 2017,  
25 Appellants disputed residency but did not submit any

1     declarations regarding the residency issue.

2             Many of the statements made in the declarations  
3     are irrelevant, inconsistent with earlier representations  
4     in evidence, or not among the objective factors typically  
5     considered in determining residency. For example,  
6     Appellant Housman declaration states that, while in San  
7     Francisco, he was involved in BCS day-to-day operations.

8             He further states he did not intend to operate  
9     both the satellite San Francisco and Australian business  
10    on an extended basis. Those statements are inconsistent  
11    with management agreement and Appellant's responses to  
12    information and document requests.

13            The management agreement stated that the  
14    consultant's representative will be Bardia Housman, who  
15    will perform the services under the agreement. In the  
16    event the representative is an employee of the company,  
17    meaning BCS, then, for as long as this agreement is in  
18    effect, then representative shall rescind all active  
19    duties at the company.

20            In response to IDRs issued in November 2013,  
21    Appellants described their employment in Australia and  
22    United States by stating as follows: "Bardia Housman was  
23    employed in Australia by BC -- Business Catalyst Systems,  
24    Pty. Ltd. He resigned from his position effective May 31,  
25    2008."

1 Additional facts in evidence demonstrating  
2 Appellants' residency in California during 2009, and  
3 thereafter, are set forth in Respondent's briefs. Among  
4 other things, there's evidence regarding their bank and  
5 savings accounts held in California, use of professional  
6 services, and their driver's licenses.

7 In summary, it is undisputed that Appellants were  
8 physically present in San Francisco from April 2008 to  
9 August 2009, when they sold their stock in Monkey for over  
10 \$20 million. They continued to live and work in San  
11 Francisco until November 2014, a period of six years.  
12 They both quit their jobs in Australia. They were both  
13 employed at a company located in San Francisco and owned  
14 by Appellant Housman.

15 Although Appellants had a home in San Francisco,  
16 they never returned to it. It remained under lease to  
17 this day. Appellants filed tax returns for tax years 2008  
18 through 2014, which it expressly stated, or otherwise  
19 indicated, that they were residents of California; thus,  
20 for seven years, beginning in 2009 and ending in 2016,  
21 Appellants represented to the State of California that  
22 they were residents of California.

23 Their statements that they were residents of  
24 California are corroborated by their actions during and  
25 after the tax year in question.

1           In addition to the factors already discussed,  
2 Appellants obtained California driver's licenses in early  
3 2010, bought a home in California in 2010, and invested in  
4 multiple real estate companies from 2011 to 2013.

5           Appellants' post-2009 activities are probative  
6 because they corroborate Appellants' own representations  
7 during and after the tax year in question. Even after  
8 they raised the dispute about residency, Appellants filed  
9 returns which stated that they were residents from 2008 to  
10 2014.

11           In short, the objective evidence shows that  
12 Appellants were physically present in California and  
13 enjoyed the benefit and protection of its laws and  
14 government; hence, Appellants have failed to establish  
15 that Respondent erred in treating Appellants as California  
16 residents in tax year 2009.

17           Appellants' contention that they were not  
18 residents in 2009 is contradicted by their attempt to  
19 change the classification of Monkey after they sold the  
20 stock, which brings us to the second issue.

21           Appellants have failed to establish that  
22 Respondent erred in disallowing their reported step-up in  
23 basis of the corporate stock sold in 2009 because the  
24 retroactive classification of the corporation was  
25 irrelevant for tax purposes. The law provides that the

1 gain from the sale of property is the excess of the amount  
2 realized over the adjusted basis of the property.

3 The adjusted basis for determining gain, or sale,  
4 from the sale of property is basis determined under --  
5 determined under Section 1012. Section 1012 provides that  
6 the basis of property is its cost.

7 In the present case, Appellant sold 9 million  
8 shares of stock for approximately \$22.6 million. Their  
9 cost basis was approximately 4 million; thus, the total  
10 gain was 18.6 million. However, after the sale was  
11 concluded and the funds distributed, Appellants took steps  
12 to increase their basis by retroactively reclassifying  
13 Monkey from a corporation to a partnership.

14 They filed amended tax returns for tax year 2008,  
15 which included federal Form 8832, the form used by an  
16 eligible entity to change its classification for tax  
17 purposes. The Form 8832 stated that Monkey was a foreign  
18 eligible entity electing to be classified as a  
19 partnership, effective April 1, 2008.

20 April 1 was 18 days before Appellant Housman  
21 became a resident of the United States. Appellant set the  
22 effective date of the election prior to the date they  
23 became residents so that they could avoid paying any tax  
24 on the deemed transactions while obtaining the advantage  
25 of stepped-up basis as an offset on their later in time

1 sale of the company.

