

No. A07-615

STATE OF MINNESOTA
IN SUPREME COURT

DEANNA L. BYERS,

Relator,

vs.

COMMISSIONER OF REVENUE,

Respondent.

ON REVIEW OF THE DECISION OF
THE MINNESOTA TAX COURT

RELATOR'S INFORMAL BRIEF AND APPENDIX

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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).

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LEGAL ISSUES

I. Whether Erie Mining Co. v. Commissioner of Revenue, 343 N.W.2d 261 (Minn. 1984), which recognizes the Tax Court's lack of original jurisdiction to decide constitutional claims, and which requires the Tax Court to stay its proceedings and to transfer a raised constitutional claim to a District Court, authorizes the Tax Court to transfer a constitutional claim raised before it to the District Court, at a time of its choosing, after the Tax Court first conducts a trial on the facts.

The Tax Court concluded that Erie did not require it to first stay its proceedings and to then transfer the raised constitutional claim to a District Court. The Tax Court further concluded that it properly could hold a trial on the facts first and could transfer the constitutional claim post-trial, even after it ordered judgment on the facts.

II. Whether Minnesota Statute § 289A. 37, subd. 3, which places on a taxpayer who challenges a tax assessment the burden of establishing its incorrectness or invalidity in any related action or proceeding, works to unconstitutionally deprive a taxpayer of due process of law

insofar as it purports to encompass actions or proceedings in which the tax assessment's sole basis is the Commissioner's claim that the taxpayer received unreported income.

The Tax Court held that Minnesota Statute 289A.37, subd. 3, was constitutional notwithstanding that the sole basis for the tax assessment is the Commissioner's determination that the taxpayer received unreported income.

III. Whether Minn. Stat. § 270.0603 (a section of the Minnesota Taxpayers' Bill of Rights), and MBNA American Bank v. Commissioner of Revenue, 694 N.W.2d 778 (Minn. 2005), which mandate that the Commissioner of Revenue send a taxpayer a notice of her rights as a taxpayer before he determines a tax against her, act to invalidate a tax assessment in a case where the Commissioner failed to send the taxpayer such statutory notice.

The Tax Court concluded that a tax assessment is valid if a taxpayer does not receive the required Taxpayers' Bill of Rights notice. Although the Tax Court's conclusion could be read to include instances where the taxpayer did not receive the statutory notice because of the Commissioner's failure to even send it, the Tax Court

did not directly address Mrs. Byers's argument that the tax assessments against her are invalid because the Commissioner failed to send her the mandatory Taxpayers' Bill of Rights notice.

IV. Whether sufficient evidence exists to support the Tax Court's findings for each taxable year in issue that Mrs. Byers received unreported income in an amount equal to or above the gross income threshold applicable to her filing status.

The Tax Court found sufficient evidence existed to support the Commissioner of Revenue's determinations that Mrs. Byers received unreported income in amounts exceeding the gross income threshold applicable to her filing status.

STATEMENT OF THE CASE

After previously raising a new constitutional claim in an amendment to her Minnesota Tax Court notice of appeal that challenged the Commissioner of Revenue's tax, penalties and interest assessments against her for the tax years 1996, 1997 and 1998, Relator Deanna L. Byers moved the Tax Court on October 26, 2005, under authority of this Court's holding in Erie Mining Co. v. Commissioner

of Revenue, 343 N.W.2d 261 (Minn. 1984), to stay its proceedings and to transfer the new constitutional claim to the Hennepin County District Court.

The Tax Court held that Erie, *supra*, did not require it to first stay its proceedings and to then transfer a constitutional claim to the District Court. The Tax Court reasoned that Erie conferred jurisdiction on the Tax Court to immediately conduct a trial of the facts and to transfer the constitutional claim post-trial.

After rejecting Mrs. Byers's Erie claims, the Tax Court held a trial at which Mrs. Byers and three witnesses of the Commissioner testified. Mrs. Byers related how she did not receive an amount of gross income sufficient to oblige her to file a Minnesota income tax return. Through his witnesses, the Commissioner identified numerous documents purportedly relating to Mrs. Byers receiving unreported income. When the Commissioner moved to introduce these documents, Mrs. Byers timely objected on numerous grounds, including trustworthiness and inadmissible hearsay. The Tax Court denied all of Mrs. Byers's evidentiary challenges.

After trial and briefing, the Tax Court issued an April 4, 2006

dated order for judgment. In its order, the Tax Court first concluded that it had proper Erie jurisdiction to consider Mrs. Byers's constitutional claim because (1) the Tax Court effected a proper Erie transfer of Mrs. Byers new constitutional claim on November 2, 2005 and (2) the District Court, in turn, effected a proper Erie retransfer of the same claim on November 7, 2005.

