

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:)Case No.
)19125583
DANIEL SCHRYER,)
)
Appellant.)
_____)

CERTIFIED COPY

TRANSCRIPT OF PROCEEDINGS

Cerritos, California

Tuesday, February 14, 2023

Reported by:

SKYY CHUNG
Hearing Reporter

Job No.:
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TRANSCRIPT OF PROCEEDINGS, taken at
Cerritos, California, commencing at 2:04 p.m.
on Tuesday, February 14, 2023, reported by
Skyy Chung, Hearing Reporter.

1 APPEARANCES:

2 Panel Lead: MIKE LE, JUDGE
3 OVSEP AKOPCHIKYAN, JUDGE
4 SHERIENE RIDENOUR, JUDGE

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I N D E X

E X H I B I T S

(Appellant's Exhibits 13-16 were received on page 7)

(Department's Exhibits CC-EE were received on page 7)

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1 CERRITOS, CALIFORNIA; TUESDAY, FEBRUARY 14, 2023

2 2:04 P.M.

3
4 JUDGE LE: We are now going on the record. We are
5 opening the record in the appeal of Schryer. This
6 matter is being held before the Office of Tax Appeals.
7 The OTA case number is 19125583. Today's date is
8 Tuesday, February 14th, 2023, and the time is 2:04 p.m.
9 This hearing is being held in person in Cerritos,
10 California. Today's hearing is being heard by a panel of
11 three administrative law judges.

12 My name is Mike Le, and I will be the lead judge.
13 Judge Ovsep Akopchikyan and Sheriene Ridenour are the
14 other members of this tax appeals panel. All three
15 judges will meet after the hearing and produce a written
16 opinion as equal participants. Although the lead judge
17 will conduct the hearing, any judge on this panel may
18 ask questions or otherwise participate to ensure we have
19 all the information needed to sign for this appeal.

20 Now, for the record, will the parties please
21 state their names and who they represent, starting with
22 Respondent, Franchise Tax Boar.

23 MR. HALL: This is Nathan Hall, on behalf of the
24 respondent, Franchise Tax Board. Thank you.

25 MS. ZUMAETA: Jackie Zumaeta, Z-U-M-A-E-T-A, on

1 behalf of the Franchise Tax Board.

2 JUDGE LE: Thank you. And for Appellant?

3 MR. FEDOR: My name is Robert Fedor, on behalf of
4 Daniel Schryer.

5 JUDGE LE: Thank you.

6 Let's move on to the minutes and orders. As
7 discussed with the parties at a second prehearing
8 conference on January 17th, 2023, and notated in my
9 minutes orders, there are five issues in this matter:
10 The first is whether Appellant may exclude from income
11 approximately 15 million in capital gain for the 2012
12 taxable year for California tax purposes; the second is
13 whether Appellant is entitled to claim a passive
14 activity loss deduction, with respect to the residential
15 property located on Crest Court in Beverly Hills,
16 California; the third is whether Appellant is entitled
17 to claim a carryover loss with respect to activity at
18 the Crest Court property and the 2012 taxable year --
19 related to this issue is whether Appellant needs to
20 prove his 2011 loss relating to the Crest Court property
21 after the FTB withdrew his assessment for his 2011 tax
22 year; the fourth is whether Appellant is entitled to
23 deduct a capital loss of \$860,330 from the sale of the
24 Crest Court property; and the fifth is whether Appellant
25 is liable for the late filing penalty. Respondent has

1 conceded the accuracy-related penalty.

2 No witnesses will testify at this hearing for
3 either party. Also, Appellant's Exhibits 1 through 12
4 and Respondent's Exhibits A through BB were entered into
5 the record in my minutes and orders. After the
6 prehearing conference, Appellants submitted Exhibits 13
7 through 16, and Respondents submitted CC through EE.
8 Neither party submitted an objection by the deadline
9 notated in my minutes and orders. So Exhibits 13
10 through 16 and Exhibits CC through EE are entered into
11 the record.

12 (EXHIBITS 13-16 WERE ADMITTED INTO THE RECORD.)

13 (EXHIBITS CC-EE WERE ADMITTED INTO THE RECORD.)

14 JUDGE LE: This oral hearing will begin with the
15 presentation for up to 30 minutes.

16 Does anyone have any questions before we begin
17 with Appellant's presentation? Respondent, Franchise
18 Tax Board, any questions?

19 MR. HALL: No questions, Judge.

20 JUDGE LE: Thank you.

21 And Appellant, any questions?

22 MR. FEDOR: No questions, Judge. Thank you.

23 JUDGE LE: Okay. Appellant, you have up to 30
24 minutes for your presentation, starting now, 2:07 p.m.
25 Please proceed.

1 MR. FEDOR: Thank you very much.

2
3 PRESENTATION

4 MR. FEDOR: And thank you, Panel. It's an honor
5 and privilege to be here. It's my first time before the
6 OTA. I came in from Cleveland, Ohio last night, so I
7 look forward to this, and thank you for the opportunity.
8 I appreciate it.

9 Just to reiterate quickly, there's three macro
10 issues in this case: One is the capital gain issue of a
11 15 million dollars, which arose from the sale of real
12 estate to an unrelated entity in the state of Colorado;
13 the second macro issue relates to this Crest Court
14 property in Beverly Hills, California. It's rental real
15 estate property. The issue is whether it was entered
16 into with a profit motive. The issue is whether it was
17 sold at a loss, the basis for that, and I look at that
18 as a macro issue related to that Crest Court property.
19 The third issue is related to the delinquency penalty
20 for the late filing of a 2012 tax return, and I will
21 concede if this hearing is made for an unreasonable for
22 not filing a timely tax return in this case. So that
23 one's off target already, so --

24 JUDGE RIDENOUR: I'm sorry to interrupt. Just to
25 make sure, the taxpayer concedes the late filing

1 penalty?

2 MR. FEDOR: That's correct.

3 JUDGE RIDENOUR: Thank you.

4 MR. FEDOR: So I'm going to take the issues a
5 little bit out of order here this afternoon and address
6 the capital gains issue second. The issue, with regard
7 to the Crest Court property, really runs through most of
8 the argument for appellants, and I'd like to address
9 that in two or three different sections: One is the
10 profit motive. Daniel Schryer is a professional real
11 estate investor. This is what he's done for decades;
12 it's what he's done as a career. And you can see from
13 all of the exhibits entered as part of the record, that
14 Mr. Schryer has numerous interests in real estate. He
15 has them personally held, and in fact, that's the
16 capital gain issue. That 15-million dollar capital
17 gains issue is, as a result of one of -- a related real
18 estate investment that he has. And so, one of the
19 things that Respondent has disallowed in their proposed
20 assessment is that this transaction wasn't entered into
21 with a profit motive.

22 So 2008, 2009 timeframe, this property, Crest
23 Court, is related to Ed McMahon, the old -- the
24 gentleman who passed away -- he was on the Johnny Carson
25 show. It was his residence. It was his residence. And

1 Ed McMahon was faltering in his health. It was 2008,
2 2009. It was a real estate crisis. Everybody remembers
3 how bad it was in 2008 and 2009. And the house was in
4 foreclosure, and Mr. Schryer purchased that
5 note -- purchased it out of foreclosure and converted it
6 to rental real estate. And you will hear from
7 Respondent that, well, there was only sporadic rent
8 paid. There wasn't much rent paid going along. There
9 really wasn't a profit motive.

