



PRO BONO MATTERS

Making a Difference in Pro Bono Tax Cases

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Introduction

For this edition of Pro Bono Matters, I thought it would be interesting to write about some of the tax cases which have been handled on a pro bono basis. Most cases are settled short of trial, and therefore the tremendous results obtained by pro bono volunteers are not publicized. Nevertheless, there have been several reported opinions in the past that are noteworthy and important for the specific taxpayers and the low-income taxpayer community as a whole. The cases discussed below are merely a few examples that demonstrate the difference that practitioners can make by volunteering their time on a pro bono basis to those individuals who cannot afford legal counsel. Stay tuned for more: Professor Keith Fogg is developing an in-depth article on important cases handled by pro bono volunteers.

Tax Pro Bono Cases in the Supreme Court

We all know the Supreme Court rarely agrees to hear tax cases. Thus, it is all the more impressive when the Court takes a tax case involving pro bono counsel. Two such cases are [*Bufferd v. Commissioner*](#), 506 U.S. 523 (1993), and [*Commissioner v. Banks*](#), 543 U.S. 426 (2005).

In [*Bufferd*](#), Stuart Filler¹ of Quinnipiac Law School argued on behalf of the taxpayer. The issue was whether a passthrough corporation's limitations period on assessment controlled the government's ability to determine a deficiency for an item flowing from the entity to the shareholder. The Court held that adjustments to a shareholder's income are governed by the shareholder's limitations period. This case is noteworthy because it appears that it is the first time a low-income taxpayer clinic handled a Supreme Court case.

In [*Banks*](#), private law firms represented taxpayers on a pro bono basis in consolidated cases involving the issue of whether the portion of a money judgment or settlement paid to a plaintiff's attorney under a contingent fee agreement is income to the plaintiff for federal income tax purposes. Although the Court held for the government that such amounts were income, the case reflects the substantial time and effort expended by private law firms to provide pro bono tax services.

¹ For more information about Stuart Filler, including his creation of the first low-income taxpayer clinic in 1974 at Hofstra Law School, see [here](#).

Protections for Innocent Spouses

The so-called “innocent spouse” rules in [section 6015](#) provide relief for certain taxpayers from joint and several liability. Several cases in recent years handled by pro bono volunteers have led to case law and legislative changes ensuring that taxpayers can pursue claims for innocent spouse relief.

In the late 2000s, the issue arose as to the validity of a two-year rule on requests for equitable relief in Treasury regulations promulgated under [section 6015\(f\)](#). Pro bono volunteers took up the cause, with low-income tax clinics and private practitioners entering appearances in several cases throughout the country and working together to argue that the regulation in question was invalid. In 2009 and 2010, the Tax Court agreed, holding in [Lantz v. Commissioner](#), 132 T.C. 131 (2009), [Manella v. Commissioner](#), 132 T.C. 196 (2009), and [Jones v. Commissioner](#), T.C. Docket No. 17359-08 (May 28, 2010), that the regulation was invalid under *Chevron*. The government appealed all three cases and ultimately obtained reversals of the Tax Court. Meanwhile, the Tax Court had continued to hold the regulation invalid in cases outside of these circuits. See, e.g., [Young v. Commissioner](#), T.C. Docket No. 12718-09 (May 12, 2011); [Pullins v. Commissioner](#), 136 T.C. 432 (2011); [Stephenson v. Commissioner](#), T.C. Memo. 2011-16; [Hall v. Commissioner](#), 135 T.C. 374 (2010), *appeal dismissed* (6th Cir. Aug. 2, 2011); [Buckner v. Commissioner](#), T.C. Docket No. 12153-09, *appeal dismissed* (6th Cir. July 27, 2011); [Carlile v. Commissioner](#), T.C. Docket No. 11567-09, *appeal dismissed* (9th Cir. Dec. 8, 2010); [Payne v. Commissioner](#), T.C. Docket No. 10768-09, *appeal dismissed* (9th Cir. July 25, 2011); [Coulter v. Commissioner](#), T.C. Docket No. 1003-09, *appeal dismissed* (2d Cir. Aug. 4, 2011).

The National Taxpayer Advocate and various pro bono volunteers tirelessly and vigorously advocated for change during the [Lantz](#) saga. Dozens of members of Congress took up the cause, sending a letter to the IRS Commissioner in 2011 stating that Congress did not intend to limit the time period for bringing a claim for equitable relief in enacting [section 6015\(f\)](#). A separate letter was sent requesting a review of the regulation. The IRS listened, and later in 2011 issued guidance indicating that it would allow claims to be made during the 10-year collection period after assessment. Because this guidance applied to all cases pending on the date of issuance, it was a tremendous victory for taxpayers with equitable claims for relief. For more detail on the [Lantz](#) saga, see Robert Nadler’s [article](#) on the issue.

During this same time period, another innocent spouse victory for taxpayers came in the form of [Harbin v. Commissioner](#), 137 T.C. 93 (2011). Pro bono volunteers acting on a referral from a low-income taxpayer clinic argued that the previous concession as to the underlying deficiencies in a Tax Court case by the taxpayer and his former spouse did not create a res judicata bar to a later [section 6015](#) claim by the taxpayer. After a trial involving testimony from both the taxpayer and the former spouse, the Tax Court held that res judicata did not apply and the taxpayer was entitled to relief under [section 6015](#). On the res judicata issue, the court reasoned that (1) the former spouse exercised control over the items for which the taxpayer was currently seeking relief, and (2) the taxpayer’s former attorney in the deficiency case had a conflict of interest when he represented both parties in the deficiency proceeding, thus impairing the taxpayer’s ability to raise a claim for innocent spouse relief in that case. On the substantive merits, the court found that the taxpayer had established his right to innocent spouse relief for the items at issue.

