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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JINMING ZHANG, Plaintiff, v. **INTERNAL REVENUE SERVICE;** **UNITED STATES OF AMERICA,** Defendants.	Case No. 4:24-cv-08210-AMO **PLAINTIFF'S COMBINED CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION** **Judge:** Hon. Araceli Martinez-Olguin **Date:** November 5, 2026 **Time:** 2:00 pm PST **Place:** Oakland, Courtroom 5, 2nd Floor

PLEASE TAKE NOTICE that the Plaintiff, Jinming Zhang hereby notices the hearing on her Motion for Summary Judgment in the above-captioned matter for **November 5, 2026 at 2:00 pm** before the Honorable Arceli Martinez-Olguin in Oakland, California. The Plaintiff hereby moves for summary judgment and opposes Defendants' Motion for Summary Judgment in the above-captioned case.

The Defendant, the United States of America, cannot present a triable issue of fact that Plaintiff is not eligible for the Section 6039F reasonable cause defense for the 2017 tax year. The Court should therefore enter judgment in favor of the Plaintiff and against the United States. A proposed order is attached for the Court's consideration.

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INTRODUCTION

If a U.S. individual receives a gift of property (including money) from an individual who is not a U.S. person totaling more than $100,000 during a year, then he or she generally must file a Form 3520 with the IRS. IRC Section 6039F(a); IRS Notice 97-34, Section VI. The receipt of the foreign gift does not trigger any immediate U.S. income taxes for the recipient, solely an information-reporting duty. The penalty is five percent of the unreported gift for each month Form 3520 is late, with a maximum penalty of 25 percent. IRC Section 6039F(c)(1)(B). The IRS has the authority to waive the penalty, though, if the taxpayer can demonstrate that the violation was due to reasonable cause. IRC Section 6039F(c)(2). The IRS has acknowledged that most taxpayers are oblivious to the need to file Form 3520 when they receive a foreign gift, particularly because such an event does not trigger a taxable event for U.S. purposes. The IRS stated the following in its training guide:

> In general, gifts and inheritances are not taxable to the recipient. Many taxpayers and representatives know the basic tenant [sic] of tax law but are not aware of the requirement to report large foreign gifts and inheritances under [Section] 6039F.

IRS Voluntary Disclosure Practice Examiner Guide, 2022 Tax Notes Today Federal 138-24 (July 9, 2022), at 44; *See also* I.R.S. Chief Counsel. INFO 2013-0015 (March 29, 2013). Additional lack of transparency and clarity on the IRS's part

contributed to the basic ignorance of Form 3520 reporting obligations. For example, the IRS never updated Schedule B of Form 1040, Interest and Ordinary Dividends, and related instructions to include foreign gifts as potentially reportable transfers. The Plaintiff (Ms. Zhang) became a tax resident of the United States in 2017 and had her first obligation to file tax returns with the IRS in 2017. Ms. Zhang utilized TurboTax, a widely used computer program to prepare her 2017 income tax returns. At the time, Ms. Zhang was unaware of all the international information returns that must be filed by U.S. tax residents to report transactions. In particular, Ms. Zhang was unaware of the need to disclose foreign gifts on a Form 3520 to the IRS. Ms. Zhang sensibly believed that TurboTax would adequately inform her of all tax return obligations. This was not the case, TurboTax was not capable of preparing a Form 3520. Once TurboTax prepared Ms. Zhang's draft 2017 income tax returns, she did not bury her head in the sand and ignore her obligation to check the accuracy of her tax return, and instead she made her best effort to correctly file her tax returns with the IRS. Ms. Zhang determined she had an obligation to file a FinCEN Form 114, also known as FBAR (Report of Foreign Bank and Financial Accounts) report with the IRS. Ms. Zhang had no way of knowing that she had a Form 3520 filing obligation reviewing her 2017 draft tax return. This is because Form 1040 does not mention Form 3520 duties in situations where U.S. individuals receive foreign gifts. These factors caused Ms. Zhang to miss the Form 3520 filing

deadline. Once again, rather than "bury her head in the sand", as soon as Ms. Zhang discovered that she had a Form 3520 filing requirement and that she missed the deadline, Ms. Zhang came forward voluntarily to file the information return with the IRS and attached a reasonable cause statement to her submission. The IRS rewarded Ms. Zhang's persistence to correctly file her returns with a $71,777 Section 6039F penalty. Ms. Zhang's violation of failing to timely file a Form 3520 with the IRS for the 2017 tax year was due to reasonable cause. The Court should therefore grant summary judgment in favor of Ms. Zhang.