2 Appellants contend that the retroactive  
3 reclassification of Monkey entitled them to step-up in  
4 basis because of the deemed treatment provisions in the  
5 federal regulations, which are also in the state  
6 regulations. The regulations state that if an eligible --  
7 if an eligible entity classified as an association elects  
8 to be classified as a partnership, the following is deemed  
9 to occur: The association distributes all of its assets  
10 and liabilities to its shareholders in liquidation of the  
11 association; and, immediately thereafter, the shareholders  
12 contribute all of the distributed assets and  
13 liabilities to a newly formed partnership.

14 In regard to timing, the Regulation states that  
15 an election that changes the classification of an eligible  
16 entity for federal tax purposes is treated as occurring at  
17 the start of the day for which the election is effective.

18 It further states that any transactions that are  
19 deemed to occur as a result of a change in classification  
20 are treated as occurring immediately before the close of  
21 the day before the election is effective.

22 In the present case, Monkey elected to change its  
23 classification from an association taxed as a corporation  
24 to a partnership, effective April 1, 2008. Under the  
25 deemed treatment provision, Monkey was deemed to have

1 distributed all of its assets to its shareholders on  
2 March 31, 2008; immediately thereafter, also on March 31,  
3 2008, the shareholders were deemed to have contributed all  
4 of the distributed assets to a newly formed partnership.

5 Had at the corporation and the shareholders been  
6 U.S. residents on the day before the effective date of the  
7 election, the shareholders would have been required to  
8 recognize gain on receipt of the assets measured by the  
9 fair market value of the assets received, and the basis of  
10 the assets in the hands of the shareholders would have  
11 been the fair market value at the time of distribution.

12 However, in this case, the retroactive election  
13 did not have the tax effects reported by Appellant because  
14 the classification of Monkey was not relevant for U.S. and  
15 California tax purposes. Subsection (d) of the Regulation  
16 states, in part, that for purposes of this section, before  
17 a foreign entity's classification is relevant, when its  
18 classification effects the liability of any person for  
19 federal tax or information purposes.

20 It further states, the date that the  
21 classification of a foreign eligible entity is relevant is  
22 the date an event occurs that creates an obligation to  
23 file a federal tax return, information return, or  
24 statement for which the classification of the entity must  
25 be determined.

1           In this case, Monkey's classification did not  
2 become relevant until Appellants became residents and  
3 thereby had an obligation to file a return. According to  
4 their own records -- according to their own returns,  
5 Appellants did not become residents until April 19 and  
6 April 30, 2008; thus, Monkey's tax classification was not  
7 relevant until April 19, 2008.

8           In their declaration and reasonable cause  
9 statement, which was attached to their Form 8832,  
10 Appellant stated that, quote, prior to April 19, 2008,  
11 entity classification was not relevant for Monkey Pty.  
12 Ltd. as defined under the Regulation 301.7701-3(d).  
13 Because Monkey's tax classification was not relevant until  
14 April 19, 2008, the deemed treatment set forth in  
15 Subsection (g) had no effect for California income tax  
16 purposes.

17           The foregoing conclusion is consistent with the  
18 purpose of the Regulation, which is to ensure that the tax  
19 consequences of an elective change will be identical to  
20 the consequences that would have occurred if the taxpayer  
21 had actually taken the steps described in the regulations.

22           As applied here, if Monkey had distributed its  
23 assets to its shareholders on March 31, 2008, and the  
24 shareholders had contributed those assets to a newly  
25 formed partnership on the same day, there would not have



1    been any tax consequences in the U.S. or California  
2    because none of the participants were residents of the  
3    U.S. or California.

4           Because the owners did not pay or contribute  
5    anything more for their interest in the partnership, there  
6    would not have been any increase in the basis of the  
7    assets held by the partnership.

8           In other words, Appellants and Monkey did not  
9    realize, or recognize, any gain on the deemed distribution  
10   because the deemed transaction occurred at a point in  
11   time, March 31, 2008, when the corporation and the  
12   shareholders were irrelevant for U.S. and California tax  
13   purposes; therefore, Appellants have failed to establish  
14   that Respondent erred in disallowing the reported step-up  
15   in basis of the corporate stock.

16           Assuming arguendo that the deemed transactions  
17   were effective for California tax purposes, Respondent  
18   further contends that Appellants have failed to establish  
19   that Respondent erred in disallowing their step-up in  
20   basis because they failed to establish the value of their  
21   stock.

22           Respondent's position and criticisms on the --  
23   regarding the appraisal reports are set forth in  
24   Respondent's briefs, and I won't repeat them here.