The Tax Court then considered, and turned aside, Mrs. Byers's claim that Minnesota Statute § 289A.37, subd. 3, was unconstitutional insofar as it purported to apply in cases where the Commissioner's tax assessments are based solely on his allegation that the taxpayer received unreported income.

The Tax Court's order also, impliedly, rejected Mrs. Byers's argument that the Commissioner's assessments against her were void because the Commissioner neglected to send Mrs. Byers notice of her rights as a taxpayer as required by Minnesota Statute § 270.0603 and this Court's holding in MBNA v. Commissioner of Revenue, 694 N.W. 778 (Minn. 2005).

Finally, the Tax Court found sufficient evidence existed to

reasonably support the Commissioner's determinations that Mrs. Byers had received unreported income; thus, it fully upheld the Commissioner's assessments.

Mrs. Byers filed timely post-trial motions that challenged the Tax Court's order for judgment, requested a new trial, and disputed certain of the Tax Court's conclusions of law and findings of fact.

The Tax Court stated that it granted Mrs. Byers's post-trial motions in part by order dated June 27, 2006. In its order, the Tax Court reiterated that in November of 2005 both it and the District Court had indeed conducted proper Erie transfers of Mrs. Byers's new constitutional claim. However, the Tax Court also stated that when it reviewed Mrs. Byers's post-trial motion, it discovered that the parties had not been sent written notice of the Erie transfer(s). The Tax Court attributed this oversight to a clerical error.

In its June 27, 2006 dated order, the Tax Court directed that Mrs. Byers's pre-trial constitutional claim be transferred to the District Court for either decision by that Court or for retransfer to the Tax Court for decision.

Before the District Court, Mrs. Byers argued that the District

Court lacked jurisdiction to consider the constitutional claim because the Erie transfer to it was defective on account of the Tax Court's failure to stay its proceedings once the constitutional claim was before the Tax Court.

After hearing, by order dated August 24, 2006, the District Court retransferred the constitutional claim to the Tax Court for decision.

The Tax Court, on January 11, 2007, issued an order that again concluded it had Erie jurisdiction to proceed in Mrs. Byers's case, again considered and denied Mrs. Byers's constitutional claim, and again affirmed the Commissioner's tax assessment order.

Mrs. Byers appeals to this Court to vacate the Tax Court's orders of judgment on the ground that the Tax Court lacked jurisdiction to issue them or, alternatively, to reverse the Tax Court's orders and to remand the case to that Court so it can either enter judgment for Mrs. Byers or, alternatively, it can order a new trial.

STATEMENT OF FACTS

A. The Commissioner's Assessments And Mrs. Byers's First Constitutional Claim.

Relator Deanna L. Byers resided in Minnesota in 1996, 1997 and

1998, the tax years in issue. During these tax years, Mrs. Byers was married. Mrs. Byers did not file Minnesota income tax returns for either year.

By order dated June 15, 2001, the Commissioner of Revenue ("Commissioner") assessed Mrs. Byers for Minnesota individual income tax, penalties and interest for the 1996, 1997 and 1998 tax years. The Commissioner supported his assessments with a claim that Mrs. Byers received unreported income.

Further, the Commissioner alleged that while Minnesota law required Mrs. Byers to file returns of Minnesota income tax for 1996, 1997 and 1998, Mrs. Byers had failed to file such returns. Mrs. Byers filed an administrative appeal with the Commissioner that protested his assessment order. After Mrs. Byers's administrative appeal was denied on August 9, 2001, Mrs. Byers timely appealed to the Tax Court.

In her notice of appeal, Mrs. Byers did not dispute the Commissioner's assertion that she had not filed returns of Minnesota income tax. She did, however, argue that she had not received an

amount of gross income equal to or above the gross income threshold applicable to her filing status, and thus Minnesota law excused her from filing such returns. Mrs. Byers also alleged a constitutional claim against the validity of the Commissioner's order. Appendix (App.) 1-2.

Shortly before the scheduled trial date, the Commissioner alerted the Tax Court that Mrs. Byers's appeal contained a constitutional claim that, under this Court's holding in Erie Mining Co. v. Commissioner of Revenue, 343 N.W. 2d 261, 264 (Minn. 1984), should be transferred to the District Court for Hennepin County for decision or for retransfer to the Tax Court. The Tax Court subsequently transferred the constitutional claim to the District Court. The District Court retransferred the constitutional claim to the Tax Court by order dated December 9, 2004. By its terms, the District Court's retransfer order applied only to the previously transferred constitutional claim. App. 13-15.

B. Mrs. Byers's Notice Of Appeal Amendment, New Constitutional Claim And Trial.

During a pre-trial telephone conference held amongst the parties and the Tax Court, Mrs. Byers moved the Tax Court for leave to file

an amendment to her notice of appeal. The Tax Court judge, the Honorable Kathleen H. Sanberg, informed Mrs. Byers that she would be amenable to the filing of such an amendment provided that Mrs. Byers first obtained the consent of the Commissioner. Mrs. Byers promptly obtained the Commissioner's consent and filed the amendment to the notice of appeal. App, 16.

