A Memorable and Lasting Experience in the U.S. Tax Court

By Steven L. Jager

Steven L. Jager shares his experience as a volunteer at a Tax Court calendar call.

Introduction by Claudia Hill

Over 75% of the petitioners who file with the Tax Court are self-represented (*pro se*)[1]. In doing so they face significant disadvantages, not the least of which are unfamiliarity with the Tax Court Rules of Practice and Procedure, the Federal Rules of Evidence, and the internal protocols of the Internal Revenue Service (IRS). These self-represented taxpayers and the Tax Court as an institution need the private tax bar's help to resolve many of these cases.

In this article, Steven Jager shares his experience as a volunteer at a Tax Court calendar call. He marvels that the issue that brought his client to the court is the frequently encountered cancellation of debt and has several remedies under Code Sec. 108. Steve was surprised that the matter had not been resolved up to that point. I'm speculating, but most likely the case evolved from the failure of the taxpayer to report the cancellation of debt income that was picked up by the IRS Automated Under Reporter (AUR) program when a "CP-2000" letter was sent to the taxpayer and possibly to an old address. The taxpayer may never have received that first notice. In fact, since the Notice of Deficiency is the only notice sent Certified, the taxpayer's first clue there was a problem could have been when they received the 90-day Notice.

Having assisted on such cases myself, I have thought there has to be a better way than allowing a case to default from lack of response in the IRS AUR program, to then place the taxpayer in the position of having to petition Tax Court to allow them to be heard. Essentially the person who didn't understand what happened to them in the tax assessment arena is moved into an equally unfamiliar legal procedural environment. Neither of these procedures take a time out to get the taxpayer the assistance they need, allow them to feel "heard," or convey a sense of fairness with the system. If the taxpayer is lucky, knowledgeable volunteers can assist taxpayers through this unfamiliar legal procedural environment.

STEVEN L. JAGER, CPA, MST, USTCP, Tax Court Advisor, Bookstein Low Income Tax Clinic, California State University, Northridge and Tax Partner, Fineman West & Company, LLP.

The Tax Court initiated a program approximately 40 years ago to permit low income taxpayer clinics (LITCs) and bar-sponsored calendar call programs to participate in court trial sessions to assist otherwise unrepresented taxpayers. With encouragement from the Tax Court, the Taxpayer Advocate Service, the American Bar Association Tax Section, and congressional funding the program has grown substantially during the past 20 years.

Currently, in each of the Tax Court's 74 trial cities, taxpayers have access to legal assistance through 131 LITC programs as well as nine calendar call programs operated by volunteers working through the tax section of state and local bar associations in 15 cities. The 131 participating LITCs comprise: 41 law schools; two nonlaw schools; and 88 legal service organizations. The Tax Court provides information to every self-represented petitioner as to the availability of these programs. The information, in the form of a letter, is provided three times: (i) when a petition is filed; (ii) when the notice of trial is issued; and (iii) 30 days before the call of the calendar. In addition to the communication that clinics may have with petitioners prior to trial, representatives of most of the 131 clinics appear at calendar calls to assist petitioners who appear in court without counsel.

This is a call out to attorney and accountant tax professionals: Low Income Tax Clinics need your expertise. Find a Low Income Tax Clinic Near You.[2] Find out more about the calendar call programs at *www.ustaxcourt.gov/clinics_calendar_call.html*.

Tax Court Calendar Call

That particular morning at the virtual Tax Court calendar call started out typically enough. Lots of waiting time, leaving my web camera off and myself muted until there was activity that aroused my attention, pulling me away from the emails I was sorting through, answering and working through, when the booming voice of the Tax Court Clerk announced that a *pro se* petitioner had made a request to speak to one of the *pro bono* practitioners about his case! When a call like that goes out, the person designated as that sessions' coordinator whips into action and decides which of the available *pro bono* practitioners to route the request to, and I heard my name mentioned through my headphones.

