

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF:)
)
LA PALOMA NEVADA TRUST,) OTA NO. 18010922
)
)
) APPELLANT.)
)
_____)

CERTIFIED COPY

TRANSCRIPT OF PROCEEDINGS

Sacramento, California

Tuesday, May 24, 2022

Reported by:

SARAH M. TUMAN, RPR
Hearing Reporter

Job No.:
36790 OTA(B)

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TRANSCRIPT OF PROCEEDINGS, taken at
 400 R Street, Sacramento, California,
 commencing at 1:02 p.m. and concluding
 at 2:15 p.m. on Tuesday, May 24, 2022,
 reported by Sarah M. Tuman, RPR,
 Hearing Reporter.

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APPEARANCES :

Panel Lead: ALJ SARA HOSEY

Panel Members: ALJ MIKE LE
ALJ TOMMY LEUNG

For the Appellant: R. TODD LUOMA

For the Respondent: STATE OF CALIFORNIA
FRANCHISE TAX BOARD
SONIA WOODRUFF
CAROLYN KUDUK

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APPELLANT'S WITNESS:	DIRECT	CROSS	REDIRECT	RECROSS
Bill Burger	15	33		

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(Appellant's Exhibits 1-16 were previously received at the prehearing conference)
(Respondent's Exhibits A-W were previously received at the prehearing conference)

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1 Sacramento, California; Tuesday, May 24, 2022

2 1:02 p.m.

3
4 ADMINISTRATIVE LAW JUDGE HOSEY: We are on the
5 record for the Appeal of La Paloma Nevada Trust. This
6 matter is being held before the Office of Tax Appeals,
7 Case Number 18010922. Today is May 24, 2022, and it's
8 approximately 1:00 p.m. We're in Sacramento, California.

9 I'm the lead Administrative Law Judge Sara Hosey,
10 and with me today are Judge Tommy Leung and Mike Le. All
11 three judges will meet after the hearing and produce a
12 written decision as equal participants.

13 Can I have the parties please state their names
14 for the record.

15 MR. LUOMA: My name is Todd Luoma, and I
16 represent the Appellant.

17 MR. BURGER: My name is Bill Burger.

18 ADMINISTRATIVE LAW JUDGE HOSEY: Mr. Burger, is
19 the light -- a green light on your --

20 MR. BURGER: Maybe not. Now, it is. Thank you
21 for checking.

22 ADMINISTRATIVE LAW JUDGE HOSEY: Thank you.

23 MS. WOODRUFF: My name is Sonia Woodruff for
24 Respondent, Franchise Tax Board.

25 MS. KUDUK: Carolyn Kudok for Respondent,

1 Franchise Tax Board.

2 ADMINISTRATIVE LAW JUDGE HOSEY: Okay. Okay.
3 Thank you.

4 Today the issue before us is whether Appellant
5 has met their burden of proof as to qualifying for a
6 tax-deferred treatment regarding the real property on La
7 Paloma Road in Los Altos, California pursuant to IRC
8 Section 1031-(a). This was agreed to in the prehearing
9 conference minutes and orders issued on September 8, 2021.

10 We also have a pending accuracy-related penalty
11 pursuant to our Revenue and Tax Code Section 19164.

12 For the exhibits, we premarked 1-16 for
13 Appellant, and A through W for Respondent, FTB, at the
14 prehearing conference held on September 2, 2021. No
15 objections -- no objections were raised by either party,
16 and all exhibits were admitted into the record, as ordered
17 in the prehearing conference minutes and orders issued on
18 September 8, 2021.

19 All right.

20 Mr. Luoma, would you start with your opening
21 statement please.

22 MR. LUOMA: I will.

23 ADMINISTRATIVE LAW JUDGE HOSEY: You have ten
24 minutes.

25 ///

1 has no assets.

2 The Trust included the sale of properties, both
3 replacement properties, which we'll go into in more detail
4 in a bit or, at least during testimony. They were
5 reported on federal tax returns when they were sold. The
6 property in Sparks, Nevada was sold in 2010. And, again,
7 the final property, the Carson City property, was sold in
8 2017.

9 The distribution from the Trust to the
10 beneficiaries was included on the beneficiary's tax
11 returns in 2017. Tax was paid both federal and
12 California.

13 Another player in this game is the property
14 itself, La Paloma Road in Los Altos. And it was acquired
15 in 1998 by Mr. And Mrs. Burger. And they acquired it as
16 bare land, but it was zoned for single-family home only.

17 So they acquired it for investment and had not
18 yet decided whether they were going to let it ride as an
19 investment in bare land and sell it later, or whether it
20 would be appropriate to develop it. And that took years
21 for them to make that decision.

22 Then, finally, it was sold in 2009. And, in that
23 sale, the like-kind exchanges took place.

24 And then there was the -- the two replacement
25 properties that are also players here. And that is the

1 Sparks property -- Sparks, Nevada, and the Carson City
2 property. The Sparks replacement property was a multiunit
3 residential building. The Carson City was a class A
4 commercial building.

5 And a couple other players in this were the
6 Franchise Tax Board, certain Audit Units. One being the
7 1031 Unit, and one being the Residency Unit.

8 These two Units are probably the most aggressive
9 of all Audit Units in the Franchise Tax Board. It's --
10 it's rare that it -- that a Residency Unit will let a
11 taxpayer not be a resident of California if there's any
12 connection.

13 And for 1031 Unit, I don't think there's ever
14 been a 1031 exchange that was not audited in California.
15 And that was the case here, of course.

16 And how does a Residency Unit come into play?
17 The Franchise Tax Board 1031 Unit took the position that
18 Mr. Burger and his wife, Patricia, lived in the property,
19 the La Paloma Road property, for three years; yet, the
20 Residency Unit of the Franchise Tax Board declined to
21 pursue a residency audit of the taxpayers.

22 And that should tell you at least one thing is
23 that the assumptions made by the 1031 Unit that the tax --
24 that the individuals, beneficiaries, lived in the property
25 was certainly questionable to arrive at that conclusion.

1 1031 -- in this case, all of the technical
2 requirements for 1031 have been met. Properties were
3 identified within 45 days; replacement properties were
4 acquired within 180 days; and, where the issue really
5 comes down to is, was this property either used in trade
6 or business? And we admit that it was not. Or was it
7 in -- for investment purposes?

8 And 1031 permits both of those.

9 And one of the issues that Franchise Tax Board
10 has raised is whether or not this was held for sale and
11 whether or not the property was used for personal
12 purposes. And the testimony will describe those issues.

13 Mr. Burger or the Trust, even if you conflate the
14 two, they were not in the business of buying bare land,
15 developing it, and holding it for sale.

16 But the question is how does somebody who does an
17 investment in bare land get -- get the investment out, or
18 the gain, from such an investment? Well, you have to sell
19 it. And if the decision is to develop that property, to
20 maximize the recovery, and they maximize the recovery --
21 they -- they sold the property for \$7 million dollars and
22 had a significant profit -- then, that doesn't violate any
23 holding out for sale. Because that's the only way you can
24 recover your investment in any property in any event. You
25 have to sell it. You have to hold it out for sale.

1 But it's not a situation where Mr. Burger, or the
2 Trust, is in the business of buying, developing and
3 selling.

4 And, on the personal use, there's just
5 allegations that they lived there for three years because
6 the Franchise Tax Board could not understand why property
7 that was completed for occupancy purposes in 2005 wasn't
8 sold until 2009. Mr. Burger will testify to those things.