10 But that's not the only thing this panel should
11 consider. It's not just the landlord-tenant
12 relationship, which existed between the parties. But my
13 client, Mr. Schryer, Appellant herein, often times makes
14 his profit from the disposition of the asset. And so,
15 this was purchased in 2009. Substantial improvements
16 were made to the property. True and conceded, there
17 wasn't a lot of rent collected, but improvements were
18 made to the property. There is an affidavit from
19 Mrs. McMahon, who was a survivor. Ed McMahon passed
20 away during this time period. And she indicated she was
21 of the belief that this was a landlord-tenant
22 relationship between the parties. She did her best to
23 pay sporadic rent. It wasn't paid often. But Schryer,
24 in this instance, had the expectation, like he does for
25 all his other investments, where he would reap the

1 rewards in 2012, when this real estate was actually
2 sold.

3 And so, the market was so bad. But if you take a
4 look at the 2012 scheduling and the individual tax
5 return, there's at least nine different parcels of real
6 estate of which he hauled as a real estate investor.
7 Respondent did so, cites through their briefing, that
8 Mr. Schryer is a real estate investor. So I don't know
9 how they can argue on the one hand that this wasn't
10 entered into for a profit motive, but on the other hand
11 say that he's actually a real estate investor, and this
12 is what he does.

13 And this is all that Mr. Schryer has done his
14 entire life and used to do until today. And sometimes
15 he hits big; sometimes he loses money, but this is what
16 he does for a living. And that's repeat through the
17 record into the tax filings in this case. So that is
18 that's the first part regarding the profit motive.

19 It's important to note, also, that originally
20 this matter involved -- actually, it's 2011 and 2012.
21 And in 2011, a notice of proposed assessment was
22 withdrawn in 2020. You're going to hear from
23 Respondent, I'm sure, that that is irrelevant. We still
24 need to be -- the losses proved of for 2011; however,
25 Appellants would argue that that issue is not an issue.

1 It should be a stop from arguing what was done in 2011,
2 other than as it relates to basis. Because we all know
3 sitting here that basis is always relevant for
4 determinations of gains or losses at a point of
5 disposition.

6 But what's important in this case is, you have
7 suspended losses from these periods. You have 2009,
8 when the purchase was made. You have 2010. You have
9 2011. All these were suspended losses by and large,
10 very little of which was claimed in the current year.
11 And in 2012 -- it was the first couple of days of 2012,
12 is when the property was sold. And it was sold at a
13 loss, and that is when the suspension is released and
14 Mr. Schryer should be able to claim those losses. It's
15 a simple passive activity investment, where you're not
16 allowed to -- you incur the losses, but you're not
17 allowed to take them until the asset is disposed of.
18 And in 2012, this asset was disposed of, and that is our
19 argument, certainly for the losses being carried forward
20 into 2012, and those being released into the 2012 tax
21 year, but it's a separate issue then related to the
22 basis argument. So those are two separate issues,
23 obviously, both of which would relate to Crest Court.
24 That's why I broke in out Crest Court first, because
25 that's a majority of the issues in this case.

1 So going back to the profit motive argument, just
2 briefly -- and we cited in our response brief that there
3 are several factors which go into the determination of
4 whether a taxpayer has a profit motive for an investment
5 activity like this. And the first question would call
6 into mind: Did the taxpayer conduct the activity in a
7 businesslike manner? And here, the taxpayer kept track
8 of all income expenses, like he does for all his other
9 real estate activities. He has a bookkeeper in charge.
10 He invested in the property, he paid for repair and
11 maintenance costs, he paid for substantial improvements
12 to the property, all of which are reflected in the books
13 and records, and on the tax returns filed by
14 Mr. Schryer.

15 As I indicated and notated in Exhibit 4 and made
16 part of the record, that Ms. McMahon submitted an
17 affidavit regarding her attempts to pay rent after her
18 husband had passed away. And she was of the belief that
19 there existed a landlord and tenant relationship between
20 the parties. And this is a short-term transaction: 2009
21 to 2012. By the first week of 2012, in January, his
22 asset was disposed of. You see there's tentative
23 closing documents for the last week, two weeks of
24 December, but it ultimately closed in the first week of
25 January in 2012.

1 The second factor in determining profit motive is
2 the expertise of a taxpayer. Appellant's a real estate
3 professional; he has been for decades. As I have stated
4 previously, the actual gain related to the Colorado
5 asset, which we will discuss briefly and shortly, that's
6 also from his activities as a real estate professional.
7 He has a multitude of different disclosures on Schedule
8 E through different past entities, typically a single
9 member of LLC, which is also what helped Crest Court.
10 This is what this gentleman does all over the world. He
11 has investments in Bali, he has investments throughout
12 California. This was a Colorado investment.

13 Just to give you some background, the investments
14 were typically back in the day. And what's at issue
15 here, Mr. Schryer would buy dilapidated buildings
16 typically out of Chapter 11 bankruptcy or Chapter 7
17 bankruptcy. They would take these old buildings and
18 convert them into server farms. And that was a growing
19 business during that time frame. And they'd lease up
20 these server farms to Fortune 100 companies, and then
21 they'd turn around and sell it, and that's how they made
22 their money. And he was one person amongst many in
23 these different investments.

24 And so, if you were to see, which isn't a part of
25 the record, tax returns from Mr. Schryer, inside and

1 outside these periods, you would see that periodically,
2 he does really well. He might make 10, 20 or
3 \$30 million, but he also might lose significant amounts
4 in off-years where he's pumping money into these
5 investments, but he doesn't have a return yet. Because
6 what's key on this is the end; the disposition of the
7 asset. Not occurred maintenance, the repairs, or
8 improvements to the asset. That's also obviously
9 suspended losses, which are then, as I've said, released
10 upon disposition of the asset. So that's the second
11 issue regarding the profit motivation.

12 The third factor that goes into profit motivation
13 is the time and effort by the taxpayer and the activity.
14 And I'll state from this panel, this is one of many
15 assets Mr. Schryer had in this timeframe. He had a
16 bookkeeper involved. He wasn't day-to-day involved in
17 this, but this is not your typical rental real estate
18 investor. Certainly not a residential real estate
19 investor. He's more along the licensed of a commercial
20 real estate investor or a building or apartment
21 investor. So this is just one of several in his
22 portfolio. And he has, as I indicated, on a 2011, 2012
23 income tax returns, he has at least nine different
24 rental real estate activities on the return, and some of
25 which have passive income, some of which have passive

1 losses, and everywhere in between. So this fit right
2 into his portfolio.

3 And the real -- we would not be here today on
4 this issue -- but for -- he purchased it back in 2009,
5 but there was an expectation that the market would turn,
6 certainly out here in California, and elsewhere. And
7 when this was sold in 2012, the market still wasn't
8 good. And so, he incurred a loss from the sale of it in
9 it in 2012. So that's the profit motivation issues.

10 And I don't think there's anything that this
11 panel should take issue with, that he was looking to
12 earn to take a profit. I don't see where Respondent
13 could ever -- excuse me -- could ever see where this
14 wasn't entered into with a profit motivation. This is
15 all this guy does. And historically, he's made a lot of
16 money over the years from real estate investments.

