

No. A06-2450

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STATE OF MINNESOTA  
IN SUPREME COURT

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Ronald E. Byers,

Relator,

vs.

Commissioner of Revenue,

Respondent.

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**RESPONDENT'S BRIEF AND APPENDIX**

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## LEGAL ISSUES

I. Did the tax court properly exercise its discretion in denying Relator's motion to remove the presiding judge?

*The tax court held that in the affirmative.*

Minnesota Rule of Civil Procedure 63.02.

Minnesota Rule of Criminal Procedure 26.02, subd. 5(1).

*Weed v. Comm'r of Revenue*, 550 N.W.2d 285 (Minn. 1996).

*Liteky v. United States*, 510 U.S. 540 (1994).

II. Did the tax court properly exercise its discretion in denying Relator's motion for a continuance so that the chief judge of the tax court might reconsider the court's denial of Relator's motion to remove the presiding judge?

*The tax court held that in the affirmative.*

General Rule of Practice for the District Courts 106.

III. Was the tax court's determination of Relator's taxable income reasonably supported by the evidence as a whole?

*The tax court held that in the affirmative.*

*Bond v. Comm'r of Revenue*, 691 N.W.2d 831 (Minn. 2005).

## PROCEDURAL HISTORY

Commissioner of Revenue receives information that Ronald Byers earned income during 2000 and 2001.	April 2003.
Commissioner sends letter to Ronald Byers requesting that he file income tax returns for 2000 and 2001.	April 4, 2003.
Commissioner determines Ronald Byers' income tax liability for 2000 and 2001 and issues Tax Order assessing tax, penalty and interest.	May 12, 2003.
Ronald Byers appeals to tax court.	July 28, 2003.
Tax court transfers case to district court because tax court lacked jurisdiction over constitutional claims.	June 8, 2004.
District court grants partial summary judgment in favor of Commissioner on all constitutional claims, and transfers all remaining claims back to tax court.	May 18, 2005.
Tax court determines that there are genuine issues of material fact and denies Commissioner's summary judgment motion.	October 3, 2005.
Tax court resets trial for March 6, 2006.	October 6, 2005.
Tax court clerk signs Subpoena Duces Tecum, requested by Commissioner, ordering Ronald Byers to appear and produce records at Deanna Byers' trial.	October 19, 2005.
Deanna Byers' tax court trial is held. Ronald Byers does not appear at Deanna Byers' trial despite subpoena.	October 26, 2005.
Ronald Byers does not appear for pre-trial conference in his own case.	February 22, 2006.
Ronald Byers moves for continuance until United States Tax Court proceeding for same years is completed. Minnesota Tax court postpones ruling on motion.	February 28, 2006.
Ronald Byers cannot confirm that previously dismissed United States Tax Court proceeding has been reinstated. Minnesota tax	March 2, 2006.

court denies motion for continuance.

Ronald Byers moves for continuance until he completes litigation in separately docketed state tax court case for tax year 2000. Tax court denies motion for continuance. March 2, 2006.

Tax court trial begins. Ronald Byers moves for removal of presiding judge. Tax court denies motion for removal. March 6, 2006.

Ronald Byers moves for continuance until chief judge of tax court hears and reconsiders tax court's denial of removal motion. Tax court denies motion for continuance. March 6, 2006.

Ronald Byers introduces into evidence IRS Notice of Deficiency showing taxable income for 2000 and 2001 to be lower than shown on Commissioner's Tax Order. March 6, 2006.

Tax court issues decision affirming denial of pre-trial and trial motions and finding that Ronald Byers had taxable income for 2000 and 2001 as shown on IRS Notice of Deficiency. August 14, 2006.

Ronald Byers moves for a rehearing, new trial, and amended findings of fact and conclusions of law. August 25, 2006.

Tax court issues decision amending one finding of fact and denies remainder of motion. November 2, 2006.

Ronald Byers files Petition for Writ of Certiorari. December 27, 2006.

## STATEMENT OF THE CASE

By Order dated May 12, 2003, the Commissioner of Revenue (“Commissioner”) assessed Relator, Ronald E. Byers, for individual income tax, penalties, and interest for tax years 2000 and 2001 (“tax years”). Mr. Byers appealed to the tax court. Mr. Byers had not filed tax returns for the tax years, and argued that he was not required to file returns because his gross income was below the “applicable exemption amount” for each of the years. Mr. Byers also asserted federal and Minnesota constitutional claims contesting the Commissioner’s Order.

The tax court transferred the constitutional claims to the district court, which granted the Commissioner’s motion for partial summary judgment on the constitutional claims and transferred the remaining claims back to tax court. On October 3, 2005, after the tax court determined that there were genuine issues of material fact with respect to the remaining claims, trial was set for March 6, 2006.

On February 28, 2006, six days after failing to appear for a pretrial conference, nearly five months after the setting of a trial date-certain, and only six days before trial, Mr. Byers orally moved for an indefinite continuance. When the motion was denied two days later, just four days before trial, Mr. Byers made a separate motion for continuance on a different ground. The second motion for continuance also was denied.

After the trial commenced, Mr. Byers moved for removal of the presiding judge. After the removal motion was denied, Mr. Byers moved for a continuance so that the

chief judge might hear and reconsider his removal motion. The tax court denied this third continuance motion.

Mr. Byers then presented his case. Before calling his only witness, Mr. Byers introduced into evidence an Internal Revenue Service (“IRS”) Notice of Deficiency showing a lower amount of taxable income than claimed by the Commissioner. The Commissioner did not dispute this amount and produced evidence supporting the taxable income shown on the IRS Notice of Deficiency. Mr. Byers refused to testify when called by the Commissioner.

The tax court issued two decisions affirming its denial of Mr. Byers’ various pretrial motions and determining that the IRS Notice of Deficiency accurately stated Mr. Byers’ taxable income for the tax years. Mr. Byers contests both the tax court’s rulings on his motions and the tax court’s determination of his taxable income.

### **STATEMENT OF FACTS**

#### **A. The Commissioner’s Assessment and Early Pretrial Proceedings.**

Ronald E. Byers resided in Minnesota in 2000 and 2001 (“tax years”). Byers’ Appendix (“B. App.”) at 93. Mr. Byers drove a truck and operated as an independent contractor for Edina Couriers, located in Minnesota, during the tax years. B. App. 62, 71, 93. Mr. Byers received income from Edina Couriers for these services during the tax years. B. App. 69-70, 93.

