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YOU'RE ONLY AS GOOD AS YOUR TAX SOFTWARE: THE TAX COURT'S WRONGFUL APPROVAL OF THE TURBOTAX DEFENSE IN *OLSEN V. COMMISSIONER*

Kacey Marr∗

I. INTRODUCTION

In November 2011, the United States Tax Court disallowed the imposition of accuracy-related penalties on taxpayer Kurt Olsen who made an input error on his federal income tax return while using tax preparation software.[1] Only seven pages long and carrying no precedential value, the summary opinion seemed as innocuous as any other tax case.[2] However, the opinion quickly created a stir among tax experts.[3]

Kurt Olsen was the first taxpayer to successfully argue the so-called "TurboTax Defense" to the Tax Court.[4] The thrust of the defense is that tax penalties should be excused if tax reporting mistakes are caused by the tax preparation software.[5] It has also been referred to as the "Geithner Defense" after US Department of Treasury Secretary Tim Geithner implied during his confirmation hearing that he was relieved from accuracy-related penalties, at least partially, because his tax return mistakes were caused by TurboTax.[6]

After Geithner publicly blamed the software, many taxpayers who had been assessed accuracy-related penalties by the Internal Revenue

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1. Olsen v. Comm'r, T.C. Summ.Op. 2011-131, 7 (2011). Olsen and his wife filed joint federal income tax returns, but Olsen "usually takes the lead in preparing" returns, as was the case for the return at issue. *Id.* at 3.

2. *Id.*

3. *See, e.g.*, Laura Saunders, *Tax Court Approves 'Geithner Defense' Surprising Experts*, WALL STREET ST. JOURNAL TOTAL RETURN (Nov. 25, 2011), http://blogs.wsj.com/totalreturn/2011/ 11/25/tax-court-approves-geithner-defense-surprising-experts/ [hereinafter *Surprising Experts*] ("The case has caught the eye of tax experts, as in several other cases the Court has turned a deaf ear to taxpayer pleas for penalty abeyance due to mistakes made while using tax-prep software.").

4. *Olsen*, T.C. Summ.Op. at 7 (holding that Olsen is not liable to the accuracy-related penalty under I.R.C. § 6662(a) for his data entry error that prevented the tax preparation software from reporting a source of income properly).

5. *See, e.g.*, Paul L. Caron, *For First Time, Tax Court Approves Use of Geithner/Turbo Tax Defense*, TAXPROF BLOG (Nov. 25, 2011), http://taxprof.typepad.com/taxprof_blog/2011/11/for-first-time.html [hereinafter *For First Time*] ("[T]axpayer's use of the Geithner/TurboTax Defense . . . to blame mistakes in his use of tax preparation software to excuse him for penalties for failing to report income on his return.").

6. *See* Peter Pappas, *Geithner Tax Defense Doesn't Work for the Small People*, TAX LAW. BLOG (June 23, 2010), http://www.pappasontaxes.com/index.php/2010/06/23/geithner-defense-doesnt-work-for-the-small-people/ ("Geithner was . . . relieved of the penalties based, at least in part, on his contention that his tax software, TurboTax, screwed up.").

Service (IRS) decided to test the TurboTax Defense in the Tax Court, and for a time, all were rejected.[7] Tax and accounting experts became used to, and even amused by, the Tax Court's unwillingness to accept the defense after Geithner's admission.[8] Thus, when Olsen successfully used the defense, experts erupted with shock and criticism.[9]

This criticism is not unfounded. The Tax Court improperly allowed Olsen to use the TurboTax Defense, not just because it went against precedent, but also because the defense did not fit the facts of the case and because the Tax Court could have reached the same result with other, more viable options. Part II of this Note investigates the rise of the TurboTax Defense; specifically, the catalyst effect of Geithner's testimony on the defense strategies of taxpayers who had similarly used, and misused, tax preparation software. Part III discusses circumstances under which the Tax Court allowed the defense in *Olsen v. Commissioner*, as well as the media aftermath. Part IV will discuss the correctness of the *Olsen* decision and compare the allowance of the TurboTax Defense with other, more fitting alternatives, including the appropriateness of imposing the penalties assessed by the IRS.

This Note argues that the *Olsen* decision was not properly based on the TurboTax Defense, both because of the facts and because of recent precedent. If the Tax Court wanted to avoid penalizing the taxpayer, it could have reached the same result through other, less controversial

7. *See, e.g.*, Anyika v. Comm'r, 101 T.C.M. (CCH) 1322 (2011); Parker v. Comm'r, T.C. Summ.Op. 2010-78 (2010); Lam v. Comm'r, 99 T.C.M. 2010-82 (2010). *See also* Paul L. Caron, *Geithner Blames Turbo Tax for His Tax Troubles*, TAXPROF BLOG (Jan. 22, 2009), http://taxprof.typepad.com/taxprof_blog/2009/01/geithner-blames-.html [hereinafter *Geithner Blames*] ("Timothy Geithner implied at his confirmation hearing that the mistakes in his tax returns were caused by his use of the TurboTax software program."); Paul L. Caron, *Tax Court Rejects Taxpayer's Attempt to Use Geithner's TurboTax Defense*, TAXPROF BLOG (Aug. 26, 2009), http://taxprof.typepad.com/taxprof_blog/2009/08/tax-court-rejects.html ("The Tax Court yesterday rejected a taxpayer's attempt to use the TurboTax defense successfully employed by Treasury Secretary Timothy Geithner."); Paul L. Caron, *Tax Court Again Rejects Geithner/ TurboTax Defense*, TAXPROF BLOG, Nov. 12, 2010, http://taxprof.typepad.com/taxprof_blog/ 2010/11/tax-court.html ("The Tax Court yesterday again rejected . . . use of the "Geithner defense").

8. *See, e.g.*, Caleb Newquist, *For the Last Time, Only Tim Geithner Can Blame TurboTax and Get Away with It*, GOING CONCERN (June 23, 2010), http://goingconcern.com/2010/6/for-the-last-time-only-tim-geithner-can-blame-turbotax-and-get-away-with-it [hereinafter *For the Last Time*] ("If you are a not a well-connected bureaucrat with a fabulous coif, you are not afforded the same privileges as [those] who are/do."); Ashby Jones, *Tax Court: If You're Gonna Use TurboTax, Use it Correctly*, WALL ST. J. (Apr. 20, 2010), http://blogs.wsj.com/law/2010/04/20/tax-court-if-youre-gonna-use-turbotax-use-it-correctly/ [hereinafter *Use it Correctly*] ("In other words, it's not enough to blame TurboTax. You've got to make sure you're using TurboTax correctly.").