17 As I stated, the 2011 loss, which I believe was
18 stipulated to by Respondent as well, from the Crest
19 Court property is \$455,320. That was the issue, where
20 it was the notice of proposed assessment. And for
21 whatever reason -- and I don't know the reason -- the
22 FTB withdrew that at notice of proposed assessment. So
23 it's Appellant's position that the \$455,000 loss taken
24 on this 2011 return should be allowed in full and then
25 included as part of the past activity losses, which were

1 suspended until 2012, when a property was disposed of.
2 That's 2011 issue related to that.

3 I think what you'll hear from -- from Respondent,
4 is that issue still needs to be proven up. It's
5 Appellant's position that since they withdrew the
6 proposed assessment, the tax return stands on its own.
7 There should be a stop from arguing that. It's not a
8 basis argument. It's being lost, which was taken as a
9 current year deduction on the 2011 tax year return. Had
10 the FTB wanted to litigate that issue, they should not
11 have withdrawn the notice of proposed assessment. We
12 would still be sitting here today discussing that issue.
13 But because they took the action of withdrawing the
14 proposed assessment, Appellant argues that they are
15 stopped, as I said, previously, from making that
16 argument and asserting that that number is still in
17 issue and is still in controversy.

18 The next issue I'd like to address, with regard
19 to the Crest Court property, are the basis computations.
20 Appellant submits that he has substantiated a loss in
21 the amount of \$860,000. The FTB would submit that the
22 loss is 469,165. I think some of that is related to the
23 misunderstanding and the depreciation or otherwise. But
24 what I would submit to the panel here today is that the
25 property was purchased, and purchase price was

1 \$3.8 million. That is Mr. Schryer, the Appellant here,
2 taking over here the note that was due countrywide that
3 the McMahons had. The property was then sold in 2012.

4 In addition to that, there was -- and I'm
5 referring to Exhibit Y of Respondent's submissions to
6 the record, and all of these are numbers which are
7 predominantly agreed to. There is an additional basis
8 of \$467,516. There is a cost basis of 4.267516. That's
9 \$4,267,516. And then the proceeds from sale are
10 \$3,780,810. And that's Exhibit V in the record. And
11 the loss from this sale, cash-on-cash loss, is
12 \$1,188,706. Of course, we all know when you're
13 computing gain for tax purposes. Then you have to back
14 out from depreciation that was previously taken. So you
15 back out and depreciation taken from 2009, 2010, and
16 2011, and that totals, \$322,710. That's stipulated to
17 between the parties. And that's a loss, then, from that
18 transaction of 865,996, which is about what was
19 addressed in the issues before the panel.

20 And the prior year's depreciation deductions are
21 reflected in Exhibits P, Q, and R. And, you know, much
22 of this is agreed to and stipulated between the parties
23 here. So I look at this is almost akin to a summary
24 judgment motion, and that 95 percent of these facts are
25 agreed to with issues of law, with regard to the passive

1 activity rules, with regard to profit motivation rules,
2 with regard to capital gain rules, and the basis rule.
3 So there's not a lot of issue factually between the
4 parties. But obviously, there is legally, and that's
5 why we're here today.

6 The last issue -- so I'm done with Crest Court.
7 That's the macro issues for Crest Court: profit motive;
8 the loss from the conduction of activities under Crest
9 Court property; and then, third, the basis of issues and
10 the amount of the loss. And Respondent concedes that
11 there is a loss; however, we have a difference of
12 opinion what that amount that loss actually is. And
13 you'll hear it, I'm sure, from Respondent, on that.

14 The next issue, then, is the capital gain issue.
15 And that's the 15-million dollar issue. The FTB
16 proposes that a capital gain adjustment in the amount of
17 \$15,217,391 be made for tax year 2012. The issue with
18 this is that Dan Schryer, the Appellant here, was not a
19 party to the transaction. There was separate businesses
20 and different entities which were party to a
21 transaction. And on top of that, all this transaction
22 took place in Colorado. All of the tax due, 100 percent
23 of the tax due, was paid to the state of Colorado at the
24 time of the transaction. When he was asked that, it was
25 disposed in 2012.

1 And if you go to Exhibit 2, page 13. Of Exhibit
2 2, you can see the flow chart for how this transaction
3 was actually conducted. And this was put together by
4 FTB. And there's three different entities that were
5 involved, before it even gets down to Mr. Schryer. But
6 in our opinion, it doesn't touch Mr. Schryer. It is an
7 entity-paid tax. And these were all third-party
8 independent CPA firms which prepared these returns, and
9 which reported a transaction. And it was prepared by
10 McGlavery (phonetic), and they took a position on the
11 K-1 of the 540 that this is not income that's reportable
12 by Mr. Schryer. And I'll outline that in a second.

13 But if you go to Exhibit 2, page 13, it's a flow
14 chart of the actual transaction for the Aurora,
15 Colorado, real estate sale. If I can flip to Exhibit 16
16 for a moment, Exhibit 16, page 90 -- Exhibit 16 is the
17 partnership tax return for an entity by the name of DCI
18 Technology Holdings, LLC. It was a real estate
19 management company. And I'm looking at 2012, Form 1065,
20 which was timely filed. And together with that, there
21 is attachments for the relevant California schedules
22 that go with that, as well as the Colorado schedules,
23 and other state's activities, which were made up of part
24 of that LLC.

25 And if you look at page 90 of Exhibit 16 -- let

1 me reference back to for a moment. Page 90 of Exhibit
2 16 is a 2012 scheduled K-1 from the State of California.
3 Member share of income deductions credits, et cetera,
4 related to Dan Schryer arising out of a DCI Technology
5 Holdings, LLC. And as I indicated and stated, this
6 return was prepared by an independent CPA firm and
7 reports the activities from the sale of this Aurora
8 building in Colorado. And if you look at line 10, total
9 gain under Section 1231: In the case, amounts due for
10 federal purposes, you have a \$15,218,000 gain. And then
11 California adjustments, it's removed from that. And
12 that's the California scheduled K-1 Form 568, related to
13 2012 partnership return from the entity that was
14 involved with the actual transaction.

15 Now if you go to -- pardon me. If you go to page
16 106 of same Exhibit 16, that is the Colorado scheduled
17 K-1. And its called the --

18 JUDGE LE: Stop. Stop. My apologies. Let me
19 interrupt.

20 MR. FEDOR: Yes, sir.

21 JUDGE LE: When you're referring to exhibits and
22 pages, give us a second, while we catch up.

23 MR. FEDOR: Oh, I'm sorry.

24 JUDGE LE: Yeah. So can you say that one more
25 time. What page was that? Page number?

1 MR. FEDOR: I'll go back. The first one was
2 Exhibit 16, page 90. That's a K-1 for the state of
3 California. The second one is Exhibit 16, page 106. My
4 apologies.

5 JUDGE LE: Thank you.

6 MR. FEDOR: I have not been before the OTA before.

7 JUDGE LE: Please proceed.

8 MR. FEDOR: Thank you very much. And so, Exhibit
9 16, page 106, is a 2012 Colorado equivalent scheduled
10 K-1. And as for Mr. Schryer and the partnership is DCI
11 Technology Holdings, LLC. You will see on that, it has
12 federal income from the sale of this real estate,
13 16,171,250 and then it has it modified for Colorado.
14 For Colorado purposes, the income is \$16,171,250. So
15 there's a position taken by the CPA firm, correctly,
16 that this is Colorado-based income. This is not
17 California-based income.

