

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:

PATIENT COMFORT SERVICES, LLC) OTA Case No. 19044621
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)**OPINION**

Representing the Parties:

For Appellant:

Robert C. Mack, Jr.

For Respondent:

Grace A. Power, Tax Counsel
Nancy Parker, Tax Counsel IV

J. LAMBERT, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, Patient Comfort Services, LLC (appellant) appeals an action by respondent Franchise Tax Board (FTB) in proposing an assessment of additional tax of \$800, a notice and demand (demand) penalty of \$200, and applicable interest, for the 2016 tax year.

Office of Tax Appeals Administrative Law Judges Josh Lambert, Tommy Leung, and Elliott Scott Ewing held an oral hearing via videoconference for this matter on May 25, 2021. At the conclusion of the hearing, the record was closed, and this matter was submitted for decision.

ISSUES

1. Whether appellant has a filing requirement and an obligation to pay the annual minimum limited liability company (LLC) tax for the 2016 tax year.
2. Whether the demand penalty should be abated.
3. Whether interest should be abated.

FACTUAL FINDINGS

1. Appellant is a California LLC classified as a single-member LLC. Appellant filed Articles of Organization with the California Secretary of State (SOS) on January 11, 2000.
2. Appellant did not file a timely California tax return for the 2015 or 2016 tax years.
3. FTB received information that appellant was registered to do business in California.
4. On June 13, 2018, FTB issued a Demand for Tax Return (Demand) for the 2016 tax year. The Demand instructed that, by July 18, 2018, appellant file a tax return, send a copy of the return if one was filed, or explain why it was not required to file a return.
5. On June 15, 2018, appellant responded that its business closed on December 24, 2015, and provided an unfiled copy of a Certificate of Cancellation.
6. Appellant filed a Certificate of Cancellation with the SOS, which stamped the certificate as filed on February 28, 2018.
7. After FTB determined that appellant had a filing requirement, appellant was given until August 31, 2018, to file a return. After appellant did not reply by the due date, FTB imposed a demand penalty.
8. FTB issued a Notice of Proposed Assessment (NPA), which proposed to assess the annual minimum LLC tax of \$800, a demand penalty of \$200, and applicable interest.
9. On January 15, 2019, appellant filed an LLC Return of Income (Form 568) for the 2015 tax year, indicating that it was a final return. On the same day, appellant filed a Form 568 for the 2016 tax year, reporting a tax liability of zero.
10. FTB issued a Notice of Action that affirmed the NPA.
11. This timely appeal followed.

DISCUSSION

Issue 1: Whether appellant has a filing requirement and an obligation to pay the annual minimum LLC tax for the 2016 tax year.

FTB's determination of tax is presumed to be correct, and a taxpayer has the burden of proving error. (*Appeal of GEF Operating, Inc.*, 2020-OTA-057P.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Ibid.*) FTB's determinations cannot be

successfully rebutted when the taxpayer fails to provide credible, competent, and relevant evidence as to the issues in dispute. (*Ibid.*)

As applicable to the tax year at issue, every LLC is required to pay an annual minimum tax to California for the privilege of doing business in this state equal to the applicable amount specified in R&TC section 23153(d), 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) and (b).) R&TC section 17941(b)(1) states that an LLC shall pay the annual minimum tax for each taxable year, or part thereof, until a Certificate of Cancellation of Registration or of Articles of Organization is filed with the SOS. In addition, R&TC section 17941(b)(2) states that if a taxpayer files a return that is designated as its final return, FTB shall notify the taxpayer that the annual tax shall continue to be due annually until a Certificate of Dissolution is filed with the SOS pursuant to Corporations Code section 17707.08 or a Certificate of Cancellation is filed with the SOS pursuant to Corporations Code section 17708.06. The R&TC does not provide a “reasonable cause” exception to the annual minimum LLC tax imposed under R&TC section 17941.