9. *See, e.g.*, Robert W. Wood, *No More Laughing at TurboTax Defense*, FORBES (Dec. 8, 2011), http://www.forbes.com/sites/robertwood/2011/12/08/no-more-laughing-at-turbotax-defense/ [hereinafter *No More Laughing*] ("I thought the TurboTax Defense was silly, but no more. Now that the Tax Court embraced it in *Olsen v. Commissioner*, it looks downright legitimate."); *Surprising Experts*, *supra* note 3 ("The case has caught the eye of tax experts, as in several other cases the Court has turned a deaf ear to taxpayer pleas for penalty abeyance due to mistakes made while using tax-prep software.").

means. However, this Note ultimately concludes that the Tax Court should have imposed penalties, which would have been congruent with precedent and would have avoided further expanding and complicating tax jurisprudence.

II. BACKGROUND

Beginning in 2009, taxpayers who were assessed accuracy-related penalties by the IRS due to underpayment on taxes found a creative new way to defend their mistakes—namely, by blaming it on their tax preparation software.[10] The catalyst behind the so-called TurboTax Defense was U.S. Department of Treasury Secretary Timothy Geithner, who had understated his tax liabilities by approximately $50,000 over a five year period. The IRS relieved Geithner of accuracy-related penalties, at least in part, because of his claim that the mistakes were caused by his TurboTax software.[11]

A. The Rise of the "Geithner Defense"

On January 26, 2009, Timothy Geithner was sworn in as the 75th Secretary of the U.S. Department of the Treasury.[12] Prior to taking office, his nomination came under fire when it was discovered that he had made certain errors in his past tax returns, which were considered serious offenses and could have potentially disqualified him[13] from serving as the head of the government body responsible for, *inter alia*, collecting taxes, enforcing tax laws, and prosecuting tax evaders.[14]

The Senate Finance Committee released a memorandum documenting Geithner's tax troubles.[15] For the taxable years between 2001 and 2006, Geithner made several errors that resulted in tax adjustments totaling around $50,000.[16] The most significant tax concern involved his failure to pay social security taxes during his employment at the International

10. *See Anyika*, 101 T.C.M. at 6; *Parker*, T.C. Summ.Op. 2010-78; *Lam*, 99 T.C.M. 2010-82.

11. Pappas, *supra* note 6 ("Geithner was . . . relieved of the penalties based, at least in part, on his contention that his tax software, TurboTax, screwed up.").

12. *About the Secretary*, U.S. DEPARTMENT TREASURY (Oct. 28 2012, 10:22 AM), http://www.treasury.gov/about/Pages/Secretary.aspx.

13. Jonathan Weisman, *Geithner's Tax History Muddles Confirmation*, WALL ST. J. (Jan. 14, 2009), http://online.wsj.com/article/SB123187503629378119.html [hereinafter *Muddles Confirmation*].

14. *Duties and Functions of the U.S. Department of the Treasury*, U.S. DEPARTMENT OF THE TREASURY, http://www.treasury.gov/about/role-of-treasury/Pages/default.aspx (last visited Sept. 26, 2012).

15. Carol Guthrie & Jill Kozeny, *Comment Regarding Treasury Nominee Geithner*, U.S. SENATE COMMITTEE ON FINANCE (Jan. 13, 2009), *available at* http://www.finance.senate.gov/newsroom/chairman/release/?id=f4382cc9-6fb9-4e2e-90a4-46b3b4caa16d.

16. *Id.* at 1.

Monetary Fund (IMF).[17]

As an international organization, the IMF is exempted from the Federal Insurance Contributions Act and therefore does not pay the employer share of social security taxes.[18] Thus, IMF employees who are U.S. citizens must pay self-employment taxes with respect to compensation.[19] To further this end, the IMF provides its employees with documents to help employees understand and meet their federal, state, and self-employment tax obligations.[20] Despite having received all of these documents, and despite his past experience with social security tax issues, Geithner failed to pay social security and self-employment taxes from 2001 to 2004, with the deficiencies totaling $42,702.[21]

Geithner agreed to IRS adjustments for the taxable years 2003 and 2004, and Geithner voluntarily submitted payments for 2001 and 2002 resulting from his failure to pay the self-employment taxes.[22] The IRS then waived the accuracy-related penalties.[23] He was relieved of these penalties, at least in part, because of his contention that TurboTax was to blame.[24]

After Geithner's confirmation hearing, where he publicly implied that the mistakes in his tax returns were caused by tax preparation software, tax experts were quick to debunk the possibility that the mistakes were caused by TurboTax.[25] Paul Caron, Pepperdine University School of Law professor and popular tax blogger,[26] said that "TurboTax (and any other leading software program) easily calculates self-employment tax."[27] Likewise, Jim Lindgren, a law professor at Northwestern University Law School,[28] conclusively demonstrated that Geithner's

17. *See id.* at 2.

18. *Id*.

19. *Id.*

20. *Id.*

21. *Id.* at 1, 3. Geithner began working for IMF in 2001 and concluded his work there in 2003, with some of his compensation being paid in 2004. *Id.* at 2. Therefore, he failed to meet his tax obligations during his entire tenure at IMF. *Id.*; *see also Muddles Confirmation*, *supra* note 13 (IRS concluded Geithner owed taxes for 2003 and 2004 totaling $17,230 and the Obama transition team discovered Geithner owed $25,970 from 2001 and 2002).

22. *Muddles Confirmation*, *supra* note 13.

23. *Id.*

24. Pappas, *supra* note 6.

25. *See Geithner Blames*, *supra* note 7 ("Of course, as any tax professional knows, TurboTax (and any of the other leading software programs) easily calculates self-employment tax.").

26. *See Paul L. Caron*, PEPPERDINE UNIV. SCHOOL OF LAW, http://law.pepperdine.edu/academics/faculty/default.php?faculty=paul_caron (May 6, 2013, 2:40 PM); *see also* Molly McDonough, *The 5th Annual ABA Journal Blawg 100*, ABA J., Dec. 1, 2011, http://www.abajournal.com/magazine/article/the_5th_annual_aba_ journal_blawg_100.

27. *Geithner Blames*, *supra* note 7.

