

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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ON REVIEW OF THE DECISION OF  
THE MINNESOTA TAX COURT

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RELATOR'S INFORMAL BRIEF AND APPENDIX

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## LEGAL ISSUES

I. Does Minnesota Rule of Civil Procedure 63.02, providing that a judge is prohibited from presiding over a case if she would be excluded for bias from acting therein as a juror, require a Minnesota Tax Court trial judge to grant a party's removal motion when that trial judge has presided in a recent case involving the party's wife as the sole appellant and the trial judge there deemed the party, a subpoenaed witness for the Commissioner, in contempt of court?

The Minnesota Tax Court held that the trial judge may deny the party's removal motion.

II. Does Minnesota General Rule of Practice 106, providing that in all civil actions a party whose motion for removal of the presiding judge is denied by that judge may seek hearing and reconsideration by the Chief Judge, apply to a denied removal motion in a case presided over by a Minnesota Tax Court judge?

The Minnesota Tax Court held that a presiding Minnesota Tax Court judge may refuse to allow a party to bring a denied motion for her removal before the Chief Judge of the Minnesota Tax Court for his hearing and reconsideration.

III. Whether the Tax Court clearly erred when it found that, in the years 2000 and 2001, Mr. Byers received unreported income amounts reflected in an IRS notice of deficiency.

The Minnesota Tax Court held that sufficient evidence existed to support such a finding.

## STATEMENT OF FACTS

### I. Judge Removal Motion Under Minn. R. Civ. P. 63.02 Denied

The Honorable Judge Kathleen H. Sanberg presided over the proceedings in Mr. Byers's appeal to the Minnesota Tax Court.

The proceedings involved Mr. Byers' challenge of the Commissioner of Revenue's determination that, for the calendar years 2000 and 2001, Mr. Byers was liable for additional Minnesota income tax, penalties and interest based on his failure to file Minnesota income tax returns and on his receipt of substantial amounts of unreported income. (Notice of Commissioner Filed Return)

Shortly before trial of Mr. Byers' appeal on March 6, 2006, Mr. Byers filed a motion to remove Judge Sanberg as the presiding judge. (*Ronald E. Byers v. Commissioner*, Dkt. 7601-R, dec. of 8-14-06, p. 11; *Ronald E. Byers v. Commissioner*, Dkt. 7601-R, dec. of 11-2-06, p. 3)

While Judge Sanberg was actively considering Mr. Byers' appeal, she was also the presiding judge in another tax appeal in which the sole appellant was Mr. Byers' wife. *See Deanna L. Byers v. Commissioner*, Dkt. 7408-R..

A few days before Judge Sanberg was to conduct the October 26, 2005 trial in the appeal of Mr. Byers's wife, the Commissioner subpoenaed Mr. Byers to appear as a witness in that trial.

In subpoenaing Mr. Byers as a witness, the Commissioner wanted Mr. Byers produce certain records and to testify in support of the Commissioner's theory that, as owner-operator of a bakery, Mr. Byers had employed his wife and paid her income which she did not report.

Mr. Byers did not appear before Judge Sanberg in response to the Commissioner's subpoena. (MN Tax Court decision 8-14-06, pg. 11)

In lieu of appearing in response to the subpoena, Mr. Byers filed with the Tax Court a motion to quash the Commissioner's subpoena. *Deanna L. Byers v. Commissioner*, Dkt. 7408-R. (Notice of Objection to Subpoena Filed By Ronald E. Byers); *Ronald E. Byers v. Commissioner*, Dkt. 7601-R, Trial Transcript, p. 5:5-18.

In his motion, Mr. Byers averred that the subpoena's short compliance period had given him insufficient time to even seek advice from counsel on how to comply. Mr. Byers further averred that it was impossible for him to timely search for the subpoenaed records and, if they existed and were located and authenticated, to bring them to court

and to competently testify about them.

When presiding over the trial of Mr. Byers' wife, Judge Sanberg explicitly found that Mr. Byers had deliberately failed to appear before as a subpoenaed witness:

The Court: "[T]he books and records of the bakery [demanded by the Commissioner's subpoena served on Mr. Byers] would show what had been paid out or not paid out. 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.

Now, I could continue the hearing and ask that the sheriff go out and pick him up and bring him in..."

--*Deanna L. Byers v. Commissioner*, Dkt. No. 7408-R, Trial Transcript October 25, 2005, p.121; reproduced in *Ronald E. Byers v. Commissioner*, Dkt. 7601-R, dec. of 8-14-06, p. 11.

Subsequent to the trial involving his wife, and prior to the scheduled March 8, 2006 trial in his own case, Mr. Byers moved Judge Sanberg for a trial continuance on two grounds.

First, Mr. Byers noted to Judge Sanberg that while the Commissioner insisted that Mr. Byers was required to file a return of Minnesota income tax for the years 2000 and 2001, he had nonetheless imputed to Mr. Byers different, and widely varying, amounts of unreported federal taxable income, and thus of Minnesota taxable

income.

At various times in the proceedings, then, Mr. Byers pointed out, the Commissioner's federal taxable income assertions contradicted not only Mr. Byers' claims, but on that same subject matter contradicted the Commissioner's own assertions and the Internal Revenue Service's determinations.

