

**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

JOY FORD,	)	
	)	
Petitioner-Appellant,	)	
	)	
v.	)	Docket No. 18-1524
	)	
COMMISSIONER OF INTERNAL REVENUE	)	
	)	
Respondent-Appellee.	)	

*Appeal from United States Tax Court Decision*

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**BRIEF OF APPELLANT JOY FORD**

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*Disclosure: No corporate disclosure is required as the Appellant is an individual taxpayer.*

## STATEMENT IN SUPPORT OF ORAL ARGUMENT

Appellants request oral argument because this case, which is on appeal from the United States Tax Court, involves a question of whether the Tax Court abused its discretion in failing to continue the trial of this case to allow the *pro se* taxpayer, Ms. Ford, to allow Ms. Ford to seek the assistance of counsel or adequately prepare for the trial in light of her sicknesses during the period leading up to the trial.

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## I. STATEMENT OF JURISDICTION

Pursuant to I.R.C. § 7442, the United States Tax Court had subject matter jurisdiction over the Petition filed by Joy Ford, Petitioner /Appellant (hereinafter “Ms. Ford” or “Appellant”), a Tennessee resident, against the Commissioner of Internal Revenue, Respondent/Appellee (“IRS” or “Appellee”), for the redetermination of the correct amount of the tax reported in the Notices of Deficiency for tax years 2012, 2013, and 2014 (“Tax Years at Issue”), which were issued by the IRS on January 14, 2016 and May 26, 2016. [Petition, 8575-16, pg. 3; Petition, 18605-16, pg. 3]

The United States Courts of Appeals has exclusive jurisdiction to review the decisions of the Tax Court in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury. I.R.C. § 7482(a)(1). Venue is in the Sixth Circuit based on the location of Ms. Ford’s residency in Tennessee under I.R.C. § 7482(b)(1)(A).

Ms. Ford timely filed her Notice of Appeal on April 25, 2018 pursuant to I.R.C. § 7502, [Notice of Appeal] after the Tax Court took the following actions: (1) issued T.C. Memo 2018-8, on January 25, 2018, and (2) entered the Final Decision on January 26, 2018. [Final Decision, Jan. 26, 2018] This appeal is from a final order that disposes of all the parties’ claims.

## II. STATEMENT OF ISSUES

(1) Whether the Tax Court committed reversible error in failing to ensure that Ms. Ford-Appellant was aware of her right to seek a continuance and also by failing to grant a continuance to ensure that Ms. Ford-Appellant had adequate time to prepare and present her case to the Tax Court.

(2) Whether Ms. Ford's operation of the Bell Cove Club ("Bell Cove") constitutes an activity engaged in for profit within the meaning of I.R.C. § 183(a) during the Tax Years at Issue.

## III. STATEMENT OF THE CASE

Ms. Ford timely filed her federal income tax returns for the Tax Years at Issue. [Joint First Stipulation of Facts, Case No. 8575-16 ("8575-16 Stip."), para. 1, 2; Joint First Stipulation of Facts, Case No. 18605-16 ("18605-16 Stip."), para. 1] On those tax returns, Ms. Ford claimed business deductions for her operations of the Bell Cove, an event and entertainment venue she owns and operates in Hendersonville, Tennessee. 8575-16 Stip., Exhs. 1-J & 2-J; 18605-16 Stip. Exh. 1-J] On January 14, 2016 and May 26, 2016, the IRS issued separate Notices of Deficiency for the Tax Years at Issue, assessing deficiencies, penalties and interest in the following amounts:

	<u>2012</u>	<u>2013</u>	<u>2014</u>
Tax	\$30,647.00	\$22,200.00	\$23,428.00
Penalties	\$6,129.40	\$4,440.00	\$4,685.60

[Petition, 8575-16, pg. 3; Petition, 18605-16, pg. 3] Ms. Ford challenged the Notices of Deficiency by filing separate petitions in the United States Tax Court, one on April 12, 2016 for the 2012 and 2013 tax years and a separate petition for the 2014 tax year on August 23, 2016. [Petition, 8575-16; Petition, 18605-16] The trial was conducted on May 10, 2017. [Trial Transcript, 5/10/2017 (“Trial Transcript”)] The separate petitions were consolidated for purposes of the trial, briefing and disposition of the cases. [Trial Transcript, pg. 4]

The Tax Court issued its opinion on January 25, 2018 in favor of the government. [T.C. Memo 2018-8] The Tax Court held that:

Ms. Ford earnestly devoted time and energy to Bell Cove but was primarily motivated by personal pleasure, not profit, and simply used the club's losses to offset her trust and capital gain income.