In her amendment to the notice of appeal, Mrs. Byers raised a new legal claim that challenged the constitutionality of Minnesota Statute § 289A.37, subd. 3. Mrs. Byers argued that the statute violated the due process clauses of the Minnesota and United States Constitution in cases where the sole basis for the Commissioner's tax assessment was his allegation that the taxpayer had received unreported income. Mrs. Byers also raised a new factual claim in her amended notice of appeal; the factual claim challenged the validity of the Commissioner's assessments on the ground that the Commissioner had failed to meet the statutory prerequisite of sending to her a notice explaining her rights as a taxpayer under the Minnesota Taxpayer Bill of Rights. App. 21-25.

The Tax Court did not effect an Erie transfer of Mrs. Byers's new

constitutional claim. As a result, before trial commenced on October 26, 2005, Mrs. Byers moved the Court to follow this Court's dictates in Erie by staying the proceedings and by transferring the new constitutional claim to the District Court for Hennepin County. The Tax Court denied Mrs. Byers's Erie motion. The Tax Court reasoned that Erie did not require it to stay the proceedings and to then transfer the constitutional issue; instead, the Tax Court concluded, it could conduct a trial on the facts and then effect a post-trial Erie transfer. Over Mrs. Byers's protests regarding the clear wording of Erie, the Tax Court proceeded to trial and indicated that it would later transfer the new constitutional issue to the District Court.

At trial, Mrs. Byers testified that she had not received the amounts of gross income for the years at issue as alleged by the Commissioner. Trial Transcript (Tr.19:19-56).

In turn, the Commissioner called three government agency employees as witnesses and introduced through them numerous documents that consisted of third-party claims that Mrs. Byers had been paid certain amounts. (Tr. 56-117:14). The Commissioner called no witness nor introduced any evidence, e.g. cancelled checks, bank

statements, payroll sheets, documents completed or signed by Mrs. Byers, who testified or that showed Mrs. Byers had actually or constructively received the gross income alleged. Although Mrs. Byers challenged the admission of these documents on grounds of inadmissible hearsay, the Tax Court allowed them into evidence.

C. Post-Trial Proceedings

On April 4, 2006, the Tax Court issued an order that upheld the Commissioner's assessment order and ruled against Mrs. Byers's new constitutional claim. In the order, the Tax Court asserted that it had conducted an Erie transfer of Mrs. Byers's second constitutional claim on November 2, 2005. The Tax Court further asserted that the District Court for Hennepin County had retransferred Mrs. Byers's new constitutional claim to the Tax Court on November 7, 2006.

Mrs. Byers, however, suspected that neither the Tax Court nor the District Court conducted a post-trial Erie transfer(s) because, for one reason, neither Court notified the parties of any such transfer(s). Therefore, arguing that the Tax Court lacked jurisdiction to issue its order, among other arguments, Mrs. Byers filed post-trial motions to

set aside the Tax Court's order of judgment.

On June 27, 2006, the Tax Court issued an order stating that it had granted Mrs. Byers's motion in part and would conduct an Erie transfer to the District Court of Mrs. Byers's new constitutional claim. The Tax Court insisted that the Erie transfers took place in November 2005, but that a "clerical error" prevented the parties from receiving notice of them. The Tax Court's order also again rejected Mrs. Byers's Taxpayers' Bill of Rights notice claim, denied Mrs. Byers's motion with respect to the sufficiency of the evidence and stated that the Tax Court had jurisdiction "at all times" over Mrs. Byers's new constitutional claim.

Although Mrs. Byers argued to the District Court that it too lacked jurisdiction to either decide the new constitutional claim, or to retransfer it to the Tax Court, the District Court retransferred that claim to the Tax Court for decision by order dated August 24, 2006.

On January 11, 2007, the Tax Court rejected Mrs. Byers's new constitutional claim after it first concluded that her argument that the Tax Court lacked Erie jurisdiction to decide the claim lacked merit.

ARGUMENT

I. Standard of Review

This Court reviews decisions of the Tax Court to determine 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. Minn. Stat. § 271.10, subd. 1 (2006).

This Court reviews the Tax Court's conclusions of law *de novo* and the Tax Court's findings of fact for clear error. Bond v. Commissioner of Revenue, 691 N.W.2d 831 (Minn. 2003).

Accordingly, the Tax Court's conclusions that it had Erie jurisdiction to determine Mrs. Byers's constitutional claim that she raised in the amendment to her notice of appeal, that the constitutional claim was meritless, and the impact of the Commissioner's failure to send a taxpayer the notice required by Minn. Stat. § 270.0603 and MBNA, *supra*, will be reviewed *de novo*. The Tax Court's finding that sufficient evidence existed to reasonably support the Commissioner's assessments will be reviewed for clear error.