9 And one of the more important exhibits that you
10 can review in this is Exhibit 5. And that was the
11 reconstructed timeline by Mrs. Burger about when they were
12 in -- at the property to do service to the property to
13 prepare it for sale. And when they were traveling --
14 either in Africa, New York City, Wisconsin, where they
15 were in Tahoe, Southern California, wherever they might
16 be -- that all appears in Exhibit 5.

17 And you can see there's very little time spent at
18 the property. Certainly, and that's likely, the reason
19 why the Residency Unit did not pursue it as a residency
20 question.

21 The testimony is going to show that the
22 acquisition of the property was for investment purposes.
23 They made the choice to develop it, sell it at a high
24 return, and that they completed the exchanges, all in
25 accordance with 1031.

1 So at the conclusion of the hearing, I think
2 you'll find that the taxpayer has met his burden -- or the
3 Trust has met its burden, even though it doesn't exist
4 anymore -- that the exchange qualified as like-kind and,
5 therefore, tax deferment.

6 Thank you.

7 ADMINISTRATIVE LAW JUDGE HOSEY: Okay. Thank
8 you, Mr. Luoma.

9 Mrs. Woodruff, would you like an opening
10 statement?

11
12 OPENING STATEMENT

13 BY MS. WOODRUFF, Attorney for Respondent:

14 MS. WOODRUFF: Good afternoon, Judge Hosey, and
15 members of the panel.

16 Can you hear me? Is this --

17 ADMINISTRATIVE LAW JUDGE HOSEY: Oh no, little
18 closer. Sorry. A little closer.

19 MS. WOODRUFF: Okay.

20 Thank you for your time today. The -- as I said
21 earlier, my name is Sonia Woodruff, and I'm joined here by
22 my co-counsel, Carolyn Kuduk. Thank you for your time
23 today.

24 The question in this appeal is whether Appellant
25 has established it is entitled to defer gain from the sale

1 of California real property in 2009 under Internal Revenue
2 Code Section 1031.

3 (Reporter interrupted)

4 MS. WOODRUFF: Still too quite? Okay.

5 ADMINISTRATIVE LAW JUDGE HOSEY: Is the green --
6 Is the green light on?

7 MS. WOODRUFF: The green light is on. Can you
8 hear me now?

9 (Reporter interrupted)

10 MS. WOODRUFF: Okay.

11 So, the question in this appeal is whether
12 Appellant has established it's entitled to defer gain from
13 the sale of California real property in 2009 under
14 Internal Revenue Code Section 1031.

15 The Appellant in this case is an irrevocable
16 trust, the La Paloma Nevada 2006 Trust. Mr. And Mrs.
17 Burger are both the Grantors and the primary
18 beneficiaries of the -- under the Trust.

19 The Trust attempted to engage in a like-kind
20 exchange under IRC Section 1031 in 2009, selling Los Altos
21 real property for two Nevada real properties.

22 Section 1031 exchanges can only be performed to
23 exchange property used in a trade or business or held for
24 investment purposes. Because Appellant's property was not
25 held for a trade or business, or for investment, the

1 exchange is not entitled to deferral treatment under IRC
2 Section 1031.

3 The evidence shows the Trust was intended to hold
4 the residence for Grantor's use, enjoyment, and occupancy,
5 rather than for making the Trust property productive.

6 The evidence also shows that Appellant never held
7 the house out for rent, that the Grantor beneficiaries
8 alleged in loan documents that they were staying at the
9 home, and that they occupied the residence while they were
10 in the Bay Area.

11 Under IRC Section 1031, the taxpayers were not
12 holding the property for investment; and, therefore, it's
13 not qualified for like-kind exchange treatment.

14 Thank you.

15 ADMINISTRATIVE LAW JUDGE HOSEY: Okay. Thank
16 you, Mrs. Woodruff.

17 Mr. Luoma, would you like to call Mr. Burger for
18 testimony?

19 MR. LUOMA: Yes, I would.

20 ADMINISTRATIVE LAW JUDGE HOSEY: Okay. I'm going
21 to swear him in. And then FTB may have some question, and
22 then the judges might have some questions for you too.

23 Okay.

24 Please stand and raise your right hand.

25 ///

1 BILL BURGER,
2 called as a witness on behalf of the Appellant, having
3 first been duly sworn by the Administrative Law Judge, was
4 examined and testified as follows:

5
6 MR. BURGER: I do.

7 ADMINISTRATIVE LAW JUDGE HOSEY: Thank you.

8 Please begin.
9

10 DIRECT EXAMINATION

11 BY MR. LUOMA:

12 Q Mr. Burger, for the -- for the record, could you
13 tell us who you are?

14 A My name is Bill C. Burger.

15 Q Are you a resident of California today?

16 A No.

17 Q Were you ever a resident of California?

18 A Yes.

19 Q When were you a resident?

20 A From 1976 to the year 2001.

21 Q And did you move out of California, at that time,
22 in 2001?

23 A I did.

24 Q Where did you move?

25 A I moved to Nevada.

1 Q Do you own a home in Nevada?

2 A I do.

3 Q When did you buy that home?

4 A The year 2000.

5 Q Do you still live in that same home?

6 A I do.

7 Q After you left California, were you engaged in
8 any way by the Franchise Tax Board Residency Unit?

9 A No.

10 Q Did they ever question your status about being a
11 Nevada resident after you left?

12 A Never.

13 Q I'm going to ask you --

14 A I could add to that. I retired in 2001, and so
15 there was no need for me to be here.

16 Q I'm going to ask you a few questions about the La
17 Paloma Road property. When did you buy that?

18 A 2098 -- excuse me. 1998.

19 Q Okay. In 1998 you bought that as Bill and
20 Patricia Burger?

21 A Correct.

22 Q Why did you buy it?

23 A Well, it was a property that had a great 2-plus
24 acre lot and cost structure looked appealing, i.e., it was
25 a good investment.

1 Q Was there a home on the property?

2 A No.

3 Q Was it just bare land?

4 A Yes.

5 Q And this is in Los Altos?

6 A Correct.

7 Q Were there any limitations on the use of that
8 property, zoning-wise?

9 A No. It was for single-family residence.

10 Q Okay. So you couldn't -- could not, if you
11 wanted to, build a multi-residential unit on the property?

12 A No. Not allowed in Los Altos Hills, to the best
13 of my knowledge, ever.

14 Q Now, you bought it as bare land. Had you thought
15 about selling it as bare land at some point?

16 A Yes. It could have certainly been sold as bare
17 land. At that -- Sorry.

18 Q Go ahead. Go ahead.

19 A No. I -- but, at the point we bought it, we
20 didn't have a plan. It just was a good deal, a good
21 investment, and I'd make a decision later on as to what to
22 do.

23 Q At some point, did you decide to improve the
24 property?

25 A We did.

1 Q When was that?

2 A Probably 2003 is when we decided to that with it.

3 Q So you bought it in 1998, and 2003 it -- is when
4 you decided to develop it into a single-family home?

5 A Correct.

6 ADMINISTRATIVE LAW JUDGE HOSEY: I'm sorry. Hey,
7 I'm getting a note. Mr. Burger, can you talk a little bit
8 closer to the mic?