For tax year 2000, Edina Couriers filed an IRS Form 1099-MISC reporting that Mr. Byers was the recipient of \$97,984.77 of non-employee compensation from Edina

Couriers. B. App. 11, 67, 73, 93, 108. For tax year 2001, Edina Couriers filed an IRS Form 1099-MISC reporting that Mr. Byers was the recipient of \$85,163.70 of non-employee compensation from Edina Couriers. B. App. 12, 67, 73, 93, 108. The reported amounts were the *gross* amounts Edina Couriers paid to Mr. Byers (or to others as directed by Mr. Byers) for each year. B. App. 67, 108.

On a bimonthly basis, Edina Couriers provided Mr. Byers with a settlement statement indicating his gross payments, deduction amounts, and net amount payable by check to Mr. Byers. B. App. 67, 69; *see* Tax Court Exhibits (“T.C. Ex.”) 107, 111-56. As agreed to contractually with Mr. Byers, Edina Couriers deducted lease payments from the gross amount payable to Mr. Byers and remitted the lease payments to an affiliate company of Edina Couriers. B. App. 67, 70; *see* T.C. Ex. 110. The lease payments were the largest deductions, but the net bi-monthly payment to Mr. Byers might also include other deductions. B. App. 67; *see* T.C. Ex. 107, 111-56. For 2001, the sum of the gross settlement payments and additional miscellaneous payments of \$300 amounted to \$85,163.70—the same amount shown on Mr. Byers’ IRS Form 1099-MISC for that year. Commissioner’s Appendix (“C. App.”) 44-47; B. App. 12. The net amount paid by check to Mr. Byers in 2001 from Edina Couriers was \$39,133.53. C. App. 47; *see* B. App. 21 (indicating net earnings from “Edina” of \$39,134).

Mr. Byers did not file Minnesota income tax returns for the tax years. B. App. 93, *see* B. App. 80. In an affidavit filed in opposition to the Commissioner’s motion for summary judgment, Mr. Byers averred that he “did not receive an amount of gross

income above the applicable exemption amount that would have obliged me to file a Minnesota state income tax return.” C. App. 2. After Mr. Byers failed to comply with the Commissioner’s request that he file income tax returns for the tax years, the Commissioner prepared income tax returns on Mr. Byers’ behalf. B. App. 93, *see* B. App. 80; C. App. 10-14; T.C. Ex. 105. The only income shown on the Commissioner-prepared returns was the gross amount of payments shown on the 1099-MISCs filed by Edina Couriers. B. App. 11-12; C. App. 9-11. Based on these returns, the Commissioner issued an Individual Income Tax Audit Report/Tax Order Summary dated May 12, 2003 (“Order”), assessing income tax, penalties, and interest in the amount of \$17,058.65, for 2000 and 2001 combined. B. App. 93; C. App. 4-16.

On July 28, 2003, Mr. Byers timely filed an Appeal of the Order with the Minnesota Tax Court.<sup>1</sup> B. App. 93; C. App. 17-18. On June 8, 2004, the tax court, the Honorable Kathleen H. Sanberg presiding, transferred the matter to the district court, “because the Tax Court lacked original jurisdiction over the constitutional issues raised.”

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<sup>1</sup> Mr. Byers’ only stated reason for appeal was:

The alleged determination is both capricious and whimsical. In addition, the taxing clauses of the Minnesota Constitution bar the Commissioner from making this purported determination and from demanding my payment of the subject tax. Further, the alleged determination made against me violates my rights to both due process of law and the equal protection of the laws as guaranteed to me by the United States and the Minnesota Constitutions, respectively.

C. App. 18.

B. App. 96 (citing *Erie Mining Co. v. Comm. of Revenue*, 299 N.W.2d 138 (Minn. 1980)).

On May 18, 2005, the Hennepin County District Court granted partial summary judgment to the Commissioner with respect to all of the constitutional issues raised by Mr. Byers.

B. App. 96. The district court then transferred jurisdiction back to the tax court for decision on all of the other claims. B. App. 96. In a telephonic hearing held on October 3, 2005,<sup>2</sup> the tax court denied the Commissioner's motion for summary judgment, finding that there were disputed issues of material fact. B. App. 96; *see* B. App. 58. The tax court then scheduled a pretrial conference on February 22, 2006, and reset trial for March 6, 2006 (two days prior to the previously set date of March 8).

B. App. 96; *see* C. App. 19.

**B. Trial in a Separate Tax Court Appeal Brought by Relator's Wife.**

Mr. Byers' wife, Deanna Byers, brought an appeal to the tax court of a different order by the Commissioner that assessed her for unpaid income tax for the years 1996, 1997, and 1998. B. App. 41; C. App. 22. After she failed to file tax returns, the Commissioner had prepared returns on Deanna Byers' behalf which included wages from the Glen Lake Bakery. C. App. 22-23. The Glen Lake Bakery reported the wages paid to Deanna Byers on IRS W-2 Forms obtained by the Commissioner. C. App. 25-26.

Deanna Byers' trial was held October 26, 2005—less than a month after Mr. Byers' most recent tax court hearing. C. App. 20. At the trial, Deanna Byers testified

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<sup>2</sup> At trial, Mr. Byers stated that he did not recall having telephone conferences after July 28, 2005. B. App. 58.

that her husband, Ronald Byers, had purchased the Glen Lake Bakery from his parents. C. App. 35.<sup>3</sup> Deanna Byers claimed that she did not work for or receive payment from the Glen Lake Bakery after her husband purchased it. C. App. 34-35.

On October 19, 2005, at the Commissioner's request, a clerk of the tax court (under the authority of the chief judge) had signed a subpoena duces tecum commanding Mr. Byers to appear at Deanna Byers' trial and produce records of the Glen Lake Bakery. B. App. 50. The tax court, the Honorable Kathleen H. Sanberg presiding, did not learn until late in Deanna Byers' trial that Mr. Byers had been subpoenaed. C. App. 37. After the Commissioner rested—without ever calling Mr. Byers as a witness—the court asked Deanna Byers why Mr. Byers was not at the trial. C. App. 39. Deanna Byers then served on the Commissioner and the tax court, purportedly on behalf of Mr. Byers, a motion to quash. C. App. 39.

