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3 **BOARD OF EQUALIZATION**
4 **STATE OF CALIFORNIA**
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6 In the Matter of the Appeal of:) **SUMMARY DECISION**
7) **LIMITED LIABILITY COMPANY APPEAL**
8 **MOCKINGBIRD PARTNERS, LLC**) Case No. 306061
9) Adopted: May 17, 2006

10 Representing the Parties:

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12 For Appellant: Adam S. Bush, C.P.A.
13 For Franchise Tax Board: D. Todd Watkins, Tax Counsel
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15 Counsel for the Board of Equalization: Carl Bessent, Tax Counsel III
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17 This appeal is made pursuant to section 19324 of the Revenue and Taxation Code from
18 the action of the Franchise Tax Board (FTB) in denying appellant's claim for a refund in the amount of
19 \$800¹ for 2001 and in the amount of \$800 for 2002. The issue presented in this appeal is whether
20 appellant was doing business in California during 2001 and 2002, such that it was liable for the
21 minimum tax imposed on a limited liability company (LLC).

22 FINDINGS AND DISCUSSION

23 Background

24 Appellant was an LLC that was organized in Montana on October 2, 2000, and dissolved
25 on December 1, 2004. The LLC operating agreement provided that appellant was formed for the
26 purpose of engaging in the business of real estate development, acquisition and management and related
27

28 ¹ Appellant did not request refund of the late payment penalties in its appeal to this Board (\$116 for 2001 and \$104 for 2002). Appellant has paid the late payment penalties.

1 activities, and any other lawful business purpose. Appellant did not register with the California
2 Secretary of State for the purpose of transacting intrastate business in this state during its existence.

3 Appellant had two members during 2001 and 2002, Kenneth C. Haupt, Trustee, and
4 Andrew H. Roediger, Trustee. Appellant was a member-managed LLC. The operating agreement for
5 appellant indicated that Andrew Roediger was responsible for general and financial administration,
6 including: bill payment, bookkeeping, financial statement preparation and tax returns. Some of the
7 duties such as bookkeeping and bill paying could be delegated to Evelyn Haupt, member Kenneth
8 Haupt's wife. The operating agreement authorized the members to open a bank account (checking) in
9 San Francisco. Both members were to have signing privileges on the checking account.

10 During 2001, appellant bought a residential rental property located in Hamilton,
11 Montana, which it operated for both years at issue. This Montana real estate was appellant's primary
12 asset.

13 Both appellant's 2001 and 2002 California LLC returns of income indicated appellant's
14 address as in Novato, California, the same address as was listed for Kenneth Haupt. Appellant's 2002
15 California return shows a liability for a loan from the Kenneth Haupt Trust. For 2001, the LLC return
16 listed an address for Andrew Roediger in San Francisco, California. For 2002, Andrew Roediger filed a
17 joint California nonresident or part-year resident personal return, which indicated that he was a resident
18 of California until April 1, 2002, when he moved to Arizona. Mr. Roediger owned his San Francisco
19 property until it was sold on June 2, 2003.

20 On April 4, 2002, FTB received appellant's 2001 LLC return. Appellant self-assessed
21 the LLC tax of \$800, but did not include a payment with the return. Appellant's payment of the 2001
22 LLC tax was due on April 15, 2001. (Rev. & Tax. Code, § 17941, subd. (c).) FTB received full
23 payment of appellant's 2001 LLC tax, (late payment) penalty and interest on November 12, 2002.

24 Appellant filed its original 2002 LLC return on February 23, 2003. FTB received full
25 payment of appellant's 2002 LLC tax, (late payment) penalty and interest on August 15, 2003.

26 On January 9, 2004, appellant filed amended LLC returns for 2001 and 2002 reporting
27 zero LLC tax due and claiming a refund of \$800 for each year. Upon further review, FTB denied
28 appellant's claims for refund. Appellant then filed this appeal.