9 MR. BURGER: Oh, okay.

10 ADMINISTRATIVE LAW JUDGE HOSEY: Sorry. We're
11 having --

12 MR. BURGER: I thought I was going good, but
13 I'm -- apparently, I'm not.

14 ADMINISTRATIVE LAW JUDGE HOSEY: It's Okay. I
15 think it drifts in an out for some reason. Its
16 frustrating.

17 MR. BURGER: Yeah, well I'm trying not to move my
18 head, but --

19 ADMINISTRATIVE LAW JUDGE HOSEY: It's -- it's
20 okay. Thank you, you're doing a great job.

21 MR. BURGER: Alright, we'll do better.

22 MR. LUOMA: I know that mine fades in and out.

23 ADMINISTRATIVE LAW JUDGE HOSEY: Yeah.

24 MR. LUOMA: So I apologize for that. Hopefully I
25 can project loud enough that you can at least hear it --

1 take it down.

2 BY MR. LUOMA:

3 Q So in 2003, you decided to develop the property
4 as a single-family home; is that correct?

5 A Correct.

6 Q And what was -- what was the plan at that point?
7 You know, how were you going to develop it? What was it
8 going to be?

9 A Well, it was going to be a single-family
10 residence of substantial scale because that lot allowed
11 for that. And it was going to be built to the level of
12 whatever was possible with that land to increase its value
13 to the maximum. And we were permitted to build what we
14 wanted to build by the city. And the result was that it
15 worked out very well.

16 Q Now, at the time -- well, let me ask you this.
17 How long did it take to build the property itself?

18 A Well, we completed it in, I believe, May or so of
19 2005 -- about 18 months, as I recall, actually, to build
20 it.

21 Q And at that point, could you have sold the
22 property?

23 A It was possible to sell because it did have an
24 occupancy permit. But, frankly, it was not -- sorry for
25 this sound -- it was not completed as a -- as a project by

1 any means. The raw home was completed, but there was a
2 lot of work to still be done. Because it was a big house;
3 7,000-plus square feet; 5-car garage; and the whole 2
4 acres-plus was going to get landscaped and completed,
5 which took years, quite frankly, at the pace we chose to
6 go at it to finish it.

7 Q How long was the process for building the pool
8 and all of its accoutrements?

9 A We started that after we got occupancy sometime,
10 months later, and it took two and a half years,
11 approximately.

12 It was a slow process because it's a hillside
13 lot. And we wanted to make sure we had the ability to get
14 an infinity edge in the pool. And we had a spa. And we
15 had a bunker where all the equipment went in so you
16 wouldn't see it. And it was on two levels. And it was
17 quite elaborate. It had huge rocks to create the hillside
18 effect appropriately.

19 And, frankly, it took two and a half years,
20 total, to get it done.

21 Q And so that would have been sometime in 2007?

22 A Yeah.

23 Q What additional work was required to complete the
24 project so that you could sell it?

25 A Well, again, two-and-a-quarter-plus acres is a

1 lot of land.

2 We had at least a quarter of a mile of fencing
3 that we put in, rot iron fence with gates, and all of
4 the -- the things that you would go with that. And we put
5 in other columns and gates to protect the pool area from
6 other occupancies coming in unnaturally. So that was an
7 additional big project.

8 And put in lots of grass and lots of plants. And
9 we put in a bocce ball court, after the pool, and things
10 of that nature.

11 So the whole lot -- all of it, a hundred percent
12 of it, was landscape.

13 Q And did the property have a driveway from the
14 base up to the top?

15 A Yes, it did. It was over 300 feet long.

16 Q And were there any special electronics or
17 anything else that had to be installed in the property?

18 A Well, over the course of the time after the home
19 was occupiable, we spent a lot of time adding things.

20 We had low-voltage people come in and put in
21 security systems all the way down to the gates -- that you
22 could turn things on, cameras, you name it. It was
23 intended to be as complete a home, for the person who
24 wanted protection with this home, as we could provide.

25 MR. LUOMA: And, for the panel, I direct your

1 attention to Exhibit 7, which is a series of photographs
2 of the property that shows the pool, the landscaping, the
3 -- the road, and the fencing up to -- for the property.

4 And that's all been admitted.

5 MR. BURGER: I mean, I can think of other things
6 that we did.

7 We even had some of the walls faux-painted with a
8 scene of the hillsides near us so that, if somebody
9 looking out of that particular lower bedroom, which had an
10 escape route out because it was underground on that
11 side -- that was all painted, you know, so it looked like
12 you were looking out at the scenery that actually was out
13 there.

14 Stuff like that was part of our plan to really
15 make it as nice a home as we could.

16 Q Now, after May of 2005, when the occupancy
17 certificate was provided by the -- the County Authority,
18 did you live at the property?

19 A No.

20 Q Did you ever live at the property?

21 A No.

22 Q Did you spend time at the property?

23 A Yes.

24 Q What did you do at the property?

25 A Worked on the things I just implied over the

1 course of time. Coordinating construction, coordinating
2 landscaping -- you name it, we did it.

3 Q Now, in 2006, the La Paloma Nevada 2006 Trust was
4 created. Do you recall that?

5 A Yes.

6 Q What was the purpose of that Trust?

7 A The purpose of the Trust was to hold this
8 property in it.

9 Q And was the property transferred, in 2006, to the
10 Trust?

11 A Yes.

12 Q Now, at that time, the occupancy certificate had
13 been issued, but the project had not been completed; is
14 that right?

15 A Correct.

16 Q And did you continue to provide the -- whatever
17 service was required to complete the project as you had
18 envisioned it?

19 A Yes, we did.

20 Q And after 2005, you did not live in the property;
21 correct?

22 A Correct, did not.

23 Q Now, there was some question that was raised,
24 during the course of the audit, about the -- the hardwood
25 floors that were in the property.

1 And Franchise Tax took the position that, because
2 you were having those replaced, it's because of your
3 normal wear and tear of living in the house that required
4 the hardwood to be replaced; is that correct?

5 A Well, we didn't replace any hardwood. But I'll
6 explain why this has come up, maybe, for you?

7 Q Yeah. Please do.

8 A In that, we did resurface the -- the floors, the
9 hardwood floors. And we resurfaced those several months
10 just before we put it on the market to sell.

11 And the reason we did that was, when it was
12 built, we built it with hickory hardwood,
13 three-quarter-inch full wood. And, apparently, that wood
14 was never properly dried.

15 It was -- we needed it, we needed it, and we
16 needed it, and it we got it. And after the installation,
17 a year later -- nine months -- we started getting cracks
18 that were quite broad and wide and prevalent over the
19 whole floor, all of it.

20 And we've had the people out more than once, we
21 paid money for inspections, we tried to collect money from
22 the people who supplied it, et cetera.

23 And we, ultimately, decided to just live with it
24 until we were ready to actually complete a sale plan in
25 place. Because, otherwise, if it got scratched somehow,

1 then we'd be unhappy. So I wanted to be perfect when we
2 actually put the home on the market.

3 So we were able to repair the wood by filling the
4 cracks and refinishing with the proper stain and then
5 clear coating and all that stuff that you do.

6 Q During the course of the audit, there was also a
7 question about a Wells Fargo loan. There was a \$3 million
8 loan and \$500,000 dollar line of credit. Do you recall
9 that?

10 A Yes.

11 Q Why did you obtain the loan?

12 A Because I could.

13 Q And what -- what did you use the funds for?

14 A I used them for other investment purposes.

15 Q And those loans were secured by the La Paloma
16 Road property?

17 A Correct.

18 Q Did you live in the home?

19 A No. We -- we had a primary home in Nevada. It
20 was very nice home. It was a big enough home to satisfy
21 us and our children and grandchildren.