The tax court first ruled that the motion to quash was untimely because it was not served before the hearing. C. App. 39. The court then asked Deanna Byers whether she,

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<sup>3</sup> The Commissioner has included in his appendix selected pages from the tax court transcript of Deanna Byers' trial, docket No. 7408-R, as a supplemental record allowed by Minnesota Rule of Civil Appellate Procedure 130.03. The tax court properly took judicial notice of the transcript in ruling on Mr. Byers' motion to remove. B. App. 102 n.5; see Minn. R. Evid. 201(b)(2); *In re Welfare of Clausen*, 289 N.W.2d 153, 156-57 (Minn. 1980) (holding that “[j]udicial notice of records from the court in which a judge sits would appear to greatly serve th[e] function [of judicial notice] and satisfy the requirement of Rule 201(b)(2)”). This Court could, if it wished, consider the entire transcript from docket No. 7408-R because the tax court considered the transcript when making its ruling. B. App. 102 n.5; see *Funchess v. Cecil Newman Corp.*, 632 N.W.2d 666, 673 (Minn. 2001) (“In deciding a matter before it, a reviewing court generally may consider only those issues that the record shows were presented to and considered by the trial court.”).

Mr. Byers, or others had the records of the Glen Lake Bakery that the Commissioner had subpoenaed. C. App. 39-40. When Deanna Byers responded that she did not know and had not talked to Mr. Byers about the subpoenaed records, the court stated:

But the books and records of the bakery [covered by the Commissioner's subpoena of the Glen Lake Bakery and Mr. Byers, its president] would show what had been paid out or not paid out [to Deanna Byers]. If there is no payment, and so I'm—as I said, I'm not terribly sympathetic because you and your husband have the means to prove your case, and you've chosen and Mr. Byers has chosen not to appear.

C. App. 39-40.

The tax court then *sua sponte* considered whether to continue the trial “and ask that the sheriff go out and pick [Mr. Byers] up and bring him in, but this afternoon I think that the Commissioner has proven [that Deanna Byers earned income], so I'm not going to continue the hearing.” C. App. 40. The tax court said nothing more about the subpoena, and never even mentioned the idea that Mr. Byers was in contempt of court.<sup>4</sup>

### C. Further Proceedings in Relator's Case.

Mr. Byers failed to appear at the first hearing in his own case scheduled after Deanna Byers' trial—a pretrial conference set for February 22, 2006. B. App. 96. The pretrial conference was rescheduled and took place on Tuesday, February 28, 2006.

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<sup>4</sup> Mr. Byers, who had not appeared at his wife's trial, later averred to the tax court in this case that his motion to quash had been served *prior* to the commencement of his wife's trial. B. App. 31. Mr. Byers also averred that the transcript of his wife's trial, which he did not provide to the Court with his motion to remove, showed “that Judge Sanberg threatened to order State Troopers to arrest Mr. Byers for contempt of court.” B. App. 31. Judge Sanberg, however, did not mention either “State Troopers,” “arrest,” or “contempt” during the Deanna Byers trial. *See* C. App. 40.

B. App. 96. At this conference, Mr. Byers moved the court to continue trial because he had filed a federal tax appeal for the same years covered by the Commissioner's Order.

B. App. 96-97. Mr. Byers had not previously informed the tax court of the federal appeal.

B. App. 96. The Commissioner objected because Mr. Byers' federal appeal had been dismissed and not reinstated. B. App. 97.

The tax court told Mr. Byers that his motion for continuance would be granted if Mr. Byers could confirm, by the afternoon of Thursday, March 2, 2006, that the federal appeal had been reinstated. B. App. 97. On March 2, 2006, Mr. Byers told the court that he had sent in the papers for reinstatement, but could not confirm that the federal appeal actually was reinstated. B. App. 97. Consequently, the tax court denied the motion for continuance and ruled that the case would proceed to trial as scheduled on Monday, March 6, 2006. B. App. 97.

After trial had begun on March 6, 2006, Mr. Byers served for the first time, on the tax court and the Commissioner, a motion to remove Judge Sanberg "as the presiding judge in this case on the ground that Judge Sanberg has an actual prejudice and bias against Ronald E. Byers to such a degree that she cannot try this case fairly and impartially." B. App. 28; *see* B. App. 56-57. The motion was made pursuant to Minnesota Rule of Civil Procedure 63.02. B. App. 28. Both at trial and in the motion papers, Mr. Byers argued that the late timing of his motion was excusable because he "brought this motion [to remove] before the Court as soon as the bias was recognized." B. App. 59; *see* B. App. 39 (alleging that timing of motion was "excusable because Judge

Sanberg's improper prejudice and bias against Mr. Byers have not been manifested until very recently").

Mr. Byers argued that his failure to appear at his wife's trial "gave rise to Judge Sanberg's prejudice and bias against him." B. App. 29-31, 57. In addition, he argued that the judge's bias was "reflected in her decision to unreasonably compel Mr. Byers to go forward with a trial in the Minnesota Tax Court on the same subject matter that is before the United States Tax Court." B. App. 35-36, *see* B. App. 59. He also argued that the tax court's denial of his separate motion for continuance, made on March 2, 2006, "manifested" Judge Sanberg's "impermissible prejudice and bias against Mr. Byers." B. App. 36. This separate motion for continuance was based on Mr. Byers' desire to litigate one of the tax years in a separately docketed case—Docket No. 7733-R—presided over by a different Tax Court judge. B. App. 36, *see* B. App. 59-60. The tax court denied Mr. Byers' motion for removal because it was not timely and because the court determined that the judge had no bias. B. App. 57-60; *see* B. App. 102-04, 115 (tax court orders affirming decision to deny motion to remove).

