

STATE OF MINNESOTA
IN SUPREME COURT

MAR 18 2011

FILED

Crossroads Church of Prior Lake, MN,

Relator,

vs.

County of Dakota,

Respondent.

**RESPONDENT'S MEMORANDUM IN
OPPOSITION TO RELATOR'S
PETITION FOR REHEARING**

Supreme Court No. A10-859

Tax Court File No. 19HA-CV-09-2780

Respondent strongly opposes Relator's petition for rehearing of the above-entitled matter. The Affidavit of Suzanne W. Schrader in Opposition to Relator's Petition for Rehearing is attached as Exhibit A.

ARGUMENT

The issues of constitutionality raised by Relator in the Supreme Court were not properly raised by Relator before the Tax Court, and the Tax Court therefore was not required to rule on any constitutional issues.

In support of its arguments, Relator refers to the procedure known as the "*Erie Shuffle*" or "*Erie transfer*," whereby the Tax Court obtains from the district court jurisdiction to hear constitutional issues. *See Erie Mining Co. v. Comm'r of Revenue*, 343 N.W.2d 261 (Minn. 1984). Relator has claimed that when the Tax Court signed its standard form Order of Referral and Stay of Proceedings, requesting the district court to transfer constitutional jurisdiction to the Tax Court, that this somehow proved that Relator actually raised constitutional issues in Tax Court. This is not correct. Tax Court

judges routinely inquire of parties whether constitutional issues may be raised, and if so, the Court instructs the parties that an “*Erie Shuffle*” must be done. *See* Affidavit of Suzanne W. Schrader in Opposition to Relator’s Petition for Rehearing, paragraph 2. However, it is incumbent upon a party to actually raise such constitutional arguments in its briefs if it intends to make such arguments. Relator made no such constitutional arguments in its summary judgment briefs, and the Tax Court therefore was not required to rule on any such issues.¹ It should further be emphasized that this is the first time Relator has raised this argument concerning the *Erie transfer*, although this argument is not based on any “new” facts that have only recently come to light; all of Relator’s arguments in this motion could have been raised immediately following the issuance of the Tax Court’s order, yet Relator did not even raise these arguments in its Supreme Court brief.

Although Relator has accurately stated that the Tax Court *could have* raised constitutional issues *sua sponte*, there was no requirement that the Court do so, and this concept did not eliminate Relator’s responsibility to raise its own constitutional issues in its Tax Court brief, particularly if Relator wanted to preserve such issues for Supreme

¹ The record below shows that Relator raised a constitutional issue only on pages 13-14 of its memorandum opposing Respondent’s summary judgment motion, where it cited to the Constitution and to one case that provided a general interpretation of the constitutional provision. However, Relator raised this issue only in the context of the hardship requirement under its motion for waiver of taxes, which had already been denied by the Tax Court, and which was not relevant for the parties’ summary judgment motions. Relator further did not raise this issue in its memoranda in support of its own motion for summary judgment. The Supreme Court found this constitutional issue about the hardship requirement to be moot, and thus declined to rule on it.

Court review. How would the Tax Court know which specific constitutional issues Relator wanted it to address if Relator did not include such arguments in its brief? Although the Tax Court Judge signed an Order requesting constitutional authority be transferred from the district court, this did not mean that either party had in fact raised any specific constitutional issues in Tax Court, but only meant that the parties had expressed an intent to raise such issues. The *Erie transfer* did not require either party to raise constitutional issues, and the record of the Tax Court is clearly devoid of any constitutional issues actually being raised and argued by Relator.²

Relator now claims for the first time that it could not have raised constitutional issues in Tax Court until after the *Erie transfer* documents were finalized, because the Tax Court Judge signed a document indicating that the constitutional issues were “stayed” until such authority transferred, but this argument does not have merit. Although the transfer of jurisdiction was required to take place prior to the issuance of the Tax Court’s Order below, the parties were free to raise such constitutional arguments in their summary judgment briefs even if the briefing took place prior to the official transfer of constitutional authority from the district court. In fact, it was incumbent on both parties to raise all arguments they had in support of their motions in their original summary judgment briefs. Moreover, Relator itself must have believed it had the ability to raise constitutional issues in its summary judgment briefs, as it raised a constitutional