Single-member LLCs may elect to be taxed as a corporation. Upon such an election, the LLC is taxed as a separate entity from its owner. (*Bunzl Distribution USA, Inc. v. FTB* (2018) 27 Cal.App.5th 986, 993 (*Bunzl Distribution*), citing *City of Los Angeles v. Furman Selz Capital Management, LLC* (2004) 121 Cal.App.4th 505, 513 (*City of Los Angeles*).) However, where an LLC does not elect to be taxed as a corporation, it is treated as part of its owner for tax purposes. (*Bunzl Distribution, supra*, at p. 993, citing *City of Los Angeles, supra*, at pp. 513-514.) In other words, where an LLC elects not to be taxed as a corporation, its status as a separate entity is “disregarded” for income tax purposes, and it is taxed as part of its owner. (*Bunzl Distribution, supra*, at p. 993.)

Every LLC doing business in this state, organized in this state, or registered with the SOS, that is disregarded pursuant to R&TC section 23038 shall file a return on or before the fifteenth day of the fourth month following the close of the taxable year. (R&TC, § 18633.5(i)(1) & (3).) A single-member LLC that is not a corporation is disregarded as an entity separate from its owner for purposes of Part 10 (Personal Income Tax Law commencing with R&TC section 17001), Part 10.2 (Administration of Franchise and Income Tax Law

commencing with R&TC section 18401), and Part 11 (Corporation Tax Law commencing with R&TC section 23001), subject to certain statutory exceptions which recognize the existence of otherwise disregarded entities for certain purposes including the LLC tax and fee under R&TC sections 17941 and 17942, the LLC return filing requirements under R&TC section 18633.5, and the credit limitations of a disregarded entity under R&TC sections 17039 and 23036. (R&TC, § 23038(b)(2)(B)(iii); Cal. Code Regs., tit. 18, § 23038(b)-2(c)(2).)

The effective date of dissolution, withdrawal, or cancellation of an LLC is the date on which the certified copy of the court decree, judgment, or order declaring the LLC duly wound up and dissolved is filed with the SOS or the date on which the certificate of winding up and dissolution is filed with the SOS. (R&TC, § 17944(a).) In addition, the effective date of cancellation of registration of a foreign LLC is the date on which the Certificate of Cancellation of registration is filed with the SOS. (R&TC, § 17944(a).)

Unlike a foreign LLC which must file a Certificate of Cancellation to cancel its registration pursuant to Corporations Code section 17708.06, appellant, as a California LLC, must file a Certificate of Dissolution in addition to a Certificate of Cancellation, unless it meets certain requirements. (See Corp. Code, § 17707.08.) If a dissolution pursuant to Corporations Code section 17707.01(b) is made by the vote of all the members and a statement to that effect is added to the Certificate of Cancellation of Articles of Organization pursuant to Corporations Code section 17707.08(b), the separate filing of a Certificate of Dissolution is not required. (Corp. Code, § 17707.08(a)(3).) On appellant's Certificate of Cancellation, appellant's member checked the box stating that, as a California LLC, appellant met the requirement that dissolution was made by a vote of all members, such that a Certificate of Dissolution did not have to be filed prior to or together with the Certificate of Cancellation, pursuant to Corporations Code section 17707.08(a).

Appellant provides an SOS Statement of Information dated August 10, 2016, with a note that it was re-mailed on September 6, 2016. On the form, under the heading "type of business," appellant's member wrote that the business closed on December 24, 2015, and that it was not conducting any business activities. Appellant also provides a second SOS Statement of Information dated January 11, 2018, also stating that the business closed on December 24, 2015. However, a Statement of Information does not include the necessary information, per statute, to cancel an LLC. (Cf. Corp. Code, § 17702.09 [describing what information is included in a

Statement of Information].) A Certificate of Cancellation must include certain information, such as, for example, that all final returns have been or will be filed, and that upon the effective date of the Certificate of Cancellation, the LLC's registration is cancelled and its powers, rights and privileges will cease in California. (Corp. Code, § 17707.08(b)(2).) The Certificate of Cancellation in the appeal record, which includes the above information, indicates the cancellation became effective on February 28, 2018, as evidenced by the endorsement of the SOS of the filing date on the certificate. (See Corp. Code, § 17702.05(c).)¹ As stated above, an LLC shall pay the annual minimum tax for each taxable year, or part thereof, until a Certificate of Cancellation of Registration or of Articles of Organization is filed with the SOS. (See R&TC, § 17941(b)(1).) Therefore, appellant had a filing requirement and owed the annual minimum LLC tax for the 2016 tax year.