Under these confusing circumstances, Mr. Byers suggested to Judge Sanberg that the interests of justice and of judicial economy would be better served if the Minnesota Tax Court trial was continued until the amount, if any, of Mr. Byers' federal taxable income was finally decided by the United States Tax Court, which also had before it Mr. Byers's taxable years 2000 and 2001.

During a telephone hearing held on February 28, 2006, Judge Sanberg was inclined to deny Mr. Byers' continuance motion on the ground that, as the Commissioner alleged, Mr. Byers's case before the United States Tax Court had recently been dismissed.

In response, however, Mr. Byers explained to Judge Sanberg that the United States Tax Court had improperly dismissed his federal tax

case for years 2000 and 2001 for lack of jurisdiction and that he was then actively working on getting his United States Tax Court case reinstated.

With the Commissioner's acquiescence, Judge Sanberg stated that she would indeed grant Mr. Byers' motion for a trial continuance, with the *proviso* that Mr. Byers cause the United States Tax Court to reinstate his case within the next two business days, or on or before March 2, 2006, four days prior to trial.

The United States Tax Court vacated its previous dismissal order and reinstated Mr. Byers's case by order dated March 3, 2006 and notified the parties thereof on March 6, 2006, the day of Mr. Byers' trial and two days before the originally scheduled trial date of March 8, 2006. *Ronald E. Byers v. Commissioner*, Dkt. 7601-R, dec. of 8-14-06, p. 5, n. 2; p.10.

Next, as an alternate ground for his moving for a trial continuance, Mr. Byers asserted to Judge Sanberg that trial of his taxable year 2000 should be continued pending the outcome of Mr. Byers' other active Minnesota Tax Court appeal, No. 7733-R. This

other active appeal of Mr. Byers also involved his year 2000 income tax, but was presided over by a different judge, the Honorable Sheryl A. Ramstad.

In support of his motion made to Judge Sanberg to continue the trial with respect to his year 2000 income tax, Mr. Byers contended that:

(1) the determinations at issue in his appeal at case number 7733-R were the Commissioner's latest, and presumably final, determinations of Mr. Byers' liability for year 2000 income taxes;

(2) in his later appeal at case number 7733-R, Mr. Byers had far better stated his arguments against the Commissioner's year 2000 income tax determinations than he had in his instant appeal at case number 7601-R; and

(3) if his instant appeal at case number 7601-R was decided, Mr. Byers would lose the opportunity to litigate his appeal at number 7733-R under the principle of *res judicata*.

Judge Sanberg declined to grant Mr. Byers's continuance request on the ground that Mr. Byers's instant appeal at case number 7601-R could proceed without adversely impacting Mr. Byers's ability to

litigate his year 2000 income tax in his appeal at case number 7733-R.

*Ronald E. Byers v. Commissioner*, Dkt. 7601-R, dec. of 8-14-06, p. 6; Trial Transcript, p. 16:17-25.

Until shortly before the March 6, 2006 trial, Judge Sanberg had neither contact with, nor made any statement about, Mr. Byers in the previous five months.

On October 25, 2005, however, as described above, at the trial of an appeal filed solely by Mr. Byers' wife, Judge Sanberg stated on the record her opinion that Mr. Byers had willfully failed to appear before her and produce records as a subpoenaed witness. Under the circumstances present, Judge Sanberg found, she had cause to direct a sheriff to arrest Mr. Byers.

Mr. Byers's motion to remove Judge Sanberg as the presiding judge in his appeal averred that Judge Sanberg would not be qualified to sit in Mr. Byers' case as a juror.

In his removal motion, Mr. Byers recounted to Judge Sanberg their recent out-of-case interaction. Mr. Byers also explained that he filed his motion on the eve of trial because Judge Sanberg's bias had only then manifested itself, i.e. in her adverse rulings on Mr. Byers'

reasonable (in his view) continuance motion(s).

In ruling on Mr. Byers' motion for her removal as presiding judge, Judge Sanberg found that:

(1) she was not biased against Mr. Byers;

(2) Mr. Byers had misconstrued what she had said about him at his wife's trial; and

(3) Mr. Byers was simply dissatisfied with her recent adverse rulings.

From these findings of fact, Judge Sanberg concluded that as a matter of law she was not obliged to remove herself from presiding over Mr.

Byers's appeal.

II. Motion Under Minn. Gen. R. Pr. 106 For  
Chief Judge Reconsideration of Denied Judge  
Removal Motion Under Minn. R. Civ. P. 63.02 Denied

Immediately after Judge Sanberg denied Mr. Byers's motion for her removal as the presiding judge, Mr. Byers moved Judge Sanberg for hearing and reconsideration of the denied motion by the Chief Judge of the Minnesota Tax Court. *Ronald E. Byers v. Commissioner*, Dkt. 7601-R, dec. of 8-14-06, pp. 12-13; Trial Transcript, pp. 14:17-21; p. 17:22-25, p. 18:1.

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Mr. Byers asserted to Judge Sanberg that his denied removal motion was entitled to receive Chief Judge reconsideration under authority of Minnesota Rule of Civil Procedure 63.02, as implemented by Minnesota General Rule of Practice 106.

Judge Sanberg refused Mr. Byers motion for Chief Judge reconsideration of his denied motion for her removal as presiding judge. Mr. Byers timely objected to Judge Sanberg's denial.