28. *See Faculty Profiles: James T. Lindgren*, NW. U. L. SCHOOL, http://www.law.northwestern.

self-employment tax error would have been discovered by an interactive prompt in the 2004 version of TurboTax software.[29]

B. Early Cases Using the TurboTax Defense

After the publicity surrounding Geithner's TurboTax claim, and Geithner's ability to ward off accuracy-related penalties at least partly because of it, taxpayers facing penalties for understating income on their federal income tax returns started testing the TurboTax Defense in front of the Tax Court.[30] Each case was met with substantially the same answer: "[T]he misuse of tax preparation software, even if unintentional or accidental, is no defense to penalties . . . ."[31]

In *Lam v. Commissioner*, the taxpayer explicitly analogized her situation to that of Geithner to defend against accuracy-related penalties assessed by the IRS.[32] When Ms. Lam used TurboTax for her income tax returns, she improperly combined losses from her real estate business with unrelated losses.[33] The IRS disallowed the reported rental losses, re-characterized other losses, and then determined that Ms. Lam was liable for accuracy-related penalties.[34] The IRS argued that penalties were warranted because Ms. Lam did not behave reasonably since she did not seek the help of a tax professional, consult with the IRS, visit the IRS website, or read any instructions on how to properly report her losses.[35] Ms. Lam focused on the similarities between hers and Geithner's situation and argued that she acted with reasonable cause because the mistakes were made using TurboTax.[36] She cited a Wikipedia article about Geithner's tax troubles to argue that her use of TurboTax resulted in mistakes on her taxes.[37] The Tax Court briefly dismissed this argument, noting that it was not a flaw in the TurboTax software that caused Ms. Lam's errors, and that her misuse of the software, even though not purposeful, was no defense to the penalties.[38]

In a case decided just eight months prior to the *Olsen* decision, the

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edu/faculty/profiles/jameslindgren/ (Oct. 28, 2012, 10:44 AM).

29. *Geithner Blames*, *supra* note 7.

30. *See* Anyika v. Comm'r, 101 T.C.M. (CCH) 1322 (2011); Parker v. Comm'r, T.C. Summ.Op. 2010-78 (2010); Lam v. Comm'r, 99 T.C.M. 2010-82 (2010).

31. *Anyika*, 101 T.C.M. at 6; *see also Lam*, 99 T.C.M. at 3.

32. *Lam*, 99 T.C.M. at 3.

33. *Id.* at 1.

34. *See id.*

35. *Id.* at 3.

36. *Id.*

37. *Id.*

38. *Id.*

Tax Court again rejected the taxpayer's use of the TurboTax Defense.[39] In *Anyika v. Commissioner*, the Anyikas used TurboTax software to prepare their joint tax return and claimed deductions for managing rental properties.[40] They did not consult tax professionals to find out whether or not the deductions were proper.[41] The IRS disallowed the deductions and assessed penalties.[42] The Tax Court noted that an exception to the imposition of penalties applied if the taxpayer could demonstrate reasonable cause and good faith by showing their efforts to assess proper tax liability, or by showing that they misunderstood a fact or the law in a manner that was reasonable for a taxpayer of similar experience, knowledge, and education.[43] The Anyikas sought to prove the exception applied because the software was responsible for the miscalculations; however, they never provided any evidence to substantiate that claim.[44] The Tax Court dismissed the TurboTax Defense and assessed penalties, again holding that the misuse of tax preparation software, whether purposeful or not, was not a defense against penalties.[45]

Tax experts were intrigued by these results, as well as the many other attempts made by taxpayers to use the TurboTax Defense.[46] News and blog articles even began to joke about the taxpayer who dared to blame TurboTax for their reporting mistakes.[47] Despite the humor of all the failed attempts, tax experts recognized that Tim Geithner's ability to successfully use the excuse was now incongruent with Tax Court holdings.[48]

One case in particular seemed to spark the most controversy in the blogosphere. In *Parker v. Commissioner*, taxpayer Parker fought accuracy-related penalties on facts strikingly similar to Tim Geithner's situation.[49] Starting in 2005, Parker, like Geithner, worked for the IMF, which did not withhold federal income tax or social security tax, and therefore obligated Parker to pay self-employment tax.[50] Parker, like

39. Anyika v. Comm'r, 101 T.C.M. (CCH) 1322, 6 (2011).

40. *Id.* at 1.

41. *Id.*

42. *Id.*

43. *Id.* at 6.

44. *Id.*

45. *Id.*

46. *See, e.g.*, *For the Last Time*, *supra* note 8.

47. *See, e.g.*, *Use it Correctly*, *supra* note 8 ("In other words, it's not enough to blame TurboTax. You've got to make sure you're using TurboTax correctly.").

48. *See, e.g.*, *For the Last Time*, *supra* note 8 ("If you are a not a well-connected bureaucrat with a fabulous coif, you are not afforded the same privileges as [those] who are/do.").

49. Parker v. Comm'r, T.C. Summ.Op. 2010-78 (2010).

50. *Id.* at 1–2.

Geithner, used TurboTax software to prepare his return, and, like Geithner, failed to pay self-employment tax.[51] He claimed that "TurboTax had provided erroneous information . . . to wit, that the social security taxes were included in [his] taxes due."[52]

The Tax Court agreed with the IRS and assessed the accuracy-related penalties.[53] In a controversial footnote, the Tax Court addressed Parker's contention that "the IRS granted 'favorable treatment' in a case involving US Secretary of the Treasury Timothy Geithner" and that "there should not be different[ ] or favorable rules for the well-connected."[54] The Tax Court said that the facts of Parker's case were not relevant to Geithner's case and that, even if the facts were relevant, it would still be irrelevant to the holding because Parker was "required to establish on the basis of the facts and circumstances . . . in his own case" that the accuracy-related penalties should not be assessed.[55]

Joe Kristan, tax technical director for Roth & Company and writer of TaxUpdate Blog, analogized the *Parker* decision to a tax law experiment.[56] Kristan said the hypothesis was that Geithner got "a special deal because he's a big shot" and that the "scientists at the Tax Court . . . validated this hypothesis."[57] He summarized the Tax Court's holding as saying that the accuracy-related penalties "are for little people."[58] Editor of Going Concern Caleb Newquist, in pointing out that the Tax Court had again debunked a "likeness between a regular schmo" and Geithner, said that "[i]f you are not a well-connected bureaucrat with a fabulous coif, you are not afforded the same privileges as [those] who are/do."[59] Tax attorney and certified public accountant (CPA) Peter Pappas wrote in his blog that he did not necessarily disagree with the *Parker* decision, but that he thought "Geithner, especially because of his sophistication in financial matters, should have had to pay the penalty as well."[60]

III. *OLSEN V. COMMISSIONER*

Despite many failed attempts by other taxpayers to employ the

51. *Id.* at 2.
52. *Id.* at 4.
53. *Id.* at 7.
54. *Id.* at 7 n.15.
55. *Id.*
56. Joe Kristan, *The Geithner Rule Only Applies to Geithner*, TAX UPDATE BLOG (June 22, 2010), http://www.rothcpa.com/archives/006107.php.
57. *Id.*
58. *Id.*
59. *For the Last Time*, *supra* note 8.
60. Pappas, *supra* note 6.

