

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 18010699
PROPHARMA SALES LLC)
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OPINION

Representing the Parties:

For Appellant: Troy Shutler, Human Resource Manager

For Respondent: Brandon S. Knoll, Tax Counsel

For Office of Tax Appeals: Neha Garner, Tax Counsel III

A. LONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, ProPharma Sales LLC (appellant) appeals an action by Franchise Tax Board (respondent) proposing additional tax of \$800, a late filing penalty of \$432, a notice and demand penalty of \$200, a filing enforcement fee of \$81, and applicable interest, for the 2014 tax year.¹

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

ISSUE

Whether appellant was doing business in California during 2014, and therefore subject to the annual \$800 limited liability company (LLC) tax.

¹ Appellant does not provide any argument or evidence related to the imposition of the late filing penalty, the notice and demand penalty, the filing enforcement fee, and applicable interest, and we find no grounds for abatement under the facts.

FACTUAL FINDINGS

1. Appellant is a foreign LLC that is not registered to do business in California with the Secretary of State. It is classified as a partnership for federal and California income tax purposes.²
2. Respondent received information from the California Employment Development Department (EDD) that appellant paid \$12,426.88 in wages to, and withheld taxes from, a California employee during 2014. Appellant concedes that it employed the employee in California from October 2, 2014, through December 31, 2015. On Internal Revenue Service (IRS) Form 941, Employer's Quarterly Federal Tax Return, appellant reported a California address in the city of Aliso Viejo for the last quarter of 2014.
3. Respondent issued a Demand for Tax Return, which required appellant to do one of the following: file a 2014 tax return, provide a copy of its 2014 tax return if it was already filed, or provide an explanation as to why it did not have to file a 2014 tax return.
4. When respondent did not receive a reply, it issued a Notice of Proposed Assessment (NPA), imposing an annual \$800 LLC tax, a notice and demand penalty, a late filing penalty, and a filing enforcement fee, plus interest.
5. On August 28, 2016, appellant sent respondent correspondence stating that appellant no longer had an employee in California as of December 2015.
6. On March 2, 2017, respondent issued a Notice of Action to appellant, affirming the NPA.
7. Appellant filed this timely appeal.
8. Office of Tax Appeals (OTA) requested additional briefing from the parties. In particular, OTA requested that appellant describe the activities it performed in California during the 2014 tax year, including the activities, if any, performed at its Aliso Viejo, California address (per its federal 4th Quarter Form 941) and by its California employee(s) at that address or elsewhere in the state. Appellant did not respond to OTA's request.

² Respondent describes appellant's business as "marketing services and contract sales support for pharmaceutical and healthcare providers across the United States. [Appellant] employ[s] sales representatives who in turn solicit business from local healthcare providers." Appellant does not dispute this accurately describes its business activities in general; however, the record does not indicate specifically what it did in California during 2014.

DISCUSSION

Respondent's determination of tax is presumed to be correct, and a taxpayer has the burden of proving error. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of Magidow* (82-SBE-274) 1982 WL 11930.) Respondent's determinations cannot be successfully rebutted when the taxpayer fails to provide credible, competent, and relevant evidence as to the issues in dispute. (*Appeal of Seltzer* (80-SBE-154) 1980 WL 5068.)

R&TC section 17941 provides that every LLC must pay the annual \$800 LLC tax for the privilege of "doing business" in California, as defined in R&TC section 23101. (R&TC, §§ 17941(a), 23153(d).) R&TC section 23101, in turn, establishes two alternative ways a taxpayer is considered doing business in California. (*Appeal of GEF Operating, Inc.*, 2020-OTA-057P.) Respondent bases its proposed assessment in this case on R&TC section 23101(a), which provides that a taxpayer is doing business in California if it is "actively engaging in any transaction for the purpose of financial or pecuniary gain or profit."³

The word "actively" has been interpreted as the opposite of passively or inactively, and means the active participation in any transaction for the purpose of a financial or pecuniary gain or profit. (*Golden State Theatre & Realty Corp. v. Johnson* (1943) 21 Cal.2d 493, 496 [construing the predecessor to R&TC section 23101(a)].) The transaction does not need to result in an actual profit for purposes of R&TC section 23101(a), and the relevant inquiry is whether the activity or transaction was motivated by a financial or pecuniary gain or profit. (*Hise v. McColgan* (1944) 24 Cal.2d 147; *Appeal of Columbia Supply Co.* (60-SBE-012) 1960 WL 1391.)

Here, it is undisputed that appellant employed a California employee during 2014. Respondent received information from the California EDD that appellant paid \$12,426.88 in wages to, and withheld taxes from, a California employee during 2014, and appellant concedes that it had an employee in this state from October 2, 2014, through December 31, 2015. In addition, on IRS Form 941, Employer's Quarterly Federal Tax Return, appellant reported a

³The second way a taxpayer is considered doing business in California is if it satisfies certain bright-line nexus conditions or thresholds found in R&TC section 23101(b)(1) through (4), which is effective for tax years beginning on or after January 1, 2011. However, respondent concedes that appellant does not meet the payroll threshold under R&TC section 23101(b)(4), and it does not appear to us that appellant meets the remaining conditions under R&TC section 23101(b). Therefore, we do not consider these conditions or thresholds further.

California address for the last quarter of 2014. Based on these limited facts, we can only conclude that appellant was doing business in California because it had a physical presence in the state. (See *Appeal of John H. Grace Co.* (80-SBE-115) 1980 WL 5084 [“no barrier exists to prevent the taxation of income derived wholly in furtherance of interstate commerce so long as the [taxpayer’s] in-state business activities have some regular, systematic and substantial connection with, *and physical presence within*, the taxing state”], italics added.)

Indeed, appellant has not argued otherwise, and as noted above, when we provided it an opportunity to develop these limited facts, it did not respond to our additional briefing request. Rather, appellant’s only contention is that it paid its sole California employee through ADP, a professional employer organization, and that this shielded appellant from a California tax filing requirement. ADP, also known as a payroll company, provides payroll services, tax withholding services, and related human resource compliance services for its clients. However, appellant’s outsourcing of payroll duties does not change the employer-employee legal status it held with its California employee. The California employee was under appellant’s direct control, operating under appellant’s direction, and selling appellant’s services, not the services of ADP. The fact that ADP handled the California employee’s payroll and issued the employee a check on appellant’s behalf does not change the fact that the California employee was appellant’s employee. Therefore, respondent properly determined that appellant was subject to the \$800 LLC tax, and appellant has failed to carry its burden of showing it was not doing business in California.

HOLDING

Appellant was doing business in California during 2014, and therefore subject to the annual \$800 LLC tax.

DISPOSITION

Respondent’s action is sustained in full.

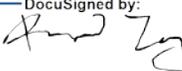
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Andrea L.H. Long
Administrative Law Judge

We concur:

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Kenneth Gast
Administrative Law Judge

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Richard Tay
Administrative Law Judge

Date Issued: 8/18/2020