

**OFFICE OF TAX APPEALS  
STATE OF CALIFORNIA**

In the Matter of the Appeal of:  
**ART ASYLUM**

) OTA Case No. 19115434  
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**OPINION**

Representing the Parties:

For Appellant:

Roland Biegler, CPA

For Respondent:

Christopher M. Cook, Tax Counsel III

For Office of Tax Appeals:

Michelle Huh, Tax Counsel

A. ROSAS, Administrative Law Judge: Under Revenue and Taxation Code (R&TC) section 19324, appellant Art Asylum, a dissolved corporation, appeals respondent Franchise Tax Board’s action denying appellant’s claim for refund of \$882.59, which consists of a minimum franchise tax of \$800, a late-payment penalty of \$48, and an estimated tax penalty of \$30.90, plus interest of \$3.69. Although this appeal began with only tax year 2018 at issue, the parties agreed that tax year 2017 is also at issue.

Office of Tax Appeals (OTA) Administrative Law Judges Josh Lambert, Sheriene Anne Ridenour, and Alberto T. Rosas held an oral hearing for this matter on December 17, 2020.<sup>1</sup> At the conclusion of the hearing, the record was closed and this matter was submitted for decision.

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<sup>1</sup> The oral hearing was noticed for Sacramento, California, and conducted electronically due to COVID-19.

ISSUE<sup>2</sup>

Whether appellant established that it is not subject to the \$800 minimum franchise tax.

FACTUAL FINDINGS

1. Appellant's incorporator submitted to the California Secretary of State (SOS) a "Corporation – Document Filing Request Form" dated December 16, 2016. This request form included Articles of Incorporation of a General Stock Corporation (Articles) for appellant and a request for expedited 24-hour filing service. The SOS filed appellant's Articles on Friday, December 16, 2016.
2. Appellant filed an Application for Employment Identification Number with the Internal Revenue Service. The form lists the entity as an S-corporation with a business start date of December 16, 2016.
3. Appellant did not file a Corporation Franchise or Income Tax Return for tax year 2016.
4. On April 14, 2017, respondent received appellant's minimum franchise tax payment of \$800, and applied the payment to appellant's account for tax year 2017.
5. Appellant filed a timely California tax return for tax year 2017. The return reported a tax of \$0, an estimated tax payment of \$800, and an overpayment of \$800 to be credited to appellant's estimated tax payment for tax year 2018.
6. Appellant filed a timely California tax return for tax year 2018. The return reported a tax of \$800, an overpayment of \$800 from the prior year that was claimed as a credit, and no balance due. Appellant did not remit a payment when it filed its 2018 return.
7. In April 2019, respondent issued a Notice of Balance Due for tax year 2018, indicating appellant had a balance of \$882.59 (a tax assessment of \$800, an estimated tax penalty of \$30.90, a late payment penalty of \$48, and interest of \$3.69). Appellant remitted a payment of \$882.59 by the due date indicated in the notice.
8. In April 2019, appellant requested a refund of the \$882.59 payment. On September 20, 2019, respondent sent a notice denying appellant's claim for refund for tax year 2018. Appellant filed this timely appeal.

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<sup>2</sup> Appellant's sole contention on appeal is that it is not liable for the \$800 minimum franchise tax for 2018 because 2017 was appellant's first year that it was incorporated in California. Appellant does not argue that it had reasonable cause for the late payment of tax or the underpayment of estimated tax or that interest should be abated. Rather, appellant contests the penalties and interest as they pertain to the minimum franchise tax, such that if appellant establishes that it is not subject to this tax, appellant will not be liable for the penalties or interest.

## DISCUSSION

In this appeal, we must determine what year constituted appellant's first taxable year. Appellant argues that it does not owe the \$800 minimum franchise tax for tax year 2017 because that was its first taxable year for purposes of R&TC section 23153(f)(1), which provides that every corporation that incorporates to do business in California on or after January 1, 2000, shall not be subject to the minimum franchise tax for its first taxable year. Appellant reasons that even though it incorporated with the SOS on December 16, 2016, tax year 2016 was not its first taxable year for purposes of R&TC section 23153(f)(1) because it qualifies for a statutory exception under R&TC section 23114. That exception provides that if a corporation did no business in California during a taxable year that was 15 days or less, it is not subject to the franchise tax for that year and that year (here, 2016) is not counted as its first taxable year when applying R&TC section 23153(f)(1).

Consequently, it is appellant's position that because it was not subject to the minimum franchise tax for 2017, the \$800 that it timely paid for tax year 2017 was essentially an overpayment, which respondent should have attributed to tax year 2018. If we agree, this means that, as a result of attributing the timely \$800 payment from 2017 to 2018, appellant would have timely paid the \$800 minimum franchise tax for 2018 and is, therefore, not liable for any additional minimum franchise tax, penalties, or interest for tax year 2018. As explained below, we do not agree.

Every taxpayer subject to the tax imposed by the Corporation Tax Law, beginning with R&TC section 23001, shall file a return with respondent. (R&TC, § 18601(a).) With some exceptions not relevant here, every corporation doing business in California shall annually pay, for the privilege of exercising its corporate franchise within this state, a tax according to or measured by its net income. (R&TC, § 23151.) A taxpayer that incorporates in California is required to pay the \$800 minimum tax. (R&TC, § 23153(b)(1).)