Concluding that the Minnesota General Rules of Practice do not apply to proceedings in the Tax Court, Judge Sanberg stated at trial, and in the Tax Court's decision, that she could properly prevent a party from bringing before the Chief Judge for reconsideration her denial of a motion that sought to remove her as presiding judge.

Judge Sanberg reasoned that even if Minn. Gen. R. Pr. 106 applied to proceedings in the Tax Court:

(1) she nevertheless had no bias against Mr. Byers, and thus was not obliged to remove herself as presiding judge. *Ronald E. Byers v. Commissioner*, Dkt. 7601-R, dec. of 11-2-06, p. 9, and

(2) she had discretion to prevent a denied removal motion from coming before the Chief Judge for hearing and reconsideration.

*Ronald E. Byers v. Commissioner*, Dkt. 7601-R, dec. of 8-14-06, p. 13.

III. Unreported Income Allegations

In an assessment order dated May 12, 2003, the Commissioner of Revenue determined that for the taxable years 2000 and 2001, respectively, Relator Ronald E. Byers had failed to file a return of Minnesota income tax and had failed to report income in the amounts of:

2000--\$97,984.77; and

2001--\$85,163.70.

Also in the May 12, 2003 assessment order, the Commissioner stated that he had (a) prepared on Mr. Byers's behalf a draft Form 1040, U.S. Individual Income Tax Return, (b) used the draft Form 1040 to file a return of Minnesota income tax for Mr. Byers, and (c) assessed against Mr. Byers Minnesota substantial amounts of income taxes, penalties and interest.

Mr. Byers timely appealed to the Minnesota Tax Court for review of the Commissioner's determinations and assessments.

In his notice of appeal, Mr. Byers agreed that he did not file a

return of Minnesota income tax for either the years 2000 or 2001. Mr. Byers explained, however, that he had not received gross income in an amount sufficient to oblige him to file these returns.

In his return and answer to the notice of appeal, the Commissioner contended that Mr. Byers had received the income amounts of \$97,984.77 (2000) and \$85,163.70 (2001) because both amounts had been reported to the Department of Revenue via respective Forms 1099 filed with the IRS by a third-party source, Edina Couriers, LLC.

In the same pleading, the Commissioner asserted that the Tax Court should fully sustain Mr. Byers's assessments based on the income he reportedly received from Edina Couriers, LLC.

After Mr. Byers's appeal was at issue in the Minnesota Tax Court, two events occurred that affected the presumption of correctness afforded to the Commissioner's determinations.

The first event arose on March 22, 2005, when the Internal Revenue Service (IRS) sent Mr. Byers a notice alleging that a deficiency exists in Mr. Byers's federal income tax for the years 2000 and 2001.

In its notice of deficiency, the IRS also alleged that for 2000 and 2001, respectively, Mr. Byers had failed to file a return of (federal) income tax and had failed to report income, including income from Edina Couriers, LLC.

The IRS notice of deficiency claims that Mr. Byers did not report to the United States in the years 2000 and 2001 income from Edina Couriers, LLC, in the following amounts:

2000--\$45,073.00; and

2001--\$39,134.00

Mr. Byers timely petitioned the United States Tax Court for a redetermination of the IRS's years 2000 and 2001 federal income tax determinations. Mr. Byers's case remains pending before the United States Tax Court for decision, with trial currently scheduled on March 5, 2007.

The second event arose on October 26, 2004, when the Commissioner of Revenue sent Mr. Byers a second assessment order, a Notice of Commissioner Filed Return, for the tax year 2000. (Trial Transcript 102:1-9)

The Commissioner's second year 2000 income tax determination asserted that Mr. Byers had failed to report to the State of Minnesota income in the following amount:

2000--\$90,784.00

The Commissioner's second stated amount of allegedly unreported income for year 2000 was higher than the unreported income amount for that year asserted by the IRS in its Notice of Deficiency but substantially lower than the amount the Commissioner had alleged in his first assessment order.

Mr. Byers timely appealed to the Minnesota Tax Court for review of the Commissioner's second income tax assessment notice for the year 2000 (Minnesota Tax Court case number 7733-R). That appeal was still pending at the time the appeal to the Tax Court in the instant case was submitted for decision.

(Subsequently, the Commissioner moved to dismiss the appeal at 7733-R for lack of jurisdiction. In support of his motion, the Commissioner alleged that his second year 2000 assessment had been "withdrawn" on a day prior to the day that Mr. Byers filed his timely notice of appeal. *See* Trial Transcript 103:3-9.

Although the Commissioner admitted that he failed to notice Mr. Byers of the withdrawal before Mr. Byers filed his timely notice of appeal, the Tax Court granted the Commissioner's motion on August 22, 2006 and dismissed the appeal for lack of jurisdiction. The dismissal date was 12 days after the Tax Court entered its original decision in the instant case. Mr. Byers did not seek this Court's review of the August 22, 2006 dismissal.)

Nine days after trial of Mr. Byers' case here on review, the Commissioner filed with the Court a letter in which he announced that he had abandoned his defense of the correctness of his May 12, 2003 dated assessment order and each of its assessments.