22 I didn't have any reason to live in that house.

23 I was intent on finishing it to my standard,
24 which is pretty strict, and then sell it when the time was
25 right.

1 Q Perhaps you could explain to the panel what your
2 background is and why you were so intense on getting it
3 just right.

4 A Well, I've got engineering degrees, if that helps
5 you. And I've been very particular all my life about
6 things.

7 I've restored cars, I've restored antique
8 motorcycles, I built an airplane that -- that flies, et
9 cetera. And so, you know, that's just who I am.

10 By the way, my wife shares similar goals, so it
11 worked out well.

12 Q Okay. Now, at what point, if you can recall, did
13 you decide to sell the La Paloma property?

14 A Well, we -- we decided to sell it when we were
15 finishing it, number one.

16 Number two, we weren't in a hurry to sell it
17 because the market had tanked. If you know, 2007 and '8
18 were disaster years. And so I bid my time.

19 And once we got everything done -- well, or
20 almost done -- we said, "Well, let's sell it this year."
21 And that was 2019.

22 And so we started interviewing people that I knew
23 for putting it on the market; hired two separate companies
24 to -- to participate in the selling process; and then we
25 started preparing the home, probably around April, for

1 getting it on the market, including figuring out who was
2 going to stage it and, you know, finishing up the last
3 problems that the house had. There were several that we
4 spent money on in the -- in -- right up until June.

5 In fact, even in July, we were still fixing
6 the -- I had the low-voltage people in fixing a security
7 system board failure, or something.

8 So we kept at it until it was, really, perfect
9 and then put it on the market.

10 ADMINISTRATIVE LAW JUDGE HOSEY: Mr. Burger, I'm
11 going to ask you again, just a little but closer. Yeah.
12 I know. I'm sorry.

13 MR. BURGER: It's okay.

14 ADMINISTRATIVE LAW JUDGE HOSEY: I think -- I
15 caught most of it, but I'm getting notes that's its
16 getting softer again. So --

17 MR. BURGER: Yeah. Alright.

18 ADMINISTRATIVE LAW JUDGE HOSEY: Thank you, so
19 much. I really appreciate it.

20 MR. BURGER: What -- What would you like me to
21 repeat?

22 ADMINISTRATIVE LAW JUDGE HOSEY: I think I got
23 most of it. You could --

24 MR. BURGER: I'm sorry for that.

25 ADMINISTRATIVE LAW JUDGE HOSEY: Okay.

1 Judge Leung?

2 ADMINISTRATIVE LAW JUDGE LEUNG: I'm good.

3 ADMINISTRATIVE LAW JUDGE HOSEY: You can hear?

4 Okay.

5 MR. BURGER: Thank you.

6 ADMINISTRATIVE LAW JUDGE LEUNG: I can hear it.

7 MR. BURGER: Sorry.

8 ADMINISTRATIVE LAW JUDGE LEUNG: The eyes don't
9 work.

10 ADMINISTRATIVE LAW JUDGE HOSEY: Okay. I think
11 we're okay. Just checking in. Thank you.

12 MR. BURGER: I'll start eating it. Maybe that'll
13 help. Okay.

14 BY MR. LUOMA:

15 Q All right. At the -- at the point you were
16 preparing to sell it, the -- was there a time you decided
17 that you were going to look at selling it and doing a
18 like-kind exchange?

19 A I'm sorry, I didn't understand the question.

20 Q Okay. When you were selling the property, did
21 you decide you were just going to take the gain on it and
22 pay tax on it? Or were you going to --

23 A Oh, no. No. We wanted to do a 1031 exchange
24 from the early days.

25 Q All right.

1 A Concept.

2 Q And you engaged a third party to provide
3 assistance in --

4 MR. BURGER: Mm-hmm.

5 Q -- executing the 1031?

6 A Right. A San Francisco company.

7 Q For the replacement properties, those are the
8 properties in which you're taking the gain on and
9 acquiring --

10 MR. BURGER: Mm-hmm.

11 Q Had you identified those properties within
12 45 days of the sale of the La Paloma?

13 A Yes, we did.

14 Q And did you close on those properties within
15 180 days?

16 A Yes.

17 Q Could you describe the -- the nature of the
18 Sparks property?

19 A Well, it's -- it was a multifamily unit, or
20 units, I think, actually.

21 Q Okay. So it was residential rental?

22 A Yes. Definitely.

23 Q And could you describe the Carson City property?

24 A It is a two-story, 20,000-square-foot, class A
25 office building.

1 Q And who were the tenants of the building?

2 A I had, actually, during my tenure owning it, got
3 the State of Nevada Department of Business and Industry,
4 specifically, into that property. They took it over in
5 certain groups of time. But, overall, they -- they own --
6 they had all of it.

7 Q Do you recall when the Sparks property was sold
8 by the Trust?

9 A Not in detail. Sometime in 2010, I believe, you
10 said. That's my best recollection.

11 Q Did the Trust report the sale of the Sparks
12 property on it's tax returns?

13 A Oh, yes.

14 Q Do you recall when the Carson City property was
15 sold?

16 A 2017.

17 Q Now, Franchise Tax, at some point, has indicated
18 they thought it was sold in 2011?

19 A Nope. I --

20 Q Do you know what happened in 2011?

21 A I think it was transition between Nevada Trust,
22 you know, La Paloma Nevada Trust -- changing it out to
23 Bill and Patricia Burger, or the Burger Family Trust,
24 temporarily, for financing of the property.

25 And then it was put back.

1 Q Did the lender require that it be transferred
2 from La Paloma Trust?

3 A I wouldn't have done it otherwise.

4 Q And then after the financing was complete, or
5 refinancing was complete, you returned the property to La
6 Paloma Nevada Trust 2006?

7 A It did get returned.

8 Q Right. And then in 2017, did the Trust sell the
9 property?

10 A Correct.

11 Q And was that the last asset within the Trust?

12 A Yes.

13 Q Did the Trust report the sale on its tax returns?

14 A Yes.

15 Q And what happened to the proceeds of the Carson
16 City property sale that were held by the Trust?

17 A They -- they were distributed to the parties that
18 were entitled to receive the funds from the Trust.

19 Q Okay. Did that include you and Patricia?

20 A It did.

21 Q And did you report that distribution on your
22 returns?

23 A Absolutely.

24 Q Both federal and California?

25 A Sure did.

1 Q By going through the 1031 exchange process for
2 the La -- La Paloma Road property and acquiring property
3 in Nevada, did you, at any time, intend to evade paying
4 California tax?

5 A As required, absolutely.

6 Q You mean you paid California tax as required?

7 A Correct.

8 MR. LUOMA: Okay.

9 I have no further questions.

10 ADMINISTRATIVE LAW JUDGE HOSEY: Great. Thank
11 you, Mr. Luoma.

12 I'm going to see Franchise -- Mrs. Woodruff, do
13 you have any questions for Mr. Burger?

14 MS. WOODRUFF: I would -- I would like to ask him
15 just one or two questions, if that's all right.

16 ADMINISTRATIVE LAW JUDGE HOSEY: Yeah. Go ahead.
17 Thank you.

18 MS. WOODRUFF: Thank you. Can you hear me? Is
19 this sufficiently close?

20 (Reporter interrupted)

21 MS. WOODRUFF: Little bit closer. Okay. All
22 right.

23 (Reporter interrupted)

24 MS. WOODRUFF: Okay. All right.

25 ///

1 CROSS-EXAMINATION

2 BY MS. WOODRUFF:

3 Q Mr. Burger, you testified that, during 2005
4 through 2009, you spent time at the -- the Los Altos
5 property; is that correct?

