

Limited Liability Company Fee Unconstitutional

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The California Superior Court, sitting in San Francisco, held that the California LLC fee (the fee based on revenue, not the annual minimum tax of \$800) is unconstitutional on the basis that it applies to all LLCs that are organized or qualified to do business in California whether or not they have any business activities in the state. In addition, for those LLCs doing business within and without the state, there is no provision for apportioning the revenue and they would appear to be covered by the decision.

The California Franchise Tax Board will no doubt appeal.

We recommend that the fee be paid for the current year by the above LLCs because the decision is not final and that a protective refund be filed for the current year and all prior open years (the statute of limitations is generally four years from the date of filing) by the LLCs who do no business in California or are doing business within and without the state.

In addition to those LLCs described above, we suggest that all LLCs that have been subject to the fee make a protective refund claim in case it is determined that the fee is unconstitutional as applied to all LLCs.

The Franchise Tax Board has established a simplified procedure to file protective refund claims. An LLC may make the claim by fax or letter addressed to the Franchise Tax Board that includes the following information:

- The name of the LLC and ID number issued by the Secretary of State
- A statement indicating that it is a protective claim (and perhaps suggesting that the claim not be acted on until the legal issue is resolved by a final decision)
- The tax years involved
- The amount of the claim, which should match the amount of the annual fee or fees that the LLC paid
- A description of the issue, such as a statement that the LLC fee is unconstitutional
- The name, phone number, and fax number of a contact person

The letter must be signed by the LLC representative with a power of attorney, or by the LLC managing member, and sent as indicated below. E-mail is not acceptable. The FTB will send a fax confirmation receipt.

Franchise Tax Board
Fax: (916) 845-9796
Mail: Franchise Tax Board, Box 942867, Sacramento, CA 94267-8888