

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:)
OTC GLOBAL FOUNDATION) OTA Case No. 22039998
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OPINION

Representing the Parties:

For Appellant: Jia Phong Wong, CEO

For Respondent: D’Arcy Dewey, Attorney

For Office of Tax Appeals: Linda Frenklak, Attorney

A. VASSIGH, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, OTC Global Foundation (appellant) appeals actions by respondent Franchise Tax Board (FTB) proposing additional tax of \$5,876 and applicable interest for tax year ending (TYE) October 31, 2012 (tax year 2011); additional tax of \$4,488 and applicable interest for TYE October 31, 2013 (tax year 2012); additional tax of \$1,036 and applicable interest for TYE October 31, 2014 (tax year 2013); and additional tax of \$4,534 and applicable interest for TYE October 31, 2015 (tax year 2014).¹

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

¹ The tax year refers to the calendar year when appellant’s fiscal year commenced as the tax year. Appellant lists amounts at issue lower than the amounts listed in the Notice of Action (NOA)s (\$5,655, \$4,267, \$815, and \$4,313 for tax years 2011, 2012, 2013, and 2014, respectively). On appeal, FTB modifies the proposed assessments to \$5,855, \$811, \$1,001, and \$4,381 for tax years 2011, 2012, 2013, and 2014, respectively.

ISSUES

1. Whether appellant has established that it is eligible for a charitable exemption under R&TC section 23701d for any of the tax years at issue.
2. Whether appellant has established that it is entitled to claim disallowed charitable contributions and gifts deductions for any of the tax years at issue.
3. Whether appellant has established that it is entitled to claim disallowed business expense deductions or disallowed depreciation deductions for any of the tax years at issue.
4. Whether appellant has established that payments it received from its founders constitute nontaxable contributions to capital for any of the tax years at issue.
5. Whether appellant is entitled to interest abatement for any of the tax years at issue.

FACTUAL FINDINGS

1. On November 18, 2010, appellant registered and filed its Articles of Incorporation with the California Secretary of State. Appellant's Articles of Incorporation describe appellant as a California nonprofit public benefit corporation with the stated purpose "to donate available fund assets to certain academic institutions for their research and development activity uses; advocacy for community benefits, which include, but not limited to the performance of arts; and the remaining money is used to develop and expand [its] variety of philanthropic missions." Appellant's Articles of Incorporation also provide that it is organized and operated exclusively for charitable purposes within the meaning of Internal Revenue Code (IRC) section 501(c)(3) and its property is irrevocably dedicated to charitable purposes and no part of the net income or assets shall ever inure to the benefit of any director, officer or member thereof or to the benefit of any private person. Appellant's Articles of Incorporation further provide that on its dissolution, its assets shall be distributed to a non-profit fund, foundation or corporation that is organized and operated exclusively for charitable purposes.
2. Appellant subsequently requested an exemption from tax as a nonprofit public benefit corporation – private non-operating foundation. In an Exempt Determination Letter dated May 13, 2011, FTB granted appellant an exemption from corporate income taxes as a charitable organization pursuant to R&TC section 23701d effective as of November 18, 2010.
3. Appellant filed California Exempt Organization Annual Information Returns (Forms 199) for the tax years at issue. On these returns, appellant identified J. Phong Wong as its

- CEO and Y. Lee as its Secretary and reported that neither of them was compensated. J. Phong Wong and Y. Lee are married to each other and are appellant's founders.
4. FTB examined appellant's exempt status to determine whether its activities were confined to those permitted under R&TC section 23701d. FTB conducted the examination after receiving information from the Santa Clara District Attorney's office that it charged appellant's CPA with tax evasion related to the abuse of his private foundation—the CPA who appellant's founders engaged to form a private foundation in 2016. The charges indicate that the CPA facilitated the organization of several other private foundations that may have been operating similar to his private foundation.
 5. In an audit position letter dated May 11, 2018, FTB concluded that appellant was not operating substantially for exempt purposes as required under R&TC section 23701 but to serve the personal benefit of its founders. FTB determined that appellant's tax-exempt status would be revoked effective November 1, 2011. FTB also stated that Notices of Proposed Assessment (NPAs) would be issued to appellant proposing taxes and accuracy-related penalties for the tax years at issue.
 6. In a letter dated July 26, 2018, FTB informed appellant that, after reviewing all available information, it confirmed its position that appellant is not qualified for tax-exempt status because its activities were not confined to those permitted under R&TC section 23701d. FTB determined that appellant was not operating exclusively for charitable purposes, and its net earnings were improperly used for the personal expenses of its directors. FTB informed appellant that it revoked appellant's tax-exempt status effective November 1, 2011. FTB also stated that appellant would continue to be recognized as a nonprofit public benefit corporation subject to the franchise tax, and, as a nonprofit public benefit corporation, its assets, including cash and property, were irrevocably dedicated to charitable purposes in accordance with its articles of incorporation, and its founders were not allowed to use appellant's assets for any other purpose.
 7. FTB issued appellant NPAs dated August 24, 2018, for the tax years at issue, each of which increased appellant's reported net income due to the disallowance of claimed deductions for: 1) auto and insurance, 2) contributions and gifts, 3) consultation services and legal fees, 4) dues, subscriptions, and telephone, 5) education and training, 6) maintenance and repair, 7) meals and entertainment, 8) office and supplies, 9) travel, meetings, and rent, and 10) depreciation. The NPAs proposed additional taxes of \$5,876, \$4,488, \$1,036, and \$4,534 and accuracy-related penalties for tax years 2011, 2012, 2013, and 2014, respectively. Each of the NPAs stated that appellant's