FACTUAL BACKGROUND

For purposes of this motion for summary judgment, the Plaintiff provides the following undisputed facts in the light most favorable to the United States.

a. Ms. Zhang's Education

Ms. Zhang was born in China. Deposition of Jinming ("Zhang Depo.") 11:20-21. The Plaintiff resided in the U.S. temporarily as a student from June 2012 to December 2013 where she attended the University of Miami to study accounting. Zhang Depo. 13:2-7; 23:20 to 24:17. While studying accounting, Ms. Zhang took one class regarding U.S. income tax. Zhang Depo. 24:18-20. That course did not discuss the reporting of foreign income or foreign activity. Zhang Depo. 25:4-22. After failing the CPA exam several times, Ms. Zhang obtained a CPA license from the Board of Accountancy in 2015. Zhang Depo. 26:7 to 27:5; 27:19-25 to 28:1-6.

The CPA exam Ms. Zhang took did not cover topics such as international information reporting requirements or the reporting of foreign gifts and the Plaintiff did not study such areas for the exam. Zhang Depo. 29:18-24. Ms. Zhang allowed her CPA license to become inactive sometime around the 2022 calendar year. Zhang Depo. 30:22 to 31:2.

b. Ms. Zhang's Immigration and Marital Status

Ms. Zhang married a Chinese citizen, Zhenghang Xu, in China in December of 2016. Zhang Depo. 12:11-16. After Ms. Zhang got married, she came to the U.S. on an immigration visa. Zhang Depo. 18:5-12.

c. Ms. Zhang's Employment Experience

After Ms. Zhang graduated from the University of Miami, she moved back to China. Zhang Depo. 31:16-25 to 32:1-7. Once Ms. Zhang returned to China, she worked for a Chinese auditing agency that audited different Chinese government departments. Zhang Depo. 31:16-25; 32:8-15. In September or October of 2017, Ms. Zhang got two part-time jobs in the United States for companies named JingChi Corp and Bank of America ("BOA"). Zhang Depo. 34: 14-23. At JingChi Ms. Zhang worked as an architect and for BOA, Ms. Zhang worked as a teller. Zhang Depo 34:24-25 to 35:1-5. She did not perform any accountancy or tax-related duties for either of these companies. Zhang Depo. 35:6-11. In April of 2018, Ms. Zhang started work at a company called Newstyle Entertainment

Blockchain Inc, a company located in Menlo Park, California as an operation manager. Zhang Depo. 35:15-22; 36:3-6. As an operation manager, Ms. Zhang's duties were primarily that of a bookkeeper and office administrator. Zhang Depo. 35:20-22. In February 2022, Ms. Zhang obtained a position at a company called Alluxio as the assistant to the CEO for approximately four months. Zhang Depo. 36:11-15. Ms. Zhang then obtained her current position with the County of San Mateo. Zhang Depo. 36:16-18. At the County of San Mateo, Ms. Zhang assists her manager obtain reimbursements from federal and state funds. Zhang Depo. 36:19-22. Ms. Zhang never researched or investigated any questions about U.S. tax-filing obligations for any of her previous employers or for any third parties. Zhang Depo. 37:10-25.

d. Ms. Zhang's Wedding Gifts

In 2017, Ms. Zhang received wedding gifts from her parents, grandparents, and uncles in China. Zhang Depo. 53:10-25. In China, there is a tradition for parents and family members to help their children to buy a house or car when they get married. Zhang Depo. 54:1-18. Ms. Zhang received $287,108 from her family members in China. Zhang Depo. 60:5 to 62:17; Zhang Depo. Ex. 2 at 6–7.

e. Ms. Zhang's First U.S. Tax Return and TurboTax Software Failure

Ms. Zhang filed her first tax return with the IRS for the 2017 tax year on March 18, 2018. Zhang Depo. 38:17 to 39:22. Ms. Zhang used TurboTax software

to prepare her joint 2017 federal income tax return. Zhang Depo. 40:7 to 41:9. Ms. Zhang used TurboTax for the 2017 tax year because her husband bought it and used it in the past. Zhang Depo. 41:20-22. Ms. Zhang also used TurboTax for the 2017 tax year based on recommendations from her friends. Zhang Depo. 41:20 to 42:2. Ms. Zhang did not do any research into TurboTax because it was readily available and large businesses such as Costco sold the software program. Zhang Depo. 42:3-7. Ms. Zhang was not alone in trusting TurboTax to prepare her 2017 federal income tax return. More than 34 million other Americans trusted TurboTax to prepare their 2017 federal income tax returns. *See* Intuit Inc., *Intuit Reports 6 Percent Increase in TurboTax Online Units*, SEC Edgar Ex. 99.01 (Apr. 25, 2018). Ms. Zhang did not believe it was necessary to hire a tax accountant or professional to prepare her 2017 income tax returns or to review the 2017 TurboTax prepared return because her "tax condition [was] too simple, just W-2 and 1099." Zhang Depo. 42:13 to 44:15. Ms. Zhang prepared her 2017 by relying on information provided to her by her husband. Zhang Depo. 41:13-19.