Through the miracle of zoomgov, I soon found myself in a "breakout room" with the petitioner, Mr. Jimenez,[3] and two other *pro bono* lawyers from other LITC's who were present.[4] Knowing that our time would be short, I asked Mr. Jimenez if he could quickly summarize the issues in his case. Here are the salient facts of his case: Some years ago, his parents needed a co-guarantor on their home mortgage, and because his credit was stronger, they asked him to be their guarantor. Parents got into financial difficulty and could not pay the mortgage, and so the financial institution looked to Mr. Jimenez to satisfy the debt. On January 1, 2014, that debt was eventually "forgiven" and the financial institution issued a 1099-C for the amount of the $118,166 forgiven debt to the co-obligor, Mr. Jimenez. There were a couple other "quirks" relating to the filing of the tax return itself, but the cancellation of debt was the major issue. The IRS Statutory Notice asserted that, along with a myriad of penalties and interest calculated, the grand total owed was over $60,000!

My first question of Mr. Jimenez was to inquire whether he was insolvent at the time of the loan cancellation. He asked me what that meant, so I asked him if that debt, plus all of his other debts combined, was more or less than the value of all the things he owned, and when he quickly answered that he did not own property anywhere close to that number, I then explained to him that, if he could prove this fact, then this "income" is NOT TAXABLE, at least to the extent that his liabilities exceeded his assets. His mouth and jaw were agape; his body language completely changed, and I asked him, "didn't the IRS Appeals Officer or the Counsel Attorney ever ask you the same question that I asked you?" "No," he said. "No one has ever asked that question of me until now."

Surprise? Yes! Indignation? Yes! But I truly did not even have the luxury of a few moments to deal with these feelings as I was scrambling to compose my thoughts in raising this new fact to the Tax Court. Clearly, this was a highly unusual situation, and how I was about to explain this in open court was going to be very impactful and I wanted to be very clear that there was no way that Mr. Jimenez could have raised this any sooner, since he was representing himself and clearly, no one at the IRS had been watching out for him. Whatever was about to happen, I knew could have very real repercussions, but my duty now was to see justice prevail for my newest client. If he was correct and was truly insolvent on the day prior to the cancellation of debt, then he clearly could not possibly owe the federal government in excess of $60,000, which to most people was a lot of money, *especially if it was not really and truly owed*. Judge Vasquez was presiding over the Calendar session, and I knew from my previous experiences before him and from having read so very many of his opinions, that he would appreciate Mr. Jimenez' story.

I did not have long to wait.

Almost immediately after being pulled out of the private breakout session, the Trial Clerk called the case, and in as confident a voice as I could muster, I introduced myself

to the Tax Court and declared that I was assisting the petitioner, Mr. Jimenez. Next, as Judge Vasquez acknowledged my assistance, I proceeded to thank the court for giving me a few moments to confer with Mr. Jimenez where I learned that the primary issue of the case deals with cancellation of debt and that when I asked the petitioner if he had been insolvent just prior to the cancellation of that debt, he told me (after explaining what that meant) that he believes that he clearly had been insolvent, and that if the Tax Court would grant a continuance, Mr. Jimenez could have the opportunity to put a balance sheet together to demonstrate the extent of his insolvency, because to "the extent of his insolvency, the cancellation of debt would not be taxable income."[5]

A mouthful. Maybe I stumbled to get it out, but I simply laid it out there. Judge Vasquez then asked respondent's counsel what his thoughts were, and he—a lawyer whom I had never previously met, nor worked with—answered by objecting to my request for a continuance, and after declaring that Mr. Jimenez had already been to IRS Appeals where he already had the chance to raise this issue, he made an oral motion for a "preclusion order" due to unfair surprise!

I was completely dumbfounded, as that was not what I expected, and I am sure that my facial expression and my body language conveyed my incredulity. I remember thinking to myself, "how could any Appeals Officer AND Chief Counsel attorney overlook the insolvency issue?" Judge Vasquez then turned his attention to my client, Mr. Jimenez. He asked him if he was aware of the insolvency exception and Mr. Jimenez (who is a very smart and intelligent gentleman, even if he is financially unsophisticated) explained that before today, he was not aware, and certainly not aware that it pertained to him. It was then that Judge Vasquez returned his focus to how long of a continuance would be reasonable. It was respondent's counsel's turn to speak and he said, "we would agree to the motion for continuance and also move for a preclusion order requiring that the petitioner provide that document within 45 days, Your Honor."[6] Of course, "that document" meant the balance sheet stated as of the day before that $118,166 debt was "cancelled" by the financial institution.