25           Based on the evidence and facts submitted,

1 Respondent requests that the panel sustain Respondent's  
2 determinations.

3 If you have any questions, I will do my best to  
4 answer them. Thank you for your time.

5 ADMINISTRATIVE LAW JUDGE LAMBERT: Thank you,  
6 Mr. Kragel.

7 Judge Akin, did you have any questions?

8 ADMINISTRATIVE LAW JUDGE AKIN: Yes. I --  
9 Let me try again.

10 Okay. Yes, I do have one question.

11 You just noted that the purpose of the  
12 regulations is to treat a taxpayer as they would be  
13 treated if, you know, the deemed transaction actually  
14 occurred. And you also stated that if the -- Monkey had  
15 distributed the assets to its owners on March 31, 2008,  
16 Appellants wouldn't be entitled to a stepped-up basis  
17 because they didn't contribute any actual, you know, funds  
18 when they then re-contributed it to the partnership;  
19 correct?

20 MR. KRAGEL: Correct.

21 ADMINISTRATIVE LAW JUDGE AKIN: What about IRC  
22 Section 332(a)?

23 Hold on. Let me scroll up. Excuse me.

24 331(a) -- which states that if property is  
25 received in a distribution in a complete liquidation, and

1 if gain or loss is recognized on the receipt of such  
2 property, then the basis of the property in the hands of  
3 the distributee shall be the fair market value of such  
4 property at the time of distribution.

5 Would that be applicable? And how would FTB  
6 apply that in this situation if Monkey had actually,  
7 truly, you know, liquidated at that point?

8 MR. KRAGEL: I don't know that I can answer that.  
9 Because at the time it happened on March 31, all of the  
10 shareholders in the entity were all Australian taxpayers.  
11 So I don't know how they could use a U.S. law -- I don't  
12 think a U.S. law would apply at all.

13 If you would like me to give it further  
14 consideration and briefing, I'd be happy to do so.

15 ADMINISTRATIVE LAW JUDGE AKIN: No. I -- I think  
16 that answers my question.

17 I -- I just wondering how that, you know, in  
18 FTB's interpretation -- that code section would come into  
19 play. And you've answered that.

20 Thank you.

21 ADMINISTRATIVE LAW JUDGE LAMBERT: Judge -- Judge  
22 Hosey, did you have any questions?

23 ADMINISTRATIVE LAW JUDGE HOSEY: Yeah. Just one.

24 Does the IRS Chief Counsel Memo AM2021-002 in any  
25 way change your analysis of the relevancy issue?

1           MR. KRAGEL: Judge, no it does not. I think what  
2 that memo is discussing is whether or not a foreign entity  
3 has a classification, as Appellant's counsel was talking  
4 about. And that's not really the issue in our view.

5           It can have a classification, but it's still  
6 irrelevant for our tax purposes.

7           So I don't think that -- and I just briefly read  
8 it over, and I didn't see anything that would change our  
9 analysis.

10          ADMINISTRATIVE LAW JUDGE HOSEY: Okay. Great.  
11 Thank you, Mr. Kragel. That's my only question. Thank  
12 you.

13          ADMINISTRATIVE LAW JUDGE LAMBERT: I want to ask  
14 just one question.

15          On the IRS effective date of April 1st and using  
16 the claim basis Appellant used, is that consistent with  
17 FTB's analysis that Appellant was not a resident and he  
18 was -- so therefore, the business -- and he was not  
19 relevant for tax purposes, given that the IRS gave the  
20 retroactive effective date of April 1st? And is it  
21 relevant for federal tax purposes as of that date?

22          MR. KRAGEL: I had trouble -- I had trouble  
23 following that.

24          ADMINISTRATIVE LAW JUDGE LAMBERT: Well, can you  
25 comment on the fact that the IRS used April the 1st

1 effective date and used the claim basis and how that --  
2 why does FTB have a different analysis than perhaps,  
3 maybe, it appears?

4 MR. KRAGEL: I -- I -- I don't know how the --  
5 IRS ended up analyzing the tax return on that. I do  
6 know -- I understand that they granted their request for  
7 reclassification effective April 1. I think that's  
8 accurate.

9 But, even so, that's just the effective date of  
10 the transfer. If you look at the statutory -- at the  
11 regulations, the actual transaction they're relying on,  
12 would have occurred the day before. And so it would have  
13 been irrelevant for tax purposes in our understanding of  
14 the rules, Judge.

15 ADMINISTRATIVE LAW JUDGE LAMBERT: Okay. Thank  
16 you. Appreciate it.

17 I have no further questions. And we're going to  
18 move to closing remarks.

19 Mr. Vesely, did you want to give your closing  
20 remarks?

21 MS. HUANG: Thank you, your honor.

22 ADMINISTRATIVE LAW JUDGE LAMBERT: Or Ms. Huang?

23 MR. VESELY: Yes. We're going to -- we're going  
24 to split them.

25 ADMINISTRATIVE LAW JUDGE LAMBERT: Okay. Thank

1     you.