II. The Tax Court Erred When It Concluded That This Court's Erie Decision Did Not Require It To First Stay Its Proceedings And To Then Transfer Mrs. Byers's Second Constitutional Claim To A District Court.

Nearly a quarter-century ago, this Court laid down certain dictates for the Minnesota Tax Court to follow in the event that a party raised before it a constitutional claim in defense against a tax assessment. Erie Mining Co. v Commissioner of Revenue, 343 N.W.2d 261 (Minn. 1984).

The dictates of Erie that the Tax Court must follow are both simple and unambiguous:

First, the Tax Court must stay its proceedings; and

Second, the Tax Court must refer the constitutional claim raised to a District Court. Erie at 264.

In her original notice of appeal to the Tax Court, Mrs. Byers raised a constitutional claim. Following Erie, the Tax Court properly transferred to the District Court that constitutional claim. In turn, on December 9, 2004, the District Court retransferred that constitutional claim to the Tax Court.

As the Tax Court undoubtedly recognized, however, the

parameters of the District Court's December 9, 2004 Erie retransfer order were limited:

"The language used in the District Court's December 9, 2004 Order was not the standard Erie transfer language; the language normally used covers all prior and future constitutional issues." (Tax Court Order dated June 27, 2006 at 4.)

The Tax Court approved an amendment to Mrs. Byers's notice of appeal that was made well after December 9, 2004. In her notice of appeal amendment, Mrs. Byers raised a second and distinct constitutional claim. Unfortunately, unlike its treatment of Mrs. Byers's first constitutional claim, and notwithstanding its knowledge of the limiting language of the District Court's December 9, 2004 dated retransfer order, the Tax Court decided to eschew the Erie mandates.

Waving aside Mrs. Byers's vigorous argument that the Tax Court was required to stay its proceedings and transfer her new constitutional claim to a District Court, the Tax Court blithely (1) proceeded to a trial on the facts, (2) stated it would transfer the constitutional claim at some later date, (3) ordered and received post-trial briefing and (4) on April 4, 2006, issued an order for judgment in

which it asserted jurisdiction over Mrs. Byers's second constitutional claim--and decided it adversely to her.

Still further, even after it had side-stepped the Erie prerequisites to conduct a trial, the Tax Court in fact never transferred Mrs. Byers's second constitutional claim in what it termed a "Second Erie Transfer." (*See* Tax Court Order of January 11, 2007 at 3).

Contrary to the Tax Court's assertions in both its April 4, 2006 and January 11, 2007 dated orders, the Tax Court did not transfer Mrs. Byers's second constitutional claim to the District Court on November 2, 2005. Likewise, the District Court did not retransfer that claim to the Tax Court on November 7, 2005.

To explain, the Tax Court alleged that a "Second Erie Transfer" took place, but that the parties merely were not notified of it due to its late-discovered "clerical error." (Tax Court Order dated June 27, 2006 at 4.)

The entire record, however, is bereft of any Tax Court order dated on or about November 2, 2005, which purported to transfer Mrs. Byers's second constitutional claim to the District Court. Not

surprisingly, then, the entire record also lacks any District Court order dated on or about November 7, 2005, which purported to retransfer that constitutional claim to the Tax Court.

[The Tax Court, in its January 11, 2007 dated order at 3, also stated that the District Court's role in the alleged "Second Erie Transfer" took place on November 9, 2005, rather than on November 7, 2005.]

Assuming, *arguendo*, that the Tax Court actually committed a "clerical error" that prevented the parties from learning of a November 2, 2005 "Second Erie Transfer," it is highly implausible that the District Court committed the identical "clerical error" and likewise failed to inform the parties of the supposed November 7 (or November 9), 2005, "Second Erie Transfer" order.

In any event, even if it had taken place as the Tax Court alleged, a "Second Erie Transfer" would have not have cured the Tax Court's failure to follow Erie's first dictate, i.e. order a pre-transfer stay of its proceedings.

It necessarily follows, of course, that the so-called "Third Erie Transfer," memorialized in the Tax Court's order of June 27, 2006 and

in the District Court's order of August 24, 2006, which took place after the Tax Court purported to decide the facts of this case, likewise does not cure the Tax Court's failure to abide by the first Erie dictate.

This Court no doubt fashioned Erie as a judicial remedy to, *inter alia*, prevent taxpayers from falling under the concurrent jurisdiction of the Tax Court and of a District Court and thus implicating potential issues of separation of powers.