In his March 15, 2006 letter to the Court, the Commissioner revealed a new litigating position that he would argue on brief. The Commissioner now claimed that Mr. Byers had actually received, and failed to report, the lower income amounts for years 2000 and 2001 reflected in the notice of deficiency sent to Mr. Byers by the IRS. (Trial Ex. 2)

The IRS notice of deficiency also alleges that Mr. Byers received unreported income amounts from a source other than Edina Couriers,

i.e. unexplained bank deposits.

In both the Commissioner's May 12, 2003 assessment order and in his responsive pleading, the Commissioner claimed that Mr. Byers had received unreported income, but solely from Edina Couriers, LLC.

Neither the Commissioner's notice nor his pleading asserted that Mr. Byers had also received unreported income from unexplained bank deposits.

The Commissioner did not either amend his pleading, or move for leave to amend his pleading, to incorporate his new litigating position.

At the trial held on March 6, 2006, after argument was heard on the procedural motions fully discussed in sections I and II above, Mr. Byers called as a witness Thomas C. Bartsh, a representative of Edina Couriers, LLC (Edina Couriers).

Edina Couriers is a courier service owned by Stanley Olsen and his son, Nicholas Olsen. (Trial Transcript p. 86:11-25, 87:1) Stanley Olsen also owns Conrad Companies, a truck leasing company. (Trial Transcript p. 33:17-20) Edina Couriers hires drivers to drive its courier routes in trucks leased to them by Conrad Companies. (Trial

Transcript p. 35:21-25, p. 36:1-6)

Mr. Bartsh testified that Mr. Byers had been an independent contractor who drove a truck leased from Conrad Companies for Edina Couriers in both 2000 and 2001, and that Edina Couriers had paid Mr. Byers the income amounts shown on Forms 1099 it had filed with the IRS.

During his cross-examination of Mr. Bartsch, the Commissioner offered into evidence, and the Court received, numerous alleged Edina Courier sourced documents that purported to show a working relationship between Mr. Byers and Edina Couriers in the years 2000 and 2001. (Trial Exs. 101-156).

In response to an inquiry from the trial judge, Mr. Bartsh stated that Edina Courier had paid Mr. Byers the asserted income amounts by and through checks, and that he had with him at trial canceled copies of such checks.

The trial judge then asked Mr. Bartsh to produce the copies of the cancelled checks. After some searching, Mr. Bartsh told the trial judge that he did not have the copies of the canceled checks because no one had asked him to bring them to court. (Trial Transcript

p.88:22-25, 89:1-15)

Thomas C. Bartsh is a disbarred lawyer who has served prison time after a criminal conviction. (Trial transcript p.54:13-21)

The Commissioner called as his witness, Matthew J. Shaefer, an agent of the Minnesota Department of Revenue (DOR). (Trial transcript p.95:4-5)

DOR Agent Shaefer stated that as the bases for the DOR's (initial) year 2000 and 2001 assessments against Mr. Byers, it had relied solely on the Forms 1099 filed with the IRS by Edina Couriers. (Trial Transcript p. 118:17:23)

On cross-examination by Mr. Byers, Agent Shaefer affirmed that the DOR did not rely on any other information for the assessments against Mr. Byers, such as cancelled checks or bank records. (Trial transcript p.117:15-25, p. 118:1-3)

The record before the Court contains:

- (1) no canceled checks evidencing payments by Edina Couriers to Mr. Byers (Entire Record);
- (2) no invoices submitted by Mr. Byers to Edina Couriers requesting payment for his alleged independent contractor services

(Entire Record);

(3) no bank records of Mr. Byers showing bank deposits (Entire Record); and

(4) no records reflecting that Mr. Byers actually, or constructively, received income in an amount equal to or above his applicable gross income threshold for filing a Minnesota income tax return. (Entire Record)

## ARGUMENT

**I. Although The Trial Judge Knew, Or Reasonably Should Have Known, That She Was Prohibited From Sitting In Mr. Byers' Case If She Might Be Excluded For Bias From Acting Therein As A Juror, She Continued To Preside Over The Case And Thereby Abused Her Discretion.**

The Honorable Kathleen H. Sanberg abused her discretion in Mr. Byers' Minnesota Tax Court appeal when she denied Mr. Byers' pre-trial motion to remove her as the presiding judge.

A Minnesota Tax Court judge is prohibited from sitting in any case if she might be excluded for bias from acting therein as a juror. Minn. R. Civ. P. 63.02.

A little over four months before she conducted Mr. Byers' trial, Judge Sanberg presided over a trial in a case involving Mr. Byers'

wife as the sole appellant. At Mr. Byers' wife's trial, Judge Sanberg deemed Mr. Byers in contempt of court and stated that she could have him arrested.

Judge Sanberg deemed Mr. Byers in contempt of court when she asserted that Mr. Byers, although he had the means to do so, willfully failed to appear before her, to testify and to produce records on behalf of the Commissioner of Revenue as a subpoenaed witness. *See* Minn. R. Civ. P. 45.05.

Although Mr. Byers filed with Judge Sanberg a pre-trial objection against his having to comply with the subpoena served on him in his wife's case, Judge Sanberg nonetheless deemed Mr. Byers to have committed contempt.

In deeming Mr. Byers in contempt of court, Judge Sanberg necessarily found that Mr. Byers' pre-trial objection against the subpoena was not an adequate excuse for his failure to appear before her and to testify and produce records. Minn. R. Civ. P. 45.03(b)(2); Minn. R.C.P. 45.05.