In November 2015, the IRS issued [proposed regulations](#) relating to portions of [section 6015](#), including some rules designed to partially overturn *Harbin*. The American Bar Association Section of Taxation has provided [comments on these proposed regulations](#).

Obtaining Attorney's Fees in Pro Bono Cases

Under [section 7430](#), taxpayers may be entitled to attorney's fees if a qualified offer is submitted, the IRS fails to respond or rejects the offer, and the taxpayer later prevails in the case. In [Knudsen v. Commissioner](#), 793 F.3d 1030 (9th Cir. 2015), the IRS did not respond to the taxpayer's qualified offer to settle her case and subsequently conceded the entire case after the Tax Court agreed to hear the case on a fully stipulated basis. The Lewis & Clark Low Income Taxpayer Clinic, which represented the taxpayer, sought attorney's fees for costs incurred after the qualified offer was made. The Tax Court held in favor of the IRS, but the Ninth Circuit rejected the IRS's position that its unilateral concession was a "settlement" not subject to the qualified offer rules. The Ninth Circuit then remanded the case to the Tax Court for a determination of reasonable attorney's fees and costs to be awarded to the taxpayer.

It remains to be seen how the IRS and the courts will respond to *Knudsen*, but it is an important development for tax clinics seeking to recoup fees for their time and effort in representing low-income taxpayers. The Procedurally Taxing blog offers [further discussion of the Knudsen case](#) that practitioners may find useful.

Protecting Against the Imposition of Penalties

Most low-income taxpayers are unsophisticated in tax matters, which can lead to tough decisions as to whether penalties are appropriate for incorrect tax return positions. One of the most difficult areas to navigate can be the rules regarding the entitlement to refundable tax credits such as the earned income tax credit and the child tax credit. It is common for low-income taxpayers not to owe any tax after claiming the standard deduction and dependent exemptions and to file a tax return solely to obtain one of the refundable tax credits. But what happens when the refundable credits are improperly claimed and the IRS asserts a penalty under [section 6662](#) equal to 20 percent of the disallowed refundable amount, since the Code imposes such penalties only when there is an "underpayment" of tax?

This issue arose in [Rand v. Commissioner](#), 141 T.C. 376 (2011), a case that was referred to private practitioners by the Center for Economic Progress in Chicago. The Tax Court held that, in the case of improperly claimed tax credits, the 20-percent penalty can only be imposed on the amount of tax shown on the return that is reduced to zero and cannot extend to the amount of any negative tax. After *Rand* was decided, the IRS embarked on a project that resulted in the abatement of approximately \$215 million in penalties where refunds had been frozen in cases with facts similar to *Rand*. Although Congress recently amended the Code to apparently retroactively overrule *Rand*, several low-income taxpayer clinics and private practitioners continue to fight this issue for taxpayers that filed returns before Congress amended the Code. For additional information on *Rand*, see [Rand Timeline and Update](#), Low-Income Taxpayer Representation Workshop (Dec. 12, 2016).

Important Filing Status Issues

A taxpayer's filing status can have major implications for his or her ability to claim certain tax credits. In [Ibrahim v. Commissioner](#), 788 F.3d 834 (8th Cir. 2015), the issue arose as to whether a taxpayer that incorrectly claimed head of household status could, after receiving a notice of deficiency and filing a Tax Court petition, change his status and receive the earned income tax credit. Frank DiPietro, then a third-year student attorney at the University of Minnesota Tax Clinic, litigated the case under the supervision of Professor Kathryn Sedo. The Eighth Circuit, overruling the Tax Court, found in favor of the taxpayer. As with the situation in [Rand](#), pro bono volunteers are continuing the fight to get the IRS and the Tax Court to follow

the Eighth Circuit's opinion in [Ibrahim](#). Here again, the Procedurally Taxing blog offers more [discussion of the Ibrahim case](#) that practitioners may find useful.

Conclusion

As the above examples demonstrate, pro bono volunteers can have a significant impact on the tax judicial system and in the lives of low-income taxpayers. For those not already engaging in pro bono tax matters, there are several options available to get involved. These opportunities include, but are not limited to, the [Tax Court's calendar call program](#), the [Partnering-for-Pro Bono](#) initiative, and the [Adopt-a-Base](#) program. For tax litigators such as myself, there are also ample opportunities to seek involvement in important cases affecting the low-income taxpayer community through the *amicus* process.

As a conclusion to this article, I thought a few anonymous comments from pro bono volunteers would be appropriate.

—I represented a taxpayer with cultural and language barriers before IRS Appeals and was able to obtain a partial grant of innocent spouse relief and to explain to the taxpayer why the remainder of his claim was not valid. As a result of my efforts, the taxpayer's view of the tax system changed and he understood that he was getting a fair shake. He must have thanked me and the LITC I was working with 50 times – one of the few times I have received such profuse praise for only obtaining partial relief.

—One of my most memorable moments as a pro bono volunteer was when I received a Christmas card from two elderly clients I had helped avoid a penalty. The letter simply said "Thank You."

—After helping a client who suffered severe brain trauma obtain a 100% concession in a Tax Court case, I received a box of dried fruit from his farm with a note referring to me as his "Guardian Angel."

—After my clinic and I helped a client who had been victimized by a predatory lender, had lost her home, and had received Forms 1099-COD, she insisted in giving a huge, long hug of thanks to my student and me. How many private clients give you hugs for your work? ■