18 And so, if a California based K-1, as I said, had
19 no reporting of this capital gain transaction for
20 California purposes, but it was fully reportable in the
21 state of Colorado, and all the tax was paid on that
22 transaction. And it's not relevant to my argument
23 today, but you have another five or ten different
24 states' K-1s in here showing all the different
25 activities between different states. Mr. Schryer

1 probably files on average 12 to 15 different state tax
2 returns each and every year. And so there's always
3 allocations and different K-1s coming through, depending
4 on what state the activity is in. And so, this is just
5 another instance of an allocation of an investment where
6 the state tax is paid on the entity level, and it's paid
7 in full.

8 And if you go to page 93 of the same exhibit,
9 same Exhibit 16, you can see and the panel can see that
10 on the California scheduled K-1, other information, it
11 indicates that Colorado tax paid at the partnership
12 level, \$743,306. And respondent would concede that
13 that's been paid, as well. And they will stipulate to
14 that. Mr. Schryer would argue that as a California
15 resident, he had the duty to report his income, which
16 included gains attributable to him. This is not a gain
17 which is attributable to him under the code. This is a
18 gain which is attributable to entities unrelated to
19 Mr. Schryer. So this is -- if you go back to that flow
20 chart, it's clear all the different entities that are
21 involved and the lack of relationship that Mr. Schryer
22 has to these entities. So we would argue that this gain
23 is not attributable to the Appellant, but rather, to a
24 separate unrelated entity, which already paid all of the
25 taxes which were due and owed to the state of Colorado.

1 Just, in closing, in summary, Appellant should be
2 entitled to a real estate loss related to his investment
3 in the Crest Court property, to a capital loss related
4 to the sale of Crest Court as well, and to the exclusion
5 of the capital gain from the sale of the Colorado real
6 estate, because it's unrelated to him. And I'd like to
7 reserve my rebuttal time if I could, Panel.

8 JUDGE LE: So looks like you have three minutes
9 left. So we can reserve that three minutes, and we'll
10 add it to your rebuttal.

11 MR. FEDOR: Thank you very much for your time.

12 JUDGE LE: Thank you for your presentation. Let me
13 turn to AOG (phonetic) panel to see if they have any
14 questions for Appellant here. Judge Akopchikyan, any
15 questions at this moment?

16 JUDGE AKOPCHIKYAN: I have one question. You
17 indicated Appellant made improvements to the property.
18 At the same time you indicated that the former owner was
19 living there. Can you reconcile those two facts for me?

20 MR. FEDOR: Sure. The owner was living there at
21 the time, but there was a new roof put on. There was, I
22 believe, there was a siding or some outdoor
23 reconstruction, which took place, but the owner was
24 there while those improvements and repairs and
25 maintenance took place. That's correct.

1 JUDGE AKOPCHIKYAN: Thank you.

2 JUDGE LE: Thank you. Let me turn to Judge
3 Ridenour. Do you have any questions?

4 JUDGE RIDENOUR: Yes, thank you.

5 Can you clarify, when you said the owner lives
6 there, are you talking about your client or during
7 the --

8 MR. FEDOR: That would be the McMahons. Thank you
9 very much for clarifying that.

10 JUDGE LE: Okay.

11 MR. FEDOR: The tenants lived there. Mr. and
12 Mrs. McMahon, while the note was purchased by my client.
13 And my client then became the landlord, and they were
14 the tenants, but yes.

15 JUDGE LE: Okay. So along that line, you indicated
16 that your client is a real estate professional, and I
17 think you said, if he's pumping in money but no returns.
18 He sells it. So I have -- how can you reconcile that
19 statement with him not receiving rent for this period of
20 time when he wants to make a profit, but yet, he's not
21 getting at least the rent during the time that he is
22 trying to do improvements, and making it so he can make
23 a profit upon sale?

24 MR. FEDOR: He did receive rent of about \$10,000,
25 but that's not market, like what you will hear from

1 Respondent. He could have asked for and demanded rent
2 further. I think part of the issue was, you know, in
3 all candor, that Mr. McMahon was passing, that he was in
4 bad health, and I really think there was an expectation
5 that at the end of the investment period, that he'd make
6 a profit on the back end. And there perhaps should have
7 been steps taken to collect the rent or demand the rent
8 further. My client was hoping he'd make out at the end
9 of the deal and not during the deal.

10 JUDGE RIDENOUR: Okay. And thank you. And to
11 follow up on that, when you say he received rent of
12 around \$10,000, are you talking aggregate or monthly?
13 It appears there wasn't very many months that rent was
14 paid.

15 MR. FEDOR: I think that was in the first year. It
16 was 2009 or 2010. There was \$10,000 paid total.

17 JUDGE RIDENOUR: Total. And --

18 MR. FEDOR: And then that was it. Correct.

19 JUDGE RIDENOUR: Thank you for clarifications. No
20 further questions.

21 JUDGE LE: Thank you, Judge Ridenour.

22 I had one question myself right now. You
23 referred to stipulations between the parties, Appellant
24 and FTB. Was there an actual document prepared or what
25 are you referring to?

1 MR. FEDOR: No. There was no legal stipulation
2 prepared in this matter. I think the parties are in
3 agreement that those -- anytime I use the term
4 "stipulation," it wasn't in a legal sense. It was an
5 agreement between the parties on either the number, the
6 issue, or something along those lines.

7 JUDGE LE: Thank you.

8 MR. FEDOR: Thank you.

9 JUDGE LE: Okay. It's now Respondent's turn for
10 their presentation. You have up to 30 minutes, starting
11 at 2:38 p.m. Please proceed.

12 MR. HALL: Thank you, Judge.

13
14 PRESENTATION

15 MR. HALL: This case involves five issues: The
16 first is whether Appellant Daniel Schryer is required to
17 include gain from the sale of an office building in
18 California -- in California gross income. Under the
19 California law, Appellant is required to include income
20 from all sources. The second issue is whether Appellant
21 has satisfied his burden to show he's entitled to claim
22 passive activity loss, with respect to his purported
23 rental activity. Appellant has not met his burden to
24 show that he is entitled to claim such a loss. The
25 third issue is whether Appellant has met his burden to

1 show he's entitled to claim a loss in 2012 that was
2 purportedly carried over from 2011. Appellant has not
3 met his burden to show that he is entitled to claim such
4 a loss. The fourth issue is whether Appellant's has met
5 his burden to substantiate his reported loss from the
6 sale of the property. Appellant has failed to
7 substantiate his reported loss. And the fifth issue is
8 whether Appellant is liable for the late filing penalty.
9 Appellant is liable for the late filing penalty and has
10 not shown any exception to the penalty applied.
11 Respondent will address each issue in turn.