Both during trial and in its post-trial memoranda, the tax court determined that the factual predicate underlying Mr. Byers' allegations of bias were either false or unsupported by the record. First, the tax court determined that, contrary to an allegation of Mr. Byers, Judge Sanberg never threatened to have Mr. Byers arrested. B. App. 57, 102, 115; *see* C. App. 40. Second, the tax court determined that there was no support in the record for Mr. Byers' allegation that Judge Sanberg "blamed" him for delays in his

case. B. App. 59, 102-03, 115. Third, the tax court determined that its decisions to deny Mr. Byers' motions for continuance were proper because Mr. Byers' arguments were not persuasive. B. App. 100-02. Finally, the tax court determined that there was "no legal or factual basis for [Mr. Byers'] claim that [Judge Sanberg] should have removed herself for bias." B. App. 104.

At trial, after his motion to remove Judge Sanberg was denied, Mr. Byers told the tax court that he would "like to request reconsideration from the chief judge then on my motion, Rule 106." B. App. 59. The tax court told Mr. Byers that the court was "not necessarily governed by the Rules of General Practice." B. App. 59. After further argument, the tax court told Mr. Byers that his motion to remove was "not timely." B. App. 60. Mr. Byers then stated that he "objected at this point to moving forward without having the Motion for Removal reconsidered by the chief judge." B. App. 60. The tax court stated that the "Rules of Civil Procedure do not require that the chief judge rehear this motion." B. App. 60. After further argument ensued, the tax court stated that "[t]he Motion to Continue is denied." B. App. 60. After further argument by Mr. Byers, the court stated: "The motion for a continuance is denied." B. App. 61; *see* B. App. 103-04. Mr. Byers responded: "Again, for the record, I would like to object to this case moving forward without having the motion reviewed and removal considered by the chief judge." B. App. 61.

Mr. Byers then presented his case. B. App. 61. Before calling his only witness, Mr. Byers introduced into evidence a Notice of Deficiency issued by the IRS to

Mr. Byers, showing taxable income of \$61,972 in 2000 and taxable income of \$36,797 in 2001. B. App. 15-22, 61. Mr. Byers refused to be sworn in and refused to testify at trial. B. App. 104; *see* B. App. 87-89.

The tax court issued its order dated August 14, 2006. B. App. 92. The tax court determined that the IRS Notice of Deficiency accurately reflected Mr. Byers' taxable income for the respective tax years and ordered the Commissioner to recalculate the correct amount of tax, penalties, and interest due for the tax years based on the amounts shown in the Notice of Deficiency. B. App. 94.

Mr. Byers moved the tax court for a rehearing, new trial, and amended findings of fact and conclusions of law. B. App. 111. On November 2, 2006, the court issued an order amending one finding of fact<sup>5</sup> and denying the remainder of the motion—including the motion for a rehearing or a new trial. B. App. 107-08. Although Mr. Byers argued that the court's decision was not supported by the evidence, the tax court concluded that "the documentary evidence overwhelmingly support the Court's findings . . . ." B. App. 113. Additionally, the court affirmed its rulings denying Mr. Byers' motions for continuance and motion to remove the presiding judge. B. App. 114-15.

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<sup>5</sup> The tax court had originally transposed two numbers in its Findings of Fact Number 7. The amended finding corrected this error. B. App. 108, 115; *see* B. App. 93.

## ARGUMENT

### I. STANDARD OF REVIEW

In general, the review of tax court decisions is limited to whether that court had jurisdiction, whether its decision was justified by the evidence and in conformity with the law, or whether it committed any other error of law. *See* Minn. Stat. § 271.10, subd. 1 (2006). Mr. Byers' post-trial motion for a new trial was denied by the tax court. B. App. 108, 111. "The decision whether to grant a new trial [for judicial bias] \* \* \* rests within the sound discretion of the trial court and will be reversed only for a clear abuse of that discretion." *In re Welfare of D.L.*, 486 N.W.2d 375, 382 (Minn. 1992) (alteration in original) (quotation omitted). Similarly, "[t]he granting of a continuance is a matter within the discretion of the trial court and its ruling will not be reversed absent a showing of clear abuse of discretion." *Dunshee v. Douglas*, 255 N.W.2d 42, 45 (Minn. 1977). Before overruling the tax court's findings of fact, this Court "must conclude that the court's decision is clearly erroneous because the evidence as a whole does not reasonably support the decision." *Bond v. Comm'r of Revenue*, 691 N.W.2d 831, 835-36 (Minn. 2005).

### II. THE TAX COURT DID NOT ABUSE ITS DISCRETION IN DENYING RELATOR'S MOTION TO REMOVE THE PRESIDING JUDGE.

Mr. Byers first argues that the "trial judge abused her discretion when she denied Mr. Byers' motion for her removal as presiding judge." Byers' Brief ("B.B.") at i. The motion for removal was made pursuant to Minnesota Rule of Civil Procedure 63.02. B. App. 28. Rule 63.02 provides that

No judge shall sit in any case if that judge is interested in its determination or if that judge might be excluded for bias from acting therein as a juror. If there is no other judge of the district who is qualified, or if there is only one judge of the district, such judge shall forthwith notify the chief justice of the supreme court of that judge's disqualification.

Minn. R. Civ. P. 63.02. The tax court denied Mr. Byers' motion for removal, determining that it was not timely and that the judge had no bias. B. App. 57-60; *see* B. App. 102-04, 115.

**A. The Tax Court Did Not Abuse Its Discretion When It Denied Relator's Motion To Remove Because That Motion Was Untimely.**

The tax court ruled that the motion to remove was "not timely," having been made on "the morning of trial." B. App. 60, 102. Indeed, the tax court's order dated November 2, 2006, indicates that the motion was made after the trial had begun.<sup>6</sup> B. App. 109-10 ("At trial, Appellant . . . requested that this Tax Court Judge be removed for bias.").

Minnesota Statutes § 271.06, subd. 7 (2006), provides that, where practicable, the Rules of Civil Procedure generally govern procedures in tax court. The motion to remove was submitted pursuant to Minnesota Rule of Civil Procedure 63.02. B. App. 28. Rule 63.02 does not explicitly specify that a motion must be made by a certain time. But in *Weed v. Comm'r of Revenue*, this Court indicated that the rule requires such a motion

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<sup>6</sup> Mr. Byers describes his motion to remove Judge Sanberg for bias as a "pre-trial motion." B.B. 20; *see* B.B. 3. The trial transcript clearly indicates, however, that the court called the case before either the Commissioner's representative or the Tax Court had received Mr. Byers' motion to remove. B. App. 56-57. Regardless of the precise timing of the motion, the Commissioner contends that it was untimely.

to be made before trial. 550 N.W.2d 285, 290 (Minn. 1996). The *Weed* opinion thus implicitly confirmed that a “litigant who, in the absence of fraud or other controlling circumstance, elects to go to trial without taking timely and appropriate action to disqualify a judge for bias waives his right to assert such bias.” *Baskerville v. Baskerville*, 246 Minn. 496, 501, 75 N.W.2d 762, 766 (1956) (analyzing motion to disqualify a substituted judge under Rule 63.02 after “a litigant has once disqualified a presiding judge as a matter of right under Rule 63.03”).

