

**OFFICE OF TAX APPEALS  
STATE OF CALIFORNIA**

In the Matter of the Appeal of:  
**TIME TO BE HERD**

) OTA Case No. 19054730  
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**OPINION**

Representing the Parties:

For Appellant: Mary Ann Meisenbach, Partner

For Respondent: Kamalpreet Khaira, Tax Counsel

C. AKIN, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, Time To Be Herd (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant’s claim for refund of \$884<sup>1</sup> for the 2017 tax year.

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

**ISSUES**

1. Whether appellant is liable for the \$800 limited liability company (LLC) annual minimum tax.
2. Whether appellant has established reasonable cause for the abatement of the late-payment penalty.

**FACTUAL FINDINGS**

1. Appellant was organized with the California Secretary of State’s Office (SOS) as an LLC on August 30, 2017, with two members.
2. On November 22, 2017, FTB mailed appellant FTB Form 5954 “Requirements for Limited Liability Companies.” The form explains that if the LLC is doing business in California, is organized in California, or registered with the SOS, it must do the following

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<sup>1</sup> This amount includes the \$800 limited liability company annual minimum tax and a late payment penalty of \$84.

three things: (i) “[p]ay the \$800 annual tax by the 15th day of the 4th month after the beginning of the current tax year;” (ii) [e]stimate and pay the annual fee by the 15<sup>th</sup> day of the 6th month after the beginning of the current tax year;” and (iii) “[f]ile Form 568, *Limited Liability Company Return of Income* by the original return due date.” (Emphasis in original.)

3. Appellant timely filed its California LLC Return of Income (Form 568) for the 2017 tax year. The return is marked as appellant’s final return and reports total income of \$0, 2017 annual LLC tax of \$0, and total tax and fee of \$0.
4. FTB subsequently sent appellant a Limited Liability Company Past Due Notice. The notice reflects a balance due of \$912.28 which includes: tax of \$800, a penalty of \$84, and interest of \$28.28.
5. On October 12, 2018, appellant paid the balance due for the 2017 tax year, including the tax, penalties, and interest assessed by FTB and subsequently filed a claim for refund for the 2017 tax year, explaining that in August 2017, its members decided to start an online business to generate funds in order to donate to elephant conservation organizations. Appellant states that its members had no knowledge of starting a business or the requirements, sought advice from outside resources, and decided to organize their business as a California LLC because they could not be considered a sole proprietorship. Appellant further explains that at the beginning of 2018, its members realized that organizing as an LLC business was not in appellant’s best interest and that in March 2018, appellant started the process of canceling its LLC designation with the SOS. Appellant further asserts that it requested advice from the Internal Revenue Service (IRS) regarding its federal employer identification number (FEIN) and the IRS representative it spoke with suggested that appellant “convert” its business to a general partnership so that it could retain the same FEIN. Appellant states that based on this advice it withdrew its Form LLC-4/8 Short Form Cancellation Certificate and then proceeded to file Form CONV-1A with the SOS. Appellant states that because of correspondence back and forth between itself and the SOS, there was a delay in the filing of the conversion and that appellant formally converted to a general partnership on July 23, 2018.

6. FTB subsequently denied appellant's claim for refund for the 2017 tax year.
7. This timely appeal followed. In its appeal, appellant raises similar arguments to those presented in its November 5, 2018 claim for refund.

### DISCUSSION

#### Issue 1. Whether appellant is liable for the \$800 LLC annual minimum tax.

Every LLC is required to pay an annual minimum tax to California for the privilege of doing business in this state if one of three requirements is met: (1) the LLC is doing business in this state as defined in R&TC section 23101; (2) the LLC's articles of organization have been accepted by the SOS; or (3) a certificate of registration has been issued by the SOS. (R&TC, § 17941(a), (b)(1).) Under R&TC section 23101(b)(1), a taxpayer is doing business in this state if it is organized or commercially domiciled in this state. The annual minimum tax is equal to \$800, as specified in R&TC section 23153(d)(1).

In general, the annual minimum tax must be paid for each taxable year, or part thereof, until a certificate of cancellation of registration has been filed with the SOS. (R&TC, § 17941(b)(1).) The annual minimum tax is due "on or before the 15th day of the fourth month of the taxable year." (R&TC, § 17941(c).) There is no "reasonable cause" exception to the imposition of the annual minimum tax.<sup>2</sup>

Appellant was organized as an LLC with the SOS on August 30, 2017. Because appellant organized in California, it is doing business in California as provided in R&TC section 23101(b)(1). Therefore, pursuant to both R&TC section 17941(a) and (b)(1), appellant was required to pay the LLC annual minimum tax until it ceased to be organized as an LLC with the SOS as a result of its conversion to a general partnership with the SOS on July 23, 2018.

A taxpayer is only excused from the LLC annual minimum tax if one of the statutory exceptions set forth in R&TC section 17946 or 17947 applies. R&TC section 17946 provides an exception if both conditions are satisfied: (1) the LLC did no business in this state during the year; and (2) the taxable year was 15 days or less. The exemption provided by R&TC section 17946 is not applicable because the second prong, requiring that the taxable year be 15 days or less, has not been satisfied. Here, appellant's 2017 short tax year began when it registered as an

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<sup>2</sup> R&TC section 17941 does not contain an exception to the imposition of the LLC annual minimum tax for reasonable cause or otherwise. While two exceptions to the LLC annual minimum tax are set forth in R&TC sections 17946 and 17947, neither relates to reasonable cause.