[T.C. Memo 2018-8, pg. 6] Ms. Ford filed her Notice of Appeal on April 25, 2018.

[Notice of Appeal, as amended]

#### IV. STATEMENT OF FACTS

##### Ownership and Operation of Bell Cove

Appellant owns and operates an event and entertainment venue in Hendersonville, Tennessee known and recognized internationally among country music fans as the Bell Cove. [Trial Transcript, pgs. 57-58, 62, 100] Ms. Ford purchased the Bell Cove in 1986 with her Husband, Sherman Ford, and began operating the Bell Cove as an event and entertainment venue. [Trial Transcript, pgs. 58-60] The business of the Bell Cove consists of i) hosting songwriter shows and other country music events as well as ii) rental of the Bell Cove for weddings and other special events. [Trial Transcript, pgs. 57, 62, 64-65]

Ms. Ford charges admission and rental fees for the use of the facility and sells food and drink items at the events. [Trial Transcript, pgs. 96-97] Ms. Ford's operation of Bell Cove was originally with the assistance and participation of her husband, and this continued through the years until he passed away in 1999. [Trial Transcript, pg. 58; 8575-16 Stip., para 5] In more recent years, Ms. Ford relaunched operations of the Bell Cove, but Ms. Ford has experienced numerous difficulties and setbacks in operating the Bell Cove on her own. [Trial Transcript, pgs. 19-22] In particular, the Bell Cove was significantly damaged by flooding during the 2010 Nashville floods. [Trial Transcript, pgs. 19-22] Bell Cove also suffered significant

damage from tornadoes in 2012. [Trial Transcript, pgs. 19-22, 90] Despite these setbacks, Ms. Ford has continued efforts to operate the Bell Cove as an event and entertainment venue. [Trial Transcript, pgs. 19-22, 33]

Consistent with its operation as an active trade or business, the Bell Cove Club has a business tax license, music licenses and is registered with the Tennessee Revenue Department to collect sales tax. [8575-16 Stip., paras. 25-30] The Bell Cove also maintains property and casualty insurance. [8575-16, para. 31; Trial Transcript, pg. 98] Ms. Ford does not have a beer or liquor license due to the liability risks associated with those licenses. [Trial Transcript, pg. 87] While in recent years, Ms. Ford has not been using the kitchen to prepare meals, she has plans to begin using the kitchen more extensively in the future. [Trial Transcript, pgs. 88-90]

Ms. Ford retains all business decision-making functions with respect to running the Bell Cove. [Trial Transcript, pgs. 58, 60-62] During the Tax Years at Issue and in all subsequent years, Ms. Ford dedicated 8-10 hours per day to the care and operation of the Bell Cove. [Trial Transcript, pg. 27] The time and effort devoted by Ms. Ford to the operation of the Bell Cove involves booking events, advertising and making all decisions related to the Bell Cove. [Trial Transcript, pgs. 77-82, 95-98] Ms. Ford prepared accounting records during the Tax Years at Issue

and provided those records to her accountant, an enrolled agent, who assisted with tax return preparation. [Trial Transcript, pgs. 28-30, 81-82] Despite the daunting task of operating the Bell Cove without her husband, she continues to show a zeal and commitment to its operation despite numerous setbacks. [Trial Transcript, pgs. 19-22]

Prior to going into the event and entertainment venue business, Ms. Ford and her husband were traveling entertainers and were very involved in the music industry. [Trial Transcript, pgs. 44-54] Ms. Ford gained experience running event venues through her travel and work in the music industry. She and her husband were well known and have deep ties to the Nashville music community through which she networks and advertises the Bell Cove. [Trial Transcript, pgs. 51-57]

The Bell Cove has gained an international following based on the artists that have performed or been discovered there. [Trial Transcript, pg. 100] This popularity is evident in the recognition that artists give to the efforts that take place at the Bell Cove. [Id.] Ms. Ford has also been in talks with producers who may make a movie or television show about the Bell Cove. [Trial Transcript, pg. 70] The Bell Cove has been in business for close to 30 years. [Trial Transcript, pg. 81]

The Bell Cove has doubled in value since its original purchase in 1986 based on property tax records and despite damage that it has suffered through repeated

natural disasters in Middle Tennessee. [Trial Transcript, pg. 59] Since reopening the Bell Cove, Ms. Ford has not made a profit from the operation of the Bell Cove as an event and entertainment venue despite Ms. Ford's best efforts. [8575-16 Stip., paras. 1, 2, 6-11] It is Ms. Ford's intent and belief that the Bell Cove can and will become profitable, and she remains committed to putting forth the effort to make it profitable. [Trial Transcript, pg. 78]