Shortly before Mr. Byers' trial commenced, then, Judge Sanberg held a belief that Mr. Byers had just recently disrespected her judicial

authority. Judge Sanberg's belief regarding Mr. Byers' character necessarily gave rise to a bias against him that might have excused her from sitting in Mr. Byers' case as a juror. Minn. R. Civ. P. 63.02.

Judge Sanberg's bias against Mr. Byers overtly manifested itself in his own case when she denied Mr. Byers' reasonable requests for a trial continuance pending the outcomes of other cases Mr. Byers was involved in with respect to the same tax years 2000 and 2001.

The Commissioner had made contradictory determinations regarding Mr. Byers' federal taxable income for the years 2000 and 2001, and Mr. Byers' taxable year(s) 2000 and 2001 were also at issue in two other cases, i.e. Mr. Byers' case in the United States Tax Court, and his other case in the Minnesota Tax Court presided over by the Honorable Sheryl A. Ramstad. Thus, in his continuance motion, Mr. Byers explained to Judge Sanberg the potentially harmful ramifications to him if his case before her was tried, briefed and decided.

Byers reasoned that both the interests of justice and of judicial economy would be better served by a trial continuance. As Mr. Byers' tax years 2000 and 2001 were at issue in other tax cases, he would be

unduly burdened by further costs to litigate in multiple foras the same fundamental issue, i.e. the amount of his federal taxable income.

More importantly, Mr. Byers noted, the Commissioner would not suffer harm if the trial was continued; in fact, the Commissioner stood to gain by having the widely varying assertions of Mr. Byers' federal taxable income finally decided by a federal body uniquely qualified to make this federal tax determination.

Furthermore, Mr. Byers pointed out that if Judge Sanberg entered a decision adverse to him, then ultimately Mr. Byers could litigate his other tax cases only in futility: an adverse decision in one Minnesota Tax Court case would necessarily render Mr. Byers vulnerable in his United States Tax Court and other Minnesota Tax Court cases to the opposing party's defense of either *res judicata* or collateral estoppel.

Instead, Mr. Byers' case was tried by a judge who had a pre-existing bias against him.

While the interests of justice, and of judicial economy, would have been better served had Mr. Byers' trial been continued pending the decision by the United States Tax Court (and Mr. Byers' Minnesota Tax Court case at 7733-R) on Mr. Byers' taxable years 2000 and 2001,

the judge's pre-existing bias against Mr. Byers caused her to refuse his reasonable continuance requests.

Unfortunately, Judge Kathleen H. Sanberg abused her discretion when she denied Mr. Byers' pre-trial motion for her removal and continued to preside over Mr. Byers' appeal notwithstanding that she knew, or she reasonably should have known, that she was prohibited from sitting in the case if she *might* be excluded for bias from acting therein as a juror.

It was not enough for Judge Sanberg to find that she could be unbiased in view of her previous encounter with Mr. Byers. This Court has held trial judges to a higher standard than merely their own beliefs about their possible biases:

"The 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." *Wiedemann v. Wiedemann*, 228 Minn.174, 36 N.W.2d 810 (1949).

Minn. R.Civ.P. 63.02 explicitly supplies a trial judge with a bias standard that is for an ordinary citizen randomly selected as a prospective juror.

Judge Sanberg did not meet the bias standard set forth in Minn. R.Civ.P. 63.02 because, as a prospective juror in Mr. Byers' case, she might have been excluded for bias.

Consequently, this Court should exercise its authority to remedy Judge Sanberg's abuse of discretion.

**II. The Trial Judge Clearly Erred When She Concluded That Rule 106 Of The Minnesota General Rules of Practice Need Not Apply To Proceedings In The Minnesota Tax Court And Denied Mr. Byers' Pre-Trial Motion To Bring His Denied Motion For Her Removal Before The Minnesota Tax Court Chief Judge For Hearing And Reconsideration.**

Judge Kathleen H. Sanberg committed a non-harmless error of law when she denied Mr. Byers the right to present his denied motion for her removal as presiding judge to the Chief Judge of the Minnesota Tax Court for his hearing and reconsideration.

The interaction amongst the Minnesota statutes, Minnesota Rules of Civil Procedure, and the Minnesota Tax Court Rules leaves no room for doubt (and the presiding judge in Mr. Byers' Minnesota Tax Court appeal agreed) that Rule 63.02 of the Minnesota Rules of Civil Procedure applies to an action in the Minnesota Tax Court.

In construing and administering Minn. R. Civ. P. 63.02, the

Minnesota Tax Court must act in a manner that will secure the just, speedy and inexpensive determination of every action. Minn. R. Civ. P. 1.

As stated in part I of this argument, Minn. R. Civ. P. 63.02 provides that a Minnesota Tax Court judge is prohibited from sitting in any case if she might be excluded for bias from acting therein as a juror.

Notwithstanding that it is a rule of procedure, Minn. R. Civ. P. 63.02 lacks a specific procedure for a party to follow if and when he makes a motion to remove a judge from presiding over a case on the grounds of actual bias or prejudice.

There is, however, a rule of law that supplies a judge with a procedural rule to follow when a party makes a motion for removal of that judge under Minn. R. Civ. P. 63.02.

