

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:
TRYONAPPS, INC.

) OTA Case No. 21108811
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OPINION

Representing the Parties:

For Appellant: Grace Tang, Owner

For Respondent: Topher Tuttle, Tax Counsel

J. LAMBERT, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, TryOnApps, Inc. (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing additional tax of \$800, a late filing penalty of \$200, a notice and demand (demand) penalty of \$200, and a filing enforcement fee of \$83, plus applicable interest for the 2018 tax year.

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

ISSUES

1. Whether appellant established that it was not subject to the minimum franchise tax.
2. Whether appellant established reasonable cause for failing to timely file its return.
3. Whether appellant established reasonable cause for failing to timely respond to the Demand for Tax Return (Demand).
4. Whether the filing enforcement fee may be abated.
5. Whether appellant established a basis to abate interest.

FACTUAL FINDINGS

1. FTB received information from the IRS showing that appellant filed its 2018 federal tax return using a California address and that appellant may have had a 2018 California filing requirement.
2. On February 17, 2021, FTB issued a Demand for Tax Return (Demand) because FTB did not have a record of appellant's 2018 tax return.¹ The Demand instructed that appellant file a tax return, show that it already filed a tax return, or establish that it was not required to file a tax return by March 24, 2021.
3. On February 23, 2021, appellant's owner and founder, Grace Tang (Tang), responded to the Demand by telephone. Tang explained that appellant was incorporated in Delaware and performed marketing services for fashion, jewelry, and art industries out of Tang's home in California as a single person operation. Tang further explained that appellant was in "stealth mode" in 2018, but Tang checked appellant's email while in California.
4. On April 26, 2021, FTB issued a Notice of Proposed Assessment (NPA) proposing to assess the \$800 minimum tax, \$200 late filing penalty, \$200 demand penalty, and \$83 filing enforcement fee, plus applicable interest.
5. On May 12, 2021, appellant timely protested the NPA.
6. FTB issued a Notice of Action affirming the NPA.
7. Thereafter, appellant timely filed this appeal.

DISCUSSION

Issue 1: Whether appellant established that it was not subject to the minimum franchise tax.

FTB's determination is presumed correct and the taxpayer has the burden of proving error. (*GEF Operating Inc.*, 2020-OTA-057P.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Ibid.*) FTB's determination must be upheld in the absence of credible, competent, and relevant evidence showing error in FTB's determination. (*Ibid.*)

Every corporation "doing business" in California annually pays for the privilege of exercising its corporate franchise within California a tax according to or measured by its net income or, if greater, the minimum franchise tax. (R&TC, §§ 23151(a), 23153(b)(3).) A foreign

¹ FTB previously issued a Demand to appellant on July 22, 2020, for the 2018 tax year, but the Demand was returned to FTB as undeliverable.

corporation that does not qualify to engage in intrastate activities, but nevertheless engages in such activities, is subject to at least the minimum tax for any year or years it engaged in such activities. (Cal. Code Regs., tit. 18, § 23151.) Corporations subject to the minimum franchise tax shall pay annually to the state a minimum franchise tax of \$800. (R&TC, § 23153(d)(1).)

A taxpayer may have a filing requirement and be subject to the minimum franchise tax if the taxpayer's activities qualify as "doing business" in California under either R&TC section 23101(a) or (b). (*Appeal of GEF Operating, Inc., supra.*) Under R&TC section 23101(a), a taxpayer is "doing business" in California when it actively engages in any transaction for the purposes of financial or pecuniary gain or profit. The transaction does not need to result in actual profit, and the relevant inquiry is whether the activity or transaction was motivated by a financial or pecuniary gain or profit. (*Appeal of Wright Capital Holdings LLC, 2019-OTA-219P.*)

Under R&TC section 23101(b), a taxpayer is "doing business" in California if any of the following conditions are satisfied: (1) the taxpayer is organized or commercially domiciled in California; (2) sales of the taxpayer in California exceed the lesser of \$500,000 or 25 percent of the taxpayer's total sales; (3) the real property and tangible personal property of the taxpayer in California exceed the lesser of \$50,000 or 25 percent of the taxpayer's total real property and tangible property; or (4) the amount paid in California by the taxpayer for compensation exceeds the lesser of \$50,000 or 25 percent of the total compensation paid by the taxpayer.²

Here, appellant was a foreign corporation that operated out of Tang's home office in California and Tang checked appellant's emails in California in 2018. A corporation is "doing business" in California where it "actively" engages in any transaction for the purposes of financial or pecuniary gain or profit. (R&TC, § 23101(a).) Appellant's activities in California satisfy this standard because appellant's activities were performed with the motivation for pecuniary gain or profit, which appellant does not dispute. It is also not relevant that appellant did not earn a profit. (*Appeal of Wright Capital Holdings LLC, supra.*)

Appellant argues that it was not subject to the minimum franchise tax because Tang resided in California for only a portion of 2018, moved out of her rental apartment in May 2018, and traveled out of state for six months. However, appellant's activities in California, while limited, are sufficient to satisfy the "doing business" standard under R&TC section 23101(a).

² These threshold amounts are adjusted annually for inflation. (See R&TC, § 23101(c).)

Appellant further argues that it was not subject to the minimum franchise tax because it was not doing business in California under R&TC section 23101(b) because appellant was not organized or commercially domiciled in California, did not receive business income in 2018, and did not earn a profit. However, a taxpayer may be subject to the minimum franchise tax under either R&TC section 23101(a) or (b). As discussed above, appellant's activities satisfy the "doing business" standard under R&TC section 23101(a). Therefore, appellant has not established that it was not subject to the minimum franchise tax.

