

**OFFICE OF TAX APPEALS**  
**STATE OF CALIFORNIA**

In the Matter of the Appeal of:

**S. GAMBLE**) OTA Case No. 19064924  
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)**OPINION**

Representing the Parties:

For Appellant:

S. Gamble

For Respondent:

Leoangelo C. Cristobal, Tax Counsel

For Office of Tax Appeals:

Oliver Pfof, Tax Counsel

E. S. EWING, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, S. Gamble (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing tax of \$4,799.00, a late-filing penalty of \$1,199.75, and applicable interest, for the 2016 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 has established that the late-filing penalty should be abated based on a showing of reasonable cause for the late filing of the return.
2. Whether appellant is entitled to interest abatement.

FACTUAL FINDINGS

1. Appellant resided in Colorado during the 2016 tax year.
2. FTB received information from the Internal Revenue Service (IRS) showing that appellant derived non-employee compensation income from glassCanopy, Inc. (GI)<sup>1</sup>, a California corporation based in San Francisco, during the 2016 tax year. Appellant had not filed a California income tax return for that tax year.
3. FTB then sent appellant a Request for Tax Return, requesting that appellant either file a 2016 tax year return, provide evidence a 2016 tax year return had already been filed, or explain why appellant was not required to file a 2016 tax year return.
4. In response to FTB's Request for Tax Return, appellant asserted she was not required to file a 2016 tax year return because she resided in Colorado and was not physically present in California during the 2016 tax year.
5. FTB did not accept appellant's explanation of why she did not have a filing requirement for the 2016 tax year and issued her a Notice of Proposed Assessment (NPA). FTB estimated appellant's 2016 tax year California taxable income based on the income earned from GI, as reported on federal Form 1099-MISC. The NPA proposed California income tax of \$4,799.00 and imposed a late-filing penalty of \$1,199.75, plus applicable interest.
6. Appellant timely filed a protest of the NPA.
7. FTB responded to appellant's protest by letter, concluding that appellant received California source income from GI during the 2016 tax year. FTB issued appellant a Notice of Action affirming the NPA in full.
8. This timely appeal followed.
9. During the pendency of this appeal, appellant filed a joint California Nonresident or Part-Year Resident Income Tax Return (Form 540NR) for the 2016 tax year, reporting California source income as a nonresident sole proprietorship and a tax liability of \$3,858, which appellant paid with the return. FTB accepted appellant's Form 540NR as filed, reduced the late-filing penalty to \$964.50, and assessed interest of \$559.25.<sup>2</sup>

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<sup>1</sup> We note that the briefs filed by the parties in this appeal also refer to glassCanopy, Inc. as "Glasscanopy, Inc.".

<sup>2</sup> It appears appellant has not paid the late-filing penalty and interest.

## DISCUSSION

### Issue 1: Whether appellant has established that the late-filing penalty should be abated based on a showing of reasonable cause for the late filing of the return.

On appeal, appellant initially asserted she did not owe any tax to California because she was a nonresident of, and performed no services in, California during 2016. However, in her reply brief, appellant changed her position by filing Form 540NR, reporting California source income as a nonresident sole proprietorship and paying the reported tax, which FTB accepted as filed.<sup>3</sup> In that same brief, appellant “request[ed] abatement from all penalties and interest associated with this matter,” but did not otherwise contest the tax due. Therefore, we take the combination of appellant’s actions and change in assertions as an indication that she concedes the amount of tax self-reported on Form 540NR. Accordingly, the only remaining issues in this appeal are whether the late-filing penalty and interest should be abated.

R&TC section 19131 imposes a late-filing penalty where a taxpayer fails to file a return when due, unless the failure is due to reasonable cause and not willful neglect. The penalty is calculated at five percent of the tax liability for each month the return is past due, up to a maximum of 25 percent. (R&TC, § 19131.) When FTB imposes a penalty, the law presumes that FTB properly imposed the penalty. (*Appeal of Xie*, 2018-OTA-076P.) Appellant does not contend that FTB erred in its calculation of the penalty. Instead, appellant contends that reasonable cause exists for failure to timely file the 2016 tax year return.

A taxpayer must provide credible and competent evidence supporting a claim of reasonable cause to overcome this presumption of correctness. (*Appeal of Xie, supra.*) To establish reasonable cause, a taxpayer must show that the failure to timely file a return occurred despite the exercise of ordinary business care and prudence or such cause existed that would prompt an ordinarily intelligent and prudent businessperson to have acted similarly under the circumstances. (*Appeal of Auburn Old Town Gallery, LLC*, 2019-OTA-31P.)