Rule 106 of the Minnesota General Rules of Practice provides:

"All motions for removal of a judge, referee, or judicial officer, on the basis of actual prejudice or bias shall be heard in the first instance by the judge sought to be removed. *If that judge denies the motion, it may subsequently be heard and reconsidered by the Chief Judge of the district or another judge designated by the Chief Judge.*" [Emphasis supplied.]

While it is not made explicitly applicable to Minnesota Tax Court proceedings, Minn. Gen. R. Pr. 106 does contain a specific cross-reference to Minn. R. Civ. P. 63.02, which does apply to proceedings in the Minnesota Tax Court

Furthermore, the Task Force Commentaries on the 1991 adoption of Minn. Gen. R. Pr. 106 noted that the purpose of promulgating that rule was to provide a party who files a judge removal motion with a procedure that would carry out Minn. R. Civ. P. 63.02's intent of prohibiting a judge from presiding in a case if she might be excluded for bias from acting therein as a juror:

*"Minn. R. Civ. P. 63.02 does not currently specify the procedure to be followed when a motion is made to remove a judge from hearing a case on the grounds of actual bias or prejudice.*

*This rule requires the motion to be heard initially by the judge sought to be removed, and allows the chief judge of the district to reconsider the motion if it is denied by the affected trial judge.*

*The rule does not require the party seeking removal to bring the motion for reconsideration before the chief judge; it merely permits that reconsideration.*

*Bringing the motion for consideration should not be construed as any condition precedent to appellate review, whether by appeal or extraordinary writ.*

*The rule intentionally allows a motion for reconsideration only if the trial court denies the motion for removal. If the motion is granted,*

*it should only be addressed further on appeal.*

*The procedure for review by the chief judge of the district is not entirely satisfactory. Consideration should be given to facilitating appeal of these issues to the appellate courts, but the Task Force did not directly address this question because of the current limited jurisdiction of the appellate courts to hear appeals of decisions by judges declining to recuse themselves.*

(Task Force Commentary on 1991 Adoption of Minnesota General Rule of Practice 106.)

Thus, if a party files a judge removal motion in the Minnesota Tax Court under authority of Minn. R. Civ. P. 63.02, as implemented by Minn. Gen. R. Pr. 106, and the moving party's removal motion is denied by the Tax Court judge sought to be removed, the party may then exercise either one of two options.

First, as the Minn. Gen. R. Pr. 106 Task Force Commentaries note, the moving party "may," but is not required to, have his removal motion heard and reconsidered by the Chief Judge. Thus, the party denied removal of a judge may simply decide to proceed in the case with the affected judge.

Alternatively, the moving party may have his removal motion heard and reconsidered by the court's Chief Judge.

Neither Minn. R. Civ. P. 63.02, nor Minn. Gen. R. Pr. 106,

however, permits the judge sought to be removed to deny or refuse a party from bringing a denied removal motion before the Chief Judge for hearing and reconsideration.

Immediately after Judge Sanberg denied his pre-trial motion to have her removed from the case for bias, Mr. Byers moved to bring his denied removal motion to the Chief Judge of the Minnesota Tax Court for reconsideration. In support of his Chief Judge reconsideration motion, Mr. Byers explicitly cited in support thereof Minn. Gen. R. Pr. 106.

Nevertheless, Judge Sanberg denied Mr. Byers' motion.

While Judge Sanberg conceded that the Minnesota Tax Court had applied some of the Minnesota General Rules of Practice to some of its proceedings, she stated these rules did not apply generally to Minnesota Tax Court proceedings.

From her reasoning generally, Judge Sanberg erroneously held that Minn. Gen. R. Pr. 106 specifically did not apply to Mr. Byers' case, and concluded that she was not required to allow Mr. Byers to receive Chief Judge hearing and reconsideration of his denied motion for her removal as presiding judge.

Yet, as Mr. Byers argued on brief to the Tax Court, Minn. Gen. R. Pr. 106 was specially drafted to implement the provisions of Minn. R. Civ. P. 63.02.

Moreover, as Mr. Byers also argued on brief to the Tax Court, Minn. Gen. R. Pr. 106 is specifically made applicable to "*all* civil actions" in this state. Minn. Gen. R. Pr. 101 ("Rules 101 through 145 shall apply in all civil actions, except those governed by the Rules of Juvenile Procedure.")

It appears self-evident that if Mr. Byers' case in the Tax Court was not a criminal action, then it must have been a civil action. Appearances aside, however, a statute removes all doubt that Mr. Byers' case is the type of "civil action" to which Minn. R. Gen. Pr. 101 applies the provisions of Minn. R. Gen. Pr. 106:

"...When an appeal to the Tax Court has been taken from an order or determination of the commissioner or from the appropriate unit of government, the proceeding shall be an original proceeding in the nature of a suit to set aside or modify the order or determination...." Minn. Stat. § 271.06, subd. 6 [Emphasis supplied.]

When Judge Sanberg denied Mr. Byers' motion under Minn. R. Civ. P. 63.02 to remove her as the presiding judge, the provisions of

Minn. Gen. R. Prac. 106 attached; these provisions entitled Mr. Byers to receive hearing and reconsideration of his denied removal motion by the Minnesota Tax Court Chief Judge.