R&TC section 17947(a) provides that an LLC shall not be subject to the tax imposed by R&TC section 17941 if the LLC: (1) files a timely final annual tax return for the preceding taxable year; (2) does not do 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 Dissolution with the SOS pursuant to Corporations Code section 17707.08, or a Certificate of Cancellation with the SOS pursuant to Corporations Code section 17708.06, before the end of the 12-month period beginning with the date the final annual tax return was filed.

R&TC section 17947(a)(2) requires that appellant "does not do business" after the end of the tax year for which the final tax return is filed. Here, appellant filed a 2015 return stating it was a final return and contends that it did no business after the end of 2015. We note that R&TC section 23101 states that "doing business" includes being organized in the state.² (R&TC, § 23101(b)(1).) Appellant filed its Certificate of Cancellation on February 28, 2018. However, for purposes of R&TC section 17947, an LLC that "does not do business" in the state after the tax year of the final return has up to 12 months to file a Certificate of Cancellation of the Articles of Organization beginning with the date the final return was filed. (R&TC, § 17947(a)(3).) Therefore, whether appellant "does not do business" in California for purposes of R&TC

¹ The cancellation becomes effective on the date the certificate is filed, which is evidenced by the endorsement of the SOS of the date on the certificate, or upon a specified effective date no more than 90 days after filing. (Corp. Code, § 17702.05(c).)

² R&TC section 17941 states that an LLC shall pay the minimum annual LLC tax if it is "doing business in this state," as defined in R&TC section 23101.

section 17947 would not be determined by whether appellant was organized in the state as described in R&TC section 23101.³ Here, appellant asserts that it did no business after 2015 and provides evidence and testimony in support thereof. However, that is only one requirement of R&TC section 17947(a), and appellant must also satisfy the requirements of R&TC section 17947(a)(1) and (a)(3).

R&TC section 17947(a)(1) requires that appellant file a timely final annual tax return for the preceding taxable year. In this case, FTB proposed to assess the annual minimum LLC tax of \$800 for the 2016 tax year, which is at issue in this appeal. On January 15, 2019, appellant filed a tax return for the preceding tax year, 2015, stating it was a final return. However, the return was not filed by the extended due date of October 15, 2016. An LLC must file a timely income tax return for the return to be considered a valid final return. (See R&TC, § 17947(b).) As a result, appellant's 2015 return was not a valid final return for purposes of meeting R&TC section 17947(a)(1).⁴ For the exclusion under R&TC section 17947 to apply, all three requirements must be met. Accordingly, the exclusion under R&TC section 17947 does not apply.⁵

Issue 2: Whether the demand penalty should be abated.

If any taxpayer fails or refuses to furnish any information requested in writing by FTB or fails or refuses to make and file a return upon notice and demand by FTB, then, unless the failure is due to reasonable cause, FTB may add a penalty of 25 percent of the amount of any tax assessment pertaining to the assessment of which the information or return was required. (R&TC, § 19133.) To establish reasonable cause, a taxpayer's failure to respond to a Demand must be such that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of GEF Operating, Inc., supra.*)

³ FTB describes the requirement under R&TC section 17947(a)(2) that appellant "does not do business" as appellant must "conduct no business."

⁴ In addition, appellant filed its Certificate of Cancellation on February 28, 2018, which is more than twelve months after October 15, 2016, which is the last day a timely return could have been filed. Thus, appellant also does not satisfy R&TC section 17947(a)(3).