This timing requirement comports with the rule’s substantive standard. One of the two grounds for removal under Rule 63.02 is that the “judge might be excluded for bias from acting [in the case] as a juror.” The standard for excluding a juror for bias in a civil action is the same as in a criminal action. Minn. Stat. § 546.10 (2006).<sup>7</sup> Minnesota Rule of Criminal Procedure 26.02, subd. 5(1), establishes the grounds for challenging a juror for cause. A challenge for cause to exclude a juror must be made before the juror is sworn to try the case, which must be done *before the trial begins*. Minn. R. Crim. P. 26.02, subd. 5(2). Thus, because the *timing* of a challenge to a juror is an integral part of determining whether a juror “might be excluded,” Rule 63.02 implicitly provides that a challenge to a judge must be made before trial—which is what this Court indicated in *Weed*. 550 N.W.2d at 290.

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<sup>7</sup> “In any civil action or proceeding either party may challenge the panel, or individual jurors thereon, for the same causes and in the same manner as in criminal trials.” Minn. Stat. § 546.10 (2006).

In his argument to this Court, Mr. Byers does not directly address the timeliness of his motion to remove, nor does he address the ruling by the tax court that the motion was untimely. But Mr. Byers did argue to the tax court that he “brought this motion [to remove] before the [tax] court as soon as the bias was recognized.” B. App. 59. The record shows otherwise. In attempting to support this argument, Mr. Byers makes two contradictory assertions.

Mr. Byers first asserts that “Judge Sanberg held a belief that Mr. Byers had just recently [during the Deanna Byers’ trial] disrespected her judicial authority. Judge Sanberg’s belief regarding Mr. Byers’ character necessarily gave rise to a bias against him . . . .”<sup>8</sup> B.B. 21-22. Mr. Byers thus argues that failure to obey a subpoena *necessarily* gave rise to the judge’s alleged bias against him. Mr. Byers then contradicts this assertion of ipso facto bias through his separate statement that the alleged bias was not “recognized” until after Judge Sanberg had denied his continuance motion on February 28, 2006, and another continuance motion on March 2, 2006. B. App. 59.

Even if the Court were to credit Mr. Byers’ theory that his conduct at Deanna Byers’ trial necessarily gave rise to bias against him, it would follow only that Mr. Byers had an obligation to bring a timely motion to remove during the four months that separated the two trials. Mr. Byers was not at liberty to await a ruling he did not like and then make an untimely motion. The record amply supports a conclusion of waiver

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<sup>8</sup> Although Relator repeatedly asserts on page 21 of his brief that Judge Sanberg held him in “contempt of court” because of his failure to appear at his wife’s trial, there is no record of such a ruling by Judge Sanberg.

because Mr. Byers elected “to go to trial without taking timely and appropriate action to disqualify a judge for bias.” *See Baskerville*, 246 Minn. at 501, 75 N.W.2d at 766.

This Court has determined that the purpose of the timeliness requirement for removal of a judge under a closely related rule, Minn. R. Civ. P. 63.03, “is to guard against unreasonable delay, expense, surprise, and inconvenience to the court and litigants.” *Jones v. Jones*, 242 Minn. 251, 261, 64 N.W.2d 508, 514 (1954). Similar concerns underlie the filing of all motions. *See, e.g.*, Minn. R. 8610.0070, subp. 3 (2006) (“The time limits [regarding motions] are to provide the tax court adequate opportunity to prepare for and promptly rule on matters . . . .”). Additionally, even in the context of a criminal defendant’s constitutional right to a fair trial, this Court has determined that a district court does not abuse its discretion in ruling a continuance motion untimely when made by the defendant on the day of trial for the purpose of delay. *State v. Worthy*, 583 N.W.2d 270, 278 (Minn. 1998).

Mr. Byers had more than four months from the time of his wife’s trial to make his motion to remove. Moreover, by his own admission, he “recognized” Judge Sanberg’s “bias” both six days and four days before trial, yet did nothing. B. App. 59. Allowing Mr. Byers to, in effect, “store up” his claims of bias to spring upon the court both after trial has begun and after the court has denied his motions for continuance, would allow him to inequitably impose delay, expense, and inconvenience upon both the tax court and the Commissioner. Additionally, finding no waiver here would effectively overrule the tax court’s denials of Mr. Byers’ motions for continuance—which that court had broad

discretion to deny. This Court should conclude that the tax court did not abuse its discretion in determining that the motion to remove for bias was untimely and should hold that, under the circumstances present here, Mr. Byers waived his right to assert such bias.

**B. The Tax Court Did Not Abuse Its Discretion When It Denied Relator's Motion To Remove Because The Presiding Judge Had No Bias And There Was No Appearance Of Bias.**

In addition to ruling that Mr. Byers waived his right to assert bias, this Court should conclude that the tax court did not abuse its discretion in denying the motion to remove because Judge Sanberg was not biased against Mr. Byers.

Minnesota Rule of Civil Procedure 63.02 requires that “No judge shall sit in any case if that judge is interested in its determination or if that judge might be excluded for bias from acting therein as a juror.” Mr. Byers does not argue that Judge Sanberg was “interested” in the determination of his case, but does argue that Judge Sanberg, “as a prospective juror in Mr. Byers’ case, . . . might have been excluded for bias.” B.B. 25.