6 A It is correct. We did spend some time there.
7 And it was to work on the property and to make the
8 improvements that I described earlier.

9 Q Great. Thank you. And so, when you say that you
10 spent time there, did you stay overnight at the property?

11 A Sure.

12 Q Okay. Thank you. And while -- when you stayed
13 overnight at the property, did you have anyone else stay
14 at the property with you?

15 A No.

16 Q Okay. So Mrs. Burger did not stay at the
17 property?

18 A Mrs. Burger sometimes did because she did a lot
19 of work on that property in terms of the interior
20 decorating details, et cetera.

21 Q Okay. And did you ever have family or friends
22 visit you at the residence?

23 A You know what? No. We never even used the pool.
24 Period. In all those years, never. Okay?

25 MS. WOODRUFF: Okay. Thank you.

1 I don't have any further questions.

2 ADMINISTRATIVE LAW JUDGE HOSEY: Okay. Thank
3 you.

4 I'm going to see if my panel members have any
5 questions for you.

6 MR. BURGER: Thank you.

7 ADMINISTRATIVE LAW JUDGE HOSEY: Let's start with
8 Judge Le. Do you have any questions for Mr. Burger?

9 ADMINISTRATIVE LAW JUDGE LE: This is Judge Le.
10 This is Judge Le.

11 No questions at this time.

12 ADMINISTRATIVE LAW JUDGE HOSEY: Okay. Thank
13 you. Judge Leung?

14 ADMINISTRATIVE LAW JUDGE LEUNG: Yes, I do.
15 Thank you, Judge Hosey.

16 Good afternoon, Mr. Burger. You had testified
17 that you had bought the Trust property sometime in 1998
18 and that you had lived in California to about 2000, 2001
19 and retired at that time and moved up to Nevada; is that
20 correct?

21 MR. BURGER: I did.

22 ADMINISTRATIVE LAW JUDGE LEUNG: Okay. In going
23 through some of the invoices that were submitted along
24 with your -- your last brief, I saw a number of invoices
25 from a place called Door Hardware -- I guess that's

1 hardware for your, you know, locks and stuff for your
2 doors -- and from a landscaping company called
3 Todd-something.

4 MR. BURGER: Yeah.

5 ADMINISTRATIVE LAW JUDGE LEUNG: All in 2007 and
6 all related to your La Paloma Trust property. And the
7 invoices were addressed to you at an address called 101
8 First Street Suite 451. I believe that was Palo Alto.

9 Can you tell me what's at that address?

10 MR. BURGER: Yeah. A UPS mailbox.

11 ADMINISTRATIVE LAW JUDGE LEUNG: Ah.

12 MR. BURGER: We -- we always kept something to
13 have mail to go to all the time.

14 ADMINISTRATIVE LAW JUDGE LEUNG: Okay. When you
15 embarked on this purchase, later exchange, your Trustee
16 was a Mr. Bayless; is that correct?

17 MR. BURGER: Correct.

18 ADMINISTRATIVE LAW JUDGE LEUNG: And was it he
19 who advised you as to the best way to conduct this
20 transaction to maximize your gain and minimize your costs,
21 including taxes?

22 MR. BURGER: I don't know that I would say that.

23 ADMINISTRATIVE LAW JUDGE LEUNG: Okay. Tell me
24 what exactly he advised you on.

25 MR. BURGER: I don't remember.

1 ADMINISTRATIVE LAW JUDGE LEUNG: Those are my
2 questions. Thank you, sir.

3 Judge Hosey?

4 ADMINISTRATIVE LAW JUDGE HOSEY: Thank you, judge
5 Leung.

6 I think that's all I have for you, Mr. Burger.

7 Mr. Luoma, did you have any other witnesses that
8 you wanted to call before we move forward with arguments?

9 MR. LUOMA: No. No additional witnesses because
10 we had narrowed the issue.

11 ADMINISTRATIVE LAW JUDGE HOSEY: Yeah.

12 MR. LUOMA: And Mr. Burger can answer all the
13 questions on -- on those issues.

14 ADMINISTRATIVE LAW JUDGE HOSEY: Okay. Thank
15 you.

16 Thank you, Mr. Burger.

17 Mrs. Woodruff, did you -- FTB have any witnesses
18 to call?

19 MS. WOODRUFF: No witnesses.

20 ADMINISTRATIVE LAW JUDGE HOSEY: Okay. Then we
21 will move on to our closing arguments.

22 Mr. Luoma, you are up first. Are you ready to
23 begin your presentation?

24 MR. LUOMA: Yes.

25 ADMINISTRATIVE LAW JUDGE HOSEY: Let's go. Thank

1 you.

2
3 CLOSING ARGUMENT

4 BY MR. LUOMA, Attorney for Appellant:

5 All right. Basically, you know, this is -- as I
6 indicated during the opening, that this is a fact-driven
7 case because the -- you know, the technical issues of 1031
8 were all met: 45-day requirement; 180-day requirement;
9 the question of whether it was property used in a trade or
10 business, which we acknowledged was not the case; and/or
11 whether it was used for investment.

12 And the testimony in this case, and all the
13 exhibits that have been submitted, are all supportive of
14 this being an investment.

15 You know, they acquired the property in 1998,
16 didn't decide what to do with it -- they acquired it
17 because it was a good investment. That it had -- it was
18 bare land that either would appreciate on its own as bare
19 land because it was in a desirable location -- they bought
20 it in 1998, which was as -- as -- as you'll recall, the
21 economy was recovering at that time from the 1993 crash of
22 real property in California.

23 So it was on the upswing, but they -- they bought
24 it at a good rate, and in a very desirable location. And
25 then the decision was that they could best provide, or

1 recover -- make gain on a property by developing it.

2 And in accordance with the zoning requirements it
3 had to be a single-family home in Los Altos hills. And so
4 they didn't have the option of developing it in any other
5 way, if they were going to develop it at all.

6 As it turns out, they invested significant
7 amounts into developing the property, but they also had
8 the single largest sale price in -- in the county, in
9 2009, at \$7 million.

10 And you heard Mr. Burger explain and -- and go
11 into detail on the property and what was required to get
12 it prepared for sale.

13 Even though occupancy was granted in May of 2010,
14 it very well could have been sold at that time, but the
15 profit level would have been significantly less. But
16 going through the process, a two-year process, of putting
17 the pool together; the landscaping, additional time for
18 the landscaping; and the fencing; and the driveway.

19 And because, as Mr. Burger indicated, the 2007,
20 2008 crash in the market, you know, he wasn't in any hurry
21 to sell the property. And he didn't need it to live in
22 because he didn't live in it. He had property in Nevada
23 that was his primary home for over 20 years.

24 And so the -- there was no need to sell the
25 property until the timing was right.

1 And then, in 2009, properties were starting to
2 recover; the economy was recovering. And Mr. Burger was
3 coming to the conclusion of the -- finishing the property
4 in the vision that he had in order to sell it. And he did
5 so.

6 And so -- in addition, his testimony was he never
7 lived at the property. Yes, he stayed overnight at the
8 property, but he was there to make sure that the things
9 got done -- either he was doing it, the contractors were
10 doing it, and it was necessary for him to be present.

11 But, as you go through Exhibit 5, you'll see the
12 number of days he actually spent at the property in 2007,
13 8, and 9, which is when the Franchise Tax Board said he
14 was living there full time, which the Residency Unit
15 declined to pursue.