TurboTax Defense after Tim Geithner,[61] taxpayer Kurt Olsen decided to try his hand at it in November 2011.[62] Unexpectedly, Special Trial Judge Robert Armend ruled in favor of Olsen and accepted the defense for the first time, surprising tax experts, bloggers, and journalists.[63]

A. The Tax Court's Summary Opinion

Kurt Olsen, a patent attorney for the Department of Energy, was accustomed to preparing his tax returns using tax preparation software.[64] In 2007, Olsen's wife received interest income from a trust, along with a Schedule K-1 for reporting the interest income.[65] The Olsens were unfamiliar with reporting procedures because they had never received a Schedule K-1.[66] In an attempt to ensure proper treatment of the interest income, Olsen upgraded his tax preparation software to a more "sophisticated" version and used it to prepare the couple's joint income tax return.[67]

While transcribing the trust information, Olsen made a data entry error that prevented the interest income from being correctly displayed on his federal tax return.[68] He reviewed the return using the software's verification features, but he did not discover his error.[69] The Commissioner determined a deficiency in Olsen's federal income tax of $9,297 and assessed an accuracy-related penalty of $1,859.[70]

On these facts, the Tax Court turned to whether Olsen was liable for the accuracy-related penalty, ultimately finding he was not.[71] Under the Internal Revenue Code (Code), a penalty of 20 percent is imposed on the amount of underpayment that is attributable to a "substantial understatement of income tax."[72] An understatement, or the tax assessed, is substantial if it exceeds the greater of 10 percent of the tax required or $5,000.[73] The Commissioner determined that the Olsens understated their taxes by over $9,000 and, therefore, could be assessed

61. *See infra* Part II(B).

62. Olsen v. Comm'r, T.C. Summ.Op. 2011-131 (2011).

63. *See, e.g.*, *Surprising Experts*, *supra* note 3.

64. *Olsen*, T.C. Summ.Op. at 2–3 (noting Olsen "usually takes the lead in preparing the couple's joint [f]ederal income tax returns.").

65. *Id.* at 2. A Schedule K-1 (Form 1065) is used for reporting "Beneficiary's Share of Income, Deductions, Credits, etc." on federal income tax returns. *Id.*

66. *Id.*

67. *Id.* at 3.

68. *Id.*

69. *Id.*

70. *Id.* at 2.

71. *Id.* at 2.

72. I.R.C. § 6662(a)&(b)(2) (2012); *Olsen*, T.C. Summ.Op. at 3.

73. I.R.C. § 6662(d)(1)(A) (2012); *Olsen*, T.C. Summ.Op. at 3–4.

an accuracy-related penalty.[74] The Tax Court determined that the Commissioner had carried its burden and proven that Olsen's understatement was substantial and that a penalty assessment would be otherwise proper.[75]

However, the Tax Court noted that an exception to the imposition of an accuracy-related penalty would apply if Olsen could establish reasonable cause for the understatement and also demonstrate that he acted in good faith by, for example, showing the extent of his effort to assess the proper tax liability in preparing his return.[76] Although it acknowledged that tax preparation software is only as good as the preparer's ability to input the information, the Tax Court held that an isolated transcription error is not inconsistent with a finding of reasonable cause and good faith.[77]

The Tax Court then determined that Olsen had acted reasonably and in good faith.[78] As evidence, the Tax Court noted that this was the sole error, that he had never received a Schedule K-1, and that he upgraded his tax preparation software to a more sophisticated version in an attempt to properly report the unfamiliar income and then checked his work.[79] The Tax Court also noted that, because Olsen worked for the federal government and held a security clearance subjecting him to periodic background checks, he would have "substantial motivation" to properly report income on his tax returns.[80] Given these facts, the Tax Court held that Olsen had acted with reasonable cause and in good faith and was therefore not liable for the accuracy-related penalty.[81]

B. Media and Expert Criticisms

Just days after the *Olsen* decision was released, bloggers and newspapers reacted to the news that the Tax Court had, for the first time, accepted the TurboTax Defense.[82] Forbes contributor Robert Wood said, "I thought the TurboTax Defense was silly, but no more. Now that the Tax Court embraced it . . . it looks downright legitimate."[83] But experts quickly pointed out flaws in the summary opinion.

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74. *Olsen*, T.C. Summ.Op. at 2.

75. *Id.* at 5.

76. I.R.C. § 6664(c)(1) (2012); Treas. Reg. § 1.6664-4(a) (2012); *Olsen*, T.C. Summ.Op. at 4.

77. *Olsen*, T.C. Summ.Op. at 5–6.

78. *Id.* at 7.

79. *Id.* at 6–7.

80. *Id.* at 6 n.4.

81. *Id.* at 7.

82. *See, e.g.*, *For First Time*, *supra* note 5 ("The Tax Court . . . for perhaps the first time accepted a taxpayer's use of the Geithner/TurboTax defense.").

83. *No More Laughing*, *supra* note 9.

One point raised was that the opinion, although without precedential value, opened the floodgates for many other taxpayers who did an inept job at accounting for their taxes using preparation software.[84] CPA Jay Starkman disagreed with the judgment, saying that "[s]uch mistakes happen all the time, and they are easy to make. We're likely to see more of these cases."[85] Wood argued that Olsen's defense was not even a true TurboTax Defense, pointing out that the error was Olsen's, not the tax software's.[86] If it had been a true software error, Wood argued, Olsen's penalty relief claims would have been even better.[87]

Readers commenting on the experts' articles and blogs were also quick to poke holes in the *Olsen* decision. One observer argued that, despite the Tax Court's finding, Olsen did not make his best effort, saying that "[e]xperienced preparers know that simply using the verification procedure to validate one's data entry is insufficient due diligence."[88] Another questioned Olsen's judgment in not seeking professional advice, saying "[w]hat would [patent attorney Olsen] think of a novice trying to defend a patent matter?"[89]

IV. DISCUSSION

The *Olsen* decision came as a surprise to the tax community for several reasons. Not only did it contradict a line of Tax Court cases that explicitly disallowed the TurboTax Defense,[90] but it appeared to do so under a set of facts that did not accurately fit the defense,[91] potentially opening the doors for an overwhelming amount of litigation.[92] The Tax Court's holding leaves behind a number of unanswered questions, including: Why apply the defense when the facts of the case do not match the argument? Why create a new defense when tax jurisprudence already offers justification for not imposing the accuracy-related penalties? And, perhaps most importantly, why not just hold Olsen liable for the penalties?

Subpart A addresses the correctness of the *Olsen* holding, arguing

84. *See Surprising Experts*, *supra* note 3.

85. *Id.*

86. *No More Laughing*, *supra* note 9.