2                 MS. HUANG:   Yeah.   If we could.   If we could use  
3     the time reserved from earlier?

4                 ADMINISTRATIVE LAW JUDGE LAMBERT:   Yeah.   I think  
5     it was around 22 minutes, something like that.

6                 MS. HUANG:   Okay.   Great.   Thank you.   So I'll  
7     true to quickly go through it.

8  
9                         CLOSING ARGUMENT

10    BY MS. HUANG, Attorney for Appellant:

11                 So first of all, I'd like to address the tax  
12    returns.   And I think that's -- that's the question  
13    foremost on FTB's mind and, perhaps, yours.

14                 So as Mr. Housman explained, when he came to the  
15    U.S., you know, he -- his understanding was 183 days.  
16    And, I think, as we all know here, I don't think anybody  
17    disputes that that's not California's rule.

18                 The 183 days is federal.   The 183-day rule is in  
19    a number of states, but certainly not California.   So his  
20    misunderstanding led to the initial filing of a resident  
21    return, and so on and so forth, with all the ones that  
22    Mr. Kragel went through.   And it's in the records, you  
23    know, they are what they are.

24                 But I would like to point out, you know, we got  
25    involved -- Mr. Vesely mentioned that at the start of the

1 hearing. We got involved in 2014. You know, and I know  
2 Mr. Kragel mentioned that this was not -- this issue was  
3 not brought up during audit, you know, we weren't involved  
4 during audit.

5 And I don't think there was any requirements,  
6 legal requirements -- statutory, regulatory, even case  
7 law -- requiring that you bring, you know -- every issue  
8 that's brought up should be brought up in audit.

9 Certainly, the FTB has brought up new issues, even before  
10 hearings. So that is -- should not be a strike against  
11 the taxpayer in that regard.

12 But I would also like to say, you know, in the  
13 briefs submitted by the FTB, they did mention a number of  
14 cases -- Appeal of Morgan, Appeal of Childs, Appeal of  
15 Dobbs, Appeal of Resnick; a few federal cases -- Route  
16 231, SF -- SWF Real Estate; and LaBeouf. These federal  
17 cases all further proposition that, you know -- that what  
18 you state on your tax returns are admissions.

19 They may be considered, you know -- given a, you  
20 know -- relevant; right? We are not saying that they are  
21 completely irrelevant. But what Appellant -- what FTB has  
22 failed to address is the fact that every single one of  
23 those cases, they looked at the facts; right?

24 So Appeal Morgan, Childs, Dobbs, and Resnick,  
25 they -- these were BOE cases. The BOE looked at all the

1 facts. It wasn't like, "Oh, you stated on your return,"  
2 or "You made a statement, and that's it." It was an  
3 thorough review of the facts.

4 And, in fact, one of the cases, in Appeal Childs,  
5 after thorough review of the facts, the BOE then said  
6 there was no substantive evidence to present, you know --  
7 to show that -- that, you know -- that the taxpayer's  
8 original statement was wrong. And so this is why I think  
9 it is very important that we keep this in mind.

10 And, as for federally, you know, it says that.  
11 It -- it says that if you have cogent evidence, it can  
12 certainly rebut the statements that was made previously.

13 So with that in mind, I -- I would like to go  
14 through some of the facts that -- that we have presented,  
15 again, and also the facts that -- that Mr. Kragel just  
16 presented.

17 I should also note that this part, you know,  
18 in -- in talking with Mr. Housman, there is a lot of  
19 frustration going on during audit, during protest, and  
20 also during -- at -- at, you know -- during these  
21 proceedings -- which is a lot of facts that were presented  
22 were simply not addressed by the FTB.

23 Mr. Kragel had an opportunity, just now, to  
24 interview or, you know, to -- to take the testimony, to  
25 question Mr. Housman -- who flew all the way from



1 Australia for this purpose -- and he did not address any  
2 of the facts that we brought up. And just, in his  
3 presentation, now, ignored all of them and went on with  
4 what he said.

5 For instance, he said that they, you know --  
6 they -- they came here. Oh, you know, he -- he -- he  
7 resigned from his position from BCS Australia on paper.  
8 Mr. Housman explained why that was done. Mr. Kragel did  
9 not follow-up with his answer, Mr. Housman's answer, he  
10 simply went to the next question.

11 And then, in his presentation just now, he tried  
12 to use that saying, "Well, you know, you resigned." Well,  
13 I think Mr. Housman just explained.