16 And so, you know, I think there's a failure of
17 facts on the part of the Franchise Tax Board. And I think
18 all of the facts support the position that -- that -- that
19 the Appellant has taken, and that Mr. Burger has taken, is
20 that this was investment property, and it was sold for
21 investment property. And it was properly exchanged into
22 the Sparks and the Carson City property -- and that the
23 sales of those property -- one in 2010 and the other in
24 2017 -- were all properly reported for tax purposes.

25 You know, if the Franchise Tax Board doesn't

1 think that it got its share on the sale of the property,
2 it could have issued an NPA for 2010, an NPA for 2017.

3 But they've stuck with this issue of it being an
4 unqualified 1031 exchange. And the facts support that
5 this, in fact, was a proper exchange under 1031, that all
6 the requirements were met, and that the tax should have
7 been deferred.

8 Thank you.

9 ADMINISTRATIVE LAW JUDGE HOSEY: Thank you,
10 Mr. Luoma.

11 Mrs. Woodruff, are you prepared for your closing
12 argument?

13 MS. WOODRUFF: Yes, I am.

14 ADMINISTRATIVE LAW JUDGE HOSEY: Okay. Please
15 begin. Thank you.

16 MS. WOODRUFF: Thank you.

17

18 CLOSING ARGUMENT

19 BY MS. WOODRUFF, Attorney for Respondent:

20 IRC Section 1031 permits taxpayers to defer gains
21 realized on the exchanges of like-kind real property
22 that's held --

23 (Reporter interrupted)

24 MS. WOODRUFF: Okay. I'm sorry. How's this?

25 (Reporter interrupted)

1 MS. WOODRUFF: Much better? Okay.

2 So IRC Section 1031 permits taxpayers to defer
3 gains realized on the exchanges of like-kind real property
4 that's held for productive use in a trade or business or
5 for investment. The taxpayers acknowledge that the
6 property was not used in a trade or business.

7 And so the question is whether the property was
8 held for investment within the meaning of the statute.

9 In this case, because Appellant did not rent the
10 property out, and because they personally used the
11 residence, the property was not held for investment, under
12 the strict definition of that term, for purposes of
13 Section 1031.

14 And at the outset, here, I just want to note that
15 this is not a residency appeal. We are not questioning
16 whether Appellant lived in California for purposes of
17 taxing him as a resident. So it's a very different
18 standard and a very different look at the facts.

19 The Appellant in this case is the fiduciary on
20 behalf of the La Paloma Nevada 2006 Trust. And, even
21 though the Appellant is actually the Trust, you've heard
22 testimony and argument relating mostly to the activities
23 of the Grantors and beneficiaries of the Trust, Mr. And
24 Mrs. Burger.

25 According to their statements, they created the

1 Trust in 2006 to hold a property located at 13193 La
2 Paloma Road in Los Altos, California. And according to
3 public records, they purchased the property in 1998 as an
4 empty lot. And in 2003, they began construction on a home
5 on the property.

6 According to the Town of Los Altos building
7 inspection records, the Grantors completed construction in
8 2005. And, in that year, they individually obtained a
9 \$3 million loan from Wells Fargo Home Mortgage, secured by
10 the property, as well as a \$500,000 revolving line of
11 credit, from -- also from Wells Fargo.

12 In order to obtain these loans, the Trustee
13 transferred the Los Altos property out of the Trust and
14 back to the Grantors. The security instruments for the
15 loans required that the borrowers reside in the property
16 and included a statement that the borrowers agreed to
17 notify the bank immediately if ceasing to live in the
18 property as the primary residence.

19 In 2006, the Grantors obtained homeowners
20 insurance for the Los Altos property and listed their
21 move-in date as January 1, 2006. The Grantors continued
22 to occupy the home, periodically, from the time of
23 completion until they ultimately sold the home in 2009.

24 Now, the Grantors take the position that they
25 primarily occupied the home to oversee the swimming pool

1 construction and landscaping. But the pool was completed
2 by April of 2007. The remaining work on the home, they
3 maintained, was only landscaping, which left the main
4 house free to be occupied.

5 The La Paloma Trust instrument provided that, in
6 fulfilling the purposes of the Trust, the Trustee should
7 hold and administrator the Trust property for the liberal
8 use and enjoyment of the Grantors and other beneficiaries
9 free from rent or other charges.

10 Under Section 6.8 of the Trust, the primary
11 beneficiary has the sole right to the use, possession, and
12 enjoyment of the real property, held by the Trust. The
13 Grantors had the express right to use the property as a
14 residence or second residence without rent. The Trustees
15 were specifically authorized to hold any residential real
16 property for the use and benefit of the beneficiaries.

17 Now, these provisions indicate an intent by the
18 Grantors to leave the property free for their personal
19 use. The language of the Trust instrument reflects the
20 Grantors' intent to be able to use or occupy the residence
21 if they so desired. And to that effect, they specifically
22 empowered the Trustee to hold the property for their use
23 or enjoyment.

24 Now, trust instruments --

25 (Reporter interrupted)

1 MS. WOODRUFF: Oh, sure. Yes. I'm sorry. Okay.

2 So in many cases, trust instruments can, and
3 state laws do, require that a Trustee seek to make the
4 Trust property productive. But these Grantors
5 specifically authorized the Trustee to hold the residence
6 for their own personal use.

7 The language of the instrument grants the
8 beneficiaries the sole right to the use, possession, and
9 enjoyment of the Trust property. So if the beneficiaries
10 were the only parties with the right to occupy the
11 residence, the Trustee could not even hold it out for rent
12 if they determined it would be the best and most
13 productive use of the property.

14 Now, Appellant has argued in the briefs that this
15 trust language is simply boilerplate. But a trust
16 instrument reflects the intent of the Grantors and
17 provides instructions that a Trustee must carry out.

18 And the fact that lawyers can often use trust
19 templates or drafting software doesn't mean the language
20 of the instrument can be ignored or disregarded when it's
21 inconvenient. On the contrary, the words in a trust
22 instrument are to be given their ordinary and grammatical
23 meaning.

24 The words "use and enjoyment" suggests
25 application of the property for the donee's personal

1 benefit and consumption. The Grantors employed this
2 language to direct the Trustee to apply the Trust property
3 very specifically for their personal comfort and
4 enjoyment, rather than for the production of income.

5 Under Section 1031, investment intent must be the
6 primary motive of the taxpayer in holding the property.
7 And personal use of the property as a residence is
8 antithetical to its being held for investment.

9 In Moore v Commissioner -- and that was a Tax
10 Court memorandum decision cited in Respondent's
11 briefing -- the taxpayers owned a second home. They used
12 the home for recreational purposes on several weekends out
13 of the year. But when the taxpayers moved their primary
14 residence farther away from the second home, they stopped
15 using it as a vacation home, and taxpayer visited the
16 property for purposes of only maintaining the home. The
17 taxpayers attempted to exchange that property for a
18 second -- another recreational home and exclude the gain
19 under Section 1031.

20 According to the taxpayers in Moore, the
21 existence of any investment motive in holding a personal
22 residence would render the property eligible for
23 non-recognition treatment under Section 1031. And the Tax
24 Court disagreed with that logic finding it is a taxpayer's
25 primary purpose in holding the properties that counts.

1 The Court continued to state that exclusive use
2 of property by the owner as a vacation residence, really,
3 contradicts any claim by him that the property is held for
4 investment.