Unknown to Ms. Zhang, TurboTax had its limitations. TurboTax can only help its customers prepare their Form 1040 and associated schedules. Deposition of Jaimz Davis (Intuit Inc.'s Rule 30(b)(6) Designee) ("Intuit Depo.") 24:17 to 25:7; 49:2 to 50:9. In preparing 2017 tax returns, TurboTax did not have the capability to prepare non-Form 1040 tax and information returns taxpayers may otherwise need

to file with the IRS, like partnership and corporate tax returns, or Forms 3520 or 5471 which are used to report certain foreign assets and interests. Intuit Depo. 24:17 to 25:7, 49:2 to 50:9. Significantly, the 2017 TurboTax software made no mention of any legal requirement to report gifts from non-U.S. persons, an omission that effectively led taxpayers to believe that receiving a gift from a foreign citizen was not a reportable event.. Intuit Depo. 47:2-13. Like many taxpayers, Intuit apparently believed that since there is no tax on gifts, there was no need for the gift to be reported on a tax return, regardless of the source or amount of the gift. Intuit Depo. 47:2-13. As a result, Intuit did not offer any products or software before 2018 that could be used by an individual taxpayer, such as Ms. Zhang, to prepare and file a Form 3520. Intuit Depo. 53:17-24.

Once Ms. Zhang gathered her and her husband's Form W-2s and Form 1099s, Ms. Zhang followed TurboTax's process to prepare her income tax returns. Zhang Depo. 49:20-24. TurboTax first asked her to input identifying information like names, addresses, and social security numbers. Intuit Depo. 33:20 to 34:13. It then asked Ms. Zhang to input the couple's income. Intuit Depo. 34:14 to 35:17. TurboTax asked about various sources of income, but the program did not ask Ms. Zhang about foreign gift income or gift income at all because gifts are not taxable under Internal Revenue Code Section 102 to the recipient. Zhang Depo. 50:11-13; Intuit Depo. 36.1-4. TurboTax then asked about various deductions and credits.

Intuit Depo. 36:5 to 37:12. Once TurboTax received all the information it asked for, the software prompted the user to review the data to ensure it was correct. Intuit Depo. 37:13-21. Ms. Zhang reviewed the draft return and timely filed the return with the IRS on March 18, 2018. Zhang Depo. 39:16 to 40:18, 64:15-24.

f. IRS Failure to Update Schedule B and Related Instructions to Include Foreign Gifts as a Potentially Reportable Transfer

In her filed return, Ms. Zhang noted that she had bank accounts in a foreign country and acknowledged that she needed to file an FBAR with FinCEN reporting those foreign bank accounts. Zhang Depo. 68:16 to 70:7. Ms. Zhang prepared and filed an FBAR, which was submitted separately from her tax return. Zhang Depo. 68:16 to 70:7. TurboTax did not help Ms. Zhang to prepare an FBAR. Zhang Depo. 69:4-7. Although TurboTax specifically did warn Ms. Zhang of the need to file an FBAR, the IRS alerted Ms. Zhang of the need to file an FBAR on Schedule B of the Form 1040. Zhang Depo. 69:19-24; Ex. 3 at 5. Schedule B of Form 1040 contains a specific warning in Part III, Foreign Accounts and Trusts, which explicitly alerts taxpayers to the requirement of filing an FBAR. Zhang Depo. 66:12 to 69:5; Ex. 3 at 5. Consequently, all Ms. Zhang had to do to discover she had an FBAR filing requirement, with or without TurboTax's prompt, was to review her 2017 draft tax return. On the other hand, the 2017 Form 1040 did not

