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OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **KEEN DEVICES INC.**	)	OTA Case No. 240716940

OPINION

Representing the Parties:

For Appellant: Robert Jacoby, President

For Respondent: Christopher T. Tuttle, Attorney

A. WONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, Keen Devices Inc. (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing a minimum franchise tax of $800, a per-shareholder late-filing penalty of $432, a notice-and-demand (demand) penalty of $200, a filing enforcement cost recovery (filing enforcement) fee of $86, and applicable interest, for the 2021 tax year. During the briefing period for this appeal, FTB conceded to reduce the per-shareholder late-filing penalty from $432 to $216.

Appellant waived the right to an oral hearing; therefore, the matter was submitted to the Office of Tax Appeals (OTA) on the written record pursuant to California Code of Regulations, title 18, section 30209(a).

ISSUES

1. Whether the minimum franchise tax applies to appellant.
2. Whether the per-shareholder late-filing penalty should be further abated.
3. Whether the demand penalty should be abated.
4. Whether the filing enforcement fee should be abated.

FACTUAL FINDINGS

1. Appellant was a Nevada corporation formed on May 27, 2018.[1] It was classified as an S corporation for income tax purposes.
2. According to the Nevada Secretary of State's (NV SOS's) records, the following two individuals served as appellant's corporate officers: Robert Jacoby served as its president, treasurer, and director; and another individual surnamed Jacoby served as its secretary. The NV SOS's records list a California address for both individuals, and Robert Jacoby acknowledges that he lived in California in 2021.
3. During the 2021 tax year, Robert Jacoby used appellant to make an online payment to an India-based law firm for legal work.[2]
4. On April 30, 2021, appellant filed a California S Corporation Franchise or Income Tax Return (tax return) for the 2020 tax year, listing a California address for itself. The 2020 California tax return reported the following: a net loss of $25,581 from trade or business activities; "personal service" was appellant's principal business activity; appellant had one shareholder for the 2020 tax year; and May 27, 2018, was either the date appellant's business began in California or the date its income was first derived from California sources. A CPA in Valencia, California, prepared appellant's 2020 California tax return, and Robert Jacoby signed it in his capacity as appellant's president.
5. Appellant did not file a California tax return for the 2021 tax year.
6. Subsequently, FTB received information from the IRS that appellant filed a 2021 federal tax return with a California address. Based on this information, FTB concluded that appellant had a presence in California and was required to file a 2021 California tax return.
7. FTB issued a Demand for Tax Return (Demand), but appellant did not respond.
8. FTB issued a Notice of Proposed Assessment (NPA) for the minimum franchise tax of $800, a per-shareholder late-filing penalty of $432, a demand penalty of $200, a filing enforcement fee of $86, and applicable interest.

[1] Appellant has since dissolved, but the evidentiary record does not contain its dissolution date.

[2] In appellant's additional brief dated February 21, 2025, Robert Jacoby wrote, "I did live there [i.e., California] for the entire year in question [but] I spent less than five minutes paying a lawyer in India online."

9. Appellant protested the NPA arguing that it did not do business anywhere, let alone in California, and it had no income, employees, payroll, or sales, nor did it receive any payments.
10. However, FTB found that appellant had maintained an office or place of business in California and was thus required to file a tax return and pay at least the minimum franchise tax for 2021. Accordingly, FTB denied appellant's protest and issued a Notice of Action affirming the NPA.
11. This timely appeal followed.
12. During this appeal's briefing period, FTB concedes to reduce the per-shareholder late-filing penalty from $432 to $216 because it had erroneously assumed appellant had two shareholders when it only had one (per appellant's 2020 California tax return).

DISCUSSION

Issue 1: Whether the minimum franchise tax applies to appellant.

An S corporation is subject to the minimum franchise tax imposed by R&TC section 23153. (R&TC, § 23802(c).) Under R&TC section 23153(a), every corporation is subject to the minimum franchise tax from the earlier of the date of incorporation, qualification, or commencing business within this state, until the effective date of dissolution or, if later, the date the corporation ceases to do business in this state. A foreign corporation that does not qualify to engage in intrastate activities, but nevertheless engages in such activities, is subject to at least the minimum franchise tax for any year it engages in such activities. (Cal. Code Regs., tit. 18, § 23151.) For the 2021 tax year, the annual minimum franchise tax was $800. (R&TC, § 23153(d).)

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).[3] (*Appeal of GEF Operating, Inc.*, 2020-OTA-057P.) 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.)

[3] Under R&TC section 23101(b), a taxpayer is "doing business" in California if it satisfies certain bright-line threshold amounts regarding sales, property, or payroll. FTB does not argue, nor does the evidentiary record indicate, that appellant satisfied any of these bright-line thresholds, so this Opinion will not discuss R&TC section 23101(b) any further.

FTB's determination of tax is presumed to be correct, and a taxpayer has the burden of proving error. (*Appeal of GEF Operating, Inc.*, *supra*.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Ibid*.) A taxpayer cannot successfully rebut FTB's determination when the taxpayer fails to provide credible, competent, and relevant evidence as to the issues in dispute. (*Ibid*.)