87. *Id.*

88. *See* Michael Cohn, *Tax Court Rules in Favor of TurboTax Defense*, ACCT. TODAY (Nov. 29, 2011), http://www.accountingtoday.com/news/Tax-Court-Rules-Favor-TurboTax-Defense-60893-1.html [hereinafter *Tax Court Rules in Favor*].

89. *Id.*

90. *See infra* Part II(B), Part IV(A)(2), Part IV(B)(3).

91. *See infra* Part IV(A)(1).

92. *See Surprising Experts*, *supra* note 3 ("Such mistakes happen all the time, and they are easy to make. We're likely to see more of these cases.").

that the approval of the TurboTax Defense was based on facts that do not appropriately match the law created, and that the Tax Court should have followed precedent because the arguments for rejecting the TurboTax Defense in earlier decisions apply with equal, if not greater, strength to the *Olsen* case. Subpart B addresses the alternatives that were available to the Tax Court. First, if the Tax Court wanted to avoid penalizing the taxpayer, the Tax Court could have relied solely on Olsen's reasonable cause and good faith, without reference to his use of tax preparation software. Second, the Tax Court could have extended the reliance on professional advice exception to include the TurboTax Defense on the premise that tax preparation software is a "professional" providing advice. Third, and most importantly, the Tax Court could have, and should have, found Olsen liable for accuracy-related penalties because the force of recent precedent properly disallows the TurboTax Defense on facts similar to those in the *Olsen* case.

A. Correctness of the Olsen *Holding*

The reasoning of previous Tax Court holdings rejecting the TurboTax Defense, as well as the criticisms of tax experts, journalists, and general observers, raises valid arguments that bring into question the correctness of the *Olsen* summary opinion.[93] In particular, the allowance of the TurboTax Defense on a set of facts that did not fit the mold of the argument brings into question the Tax Court's judgment.[94] Likewise, the Tax Court's decision to disallow penalties designed to reprimand taxpayers who make mistakes cuts directly against the reasoning used in recent precedential holdings.[95]

1. "Bad Facts Make Bad Law"[96]

The thrust of the TurboTax Defense is that tax penalties should be

93. *See infra* Part III.

94. *See No More Laughing*, *supra* note 9 ("If the software had made the error based on Olsen's proper input, his penalty relief claims would be even better. But Olsen made the mistake, not the software.") (emphasis omitted).

95. *See, e.g.*, Anyika v. Comm'r, 101 T.C.M. (CCH) 1322 (2011); Parker v. Comm'r, T.C. Summ.Op. 2010-78 (2010); Lam v. Comm'r, 99 T.C.M. 2010-82 (2010).

96. The legal community often uses this phrase to indicate that, in some instances, a court will create new precedent based on a case with facts that are not appropriate to the new law created. *See, e.g.*, John Tredennick, *Bad Facts Make Bad Law: 'Mt. Hawley' A Step Backward for Rule 502(b)*, CATALYST (July 6, 2010), http://www.catalystsecure.com/blog/2010/07/bad-facts-make-bad-law-mt-hawley-a-step-backward-for-rule-502b/ ("In law school, we learned the old adage that bad facts often make bad law. What it means is that judges are human. When presented with compelling circumstances . . . judges sometimes get creative with the law. In an effort to do justice, they make rules and interpret things in ways that don't always make sense for later cases.").

excused if tax reporting mistakes are caused by the tax preparation software.[97] However, Olsen's tax errors were not caused by the software, but rather by a data entry error—a human error.[98]

As at least one expert has pointed out, the *Olsen* decision did not apply the true TurboTax Defense since Olsen himself made the error, and not his software.[99] As the legal platitude goes, "bad facts make bad law."[100] If the Tax Court wanted to approve the TurboTax Defense, it should have waited to do so in a case where a taxpayer could prove that the tax return errors were actually caused by a flaw in tax preparation software and not by user error.

2. Stare Decisis[101]

Over the last few years since Geithner publicly implied that his tax return errors were caused by tax preparation software,[102] the Tax Court has created a line of precedent explicitly disallowing the TurboTax Defense as a means of avoiding accuracy-related penalties.[103] As discussed further in Part IV(B)(3), the *Olsen* Court should have followed precedent and imposed accuracy-related penalties.

In its previous decisions, the Tax Court found that taxpayers had not acted with reasonable cause and in good faith[104] for various reasons—they had not consulted tax professionals when faced with complex tax issues,[105] they did not use the IRS website for guidance,[106] or they should have known their taxes were not properly reported after reviewing their returns.[107] The Tax Court should have applied this reasoning to the facts of *Olsen* because Olsen knew he had never dealt with the type of income he misreported,[108] did not use a tax

97. *See, e.g.*, *For First Time*, *supra* note 5 ("[T]axpayer's use of the Geithner/TurboTax defense . . . to blame mistakes in his use of tax preparation software to excuse him for penalties for failing to report income on his return.").

98. *See* Olsen v. Comm'r, T.C. Summ.Op. 2011-131, 3 (2011).

99. *See No More Laughing*, *supra* note 9 ("[T]his was Olsen's error, not the tax software's.") (emphasis omitted).

100. *See* Tredennick, *supra* note 96.

101. Stare decisis is a legal "doctrine or policy of following rules or principles laid down in previous judicial decisions unless they contravene the ordinary principles of justice." *Stare Decisis*, MERRIAM–WEBSTER, *available at* http://www.merriam-webster.com/dictionary/ stare%20decisis.

102. *See, e.g.*, *Geithner Blames*, *supra* note 7 ("Timothy Geithner implied at his confirmation hearing that the mistakes in his tax returns were caused by his use of the TurboTax software program.").

103. *See, e.g.*, Anyika v. Comm'r, 101 T.C.M. (CCH) 1322 (2011); Parker v. Comm'r, T.C. Summ.Op. 2010-78 (2010); Lam v. Comm'r, 99 T.C.M. 2010-82 (2010).

104. *See* I.R.C. § 6664(c)(1) (2012).

105. *See Lam*, 99 T.C.M. at 3; *Anyika*, 101 T.C.M. at 5.

106. *Lam*, 99 T.C.M. at 3.

107. *See Parker*, T.C. Summ.Op. at 7.

108. Olsen v. Comm'r, T.C. Summ.Op. 2011-131, 2 (2010).

professional,[109] and, after reviewing his tax return, did not notice that the income was not listed.[110]

B. The Tax Court's Alternatives

The *Olsen* decision marked the first time that the Tax Court approved the TurboTax Defense, thereby opening the doors for a slew of litigation using this once-defunct excuse.[111] Before accepting the taxpayer's proposed rule of law, the Tax Court could have explored alternative courses of action.