As discussed supra in II.A., Rule 63.02 essentially incorporates Minnesota Rule of Criminal Procedure 26.02, subd. 5(1), to establish the grounds for removing a judge for bias.<sup>9</sup> One commentator on the rule states: “All but one of the grounds present objective criteria as causes for challenges. The first ground for challenge, the juror’s state of mind,

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<sup>9</sup> Minnesota Rule of Civil Procedure 63.03, closely related to Rule 63.02, essentially allows one “peremptory” challenge to allow the removal of a judge. The rule is analogous to the allowance of peremptory challenges for removal of jurors under Minnesota Rule of Criminal Procedure 26.02, subd. 6.

presents a subjective factor.” 1A David Herr & Roger Haydock, *Minnesota Practice-Civil Rules Ann.*, § 47.9 (4th ed. 2004). The first ground for removal of a juror is:

A juror may be challenged for cause by either party upon the following ground[]: 1. The existence of a state of mind on the part of the juror, in reference to the case or to either party, which satisfies the court that the juror cannot try the case impartially and without prejudice to the substantial rights of the party challenging.

Mr. Byers does not point to any evidence that Judge Sanberg might be excluded for bias based on any of the objective grounds (2 - 11) of Rule 26.02, subd. 5(1). Thus, Judge Sanberg was not subject to removal under Rule 63.02 unless, at the time of the motion, there existed a “state of mind on the part of [Judge Sanberg], in reference to the case or to either party, which satisfie[d] the court that [Judge Sanberg could] not try the case impartially and without prejudice to the substantial rights of [Mr. Byers].” *See* Minn. R. Crim. P. 26.02, subd. 5(1)1.

**1. Mr. Byers made no showing that Judge Sanberg was actually biased.**

The tax court determined that there was “no legal or factual basis for [Mr. Byers’] claim that [Judge Sanberg] should have removed herself for bias.” B. App. 104. The tax court supported its determination after reviewing the record and concluding that (a) Judge Sanberg never threatened to have Mr. Byers arrested (as he alleged); (b) there was no support in the record for Mr. Byers’ allegation that Judge Sanberg “blamed” him for delays in his case; and (c) its decisions to deny Mr. Byers’ motions for continuance were proper because Mr. Byers’ arguments were not persuasive. B. App. 57, 59, 100-03, 115; *see* C. App. 39-40.

Mr. Byers argued that his failure to appear at his wife's trial necessarily "gave rise to Judge Sanberg's prejudice and bias against him." B. App. 29-31, 57. The transcript of Deanna Byers' trial utterly fails to support Relator's claim that Judge Sanberg either (a) formed a bias against Mr. Byers for disobeying a subpoena or (b) threatened to have Mr. Byers arrested as he alleges. First, Judge Sanberg did not learn until late in Deanna Byers' trial that Mr. Byers had even been subpoenaed. C. App. 37, 39. When the Commissioner rested without calling Mr. Byers as a witness, the court asked Deanna Byers why Mr. Byers had not appeared at the trial. C. App. 39. After Deanna Byers presented Mr. Byers' motion to quash the subpoena and represented to the tax court that she did not know where the records of the bakery were, the court stated:

But the books and records of the bakery [covered by the Commissioner's subpoena of the Glen Lake Bakery and Mr. Byers, its president] would show what had been paid out or not paid out [to Deanna Byers]. If there is no payment, and so I'm—as I said, I'm not terribly sympathetic because you and your husband have the means to prove your case, and you've chosen and Mr. Byers has chosen not to appear.

C. App. 39-40.

At that point, the tax court understood that neither the Commissioner (who had obtained the subpoena) nor Deanna Byers (who served the motion to quash even though she might have benefited from Mr. Byers' production of records) ultimately intended to call Mr. Byers as a witness. Although the court then mused upon its authority to continue the trial and bring Mr. Byers in to testify, it found no reason to exercise that authority because neither party was concerned by Mr. Byers' absence. C. App. 40. Contrary to Mr. Byers' repeated assertions, Judge Sanberg did not hold Mr. Byers in contempt or

consider having him arrested. Rather, by contemplating enforcing the subpoena, Judge Sanberg apparently was giving Deanna Byers one last chance to produce evidence in her favor.<sup>10</sup> B. B. 21.

Mr. Byers no longer argues that Judge Sanberg blamed him for delays in trial, but he does argue that the tax court's denial of his continuance motions "overtly manifested" Judge Sanberg's alleged "bias" against him. B.B. 22. This argument has no merit.

As discussed *infra* in II.B.2, a judge's prior adverse rulings are generally not the basis for a removal motion. *See Liteky v. United States*, 510 U.S. 540, 555 (1994) ("Almost invariably, they are proper grounds for appeal, not for recusal."). But even if the tax court's denials of Mr. Byers' continuance motions were a possible basis for removal for bias, those denials were proper and did not constitute an abuse of the tax court's broad discretion in ruling on such motions. *Johnson v. State*, 697 N.W.2d 194, 198 (Minn. 2005) ("The decision to grant or deny a motion for a continuance lies within the sound discretion of the district court and will only be reversed upon a showing of abuse of discretion."); *see State v. Sime*, 669 N.W.2d 922, 925 (Minn. Ct. App. 2003).

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<sup>10</sup> The tax court, in affirming the Commissioner's Order assessing tax on Deanna Byers, summarized Deanna Byers' presentation of her case by stating:

[Deanna Byers] asserts that she received no wages from the Glen Lake Bakery. During the Tax Years, she testified that the bakery was owned by her in-laws, she worked behind the counter, and later her husband bought the bakery from his parents. She offered no documents or witnesses aside from her statement that she received no wages from the bakery. [Deanna Byers'] testimony was vague and evasive.

C. App. 25.

(“An unreasoned or arbitrary denial in the presence of a justifiable request for delay constitutes an abuse of discretion.”).

Mr. Byers failed to appear for the February 22, 2006, pretrial conference, which was then rescheduled and took place on Tuesday, February 28, 2006. B. App. 96. At the pretrial conference, Mr. Byers moved the court to continue trial because he had filed a federal tax appeal for the years covered by the Commissioner’s Order. B. App. 96-97. Mr. Byers had not previously informed the tax court of the federal appeal. B. App. 96. The Commissioner objected because Mr. Byers’ federal appeal had been dismissed and not reinstated. B. App. 97. The tax court told Mr. Byers that his motion for continuance would be granted if Mr. Byers could confirm, by the afternoon of Thursday, March 2, 2006, that the federal appeal had been reinstated. B. App. 97. On March 2, 2006, when Mr. Byers represented that he had sent in the papers for reinstatement but could not confirm that the federal appeal was actually reinstated, the tax court decided that the case would proceed to trial as scheduled on Monday, March 6, 2006. B. App. 97.