5 There is no evidence that the taxpayers attempted
6 to make the property produce income, but there was
7 evidence they used it occasionally as a second residence.

8 The Tax Court summarized its position that the
9 taxpayers would have us believe that they used the house
10 only as a caretaker's cottage while expecting the -- while
11 awaiting the expected appreciation in the value of the
12 property as a whole.

13 And the Court rejected the like-kind exchange
14 because the taxpayers were not holding the property for
15 investment under the definition of the statute.

16 Now, Appellant has referenced Revenue Procedure
17 2008-16, and so I want to address that piece of IRS
18 guidance. The Rev. Proc. provides a safe harbor exception
19 to the rule in Moore for taxpayers who are also renting
20 out their property to others but also have some personal
21 use of the residence.

22 And in those cases, meeting certain criteria, the
23 IRS has stated that they will not challenge the property
24 as not being held for investment. But the critical
25 requirement there is that the taxpayers actually hold the

1 property out for rent at a fair rental rate during the
2 two-year period directly preceding the exchange.

3 Those are not the facts here. Appellant cannot
4 claim the safe harbor because the property was never
5 rented out and all of the available evidence. And
6 Appellant's own admission, shows the Trust was never
7 intended hold the property out for rent.

8 The available documents in the record support
9 this intention, such as the loan documents indicating the
10 Appellants were residing in the property, the homeowners
11 insurance referencing a move-in date, and the Trust
12 agreement reflecting the Grantor's intention to occupy or
13 personally use the residence.

14 So it's important to note that, under the Moore
15 case, the mere hope or expectation that the property may
16 be sold at a gain at some point, cannot establish an
17 investment intent if the property used -- if property was
18 used as a residence by the taxpayers.

19 Under the case law and the previously cited Rev.
20 Proc., there either needs to be no personal use of the
21 property or some personal use, along with holding the
22 property out for rent, in order for it to be considered
23 investment property under Section 1031.

24 I also want to address the new amended 2017
25 return Appellants filed in June of 2020, after the filing

1 of this appeal. That amended return reflects that
2 Appellants ultimately did sell one of the Nevada
3 properties for a gain in 2017, but that they had net
4 operating losses available to offset that gain in 2017.

5 And Respondent's position is that the exchange
6 failed to qualify in tax year 2009. And so the -- that
7 gain cannot be deferred and recognized later, in -- in
8 year 2017 or -- or any other year.

9 Appellant has not met its burden of proving they
10 satisfied the investment purpose requirement of Section
11 1031 in 2009. Appellant has also failed to supply any
12 details or support to allow for abatement of the penalty.

13 Accordingly, Respondent's assessment should be
14 upheld.

15 Thank you.

16 ADMINISTRATIVE LAW JUDGE HOSEY: Thank you,
17 Mrs. Woodruff.

18 Mr. Luoma, you have five minutes for a final
19 statement, if you would like to that now.

20 MR. LUOMA: I would.

21 ADMINISTRATIVE LAW JUDGE HOSEY: Please begin.

22
23 FURTHER CLOSING ARGUMENT

24 BY MR. LUOMA, Attorney for Appellant:

25 Under 1031, property is not required to be rented

1 in order to qualify for investment property.

2 As Mr. Burger testified, he could have just left
3 it bare and it would have been investment property. But
4 Franchise Tax Board is saying, "Well that now that you've
5 built something on it, it now has to be rented," even
6 though, arguably, you don't need to rent bare land in
7 order to qualify for investment property. So 1031 doesn't
8 require that there's any rent being done at all.

9 And I'd like to point out, again, Exhibit 5 goes
10 into the details of the amount of time that was spent at
11 the property.

12 In calendar year 2007 there are 52 days that
13 either Mr. Burger or Patricia Burger were at the property
14 to do business in getting the property constructed and
15 improved, ultimately, for the sale.

16 And in calendar year 2008, there were 40 days in
17 which they spent time at the property. In calendar
18 2009 -- that's only half a calendar year since it was sold
19 in July -- they spent 36 days. And those were for the
20 final tweaks to the property.

21 So, to take the position that the Burgers lived
22 in the property for three years is really an overreach.
23 And they have a property that they lived at, that
24 Mr. Burger testified to, in Nevada. That was their
25 primary residence.

1 But in order to get the property finally
2 constructed to the point where it satisfied his views on
3 what the property should look like in order to sell it at
4 \$7 million dollars and have a gain of 3 to \$4 million
5 dollars on that, that was significantly better of an
6 investment with the property developed.

7 And so, when you look at the numbers based on
8 Exhibit 5 -- that's the reconstructed timeline -- it
9 demonstrates that the taxpayers were not living there. It
10 wasn't for their personal use. And the Exhibit also
11 indicates the activities that were taking place during the
12 time that they were at the properties.

13 So I urge you to take a look at Exhibit 5. I
14 urge you take a look at my final brief, where it lays out
15 those details. And you'll find, and you should conclude,
16 that the transaction qualified for tax-deferred like-kind
17 exchange under Section 1031 of the Internal Revenue Code.

18 Thank you.

19 ADMINISTRATIVE LAW JUDGE HOSEY: Thank you,
20 Mr. Luoma.

21 I'm going to see if my panel members have any
22 questions before we close.

23 Let's start with Judge Le.

24 ADMINISTRATIVE LAW JUDGE LE: Yes, I have a few
25 questions.

1 First, for Appellant, was the house furnished?
2 The house at La Paloma property?

3 MR. LUOMA: It was not furnished, but it was
4 staged at the end -- staged in order to make it appear
5 livable.

6 ADMINISTRATIVE LAW JUDGE LE: Okay.

7 MR. LUOMA: That's -- that's what real estate
8 agents do.

9 ADMINISTRATIVE LAW JUDGE LE: Okay. And Exhibit 7 is
10 pictures of the property staged? Not for --

11 MR. LUOMA: Exhibit 7 has photographs of the --
12 of the property. That's correct.

13 ADMINISTRATIVE LAW JUDGE LE: Okay. Thank you.

14 I have a question for the Franchise Tax Board.

15 MS. WOODRUFF: Yes.

16 ADMINISTRATIVE LAW JUDGE LE: Appellant argues
17 that the FTB Residency Unit determined that the Burgers
18 were not residents of California. Can you confirm whether
19 or not the FTB Residency Unit actually determined that?

20 MS. WOODRUFF: Well, I don't believe there was
21 ever a residency audit performed. That's not my
22 understanding. They may have looked at it. I'm not
23 entirely sure. But there was definitely no determination
24 letter issued regarding an audit based on residency.

25 ADMINISTRATIVE LAW JUDGE LE: Okay. Thank you.

1 No further questions.

2 ADMINISTRATIVE LAW JUDGE HOSEY: Thank you, Judge
3 Le.

4 Let's moved to Judge Leung. Do you have any
5 questions?

6 ADMINISTRATIVE LAW JUDGE LEUNG: Yes, I do.
7 Thank you, Judge Hosey.

8 I'll start with Ms. Woodruff, first. I'd like
9 you to follow up on what Mr. Luoma argued -- that if the
10 Burgers had not stayed a day at all at the property, it
11 would qualify for 1031 treatment. Is that a correct
12 statement?

13 MS. WOODRUFF: I don't believe so. With all of
14 the evidence that we have available to us, we can see
15 evidence of what the -- the Grantors' intention was when
16 they were forming the Trust and placing the property into
17 trust.