1 Contentions

2 On appeal, appellant does not believe it has a filing requirement in California for the
3 years at issue. Appellant owned rental real estate in Montana and it used a California CPA firm to
4 prepare its returns. Appellant indicates that the rental property was managed and maintained on a daily
5 basis by a firm located in Hamilton, Montana. Furthermore, the member responsible for general
6 administration and finances “is a non-resident of California.”

7 FTB asserts that appellant was doing business in this state during 2001 and 2002 and
8 owes the LLC tax for those years. This is because appellant’s agents engaged in activities on behalf of
9 the LLC in California.

10 Discussion

11 Revenue and Taxation Code (R&TC) section 17941, subdivision (a), provides that an
12 annual LLC tax is imposed on all LLC’s that are “doing business” in California within the meaning of
13 the term “doing business” as defined in R&TC section 23101. R&TC section 23101 defines “doing
14 business” as “actively engaging in any transaction for the purpose of financial or pecuniary gain or
15 profit.” It is not necessary, to constitute “doing business,” that there be a regular course of business or
16 transactions. (*Hise v. McColgan* (1944) 24 Cal.2d 147.) A transaction does not need to result in actual
17 profit for purposes of R&TC section 23101, and the relevant inquiry is whether the activity or
18 transaction was motivated by financial or pecuniary gain. (*Id.*) In *Carson Estate Co. v. McColgan*
19 (1943) 21 Cal.2d 516 (*Carson*), a corporation was held to be doing business when it made a purchase of
20 bonds in one year, a sale of bonds in the following year, 12 purchases and sales of stock in the year
21 thereafter and 2 such transactions in the last year which was considered. Thus, in *Carson*, a single
22 purchase of bonds in one year constituted “doing business.”

23 In a member-managed LLC, every member of an LLC is an agent of the LLC for
24 conducting the usual business of the LLC, unless the articles of organization or operating agreement
25 restrict the scope of the agent’s authority. (Corp. Code, § 17157; Mont. Code Ann. § 35-8-301.) A non-
26 member may become an agent through precedent authorization or ratification by the LLC’s members-
27 managers. (Civ. Code, § 2307; Mont. Code Ann. § 28-10-201.)

1 Here, appellant's Operating Agreement provided for management by its two members.
2 Additionally, the Operating Agreement allowed for delegation of some duties to Evelyn Haupt, a
3 California-resident non-member. Appellant's business purpose allowed for any lawful business activity.

4 During 2001 and 2002, Kenneth Haupt and Evelyn Haupt resided in Novato, California.
5 Andrew Roediger lived in San Francisco throughout 2001 and at least part of 2002, until April 1, 2002.
6 Mr. Roediger did not sell his San Francisco property until June 2, 2003.

7 The LLC returns for 2001 and 2002 listed appellant's address as the Novato address for
8 the Haupt's. Appellant purchased the Montana property in 2001. This Board has held that conducting
9 negotiations preparatory to the execution of a formal agreement is sufficient for purposes of "doing
10 business." (*Appeal of Kleefeld & Son Construction Co., Inc. and Don Ja Ran Construction Co., Inc.*,
11 60-SBE-013, June 9, 1960.) Thus, appellant would be held to have done business in California in 2001
12 if it engaged in acts related to the purchase of the Montana property while its members acted on its
13 behalf in California. We believe that with appellant's members being California residents, some activity
14 related to the purchase of the Montana property occurred in this state. In regards to 2002, appellant as
15 borrower, entered into a loan transaction with Mr. Haupt. This loan transaction is sufficient to find
16 appellant engaged in business in California during 2002.

17 Although member-Roediger may not be living in California now, he was a resident of
18 California in 2001, and a resident of California for a least the first three months of 2002. In regards to
19 appellant's property being located in Montana, it is not where property is located that is most germane,
20 but where the activity of the business which owns that property occurred.

21 CONCLUSION

22 Based on the foregoing, we must sustain FTB's action.

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