On March 2, 2006, Mr. Byers made a second motion for continuance, arguing that he should be allowed to litigate his 2000 tax year in a separately docketed case—Docket No. 7733-R—presided over by a different Tax Court judge. B. App. 97. Mr. Byers argued that he had “stated his claims better” in the other case. B. App. 97.

The tax court was not persuaded by Mr. Byers’ arguments because the instant case had been ongoing for three years, the trial date had been set for five months, Mr. Byers had waited until the week before trial to move for a continuance, and the “Commissioner

opposed a continuance, had witnesses ready, and was prepared to go to trial.” B. App. 101-102. The court ruled that there was “no error and no prejudice” in denying the motions for continuance. B. App. 114.

Mr. Byers does not argue that Judge Sanberg’s rationale for denying his continuance motions was unreasonable; instead, he argues that his motions were reasonable. This approach ignores the tax court’s broad discretion, which is only abused if the denial was “unreasoned or arbitrary.” *Sime*, 669 N.W.2d at 925. Judge Sanberg’s reasoned denials of the continuance motions were proper.

Because the tax court correctly determined that the factual predicates to support Mr. Byers’ allegation of bias were either false or not supported by the record, and because the tax court correctly determined that its decisions to deny Mr. Byers’ previous motions for continuance were proper, this Court should hold that the tax court did not abuse its discretion in denying the motion to remove Judge Sanberg for bias.

**2. Judge Sanberg’s actions did not create an appearance of bias requiring her to be removed as presiding judge.**

In *In re Collection of Delinquent Real Property Taxes*, this Court reviewed the tax court’s denial of a Rule 63.02 motion. 530 N.W.2d 200, 206-07 (Minn. 1995). After quoting Rule 63.02, this Court indicated that “[t]he controlling principle is that no judge, when other judges are available, ought ever to try the cause of any citizen, even though he be entirely free from bias in fact, if circumstances have arisen which give a bona fide appearance of bias to litigants.” *Id.* at 206. Judge Sanberg’s words and actions did not create a bona fide appearance of bias against Mr. Byers.

Generally, “[a] judge’s prior adverse ruling in a case is not sufficient to show prejudice which would disqualify the judge.” *State v. Kramer*, 441 N.W.2d 502, 505 (Minn. Ct. App. 1989); *see LoCascio v. United States*, 473 F.3d 493, 496 (2d Cir. Jan. 9, 2007) (trial judge’s decision to hold federal criminal defendant in contempt, subsequently vacated, and judge’s denial of defendant’s various motions during and after trial, did not warrant recusal). As stated by the United States Supreme Court:

opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.

*Liteky*, 510 U.S. at 555.

As discussed supra, Judge Sanberg’s words and actions regarding Mr. Byers failure to obey a subpoena for his wife’s trial provide no indication that she harbored any antagonism toward either Mr. Byers or his wife. On the contrary, Judge Sanberg was simply encouraging Deanna Byers to use every available means to contest the Commissioner’s Order against her. Additionally, Judge Sanberg initially expressed a willingness to grant Mr. Byers a continuance if he could show that his federal proceeding had been reinstated. The tax court’s ultimate denial of Mr. Byers’ continuance motions were well reasoned and were plainly within the court’s broad discretion.

Finally, Mr. Byers refused to be sworn in and refused to testify at trial. B. App. 104; *see* B. App. 87-89. This was a direct contempt of the tax court’s authority. Minn. Stat. § 588.01, subd. 2 (2006); *see State v. Martin*, 555 N.W.2d 899, 902 n.2

(Minn. 1996). Nonetheless, the tax court did not exercise its authority to summarily punish Mr. Byers for his contempt. *See State v. Martin*, 555 N.W.2d at 902. Judge Sanberg's restraint in the face of Mr. Byers' contempt at his own trial conclusively refutes any allegation of bias, actual or perceived.

As the tax court twice ruled,

A judge who is able to preside fairly over the proceedings is not required to step down on allegations of a party which themselves may be unfair or which simply indicate dissatisfaction with rulings or the possible outcome of the litigation.

B. App. 103, 115 (citing *McClelland v. McClelland*, 359 N.W.2d 7, 11 (Minn. 1984)).

Under "the controlling principle" annunciated by this Court, a review of Judge Sanberg's actions shows that she had no bona fide appearance of bias against Mr. Byers.<sup>11</sup>

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<sup>11</sup> Relator impliedly argues that Rule 63.02's use of the qualifying term "might be excluded for bias" intends to encompass the mere appearance of bias on the judge's part. B.B. 24. A better interpretation of the qualifier would recognize that challenges for cause to a juror "may" (or "might") be made by a party, but need not be. Minnesota Rule of Criminal Procedure 26.02, subd. 5(1)1, requires a conclusion by the court of a juror's *actual* state of mind, not a conclusion about the *appearance* of a juror's state of mind. As discussed *supra*, the Commissioner contends that before a judge is removed under Minn. R. Civ. P. 63.02, therefore, the court must determine that the judge has *actual* bias against a party. The Commissioner recognizes that a judge cannot sit on a case if there is a bona fide appearance of bias, but questions whether that controlling principle arises from Rule 63.02. *Cf. In re Collection of Delinquent Real Property Taxes*, 530 N.W.2d 200, 206-07 (Minn. 1995). If Rule 63.02 had intended to disqualify judges based on the appearance of bias, the rule could easily have referred to the standard for substitution of a *judge* in a criminal trial, rather than exclusion of a juror. *See* Minn. R. Crim. P. 26.02, subd. 13(3) (disqualifying judge for interest or bias "if that judge is disqualified under the Code of Judicial Conduct."). The Code of Judicial Conduct requires the disqualification of a judge for the appearance of bias. *Powell v. Anderson*, 660 N.W.2d 107, 114 (Minn. 2003).

This Court should hold that the tax court did not abuse its discretion in denying the motion to remove Judge Sanberg for bias.