Thus, this Court has plainly stated that when the Tax Court is presented with a constitutional claim, Erie first requires that it stay its proceedings and then transfer that claim to a District Court. In Mrs. Byers's case, however, the Tax Court read out of Erie this first requirement and postponed the second requirement to a date of its choosing.

The Tax Court justified its decision to refuse to stay its proceedings on the ground that Mrs. Byers's amendment to her notice of appeal raised a new constitutional claim but "no new facts." (Tax Court orders dated April 4, 2006 at 5, and June 27, 2006 at 4.). Erie, however, in no way stands for the proposition that the Tax Court may first proceed to a trial on the facts of a case and then, on some later

date, transfer a constitutional claim to the District Court. Regardless, as a matter of fact, the Tax Court also clearly erred.

As the Tax Court stated, Mrs. Byers argued that her tax assessment was void because the Commissioner failed to provide her with the statutory notice of her rights as a taxpayer mandated by Minn. Stat. § 270.0603 and cited this Court's MBNA decision in support thereof. (Tax Court Order dated April 4, 2006 at 8.) Mrs. Byers raised this issue in the amendment to her notice of appeal. Thus, Mrs. Byers's notice of appeal amendment unquestioningly placed in dispute the factual question of whether the Commissioner had actually sent her the statutory notice.

It can be safely presumed that when Mrs. Byers moved the Tax Court to stay its proceedings and transfer her second constitutional claim to the District Court, the Tax Court was well aware of both the narrow terms of the District Court's December 9, 2004 dated retransfer order and of this Court's nearly quarter-century old dictates in Erie.

Notwithstanding such presumed awareness on the Tax Court's part, when Mrs. Byers raised her second constitutional claim before the Tax Court, it refused to stay its proceedings and declined to refer

Mrs. Byers' new constitutional issue to the District Court.

The Tax Court instead conducted a trial and issued a decision on the facts without its having performed any Erie transfer. It was only after Mrs. Byers's post-trial motions that the Tax Court initiated what it calls the "Third Erie Transfer." After this extra-legal "transfer," it issued another order of judgment, again deciding against Mrs. Byers on both the facts and her constitutional claim.

The Tax Court's actions were not harmless error. For one reason, it is never harmless error when a Court acts against a citizen without jurisdiction. For another reason, the Tax Court's refusal to stay its proceedings, and instead to conduct a trial, caused it to implicitly decide at trial the very constitutional issue that it claimed it would later be transferring to the District Court.

Mrs. Byers's challenge to the constitutionality of Minn. Stat. § 289A.37, subd. 3, was that it violated a taxpayer's right to due process of law to the extent it required her to, at all times relevant to a case, bear the burden of proving that she did not receive unreported income.

As noted in more detail in section III, below, the Tax Court in effect decided the constitutional issue against Mrs. Byers by rejecting,

after the Commissioner's objection, her attempt to have the Commissioner put on his case-in-chief first. (Trial transcript at 17:22-19:1-22.)

When the Commissioner complained that, "I haven't heard [Mrs. Byers] present any evidence, nor have I heard her rest," the Tax Court immediately swore in Mrs. Byers as a witness. (Tr. at 19:14-22.) This act of the Tax Court affirmed that the presumption of correctness applied to her case and, necessarily, that the presumption of correctness was constitutional in unreported income cases.

Presumably, if this Court had authorized the Tax Court to, as it did here, find and decide facts first and to conduct an Erie transfer of a constitutional claim later, either Erie or its progeny would have said so. But this Court has seen it necessary to admonish the Tax Court for its failure to follow precise Erie protocol. *See Gonzales v. Commissioner of Revenue*, 706 N.W.2d 909, 911 (Minn. 2005) (The Tax Court must endeavor to follow the dictates of Erie.)

Here, the Tax Court failed to follow proper Erie protocol. This failure resulted in the Tax Court's once impliedly deciding Mrs. Byers's constitutional claim at trial and twice explicitly deciding it by

written order. The Tax Court, however, lacked jurisdiction to proceed in the case after Mrs. Byers raised her second constitutional claim. Accordingly, all proceedings that the Tax Court (and the District Court) conducted after Mrs. Byers's raised her second constitutional issue were void *ab initio*. This Court should so hold.

III. The Tax Court Erred As A Matter Of Law When It Concluded That Minnesota Statute § 289A.37, Subd. 3, Is Constitutional In Cases Where The Commissioner's Tax Assessments Are Based Solely On His Claim That The Taxpayer Received Unreported Income.

The Commissioner's assessments against Mrs. Byers for the years 1996, 1997 and 1998 are based solely on his allegation that Mrs. Byers received unreported income. To the extent that Minn. Stat. § 289A.37, subdiv. 3, applies to cases that involve a tax assessment based solely on the Commissioner's claim that a taxpayer failed to report income, the statute unconstitutionally deprives a taxpayer of substantive and procedural due process of law. The Tax Court clearly erred when it concluded otherwise.