As the summary opinion appears to rest on the good faith exception of § 6664(c)(1) of the Code,[112] the Tax Court could have chosen to leave out the TurboTax language and relied solely on Olsen's reasonable cause and good faith. Or, the Tax Court could have accepted the TurboTax Defense as an extension of the already well-accepted reliance on professional advice exception,[113] treating TurboTax as the professional providing advice.

Despite alternatives available to avoid penalizing the taxpayer, the Tax Court should have abandoned its desire to find that Olsen was not liable for the accuracy-related penalties and followed the recent precedent of disallowing the TurboTax Defense,[114] thereby avoiding the expert backlash[115] as well as the potential for future meritless claims.[116]

1. Good Faith Exception of § 6664(c)(1)

The Tax Court in *Olsen* concluded that Olsen was not liable for accuracy-related penalties because he acted in accordance with the reasonable cause exception for underpayments.[117] Section 6664(c)(1) of

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109. *See id.* at 3.

110. *Id.* at 7.

111. *See, e.g.*, *Surprising Experts*, *supra* note 3 ("Such mistakes happen all the time, and they are easy to make. We're likely to see more of these cases.").

112. The reasonable cause exception for underpayments states that "[n]o penalty shall be imposed under Section 6662 or 6663 with respect to any portion of an underpayment if it is shown that there was a *reasonable cause* for such portion and that the taxpayer *acted in good faith* with respect to such portion." I.R.C. § 6664(c)(1) (2012) (emphasis added).

113. The treasury regulations state that "[r]eliance on an information return, *professional advice*, or other facts . . . constitutes reasonable cause and good faith if, under all the circumstances, such reliance was reasonable and the taxpayer acted in good faith." Treas. Reg. § 1.6664-4(b)(1) (2012) (emphasis added).

114. *See, e.g.*, Anyika v. Comm'r, 101 T.C.M. (CCH) 1322 (2011); Parker v. Comm'r, T.C. Summ.Op. 2010-78 (2010); Lam v. Comm'r, 99 T.C.M. 2010-82 (2010).

115. *See infra* Part III(B).

116. *See Surprising Experts*, *supra* note 3 ("Such mistakes happen all the time, and they are easy to make. We're likely to see more of these cases.").

117. Olsen v. Comm'r, T.C. Summ.Op. 2011-131, 7 (2011).

the Code provides that "[n]o penalty shall be imposed . . . with respect to any portion of an underpayment if it is shown that there was a reasonable cause for such portion and that the taxpayer acted in good faith with respect to such portion."[118] The most important factor in determining whether the exception applies is the extent of the taxpayer's effort to properly assess his or her tax liability.[119] The Tax Court determined that Olsen "did not bury his head in the sand and ignore his obligation to check the accuracy of his tax return," and instead found that he made his best effort to assess his tax liability.[120]

The Tax Court could have relied on the reasonable cause/good faith exception without any reference to Olsen's TurboTax Defense. In fact, the summary opinion appears to turn completely on the exception. It would not be incongruous with other areas of tax jurisprudence that allow a taxpayer to escape extra liabilities beyond the taxes incurred based solely on the taxpayer's good faith.

For instance, other areas of tax law have carved out exceptions based on the taxpayer's good faith. Criminal tax law is one example. Criminal provisions of the Code provide that a taxpayer must "willfully" evade his or her taxes to be liable.[121] In response, the Supreme Court has defined "willfulness" through a series of opinions,[122] and has ultimately reached the conclusion that the standard is "voluntary, intentional violation of a known legal duty."[123]

Section 7201 of the Code provides that "[a]ny person who *willfully* attempts in any manner to evade or defeat any tax imposed . . . or the payment thereof" is guilty of a felony.[124] Likewise, § 7203 requires that

118. I.R.C. § 6664(c)(1) (2012).

119. *Olsen*, T.C. Summ.Op. at 4.

120. *Id.* at 7. The Tax Court found that Olsen's efforts were extensive, including upgrading his tax preparation software to a more sophisticated version, correctly identifying the trust as the source of the income, correctly entering the trust's tax identification number, and reviewing the information he entered. *Id.* at 6–7. "Despite his best efforts, however, [Olsen] failed to discover that the amount of the interest income did not appear on the final version of his tax return that was filed." *Id.* at 7.

121. *See* I.R.C. § 7201 (2012) (requiring a taxpayer to willfully evade or defeat taxes imposed in order to be guilty of a felony); I.R.C. § 7203 (2012) (requiring a taxpayer to willfully fail to file a tax return to be guilty of a misdemeanor).

122. *See, e.g.*, Cheek v. United States, 498 U.S. 192, 201 (1991) ("[T]he standard for the statutory willfulness requirement is the 'voluntary, intentional violation of a known legal duty.'"); United States v. Bishop, 412 U.S. 346, 360 (1973) ("The Court, in fact has recognized that the word 'willfully' in these statutes generally connotes a voluntary, intentional violation of a known legal duty. It has formulated the requirement of willfulness as 'bad faith or evil intent'"); United States v. Murdock, 290 U.S. 389, 394–95 (1933) ("[W]hen used in a criminal statute, [willfully] generally means an act done with a bad purpose . . . This court has held that, where directions as to the method of conducting a business are embodied in a revenue act to prevent loss of taxes, and the act declares a willful failure to observe the directions a penal offense, an evil motive is a constituent element of the crime.").

123. *Cheek*, 498 U.S. at 201.

124. I.R.C. § 7201 (2012) (emphasis added).

"[a]ny person required . . . to make a return . . . who *willfully* fails to . . . make such return" is guilty of a misdemeanor.[125] Therefore, determining the meaning of "willfulness" has been important in shaping criminal liability of taxpayers.

In 1991, the Supreme Court decided a case that turned on the meaning of the word "willfully" as used in the Code.[126] In *Cheek*, the taxpayer had been found guilty of six counts of willfully failing to file a federal income tax return and three counts of willfully attempting to evade his income taxes.[127] Cheek stopped paying his income taxes once he began attending seminars sponsored by a group of individuals who advocated that the federal tax system is unconstitutional.[128] Some of the speakers were attorneys who purported to give professional opinions.[129] Cheek, therefore, admitted that he did not pay his taxes for the six years in question, but defended his conduct on his sincere belief that the tax laws were being unconstitutionally enforced—essentially, that he had acted without the willfulness required for criminal liability.[130]

The Court agreed that Cheek had not acted with the required willfulness, and noted that his good-faith belief did not have to be objectively reasonable.[131] In reaching this conclusion, the Court described the evolution from the strict common law rule, which held that ignorance of the law is no defense to criminal prosecution, to the creation of the applicable exception, that specific intent is required for the action to be willful in the criminal tax context.[132] Criminal tax offenses, the Court noted, are afforded this special treatment "largely due to the complexity of the tax laws."[133]

Therefore, for the government to prove the willfulness of a defendant's actions, it must show "that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty."[134] If the government can demonstrate that the defendant had actual knowledge, then the knowledge component is satisfied *unless* the defendant "had a good-faith belief that he was not violating any of the provisions of the tax laws."[135] This belief, known as the good-faith defense, has heightened

125. I.R.C. § 7203 (2012) (emphasis added).
126. *Cheek*, 498 U.S. at 194.
127. *Id.* at 194, 198.
128. *Id.* at 195–96.
129. *Id.* at 196.
130. *Id.*
131. *Id.* at 203.
132. *Id.* at 199–200.
133. *Id.* at 200.
134. *Id.* at 201.
135. *Id.* at 202.

the standard of knowledge for a taxpayer facing criminal charges for tax liability.

