

**OFFICE OF TAX APPEALS**  
**STATE OF CALIFORNIA**

In the Matter of the Appeal of:  
**PUND, LLC**

) OTA Case No. 19034472  
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**OPINION**

Representing the Parties:

For Appellant: Donald McWhirter

For Respondent: Kamalpreet Khaira, Tax Counsel

R. TAY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, Pund, LLC (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing \$800 of additional tax, penalties of \$720, and a filing enforcement fee of \$88, plus applicable interest, for the 2015 tax year.

Appellant waived its right to an oral hearing; therefore, the matter is being decided based on the written record.

**ISSUES**<sup>1</sup>

1. Whether appellant had a filing requirement and was subject to the annual tax for the 2015 tax year.
2. Whether FTB properly assessed the notice and demand (demand) penalty and, if so, whether appellant has shown reasonable cause to justify abatement of the demand penalty.
3. Whether appellant has shown that the filing enforcement cost recovery fee should be abated.
4. Whether appellant has shown interest should be abated.

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<sup>1</sup> In its opening brief, FTB conceded the late-filing penalty in the amount of \$432 assessed in its Notice of Action dated February 15, 2019. As such, we will not discuss this penalty further.

### FACTUAL FINDINGS

1. Appellant is a California limited liability company (LLC) that filed its Articles of Organization with the California Secretary of State (SOS) on April 9, 2012.
2. Mr. Donald McWhirter was the only member of appellant during the period at issue, and appellant was classified as a disregarded single-member LLC.
3. Mr. McWhirter claims that appellant ceased doing business in 2013 and had no business activity and no income in 2015.
4. Appellant filed its Certificate of Cancellation with the SOS on February 16, 2016.
5. Appellant failed to file a timely 2015 income tax return and has not filed one to this date.
6. FTB issued a Demand for Tax Return to appellant on April 25, 2018. Appellant responded that it ceased doing business in 2013. FTB issued a Determination of Filing Requirement stating that appellant had a filing requirement and that a demand penalty would be imposed if it failed to file by a revised due date. However, appellant did not file its 2015 income tax return.
7. On August 10, 2018, FTB issued a Notice of Proposed Assessment (NPA), proposing to assess the amounts noted above. Appellant protested on August 30, 2018.
8. FTB issued a Notice of Action on February 15, 2019, affirming its NPA. This timely appeal followed.

### DISCUSSION

#### Issue 1 – Whether appellant had a filing requirement and was subject to the annual tax for the 2015 tax year.

R&TC section 17941(b)(1) states that every LLC that has filed its Articles of Organization with the California SOS is subject to the LLC annual tax of \$800. Every LLC, including single-member LLCs, are subject to the LLC annual tax for each taxable year until a certificate of cancellation is filed with the California SOS. (R&TC, § 17941(b)(1).) Every LLC organized in California is also required to file a California income tax return. (R&TC, § 18633.5(i).) The effective date of cancellation of an LLC is the date on which the certificate of cancellation is filed with the California SOS. (R&TC, § 17944.) Furthermore, to

avoid being subject to the LLC annual tax, an LLC must satisfy the requirements of R&TC section 17947.<sup>2</sup>

Here, it is uncontroverted that appellant filed articles of organization with the California SOS in 2015. Regardless of its business activity or amount of income, the fact that appellant filed with the California SOS means that it had a California filing requirement and was subject to the LLC annual tax for 2015. Moreover, although appellant claims it closed its business in 2013, appellant did not satisfy the requirements under R&TC section 17947 to avoid being subject to California tax. Thus, appellant had a filing requirement and was subject to the LLC annual tax.

Issue 2 – Whether FTB properly assessed the demand penalty and, if so, whether appellant has shown reasonable cause to justify abatement of the demand penalty.

California imposes a penalty for the failure to file a return or provide information upon FTB's demand to do so, unless reasonable cause prevented the taxpayer from responding to the demand. (R&TC, § 19133.) The demand penalty is computed at 25 percent of the amount of the taxpayer's total tax liability, which is determined without regard to payments or credits. (*Ibid.*) Here, it is undisputed that FTB properly assessed and calculated the demand penalty for 2015.