12 JUDGE LE: Respondent, it sounds like Appellant has
13 conceded.

14 MR. HALL: Yes, thank you. So we
15 will -- Respondent will not address the penalty, if
16 that's all right.

17 JUDGE LE: Thank you.

18 MR. HALL: The first issue involves unreported
19 income from the sale of an office building in Aurora,
20 Colorado. In 2012, Appellant owned an interest in an
21 office building in Colorado. Appellant's ownership
22 interest is illustrated on page 2 of Respondent's
23 opening brief and is supported by Respondent's Exhibits
24 D, E, and F. Appellant's reported income from the sale
25 on his Form 1040 for federal tax purposes in 2012, but

1 excluded it from California gross income as a Scheduled
2 CA adjustment. This is shown on page 5 of Respondent's
3 Exhibit B.

4 Appellant claims that he properly excluded this
5 income for California tax purposes as Section 1231 gain
6 not sourced to California. Appellant points
7 out -- points to an FTB publication for non-residence
8 and part residence to support this claim; however,
9 Appellant's reliance on this publication is misplaced.
10 Appellant was a California resident in 2012 and signed
11 under penalty of perjury a California resident income
12 tax return.

13 Pursuant to Revenue and Taxation Code 17041,
14 Subdivision A-1, California residents are subject to tax
15 on all income, regardless of source. Appellant has
16 failed to meet his burden, that income from the sale of
17 the Colorado office building is excludable from
18 California gross income. Appellant's counsel notes that
19 the income what considered Colorado-based income by the
20 state of Colorado. Respondent has conceded that
21 conditions have been met for Appellant to receive
22 another state tax credit for the Colorado-sourced
23 income, and it allowed Appellant and other states' tax
24 credits, pursuant to Revenue and Taxation Code 18001,
25 and Respondent's calculation of the OSTC is set forth in

1 Respondent's Exhibit H.

2 With respect to Exhibit -- excuse me. With
3 respect to Issue 2, in 2012, Appellant owned a property
4 in Beverly Hills, California. Prior to purchasing the
5 property, Appellant was personally acquainted with the
6 existing owners, who were in foreclosure due to their
7 inability to pay the mortgage. Rather than list and
8 advertise the property for rent, screen tenants, and so
9 forth, Appellant allowed the previous owner to remain in
10 the property largely rent-free. Nonetheless, Appellant
11 treated this property as a rental property, and
12 throughout the period of ownership, Appellant claimed
13 net losses on his federal Schedule E with respect to the
14 activity. Appellant claimed Schedule E losses of over
15 \$238,000 for the 2009 taxable year, over \$189,000 for
16 the 2010 taxable year, over \$455,000 for the 2011
17 taxable year, and over \$8,000 for the 2012 taxable year.
18 This is illustrated in Respondent's Exhibits P, Q, R,
19 and S.

20 During the same period of ownership, Appellant
21 reported having received total rent from the property in
22 2009 in the amount of \$10,000. In 2011 -- excuse
23 me -- 2010, 11, and 12, Appellant reported having
24 received no rent. During Internal Revenue Code Section
25 183, with respect to activities not engaged in for

1 profit, taxpayers are allowed deductions only to the
2 extent of gains from such activity. In determining
3 whether an activity is engaged in for profit, federal
4 regulations state that all factors and circumstances
5 shall be taken into account.

6 Some of the factors normally taken into account
7 include the manner in which the taxpayer carry on the
8 activity, the taxpayer's history of income and losses
9 with respect to the activity, and the financial status
10 of the taxpayer. The regulations further state that the
11 determination is not to be made, quote, "on the basis of
12 the number of factors indicating a lack of profit
13 objective exceeds a number of factors indicating a
14 profit objective, or vice versa." In other words,
15 certain factors may be more relevant or weigh more
16 heavily depending on the particular facts of each case.

17 Here, three factors previously noted are very
18 probative under the facts. These factors strongly
19 suggest a lack of profit motive. With respect to the
20 matter in which the taxpayer carries out the activity,
21 the facts indicate that Appellant did not treat the
22 activity in a business-like manner. For example,
23 Appellant failed to produce any documentation, such as a
24 listing agreement, advertisement, a rental contract, or
25 other agreement showing rental of the property at fair

1 value, all of which would be expected if the activity
2 had been treated in a business-like manner.

3 Appellant also failed to collect rent or enforce
4 collection of rent when none was paid. To the contrary,
5 Appellant was aware of the tenant's foreclosure and
6 prior inability to pay the mortgage on the property and
7 specifically allowed the tenant to stay at the property
8 without paying rent. While this is unquestionably a
9 good deed, it is not the behavior of a for-profit rental
10 activity. With respect to the taxpayers, the facts
11 indicate the activity was not engaged in for profit.

12 Collectively, Appellant claimed over \$890,000 in
13 losses, with respect to the purported rental over the
14 period it was reported. These losses are even more
15 striking, when compared with the \$10,000 of total rental
16 income reported over the life of the activity. This
17 factor is extremely relevant here, given the enormous
18 losses compared with the minimal income reported, as
19 well as the taxpayers' profession as a real estate
20 professional.

21 With respect to the financial status of the
22 taxpayer, the facts indicate the activity was not
23 engaged in for profit. Under the applicable
24 regulations, the taxpayer has substantial income from
25 other sources and arrives at a substantial benefit from

1 the losses generated by the activity. This indicates a
2 lack of profit motive. This is especially true when
3 where there are personal elements involved.

4 Here, all three conditions are true: Appellant
5 has significant sources of income from other activities,
6 including his other property interests, partnerships,
7 and so forth; Appellant has received substantial tax
8 benefits from the losses associated with the property
9 and seeks to further those benefits in this appeal;
10 additionally, there are elements, person elements
11 involved, including the fact that Appellant's purpose
12 for purchasing the property appears to be to help the
13 prior owners, who were unable to afford the property on
14 their own.

15 As pointed out by Appellant's counsel, Appellant
16 typically invested in commercial real property, not
17 residential. All signs here point to Appellant's rental
18 activity not being engaged in for profit. Moreover,
19 Appellant has failed to provide any documentation
20 affirmatively supporting his contention that his
21 activity was engaged for profit. Appellant bears the
22 burden of proving Respondent's determinations incorrect.
23 While Appellant's generosity is laudable, it's not the
24 type of activity which gives rise to a tax benefit.

25 As to the third issue, Appellant also raises in

1 the affirmative his position that he is entitled to
2 claim a loss in 2012 that was generated in 2011 and
3 related to the same purported rental activity.
4 Appellant reported a loss of approximately \$455,000 with
5 respect to the rental activity for the 2011 taxable
6 year. Respondent's auditor initially adjusted
7 Appellant's California's taxable income for that year,
8 adding back the purported \$455,000 loss as an addition
9 to income; however, upon the subsequent review,
10 Respondent discovered a math error in his adjustment.
11 Respondent failed to account for a Scheduled CA
12 adjustment, wherein Appellant suspended a vast majority
13 of the loss claimed in 2011 with respect to the property
14 for California tax purposes. As a result of this
15 oversight, Respondent determined that his notice of
16 proposed assessment for the 2011 taxable year was not
17 sustainable and withdrew the notice.