At this point, I could feel the tension …. I had no idea what the respondent's attorney was really thinking, but he had laid out his challenge to me and that same smug look that had almost faded a few moments ago, reappeared ….

Judge Vasquez must have sensed our tension, and the professional that he is, he declared that he wanted to take a few moments to review Code Sec. 108 that I had cited and that we would resume after a five-minute recess. His camera went off and his microphone went on mute.

During that five-minute recess, I took my own moment to "drill down" onto that Code Section and cull out the mention of insolvency so that I could cite it more specifically (if I needed to) as Code Sec. 108(a)(1)(B). I was confident that I was correct. Over four decades of practice as a CPA, I have prepared many tax returns where this has been an issue. I have reported the income and then backed it out as nontaxable with the explanation that, due to the insolvency exception, the debt cancelled was excludible to the extent of the insolvency.

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I remembered taking several deep yoga breaths even as I remembered that there was still my motion before the court for a continuance and respondent counsel's motion for a preclusion order. Then Judge Vasquez' camera suddenly turned back on, much the same way that a play resumes after its intermission, except that there were no chimes in the hallway urging us back to our seats, and Judge Vasquez spoke to us in his usual soft-spoken and gentle manner. He said that he looked up Code Sec. 108 and declared that there is, indeed, that exception. He then focused his gaze on Mr. Jimenez, and after noting that I am only a CPA, (and not also a lawyer), acknowledged my help with very genuine gratitude, as I assured him that I was admitted to practice in the Tax Court. His next words, directed to Mr. Jimenez, were: "Mr. Jimenez, please take advantage of Mr. Jager's participating in this case, and show him the documents you need to show to prove up if, in fact, you're insolvent."[7]

So Judge Vasquez granted my motion for a continuance by continuing the case until his next trial session in Los Angeles which would be April 26, and I agreed to file a Limited Entry of Appearance, so that I could retain the authority to act on Mr. Jimenez' behalf through the conclusion of the case, which I expected would resolve by a Stipulated Decision once an analysis

of Mr. Jimenez' insolvency could be presented. To his credit, respondent's counsel "took back" his motion for a preclusion order.

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Judge Vasquez again expressed his appreciation and gratitude for my help and made what amounted to "chit chat" by saying (to me): "And so you're admitted to practice before the Tax Court; is that correct? You've taken the exam?"[8]

> MR. JAGER: Yes, I have.
>
> THE COURT: And congratulations on passing that very difficult exam.
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> MR. JAGER: Thank you, Your Honor. I think it was the most difficult exam I've taken in my 40-year career.
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> THE COURT: You mean it's even tougher than the CPA exam?
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> MR. JAGER: It is much more difficult than the CPA exam was.
>
> THE COURT: Okay. Very good. Mr. Jimenez, you're in good hands. Take advantage of it, okay, please?
>
> MR. JIMENEZ: Yes, Your Honor.[9]

In the days and weeks following this calendar call session, I knew that I must help my client to put together a balance sheet in order to demonstrate his insolvency, and the extent of that insolvency at the date just before the date that the loan was forgiven. Fortunately, the IRS transcript, which respondent's counsel shared with me indicated that the date of forgiveness stated on the 1099-C was January 1, 2014. I suggested to Mr. Jimenez that if he could possibly find a credit report dated sometime around that date, that this would give us many clues to uncovering his liabilities. Of course, I already knew the amount of the debt on his parents' home that started this case.

As luck would have it, Mr. Jimenez was a good recordkeeper and he was able to find old copies of his credit reports from all three credit reporting bureaus as of November 2014! Between all three credit bureaus we were able to identify most, if not all of his liabilities at a date which was at least in 2014, and then by listing out the (short) list of what his assets would have been, the balance sheet took shape, and I was able to produce a schedule for respondent's counsel which, if accepted, would exclude the entirety of the debt "forgiven." I sent all of my analysis to respondent's counsel along with a brief note asking him to please review all of the materials attached and then to please consider conceding the issue of the cancellation of debt income.

