

10.03 The Most Important Witness

Of course the most important witness in an innocent spouse case is the requesting spouse. A favorable ruling in Tax Court largely depends on the requesting spouse's credibility.¹ See Wiest v. Commissioner, T.C. Memo. 2003-91 (Noting that the requesting spouse was credible, the Tax Court held that the requesting spouse was entitled to equitable relief even though it found that there was no economic hardship.); Merendino v. Commissioner, T.C. Memo. 2006-2 (the Tax Court held there was no abuse of discretion and noted that "The record's direct contradiction of petitioner's statements strongly diminishes her credibility").

Thorough preparation can strengthen your client's case. Tax Court judges are attentive listeners. If your client is hesitant, forgetful or evasive, such characteristics can jeopardize a favorable ruling. Ensuring that your client's testimony is persuasive can be enhanced by thoughtful questions and preparation. Prior to the trial date, you should sit down with the requesting spouse and go over his or her testimony. This accomplishes two things: 1) the client will know and understand the questions that you intend to ask; and 2) you will know the answers. Hearing a surprise answer for the first time at trial has ruined many cases. Here are some areas to thoroughly develop:

1) Biographical information. Age, date of marriage, date of divorce, education.

¹ The importance of credibility was pivotal in Alioto v. Commissioner, T.C. Memo. 2008-185. That case involved underpayments of 153,501.00 and \$1,832,010.00 for 1995 and 1996. The requesting spouse maintained that she believed that her husband, a successful lawyer, was financially solid and would pay any taxes due. The IRS presented testimony from a revenue officer that the requesting spouse would have known about liens on the couple's community property. In deciding the case for the requesting spouse, the court held that the requesting spouse's testimony more credible than the testimony of the revenue officer.

2) Family information. Names and ages of children. Special needs of children.

3) Work history. Information about current job and monthly income.

4) Tax Training or Preparation. Did the requesting spouse have any tax training? What role did the requesting spouse play in the preparation of the returns?

5) Knowledge of the income item. What did the requesting spouse know on the date the return was filed? Was the nonrequesting spouse deceitful or secretive?

6) Economic Hardship. Besides including all the documents in the stipulation of facts that establish the requesting spouse's basic living expenses for a month, the requesting spouse should testify as to his or her basic living expenses.

7) Abuse. Develop facts surrounding the financial decisions in the household and how the abuse affected the requesting spouse's ability to ask questions about the return. Develop facts regarding whether the nonrequesting spouse concealed financial information.

8) Physical or Mental Health Issues.

9) Significant Benefit. You will need to develop facts, if they exist, that establish that the tax savings or the refund were spent on normal support.

Now the nonrequesting spouse is entitled to testify and it is predictable that he or she will try to undermine the credibility of the requesting spouse.² It is

² Sometimes the nonrequesting spouse does not intervene, but the IRS calls him or her as a witness. This presents an important opportunity. If the nonrequesting spouse did not intervene then he or she is not a party. In this circumstance at the beginning of the trial, counsel for the requesting spouse should invoke the exclusionary rule. The rule is mandatory if invoked and the Tax Court judges regularly grant this. This will force the nonrequesting spouse to sit outside the trial and prevent him or her from knowing the content of the requesting spouse's testimony.

important to ask the requesting spouse what the nonrequesting spouse's testimony will be on key points. For example, if the requesting spouse alleges that the nonrequesting spouse did not allow her to see the bank statements or was unwilling to discuss his income, what does the requesting spouse think the nonrequesting spouse will respond to these allegations? Sometimes the requesting spouse has a good sense of the tack that the nonrequesting spouse will take and you will be better prepared on cross examination.

In law school, they told us that good trial work involved preparation, preparation and preparation. Nothing is more important than preparing the requesting spouse to testify. It will also give you confidence about your case.