18 Appellant seeks to claim the suspended loss in
19 2012. Based on Respondent's review, the suspended loss
20 was not originally claimed on Appellant's California tax
21 return for 2012, and Appellant raises his issue in the
22 appeal in the affirmative. The loss stopped by
23 Appellant here was generated by the alleged rental
24 activity. Because this activity was not engaged in for
25 profit, Appellant was not entitled to claim a loss with

1 respect to such activity. This has been and remains
2 Respondent's position. When a taxpayer carries a loss
3 to a later year and claims loss in such year, the
4 taxpayer's entitlement to such loss depends solely on
5 whether the taxpayer has substantiated both the
6 existence and the amount of the loss in such later year.

7 In the present case, Respondent's auditor issued
8 an MPA to Appellant under the mistaken belief that the
9 loss from the rental property had been claimed in 2011.
10 When this was later found later to be untrue, Respondent
11 withdraw the MPA accordingly, and the issue is now being
12 properly dealt with in 2012, the year of issue.

13 Appellant attempts to distinguish the cases
14 decided by Respondent, including Black v. Commissioner.
15 For example, Appellant argued on brief that Appellant
16 was actually audited for the 2011 taxable year, whereas
17 in black, the IRS did not audit the year in which the
18 loss originated. First, whether Black or other case
19 decided by Respondent are factually distinguishable is
20 irrelevant. Respondent cited Black purely for the
21 statement of law provided by the tax court. The legal
22 propositions set forth in black relied and other cases
23 relied on by Respondent is that a loss which is carried
24 forward is probably disallowed by Respondent in the year
25 claimed by the taxpayer, and the government's failure to

1 adjust the loss in the year of origination does not
2 preclude such adjustment in such later year. This
3 proposition is consistently applied in later cases.

4 Second, the reading of Black is inaccurate. In
5 that case, the tax court stated, quote, "Respondent's
6 failure to audit or disallow a loss claimed on a return
7 for one year does not stop it from disallowing it, and
8 it will carry over that loss to a future year."

9 Respondent notes that the court uses the word "for,"
10 meaning, either a failure to audit or a failure to
11 disallow a loss does not preclude respondent from
12 disallowing the carryover of that loss in a later year.
13 Therefore, under Black, even a non-adjustment following
14 audit does not preclude Respondent from disallowing
15 carried forward loss in a subsequent year when the loss
16 is claimed.

17 Respondent notes, again, that Appellant is
18 raising the affirmative in his entitlement to claim
19 losses, and therefore, bears the burden. To this point,
20 Appellant's position is rooted in attempts to
21 distinguish to authorities that do not support his
22 position, but has failed to cite a single legal
23 authority which actually supports his claim, that
24 Respondent's MPA for a different year precludes the
25 challenge of a loss actually claimed in 2012. This is

1 because no such authority exists. The suspended losses
2 properly determined in 2012, the year in this case.

3 In a supplemental brief, Appellant argues that
4 Respondent's disallowance of the 2012 rental loss
5 amounts to a, quote, second bite of the apple. This is
6 a red herring. This hearing is Respondent's bite of the
7 apple. And to this point, Respondent has been asked to
8 address whether res judicata or collateral will stop 405
9 (phonetic).

10 As to res judicata, also referred to as claim
11 preclusion, Revenue and Taxation Code 19802 provides,
12 quote, "In the determination of any case arising under
13 this part, the rule or res judicata is applicable only
14 if the liability involved is for the same year as it was
15 involved in another case previously determined." Here,
16 the case alleged to have been previously determined
17 relates to the 2011 taxable year and corresponding MPA;
18 however, the liability here -- the liability involved
19 relates to 2012 as the losses being claimed in this
20 year. To be sure, in Appellant's reply brief, Appellant
21 states that the 2012 taxable year -- that for the 2012
22 taxable year, he's entitled to claim the previously
23 suspended losses. Res judicata is not applicable to the
24 pursuant statute.

25 As to collateral estoppel, also referred to as

1 issue preclusion, this doctrine generally prevents the
2 litigation of individual issues that have already been
3 tried and decided by a court in a previous action. The
4 elements include, first, the issue must be
5 precluded -- the issues ought to be precluded must be
6 identical to the issue decided in a former proceeding.
7 Second, the issue must have been actually litigated in a
8 former proceeding. Third, it must have been necessarily
9 decided in a former proceeding. Fourth, the decision in
10 a former proceeding must be filed and on the merits.
11 And finally, the party against whom preclusion is sought
12 must be the same as or in privity with a party to the
13 former proceeding.

14 Here, there has been no actual litigation of the
15 issue. This proceeding is the litigation. Second,
16 because this litigation has not been finalized, there is
17 no final determination on the merits. Collateral
18 estoppel is not applicable here. Moreover, collateral
19 estoppel is based on the public policy and limiting
20 relitigation of an issue already tried. Applying
21 collateral estoppel in this instance would not serve the
22 public policy underlying the doctrine.

23 And finally, to foreclose any other potential
24 argument regarding this issue, Respondent would like to
25 point out that equitable estoppel also does not apply

1 here. Application of equitable estoppel is limited to
2 rare circumstances where it's necessary to avoid a
3 quote, "grave injustice." In the limited circumstances
4 where equitable estoppel could apply, it is the
5 taxpayer's burden to demonstrate satisfaction of the
6 elements. Those elements include, one, the government
7 agency must be shown to have been aware of the actual
8 facts. The government agency must have been shown to
9 have made an accurate representation with the intention
10 of having taxpayer act on it, or the government agency
11 must have acted in a manner that the taxpayer had a
12 right to believe, that the government agency intended
13 the taxpayer would act on its representation. Three,
14 the taxpayer must have been ignorant of the actual
15 facts. And four, the taxpayer must be shown to have
16 acted on the government agency's representation to the
17 taxpayer's detriment.

18 Here, Respondent issued a notice of proposed
19 assessment to Appellant, increasing Appellant's income
20 to disallow a loss I believe Appellant had claimed,
21 without realizing Appellant had made Schedule CA
22 adjustment, backing up the loss for California tax
23 purposes. Upon discovering his error, Respondent
24 retracted his notice of proposed assessment. In this
25 case, the taxpayer signed his tax return, and therefore,

1 cannot use and then claim ignorance as to the actual
2 facts, including the existence of the Schedule CA
3 adjustment. Second, there is no evidence of detrimental
4 reliance, in respect to the 2011 MPA or with respect to
5 Respondent's position of what the loss is for 2012. It
6 has been from the beginning and remains Respondent's
7 position that Appellant is not entitled to claim the
8 aforementioned losses with respect to the purported
9 rental activity.

10 Moving onto Issue 4, Appellant subsequently sold
11 the property at Crest Court, claiming a substantial loss
12 as a result of the sale. In determining gain or loss
13 from the sale of property, Internal Revenue Code Section
14 1001 provides that the amount of gains equal to the
15 amount realized over the adjusted basis of the property.
16 Appellant claimed the stepped up basis in the property
17 resulting from amounts characterized generically as
18 contributions. This is shown in Respondent's Exhibit Y.
19 Appellant has failed to provide any underlying
20 documentation substantiating this self-proclaimed
21 worksheet. Counsel testified a moment ago that there
22 was a new roof and other maintenance done on the
23 property, but has not provided support. Unsupported
24 assertions are insufficient to carry a taxpayer's burden
25 and Respondent's determination must be sustained.

1 This concludes Respondent's argument. Thank you.

2 JUDGE LE: Thank you. Let me again turn to the
3 panel to see if there are any questions. Judge
4 Akopchikyan, any questions for the Respondent?