- tax-exempt status was revoked as of November 1, 2011, and the proposed assessment does not include accrued interest.
8. After FTB issued the NPAs, appellant submitted amended returns for tax years 2013 and 2014, both of which changed how expenses among various categories of expenses were claimed. According to FTB, appellant's 2013 amended return conceded total expenses of \$2,343, and the 2014 amended return did not change the total amount of claimed expenses.²
 9. Appellant requested reinstatement of its tax-exempt status pursuant to R&TC section 23778. In a letter dated February 12, 2021, FTB informed appellant that it denied its application for reinstatement of its tax-exempt status for the tax years at issue because FTB did not change its position that appellant was not operating exclusively for charitable purposes and its net earnings were improperly used for the personal expenses of its directors.
 10. Appellant protested the NPAs.³ In a protest determination letter dated September 17, 2021, FTB informed appellant that after reviewing the information produced at audit and at protest, it determined that for tax year 2012, appellant is entitled to exclude capital contributions of \$41,592, because they constitute an increase to net assets from taxable gross receipts, resulting in a revised proposed additional tax of \$811 for the 2012 tax year. In addition, FTB stated that it withdrew the accuracy-related penalty for each tax year at issue.
 11. For each of the tax years at issue, FTB issued a Notice of Action (NOA) dated February 18, 2022, withdrawing the accuracy-related penalty but otherwise affirming the NPA.
 12. This timely appeal followed.
 13. During the appeal, OTA requested additional information from FTB. In its responsive brief, FTB concedes that the NOA for tax year 2012 fails to reflect the adjustment made during protest allowing capital contributions of \$41,592 and confirms that appellant is entitled to claim additional charitable contribution deductions for tax years 2011, 2013,

² Complete copies of the 2013 and 2014 amended returns are not in the appeal record. FTB incorrectly contends that on its 2013 amended Form 199, appellant conceded total expense of \$2,343. The original 2013 Form 199 reports total claimed expenses and disbursements of \$18,421 but the total amount claimed equals \$21,580. The amended 2013 Form 199 also reports total claimed expense and disbursements of \$18,421, which means that the amended 2013 Form 199 reports \$3,159 less total claimed expenses and disbursements than the original 2013 Form 199 (\$21,580 - \$18,421).

³ A copy of appellant's protest letter is not in the appeal record.

and 2014. FTB revises the proposed assessments of tax to \$5,855, \$811, \$1,001, and \$4,381 for tax years 2011, 2012, 2013, and 2014, respectively.

DISCUSSION

Issue 1: Whether appellant has established that it is eligible for a charitable exemption under R&TC section 23701d for any of the tax years at issue.⁴

Burden of Proof

A determination by FTB is generally presumed to be correct, and a taxpayer bears the burden of proving otherwise. (*Appeal of GEF Operating, Inc.*, 2020-OTA-057P.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Ibid.*) In the absence of credible, competent, and relevant evidence showing that FTB's determination is incorrect, it must be upheld. (*Ibid.*)

Tax Exemption

The California corporate franchise tax is imposed on every nonfinancial corporation organized in California that is not exempted from tax. (R&TC, § 23151.1.) Exemptions from taxation are strictly construed. (*Appeal of Nag and Rudd*, 2023-OTA-150P (*Nag*); see also *Nonprofits' Ins. Alliance of California v. U.S.* (Fed. Cl. 1994) 32 Fed.Cl. 277, 282.) Statutes granting exemption from tax "must be construed liberally in favor of the taxing authority, and strictly against the claimed exemption." (*Nag, supra.*) A taxpayer has the burden of proving that it comes within the terms of a statute granting a tax exemption. (*Valley Baptist Church v. City of San Rafael* (2021) 61 Cal.App.5th 401, 411, as modified on denial of reh. (Mar. 22, 2021); see also *Church of Scientology of California v. Commissioner* (9th Cir. 1987) 823 F.2d 1310, 1317, cert. den. (1988) 486 U.S. 1015.)

R&TC section 23701 generally provides that, if applicable requirements are met, organizations "which are organized and operated for nonprofit purposes within the provisions of a specific section of this article [Article 1 of the Corporation Tax Law] . . . are exempt from taxes" R&TC section 23701d(a) provides a tax exemption for a corporation organized and

⁴ OTA has jurisdiction to review whether appellant satisfied the requirements for tax exemption for the tax years at issue as part of its authority to hear and determine the appeal pursuant to R&TC section 19047. (See *Appeal of Charter Point Homeowners Association* (96-SBE-004) 1996 WL 263501; *Appeal of Inglewood Park Cemetery Association Endowment Care Fund* (84-SBE-091) 1984 WL 16170; *Appeal of Construction Industries Exposition and Home Show of Southern California* (64-SBE-085) 1964 WL 1489; *Appeal of South Bay Board of Realtors, Inc.* (66-SBE-029) 1966 WL 1384; *Appeal of Boys Incorporated of America* (60-SBE-015) 1960 WL 1394; *Appeal of The Federal Savings and Loan Institute of California* (43-SBE-035) 1943 WL 302.)

operated exclusively for charitable purposes. As relevant to the issues here, the language describing a qualifying organization in R&TC section 23701d(a) is substantially the same as the language found in IRC section 501(c)(3). When a California statute is substantially identical to a federal statute (as in the case of the exemption statutes, IRC section 501(c)(3) and R&TC section 23701d(a)), federal law interpreting the federal statute may be considered highly persuasive regarding the California statute. (*Appeal of Calegari*, 2021-OTA-337P.)