Minn. Stat. § 289A.37, subdiv. 3, provides:

"Assessment presumed valid. A return or assessment of tax made by the commissioner is prima facie correct and valid. The taxpayer has the burden of establishing its incorrectness or invalidity in any related action or proceeding."

For two reasons, the Tax Court concluded that Minn. Stat. § 289A.37, subdiv. 3, was constitutional in unreported income cases like Mrs. Byers's case. First, the Tax Court stated that the statute's first part, applying a presumption of correctness to an assessment was not at issue in this case because the Tax Court had not relied on the presumption for its decision. Second, the Tax Court determined that Mrs. Byers had not proven that the second part of the statute, imposing the burden of proof on the taxpayer in any related action proceeding, was unconstitutional. Both of the Tax Court's pronouncements are erroneous.

Given that Minn. Stat. § 289A.37, subdiv. 3, provides that a presumption of correctness applies to the Commissioner's tax assessments, that presumption was a part of this case at its commencement. In fact, when Mrs. Byers protested at the very beginning of her trial against the application of the presumption of correctness to her unreported income case, by attempting to have the Commissioner put on his case-in-chief first, the Commissioner objected:

"Your Honor, if I may at least note an objection because at this moment there is no evidence of any kind placing that matter at issue, and I don't believe that the Commissioner should be required to go forward until Mrs. Byers rests, and I haven't heard her present any evidence, nor have I heard her rest." (Tr. 19:11-16.) [Emphasis supplied.]

In response to the Commissioner's objection, the Tax Court immediately had Mrs. Byers sworn in as a witness. (Tr. 19:17-22.)

Therefore, the presumption of correctness was present in Mrs. Byers's case and the Tax Court did apply that presumption against Mrs. Byers. In her notice of appeal amendment, however, Mrs. Byers objected that the statute was unconstitutional insofar as it purported to apply at all to cases, like hers, involving unreported income.

Addressing Mrs. Byers's challenge to the second part of Minn. Stat. § 289A.37, subd. 3, which imposes the burden of proof on a taxpayer in all actions or proceedings relating to the Commissioner's presumptively correct assessments, the Tax Court simply concluded that Mrs. Byers did not meet her burden of proving unconstitutionality and that "the income tax system in Minnesota has been found constitutional." (Tax Court Order dated January 11, 2007 at 7.)

Mrs. Byers, however, did meet her "heavy burden" of showing

that a taxpayer against whom the Commissioner assesses tax based solely on his determination that she received unreported income is a violation of both substantive and procedural due process of law.

Significantly, many federal courts have recognized the constitutional pitfalls of burdening a taxpayer with proving a negative, i.e. that he did not receive the income that the Commissioner claims he did. These cases include United States v. Janis, 428 U.S. 433, 440-41 (1976); Zuhone v. Commissioner, 883 F.2d 1317, 1325 (7th Cir. 1989); Gerardo v. Commissioner, 552 F.2d 549, 554 (3d Cir. 1977); and Weimerskirch v. Commissioner, 596 F.2d 358 (9th Cir. 1979).

As the Eighth Circuit Court of Appeals, the federal circuit which includes the State of Minnesota, has said:

"It is generally accepted that the Commissioner also must provide evidence linking a taxpayer to a legal tax-generating activity before being entitled to the presumption of correctness." Day v. Commissioner, 975 F.2d 534 (8th Cir. 1992) (Citing to Anastasato v. Commissioner, 794 F.2d 884, 887 (3d Cir. 1986) and Portillo v. Commissioner, 932 F.2d 1128 (5th Cir. 1991)).

In Day, the appellants, like Mrs. Byers here, argued that the presumption of correctness did not apply because the Commissioner did not show that they had received unreported income. The Eighth

Circuit took issue with the claim of the Day appellant, but it did so in a way that supports Mrs. Byers's claim:

"We disagree. Appellants do not contend that they are unconnected to the tax-generating income. It is undisputed that appellants managed the massage parlors for the years in question. Accordingly, the Commissioner has demonstrated a link between the taxpayers and the tax-producing income. Such a showing satisfies the threshold level of proof and entitles the findings of the Commissioner to the usual presumption of correctness. Day, supra, (citing to Zuhone, 883 F.2d at 1326; Gerardo, 552 F.2d at 554; and Pizzarello v. United States, 408 F.2d 579 (2d Cir. 1969), cert. denied, 396 U.S. 986, 24 L. Ed. 2d 450, 90 S. Ct. 481 (1970). [Emphasis supplied.]

The Commissioner here did not "demonstrate a link between [Mrs. Byers] and the tax-producing income." All the Commissioner did was point the Tax Court toward documents that merely reflected a third-party's claim that it paid Mrs. Byers "tax generating income."