14 He cofounded BCS in Australia. They were still  
15 trying to grow that business globally. There was no way  
16 he was just going to wash his hands of it. He was the  
17 cofounder. He was the chief engineer. A business could  
18 not grow without its CEO. It could not grow without the  
19 chief engineer, not a business like theirs, a SaaS  
20 business that was, you know, up and coming. So these are  
21 the facts being ignored.

22 And I'd like to say, also, one of the things you  
23 probably noticed very glaringly absent was any discussion  
24 in the FTB's briefs, or in the presentation just now, or  
25 in any of the questions presented to Mr. Housman, was the

1 fact that there was an interview in February of 2009 that  
2 was recorded where Mr. Housman specifically said, "We are  
3 going to London in 2009."

4 There is nothing there that is, you know -- even  
5 if Mr. Kragel is saying Mr. Housman's declaration, you  
6 know, is -- should not be given the weight it should be  
7 given, I think that, by itself, is wrong because  
8 Mr. Kragel certainly has not attacked the veracity of  
9 those declarations or the veracity of Mr. Housman's  
10 testimony today.

11 So how can you ignore all that?

12 That is evidence. Testimony is evidence.  
13 Declaration is evidence, per Regulation 17014. There is  
14 no requirement that everybody under the sun needs to  
15 submit a declaration. There is no requirement under the,  
16 you know -- that declarations need to be submitted during  
17 audit, or even during protest.

18 But you have a live -- you have live testimony  
19 here.

20 Mr. Housman came here to establish a satellite  
21 office. He testified today, and also in his declarations,  
22 that he was hear to establish that office, and then he was  
23 going to move on to London. Because that's, you know,  
24 North American market as well as European market -- the  
25 European market was growing like crazy. They, you know,

1 in -- in -- in trying to meet their European market, they  
2 even translated --

3 (Reporter interrupted)

4 MS. HUANG: Oh, they even translated their  
5 products into different -- several different languages.

6 (Reporter interrupted)

7 MS. HUANG: Oh, European.

8 So they -- all that -- that was on record; right?  
9 And so here we have -- they came here with the idea that  
10 this was going to be 12 to 18 months. Ended up being, you  
11 know, shorter than that because, as of February 2009, they  
12 were already planning to leave in May of 2009. So that is  
13 13 months; right? Or 12, 13 months that they were ready  
14 to leave.

15 And at that time, as Mr. Housman also testified,  
16 while they were in discussions with Adobe, Adobe was not  
17 bound -- not legally bound to go through it. There was no  
18 penalty if they walked away. If the due diligence didn't  
19 work out, they could have walked away.

20 So, of course, BCS was going as if, you know,  
21 Adobe wasn't there -- you know, this Adobe acquisition  
22 wasn't there -- because they had to. The market was still  
23 there. They still wanted to grow the business. So they  
24 did -- their original plan was still there.

25 So, you know, I know Mr. Kragel went through,

1 basically, a list of factors. We shorthand call it "the  
2 brag factors". I think we have to keep in mind that's a  
3 little different here. We're not talking about California  
4 versus New York, California versus Nevada, California  
5 versus Colorado. We're talking California versus  
6 Australia.

7           Was he going to go back and forth between  
8 Australia and California, a 14-hour flight, you know,  
9 versus -- if they were -- if we're talking California  
10 versus Nevada, you know, when you're looking at the days  
11 here and days out? I know Mr. Kragel talked about how,  
12 "Well, you didn't -- " you know -- "You were basically  
13 here the whole time."

14           It's a little different. I think we got to keep  
15 in mind we're not talking about two different states.  
16 We're talking two different countries.

17           And also, you know, of course he hired employees  
18 here. He was trying to grow a business here. And, of  
19 course, you know, he -- he had an -- he didn't have an  
20 office. He had desks and a co-working space.

21           So, you know, one of the things that -- that I  
22 think we should keep in mind, as well, is I know  
23 Mr. Kragel mentioned that, "Oh, look at what happened  
24 after 2010." And he says, "Well, what -- you know, the  
25 years after 20 -- 20 -- 2009 is very probative."

1 I would say it's probative in a way, but opposite  
2 of what Mr. Kragel said.

3 If you look at the contrast here, 2008 and '9,  
4 they came with just clothes and a few personal items. I  
5 think we've all moved somewhere in our lives. When we  
6 move somewhere, we don't just take our clothes and a few  
7 personal items. Their furniture all stayed. They never  
8 bought any furniture. In fact, the first time they bought  
9 furniture was when they moved into their house in May of  
10 2010, when they bought that house on Jersey Street.

11 So when you consider that, the 2009 and after  
12 2009 -- Mr. Housman testified as well; right? -- that,  
13 even as late as December 2009, they were considering  
14 moving out of California; right? The idea was still  
15 there, the thought was still there, the intent was still  
16 there. And their actions evidenced that. What changed?