R&TC section 23701d and IRC section 501(c)(3) require an exempt charitable corporation to be organized and to operate exclusively for charitable purposes. “If an organization fails to meet either the organizational test or the operational test, it is not exempt.” (Treas. Reg. § 1.501(c)(3)-1(a)(1).) “The operational test focuses on the actual purposes the organization advances by means of its activities, rather than on the organization’s statement of purpose or the nature of its activities.” (*Redlands Surgical Services v. Commissioner* (1999) 113 T.C. 47, 71-72 affd. (9th Cir. 2001) 242 F.3d 904.) When applying the operational test, the term “exclusively” does not mean solely or absolutely without exception. (*Community Education Foundation v. Commissioner*, T.C. Memo. 2016-223.) Instead, “[a]n organization will be regarded as operated exclusively for one or more exempt purposes only if it engages primarily in activities which accomplish one or more of such exempt purposes” (Treas. Reg. § 1.501(c)(3)-1(c)(1).) An organization will not be regarded as operated exclusively for one or more exempt purposes “if more than an insubstantial part of its activities is not in furtherance of an exempt purpose.” (*Ibid.*)

R&TC section 23701d(a) and IRC section 501(c)(3) provide that an organization does not qualify for exemption unless no part of its net earnings “inures to the benefit of any private shareholder or individual.” (See Treas. Reg. § 1.501(c)(3)-1(c)(2).)⁵ For purposes of R&TC section 23701d, “[i]nurement means that an individual receives some special benefit which is unreasonable under the circumstances because of his membership or relationship to the organization.” (Cal. Code Regs., tit. 18, § 23701(b)(1)(A).) The term “private shareholder or individual” refers to persons who have a personal or private interest in the organization’s activities. (Cal. Code Regs., tit. 18, § 23701(e); see also Treas. Reg. § 1.501(a)-1(c)(2).) This term is “generally understood to mean an insider of the organization (such as a member or an officer).” (*Capital Gymnastics Booster Club, Inc. v. Commissioner*, T.C. Memo. 2013-193.) Applying IRC section 501(c)(3), the Ninth Circuit Court of Appeals stated, “The organization

⁵ R&TC section 23701d(a) also provides that a corporation does not qualify as an exempt charitable organization “unless its assets are irrevocably dedicated to one or more purposes listed in [R&TC section 23701d].” (Cf. R&TC, § 23701f(b); Cal. Code Regs., tit. 18, § 23701f(a).)

loses tax exempt status if even a small percentage of income inures to a private individual.” (*Church of Scientology of California v. Commissioner, supra*, 823 F.2d at p. 1316.)

“A substantial body of caselaw has explored the concept of private benefit within the framework of the relationship between an organization claiming tax-exempt status and its founder (or small group of related insiders).” (*Tikar, Inc. v. Commissioner*, T.C. Memo. 2021-53 (citations omitted).) Courts have found that “[f]actors emerging repeatedly as indicative of prohibited inurement and private benefit include control by the founder over the entity’s funds, assets, and disbursements; use of entity money for personal expenses; payment of salary or rent to the founder without any accompanying evidence or analysis of the reasonableness of the amounts; and purported loans to the founder showing a ready private source of credit.” (*Ibid.* (citations omitted).)

FTB is authorized to revoke the exempt status of an organization granted under Article I of the Corporation Tax Law if the organization fails to confine its activities to those permitted by the section under which the exemption was granted. (R&TC, § 23777(c); Cal. Code of Regs., tit. 18, § 23777(a)(3).)⁶

FTB states that appellant’s statements indicate that the founders used appellant’s net earnings “to make rental payments on their personal residence, pay for gas, maintenance, and lease expenses relating to their personal vehicles, pay themselves ‘legal and accounting fees’ without reporting wages, purchase numerous meals for themselves and in some cases ‘guests’, pay their personal cable and phone bills, and pay for personal international vacation expenses, among other items.” FTB also states that appellant’s bank statements and various claimed unsubstantiated expenses suggest that appellant may have paid for various home goods, groceries, and other items for the founders, which were paid with appellant’s net earnings during the tax years at issue. FTB argues that appellant is not entitled to tax-exempt status because it fails to prove that these paid expenses were necessary for its exempt operations and were not for the founders’ personal living expenses.

On its appeal form for each tax year at issue, appellant states that it “definitely has done extensive charity and public benefits advocacy portfolios, plus Net Earnings not in owners’ name.” Although it asserts in its opening brief that it was never incorporated as a public charity or a private operating foundation, appellant contends that its charity results are very effective and that its “global big charitable portfolios” have satisfied more than one charitable purpose defined in IRC section 501(c)(3).

⁶ R&TC section 23778 provides the process for an organization whose exemption was revoked under R&TC section 23703 or 23777 to be reestablished as an exempt organization.