18 And, you know, between the loan documents, the
19 Trust instrument, the home owner's insurance, and the fact
20 that they stayed there, all of the evidence seems to show
21 that there was an intention to use and occupy the
22 residence.

23 So it's -- it's not just the one factor. It
24 really is all of the evidence weighed together.

25 ADMINISTRATIVE LAW JUDGE LEUNG: Mr. Luoma, would

1 you agree with that? I --

2 MR. LUOMA: No, I disagree.

3 ADMINISTRATIVE LAW JUDGE LEUNG: Okay. And --
4 and do you have any citations that would just -- would say
5 that, if the Burgers had never stayed at the property at
6 all, that they would qualify for 1031?

7 MR. LUOMA: I can't draw a case at this time,
8 but, absolutely.

9 1031, you know -- Franchise Tax Board is looking
10 at this as -- as too narrow, you know.

11 Let's say the Burgers never developed it, but
12 they never rented out the bare land, you know, for
13 whatever purpose. And under their argument, that wouldn't
14 qualify for a 1031 exchange, even though the testimony
15 that was provided to you today, under oath, was that they
16 bought the property with the intent to invest because it
17 was -- it was a good property that had the ability to
18 appreciate, either as a bare land or developed into a
19 single-family home.

20 And so let's say they developed it into a
21 single-family home and never stayed on the property; yes,
22 they would still qualify -- that would qualify as a 1031
23 exchange.

24 ADMINISTRATIVE LAW JUDGE LEUNG: Mm-hmm.

25 And Ms. Woodruff, I believe you said the test was

1 primary intent.

2 MS. WOODRUFF: Correct.

3 ADMINISTRATIVE LAW JUDGE LEUNG: So how much is
4 primary?

5 MS. WOODRUFF: Well, I don't know that there is a
6 definition of primary. But I think it means the first, or
7 the most important, motive.

8 And just to follow-up on something that Mr. Luoma
9 said, I don't think it's correct that if this was a -- a
10 plot of land, an undeveloped piece of land, we would
11 consider this to be not held for investment. That would
12 be a completely different situation.

13 In that case, there wouldn't have been any
14 residents on the property, any ability to stay there, or
15 use the property as a second residence.

16 And so I think that would be a different
17 situation. It might be more likely to be held for
18 investment in that case.

19 ADMINISTRATIVE LAW JUDGE LEUNG: Okay. And
20 something that you mentioned in your closing -- you talked
21 about the Moore case and the IRS procedure in 2008 --
22 about the Moores, and the taxpayers, and the IRS
23 procedure, owning property and living in it themselves,
24 and later on changing their minds, and so forth, so on.

25 In this case, the taxpayers are not the Burgers.

1 It's the Appellants. And the individuals or persons
2 living in -- on the property were the Burgers and not the
3 Trust.

4 Is there -- is there a distinction or a
5 difference? Or what do you say about that?

6 MS. WOODRUFF: Are you referring to the fact that
7 the Appellant is actually the Trust -- Trustee on behalf
8 of the Trust?

9 ADMINISTRATIVE LAW JUDGE LEUNG: The Trust is the
10 Appellant; correct?

11 MS. WOODRUFF: Right. Yeah. Well, I think, in
12 this case, there really isn't much of a distinction. The
13 Trust was a Grantor Trust, which means it's taxed for
14 income purposes as if its disregarded for -- for income
15 tax purposes.

16 You can file a separate trust tax return, as they
17 did in this case. But if you look at the Trust, it was a
18 Grantor Trust. The Grantors transferred property in, and
19 back out, of the properties. There's a lot of just, you
20 know, treating the Trust as if it were not really not an
21 entity.

22 And so I don't think it matters too much in this
23 case to look to whether, you know, the Trustee or the
24 Grantors actually lived in the property.

25 ADMINISTRATIVE LAW JUDGE LEUNG: Okay.

1 Mr. Luoma, your comment, if any?

2 MR. LUOMA: I raise that issue in one of my
3 briefs about the Franchise Tax Board conflating the two
4 separate and distinct taxpayers. The Trust is a separate
5 and distinct taxpayer and, frankly, it no longer exists,
6 no longer has assets.

7 No matter what the panel decides, I guess there's
8 going to be a question about what happens to the tax
9 liability if Franchise Tax Board is successful?

10 Anyway, I guess that's really a non-issue that
11 you're going to have to deal with. But they conflated the
12 two separate entities, taxpayers.

13 And our position all along has been that the
14 individuals, the beneficiaries, were not living in the
15 property. They were there to ensure that it was
16 constructed in accordance with Mr. Burgers vision of what
17 that property could be.

18 And again, they spent minimal amount of time in
19 the property in 2007, 8, and 9, as I lay out in my final
20 brief: You know, 40 days in 2007; 36 days in -- sorry --
21 40 days in 2008; 36 days in 2009; and --

22 MR. BURGER: Five, two?

23 MR. LUOMA: Yeah. 52 days in the -- in 2007.

24 So Franchise Tax is trying to collapse everything
25 and say, "Well, they were there; therefore, that negates

1 the fact that they could sell that property for \$7 million
2 and get a gain of 3 to \$4 million." And somehow that --
3 that no longer is an investment, even though that's the
4 way it started, and that's how the individuals decided to
5 develop the property because that could maximize the gain
6 that they would get out of this thing.

7 And so I think the -- the Trust is the taxpayer
8 at issue here. The individuals, essentially, acting on
9 behalf of the Trust, were ensuring the Trust could
10 maximize the gain.

11 ADMINISTRATIVE LAW JUDGE LEUNG: Okay.

12 MR. LUOMA: I don't know if that answered your
13 question, or if I got too far into the weeds.

14 ADMINISTRATIVE LAW JUDGE LEUNG: Thank you,
15 Mr. Luoma. Thank you, Ms. Woodruff.

16 Judge Hosey, I'm done.

17 ADMINISTRATIVE LAW JUDGE HOSEY: Okay. Thank
18 you, Judge Leung.

19 If there's -- do you have any other questions
20 before we close for the afternoon?

21 Can you hear me?

22 Any questions, Mr. Luoma?

23 MR. LUOMA: No, I have no further questions.

24 ADMINISTRATIVE LAW JUDGE HOSEY: Mrs. Woodruff?

25 MS. WOODRUFF: No questions.

1 ADMINISTRATIVE LAW JUDGE HOSEY: Okay. Then we
2 are ready to submit the case today. The record is now
3 closed.

4 This concludes our hearing for today, and the
5 panel will meet and decided the case, based on the
6 documents and arguments presented. We will aim to send
7 both parties our written decision no later than 100 days
8 from today.

9 Thank you for coming in today. The hearing is
10 now adjourned. The next one is tomorrow at 9:30 a.m.

11 Thank you.

12 MR. LUOMA: Thank you.

13 MS. WOODRUFF: Thank you.

14 MR. BURGER: Thank you.

15 (Proceedings concluded at 2:15 p.m.)
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1 REPORTER'S CERTIFICATION

2
3 I, the undersigned, a Registered
4 Professional Reporter of the State of California, do
5 hereby certify:

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

14 Further, that if the foregoing pertains to the
15 original transcript of a deposition in a federal case,
16 before completion of the proceedings, review of the
17 transcript [] was [x] was not requested.

18 I further certify I am neither financially
19 interested in the action nor a relative or employee of any
20 attorney or party to this action.

21 IN WITNESS WHEREOF, I have this date subscribed
22 my name.

Sarah Tuman

23 Dated: June 14, 2022
24
25

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