Issue 2: Whether appellant established reasonable cause for failing to timely file its return.

Every taxpayer subject to tax imposed by Part 11 (commencing with R&TC section 23001) shall file a tax return on or before the 15th day of the fourth month following the close of its taxable year.³ (R&TC, § 18601(a).) FTB may grant an extension to file no more than seven months from the due date for filing the return. (R&TC, § 18604(a).) California imposes a penalty for failing to file a required return on or before the due date, unless the taxpayer shows that the failure is due to reasonable cause and not due to willful neglect. (R&TC, § 19131(a).) The late filing penalty is calculated at five percent of the tax for each month or fraction of each month the return is late, with a maximum penalty of 25 percent of the tax due. (*Ibid.*) To establish reasonable cause for the late filing penalty, the taxpayer must show that the failure to file a timely return occurred despite the exercise of ordinary business care and prudence or that such cause existed as would prompt an ordinarily intelligent and prudent businessperson to have so acted under similar circumstances. (*Appeal of Head and Feliciano*, 2020-OTA-127P.)

Here, appellant was required to file a 2018 tax return because appellant was a foreign corporation doing business in California and was subject to the minimum franchise tax. However, appellant did not file a 2018 tax return. FTB imposed a \$200 (\$800 x 25 percent) late filing penalty because FTB proposed to impose \$800 of tax and the maximum 25 percent penalty applies. Accordingly, FTB properly imposed and calculated the late filing penalty.

Appellant argues that it was not required to file a tax return because it was not doing business in California. However, ignorance of the law is not considered reasonable cause, even

³ In the case of an "S corporation" described in Internal Revenue Code section 1361, returns shall be filed on or before the 15th day of the third month following the close of its taxable year. (R&TC, § 18601(d)(1).)

if the taxpayer is not aware of a filing requirement. (*Appeal of GEF Operating, Inc., supra.*) Therefore, appellant has not established reasonable cause to abate the late filing penalty.

Issue 3: Whether appellant established reasonable cause for failing to timely respond to the Demand.

If any taxpayer fails or refuses to make and file a tax return required upon notice and demand by FTB, then, unless the failure is due to reasonable cause and not willful neglect, FTB may add a penalty of 25 percent of any deficiency tax assessed by FTB concerning the assessment of which the return was required. (R&TC, § 19133.) To establish reasonable cause to abate the demand penalty, a taxpayer has the burden of proof to establish that the failure to respond to the Demand occurred despite the exercise of ordinary business care and prudence or that an ordinarily intelligent and prudent businessperson would have acted similarly under circumstances. (*Appeal of GEF Operating, Inc., supra.*)

Here, FTB issued a Demand to appellant requiring it to file a tax return by March 24, 2021, but appellant did not file a 2018 tax return. FTB proposed to assess a \$200 (\$800 x 25 percent) demand penalty because FTB proposed to assess \$800 of tax and the 25 percent penalty applies. Accordingly, FTB properly imposed and calculated the demand penalty.

Appellant argues that it was not required to file a tax return because it was not doing business in California. However, appellant does have a filing requirement as explained above and ignorance of the law is not considered reasonable cause. (*Appeal of GEF Operating, Inc., supra.*) Therefore, appellant has not established reasonable cause to abate the demand penalty.

Issue 4: Whether the filing enforcement fee may be abated.

R&TC section 19254(a)(2) states that if FTB mails a formal legal demand to file a tax return and the taxpayer fails or refuses to make and file a tax return, then FTB will also impose a filing enforcement fee. Once properly imposed, there is no provision in the R&TC that would allow abatement of the filing enforcement fee. (*Appeal of GEF Operating, Inc., supra.*)

Here, it is uncontroverted that FTB properly imposed the filing enforcement fee. As such, the fee may not be abated.

Issue 5: Whether appellant established a basis to abate interest.

Tax is due on the original due date of the return without regard to any filing extension. (R&TC, § 19001.) If a taxpayer does not pay the tax by the original due date of the tax return, or if FTB assesses additional tax, the law provides for charging interest on the balance due. (R&TC, § 19101.) Imposing interest is mandatory and not a penalty. (*Appeal of Balch*, 2018-OTA-159P.) There is no reasonable cause exception to the imposition of interest. (*Appeal of Moy*, 2019-OTA-057P.)

Generally, taxpayers may obtain a waiver or an abatement of interest by establishing that a taxpayer's failure to make a timely return is due to the taxpayer's reasonable reliance on FTB's written advice, if there was an unreasonable error or delay by an officer or employee of FTB in performing a ministerial or managerial act, or extreme financial hardship. (R&TC, §§ 21012, 19104 & 19112.) OTA does not have jurisdiction to review FTB's determination regarding extreme financial hardship. (*Appeal of Moy, supra.*)

Appellant argues that interest should be abated for extreme financial hardship. However, the OTA does not have jurisdiction to review FTB's determination regarding abatement of interest for extreme financial hardship. Appellant has not established any other basis to abate interest.

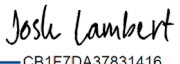
Therefore, appellant has not established a basis to abate interest.

HOLDINGS

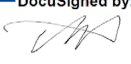
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DISPOSITION


FTB’s action is sustained.

DocuSigned by:

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 Josh Lambert
 Administrative Law Judge

We concur:
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 Andrew Wong
 Administrative Law Judge

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 Keith T. Long
 Administrative Law Judge

Date Issued: 10/6/2022