Here, appellant was a Nevada corporation whose officers all had California addresses. Although it was a foreign corporation, appellant filed a 2020 California tax return, which: (a) listed a California address; (b) indicated that appellant provided personal services; and (c) began either conducting business in California or deriving income from California from May 27, 2018, the date of its incorporation. Nothing in the record indicates that the status of any of these items changed for the 2021 tax year. Although appellant did not file a 2021 California tax return, it did file a 2021 federal tax return with a California address. Moreover, appellant acknowledges that its president, Robert Jacoby, lived in California in 2021 and, during that time, used appellant to make an online payment to an India-based law firm. OTA finds that these facts support FTB's finding that appellant was doing business in California in 2021. Accordingly, OTA concludes that FTB's determination that appellant owes the minimum franchise tax for the 2021 tax year is presumably correct. The burden of proving otherwise now shifts to appellant.

On appeal, appellant asserts that it has never done business in California, and it has no employees, sales, products, operations, services, or activity here. At the same time, appellant claims that making an online payment in California to a lawyer in India required less than 5 or 10 minutes for the 2021 tax year and did not rise to the level of doing business in California. Appellant contends that the legal work related to filing a patent "for a device that allows the very inexpensive and safe sharing of hospital respirators by two or more people in order to save lives due to COVID shortages. A device that did not even have a profit motive."[4]

A patent rewards and encourages innovation by granting an inventor the exclusive right to use or sell an invention for a set time period. (See *Sears, Roebuck & Co. v. Stiffel Co.* (1964) 376 U.S. 225, 229-230.) Accordingly, filing for a patent, as well as paying for legal work related to such filing, constitute actions motivated by financial or pecuniary gain or profit. Because appellant was conducting this action in California during 2021, it was "doing business" in California for that year. Although appellant claims that the device for which it was filing a patent

[4] In support of its arguments, appellant references three OTA Opinions that do not exist and FTB Chief Counsel Ruling 2013-03, which relates to R&TC section 25135, not R&TC section 23153. Accordingly, OTA will not discuss these authorities further.

was not motivated by profit, appellant has not provided any evidence to support such a claim. For instance, nothing in the record indicates that appellant acquired or even sought tax-exempt status either in California or Nevada, or under the Internal Revenue Code, at any time. Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of GEF Operating, Inc.*, *supra*.) Thus, OTA finds that appellant has failed to overcome the presumption that FTB's determination is incorrect and concludes that the minimum franchise tax applies to appellant.

Issue 2: Whether the per-shareholder late-filing penalty should be further abated.

California imposes a per-shareholder late-filing penalty on an S corporation for failing to file a return on or before the due date, unless the failure was due to reasonable cause. (R&TC, § 19172.5(a).) Reasonable cause requires a showing that the taxpayer acted as an ordinarily intelligent and prudent businessperson would have acted under similar circumstances. (*Appeal of Quality Tax & Financial Services, Inc.*, 2018-OTA-130P.)

Here, as of the date of this Opinion, appellant has yet to file a 2021 California return. Accordingly, FTB imposed a per-shareholder late-filing penalty of $216 (reduced from $432). Appellant now has the burden of proving FTB's determination is erroneous. (See *Appeal of Quality Tax & Financial Services, Inc.*, *supra*.)

On appeal, appellant requests dismissal of the per-shareholder late-filing penalty, arguing that it did not do any business in California. However, as noted in the prior section, the facts in the evidentiary record indicate otherwise. Accordingly, OTA concludes that the per-shareholder late-filing penalty should not be further abated.

Issue 3: Whether the demand penalty should be abated.

California imposes a demand penalty for the failure to file a return or to provide information upon FTB's demand to do so, unless reasonable cause prevented the taxpayer from responding to the demand. (R&TC, § 19133.) When FTB imposes a demand penalty, the law presumes that FTB imposed the penalty correctly. (*Appeal of Wright Capital Holdings LLC*, *supra*.) The burden of proving reasonable cause for the failure to file upon demand is on the taxpayer. (*Appeal of GEF Operating, Inc.*, *supra*.) To establish reasonable cause, a taxpayer must show that the failure to reply to a demand occurred despite the exercise of ordinary business care and prudence. (*Appeal of Wright Capital Holdings LLC*, *supra*.) A taxpayer's reason for failing 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*.)

Here, FTB issued appellant a demand for a 2021 California tax return, but appellant failed to respond or file such a tax return. The burden of establishing reasonable cause for this failure is now on appellant.

On appeal, appellant requests dismissal of the demand penalty, arguing that it did not do any business in California. However, as noted in the analysis of Issue 1 above, the facts in the evidentiary record indicate otherwise. Accordingly, OTA concludes that the demand penalty should not be abated.

Issue 4: Whether the filing enforcement fee should 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, FTB issued appellant a Demand for a 2021 California tax return, but appellant has yet to file one as of the date of this Opinion. Accordingly, OTA finds that FTB properly imposed the filing enforcement fee and concludes that there is no basis to abate it.

HOLDINGS

1. The minimum franchise tax applies to appellant.
2. The per-shareholder late-filing penalty should not be further abated.
3. The demand penalty should not be abated.
4. There is no basis to abate the filing enforcement fee.

DISPOSITION

FTB's action is modified in accordance with FTB's concession on appeal that the per-shareholder late-filing penalty should be reduced from $432 to $216. Otherwise, FTB's action is sustained.

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Andrew Wong
Administrative Law Judge

We concur:

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