17 I think, Judge Akin, you mentioned, like, "Well,  
18 why did you stay for six and a half years?" Right? What  
19 change was early 2010 they discovered they were pregnant.

20 And then you can see, if you contrast the before  
21 or after -- right? You know, the 2010 and before 2010,  
22 is -- everything before 2010 was somebody who was here  
23 temporarily.

24 They -- they lived in a fully furnished place on  
25 the short first year and, then, month-to-month after that.

1 They did not own any cars or rent any cars or lease any  
2 cars. They didn't have a driver's license. You know,  
3 they kept -- oh, they kept their driver's license in  
4 Australia. They kept their bank -- their bank accounts in  
5 Australia.

6 Sure, they had some bank account -- they had a  
7 bank account here. As Mr. Housman explained, they needed  
8 a bank account here. They were trying to establish an  
9 office here -- an office that he was going to leave in the  
10 capable hands of an employee that he was going to hire;  
11 right?

12 And so that -- that -- that was the plan. And  
13 then, what changed was their pregnancy. The pregnancy  
14 changed. And then, they thought, "Okay. Maybe we --  
15 maybe we stay put."

16 There is no -- in -- in the case law, what you  
17 can see is, there's no, you know -- people can change  
18 their intent; right? You come into someplace temporarily.  
19 And then maybe, after a while, things change, life  
20 circumstances change. And then he said, "Now, I'm going  
21 to stay."

22 He was here on E3 visa, as we've both talked  
23 about. E3 visa is temporary. Sure, he renewed it. But  
24 he didn't renew it until after, you know -- after the  
25 Adobe acquisition because, before then, he didn't need to.

1 First of all, because he was not -- the two years weren't  
2 up, but also because he was moving to London.

3 And so, then, what you have is post, you know,  
4 "pregnancy news" -- let me call it that; then they got  
5 their driver's license; then they start -- they bought the  
6 house, you know, as investment, like Mr. Housman said; but  
7 then, they could also use -- they can live in it while  
8 it's an investment property. Why not, you know?

9 So that was when they bought it; right? And they  
10 bought the house. And then they bought furniture, for the  
11 very first time since they came to the U.S. -- they bought  
12 furniture in May, you know, 2010.

13 ADMINISTRATIVE LAW JUDGE LAMBERT: I was just  
14 getting a message that on YouTube it's a little soft.  
15 So --

16 MS. HUANG: Oh, sorry.

17 ADMINISTRATIVE LAW JUDGE LAMBERT: It would be  
18 better just to be close to the microphone.

19 MS. HUANG: Sure. I apologize.

20 And so there's a distinction, if you look at the  
21 contrast pre- and after January 2010, let's say, when they  
22 got the news; right? And then a house -- Mr. Kragel  
23 mentioned that they started investing in -- in, you know,  
24 real estate properties here in California -- but that is  
25 all post.

1           If you look at what activities and what  
2       connections they had to California pre-2010, and after  
3       2010, it's glaringly different. It is very, very  
4       different.

5           Before 2010, somebody who was here temporarily --  
6       everything they did was temporary. After 2010, maybe they  
7       started putting down more roots; right? And so that's  
8       what you see.

9           And, also, one of the things that I want to  
10      mention is that -- I know Mr. Kragel just presented this  
11      in his presentation, here -- is how he -- both Mr. Housman  
12      and Ms. Pena, you know, resigned from their jobs. And we  
13      explained he didn't really resign. This was for purposes,  
14      you know -- obviously, BCS Australia didn't want to pay  
15      him if BCS LLC in the U.S. was paying him.

16           But Ms. Pena was an architect; right? So,  
17      obviously, she was not -- back in those days, we weren't  
18      doing remote working. So she could not continue working  
19      there. So she had to quit to move here. And that was  
20      another reason, you know, she wasn't thrilled to come over  
21      here; right?

22           And then so, in terms of business interests,  
23      sure, BCS LLC was here, but BCS Australia, without  
24      belaboring the point, was also there. And that was the  
25      core of the business.



1           And then so, you know -- I know I'm running out  
2 of time, so I'm going to give it to Mr. Vesely in a second  
3 here.

4           But, you know, what I really want to sort of  
5 close with this here is the FTB, given many opportunities,  
6 including today, did not challenge any of facts we  
7 presented.

8           And what we presented, even if you overlook --  
9 and I don't -- you know, Mr. Housman's testimony, you can  
10 say "contemporaneous interview", back in February 2009.  
11 He stated he was going to London. There was no reason for  
12 him to say that back then in a business interview except  
13 for the fact that he really was planning to go.