alert Ms. Zhang of the need to file a Form 3520 for the 2017 tax year. Form 1040 does not raise the potential need to submit Form 3520 upon the receipt of a foreign gift. Form 1040 (U.S. Individual Income Tax Return), which all U.S. individuals ordinarily must file with the IRS, does not raise the potential need to submit Form 3520 upon receipt of a foreign gift. Schedule B to Form 1040 expressly warns individual taxpayers that they might have to file Form 3520 if they get a distribution from, transfer anything to, or serve as a grantor of a foreign trust. Zhang Depo. Ex. 3 at 5. It makes no mention, however, of the possible Form 3520 duties in situations where U.S. individuals receive foreign gifts. *See* I.R.S. Form 1040, Schedule B, Part III (2017); I.R.S., Instructions for Schedule B (Form 1040), at B-2 (2017), https://www.irs.gov/pub/irs-prior/i1040sb--2017.pdf. Had the IRS updated Schedule B and related instructions to include foreign gifts as potentially reportable transfers, the Plaintiff would have been put on notice by the IRS that she had a duty to report her foreign gifts on a Form 3520.

g. Ms. Zhang Attempted to Correct her 2017 Tax Return Filing

Ms. Zhang first learned that she had a Form 3520 filing requirement in October of 2018 while reading an article in an accounting magazine. Zhang Depo. 57:2-14. Shortly after reading this article, she asked her friend who was a CPA about this reporting requirement. Zhang Depo. 57:15 to 58:22. Ms. Zhang's friend informed her that she needed to file the Form 3520 to report her foreign gifts.

Zhang Depo. 57:15-21. Ms. Zhang prepared a Form 3520 on October 5, 2018, and submitted it to the IRS. Zhang Depo. 61:2-8. Ms. Zhang attached a reasonable-cause statement to the Form 3520, explaining her oversight and asking the IRS not to assess a penalty based on reasonable cause. Zhang Depo. 63:4-10; Zhang Depo. Ex. 2 at 8. In October of 2018, the IRS told taxpayers they could submit requests for reasonable cause relief, but that it may not consider those requests, in which case they will have to resubmit them later in the process.[1]

h. The IRS Penalty Assessment

After Ms. Zhang reported her wedding gifts to the IRS on Form 3520 for the 2017 tax year, IRS Customer Service Representative Tracy Pace determined that a Section 6039F penalty was appropriate. Elizabeth Romo Declaration. After Ms. Zhang received notice of the penalty assessment, her authorized agent sent a detailed letter to the IRS requesting a penalty abatement for reasonable cause. Zhang Depo. Ex. 6 at 4-9. The IRS rejected the request for abatement by simply stating "[t]he information you submitted doesn't establush reasonable cause or show due diligence. Therefore, we must deny your request for penalty.". Zhang

[1] IRS, Delinquent International Information Return Submission Procedures, https://www.irs.gov/individuals/international-taxpayers/delinquent-international-information-return-submission-procedures

Depo. Ex. 8 at 1. On October 29, 2021, Ms. Zhang timely appealed the IRS's denial of her request for the abatement of the Section 6039F penalty to the IRS Independent Office of Appeals. The IRS Independent Office of Appeals agreed to abate the original penalty assessment by 20%. Zhang Depo. Ex. 13 at 4.

i. Section 6751(b)(1) Managerial Approval of Penalty

Section 6751(b)(1) of the Internal Revenue Code provides that the IRS may not assess certain penalties such as Section 6039F penalties "unless the initial determination of such assessment is personally approved (in writing) by the immediate supervisor of the individual making such determination or such higher official as the Secretary may designate." In the present case, Ms. Zhang's counsel submitted a Freedom of Information Act ("FOIA") request to the IRS for Ms. Zhang's tax records for the 2017 tax year. The IRS response to the FOIA request did not identify the name of the manager or immediate supervisor who approved the Section 6039F penalty assessed against Ms. Zhang. In its motion for summary judgment, the Government identified the manager that approved the Section 6039F penalty assessed against Ms. Zhang. Since the Government identified the manager that approved the Section 6039F penalty in writing, Ms. Zhang concedes that the IRS satisfied the Section 6751(b)(1) requirements.