Appellant argues that FTB incorrectly associates it with the CPA charged with tax evasion whom it retained. Appellant asserts that prior to its audit, FTB accepted its Forms 199 as filed and for the tax years at issue, it has federal exempt status as an IRC section 501(c)(3) non-operating foundation. Appellant contends that it is unfair to tax its net earnings in tax years 2011 and 2014 because it saved net earnings for mission development. It also asserts that it donated less in tax years 2011 and 2012 because it was still researching suitable charities. Appellant indicates that it ran charity programs pursuant to the mandatory IRC section 4942 requirements.⁷ Appellant also states that it made proactive donations two years prior to FTB's audit and fulfilled pledges to donate much more in tax year 2013. Appellant indicates that it made donations with its Capital One Business Visa credit card but incorrectly listed the business card holder's name, rather than appellant's name, on the donation receipts. Appellant states that it "wanted to donate and [did not] intend to private inure."

FTB revoked appellant's tax-exempt status due to its finding that some of appellant's net earnings inured to its founders. For example, appellant's financial statements contain charges for gas, groceries, restaurants and purchases from Costco, and appellant has not provided credible evidence showing that such charges benefited appellant rather than its founders. Appellant spent thousands of dollars to pay for international travel by its founders. Appellant claims that international travel helped it research nonprofits for international donations, but it has not substantiated this contention, and its travel expenses far outweigh its charitable contributions. Although appellant argues that it conducted bona fide charity work, appellant fails to establish that none of its income was used to pay for the founders' personal expenses.

As discussed above, an organization does not qualify for exemption under R&TC section 23701d(a) or IRC section 501(c)(3) if even a small percentage of its income inures to a private individual. (*Church of Scientology of California v. Commissioner, supra*, 823 F.2d at p. 1316.) Appellant fails to carry its burden of proving that it comes within the terms of R&TC section 23701d for the tax years at issue.⁸ Appellant has therefore not established that FTB erroneously revoked its tax-exempt status for the tax years at issue.

⁷ IRC section 4942 generally imposes a tax on certain private foundations that have undistributed income.

⁸ Assuming without finding that the IRS has never revoked appellant's federal exempt status, as appellant indicates, FTB is not required to do the same. (*Appeal of Der Wienerschnitzel International, Inc.* (79-SBE-063) 1979 WL 4104 [final federal determination is not controlling on FTB].)

Issue 2: Whether appellant has established that it is entitled to claim disallowed charitable contributions and gifts deductions for any of the tax years at issue.

Income tax deductions are a matter of legislative grace, and a taxpayer who claims a deduction has the burden of proving by competent evidence that it is entitled to that deduction. (*Appeal of Vardell*, 2020-OTA-190P.) This burden requires the taxpayer to establish that the claimed deduction is allowed pursuant to an applicable statute and to show by credible evidence that the transaction at issue comes within its terms. (*Appeal of Silver*, 2022-OTA-408P.) The burden of proof requires proof by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 30219(b).) A preponderance of the evidence means that the taxpayer must establish by documentation or other evidence that the circumstances the taxpayer asserts are more likely than not to be correct. (*Appeal of Estate of Gillespie*, 2018-OTA-052P.) Unsupported assertions are insufficient to satisfy a taxpayer's burden of proof. (*Appeal of GEF Operating, Inc.*, *supra*.) A taxpayer's failure to produce evidence within its control gives rise to a presumption that the evidence is unfavorable to its position. (*Appeal of Vardell*, *supra*.)

R&TC section 24357(a) allows a corporation to claim a deduction for a charitable contribution, which is defined in R&TC section 24359, made within the tax year. "A charitable contribution shall be allowable as a deduction only if verified under regulations prescribed by [FTB]." (*Ibid.*) R&TC section 24357(e) generally incorporates IRC section 170(f)(8)(A), which provides that a charitable deduction is not allowed for any contribution of \$250 or more unless the taxpayer substantiates the contribution with "contemporaneous written acknowledgement of the contribution by the donee organization" that meets the requirements of subparagraph (B). Subparagraph (B) provides that a contemporaneous written acknowledgement is required to include: 1) the amount of cash and a description (but not value) of any property other than cash contributed, 2) whether the donee organization provided any goods or services in consideration, in whole or in part, for any property contributed, and 3) a description and good faith estimate of the value of any goods or services that the donee organization provided. IRC section 170(f)(8) places the responsibility on taxpayers to request substantiation from the donee organization. (*Addis v. Commissioner* (9th Cir. 2004) 374 F.3d 881, 885.)

Any deduction for a charitable contribution must be substantiated, when required by FTB, by a statement from the donee organization indicating whether it is a domestic organization, the name and address of the contributor, the amount of the contribution, the date of actual receipt of the contribution, and any other information that FTB may deem necessary. (Cal. Code Regs., tit. 18, § 24357-1(a)(3)(B).) If the contribution is an item of property with a fair market value in excess of \$200, the donee organization's statement is required to indicate the

location of the item if retained by the organization, the amount received on any sale of the item, and the date of the sale or other disposition of the item. (*Ibid.*)

As relevant to this appeal, R&TC section 24359(b) defines a “charitable contribution” as a contribution or gift to or for the use of a corporation, trust, or community chest, fund, or foundation created or organized in the United States or in any possession thereof, or under the law of the United States, any state, the District of Columbia, or any possession of the United States, which is organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes for which no part of its net earnings inures to the benefit of any private shareholder or individual.