I knew, however, that I was still not quite finished with this case. Because I had entered an "appearance," in the case (*albeit* even a limited one), I was still bound and obligated to follow the Judge's "Standing PreTrial Order" and must file either a "PreTrial Memorandum" or a "Status Report" at least 21 days before our next trial session date of April 26. By April 5, respondent's counsel still had not conceded the issue, so I filed the required Status Report which recited a chronology of the case, including the fact that substantiation of the insolvency had been submitted to respondent's counsel, a request had been made for the concession of that issue, and I went onto say that "It is the Petitioner's fervent hope that Respondent's Counsel will be persuaded to concede this issue, and that the remaining issues in the case will also then be able to be resolved by a Stipulated Decision."[10]

The Tax Court responded to my Status Report by issuing an Order that respondent's counsel file his own Status Report by April 15.

Less than a week later, respondent's counsel telephoned me and (finally) declared that he would concede that main issue! We were able to reach an amicable resolution on all of the other issues, which he stated when he filed his Status Report the following day. By now it was already April 15—just 11 days before the next trial session—and Judge Vasquez signed a new Order recognizing that the basis of a settlement has been reached, and ordering that either a Stipulated Decision or a Joint Status Report be filed by June 1.

Now knowing the final expected outcome of the case, I was able to breathe more easily, focus on the tax returns

that were still ahead of me, mindful of the upcoming May 17 filing deadline, and simply sign the next "Stipulation of Settled Issues" document that respondent's counsel drafted and we signed on April 23. What began for Mr. Jimenez as a $60,000 IRS bill staring at him in the face has become what it originally deserved to be—an amount just less than $6,000.

While I love a happy ending as much as anyone, I cannot help but wonder how this glaring issue could have been ignored by so many IRS employees that clearly knew or should have known about the insolvency exception to cancellation of debt. I suppose I will never know why none of them—the IRS Appeals Officer, their Team Manager, the IRS Counsel Lawyer and their Manager—ever bothered to ask Mr. Jimenez whether he may have been insolvent at the time of that debt forgiveness.

Imagine the financial damage that could have (and I believe would have) occurred if Mr. Jimenez had not been introduced to one of the *pro bono* practitioners with enough tax preparation experience to recognize the issue! This is surely one example of how vitally important the Low Income Tax Clinics are to those petitioners who do not have professional representation, which the statistics inform us, is 70%, or perhaps even as high as 75% of all cases which are filed in the Tax Court. Personally, I am very proud to be a part of the LITC community, and I am grateful to my partners at Fineman West & Company, LLP for supporting my efforts.

ENDNOTES

[1] Congressional Budget Justification Fiscal Year 2021, Submitted February 10, 2020. United States Tax Court.

[2] Available at *www.ustaxcourt.gov/resources/clinics/clinics.pdf*.

[3] Mr. Ramiro Anthony Ramirez is the petitioner in the case, *Ramiro Anthony Jimenez*, Docket Number 2673-20. The events described in this case happened on February 22, 2021 and through May 10, 2021, and are recounted here with Mr. Jimenez' permission to make these events public and to highlight his appreciation for the work done by the author, acting on behalf of the Bookstein Low Income Tax Clinic of California State University, Northridge. The author is also in private practice as a Tax Partner with the CPA Firm, Fineman West & Company, LLP in Los Angeles and Sherman Oaks, CA.

[4] Krystal Ibarra is an attorney and the Director of the Bet Tzedek Tax Project in Los Angeles, CA; and Jennifer Schinke is an attorney with Inland Counties Legal Services in Riverside, CA.

[5] Trial Transcript, Docket Number 2673-20, Part I, at 3.

[6] *Id.*, Part I, at 5.

[7] Trial Transcript, Docket Number 2673-20, Part II, at 3.

[8] *Id.*, at 7.

[9] *Id.*, at 7–8.

[10] Docket Number 2673-20, Petitioner's Status Report, Filed Electronically, April 5, 2021.