### Audit and Assessments

Ms. Ford was audited for the Tax Years at Issue and assessed for deficiencies in income tax based on the disallowance of deductions claimed from the operation of Bell Cove. [8575-16 Stip., para. 3; 18605-16 Stip., para. 2] Some of these expenses related to the repair of Bell Cove following flooding and tornadoes. [Trial Transcript, pgs. 19-22] As part of the audit, the IRS concluded that Ms. Ford was not engaged in an activity for profit pursuant to I.R.C. §183. [Answer] Ms. Ford challenged the Notice of Deficiency by filing separate petitions with the United States Tax Court on April 12, 2016 and August 23, 2016. [Petition, 8575-16; Petitioner, 18605-16]

Ms. Ford was not familiar with the appeal process and attempted to obtain the assistance of counsel, but she was unable to identify an attorney that would take her case prior to the scheduled trial date. [Calendar Call Transcript, 5/8/2017]

(“Calendar Transcript”), pgs. 7-10] Accordingly, she proceeded to Court as a *pro se* litigant. [Trial Transcript, pgs. 4-5] The only assistance that she had was from her accountant, Billy King who is an enrolled agent with the IRS but not a certified public accountant (“CPA”), nor was he authorized to practice before the Tax Court. [Trial Transcript, pg. 34; Calendar Transcript, pg. 11] Ms. Ford did not learn until the hearing that Mr. King was not a CPA, nor did she appreciate the significance of the difference. [Id.] Ms. Ford never requested a continuance and did not understand that she could request a continuance. [Entire Trial Transcript] It was her understanding from her communications with the IRS and the Tax Court that she had to proceed with the trial during the scheduled May 2017 calendar. [Calendar Transcript; Recall Transcript, 5/8/2017 (“Recall Transcript”)]

The case was set for a trial on the Tax Court’s docket on May 8, 2017. [Calendar Transcript, pg. 2] Ms. Ford and Mr. King appeared, and counsel for Appellee appeared. [Id.] At the original docket call, Appellee’s counsel and the Court communicated about whether the case was ready for trial with little-to-no input from the Ms. Ford. [Calendar Transcript, pgs. 2-6] Appellee’s counsel provided the background from the pretrial discussion of the parties, and the Court asked questions of Mr. King regarding his review of the applicable documents. [Id.]

THE COURT: Have you gathered all the information that you have on this issue?

MR. KING: I have probably ten to 12 times on the receipts and I had probably one day to go through them again and provide substantiation for 2014, so I did the best I could.

THE COURT: You had one day? Well, this case has been – knowing this case was coming for many months.

[Calendar Transcript, pg. 6]

Additional exchanges with the Court revealed that Ms. Ford lacked a clear understanding of the process and her rights under the Tax Court Rules.

THE COURT: An option from the Court is to push this later on in the week to give you a little more time to gather that information. We could proceed Wednesday. What's your position about proceeding to trial on this matter? Or would you still like some time to see if you could settle this?

MS. FORD: I really am confused about all of this.

THE COURT: Okay. Okay.

MS. FORD: I've never been to court like this.

THE COURT Okay.

MS. FORD: So I'm trying to learn.

THE COURT: I don't know if – you may not meet the guidelines for Ms. Gillam. I don't know. But if you do, then – well, you've been working with your CPA, so in consultation with him, I think we should decide what the most prudent way to proceed is, whether you should proceed to trial or whether you should try and work something out or if you think you have a good case and you're ready to go to trial, then we'll have a trial in this matter on Wednesday, but that would give you a couple more days to gather more information and also any other documentation that you think would support your position. It's the Government's position that this case is – that Ms. Ford didn't have the requisite intent to make a profit?

MS. HARRIS: That is correct, Your Honor.

THE COURT: And —

MS. HARRIS: Your Honor will remember, we issued discovery on this and attempted to gather documents to show that this is like manner – it was conducted, and the Court does have an order, a standing pretrial order. I'm happy to look at what they have but this has drug on for quite a while.

THE COURT: This case hasn't been –

MS. HARRIS: No, it hasn't. I'm sorry. No, it hasn't but we have been seeking information since last fall.

THE COURT: And is there any reason why that information hasn't been provided?

MS. FORD: Well, I was sick with pneumonia for a couple of months with pneumonia and bronchitis, and there was a storm that hit the Bell Cove, my place of business. ...

THE COURT: Well, Ms. Ford, if we proceed to trial, one thing you have to be aware of is there are specific rules that you're going to have to meet in order to make your case, and of course you can consult with your CPA. I'm sure your CPA is aware of what the rules under 183 are and what the standards are and exactly what Ms. Ford is going to have to establish in order to meet those rules. And it's going to be your contention that she meets those standards; is that correct?