Here, FTB noted that on its Forms 199, appellant reported receiving contributions, i.e., income/receipts, in the amounts of \$66,566, \$51,704, \$10,493, and \$52,000 and spending on operational and administrative expenses 30 percent of its receipts, 50 percent of its receipts, 180 percent of its receipts, and 72 percent of its receipts for tax years 2011, 2012, 2013, and 2014, respectively. FTB also noted that appellant reported donating to non-profit organizations two percent (\$1,000), three percent (\$1,600), 18 percent (\$1,887), and eight percent (\$4,200) of its income/receipts for tax years 2011, 2012, 2013, and 2014, respectively. However, FTB determined that appellant in fact donated only 0 percent, 0 percent, 3.6 percent (i.e., \$386.67), and 0 percent of its income/receipts to non-profit organizations in tax years 2011, 2012, 2013, and 2014, respectively.

At audit, appellant provided FTB with copies of receipts, donation summaries, credit card statements, Blessing Master Practice Logs, a Giving History Form, correspondence, and acknowledgement letters. FTB found that appellant did not provide contemporaneous source documentation, except for a few receipts, and some payments were made from appellant’s accounts, but the corresponding acknowledgement letters and receipts were issued to one of appellant’s founders, rather than appellant. FTB therefore found that appellant’s claimed charitable contributions and gifts expenses for the tax years at issue should be disallowed. FTB’s findings with respect to the disallowance of the claimed charitable contributions and gifts for the tax year at issue were later affirmed on protest.⁹

Citing R&TC section 24359(b)(1), FTB contends that appellant’s receipts for contributions made to Keelung Family Helper and The Canada Bodhi Dharma Society do not adequately substantiate qualified charitable contribution deductions because, among other

⁹ However, the NPA and NOA for tax year 2013 disallowed contributions and gifts expenses of only \$1,772, which is \$247 less than the contribution and gift deductions of \$1,972 that the auditor proposed disallowing.

deficiencies, the donees appear to be foreign organizations. FTB also contends that various documents showing that one of appellant's founders made charitable contributions through his employer's matching program do not qualify appellant for charitable contribution deductions because the founder, rather than appellant, made the contributions as part of an employee matching program. FTB further contends that evidence that contributions may have been paid in full or in part from appellant's bank accounts does not adequately satisfy appellant's burden of proof because appellant often paid its founders' personal expenses.

On appeal, FTB agrees to allow additional claimed charitable contribution deductions for tax years 2011, 2013, and 2014. For tax year 2011, FTB allows additional charitable contribution deductions in the amounts of \$240 consisting of a donation of \$100 to UNICEF made on December 28, 2011, and an in-kind donation of clothing with a fair market value of \$140 to Recycle Change made on March 17, 2012. FTB determined that UNICEF was eligible to receive tax deductible donations in 2011, and the conceded donation of \$100 to UNICEF was adequately substantiated by appellant's bank statement and the UNICEF donation confirmation letter dated May 31, 2018. FTB also determined that no contemporaneous written acknowledgement was required under IRC section 170(f)(8), because the conceded donation to UNICEF was less than \$250. Additionally, FTB accepts the receipt for the clothing donation of \$140 because it confirmed that Recycle Change was eligible for tax deductible donations and no contemporaneous written acknowledgement was required under IRC section 170(f)(8), because the fair market value of the donated clothes listed on the receipt was less than \$200.

For tax year 2013, FTB concedes that appellant is entitled to claim charitable contribution deductions in the amounts of \$400 consisting of donations of \$100; \$200; and \$100 to American Intl Puti (Bodhi) Dharma Society made on August 9, 2014; October 4, 2014; and October 26, 2014, respectively, which were supported by an undated 2014 American Intl Puti (Bodhi) Dharma Society Contribution Report. FTB determined that American Intl Puti (Bodhi) Dharma Society was eligible to receive tax deductible donations in 2013, and no contemporaneous written acknowledgement was required under IRC section 170(f)(8), because each conceded donation was under the threshold amount of \$250.

For tax year 2014, FTB concedes that appellant is entitled to claim a charitable contribution deduction in the amounts of \$1,730 consisting of donations to American Intl Puti (Bodhi) Dharma Society in the amounts of \$200; \$200; \$100; \$200; \$20; \$200; and \$200 made on February 15, 2015; March 29, 2015; April 18, 2015; May 18, 2015; May 24, 2015; May 31, 2015; and June 16, 2015, respectively, and donations to Northern California Bodhi Dharma Society in the amounts of \$100; \$20; \$100; \$60; \$70; \$60; \$100; and \$100 made on

July 25, 2015; July 30, 2015; July 31, 2015; July 31, 2015; August 16, 2015; August 23, 2015; October 12, 2015; and November 18, 2015, respectively. FTB confirmed that both organizations were eligible to receive tax deduction donations in 2014 and no contemporaneous written acknowledgment was required for each donation under IRC section 170(f)(8), because each conceded donation was under the threshold amount of \$250. FTB disallowed all contributions that appellant made to these organizations for \$250 or more because the donation reports do not report an issue date and appellant failed to show that the acknowledgements were contemporaneous as required by IRC section 170(f)(8)(A).

Appellant contends that its claimed charitable contributions and gifts donations should be allowed because it substantially complied with the statutory requirements. However, appellant's argument fails because a contemporary written acknowledgment must meet the strict substantiation requirements of IRC section 170(f)(8)(B). (*Tucker v. Commissioner*, T.C. Memo. 2023-87.)