Appellant asserts that she did not know that California’s nonresident income sourcing laws had changed beginning in 2013. Nevertheless, it is well settled that ignorance of the law

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<sup>3</sup> Appellant’s change in position was apparently in response to FTB’s opening brief, which informed appellant of the 2013 tax law change in California that now requires multistate businesses, including nonresident sole proprietorships such as appellant, to source business income to California if their customer receives the benefit of their services in this state. (See R&TC, § 25136(a)(1)). Prior to 2013, multistate businesses generally sourced their income to California if they performed the services in this state.

does not excuse the failure to file a timely return. (*Appeal of Diebold, Inc.* (83-SBE-002) 1983 WL 15389.) GI's offices were located in San Francisco, California. An ordinarily prudent businessperson performing services for and receiving non-employee compensation from an out-of-state business should anticipate tax consequences arising in the state where the benefit of those services was received and make inquiry to determine whether there was a filing requirement in that state. Appellant did not do so. Therefore, appellant has not shown that the failure to timely file the 2016 tax return occurred despite the exercise of ordinary business care and prudence, or that circumstances beyond appellant's control prevented appellant from timely filing. (*Appeal of Auburn Old Town Gallery, LLC, supra.*)

Aside from being unaware of the change in California's law, appellant raises no other grounds for a showing of reasonable cause. Thus, appellant fails to establish reasonable cause to abate the late-filing penalty.

Issue 2: Whether appellant is entitled to interest abatement.

Interest must be assessed from the date a tax payment is due through the date that it is paid. (R&TC, § 19101(a).) Interest must also be assessed on a late-filing penalty imposed under R&TC section 19131. (R&TC, § 19101(c)(2)(B).) Imposing interest is mandatory and not a penalty; the purpose of interest is to compensate the state for the use of money after it should have been paid. (*Appeal of Gorin*, 2020-OTA-018P.) There is no reasonable cause exception to the imposition of interest. (*Appeal of Moy*, 2019-OTA-057P.)

Here, appellant's 2016 California income tax was due and payable on April 15, 2017. Appellant filed the untimely Form 540NR on October 8, 2019, reporting a tax liability, which appellant paid at the time she filed the return. FTB accepted appellant's return as filed, reduced the late-filing penalty, and assessed interest. As noted above, on appeal, appellant now requests abatement of the interest. However, there is no reasonable cause exception to the imposition of interest. (*Appeal of Moy, supra.*) To obtain relief from interest, a taxpayer must qualify under the waiver provisions of R&TC sections 19104, 19112, or 21012. (*Appeal of Balch*, 2018-OTA-

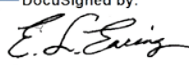
159P.)<sup>4</sup> Appellant does not assert grounds for relief from interest under any of these three statutory provisions. Thus, appellant has not established any basis for abatement of interest.

### HOLDINGS

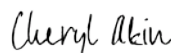
1. Appellant has not established that the late-filing penalty should be abated based on a showing of reasonable cause for the late filing of the return.
2. Appellant is not entitled to interest abatement.


### DISPOSITION

FTB's action is modified based on its acceptance of appellant's as filed 2016 tax return: (1) the late-filing penalty is revised to \$964.50; and (2) interest is revised to \$559.25.<sup>5</sup> FTB's action is otherwise sustained.

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Elliott Scott Ewing  
Administrative Law Judge

We concur:

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Cheryl L. Akin  
Administrative Law Judge

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Sheriene Anne Ridenour  
Administrative Law Judge

Date Issued: 10/7/2020

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<sup>4</sup> Pursuant to R&TC section 19104, FTB is authorized to abate or refund interest if there has been an unreasonable error or delay in the performance of a ministerial or managerial act by an employee of FTB. Here, appellant does not assert any such errors or delays occurred. We also note that relief pursuant to R&TC section 21012 is not relevant here because FTB did not provide appellant with any written advice. Neither is relief pursuant to R&TC section 19112 relevant here because appellant does not allege extreme financial hardship caused by significant disability or other catastrophic circumstance, which we do not have authority to review. (See *Appeal of Moy, supra*.)

<sup>5</sup> In its reply brief, FTB notes that appellant owes \$559.25 of interest, which ceased to accrue as of October 8, 2019, the date when appellant paid the tax due of \$3,858. The \$559.25 of interest due appears to be based on the revised tax of \$3,858 and the revised late-filing penalty of \$964.50. However, if that interest has not been appropriately recomputed based on the revised tax and late-filing penalty, FTB is directed to recompute the interest.