When FTB properly assesses a demand penalty, the law presumes that the penalty was imposed correctly. (*Appeal of Goodwin* (97-SBE-003) 1997 WL 258474.) The burden is on the taxpayer to prove that reasonable cause prevented the taxpayer from responding to a demand. (*Appeal of James* (83-SBE-009) 1983 WL 15396.) To establish reasonable cause, a taxpayer must show that the failure to respond to a demand occurred despite the exercise of ordinary business care. (*Appeal of Bieneman* (82-SBE-148) 1982 WL 11825.) The taxpayer's reason for failing to respond must be such that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of Halaburka* (85-SBE-025) 1985 WL 15809.) Unsupported assertions are not sufficient to carry a taxpayer's burden of proof. (*Appeal of Magidow* (82-SBE-274) 1982 WL 11930.)

Appellant asserts that it relied on its accountant to file its tax paperwork properly and that such reliance is the basis for reasonable cause to abate the demand penalty. Reliance upon a tax

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<sup>2</sup> R&TC section 17947 requires an LLC to file a final return with FTB for the preceding taxable year, cease doing business following the year for which the final return was filed, and file a certificate of dissolution or cancellation within the time required. Appellant does not allege it satisfied these requirements.

professional *may* establish reasonable cause. (*U.S. v. Boyle* (1985) 469 U.S. 241, 251.) However, to demonstrate such reasonable reliance, a taxpayer must establish that: (a) the taxpayer provided all necessary information to a competent tax professional; (b) the tax professional provided substantive tax advice; and (c) the taxpayer relied on such advice. (*U.S. v. Boyle, supra*, citing *Haywood Lumber & Min. Co. v. Commissioner* (2d Cir. 1950) 178 F.2d 769, 771; *Appeal of Berolzhelmer* (86-SBE-172) 1986 WL 22860.)

Appellant contends that it entrusted its accountant to file all the necessary paperwork. However, appellant has provided no documents or any other evidence to substantiate its reliance on the accountant or show that such reliance was reasonable and consistent with the exercise of ordinary business prudence. As stated above, unsupported assertions cannot satisfy a taxpayer's burden of proof. (*Appeal of Magidow, supra*.) Furthermore, each taxpayer has a personal, non-delegable duty to respond to a demand from FTB and to furnish information requested by the FTB. (*U.S. v. Boyle, supra*; *Appeal of Boehme* (85-SBE-134) 1979 WL 4224.) As stated above, appellant had a filing requirement. However, appellant has provided no information or documents to justify its failure to timely file a return in response to the FTB's demand notice. As such, appellant has not demonstrated reasonable cause to abate the demand penalty.

Issue 3 – Whether appellant has shown that the filing enforcement cost recovery fee should be abated.

R&TC section 19254 states that if a taxpayer fails to file a tax return after FTB issues a formal legal demand, then FTB will also impose a filing enforcement cost recovery fee. Once properly imposed, there is no provision in the R&TC that would allow the abatement of the filing enforcement fee. Here, it is uncontroverted that FTB properly imposed the filing enforcement cost recovery fee in the amount of \$88. As such, we uphold FTB's imposition of this fee.

Issue 4 – Whether appellant has shown interest should be abated.

If any amount of tax is not paid by the due date, interest is required to be imposed from the due date until the date the taxes are paid. (R&TC, § 19101(a).) Imposition of interest is mandatory, and it can only be abated in certain limited situations when authorized by law. (*Appeal of Yamachi* (77-SBE-095) 1977 WL 3905.) Interest is not a penalty imposed on a taxpayer, it is merely compensation for the use of money, and there is no reasonable cause exception to imposition of interest. (*Appeal of Jaegle* (76-SBE-070) 1976 WL 4086; *Appeal of*

*Goodwin* (97-SBE-003) 1997 WL 258474.) The Office of Tax Appeals has jurisdiction to determine whether respondent’s failure to abate interest under R&TC section 19104 was an abuse of discretion; if so, we may order an abatement of interest. (R&TC, § 19104(b)(2)(B).)

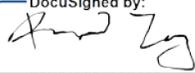
Here, appellant has not yet made a tax payment for 2015, and as such, FTB properly assessed interest. Although appellant requests interest abatement, it does not set forth any reason or provide documents to justify such abatement.

HOLDINGS

1. Appellant had a filing requirement for the 2015 tax year and was subject to California taxation.
2. Appellant failed to show that FTB erroneously assessed the demand penalty or that the demand penalty should be abated.
3. Appellant is subject to the filing enforcement cost recovery fee.
4. Appellant failed to show it is entitled to interest abatement.

DISPOSITION

FTB’s action is modified to remove the late-filing penalty of \$432. Otherwise, we sustain FTB’s proposed assessment in full.

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 Richard Tay  
 Administrative Law Judge

We concur:

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 Elliott Scott Ewing  
 Administrative Law Judge

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 Josh Lambert  
 Administrative Law Judge

Date Issued: 1/17/2020