Given the willingness of tax jurisprudence to make exceptions for taxpayers who can demonstrate that their tax errors or evasions stem from a good-faith error, framing the analysis solely in terms of good faith could have been an appropriate course of action. The Tax Court could have ignored the TurboTax Defense and focused solely on the § 6664(c)(1) exception. The exception would have disposed of the issue and justified finding no accuracy-related penalties. The Tax Court reasoned that an isolated transcription error is not inconsistent with a finding of reasonable cause and good faith,[136] consistent with the Treasury regulations,[137] and that was as far as the analysis needed to go.

2. Professional Advice Exception

Perhaps the Tax Court did not rely solely on the exception carved out in § 6664(c)(1) because the exception is often used in conjunction with specific circumstances. Instead, the Tax Court could have also relied on the professional advice exception. If a taxpayer can demonstrate that he relied on the advice of a professional, and that such reliance was reasonable and in good faith, then he may be able to invoke the good faith exception of § 6664(c)(1). The professional advice exception, although not currently accepted as encompassing the TurboTax Defense, could be a viable alternative for the Tax Court to avoid penalizing taxpayers for mistakes it deems to be made in good faith.

In some of the cases where the Tax Court rejected the TurboTax Defense, it also addressed the professional advice exception.[138] However, the Tax Court's treatment of the issue was inconsistent. In one case, the Tax Court treated TurboTax as the professional but found that the professional advice exception was inapplicable because "[t]ax preparation software, like TurboTax, is only as good as the information one inputs into it."[139] In another, the Tax Court found that TurboTax was not a professional preparer and that the professional advice

136. Olsen v. Comm'r, T.C. Summ.Op. 2011-131, 5–6 (2011).

137. The Treasury regulations provide that"[a]n isolated computational or transcriptional error generally is not inconsistent with reasonable cause and good faith." Treas. Reg. § 1.6664-4(b)(1) (2012).

138. *See* Parker v. Comm'r, T.C. Summ.Op. 2010-78, 5 (2010) ("Reliance on the advice of a professional does not necessarily demonstrate reasonable cause and good faith unless . . . such reliance was reasonable and the taxpayer acted in good faith."); Lam v. Comm'r, 99 T.C.M. 2010-82, 3 (2010) ("[R]eliance upon the advice of a tax professional may establish . . . reasonable cause and good faith for the purposes of avoiding a section 6662(a) penalty.").

139. *Parker*, T.C. Summ.Op. at 5 (internal quotations omitted).

exception could not, therefore, be reached.[140] Despite this inconsistent treatment of the professional advice exception as it applies to the TurboTax Defense, the exception could be an acceptable way to dispose of taxpayer penalties when the taxpayer has reasonably relied on tax preparation software.

Treasury Regulation § 1.6664-4 details when the good faith exception of § 6664(c)(1) of the Code applies due to reliance on professional advice.[141] The regulation defines advice as "any communication . . . setting forth the analysis or conclusion of a person, other than the taxpayer, provided to (or for the benefit of) the taxpayer and on which the taxpayer relies."[142] Advice does not have to be in any particular form, but it must be based on all pertinent facts and circumstances and must not be based on unreasonable factual or legal assumptions.[143] A taxpayer's reliance on the advice of a professional must be objectively reasonable.[144] Advice is only objective if the taxpayer has provided the professional with information that is both necessary and accurate.[145]

The Tax Court could have embraced the TurboTax Defense within the professional advice exception, thereby avoiding further expansion and complication of tax jurisprudence. The regulation does not dictate the form of advice, only that it must be a communication that analyzes a taxpayer's situation upon which the taxpayer relies.[146] In *Olsen*, the Tax Court found that Olsen "acted reasonably in upgrading his tax preparation software to a more sophisticated version" so that he could properly report the unfamiliar income.[147] The Tax Court could have found that the tax preparation software constituted professional advice, seeing as it is software designed specifically for the purpose of providing accurate tax services to customers with personalized tax advice.[148] Bolstering this approach is the fact that Olsen exercised an option to upgrade his TurboTax software for more sophisticated tax inquiries.[149]

Further, the regulations require that the taxpayer's reliance be

140. *Lam*, T.C.M. at 3 (discussing the contours of the professional advice exception and then holding that the taxpayer "did not rely on a professional preparer, but used TurboTax and stipulated to preparing her own returns without a tax professional").

141. *See* Treas. Reg. § 1.6664-4(c) (2012).

142. Treas. Reg. § 1.6664-4(c)(2).

143. Treas. Reg. § 1.6664-4(c)(1)(i)&(c)(2).

144. *See, e.g.*, *Parker*, T.C. Summ.Op. at 5.

145. *Id.*

146. Treas. Reg. § 1.6664(c)(2).

147. Olsen v. Comm'r, T.C. Summ.Op. 2011-131, 6 (2011).

148. *See, e.g.*, TURBOTAX, http://turbotax.intuit.com/ (last visited Oct. 28, 2012).

149. *Olsen*, T.C. Summ.Op. at 3.

objective, which requires the taxpayer to accurately provide the professional with all pertinent facts.[150] The Tax Court found that Olsen had correctly identified the source of income and the identification number in the software,[151] which would be objective evidence that he had given the tax professional, TurboTax, the pertinent facts. Olsen's isolated transcription error is where the calculation went awry,[152] which arguably would not have affected his objectively reasonable reliance on the software.