5 JUDGE AKOPCHIKYAN: I have no questions.

6 JUDGE LE: Thank you. And Judge Ridenour, any
7 questions.

8 JUDGE RIDENOUR: Yes. So just to clarify for the
9 record, for 2011, on the California tax return,
10 Appellants did not claim the loss; is that correct?

11 MR. HALL: They backed out a vast majority, so I
12 believe it was around \$12,000 of the total \$455,000 that
13 was backed out.

14 JUDGE RIDENOUR: Okay.

15 MR. HALL: I'm sorry; 12,000 was remaining.

16 JUDGE RIDENOUR: Thank you very much. No further
17 questions.

18 JUDGE LE: I do have one quick question. I believe
19 you mentioned that Appellant was personally acquainted
20 with the prior owners. Is there anything you could
21 point out in exhibits to show that?

22 MR. HALL: Yes. That is in both exhibits,
23 Respondent and Appellant, that would be Appellant's
24 Exhibit 4 and Respondent's Exhibit O. That is the
25 declaration of Panel and McMahon.

1 JUDGE LE: Thank you.

2 Okay. Let's now turn to Appellant for his
3 rebuttal. You have up to 13 minutes, starting at 2:58
4 p.m. Please proceed.

5 MR. FEDOR: Thank you very much again. And I'll
6 short and brief. I won't be that long.

7
8 CLOSING STATEMENT

9 MR. FEDOR: Respondent cites to Code Section 183,
10 with regard to profit motivation. One thing you don't
11 hear from Respondent is a reference to Mr. Schryer's
12 other real estate investments. I would agree with
13 Respondent if this was one parcel or one investment by a
14 small mom and pop on one piece of rental real estate,
15 and they weren't collecting rent. It's one thing. And
16 that's looking at a vacuum, in my opinion. If you're
17 looking at Mr. Schryer as a professional real estate
18 investor, this is just one in part of his portfolio of
19 many pieces and investments in different real estate.
20 So I will say it again, I would agree if this was one
21 parcel real estate we were talking about, if this was
22 one rental property, and he wasn't collecting rent. On
23 its face, you would be curious when there is no profit
24 motivation there. This is one in a scheme of things of
25 which he was betting on that he would make his money at

1 the end of his transaction. That's the one point that I
2 would like to make.

3 Mr. Schryer, he has a history of investing in
4 real estate, and he loses some in the short-term, but
5 typically gains on the long-term on the profit side when
6 he's disposing of the assets, and his historical filings
7 reflect that. To clarify again, and I think this was
8 just brought out, the \$455,320 issue arising from 2011,
9 2012, almost all of that was suspended. It was brought
10 into 2012. I would argue that there is issue preclusion
11 there in this matter. There was an MPA issued. There
12 was a consideration. There was an audit. There were
13 findings. And then, three years later, two-and-a-half,
14 three years later, it was withdrawn. I would argue that
15 that is analogous to a finding on the merit. The
16 assessment notice was withdrawn. The case was over.
17 There was a determination, and maybe not by a court of
18 law, but there was by the FTB, that there wasn't a case
19 there. And so, I would argue that that preserves that
20 \$455,000 loss issue rolling up into 2012.

21 And just, the last point I would like to make,
22 Respondent indicates that on the 2012 return, that
23 \$455,000 number wasn't claimed. Well, that's because it
24 wasn't until 2020, September of 2020, that the actual
25 MPA was withdrawn. So that wasn't an issue until 2020.

1 You're talking about 2012 tax return, so he wouldn't
2 have taken that during his time frame. That would not
3 have made sense until that issue was resolved.

4 Nothing further. I thank you very much.

5 JUDGE LE: Thank you very much for your rebuttal.

6 Again, for one last time, let me check the panel
7 to see if they have any questions from either party.
8 Judge Akopchikyan, any final questions from the other
9 party?

10 JUDGE AKOPCHIKYAN: No questions. Thank you.

11 JUDGE LE: Thank you.

12 And Judge Ridenour, any final questions for
13 either party?

14 JUDGE RIDENOUR: Actually yes, please. Thank you.
15 This would be for the Appellant. I have a couple
16 questions, please.

17 You mentioned that your client is -- this was one
18 of many of his portfolios. And he did do most of the
19 commercial, as opposed to real estate. My question is,
20 has he, in his businesslike manner, ever let his
21 commercial tenants stay this long without rent, or is
22 that his normal course of action as a real estate
23 professional?

24 MR. FEDOR: He has. Often times, he invests and
25 maintains and makes improvements to his properties. I

1 was referencing his server farms. Those server farms
2 were dying on the vine. They were in bankrupt
3 typically. They buy them out. They improve these.
4 They put a ton of money in, and then four or five or six
5 or ten years later, is when they make their money. That
6 is historically what he's done.

7 JUDGE RIDENOUR: Okay. But can you clarify during
8 those four or five or six years between buying and
9 selling for the profit, those tenants, which I'm sure,
10 I'm assuming that he had tenants during that time, did
11 he have a habit of allowing his tenants to not pay rent?

12 JUDGE LE: Often times, they didn't. Often times,
13 they did. He was losing each money each and every year
14 until the property was sold. That's my point. I don't
15 have specific information about how well he collected or
16 didn't collect. My understanding was that they were
17 loss leaders, essentially, until the disposition.

18 JUDGE RIDENOUR: Okay. Thank you.

19 Also, you mentioned that they sold at a loss in
20 2012 for Castle (phonetic). Was there any reason why he
21 decided at that time to sell it, even though it was at a
22 loss?

23 MR. FEDOR: That's a good question, and I don't
24 have that answer.

25 JUDGE RIDENOUR: Okay.

1 MR. FEDOR: I don't know if it was an expectation
2 of the market coming back and it was still really iffy
3 at that time, or if it was a cash call on another
4 investment, and he just decided to liquidate it. It's
5 speculation on my part.

6 JUDGE LE: Fair enough.

7 And one more question about Aurora and the chart:
8 I understand that there's many entities between Aurora
9 and your client, but there's a connection, and it
10 appears he did therefore receive income. Are you
11 claiming that he did not?

12 MR. FEDOR: No, I'm not. I'm claiming that he
13 received -- he received income. He received
14 distributions from the sale. That's clear. It's on
15 K-1. It's on all the schedules. But our arguments for
16 federal purposes, of course, is reportable as income for
17 cap gain. And then for Colorado purposes, it was
18 reportable; not for California.

19 JUDGE RIDENOUR: Okay. Thank you for
20 clarification. I just wanted to make sure. And so
21 then, my followup question to that is, as an individual,
22 if you see the distributions, that he's also, as you
23 conceded, he's a resident of California. So he's
24 not -- he wasn't a partial resident. He wasn't a
25 non-resident. So as a California resident, he did

1 receive income from that sale?

2 MR. FEDOR: That is correct.

3 JUDGE RIDENOUR: Okay. Thank you very much. No
4 further questions.

5 JUDGE LE: Thank you, Judge Ridenour. I do have a
6 few questions. I'll start with Appellant. Can you talk
7 about Mr. Schryer's personal relationship with the prior
8 owners?