14           And so how do you reconcile that then, you know,  
15 if he really was here and became a resident in April 2008?  
16 That's just impossible given the facts that we have.

17           So I will end it with this -- is that I think we  
18 have met our burden of proof -- that, even if, somehow,  
19 the statements that they made on the returns are  
20 considered quote/unquote, admissions, we have presented  
21 cogent evidence.

22           And by case law, you know, all the case law, you  
23 know, cited by Mr. Kragel, is -- cogent evidence is  
24 sufficient to rebut the statements that Mr. Housman made  
25 on those returns -- returns where he was under the

1 impression 183-day rule equally applied to California.

2 So I will turn this over to Mr. Vesely, now.

3 Oh, one last thing. I'm sorry. I have to say  
4 this. One last point.

5 I know Mr. Kragel made a point about how they  
6 never returned to their Kurraba --

7 MR. VESELY: Kurraba.

8 MS. HUANG: Kurraba house in Australia. I'd just  
9 say, that was a two bedroom house. They rented it out.  
10 By the time they returned to Australia, they had three  
11 children. Try to fit three children into a two-bedroom  
12 house. Clearly, they were looking for a bigger house, and  
13 they did. So, you know, they rented it, they kept it,  
14 absolutely. But they rented it out with a one-year lease  
15 with the intention of returning.

16 Life circumstances changed, and they bought a  
17 bigger house.

18  
19 FURTHER CLOSING ARGUMENT

20 BY MR. VESELY, Attorney for Appellant:

21 All right. I will make it quick, your Honors. I  
22 know we're getting close to our time here.

23 The -- I'm going to address the check-the-box and  
24 basis issues, here. There's a few things that we need  
25 to -- need to respond to. And one of them is the

1 reference to retroactive Entity Classification Election.

2 The fact of the matter is, as we've indicated in  
3 the briefs, you know, Revenue Procedure 2009-41 was issued  
4 in September of 2009. Okay?

5 That's very critical of when that was issued.  
6 Before that time, you could not do a retroactive  
7 classification election -- that -- at least by way of a  
8 revenue procedure.

9 The IRS was allowing retroactive elections  
10 through private letter rulings, and that was -- that was  
11 what led to the Revenue Procedure being issued at that  
12 time. When that was issued, here, that basically was  
13 something that Mr. Housman's advisors -- and I'm talking  
14 about his accountant -- says, you know, "This is  
15 something -- that you can make an election going back 3  
16 years and 75 days."

17 That's not something you make up. That's exactly  
18 what the revenue procedure, you know, provided.

19 And that revenue procedure is what they filed  
20 their Entity Classification Election under. And that is  
21 what the IRS approved. And they approved the effective  
22 date.

23 And, as much as the Franchise Tax Board wants to  
24 ignore the fact that the IRS approved this, the fact of  
25 the matter is, as I said at the beginning, and I said it

1 during the presentation, that is binding on the Franchise  
2 Tax Board, here.

3 It's binding under the statute, it's binding  
4 under the regulations, and it's binding on the FTB's own  
5 submission that it submitted about a year or two years ago  
6 where they said it was.

7 So the fact of the matter is, we don't get to any  
8 of this stuff, frankly. That's -- that's the thing that's  
9 very important here.

10 Mr. Kragel repeats a concept that I -- I ask you  
11 guys to go and dig through those regulations. See if you  
12 find "irrelevancy" anywhere in the federal regulations or  
13 California. It doesn't exist. It's a made up term by  
14 Mr. Kragel or the Franchise Tax Board.

15 The fact of the matter is, as the question that  
16 came from Judge Hosey about AM2021-02, yeah, that's pretty  
17 damn important. That's -- that is the position of the IRS  
18 today, very recent, as it came out. And it basically says  
19 everything that we were saying about being able to do a  
20 retroactive election, and when do you have an actual  
21 entity classification? Because they don't want to say  
22 that they had an entity classification before 4/1/08.

23 But the fact of the matter is, they had a default  
24 classification. That's what the Chief Counsel Memorandum,  
25 you know, underscores. And the fact that they weren't

1 relevant at that point in time is irrelevant, frankly, if  
2 you really want to use the phrase.

3 And so the fact of the matter is, it is critical  
4 that the Entity Classification Election was filed by -- by  
5 Monkey, like it was, and approved by the IRS.

6 And a concept that I -- I -- I listened long and  
7 hard to see if there was anything ever mentioned about it  
8 but Mr. Kragel today. That deemed relevancy provision in  
9 the federal regulations and California regulations, that's  
10 kind of troublesome for them. Because, guess what, the  
11 fact we did an election, we are now deemed relevant on  
12 that date, 4/1/08, specifically under the regulations,  
13 federal and California.