ARGUMENT

The Section 6039F Penalty and Potential Mitigation of the Penalty

The IRS assessed a Section 6039F penalty in the amount of $71,777 against Ms. Zhang for her late filed Form 3520 which was eventually reduced by 20% to $57,422. Zhang Depo. Ex. 13 at 4. At issue is whether Ms. Zhang is entitled to a reasonable cause defense to the penalty. Section 6039F(c)(1)(B) instructs the IRS to waive a Section 6039F penalty if the taxpayer can demonstrate that late filing of a Form 3520 was due to reasonable cause. The Government relies on *United States v. Boyle*, 469 U.S. 241, 250 (1985) to define the term "reasonable cause" in this case. The Government's reliance on *Boyle* is outdated in the context of international penalties such as Section 6039F penalties. In determining the appropriateness of international information return penalties such as Section 6039F penalties, courts, the regulations, and the Internal Revenue Manual ("IRM") define the term "reasonable cause" in two distinct scenarios. Since the IRS has not promulgated regulations that define the term "reasonable cause" for purposes of international penalty cases such as the Form 3520, courts have considered the definition of reasonable cause found elsewhere in the Internal Revenue Code and the Internal Revenue Manual. *See, e.g.,* I.R.S. Chief Counsel Advice 200645023 (Jun. 20, 2006); *James Moore v. U.S.* Case 2;13-cv-02063-RAJ (Apr. 1, 2015); *In re Wyly*, Case No. 14-35043-BJH (Bankr. N.D. Tex. May 10, 2016).

A Taxpayer's Ignorance of the Law May Give Rise to Reasonable Cause

The IRM, regulations, and case law has stated that a taxpayer's ignorance of

the law may give rise to reasonable cause. The IRS acknowledges that, in some instances, taxpayers may not be aware of specific obligations to file returns. IRM Section 20.1.1.3.2.2.6 (Nov. 25, 2011). It further states that reasonable cause "may be established if the taxpayer shows ignorance of the law in conjunction with other facts and circumstances," such as whether the taxpayer has been penalized before and the complexity of the issue. *Id.* At least one Federal Circuit Court and the regulations have stated that the determination of whether a taxpayer is entitled to a reasonable cause exception "[i]s made on a case-by-case basis, taking into account all pertinent facts and circumstances. *Van Scoten v. Commissioner*, 439 F.3d 1243, 1259 (10th Cir. 2006). Reasonable cause and good faith might be indicated by "[a]n honest misunderstanding of the fact that is reasonable in light of the experience, knowledge, and education of the taxpayer. *Id.* at 1259. The most important single factor in this analysis is "the extent of the taxpayer's effort to [determine his or her] proper tax liability." *See* Treas. Reg. Section 1.6664-4(b)(1).

In *Congdon v. U.S.*, 108 AFTR 2d 2011-6343 (E.D. Texas 2011), a district court determined that ignorance of law or mistake of law could establish reasonable cause for purposes of an international penalty mitigation. Whether reasonable cause exists depends upon all the facts and circumstances of the case, including the taxpayer's reason for failing to properly file, and the extent of his efforts to comply with the law. The taxpayer in *Congdon* failed to correctly prepare and attach the

Form 5471 to his tax return. This resulted in the IRS assessing a $10,000 penalty. The taxpayer sued the IRS and alleged that the Section 6038(b)(1) penalty was incorrectly assessed against him because he acted with reasonable cause. The taxpayer argued that he spent a reasonable amount of time and effort preparing his tax returns. However, as a result of the taxpayer's misunderstanding the instructions for the Form 5471, the form was incorrectly prepared. The taxpayer also argued that he was not an expert in tax law, and he has a long history of compliance with filing tax returns and paying taxes. The district court determined that these factors could constitute reasonable cause.

Like the taxpayer in *Congdon* who lacked expertise in tax, Ms. Zhang was not a tax expert, and the 2017 tax year at issue represents the first instance in which she filed a tax return with the IRS. Ms. Zhang relied on TurboTax, a highly rated software program used by more than 34 million Americans to prepare her 2017 tax return. *The Best Online Tax Preparation Software for 2017*, U.S. News & World Report: My Money Blog (Jan. 23, 2017)[2]. Ms. Zhang did not simply blindly rely on TurboTax to prepare her 2017 tax returns, Ms. Zhang reviewed the draft 2017 tax return prepared by the program. Zhang Depo. 64:22-24. When Ms. Zhang prepared

[2] Available at https://money.usnews.com/money/blogs/my-money/articles/2017-01-23/the-best-online-tax-preparation-software-for-2017

her 2017 tax return, TurboTax may have alerted her about the need to file an FBAR with the IRS. Zhang Depo. 69:19 to 70:7. The record is unclear if TurboTax alerted Ms. Zhang regarding the need to file an FBAR. However, all Ms. Zhang would have had to discover her obligation regarding her FBAR filing obligation is to review Part III of Schedule B of her Form 1040. Part III on Schedule B of Form 1040 which states the following: "At any time [during the tax year], did you have an interest in a foreign country, such as a bank account, securities account, or other financial account?" The instructions to Schedule B goes on to instruct a taxpayer with an interest in a foreign account to check the "yes" box and then disclose the account." The instructions to Schedule B provides guidance regarding disclosing foreign financial accounts to the IRS on an FBAR.