9 MR. FEDOR: I was not aware of, prior to this case,
10 if there was a personal relationship. You know, I can
11 tell you from my own personal relationship with
12 Mr. Schryer is, he is motivated day and night for
13 profit. He is not the type of real estate investor who
14 wants to lose any money, and he often times does very
15 well.

16 JUDGE LE: Thank you.

17 You talked earlier about CPA firms preparing the
18 returns for the partnership entities. My question is,
19 were those firms aware of where Mr. Schryer was a
20 resident of?

21 MR. FEDOR: Yes, because they prepared the K-1s
22 with his name and address on the K-1s.

23 JUDGE LE: Thank you.

24 Let me now turn to the Franchise Tax Board. The
25 FTB submitted Exhibits CC through EE. It appears

1 similar to Appellant's exhibits 13 through 15. Are
2 there any differences that you'd like to point out?

3
4 CLOSING STATEMENT

5 MR. HALL: No specific difference we would like to
6 point out; however, to the extent that the panel might
7 consider any differences relevant, FTB, you know, we
8 provided our own copies of those. We weren't sure what
9 Appellant's purpose for including those documents were.
10 We just wanted to make sure that FTB had its own
11 documents, because we didn't have time to fully review
12 Appellant's exhibits of those same returns.

13 JUDGE LE: Thank you.

14 MR. FEDOR: Judge, if I could, I think the
15 difference in the exhibits is the Appellant's exhibits
16 include the state returns.

17 JUDGE LE: Okay.

18 MR. FEDOR: I think that's the distinction. And
19 it's the entire complete return for each of those
20 entities.

21 JUDGE LE: Thank you. It still on the FTB here.
22 Why did the FTB issue you a revised MPA for 2012?

23 MR. HALL: Right. So the 2011 MPA was primarily
24 about rental income. I believe it's in the record. And
25 it also involved another appellant, Mr. Schryer's

1 then-spouse, and they filed a married-filing-jointly
2 return in 2011. So withdrawing the 2011 MPA was
3 Respondent's way of simultaneously simplifying the
4 appeal, rectifying the auditor's mistake, and, you know,
5 in a way, extending an olive branch to the Appellant.
6 We did give up a small amount of income. But as noted
7 earlier, we felt, the Respondent felt, that the MPA was
8 simply not sustainable, just due to the fact that the
9 vast majority of -- well, all AVHSN (phonetic) for 2011
10 was with regard to that rental loss.

11 And not only that, we had a rental loss that the
12 Appellant claimed in 2012 and naturally assumed that
13 this issue was still at play. I believe it is under the
14 law. I believe we've, you know, set forth legal
15 authorities that show that this loss has not been
16 foreclosed, especially since it's being claimed now in
17 2011 -- excuse me -- 2012.

18 JUDGE LE: Thank you.

19 The revised MPA, it has this language: "The
20 State Board of Equalization considered your appeal."
21 This was --

22 MR. HALL: I apologize, Judge. Are you talking
23 about the revised MPA for 2012?

24 JUDGE LE: Yeah.

25 MR. HALL: Yes, forgive me. I would have to go

1 back to the record, but I know we had made, I believe, a
2 downward adjustment for, I believe -- and I maybe
3 incorrect on this -- but if my memory serves me correct,
4 that revised MPA was produced during the briefing stage,
5 and we had given the Appellant an increased basis in the
6 property based on the escrow statement or one of the
7 purchase statements. When the Appellant purchased the
8 property, I believe the auditor allowed a \$3,800,000
9 basis for the purchase of the property. And on the
10 escrow or one of the purchase statements, that number
11 was a little higher, so we actually gave Appellant a
12 higher basis, and that reduced the 2012 deficiency and
13 the -- produced that revised MPA based on that figure.

14 JUDGE LE: Thank you.

15 And I just want to touch on the language in the
16 MPA, that says that the SBE considered an appeal. And
17 you're revising the MPA based on the SBE appeal?

18 MR. HALL: Okay. Yeah, my apologies, Judge. This
19 language appears to be foreign language that was typed
20 up by our staff, who created this MPA; however,
21 obviously, the board of equalization was not in
22 existence at the time. So I apologize for that.

23 JUDGE LE: Thank you so much for the clarification.

24 I do have another question. For the 2011 tax
25 year, should the FTB have issued a notice to proposed

1 carryover adjustment?

2 MR. HALL: We hadn't considered that. I would have
3 to get back to you on that, but my understanding, again,
4 is that when a loss is claimed, here, it's being claimed
5 affirmatively as you know, so I'm not sure that we would
6 have issued one of those notices; however, again, my
7 understanding is that since the loss is being claimed in
8 2012, this is the year in which it would be allowed,
9 disallowed, litigated, et cetera.

10
11 CLOSING STATEMENT

12 MS. ZUMAETA: Judge, are you asking if, in 2011,
13 there should have been a notice of carryover adjustment
14 issue?

15 JUDGE LE: Yes.

16 MS. ZUMAETA: So a notice of carryover adjustment
17 is typically issued in a year where there is going to be
18 a change, but there is no other action taken. So in
19 2011, we had issued a notice of proposed assessment, but
20 we had pulled it, because we didn't think that was
21 sustainable. But we did issue a notice of carryover
22 adjustment for that year, because there was a notice of
23 proposed assessment originally.

24 Had this all happened at the same time correctly
25 without having this issue with the 2011 MPA, there would

1 not be a need for notice of carryover adjustment. So at
2 the time that we did that, we didn't have to issue that.
3 But the way of rectifying that was by putting this on a
4 2012 MPA. And we were also able to adjust in the year
5 of carryover, rather than in the year of the generation
6 of the loss, so you don't have to issue a carryover
7 adjustment notice in the year of generation. You can
8 also just do an MPA in a later year of a loss in the use
9 of a loss, and then what we would do is, anything that
10 in the future, if we needed to not have an MPA but
11 needed to change the carryover to the future, we could
12 issue a notice of proposed carryover of adjustment.

13 JUDGE LE: Thank you. I have no further questions.

14 Are there any last comments by either party?

15 MR. FEDOR: No. Thank you, Judge. Thank you,
16 Panel. It was a pleasure.

17 JUDGE LE: Thank you.

18 MR. HALL: Thank you. No, nothing further from
19 Respondent.

20 JUDGE LE: Thank you. So that will conclude our
21 hearing. Thank you, everyone, for coming in today.
22 This case is submitted on February 14, 2023, and the
23 record is now closed.

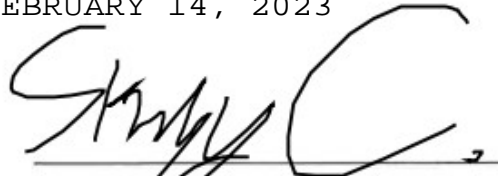
24 (HEARING CONCLUDED AT 3:13 P.M.)
25

1 REPORTER'S CERTIFICATE

2
3 STATE OF CALIFORNIA)
4) ss
COUNTY OF LOS ANGELES)

5
6
7
8 I, SKYY CHUNG, hearing reporter in and for the
9 State of California, county of Los Angeles, do hereby
10 certify that the foregoing transcript is a full, true,
11 and correct statement of the proceedings had in said
12 cause.

13
14
15 DATED: FEBRUARY 14, 2023

16
17 
18 Hearing Reporter
19

20 SKYY CHUNG
21
22
23
24
25

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