In addition, appellant argues that its claimed charitable contribution deductions should be allowed based on the produced receipts, records, and bank statements because the term "contemporaneous" was not well defined until 2017 tax law changes. There is no merit to appellant's argument. As noted by FTB, for the tax years at issue, California conformed to IRC section 170(f)(8) as of the specified date of January 1, 2009. (IRC, §§ 170(f)(8)(A); R&TC, § 24357(e)(1), 17024.5(a)(1)(o), 23051.5(a)(1).) As of January 1, 2009, IRC section 170(f)(8)(C) defined contemporaneous as follows:

Contemporaneous. For purposes of subparagraph (a) [requirement for contemporaneous donee acknowledgement], an acknowledgment shall be considered to be contemporaneous if the taxpayer obtains the acknowledgment on or before the earlier of:

- (i) The date on which the taxpayer files a return for the taxable year in which the contribution was made, or
- (ii) (ii) the due date (including extensions) for filing such return.

(See also Treas. Reg. § 1.170A-13(f)(18).)

With its reply brief, appellant submitted additional donation receipts that Northern California Bodhi Dharma Society issued to one of appellant's founders in the amounts of \$490, \$1,080, \$1,080, \$1,000, \$500, and \$1,000 dated August 15, 2015, September 15, 2015, October 4, 2015, October 4, 2015, October 19, 2015, and October 25, 2015, respectively, and another donation receipt from Northern California Bodhi Dharma Society in the amount of \$490 dated August 27, 2015, which appears to be issued to appellant. In its supplemental brief, FTB disallows each of these claimed charitable contributions because the donation receipts were issued to one of appellant's founders, rather than to appellant, and FTB determined that the

August 27, 2015 donation receipt appears to have appellant's name written or pasted over another name. In support of its determination, FTB attached to its supplemental brief an excerpt from Northern California Bodhi Dharma Society's 2015 Form 199, which reports total contributions of \$10,690 received from appellant's founder.

In its final brief, appellant asserts that some of the donation receipts from Northern California Bodhi Dharma Society were incorrectly issued to one of appellant's founders, because appellant's Capital One Business Visa credit card lists the founder's name. Appellant contends that, due to this clerical administrative error, FTB erroneously considered these donations to be from the founder, rather than appellant. Appellant states that it "will ask Bodhi to amend 2015 Form 199 for this \$10690 donation." Attached to appellant's additional brief are copies of a Capital One Visa credit card that lists the founder's and appellant's names on it and a letter addressed to one of appellant's founders from UNICEF dated April 22, 2021, which provides the vague statement that appellant "has been a Contributing Member to UNICEF USA since September 2011." An amended 2015 Form 199 was not provided.

As explained above, there are certain requirements regarding substantiation of deductions for charitable contributions, and appellant has not satisfied all of these requirements for each of the claimed deductions. (Cal. Code Regs., tit. 18, § 24357-1(a)(3)(B).) Appellant has not met its burden of proving that it is entitled to claim any additional disallowed charitable contribution deductions for any of the tax years at issue.

Issue 3: Whether appellant has established that it is entitled to claim disallowed business expense deductions or disallowed depreciation deductions for any of the tax years at issue.

Income tax deductions are a matter of legislative grace, and a taxpayer who claims a deduction has the burden of proving by competent evidence that it is entitled to the deduction claimed. (*Appeal of Vardell, supra.*) To meet that burden, the taxpayer must point to an applicable statute and show by credible evidence that the transactions in question come within its terms. (*Appeal of Silver, supra.*) The applicable burden of proof requires proof by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 30219(b).) Unsupported assertions are not enough to satisfy a taxpayer's burden of proof. (*Appeal of Dandridge, 2019-OTA-459P.*) A taxpayer's failure to produce evidence that is within its control gives rise to a presumption that such evidence, if provided, would have been unfavorable to the taxpayer's case. (*Appeal of Vardell, supra.*) A taxpayer's burden of proof is not relieved because it may be difficult or impossible to substantiate the taxpayer's position. (*Appeal of Johnson, 2022-OTA-166P.*)

IRC section 162(a) generally allows a deduction for ordinary and necessary expenses paid or incurred during the taxable year in carrying on a trade or business. (IRC, § 162; Treas. Reg. § 1.162-1(a); *Rivera v. Commissioner*, T.C. Memo. 2020-7.) A trade or business expense is ordinary for purposes of IRC section 162 if it is normal or customary within the particular trade, business, or industry, and is necessary if it is appropriate and helpful for the development of the business. (*Roberts v. Commissioner*, T.C. Memo. 2012-197.) Generally, no deduction is allowed for personal, living, or family expenses. (See IRC, §§ 262, 263; *Rivera v. Commissioner, supra*.) “Expenses of maintaining a household, including amounts paid for rent, water, utilities, domestic service, and the like, are not deductible.” (Treas. Reg. § 1.262-1(b)(3).)

Certain expenses are subject to strict substantiation under IRC section 274(d). These expenses include expenses relating to travel, meals and entertainment, gifts, and “listed property” under IRC section 280F(d)(4). (IRC, § 274(d).) For the tax years at issue, listed property included passenger automobiles and any other property used as a means of transportation. (IRC, § 280F(d)(4).) To comply with the strict substantiation rules set forth in IRC section 274(d), a taxpayer must maintain adequate records or sufficient evidence corroborating the amount of the expense, the time and the place of the expense, the business purpose of the expense, and the business relationship of the taxpayer to any others who benefited by the expense. (IRC, § 274(d).) To substantiate such expenses with adequate records, a taxpayer must keep an account book, a log, a diary, or a similar record and documentary evidence to establish each element of an expenditure. (Treas. Reg. § 1.274-5T(c)(2)(i).)