The TurboTax program did not prepare an FBAR for Ms. Zhang. Ms. Zhang prepared her own FBAR and filed it with the IRS. Zhang Depo. 66:12 to 69:5. Schedule B's explicit instructions directly guided Ms. Zhang on how to prepare her FBAR. The same cannot be said of the Form 3520. TurboTax's software also did not alert users of the need to file Form 3520s for the 2017 tax year. Intuit Depo. 52:5-14. At the same time, the IRS's 2017 tax return did not alert Ms. Zhang of the need to file a Form 3520 for the 2017 tax year. As a matter of fact, Ms. Zhang could have read each and every word of the IRS's 2017 Form 1040 along with its instructions and still never have discovered that she had a legal duty to file a Form

3520 with the IRS. The Government claims that Ms. Zhang knew at the time the 2017 Form was due that she may need to prepare additional forms to report foreign activities and assets beyond those contained in her individual income tax return. Def.'s Br., ECF No. 45 at 20. This is incorrect. Schedule B to Form 1040 never once mentions foreign gifts. The only potential indication that Ms. Zhang had another filing requirement is Question 8 of Schedule B, Part III which only mentions foreign trusts not foreign gifts. Ms. Zhang did not have an interest in a foreign trust in 2017. It is completely reasonable for Ms. Zhang to believe that she did not have an international filing requirement other than an FBAR. The IRS's own lack of transparency and clarity regarding Schedule B significantly contributed to Ms. Zhang not timely filing Form 3520. Had the IRS updated Schedule B to include foreign gifts as potentially reportable transfers, both taxpayers such as Ms. Zhang and the IRS would have significantly benefited. Instead of updating the Schedule B of Form 1040 which would be highly beneficial to both taxpayers and the IRS, the Government believes all taxpayers can "quite easily" learn all about the panoply of international returns that must be filed through a "Google search." Def.'s Br., ECF No. 45 at 21. The Government's position misses the mark. Besides the fact that most ordinary and reasonable taxpayers know nothing about international information returns such as a Form 3520, Internal Revenue Code Section 102 provides that gross income does not include the value of property

acquired by gift, meaning the receipt does not owe income tax on it. The fact that there are generally no federal income tax consequences associated with receiving a domestic or foreign gift has resulted in widespread unfamiliarity with the requirement to report foreign gifts on Form 3520. *See* Nat'l Taxpayer Advocate, 2023 Annual Report to Congress (Dec. 2023). If Ms. Zhang's foreign gifts were not taxable and the IRS's own tax return failed to provide any clue that her foreign gifts were potentially reportable, it is not reasonable for the IRS to suggest Ms. Zhang had a duty to search the internet to determine if her foreign gifts had to be disclosed on an international information return.

The Government claims that Ms. Zhang acted negligently or willfully negligently by failing to review her husband's prior year's tax return. Def.'s Br., ECF No. 45 at 23-24. Case law provides that "negligence" is the lack of due care or failure to do what a reasonable and prudent person would do under similar circumstances. *See Anderson v. Commissioner*, 62 F.3d 1266, 1271 (10th Cir. 1995). Ms. Zhang filed her first tax return with the IRS in 2018 for the 2017 tax year. Zhang Depo. 38:17-21. Ms. Zhang did not have a prior tax return. In her deposition, Ms. Zhang stated that she did tell her husband about her 2017 gifts. Zhang Depo. 56:23-57:1. The Government assumes facts not in the record. Namely that Zhenghang Xu would voluntarily share foreign gifts with Ms. Zhang. Perhaps Zhenghang Xu purposely or negligently hid his foreign gifts from Ms. Zhang. The

record is not clear as to why Zhenghang Xu did not disclose the foreign gifts he allegedly received in 2016. The record is clear that Ms. Zhang testified that she did not know Zhenghang Xu had previously filed with the IRS a Form 3520 for 2016 at the time she timely filed her 2017 tax returns. Zhang Depo. 52:3-19. It is therefore not appropriate in this case for the Government to allege Ms. Zhang acted negligently in not obtaining records that may have never been available to her. There is no reason to believe that Ms. Zhang did not prepare her first 2017 tax return as a reasonable and prudent person would do under similar circumstances.