MR. KING: Yes.

THE COURT: Well, what I can do is schedule this trial for Wednesday at ten o'clock and that doesn't mean that the parties can't sit down and talk prior to Wednesday. I would anticipate that it might make some sense for you guys to talk and to see if something can be worked out. I don't know what the merits are in this case. I don't know what evidence you plan to

present. Can you give me an idea about what kind of evidence you plan to present?

MR. KING: Well, I think she will be prepared to go through the rules to establish that she was in the business of making money.

THE COURT: Okay. All right. So any witnesses, Ms. Ford, that you plan to call?

MS. FORD: I don't know. Right now I'm not sure what 183 is even.

THE COURT: Okay. Well, consult with your CPA. He'll know what the rules are and what's going to be important for you is I'm going to give you the opportunity to testify and when you testify, you just make sur[e] that you hit all the important points. It also helps to have documentation, you know, business licenses and more things that support your contention that you were in this endeavor to make a profit.

MS. FORD: Well, I wouldn't have gone into it if I wasn't.

THE COURT: Okay.

MS. FORD: That would be silly.

THE COURT: Okay.

MS. FORD: I mean, I've generated millions of dollars through the music industry from helping everybody there. There are so many, George Jones,

John Anderson – I can't tell you how much people I've helped through there. And I didn't go in there to fail, you know. I would not want to fail.

THE COURT: All right. Well, this is what we'll do. We will schedule the trial for ten o'clock Wednesday. And do we have a stipulation of facts?

MS. HARRIS: Well, Your Honor, I have one prepared. It is not signed and if I could get some clarification on exactly, is Mr. King a witness? Is he – what role he's going to play. Ms. Ford didn't file a --- I'm somewhat at a loss here.

THE COURT: Okay. Mr. King?

MR. KING: I can only be a witness.

THE COURT: Okay.

MR. KING: I cannot practice.<sup>1</sup>

THE COURT: So you'll be a witness. Of course, you can -- I'm going to anticipate that you'll be working with Ms. Ford so that she has a better understanding of what the rules are, and I would also suggest that you meet with Ms. Gillam. Ms. Gillam is right behind you in the first row and talk to her, and then I think she'll be able to give you a better -- you, the two of you, go in one of the counsel's rooms, talk with Ms. Gillam, so that you can get a

better assessment of the strength of your case and just how prudent it is for you to proceed.

[Calendar Transcript, pgs. 6-12 (emphasis added)]

The case was recalled later that morning, and counsel for the Commissioner updated the Court on the discussions that Mr. Ford had with the Legal Aid Society and represented to the Court that “I think she understands what she is going to need to go forward” and that she would need to produce any additional documents by one o’clock the following day. [Recall Transcript, pg. 2] However, Ms. Ford did not speak during the entire recall session except to state her name and thank the Court at the conclusion of the recall. [Recall Transcript] Moreover, the Court acknowledged a concern that the Petitioner was not adequately represented:

THE COURT: Ms. Ford, I always think that if parties can get counsel, it's best to have counsel on a tax matter. I mean, these tax issues, even the simple ones, require -- you put yourself in a much better position when you have an attorney representing you, because the tax rules aren't intuitive, they're complex, and it helps to have counsel but it's very late in the game now and I'm going to schedule this trial for Wednesday and I'm going to want a stipulation of facts before the trial, so I'd like for you guys to submit a

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1 Mr. King was not admitted to practice before the Tax Court.

stip tomorrow and I won't have to call the case but you'll have to submit that to Ms. Bell.

In terms of working up the stipulation of facts, all the stipulation is is you're going to come up with a document that essentially saves the Court a lot of time, because you're going to be stipulating the things like a tax return and some kind of very basic things that the Court needs to decide the case. Of course, the bulk of what I'm going to decide the case is going to be based on, you know, the evidence that you provide.

But there are certain things that can be stipulated to and the stipulation is what allows the Tax Court to have a rather streamlined trial, so you guys are going to have to work together to put together that stipulation and you work with your accountant and you work with Ms. Dance Harris, but I must have that stipulation tomorrow.

[Recall Transcript, pgs. 3-4]

Notably, no previous continuances had been issued in this case, and Ms. Ford was not advised that she could request a continuance before proceeding in this case.

[Calendar Transcript; Recall Transcript] Accordingly, Ms. Ford proceeded as a *pro se* litigant two days later on May 10, 2017, representing herself in the trial of this case. [Trial Transcript]

## V. SUMMARY OF THE ARGUMENT

This case involves the redetermination of Ms. Ford's income tax liabilities for the Tax Years at Issue. The trial was held in Nashville, Tennessee on May 10, 2017 before the Honorable Maurice B. Foley. The issue was whether Ms. Ford's operation of an event and entertainment venue known as the Bell Cove was engaged in for profit under I.R.C. §183 for the Tax Years at Issue.