14 And that's critical here because that causes all  
15 the mechanics that we're talking about -- how you do the  
16 liquidation, the contribution, everything else, and the  
17 whole stepped-up basis concept.

18 I mean, the question that Judge Akin asked  
19 about -- about that -- something happening prior to 4/1/08  
20 and actually did a real liquidation -- well, there  
21 wouldn't have been any tax, U.S. or California, if nobody  
22 is a U.S. resident, or a California resident.

23 But the -- what was missing in all of that --  
24 what if that person, like a Mr. Housman, comes to  
25 California after that, like he did here -- guess what

1 happens? He carries that basis with him.

2 Publication 1100 that I referred to earlier on,  
3 and that we've cited, is explicit that way. And, indeed,  
4 the Franchise Tax Board included events and transactions  
5 back to 2000, when Mr. Housman was clearly an Australian  
6 resident, domiciliary, you name it, and not California  
7 one. That is reflected in the assessments here.

8 And bottom line -- the fact is, too -- this is  
9 how it was reported federally. A lot of tax was being  
10 paid there. This was a provision with the retroactive  
11 election under Rev. Proc. 2009-41 -- quite permissible,  
12 quite binding, everything about it here. The fact that  
13 IRS approved the election and -- and the effective date,  
14 that is the end of the story. That's it.

15 Final thing -- the fact to make about a comment  
16 about the appraisal -- I've got to tell you, I don't see  
17 any evidence ever being presented by the Franchise Tax  
18 Board in this case about fair market value because they  
19 don't have any.

20 The appraisal by BPM meets all the criteria that  
21 you need for effective appraisal here. And everything  
22 they've said in their briefs, we've responded to.

23 Final -- I'll close on this -- is that we believe  
24 we've carried our burden of proof on both issues. And we  
25 believe that the claim for refund should be granted --

1           MR. VESELY: Oh. And the notice of action  
2 denying our protest should also be reversed.

3           Thank you, very much.

4           ADMINISTRATIVE LAW JUDGE LAMBERT: Thank you,  
5 Mr. Vesely and Ms. Huang.

6           I'm going to ask my co-panelists if they have any  
7 questions.

8           Judge Akin, do you have any questions?

9           ADMINISTRATIVE LAW JUDGE AKIN: I do have one  
10 question for Appellants.

11           I guess, in Appellants' view, you know, knowing  
12 what they know now, do they ever view themselves as  
13 becoming California residents during the time they were  
14 here in California between the time of 2008 and 2014; and,  
15 if so, when?

16           MS. HUANG: Yeah. I think at some point, during  
17 that period post-2009, with the fact they did become  
18 residents of California.

19           And when? I think when you look at it it's, you  
20 know, sometime in 2010. I would say when they -- when  
21 they bought their house, you know, would be a good --  
22 good -- sort of mark because, you know, that's when they  
23 actually commit themselves to California.

24           Sure, you know, the pregnancy -- I -- I don't  
25 want to keep repeating it, but the pregnancy changed their

1 thinking, changed their intent, changed their view of the  
2 future.

3 And so, I would say, you know, perhaps sometime  
4 in 2010. Certainly, not before then just because, you  
5 know, again, the facts weren't there for a residency in  
6 California.

7 ADMINISTRATIVE LAW JUDGE AKIN: Okay. Thank you.  
8 And I don't have any additional questions.

9 ADMINISTRATIVE LAW JUDGE LAMBERT: Judge Hosey,  
10 do you have any questions?

11 ADMINISTRATIVE LAW JUDGE HOSEY: No further  
12 questions from me. Thank you.

13 ADMINISTRATIVE LAW JUDGE LAMBERT: And I have no  
14 questions.

15 So if there's nothing further, I'm going to  
16 conclude the hearing. And I want to thank both parties  
17 for appearing today, and Mr. Housman, as well, for coming.

18 We will issue a written opinion within 100 days.

19 Thank you. The record is now closed.

20 MS. HUANG: Thank you, very much.

21 MR. VESELY: Thank you, very much.

22 MR. KRAGEL: Thank you, Panel.

23 (Proceedings concluded at 12:00 p.m.)  
24  
25



1 REPORTER'S CERTIFICATION

2  
3 I, the undersigned, a Registered  
4 Professional Reporter of the State of California, do  
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6 That the foregoing proceedings were taken before  
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14 Further, that if the foregoing pertains to the  
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17 transcript ☐ was ☒ was not requested.

18 I further certify I am neither financially  
19 interested in the action nor a relative or employee of any  
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21 IN WITNESS WHEREOF, I have this date subscribed  
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23 Dated: June 14, 2022

24 *Sarah Tuman*  
25

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