⁵ In addition, R&TC section 17946 provides an exemption from LLC taxes if two 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. Similar to R&TC section 17947, whether the LLC "did no business" with regard to R&TC section 17946 is not determined by whether it was organized in the state. Here, appellant contends that the LLC did no business in California during the year, but the taxable year was not 15 days or less. Accordingly, R&TC section 17946 is not applicable.

We note that the concurrence/dissent asserts that, because R&TC section 23038(b)(2)(B)(iii) states that a single-member LLC that is not a corporation is disregarded for purposes of Part 10.2 of the R&TC (Administration of Franchise and Income Tax Law, commencing with R&TC section 18401), which includes R&TC section 19133, and because R&TC section 19133 is not included in the list of exceptions, then the demand penalty does not apply to single-member disregarded LLCs such as appellant. However, R&TC section 19133 applies to “any taxpayer” that fails to file a return upon notice and demand by FTB. (See, e.g., *Appeal of Wright Capital Holdings, LLC*, 2019-OTA-219P [sustaining demand penalty on a single-member LLC classified as a disregarded entity].) Single-member disregarded LLCs are subject to the LLC return filing requirements under R&TC section 18633.5 (R&TC, § 23038(b)(2)(B)(iii)) and, therefore, are subject to the demand penalty, as it relates to enforcing the filing of returns and the return filing requirement of any taxpayer.⁶

We note that the concurrence/dissent also asserts that, because appellant is required to be treated as a sole proprietorship of its owner, then California Code of Regulations, title 18, (Regulation) section 19133, which pertains to only individuals, should apply to appellant. Specifically, Regulation section 19133 states that it applies to “individuals subject to tax under Part 10 (Personal Income Tax Law).” However, a single-member LLC is not subject to tax as an individual but as a separate entity, as stated in R&TC section 23038(b)(2)(B)(iii), which recognizes the existence of otherwise disregarded entities for certain purposes including the LLC tax and fee under R&TC sections 17941 and 17942. Therefore, we would not find appellant to be considered an individual subject to tax under Part 10 (Personal Income Tax Law), such that Regulation section 19133 would apply.

Here, FTB determined that appellant had a 2016 filing requirement, and appellant was given until August 31, 2018, to file a return. However, appellant filed a 2016 tax return on

⁶ Similarly, the late-payment penalty under R&TC section 19132 and the late-filing penalty under R&TC section 19131 are also included in Part 10.2 of the R&TC and not specifically enumerated in the list of exceptions under R&TC section 23038(b)(2)(B)(iii). While those penalties are not at issue in this appeal, they have been found applicable to single-member disregarded LLCs. (See, e.g., *Appeal of Summit Hosting, LLC*, 2021-OTA-216P [sustaining the R&TC section 19132 late-payment penalty and R&TC section 19131 late-filing penalty on a single-member LLC classified as a disregarded entity]; *Appeal of Triple Crown Baseball, LLC*, 2019-OTA-025P [sustaining the R&TC section 19132 late-payment penalty on a single-member LLC].) We note that R&TC section 19132(a)(1)(D) states that the late-payment penalty is applicable to an LLC tax under R&TC section 17941, and R&TC section 19132(b) provides for circumstances where the penalty may not be assessed or may be reduced if there is also a late-filing penalty and/or demand penalty imposed pursuant to R&TC sections 19131 and 19133, respectively.

January 15, 2019. Appellant argues that it does not have a filing requirement, but as discussed above, appellant was required to file a return for the 2016 tax year. Appellant has not provided any evidence demonstrating reasonable cause for failing to respond by the due date of August 31, 2018. Therefore, there is no basis to abate the demand penalty.

Issue 3: Whether interest may be abated.