The U.S. Supreme Court, and at least six federal Circuit Courts of Appeals, found some valid reason to fashion an exception to the presumption of correctness given to an I.R.S. notice of deficiency that is supported only by an allegation that a taxpayer received unreported income. That reason could be only that according a presumption of correctness to such a bare allegation infringes on a taxpayer's right to receive substantive and procedural due process of law.

This Court should follow the lead of the above-cited federal courts and hold that the application of Minn. Stat. § 289A.37, subdiv. 3, to cases in which the Commissioner of Revenue's tax assessment is supported by only an allegation that a taxpayer received unreported income, is unconstitutional.

IV. The Tax Court's Conclusion That The Commissioner's Tax Assessments Are Not Invalid Even If He Fails To Send A Taxpayer The Notice Required By The Minnesota Taxpayer Bill of Rights Is Clearly Erroneous.

Mrs. Byers also challenged the validity of the Commissioner's tax assessments against her on the ground that the assessments were void on account of the Commissioner's failure to send her a notice of her rights as a taxpayer as required by the Minnesota Taxpayers Bill of Rights. At the time the Commissioner contacted Mrs. Byers to notify her of his tax assessments, Minn. Stat. § 270.0603, subd. 3 (in effect in 2001, before its 2005 repeal and recodification by the legislature), provided that the appropriate notice under the Minnesota Taxpayers Bill of Rights "must be distributed by the Commissioner to all taxpayers contacted with respect to the determination or collection

of a tax." MBNA American Bank v. Commissioner of Revenue, 694 N.W.2d 778 (Minn. 2005).

Here, like the situation in MBNA, it is "undisputed that the Assessment explained the taxpayer's appeal rights as required by the statute authorizing the Assessment, but did not explain the procedures for filing refund claims or taxpayer complaints as required by the Taxpayers' Bill of Rights." MBNA, *supra*.

Although Mrs. Byers properly pleaded her Taxpayers' Bill of Rights notice claim in the amendment to her notice of appeal, the Commissioner failed to either plead responsively or introduce evidence that he had complied with the terms of Minn. Stat. § 270.0603, subd. 3.

This Court also stated in MBNA:

"The triggering language for the Taxpayers' Bill of Rights is broad - any statement to 'taxpayers contacted with respect to the determination or collection of a tax' must meet the four requirements outlined above. The Commissioner cannot argue that the Assessment in the present case is not a statement 'with respect to the determination or collection of a tax.' Absent any statutory language indicating that the requirements of the Taxpayers' Bill of Rights will not be enforced when there is an order of assessment under Minn. Stat. § 289A.37, and because the requirements of the Taxpayers' Bill of Rights do not conflict with the requirements of Minn. Stat. § 289A.37, we read the plain language of the Taxpayers' Bill of Rights to create requirements in addition to those of the statute authorizing the assessment order. [Emphasis supplied.]

The Tax Court did not find, and the Commissioner did not argue, that Mrs. Byers's order of assessment made mention of "the procedures for filing refund claims and filing of taxpayer complaints." Minn. Stat. § 270.0603, subd. 1.

Once more like the case of MBNA, here "the procedures for filing a refund claim are obviously distinct from the procedures for appeal to the Tax Court, which were included in the order, and therefore the Assessment did not meet the requirements of the Taxpayers' Bill of Rights." Had the Commissioner notified Mrs. Byers of her rights as a taxpayer, including her refund and complaint rights, she could have used that information to take another course, perhaps foregoing a Tax Court appeal, to resolve her tax dispute.

Neither this Court in MBNA, nor the Tax Court in Mrs. Byers's case, addressed Mrs. Byers's direct claim that the Commissioner's failure to send (as opposed to her having not received) the statutory taxpayer rights notice requires that the Commissioner's "non-conforming assessment" be abated.

While Minn. Stat. § 270.0603, subd. 3, provides that a taxpayer's "failure to receive the [notice] does not invalidate the determination or collection action," it does not make clear if the taxpayer's "failure to

receive" the statutory notice includes the Commissioner's failure to even send it; and, if it does not, whether an assessment that could not be invalidated on the ground of "non-receipt" could be invalidated on a ground of "failure to send."

It must be, however, that given a construction consistent with its remedial purpose, Minn. Stat. § 270.0603, subd. 3, cannot include cases where the Commissioner either neglected or refused to send the statutory notice; to conclude otherwise would read the requirements of the Taxpayers' Bill of Rights out of the law.

Furthermore, because Minn. Stat. § 270.0603, subd. 3 is ambiguous, "any ambiguities in the law must be interpreted in favor of the taxpayer." Dumont v. Commissioner of Taxation, 278 Minn. 312, 317 (Minn. 1967).

Consequently, this Court should hold that the Commissioner's non-conforming assessments are invalid as a matter of law and must be abated.