LLC with the SOS on August 30, 2017, and ended on December 31, 2017, a period comprised of approximately 122 days.

R&TC section 17947 provides an exemption if the LLC does all of the following: (1) files a timely final annual tax return for the preceding taxable year; (2) does no business in this state after the end of the taxable year for which the final annual tax return was filed; and (3) files a certificate of cancellation with the SOS before the end of the 12-month period beginning with the date the final annual tax return was filed. This exemption also does not apply to appellant's 2017 tax year because appellant did not meet the requirements of subdivision (a)(1). In order to meet the requirements of R&TC section 17947(a)(1), appellant would need to file a timely final annual tax return for the preceding tax year. Because appellant did not exist in 2016, it was not possible for it to meet the requirement that it file a timely final annual tax return for the preceding tax year. While R&TC section 17947 may potentially be applicable to appellant's 2018 tax year since appellant filed a timely annual final tax return for the 2017 tax year, only appellant's 2017 taxes are at issue in this appeal.<sup>3</sup> Therefore, appellant owed the annual LLC minimum tax for the 2017 tax year and did not qualify for exemption under either R&TC sections 17946 or 17947.

Appellant's arguments regarding its members' lack of business knowledge, experience, and expertise and their misunderstanding of what type of entity would be best suited to appellant's endeavors are all based on the premise that these facts can establish reasonable cause to exempt the LLC from imposition of the tax. However, as previously noted, there is no "reasonable cause" exception to the imposition of the annual minimum tax.

Issue 2. Whether appellant has established reasonable cause for the abatement of the late-payment penalty.

R&TC section 19132 provides that a late-payment penalty shall be imposed when a taxpayer fails to pay the amount shown as due on the return on or before the date prescribed for payment. The late-payment penalty is computed as five percent of the total tax unpaid, plus one-half of one percent for every month (or fraction thereof) the payment of tax was late, not to exceed 40 months. (R&TC, § 19132(a)(2)(A), (B).) However, the late-payment penalty will not apply if the taxpayer establishes that the failure to make a timely payment of tax was due to

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<sup>3</sup> We express no opinion as to whether the exemption provided in R&TC section 17947 is applicable to appellant's 2018 tax year since this year is not on appeal before us.

reasonable cause and not due to willful neglect. (R&TC, § 19132(a)(1).) To establish reasonable cause for the late payment of tax, a taxpayer must show that the failure to make a timely payment of the proper amount of tax occurred despite the exercise of ordinary business care and prudence. (*Appeal of Curry* (86-SBE-048) 1986 WL 22783.) The taxpayer bears the burden of proving reasonable cause exists. (*Ibid.*)

Ignorance of the law does not excuse noncompliance with statutory requirements; the exercise of ordinary business care and prudence requires a taxpayer to acquaint itself with the law. (*Appeal of Diebold, Inc.* (83-SBE-002) 1983 WL 15389.) A taxpayer that fails to acquaint itself with the requirements of California tax law has not exercised ordinary business care and prudence. (*Ibid.*)

Appellant failed to pay its tax on time for the 2017 tax year. As previously noted, the annual minimum tax is due “on or before the 15th day of the fourth month of the taxable year.” (R&TC, § 17941(c).) Because appellant’s 2017 tax year began on August 30, 2017, its annual minimum tax was due on December 15, 2017. However, appellant did not pay the annual minimum tax due for the 2017 tax year until October 12, 2018.

Appellant has not established reasonable cause for its failure to comply with its statutory requirements. Specifically, appellant has not shown that it took any steps to timely ascertain and pay the tax due, by investigating the tax requirements that applied to it or by hiring a tax professional. Additionally, in a notice FTB sent to appellant on November 22, 2017, appellant was notified of its obligation to “**Pay the \$800 LLC annual tax** by the 15th day of the 4th month after the beginning of the current tax year.”<sup>4</sup> This was prior to the December 15, 2017 due date for the payment of appellant’s 2017 annual minimum tax. We believe that, upon receiving such a notice, a reasonable and prudent businessperson would have taken care to investigate the tax requirements applicable to it. Appellant does not explain what steps it took either before or after receiving this notice in order to timely ascertain and pay the tax due. While appellant indicates that at the beginning of 2018, its members realized that filing as an LLC was not in appellant’s best interest, and that in March 2018, appellant started the process to cancel its LLC designation with the SOS, no explanation is provided as to what steps it took to timely ascertain and pay its taxes for the 2017 tax year and why its LLC annual minimum tax for 2017 remained unpaid until October 2018. The exercise of ordinary business care and prudence would

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<sup>4</sup> Emphasis in original Notice FTB 3556 sent to appellant.

have required appellant to look into the tax requirements that apply to a California LLC. Appellant, however, has not presented evidence that it undertook any such actions. Consequently, appellant has not established reasonable cause for the abatement of the late-payment penalty imposed by FTB for the 2017 tax year.

HOLDINGS

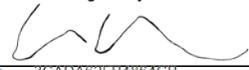
1. Appellant is liable for the \$800 LLC annual minimum tax.
2. Appellant has not established reasonable cause for the abatement of the late-payment penalty.

DISPOSITION

FTB’s action in denying appellant’s claim for refund is sustained.

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 Cheryl L. Akin  
 Administrative Law Judge

We concur:

DocuSigned by:  
  
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 Andrew J. Kwee  
 Administrative Law Judge

DocuSigned by:  
  
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 Suzanne B. Brown  
 Administrative Law Judge

Date Issued: 3/27/2020