If any amount of the 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).) Interest is not a penalty but is compensation for the taxpayer's use of money which should have been paid to the state. (*Appeal of Balch*, 2018-OTA-159P.) Imposition of interest is mandatory, and it can only be abated in certain limited situations when authorized by law. (R&TC, § 19101(a); *Appeal of Balch*, *supra*.) There is no reasonable cause exception to the imposition of interest. (*Appeal of Moy*, 2019-OTA-057P.) The Office of Tax Appeals has jurisdiction to determine whether appellant is entitled to the abatement of interest under R&TC sections 19104 and 21012. (*Id.*) R&TC section 19104 does not apply here because appellant does not allege, and the evidence does not show, that the interest at issue is attributable, in whole or in part, to any unreasonable error or delay by an officer or employee of FTB when performing a ministerial or managerial act. R&TC section 21012 does not apply as FTB did not provide appellant with any requested written advice. Therefore, we find that interest should not be abated.

HOLDINGS

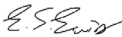
1. Appellant has a filing requirement and an obligation to pay the annual minimum LLC tax for the 2016 tax year.
2. The demand penalty should not be abated.
3. Interest should not be abated.

DISPOSITION

FTB's action is sustained.

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Josh Lambert
Administrative Law Judge

I concur:

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Elliott Scott Ewing
Administrative Law Judge

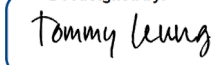
T. LEUNG, concurring in part, and dissenting in part:

I agree with the majority's Opinion except with respect to the imposition of the Revenue and Taxation Code (R&TC) section 19133 demand penalty. In relevant part, an eligible business entity that is disregarded for federal tax purposes is likewise disregarded for purposes of Parts 10, 10.2 and 11 of the R&TC, other than for the LLC tax (R&TC section 7941), the LLC fee (R&TC section 17942), the LLC tax return (R&TC section 18633.5), and credit limitations (R&TC sections 17039 and 23036). (R&TC, § 23038(b)(2)(B)(iii); Cal. Code Regs., tit. 18, § 23038(b)-1(a)(4).) With exceptions, "a business entity that has a single owner and is not a corporation . . . is disregarded as an entity separate from its owner." (Treas. Reg. § 301.7701-2(c)(2)(i).) "A business entity with only one owner is classified as a corporation or is disregarded; if the entity is disregarded, its activities are treated in the same manner as a sole proprietorship, branch, or division of the owner." (Treas. Reg. § 301.7701-2(a); see also Cal. Code Regs., tit. 18, § 23038(b)-2(a).)

Here, respondent imposed the demand penalty on appellant, the disregarded entity, and not on appellant's owner (an individual) as both the notices of proposed assessment and action are addressed to appellant. Because R&TC section 19133 resides within Part 10.2 of the R&TC, the demand penalty cannot be applied to appellant. While there might be some justification for imposing a late filing penalty (R&TC section 19131) and/or a late payment penalty (R&TC section 19132) because those two penalties are mandatory and are directly related to the R&TC section 18633.5 filing requirement and the R&TC section 17941 tax payment requirement, respectively, the demand penalty is discretionary and has no such direct nexus with any of the enumerated exceptions contained in R&TC section 23038(b)(2)(B)(iii). Simply put, the demand penalty enforces the law's requirement to comply with respondent's demand, and not the requirement to file the LLC return; instead, the late filing penalty enforces the requirement that the LLC return be filed. Furthermore, since appellant is required to be treated as a sole proprietor (outside of the exceptions referenced above), which is an individual, the exception applicable to individual taxpayers (i.e., Cal. Code Regs., tit. 18, § 19133), would be applicable; however, there is no indication in the record that respondent applied this regulation.

Thus, the plain language of R&TC section 23038(b)(2)(B)(iii), as relevant here, instructs us to essentially ignore, or disregard, the existence of appellant except for four specific situations – the LLC tax, the LLC fee, the LLC return, and credit limitations. As R&TC section 19133 is

not enumerated in the list of exceptions and is in fact specifically excluded (by reference to Part 10.2 of the R&TC), the demand penalty cannot be sustained. (See *Bostock v. Clayton County, Georgia* (2020) ___ U.S. ___, 140 S.Ct. 1731; *Gitlitz v. Commissioner* (2001) 531 U.S. 206.)

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Tommy Leung
Administrative Law Judge

Date Issued: 8/26/2021