V. The Tax Court's Finding That Sufficient Evidence Exists To Reasonably Support The Commissioner's Determinations That Mrs. Byers Received Unreported Income Is Unsupported By The Record.

During each of the tax years 1996, 1997 and 1998, Mrs. Byers was not obliged by Minnesota law to file a return of, or to pay, income

tax unless her gross income for the year equaled or exceeded the gross income threshold that Minnesota law applied to her filing status of "married, filing separately."

Mrs. Byers's gross income threshold for the years at issue was, respectively, \$5,900.00 (1996), \$6,100.00 (1997) and \$6,250.00 (1998). The Commissioner claimed in his order of assessment that Mrs. Byers received unreported income from Glen Lake Bakery in the amounts of \$47,240.00 (1996), \$46,500.00 (1997) and \$41,650.00 (1998).

Mrs. Byers testified at trial that she was not associated with any income-producing activity during the years at issue. In response, the Commissioner called governmental witnesses who lacked any personal knowledge of Mrs. Byers's economic activities during the tax years.

The Commissioner's witnesses did purport to identify and authenticate documents allegedly relating to Mrs. Byers's economic activities during the tax years. Yet those documents were untrustworthy and inadmissible hearsay documents that supposedly came to their respective departments through other agencies, and

supposedly from the Glen Lake Bakery. Given that, the Tax Court clearly erred when it denied each of Mrs. Byers's timely evidentiary objections and admitted these documents into evidence.

Even if the Tax Court properly admitted the Commissioner's documents into evidence, they do not support the purpose for which he introduced them. Thus, the documents should be given no weight.

The Tax Court found that the documents it admitted were "independent sources" that "corroborate each other for the time worked and the amounts paid." However, the Minnesota income tax is not based on bare allegations of a third-party, even if set forth on government forms, that it paid amounts to someone. Instead, the tax is based on a taxpayer's receipt, whether actual or constructive, of income.

Here, at best, the overlapping documents admitted into evidence by the Tax Court reflect only a third-party's claim that it paid Mrs. Byers during the tax years. No evidence in the record shows that Mrs. Byers received unreported income above her applicable gross income threshold, or shows that she received the amounts of the claimed payments.

In fact, none of the Commissioner's witnesses testified that he had seen originals or copies of any bank checks, bank statements, bank deposits, payroll sheets or even Mrs. Byers's representation on any document to the effect that she actually or constructively received income in 1996, 1997 and 1998.

The Tax Court erred when it effectively found that the Commissioner was correct to assume, based on mere representations of payments made by a third-party, that Mrs. Byers received unreported income above her applicable gross income threshold and to further assume that, when Mrs. Byers did not file Minnesota income tax returns, she violated the law. These determinations by the Commissioner were arbitrary and erroneous. This Court should overturn the Tax Court's findings to the contrary.

CONCLUSION

This Court's *Erie* decision required the Tax Court, once Mrs. Byers's new constitutional claim was at issue, to (1) stay its proceedings and (2) transfer the constitutional claim to the District Court. The Tax Court, however, did neither. Accordingly, when the Tax Court conducted a trial on the facts and then purported to effect a post-trial (and post-decision) *Erie* transfer of that constitutional claim, it acted without jurisdiction.

Even if the Tax Court had jurisdiction to decide Mrs. Byers's constitutional claim, its conclusion that Minn. Stat. §289A.37, subd.3 is constitutional in cases where an order of the Commissioner is based solely on an allegation that a taxpayer received unreported income is clearly erroneous.

Alternatively, when the Tax Court concluded that the Commissioner's assessment was valid notwithstanding its failure to send Mrs. Byers a statutorily required notice informing her of her rights as a taxpayer, the Tax Court committed a non-harmless error of law.

Finally, the Tax Court's finding that sufficient evidence existed

to reasonably support the Commissioner's determination that Mrs. Byers received unreported income for each taxable year was clearly erroneous.

In view of the foregoing, Mrs. Byers respectfully requests this Court to:

(a) vacate the Tax Court's order on the ground that it lacked jurisdiction to enter it and remand the case to the Tax Court for a new trial and for a proper Erie transfer of Mrs. Byers's new constitutional issue; or, alternatively,

(b) reverse the Tax Court's order on the ground that Minn. Stat. § 289A.37, subd. 3, is unconstitutional in tax cases involving a Commissioner's order of assessment based solely on his claim that a taxpayer received unreported income; or, alternatively,

(c) reverse the Tax Court's order on the ground that the Commissioner's order of assessment is invalid because he did not send Mrs. Byers notice of her rights as a taxpayer as required by the Minnesota Bill of Rights; or, alternatively,

(d) reverse the Tax Court's order on the ground that the Commissioner's tax assessments are not supported by the evidence.

Respectfully submitted,

DATE: April 23, 2007

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