### **A. Abuse of discretion in failing to grant a continuance to Appellant to prepare her case for trial.**

Appellant maintains that the Court erred in allowing this case to proceed without a continuance because Ms. Ford plainly exhibited a misunderstanding of the appeal process and her rights, and the Court attributed certain knowledge and understanding to Ms. Ford based on the appearance of her accountant with her at the hearing. On several occasions, the Court referred to Mr. King as a CPA when he is only qualified as an enrolled agent and not admitted to practice before the Tax Court. Accordingly, he was not properly before the Court as a representative of Ms. Ford. Moreover, Ms. Ford clearly indicated to the Court that she did not understand the requirements of the law or of the trial process.

In proceeding with the trial, the Court also disregarded Ms. Ford's illnesses in leading up to the trial when she had pneumonia and bronchitis for a period

exceeding two months during the months leading up to the trial. Accordingly, she had good and reasonable cause for an extension but simply did not understand her right to make such a request. Accordingly, she was prejudiced by having to proceed to trial without adequate representation.

While the Court granted Ms. Ford two additional days to prepare for trial and present her case, at that point, it was too late, and Ms. Ford was in no position to timely obtain the representation of counsel nor prepare to present all the facts. Only after the hearing and with a trial brief deadline looming did she engage counsel to help her prepare a brief in accordance with the Court's post-trial order. The damage was already done, and Ms. Ford was therefore not afforded a fair opportunity to develop the record in this case to establish her qualifications for the claimed deductions.

Accordingly, Ms. Ford submits that she was unlawfully prejudiced by the Court's misunderstanding that she was being represented by a CPA in this case, and the Court abused its discretion in failing to grant a continuance, especially in light of Ms. Ford's sickness during the period leading up to the trial. Accordingly, the case should be reversed and remanded for a new hearing to establish a complete and adequate record that sets forth Ms. Ford's qualifications for the claimed deductions.

**B. Appellant was actively engaged in the operation of the Bell Cove for a profit.**

In the alternative, Petitioner submits that the Tax Court erred in concluding that Ms. Ford was not engaged in an activity for a profit during the Tax Years at Issue. The evidence presented at trial, establishes that Ms. Ford dedicated significant time to the operation of the Bell Cove with the intent to make a profit. She registered with the appropriate local agencies for the necessary licenses and tax registrations. She coordinated entertainment, charged admission and sold food and drink as part of the operations of the Bell Cove. The operation has all the hallmarks of an activity engaged in for profit except the profit, but as Ms. Ford testified at trial, the failure to make a profit was due in large part to circumstances outside her control, including (1) significant damage suffered by the club during the 2010 Nashville floods, which set back the growth of the club and (2) separate damage suffered by the Bell Cove in tornadoes in Hendersonville, Sumner County in 2012. The Court completely ignores these extraordinary circumstances in concluding that the activities of Petitioner were not engaged in for profit. In failing to consider these unique circumstances in light of the overall activities that Ms. Ford engaged in to generate a profit, the Court has committed reversible error, and this Court should overrule the Tax Court and strike down the subject Notices of Deficiency.

Moreover, the Court almost exclusively reaches its conclusion based on Ms. Ford's enjoyment of operating the club. While Ms. Ford experienced a level of enjoyment and pleasure from the operation of the club, her enjoyment was offset by having to deal with the many setbacks that she encountered. Yet, she continued to persevere to make the club profitable again. Thus, the Court's ruling is based on conclusions that are clearly erroneous.

## **VI. ARGUMENT**

### **A. Standard of Review**

The Tax Court's legal conclusions are reviewed de novo and its findings of fact are reviewed for clear error. Atlanta Athletic Club v. Commissioner, 980 F.2d 1409, 1412 (11<sup>th</sup> Cir. 1993). The Tax Court's determination of the activities that took place, are factual findings. A finding of fact is clearly erroneous if the record lacks substantial evidence to support it such that a review of the entire evidence of the record leaves the Court with the definite and firm conviction that a mistake has been committed. Id.