A taxpayer is required to file a return if the taxpayer is subject to the tax imposed by the Corporation Tax Law. (R&TC, § 18601(a).) Because appellant was subject to the franchise tax measured by its net income for 2016, it is immaterial whether appellant's ultimate tax liability was zero for that year. However, there is a statutory exception to this rule where the corporation did no business in this state, and the taxable year was 15 days or less. (R&TC, § 23114(a).) If these requirements are satisfied, the corporation is not subject to the taxes imposed. (*Ibid.*)

Appellant asserts that the statutory exception of R&TC section 23114(a) applies to 2016. Appellant argues that it did no business in this state during 2016. Respondent does not argue that appellant failed to meet this requirement that the corporation “did no business” in California under R&TC section 23114(a). As such, for purposes of our analysis, we will assume that this requirement is met, and we focus only on whether tax year 2016 was 15 days or less.

Appellant notes that even though it submitted its Articles with the SOS on Friday, December 16, 2016, the SOS took the weekend to process the expedited 24-hour filing service, and the Articles were not processed until after the weekend, with the SOS essentially pre-dating the filing to December 16, 2016. Appellant contends that because its incorporator received the approved Articles the following week, tax year 2016 was 15 days or less. Appellant further explains the SOS’s filing processes, the process that existed prior to 2010 and the new process that began on January 1, 2010. We understand appellant’s argument, but as an administrative tax tribunal, OTA is not the proper venue for adjudicating or determining whether the SOS violated any statutes or its own internal filing processes. (Cal. Code Regs., tit. 18, § 30103(a).)

When counting the number of days in tax year 2016, appellant asserts that the tax year should be deemed to have started on the date its incorporator received the filed Articles back from the SOS, not on the date the Articles was delivered to the SOS. While we understand appellant’s argument, both the starting date of appellant’s corporate existence and the filing date of the appellant’s Articles are controlled and governed by the California Corporations Code (Cal. Corp. Code). A corporation’s existence begins upon the filing of the articles of incorporation. (Cal. Corp. Code, § 200(c); see *Jamar v. Commissioner*, T.C. Memo. 1991-602.) Generally, the date of filing shall be the date the instrument is received by the SOS, unless the instrument provides that it is to be withheld from filing until a future date. (Cal. Corp. Code, § 110(a).)

Appellant’s incorporator submitted to the SOS a “Corporation – Document Filing Request Form” dated December 16, 2016, which included appellant’s Articles. The evidence in this appeal includes a letter from the SOS, which indicates that the date of filing shall be the date the SOS receives the instrument, unless the instrument provides a future filing date. Because a future filing date was not requested, the SOS’s letter indicates that the date of filing is the date of the SOS’s receipt of the Articles—that is, December 16, 2016. In addition, the date of filing endorsed on appellant’s Articles is December 16, 2016. Thus, because appellant’s corporate existence began upon the filing of its articles of incorporation on December 16, 2016, its tax year

for 2016 also began on this date. (See Cal. Corp. Code, § 200(c).) This makes the tax year 16 days (inclusive of both December 16 and December 31), not “15 days or less” as required by R&TC section 23114(a).<sup>3</sup>

Although appellant failed to meet the “15 days or less” exception by a single day, we do not have the authority to extend the applicability of R&TC section 23114(a). (Cal. Code Regs., tit. 18, § 30103(a).) Because we find R&TC section 23114(a)’s “15 days or less” exception to be inapplicable to 2016, we conclude that 2016 was appellant’s first taxable year. Thus, the exception to the imposition of minimum franchise tax for a taxpayer’s first taxable year provided in R&TC section 23153(f)(1) was applied to tax year 2016 and cannot also be applied to tax year 2017.<sup>4</sup> Because 2017 was appellant’s second taxable year and because appellant continued to be incorporated with the SOS during 2017, appellant was subject to the \$800 minimum franchise tax for 2017 pursuant to R&TC section 23153(a) and (b). Accordingly, because the tax for 2017 was not an overpayment, respondent was not required to transfer this payment from tax year 2017 to tax year 2018. Therefore, because appellant did not pay the \$800 minimum franchise tax by the due date required for tax year 2018, respondent was correct to impose a tax assessment of \$800, plus penalties and interest.

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<sup>3</sup> California Code of Regulations, title 18, section 23222 provides a relevant example which notes that if a calendar year corporation files its articles of incorporation on December 16, it will be required to file a return and pay tax for the period from December 16 to December 31 (a period of 16 days), regardless of whether it was inactive and received no income during that period.

<sup>4</sup> Absent the exception provided in R&TC section 23153(f)(1), appellant would have been subject to the \$800 minimum tax for its 2016 taxable year under R&TC section 23153(a) and (b) since it was incorporated in California during 2016.

HOLDING

Appellant failed to establish that it is not subject to the \$800 minimum franchise tax.

DISPOSITION

We sustain respondent’s action in denying appellant’s claim for refund.

DocuSigned by:  
*Alberto T. Rosas*  
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Alberto T. Rosas  
Administrative Law Judge

We concur:

DocuSigned by:  
*Josh Lambert*  
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Josh Lambert  
Administrative Law Judge

DocuSigned by:  
*Sheriene Anne Ridenour*  
67F043D83EF547C...  
Sheriene Anne Ridenour  
Administrative Law Judge

Date Issued: 3/2/2021