3. Impose Accuracy-Related Penalties

The reasonable cause exception for excusing accuracy-related penalties requires a showing "that there was a reasonable cause for [the underpayment] and that the taxpayer acted in good faith with respect to [it]."[153] Courts determine this case-by-case, taking into account all pertinent facts and circumstances and, most importantly, the extent of the taxpayer's effort to assess his proper liability.[154] "Circumstances that may indicate reasonable cause and good faith include an honest misunderstanding of fact or law that is reasonable in light of all the facts and circumstances, including the experience, knowledge, and education of the taxpayer."[155]

In the previous decisions confronting the TurboTax Defense, the Tax Court found that the reasonable cause exception was inapplicable. In *Lam v. Commissioner*, the Tax Court refused to exercise the exception because the taxpayer did not behave "in a manner consistent with that of a prudent person" and "did not consult a tax professional or visit the IRS website for instructions on filing."[156] The Court further held that it did "not accept [the taxpayer's] misuse of TurboTax, even if unintentional or accidental, as a defense to the penalties" and that the underpayments were a result of the taxpayer's own negligence.[157]

The Tax Court also refused to excuse the accuracy-related penalties assessed in *Anyika v. Commissioner*.[158] It noted that the taxpayers did not provide any evidence showing that the software was at fault and further noted that "software is only as good as the information the

150. Treas. Reg. § 1.6664-4(c)(1)(i) (2012); *Parker*, T.C. Summ.Op. at 5.
151. *Olsen*, T.C. Summ.Op. at 6–7 (2011).
152. *Id.* at 6.
153. I.R.C. § 6664(c)(1) (2012).
154. Treas. Reg. § 1.6664-4(b).
155. *Id.*
156. Lam v. Comm'r, 99 T.C.M. 2010-82, 3 (2010).
157. *Id.*
158. Anyika v. Comm'r, 101 T.C.M. 2011-69, 6 (2011).

taxpayer puts into it," reiterating the finding in *Lam* that "the misuse of tax preparation software, even if unintentional or accidental, is no defense to penalties."[159] The Tax Court held that a reasonable person in the Anyikas' position would have understood that the tax law governing this particular issue was complex and would have then consulted a tax professional instead of making assumptions.[160]

Finally, in *Parker v. Commissioner*, the Tax Court would not excuse accuracy-related penalties because the taxpayer was aware of his tax responsibilities and because he either knew, or should have known by reviewing his returns, that he had not properly reported his tax responsibilities.[161] The Tax Court also rejected the taxpayer's reliance on unidentified TurboTax experts with whom he had consulted while preparing his returns.[162]

Given the reasoning previously employed by the Tax Court when confronted with the TurboTax Defense to accuracy-related penalties, it would have been proper, and even expected, for the *Olsen* Court to impose the accuracy-related penalties. Following precedent, the Tax Court should have found that Olsen did not act reasonably and in good faith in reporting his income. Following the reasoning in *Lam*, the Tax Court should have found that Olsen was unreasonable in that he neither consulted a tax professional nor the IRS website to determine how to properly report income with which he was unfamiliar.[163] As in *Anyika*, the Tax Court should have found that Olsen should have known that the tax law was complex when he was confronted with a type of income to which he had never been exposed,[164] and, if he had been a reasonable person, he would have consulted a tax professional instead of assuming that he could figure it out just by upgrading his software. As in *Parker*, the Tax Court should have found that Olsen knew or reasonably would have known he had made an error when the amount of the particular income at question did not appear on the final version of his tax return.[165]

Finally, a reading of the Code and Treasury regulations would also substantiate a finding that imposition of accuracy-related penalties was warranted in *Olsen*.[166] The regulations require the Tax Court to take

159. *Id.*

160. *Id.* at 5.

161. Parker v. Comm'r, T.C. Summ.Op. 2010-78, 7 (2010).

162. *Id.* at 6.

163. *Olsen*, T.C. Summ.Op. at 2 (Olsen's "wife received a Schedule K-1 . . . Prior to this instance, the couple had never received a Schedule K-1 and were unfamiliar with the form").

164. *See id.*

165. *Id.* at 7 ("Despite his best efforts, however, [Olsen] failed to discover that the amount of the interest income did not appear on the final version of his tax return that was filed.").

166. *See* Treas. Reg. § 1.6664-4 (2012).

into account the experience, knowledge, and education of the taxpayer.[167] Olsen admittedly had no experience with the particular income he failed to report properly.[168] However, Olsen was a highly educated patent attorney for the government,[169] which, as pointed out by some observers,[170] should have motivated him to seek professional advice. Olsen was someone who should have understood that dealing with government forms is highly complex and requires specialized knowledge. Therefore, the Tax Court should have found that it was unreasonable for Olsen to not seek professional tax advice, or to at least search the IRS website for advice on how to properly report this unfamiliar income.

V. CONCLUSION

The seemingly innocuous *Olsen* summary opinion sparked controversy in allowing the TurboTax Defense, and for good reason. The Tax Court's decision to abandon precedent cut directly against the Tax Court's previous findings that the TurboTax Defense was meritless[171] and opened the floodgates for even more taxpayers to claim that return errors are the fault of tax preparation software.[172]

The Tax Court's decision was also flawed in that it was based on bad facts—facts that did not properly fit the TurboTax Defense.[173] Further, if the Tax Court was determined to find that Olsen was not liable for accuracy-related penalties, it had other alternatives that would reach the same result without expanding tax jurisprudence.[174] Or, the Tax Court should have followed precedent, as was expected by the tax community, and found that Olsen was liable for accuracy-related penalties based on his own inexcusable error.[175]

After exploring the contours of the statutory and case law behind the *Olsen* decision, the question remains: Why even allow the TurboTax Defense? This is a question that is expected to be debated in the years to come, as the use of tax preparation software continues to be a popular

167. Treas. Reg. § 1.6664-4(b).

168. Olsen v. Comm'r, T.C. Summ.Op. 2011-131, 3 (2011).

169. *Id.* at 2.

170. *See, e.g.*, *Tax Court Rules in Favor*, *supra* note 88 ("Did Mr. Olsen ever think of hiring a professional knowledgeable in the preparation of income tax returns? What would he think of a novice trying to defend a patent matter?").

171. *See infra* Part II(B).

172. *See Surprising Experts*, *supra* note 3 ("Such mistakes happen all the time, and they are easy to make. We're likely to see more of these cases.").

173. *See infra* Part IV(A)(1).

174. *See infra* Part IV(B)(1–2).

175. *See infra* Part IV(B)(3).

alternative to seeking advice from a certified tax professional. Therefore, the Tax Court should be wary of its future decisions, and consider just how "reasonable"[176] it is for a taxpayer to underpay on his tax liabilities when relying on tax preparation software, software which "is only as good as the information one inputs into it."[177]

176. I.R.C. § 6664(c) (2012). The Tax Court will not impose an accuracy-related penalty "if it is shown that there was a reasonable cause for such portion and that the taxpayer acted in good faith with respect to such portion." I.R.C. § 6664(c)(1) (2012).

177. Parker v. Comm'r, T.C. Summ.Op. 2010-78, 5 (2010).