**B. The decision of the Tax Court should be reversed and remanded because it was an abuse of the Tax Court’s discretion not to grant Ms. Ford a continuance to adequately prepare to present her case to the Court.**

Appellant maintains that the Court erred in allowing this case to proceed without a continuance because Ms. Ford plainly exhibited a misunderstanding of the appeal process and the Court attributed certain knowledge and understanding to Ms. Ford based on the appearance of her accountant with her at the hearing. In particular, Ms. Ford commented to the Court during pre-trial hearings that “I really am confused about all of this.” “I’ve never been to court like this.” “So I’m trying to learn.” When asked if she was going to present any witnesses, she responded, “I don’t know. Right now I’m not sure what 183 is even.” [Calendar Transcript, pgs. 6-12] These statements indicate a clear lack of understanding of the process and the law, and the Tax Court acknowledged that it had reservations about proceeding.

Ms. Ford, I always think that if parties can get counsel, it's best to have counsel on a tax matter. I mean, these tax issues, even the simple ones, require -- you put yourself in a much better position when you have an attorney representing you, because the tax rules aren't intuitive, they're complex, and it helps to have counsel but it's very late in the game now and I'm going to schedule this trial for Wednesday

[Recall Transcript, pgs. 3-4] In reaching this conclusion, the Tax Court attributed some credibility to Mr. King as being able to assist Ms. Ford. “[O]f course you can consult with your CPA. I’m sure your CPA is aware of ... what the standard are and

exactly what Ms. Ford is going to have to establish in order to meet those rules.”

“Well, consult with your CPA. He’ll know what the rules are what’s going to be important for you.” [Calendar Transcript, pgs. 6-12]

First, Mr. King is not a CPA. He is an enrolled agent, so the Court assigned a greater degree of deference and experience to Mr. King than his qualifications merit. [Trial Transcript, pg. 34] This was plainly in error. Mr. King notified the court that he was not authorized to practice in the Tax Court and that he could only be a witness, but the Court disregarded this disclosure instead stating that the Court was “going to anticipate that [Mr. King] will be working with Ms. Ford so that she has a better understanding of what the rules are.” [Calendar Transcript, pgs. 11]

The Court’s misunderstanding regarding Mr. King’s qualifications and experience undermine the process and put Ms. Ford at a significant disadvantage in these proceeds. The Court should have notified Ms. Ford that she could request a continuance based on these factors, and its failure to do so was an abuse of discretion. The Court’s actions are even more egregious when considering that the Court also disregarded Ms. Ford’s illnesses in leading up to the trial when she had pneumonia and bronchitis for a period exceeding two months during months prior to the trial. Accordingly, she had good and reasonable cause for an extension but

simply did not understand her right to make such a request. Accordingly, she was prejudiced by having to proceed to trial without adequate representation.

While the Court granted Ms. Ford two additional days to prepare for trial and present her case, at that point, it was too late, and Ms. Ford was in no position to timely obtain the representation of counsel nor prepare to present all the facts. Only after the hearing and with a trial brief deadline looming did she engage counsel to help her prepare a brief in accordance with the Court's post-trial order. The damage was already done, and Ms. Ford was therefore not afforded a fair opportunity to develop the record in this case to establish her qualifications for the claimed deductions. Based on the foregoing, this case should be reversed and remanded for a new hearing to establish a complete and adequate record that establishes Ms. Ford's qualifications for the claimed deductions.

**C. During the Tax Years at Issue, Ms. Ford's operation of the Bell Cove constituted an activity engaged in for profit within the meaning of I.R.C. § 183(a).**

Deductions are allowable under section 162 for expenses of carrying on activities that constitute a trade or business of the taxpayer. "In the case of an activity engaged in by an individual...if such activity is not engaged in for profit, no deduction attributable to such activity shall be allowed under this chapter except as provided in this section." I.R.C. § 183(a). An activity is engaged in for profit if the

taxpayer has an “actual and honest objective of making a profit.” Keanini v. Commissioner, 94 T.C. 41, 46 (1990) (quoting Dreicer v. Commissioner, 78 T.C. 642, 644-45 (1982), aff'd without published opinion, 702 F.2d 1205 (D.C. Cir. 1983)). Although the expectation of profit need not be reasonable, a bona fide profit objective must exist. Keanini v. Commissioner, 94 T.C. 41 (1990); Treas. Reg. § 1.183-2(a). As the Court recognized in Helmick v. Commissioner, T.C. Memo 2009-220, although a taxpayer’s intent to make an activity “eventually profitable” may be objectively unreasonable, the genuine subjective intention to make a profit can serve as the basis for an active trade or business.