These factors combined with Ms. Zhang's inexperience in tax matters constitute reasonable cause. Although Ms. Zhang at one time obtained a CPA license, she had little instruction in tax law and no instruction or experience in preparing U.S. tax returns. Zhang Depo. 24:9 to 37:21. Ms. Zhang paid the correct amount of tax on her 2017 income tax returns. Finally, when Ms. Zhang was alerted of the fact she had a Form 3520 filing obligation, she immediately came forward voluntarily to file the information return notwithstanding the potential penalties. These facts in their totality establish that Ms. Zhang had reasonable cause for her failure to timely file Form 3520.

Professional Advice Exception for Reasonable Cause

The second reasonable cause defense is reliance on a tax professional. Treasury Regulation Section 1.6664-4(c) details the minimum requirement for

determining whether a taxpayer reasonably relied in good faith on the advice of a professional tax advisor. In this case, Ms. Zhang believed there were no federal income tax consequences associated with her wedding gifts and as a result there were no filing consequences associated with these foreign gifts. Given that there were no income tax consequences associated with Ms. Zhang's wedding gifts, Ms. Zhang was under the impression that her 2017 tax returns were simple and that she did not need to utilize a tax professional. Zhang Depo. 42:8 to 45:5. Thus, Ms. Zhang did the same thing that over 35 million Americans did for the 2017 tax year. Ms. Zhang utilized TurboTax to prepare her tax returns.

For many years, courts have rejected the so-called "TurboTax Defense" in the context of a reasonable cause reliance defense argument. *See Lam v. Commissioner*, 99 T.C.M. 2010-82 (2010); *Anyika v. Commissioner,* 101 T.C.M. (CCH) 1322, 6 (2011); *Parker v. Commissioner,* T.C. Summ.Op. 2010-78 (2010). That changed in November of 2011 when the Tax Court issued its opinion in *Olsen v. Commissioner,* T.C. Summ.Op. 2011-131 (2011).

In *Olsen,* the Tax Court disallowed the imposition of accuracy-related penalties on Kurt Olsen who made an input error on his federal tax return while using tax preparation software. Olsen, a patent attorney for the Department of Energy, was accustomed to preparing his tax returns using tax preparation software. Olsen's wife received interest income from a trust, along with a Schedule K-1 for

reporting interest income. The Olsens were unfamiliar with reporting procedures because they had never received a Schedule K-1. 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. 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. Olsen reviewed the return using the software's verification features, but the taxpayer did not discover his error. The IRS determined a deficiency in Olsen's federal income tax of $9,297 and assessed an accuracy-related penalty of $1,859. On these facts, the Tax Court turned to whether Olsen was liable for the accuracy-related penalty, ultimately finding that he was not. The Tax Court noted that an accuracy-related penalty should not be assessed if a taxpayer can establish reasonable cause and that he acted in good faith by showing the extent of his effort to assess the proper tax liability in the preparation of his tax return. The Tax Court determined that Olsen had acted reasonably and in good faith. As evidence, the Tax Court noted that 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. 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.

It is noteworthy that Olsen is not a true "TurboTax Defense" case because the error in that case which resulted in the tax deficiency was the result of user error. Here, there was no user error on part of Ms. Zhang. She entered all her information correctly into the TurboTax software. The problem in this case is that the TurboTax software did not have the capability to alert Ms. Zhang of any information filing requirements such as the Form 3520. Intuit Depo. 52: 5-14. This is truly a case where the "TurboTax Defense" applies because the error in failing to alert Ms. Zhang of her Form 3520 filing requirement can be assigned to the TurboTax software, not Ms. Zhang.

As with Mr. Olsen, Ms. Zhang "did not bury [her] head in the sand and ignore [her] obligation to check the accuracy of [her] tax return." Ms. Zhang checked her 2017 tax return. Not only did Ms. Zhang check her tax return, she made sure to file an FBAR with the IRS, an information return that TurboTax did not prepare. Zhang Depo. 69:4-18. A review of Schedule B of the 2017 Form 1040 and its instructions would have told Ms. Zhang about the FBAR and how to file it with the IRS. The TurboTax software did not inform Ms. Zhang about the need to file a Form 3520. Zhang Depo. 70:8-10; Intuit Depo. 49:13 to 50:9. Had the TurboTax software and/or the IRS's Form 1040 alerted Ms. Zhang of her Form 3520 filing obligation, Ms. Zhang would have known of the obligation to timely file Form 3520 for the 2017 tax year.