Mr. Byers was harmed when his case continued to be presided over by a judge who, had proper procedural review occurred, may have been prohibited from presiding therein on the ground that she might have been excluded for bias from acting therein as a juror.

Judge Sanberg also erroneously concluded that the question of the propriety of her presiding over Mr. Byers' case was vested in her alone.

While Judge Sanberg also purported to address what would happen if Minn. Gen. R. Pr. 106 did apply in Mr. Byers' case, she erred by construing the rule as permitting the trial judge to exercise discretion over whether a denied removal motion would be brought before the Chief Judge for hearing and reconsideration.

Judge Sanberg construed the following words from Minn. Gen. R. Prac. 106, "...[i]f that judge denies the motion, it may subsequently be heard and reconsidered by the Chief Judge....," as meaning that the presiding judge herself could determine whether or not a denied

removal motion "may" be heard by the Chief Judge.

Of course, the text of Minn. Gen. R. Prac. 106, and of its 1991 Task Force Commentary, reveals that it is actually the moving party who "may" decide (or may not decide) to have his denied removal motion heard by the Chief Judge.

When Judge Sanberg concluded that Minn. Gen. R. Prac. 106 did not apply in Mr. Byers' case, and she refused to allow Mr. Byers to bring his denied removal motion to the Minnesota Tax Court Chief Judge for hearing and reconsideration, she committed a non-harmless error of law that this Court, after applying *de novo* review, should reverse.

**III. As The Record Evidence Fails To Show That Mr. Byers Received An Amount Of Gross Income Equal To Or Above The Non-Taxable Amount Of Gross Income Applicable To His Filing Status For The Years 2000 And 2001, Including Income From Unexplained Bank Deposits, The Minnesota Tax Court Clearly Erred When It Found That Mr. Byers Had Received Substantial Sums of Unreported Taxable Income As Claimed In An IRS Notice of Deficiency**

The Minnesota Tax Court's finding that Mr. Byers had received substantial sums of unreported taxable income in the years 2000 and 2001, including income from unexplained bank deposits, as alleged in

a notice of deficiency issued to Mr. Byers by the Internal Revenue Service, is not supported by the record and thus is clearly erroneous.

The Commissioner's Notice of Commissioner Filed Return issued to Mr. Byers, the returns prepared on his behalf, and the tax assessments made against him, are indeed entitled to receive a presumption of correctness.

Minn. Stat. § 270C.33, subd. 6.

In Mr. Byers' case, however, he demonstrated that the Commissioner's determinations of his federal taxable income, the prerequisite foundation for an assessment of Minnesota income tax, were arbitrary and erroneous.

When Mr. Byers confronted the Commissioner with evidence that his federal taxable income determinations were widely at odds with the determinations made on the same subject matter by both the IRS (2000 and 2001) and the Commissioner himself (2000; determination at issue in Minnesota Tax Court case number 7733-R), the Commissioner conceded that his tax assessments were incorrect.

After conceding that his determinations against Mr. Byers were erroneous, the Commissioner simply adopted wholesale the income determinations that the IRS set forth in Mr. Byers' IRS notice of

deficiency.

Mr. Byers was obliged to file a Minnesota income tax return, and possibly liable for Minnesota income tax, only if his filing status's (married, filing separately) gross income was equal to or greater than the amounts of \$6,475.00 (2000) and \$6,700.00 (2001).

Thomas C. Bartsh, a representative of Edina Couriers, LLC, who testified at trial, alleged that in the years 2000 and 2001 Mr. Byers was an independent truck driver who performed contractor services on behalf of Edina Couriers, who then paid Mr. Byers for those services.

Yet Mr. Bartsh, an admitted disbarred lawyer and convict, also admitted that the IRS sent him a letter stating that the Forms 1099 Edina Couriers submitted to the IRS, on which were purportedly reflected the correct amounts of non-employee compensation paid to Mr. Byers, were erroneous.

Mr. Bartsch asserted that Mr. Byers received non-employee compensation by checks made out to him. Yet Mr. Bartsch also "explained" that the checks did not add up to the amount of non-employee compensation Edina Couriers reflected on its filed Forms 1099 as having been paid to Mr. Byers.

According to Mr. Bartsh's, this discrepancy existed because Edina Couriers had deducted from the amounts it had paid to Mr. Byers certain "lease payments." Mr. Bartsh claimed that Edina Couriers deducted these payments from Mr. Byers' non-employee compensation at Mr. Byers' direction. This was so Mr. Byers, who was supposedly an "independent" truck driver, could lease a truck from Conrad Companies--coincidentally a closely held company owned by the owner of another closely held company, Edina Couriers.

For three reasons, though, the evidentiary record shows that Mr. Bartsh's testimony was false.

First, Mr. Bartsh's testimony must be false because the Forms 1099 submitted to the IRS by Edina Couriers did not follow the law and inform either the IRS, or the Commissioner here, that "lease payments" had been deducted from the gross income amount that Edina Couriers reported it paid to Mr. Byers.

In examining the Forms 1099 filed by Edina Couriers, the reader would reasonably conclude (as the Commissioner here did) that because no other amounts were shown on the forms, Mr. Byers must have received the entire amount of non-employee compensation shown

thereon. Such a conclusion, however, would be false, as the Commissioner conceded when he filed his post-trial letter that adopted *in toto* the position taken by the IRS in its notice of deficiency issued to Mr. Byers.