In addition, a taxpayer may deduct depreciation as a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence) of property used in the taxpayer’s trade or business or held for the production of income. (IRC, § 167(a); R&TC, § 24349.) “The allowance is that amount which should be set aside for the income year in accordance with a reasonably consistent plan (not necessarily at a uniform rate), so that the aggregate of the amounts set aside, plus the salvage value, will, at the end of the estimated useful life of the depreciable property equal the cost or other basis of the property.” (Cal. Code Regs., tit. 18, § 24349(a).)

On its Forms 199 for the tax years at issue, appellant claimed business expenses for auto and insurance, consultation services and legal fees, dues, subscriptions, and telephone, education and training, maintenance and repair, meals and entertainment, office and supplies,

travel, meetings, and rent, as well as total depreciation deductions of \$10,805.¹⁰ FTB found that appellant failed to substantiate with any corroborating evidence that these expenses were incurred to further appellant's charitable purposes. In addition, FTB found that many of these claimed business expenses represent the personal expenses of appellant's founders. FTB stated that "the Costco credit card (American Express credit card) purchases for gas, car rental, groceries, apparel, TJ Max, Safeway, Sprouts, restaurant meals, Costco, Comcast (cable services), AT&T, All State (insurance), Home Depot, Juniper Networks (Founder's employer) and other credit card purchases have not been substantiated as expenses of [appellant] and are personal expenses of the founders."

FTB also found that appellant's claimed depreciation deductions for the tax years at issue were not substantiated with any corroborating evidence to show that the assets were owned by appellant and were used in furtherance of appellant's exempt purpose. FTB stated that appellant failed to produce "detail and breakdown of those assets/equipment and their usage in support of claim that they were used to further [appellant's] exempt purpose." This conclusion was affirmed at the protest level.

In addition, FTB found that appellant has not provided a list of the assets being depreciated and has not provided any documentation substantiating the purchase of the assets or that the assets were used in appellant's trade or business. With respect to the depreciation deductions claimed for the tax years at issue, FTB stated that the only asset identified on any of the Forms 199 was a television purchased on January 26, 2011. FTB thus found that appellant is not permitted to claim depreciation deductions in the amounts of \$1,433; \$2,343; \$2,343; and \$4,686 for tax years 2011; 2012; 2013; and 2014, respectively.

Appellant has not substantiated that the business expenses, as well as the depreciation deductions, claimed on its Forms 199 for the tax years at issue were directly related to appellant's charitable purpose, rather than the personal expenses of its founders. Accordingly, appellant has not demonstrated that it is entitled to claim any of the business expense deductions or any of the depreciation deductions claimed on its Forms 199 for tax years 2011; 2012; 2013; and 2014.

¹⁰ On line 16 of its Forms 199, appellant reported depreciation expenses of \$1,433, \$2,343, \$2,343, and \$4,686 for tax years 2011; 2012; 2013; and 2014, respectively. Its 2011, 2012, and 2014 California Forms 3885, appellant reported depreciation expenses for a TV acquired on January 26, 2011, and "equipments" with "various" acquisition dates. (*Ibid.*) Appellant reported depreciation expenses of \$4,686 on line 16 of its 2014 Form 199 but on its 2014 California Form 3885, appellant reported total depreciation expenses of \$2,343. A copy of appellant's 2013 Form 3885 is not in the appeal record.

Issue 4: Whether appellant has established that payments it received from its founders constitute nontaxable contributions to capital for any of the tax years at issue.

IRC section 61 defines gross income as all income from whatever source derived unless such income has been specifically exempted from inclusion by the Internal Revenue Code.¹¹ IRC section 61 is broadly construed and statutory exclusions from income are narrowly construed. (*Tuma v. Commissioner*, T.C. Memo. 2024-71.) Taxpayer seeking an exclusion from income “must bring themselves within its ‘clear scope.’” (*Ibid*, citations omitted.)

IRC section 118(a) provides that a corporate taxpayer does not include any contribution to its capital in its gross income.¹² As applicable to this appeal, IRC section 118 applies to contributions to capital made by non-shareholders. (Treas. Reg. § 1.118-1.) The United States Supreme Court has held that, for a non-shareholder’s payment to qualify as a nontaxable contribution to capital under IRC section 118(a), the payment must satisfy the following five requirements: (1) it must become part of the recipient’s capital structure; (2) it may not be compensation for a “specific, quantifiable service;” (3) it must be bargained for; (4) it must result in a benefit to the recipient; and (5) it ordinarily will be employed in or contribute to the production of additional income. (*United States v. Chicago, Burlington & Quincy Railroad Co.* (1973) 412 U.S. 401, 413.)

FTB discussed whether contributions that appellant received from its founders during the tax years at issue are taxable gross receipts or nontaxable capital contributions. FTB noted that appellant’s Articles of Incorporation do not authorize capital stock or members. FTB found that the amount of assets and liabilities that appellant reported on Schedules L of its Forms 199 do not agree with appellant’s produced bank statements or investment statements. Instead, FTB found that at the beginning of tax years 2011; 2012; 2013; and 2014, appellant had net assets/liabilities (i.e., working capital) in the amounts of \$75,052; \$68,334; \$109,926; and \$104,279, respectively. FTB noted that appellant reported on its Schedules L for tax years 2011; 2012; 2013; and 2014 that it received total gross sales and contributions in the amounts of \$66,566; \$51,855; \$11,850; and \$53,146, respectively.