Treasury Regulation Section 1.6664-4 details when the good faith exception of Section 6664(c)(1) of the Internal Revenue Code applies due to reliance on professional advice. *See* Treas. Reg. Section 1.6664-4(c). 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 on which the taxpayer relies." Treas. Reg. Section 1.6664-4(c)(2). 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. Treas. Reg. Sections 1.6664-4(c)(1)(i) & (c)(2). A taxpayer's reliance on the advice of a professional must be objectively reasonable. *See,* e.g., *Parker v. Commissioner,* T.C. Summ.Op. 2010-78, 5. Advice is only objective if the taxpayer has provided the professional with information that is both necessary and accurate.

The regulations do not indicate the form of advice, only that it must be a communication that analyzes a taxpayer's situation upon which the taxpayer relies. Treas. Reg. Section 1.6664-4(c)(2). Here, TurboTax, the tax preparation software, constituted professional advice because it is software designed specifically for the purpose of providing accurate tax services to customers with personalized tax advice. Furthermore, the regulations require that the taxpayer's reliance be objective, which requires the taxpayer to accurately provide the professional with all pertinent facts. Treas. Reg. Section 1.6664-4(c)(1)(i). The Tax Court found that

Olsen had correctly identified the source of income and the identification number in the software, which would be objective evidence that he had given the tax professional, TurboTax, the pertinent facts. *Olsen*, T.C. Summ.Op. at 6-7 (2011). The TurboTax software's lack of communication regarding disclosing foreign gifts on a Form 3520 establishes reasonable reliance on the tax preparation software. The regulations also require that a taxpayer's reliance be objective, which require the taxpayer to accurately provide the professional with all pertinent facts. Treas. Reg. Section 1.6664-4(c)(1)(i). Because of the limitations of the TurboTax software, it does not appear that Ms. Zhang could have provided the software program with all of her pertinent facts. Intuit Depo. 50:2-9. However, Ms. Zhang did correctly identify all her taxable income, which is objective evidence that she had given the tax professional, TurboTax, the pertinent facts.

The reasonable cause exception for excusing penalties requires a showing "that there was reasonable cause and that the taxpayer acted in good faith with respect to it." *See Van Scoten v. Commissioner*, 439 F.3d 1243, 1259 (10th Cir. 2006). 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 or her proper liability. Treas. Reg. Section 1.6664-4(b). Ms. Zhang had no experience preparing U.S. tax returns prior to the 2017 tax year. She was unaware of the international information returns that had to be filed with the IRS

once she became a U.S. resident. Just like 35 million other Americans, Ms. Zhang sensibly believed that TurboTax would adequately inform her of all her tax return obligations. Unknown to Ms. Zhang, as a result of a lack of transparency on the part of TurboTax, the TurboTax software was not capable of preparing Ms. Zhang's 2017 tax returns. Prior to the 2018 tax year, TurboTax did not have the ability to prepare international information returns. Intuit Depo. 49:13 to 50:5. Despite the limitations in TurboTax software, she filed an FBAR with the IRS. Because the IRS failed to provide any information regarding the need to disclose foreign gifts on a Form 3520 on its 2017 Form 1040, Ms. Zhang was not apprised of the Form 3520 requirement. In the present case, Ms. Zhang acted reasonably by relying on a tax professional, TurboTax, she also took extra steps such as preparing and filing her own FBAR for the 2017. These facts in their totality establish that Ms. Zhang had reasonable cause for her failure to timely file Form 3520.

Conclusion

Ms. Zhang filed her first U.S. tax returns with the IRS in 2017. She was unaware of all the international information returns that are required to be filed by individuals immigrating from a foreign country. She utilized TurboTax software, a program utilized by more than 35 million taxpayers during the at issue. Given software's ubiquitous use, it was reasonable for an individual first relocated to the United States to believe it will adequately inform her of all tax return obligations.

The TurboTax program failed to adequately warn Ms. Zhang does not have the ability to correctly file her tax returns. To make matters worse, as discussed in the National Taxpayer Advocate 2023 report to Congress, the IRS failed to update Schedule B to Form 1040 and its related instructions to include foreign gifts as potential reportable transfers. Nat'l Taxpayer Advocate, 2023 Annual Report to Congress (Dec. 2023). The IRS's lack of transparency and clarity regarding the filing requirements for foreign gifts undoubtedly contributed to Ms. Zhang's failure to timely file a Form 3520. There is no question that in this particular case, Ms. Zhang acted with reasonable cause in failing to timely report her foreign gifts on a Form 3520 for the 2017 tax year.

For these and all other reasons stated above, the Court should grant summary judgment in favor of Ms. Zhang and deny Defendants' Motion for Summary Judgment in the above-captioned case.

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Respectfully Submitted,

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