



Robert W. Wood

THE TAX LAWYER

Nov. 18 2010 — 9:27 am

TurboTax Is No Twinkie Defense

In San Francisco, Dan White infamously urged the “[Twinkie defense](#)” for diminished capacity in connection with murdering several public officials in 1978. Lots of junk food, the theory went, can mess up your brain and make you depressed. Convicted of only manslaughter, White served only five years. The press and criminal lawyers had a field day until California anti-twinkie’d the criminal law to abolish “diminished capacity” ([California Code Section 25](#)) and [Proposition 8](#), a Victim’s Bill of Rights.

Among the better “oops” tax excuses of the last few years was the statement by [Treasury Secretary hopeful Tim Geithner](#) when accused of not paying approximately \$35,000 of self-employment/FICA tax. TurboTax didn’t tell me I owed it, he famously said. He was then confirmed as Treasury Secretary.

Many observers thought it odd. See [Kyl Sends Geithner Off With Tough Beating On Botched Taxes](#). But most [Congressman don’t do their own returns](#), the country seemed to need Mr. Geithner in the top Treasury spot, and he got a pass.

Since then, a few more regular Joe taxpayers have tried to reprise the defense unsuccessfully: [Hopson v. Commissioner](#); [Parker v. Commissioner](#); and [Lam and Chang v. Commissioner](#).

The latest is [Au v. Commissioner](#), a tax case involving gambling. Mr. and Mrs. Au said the software spewed out their 2006 return so they shouldn’t owe penalties. But the Tax Court found it disturbing that they

admitted they did not consult any IRS publications or tax advisers, and they ended up claiming deductions equaling almost half their reported income. The Tax Court didn't have the software instructions in the record before it, but said it seemed unlikely that tax software would allow a result directly contrary to the tax code.

Floodgates? It may be too soon to say that no one will repeat Mr. Geithner's success. Many Tax Court cases where the TurboTax defense is asserted are *pro se*, meaning taxpayers are representing themselves. Often they don't make a good case about the software instructions, what information they put in, what other due diligence they did, etc.

Thus, it may be too early to entirely rule out the Geithner defense. But good groundwork is clearly required. After all, the IRS and Tax Court hardly want the floodgates to open.

Finally, there may be one more thing going on. Getting out of a few thousand dollars of penalties is a big deal. Getting confirmed for a cabinet level post? Perhaps not so much.

For more, see:

[Tax Court Rejects Geithner/Turbo Tax Defense](#)

[Tax Court: If You're Gonna Use Turbo Tax, Use It Correctly](#)

[Don't Robo Sign Tax Returns](#)

*Robert W. Wood practices law with [Wood & Porter](#), in San Francisco. The author of more than 30 books, including *Taxation of Damage Awards & Settlement Payments* (4th Ed. 2009, [Tax Institute](#)), he can be reached at wood@woodporter.com. This discussion is not intended as legal advice, and cannot be relied upon for any purpose without the services of a qualified professional.*