The regulations promulgated under section 183 provide a nonexclusive list of factors to be considered in determining whether an activity is engaged in for profit. Treas. Reg. § 1.183-2(b). Section 1.183-2(b)(1)-(9), Income Tax Regs., sets out the following factors (principally derived from case law, see Benz v. Commissioner, 63 T.C. 375, 382-383 (1974) to be taken into account in determining a profit objective, or lack of one:

- (1) the manner in which the taxpayer carries on the activity;
- (2) the expertise of the taxpayer or the taxpayer's advisors;
- (3) the time and effort expended by the taxpayer in carrying on the activity;

- (4) the expectation that assets used in the activity may appreciate in value;
- (5) the success of the taxpayer in carrying on other similar or dissimilar activities;
- (6) the taxpayer's history of income or losses with respect to the activity;
- (7) the amount of occasional profits, if any, which are earned;
- (8) the financial status of the taxpayer; and
- (9) elements of personal pleasure or recreation.

No single factor is determinative. Rather, the facts and circumstances of the case taken as a whole are determinative. Taube v. Commissioner, 88 T.C. 464, 479-80 (1987); Treas. Reg. § 1.183-2(b). Each of the factors are addressed below.

#### Manner of Carrying on the Activity

Ms. Ford came from a background being successful in the music industry. In an ideal world, she may have applied her experience and sound business judgment to her entertainment and event venue by cutting her losses and abandoning the venture after having lost money year after year. We acknowledge that an objective, reasonable person might have realized after the flooding and tornado that the venture may not likely be a profitable venture. However, her experience in running

the Bell Cove with her husband's assistance in the past had proved otherwise, and moreover, the reasonable person standard is not dispositive here. The taxpayer's expectation of profit need not be a reasonable one; it is sufficient if the taxpayer has a bona fide objective of realizing a profit. Dreicer v. Commissioner, *supra*; sec. 1.183-2(a), Income Tax Regs.; see also Helmick, *supra* (conclude that although a taxpayer's intent to make an activity "eventually profitable" may be objectively unreasonable, the genuine subjective intention to make a profit can serve as the basis for an active trade or business).

In operating the Bell Cove, Ms. Ford maintained business licenses, insurance and collected sales tax on the events at the Bell Cove. Ms. Ford also kept records of receipts and expenditures from 2008 through 2014 that she provided to her accountant to prepare tax returns. Although Ms. Ford did not institute recordkeeping systems that could have helped her improve her operations, the records substantiated her income and expenses. Ms. Ford also expanded the operations from just using the Bell Cove for entertainment to include renting the Bell Cove for weddings and other events. Accordingly, Ms. Ford carried on her duties related to the venue in a businesslike manner.

Expertise of Taxpayer or Advisors

Ms. Ford had both the personal knowledge and background to run an entertainment venue based on her and her husband's long history in the music industry. Ms. Ford had long been a musician and artist and had performed across the country at various entertainment venues. Furthermore, Ms. Ford consulted with advisors who recommended certain alternatives for improving the returns of the Bell Cove, including obtaining a liquor license. But Ms. Ford made the decision not to obtain a liquor license due to the corresponding risks associated with serving alcohol. Although Ms. Ford did not pursue some of the suggested uses of the property, it is not clear that Ms. Ford would have done better if she would have pursued some of those additional options, especially in light of the fact that the setback from natural disasters played a significant role in the inability of the Bell Cove to gain momentum during the Tax Years at Issue and generate a profit.

Time and Effort Expended in Activity

Ms. Ford spent more than 40 hours per week on her work related to the Bell Cove related to advertising, networking, and taking care of the property. The fact that Ms. Ford expended so much time and effort in the management and operation of the Bell Cove is a strong factor in supporting the fact that she had a profit objective. Again, the lack of success of the Bell Cove during the Tax Years at Issue

was attributable to the fact that the venue was significantly damaged by the 2010 floods and tornadoes in 2012. This set the Bell Cove back and prevented it from gaining the momentum to generate a profit, during the Tax Years at Issue.

#### Expectation That Assets May Appreciate

Ms. Ford bought the Bell Cove over 30 years ago, and the property has appreciated in value significantly during that intervening period. From 1998 to 2014, the property has over doubled in value. Accordingly, the appreciation of the property supports the conclusion that Ms. Ford had an expectation that the property would appreciate in value. Ms. Ford also has had discussions with producers to make a movie about the Bell Cove, so there are potential long-term profits separate from the operation of the Bell Cove.

#### Taxpayer's Success in Other Activities

Ms. Ford has been successful in the music industry, and as stated above, the inability to begin making profits at the Bell Cove is due in large part to circumstances outside her control, including the flooding and other natural disasters that she has had to endure and overcome.