Applying the first requirement set forth in *United States v. Chicago, Burlington & Quincy Railroad Co.*, *supra*, 412 U.S. at p. 413, FTB determined that for tax years 2011, 2013, and 2014, none of the contributions that the founders made to appellant contributed to appellant’s

¹¹ California conforms to IRC section 61 pursuant to R&TC section 24271(a).

¹² California conforms to IRC section 118 pursuant to R&TC section 24325.

permanent working capital because appellant's net assets decreased during each of these tax years even though it reported receiving significant amounts of gross sales and contributions.

For the other tax years at issue and for the rest of the founders' contributions for tax year 2012, FTB argues that no part of the founders' contributions to appellant constitute tax exempt capital contributions under IRC section 118(a). FTB contends that to the extent that the founders used their contributions to appellant to pay for their personal expenses, the contributions do not satisfy the requirements set forth in *United States v. Chicago, Burlington & Quincy Railroad Co.*, *supra*, 412 U.S. at p. 413. Citing *Washington Athletic Club v. United States* (9th Cir. 1980) 614 F.2d 670, 675,¹³ FTB also contends that to the extent that the founders did not use their contributions to pay for their personal expenses, the contributions were not tax exempt under IRC section 118(a) because the founders "could not have any personal investment interest in contributing cash to [a]ppellant."

On appeal, appellant does not address this issue and therefore has not carried its burden of proving that each of the five requirements approved in *Chicago, Burlington & Quincy Railroad Co.*, *supra*, 412 U.S. at p. 413, was satisfied for any of the founder's contributions. Accordingly, appellant is not entitled to any further capital contribution exclusions for any tax year at issue under IRC section 118(a).

Issue 5: Whether appellant is entitled to interest abatement for any of the tax years at issue.

The imposition of interest on a tax deficiency is mandatory, and FTB cannot abate interest except when authorized by law. (R&TC, § 19101; *Appeal of Balch*, 2018-OTA-159P.) Interest is not a penalty; it is compensation for the use of money. (*Appeal of Balch, supra*.) Interest cannot be waived based on reasonable cause. (*Appeal of Moy*, 2019-OTA-057P.) To obtain relief from interest, taxpayers must qualify under the waiver provisions of R&TC section 19104 (pertaining to unreasonable error or delay by FTB in the performance of a ministerial or managerial act), section 19112 (pertaining to extreme financial hardship caused by significant disability or other catastrophic circumstance), or section 21012 (pertaining to reasonable reliance on the written advice of FTB). (*Ibid.*)

In its reply and supplemental briefs, appellant raises for the first time the issue of interest abatement. Appellant asserts that it did not anticipate that this matter would not be resolved after six years. Appellant states, "Because FTB and process used much time in those years,

¹³ In *Washington Athletic Club v. United States, supra*, 614 F.2d at p. 675, the Ninth Circuit held that membership fees and dues paid to an athletic club were conditions of entitlement to the club's facilities and were not excludable from income as capital contributions, even though the fees were set aside and exclusively used for capital improvements.

please kindly not applying interest.” Appellant also states, “R&TC [section] 19116 supposedly can suspend interest for TY11-13, as FTB is beyond 36 months limit late to notify OTC about interest [sic].”

FTB argues that appellant has not demonstrated that it is entitled to interest abatement because it has not established that any of the limited exceptions for interest abatement applies in this appeal. FTB contends that it properly charged the mandatory interest because it found no irregularities in the processing or treatment of appellant’s matter that would warrant interest abatement under the law.


Appellant does not allege, and the record does not reflect that any of the above waiver provisions are applicable here. Furthermore, appellant’s argument that it is entitled to interest abatement under R&TC section 19116 fails because R&TC section 19116 only applies to individuals, and appellant is a corporation. Therefore, appellant has not established a basis to abate interest.

HOLDINGS


1. Appellant has not established that it is eligible for a charitable exemption under R&TC section 23701d for any of the tax years at issue.
2. Other than FTB’s concession that appellant is entitled to claim charitable contributions and gifts deductions in the amounts of \$240 for tax year 2011, \$400 for tax year 2013, and \$1,730 for tax year 2014, appellant has not established that it is entitled to claim any additional disallowed charitable contributions and gifts deductions for any of the tax years at issue.
3. Appellant has not established that it is entitled to claim disallowed business expense deductions or disallowed depreciation deductions for any of the tax years at issue.
4. Other than FTB’s concession that appellant is entitled to an income exclusion of \$41,592 for tax year 2012, appellant has not established that any payments it received from its founders constitute nontaxable contributions to capital for any of the tax years at issue.
5. Appellant is not entitled to interest abatement for any of the tax years at issue.


DISPOSITION

As conceded by FTB on appeal, FTB modifies the proposed assessments to \$5,855; \$811; \$1,001; and \$4,381 for tax years 2011; 2012; 2013; and 2014; respectively. FTB’s actions are otherwise sustained.

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 Amanda Vassigh
 Administrative Law Judge

We concur:

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 Erica Parker
 Administrative Law Judge

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 Administrative Law Judge

Date Issued: 11/4/2025