**III. THE TAX COURT DID NOT ABUSE ITS DISCRETION IN DENYING RELATOR'S MOTION FOR A CONTINUANCE SO THAT THE CHIEF JUDGE OF THE TAX COURT MIGHT RECONSIDER THE COURT'S DENIAL OF RELATOR'S MOTION TO REMOVE THE PRESIDING JUDGE.**

Mr. Byers' essentially argues that the tax court abused its discretion when it did not halt the trial to allow him to make a motion to the Chief Judge of the tax court for reconsideration of his motion to remove the presiding judge.<sup>12</sup> First, he argues that Minnesota General Rule of Practice for the District Courts 106 applies to tax court proceedings. B.B. 29. He then argues that, at the option of the moving party, Rule 106 *requires* a hearing and reconsideration before the chief judge. B.B. 32. Finally, Mr. Byers implicitly argues (without citing any authority) that Rule 106 also *requires* a continuance of trial to allow for such reconsideration, and that denial of such continuance is a *per se* abuse of discretion. All of these arguments should be rejected.

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<sup>12</sup> In his brief to this Court, Relator argues that the "trial judge committed a clear non-harmless error of law when she refused to allow Mr. Byers to bring his denied removal motion before the Chief Judge of the Minnesota [Tax] Court for hearing and reconsideration." B.B. at i. The transcript clearly reflects that both the tax court and Mr. Byers considered the motion before the court to be a motion *for continuance*, and that Mr. Byers was "prevented" from making a motion to the Chief Judge only because of his own late timing in making his motion to remove. B. App. 59-61. The Commissioner thus presumes that Relator is appealing a denial of the motion for continuance. *See* B. App. 104 ("the [tax] Court did not err in denying the request to continue trial in order to have the Chief Judge immediately review the denial of the Motion to remove").

As the tax court correctly noted, Minn. Stat. § 271.06, subd. 7, provides that, where practicable, the Rules of Civil Procedure generally govern procedures in tax court. B. App. 103. Mr. Byers cites no statute, court precedent, or tax court rule supporting his contention that General Rule of Practice for the District Courts 106 applies to tax court proceedings. The tax court did not err in holding otherwise.

The tax court also did not err in concluding that, even if Rule 106 applied to tax court proceedings, review by the chief judge is discretionary.<sup>13</sup> B. App. 104. Mr. Byers erroneously argues that the text of Rule 106 and the accompanying commentary show that the moving party (Mr. Byers) has the authority to require a hearing and reconsideration by the chief judge. A more natural reading of the rule is that, upon proper motion, the *chief judge* has discretion to hear and reconsider a presiding judge's denial of a motion to remove. This reading is in harmony with the general principle that a judge (including a chief judge) controls his or her own calendar. See Minn. R. Civ. P 40 ("The judges of the court may, by order or by rule of court, provide for the setting of cases for trial upon the calendar, the order in which they shall be heard, and the resetting thereof.").

The tax court correctly concluded that Rule 106 did not *require* reconsideration, and that it did not have authority to determine whether the chief judge should reconsider.

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<sup>13</sup> Contrary to Relator's characterization, the tax court did not construe Rule 106 to give the *presiding* judge the power to determine whether the chief judge should reconsider. The tax court merely indicated that review was discretionary and therefore, not mandated by the rule. See B. App. 104 ("Since this review is discretionary, the Court did not err in denying the request to continue the trial in order to have the Chief Judge immediately review the denial of the Motion to remove.").

Likewise, the tax court correctly concluded that Rule 106 did not require a continuance to avoid mootng Rule 106.

This Court should hold that the tax court did not abuse its discretion in denying Mr. Byers' final motion for a continuance.

**IV. THE TAX COURT'S DETERMINATION OF RELATOR'S TAXABLE INCOME WAS NOT CLEARLY ERRONEOUS BECAUSE THE EVIDENCE AS A WHOLE REASONABLY SUPPORTS THE DECISION.**

Mr. Byers argues that "there is no evidence that Mr. Byers received gross income amounts equal to or above his statutory threshold of \$6,475.00 (2000) and \$6,700.00 (2001)." B.B. 40. With respect to individual items of income, he also argues that "[n]ot only does the record lack any evidence of payments from Edina Couriers to Mr. Byers, it likewise lacks any evidence that Mr. Byers received unreported income from bank deposits." B.B. 37.

The tax court disagreed, finding that the witness who testified that Mr. Byers had received income from Edina Couriers was both credible and persuasive. B. App. 113. The tax court also determined that the 1099-MISC forms filed by Edina Couriers accurately reflected the gross amounts Edina Couriers paid to Mr. Byers (or to others as directed by Mr. Byers) for each tax year. B. App. 67, 108; T.C. Ex. 101-102. In determining Mr. Byers' net taxable income from Edina Couriers, the Court accepted the amount shown on the IRS Notice of Deficiency, a document Mr. Byers himself introduced into evidence. B. App. 21.

The court's acceptance of the amount of net income from Edina Couriers shown in the IRS Notice is supported by summing the net payments made to Mr. Byers as shown in the summary of 2001 payments made by Edina Couriers to Ronald E. Byers (tax court exhibit 108). C. App. 44-47. Given that the tax court had this corroborating evidence supporting the largest amounts shown on the IRS Notice, the court reasonably concluded that the other income (bank deposits) shown on the IRS Notice was accurate. This conclusion appears especially reasonable in light of the fact that Mr. Byers "introduced no documents or testimony that supported" his argument "that he received nothing from Edina Couriers." B. App. 105.

Although Mr. Byers argues that there was "no evidence" to support the tax court's determination of his taxable income for the tax years, the record clearly shows that each of the factual findings by the tax court was supported by evidence in the record. This Court should hold that the tax court's determination of Mr. Byers' taxable income was not clearly erroneous because the evidence as a whole reasonably supports the decision.

### CONCLUSION

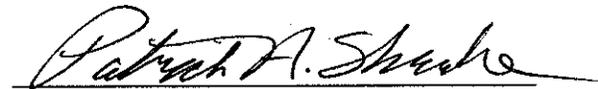
The tax court did not abuse its discretion in denying Mr. Byers' motion for removal or his motions for continuance. The tax court's factual findings regarding Mr. Byers' taxable income were not clearly erroneous and were reasonably supported by

the evidence. Respondent respectfully requests that the Court affirm the decision of the Tax Court in all respects.

Dated: April 2, 2007.

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).