Next, although Mr. Bartsh alleged that Mr. Byers performed services for Edina Couriers as an independent contractor, nothing in the record indicates that Mr. Byers either billed or invoiced Edina Couriers for these alleged services.

Finally, and critically, the trial judge asked Mr. Bartsh whether he had with him evidence of payments made by Edina Couriers to Mr. Byers. Without hesitating, Mr. Bartsh replied that he had brought with him copies of cancelled checks.

When the trial judge requested that Mr. Bartsh produce the cancelled checks, Mr. Bartsh purported to thoroughly search for them. Shortly thereafter, however, Mr. Bartsh abandoned his search and baldly told the Court that "nobody asked me to bring [the cancelled checks.]"

Thus, although Mr. Bartsh talked about the existence of "cancelled checks" payable to Mr. Byers, no such checks are in this

record. In fact, no evidence of any kind reflects any amount of payments.

Not 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.

As noted in this argument section, the Commissioner adopted as his litigating position the determinations stated by the IRS in its notice of deficiency issued to Mr. Byers. (Trial Ex. 2) These IRS determinations adopted by the Commissioner included an allegation that Mr. Byers received unreported income from unexplained bank deposits.

The Commissioner, however, introduced no evidence whatever relating to his wholly new theory that a portion of Mr. Byers' gross income derived from unexplained bank deposits.

The Commissioner's own witness, DOR Agent Matthew J. Schaefer, testified that in making the assessments against Mr. Byers, he possessed no evidence of cancelled checks, bills, invoices or bank statements. Indeed, Agent Schaefer testified that the Commissioner's assessments were based solely on amounts shown on two Forms 1099

filed with the IRS by Edina Couriers.

By embracing the IRS's position in its notice of deficiency as his own, the Commissioner repudiated the correctness of the Forms 1099 and the accuracy of his own assessments. In doing so, though, the Commissioner improperly "bootstrapped" into the case the IRS's determinations that Mr. Byers had unreported bank deposit income.

Mr. Byers introduced evidence showing that both the IRS (for 2000 and 2001) and the Commissioner himself (for 2000) had also computed Mr. Byers' federal taxable income, the starting point for an assessment of Minnesota income tax, but in amounts widely divergent from the Commissioner's computation of Mr. Byers' federal taxable income.

Once Mr. Byers met his initial burden of showing that the Commissioner's assessments were incorrect, the presumption of their correctness vanished. The burden then shifted to the Commissioner to produce evidence in support of his assessments.

Rather than introduce evidence in support of his assessments, however, the Commissioner simply conceded that his assessments were incorrect.

After conceding that his assessments were incorrect, the Commissioner merely declared that the IRS's determinations of Mr. Byers' federal taxable income, which included allegations that Mr. Byers received unexplained bank deposit income, were correct and that he would adopt the IRS's determinations as his own.

An IRS notice of deficiency, though, is just the IRS's claim that a deficiency in tax is due and owing. While an IRS notice of deficiency, like the Commissioner's assessments, enjoys a presumption of correctness, that presumption attaches only in federal, not in state, courts.

Therefore, both the Commissioner and the Tax Court erred in effectually treating the IRS notice of deficiency as presumptively correct in the Minnesota Tax Court.

Brought to its essence, the Commissioner abandoned his pleaded defense of the assessments from which Mr. Byers appealed. The Commissioner neither amended, nor sought leave to amend, his return and answer to plead either a new litigating position based on the IRS notice of deficiency or on different assessment amounts of tax, penalties and interest.

There exists as much evidence in the record to support the Commissioner's assessments based on his Commissioner Filed Return as there is evidence to support the Commissioner's later adoption of the income amounts shown in the IRS's notice of deficiency. That is to say, there is no such evidence.

In fact, 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). This Court should find that the Minnesota Tax Court clearly erred when it determined otherwise.

## CONCLUSION

The Minnesota Tax Court trial judge abused her discretion when she denied Mr. Byers' motion to remove her as presiding judge on the ground that she might have been excluded for bias from acting therein as a juror.

In addition, the Minnesota Tax Court trial judge committed a clear error of law when she held that Rule 106 of the Minnesota General Rules of Practice did not apply in Mr. Byers' case and that she therefore was not required to allow him to bring his denied removal motion before the Chief Judge of the Minnesota Tax Court for hearing and reconsideration.

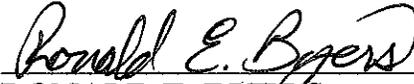
Finally, the Minnesota Tax Court's finding that Mr. Byers received unreported income in the amounts shown in an IRS notice of deficiency is clearly erroneous in that it is unsupported by the evidence.

Each of the three errors committed by the Tax Court judge and the Tax Court was non-harmless..

Therefore, Mr. Byers requests that this Court reverse the Minnesota Tax Court's decision and instruct the Tax Court to enter a

decision for Mr. Byers or, alternatively, order the Tax Court to stay its proceedings pending the final decision of the United States Tax Court in Mr. Byers' federal tax case for the years 2000 and 2001.

Respectfully submitted,

A handwritten signature in cursive script that reads "Ronald E. Byers". The signature is written in black ink and is positioned above a horizontal line.

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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).