#### History of Income or Losses from the Activity

Ms. Ford has engaged in the operation of the Bell Cove for about 10 years, since reopening follow her husband's death. When she operated the Bell Cove with

her husband in prior years, it was profitable. Since reopening the club, it has not made a profit, but for the Tax Years at Issue, the losses were due, at least in part, to disasters beyond the control of Ms. Ford. For example, in 2010, Nashville experienced a 100-year flood, and the Bell Cove is situated Old Hickory Lake, which was central to numerous disputes related to the proper management of flood control by the Army Corp of Engineers. Only two years later, Hendersonville was the sight of tornadoes that again caused significant damage to the Bell Cove.

Although a long history of losses is an important criterion, it is clear that this factor is not necessarily determinative of a lack of a profit objective. See e.g. Engdahl v. Commissioner, 72 T.C. 659, 669 (1979) (deductions allowed in spite of 12 straight years of losses in a horse breeding operation); Allen v. Commissioner, 72 T.C. 28, 34-35 (1979) (deductions allowed in spite of 12 straight years of losses in a ski lodge operation). Accordingly, on the basis of the record in the instant case, Ms. Fords' string of losses is not a strong indication that Ms. Ford did not engage in the Bell Cove with a profit objective, especially in light of the overall circumstances.

#### Amount of Occasional Profits Earned

In considering the amount of occasional profits earned, Ms. Ford has not made a profit since reopening the Bell Cove in 2008, but as previously stated, just when she should have been making a profit, she experienced setbacks as a result of

the flooding and tornadoes described above. The Tax Court failed to assign any significance or recognize the impact of these events on the factors in this case. This is indicative of the flawed analysis of the Tax Court's opinion in this case.

#### Taxpayer's Financial Status

Ms. Ford had income from other sources during the Tax Years at Issue which mitigated the impact of the losses experienced through the Bell Cove, but all Ms. Ford's other actions or activities support a conclusion that she was actively engaged in the Bell Cove to make a profit

#### Elements of Personal Pleasure or Recreation

Finally, it is important to note that while Ms. Ford loves the Bell Cove, her experiences in attempting to operate it were far from ideal in having to maintain and keep up with all the maintenance and natural disasters that have befallen the facility. Ms. Ford has suffered through disaster after disaster. Ms. Ford could not have foreseen the effects of the 2010 flood and 2012 tornadoes. The Tax Court concluded, in error, that Ms. Ford's motivation was more for personal pleasure than profit. Ms. Ford may have derived some element of personal satisfaction in seeing the careers of musicians furthered at the Bell Cove. However, as the regulations state, "An activity will not be treated as not engaged in for profit merely because the taxpayer had purposes or motivations other than solely to make a profit." Sec.

1.183-2(b)(9), Income Tax Regs. Accordingly, this factor should not overcome the overwhelming evidence that Ms. Ford was engaged in this activity for a profit.

The Bell Cove has been operated by Ms. Ford since 1986, originally with the assistance of Ms. Ford's husband who passed away in 1999. After his death and dealing with the grief related to his loss, she relaunched operations of the Bell Cove in 2008. The idea that the IRS can now approach this business after almost 30 years of activity and suggest that it is not engaged in for profit is troubling. It is particularly troubling considering the recent losses (1) followed a relaunch after her husband's death, (2) occurred without her having his assistance and (3) were caused in part by setbacks from natural disasters. Despite these difficulties and setbacks, she continues to put forth her best effort to make the Bell Cove profitable. As was the case in Helmick, while her efforts to make the Bell Cove "eventually profitable" may be objectively unreasonable, her genuine subjective intention to make it profitable should serve as the basis for the Court to conclude that there is an active trade or business.

Based on the foregoing, when looked at as a whole the, facts are in Ms. Fords' favor. Ms. Ford operated the Bell Cove during the Tax Years in Issue with an objective to make a profit. While unforeseen and unanticipated circumstances prevented her from making a profit, it does not overcome the proof that the activity

was engaged in as a business for profit. Accordingly, this Court should overrule the Tax Court and allow Appellant to deduct the expenses at issue.

## VII. CONCLUSION

As explained above, Ms. Ford respectfully requests that the Court of Appeals reverse the holding of the Tax Court and conclude either (1) that the Tax Court failed to properly grant a continuance to Ms. Ford to provide her the opportunity to obtain adequate representation and prepare her case for trial and remand the case for further proceedings, or, in the alternative, (2) that the Tax Court erred in concluding that Ms. Ford was not engaged in a trade or business with the objective of profit under I.R.C. §183 and issue a decision in favor of Appellant.

Respectfully submitted this the 18<sup>th</sup> day of June, 2018.

/S/ Brett R. Carter

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**CERTIFICATE OF COMPLIANCE WITH RULE 32(A)(7)**

I hereby certify that my word processing program, Microsoft Word, counted 7,326 words in the foregoing brief.