² Relator raised only the constitutional issue described in footnote 1, but this argument was untimely, as the motion for waiver of taxes had already been ruled on.

issue in its brief opposing Respondent's motion for summary judgment, but the Supreme Court determined that issue to be moot.³

If Relator had believed it was prevented from making any constitutional arguments due to the timing of the *Erie transfer* documents, it could have asked for an extension of time in Tax Court so it could brief constitutional issues, but it chose not to do so. Respondent is not aware that Relator's counsel ever asked the Tax Court for an extension of time to do additional briefing of constitutional issues, nor did counsel ever claim to the Tax Court that she was not afforded an opportunity to present constitutional arguments. *See* Affidavit of Suzanne W. Schrader in Opposition to Relator's Petition for Rehearing, paragraph 5. Relator has not cited to a single document in the record below that actually sets forth the constitutional issues Relator now claims were made in Tax Court. Therefore, Relator's arguments do not have merit.

Under the second heading numbered "III," found on page 7 of its brief, Relator again claims that it raised the issues of constitutionality but that the Tax Court "refused" to rule on them. This is not true. At no point in the Tax Court's Order was it stated that the Court refused to rule on the constitutional issues – there simply were no constitutional issues before the Court.

³ The constitutional issue raised by Relator in response to Respondent's motion for summary judgment, as described in footnote 1, was untimely as it related to a previous waiver motion that had already been ruled on. Nonetheless, by raising this constitutional issue at that time, it demonstrates that Relator did not in fact believe it was prohibited from raising constitutional issues prior to the date the *Erie transfer* was accomplished, as Relator now claims.

Under the third heading numbered “III,” found on page 8 of its brief, Relator claims for the first time that it never received notice of the *Erie transfer* order that had been issued from the district court. This argument does not have merit. Relator’s original property tax petition was filed in the district court, where the court file is maintained. The district court records indicate that it sent a copy of the Transfer Order to Lynn Basich, who had previously been Petitioner’s only Attorney of Record. (Relator’s page P-6). Although Ms. Basich sent a “Notice of Association of Attorneys” to the Tax Court in St. Paul on July 27, 2009, indicating that Ms. LeMaster would be joining her as an associate and co-counsel on the case (Relator’s page P-10), she apparently did not mail this notice to the district court where Relator’s property tax petition had been filed, and therefore the district court did not have notice that Ms. LeMaster was co-counsel on the case. Thus, the district court mailed the *Erie transfer* order only to Ms. Basich.⁴ However, there is no assertion that Ms. Basich was not an attorney of record for Relator throughout the Tax Court proceedings. Both Ms. Basich and Ms. LeMaster represented Relator in Tax Court, and this can be seen by viewing the signature pages on Relator’s summary judgment memoranda. Ms. Basich further represented Relator in the *Erie transfer* proceeding, as can be seen on P-2 attached to Relator’s memorandum.

⁴ Relator’s statement of facts refers to page P-9 attached to its memorandum, yet this Court Order does not indicate who the document was mailed to. Nevertheless, it is assumed that the district court mailed any and all notices to Lynn Basich, Ms. LeMaster’s co-counsel and the only attorney of record known to the district court, as evidenced by the notice sent on page P-6.

Therefore, Relator's claim that it was not notified of the *Erie transfer* does not have merit.

Relator cites to *Byers v. Commissioner of Revenue*, 741 N.W.2d 101, 105 (Minn. 2007) in support of its argument that the district court did not provide the parties with notice of the *Erie transfer*. However, *Byers* was not on point. In that case neither the petitioner, nor any attorney of record, received the notice of transfer, and moreover, the petitioner in *Byers* raised that issue while still in the Tax Court. In the present case, Ms. Basich was provided with notice as attorney for Relator. Beyond this, when the Tax Court issued its summary judgment order, Ms. LeMaster knew at that time, if not before, that the *Erie transfer* order had been issued and that she had not personally received a copy of it. She could have raised these arguments at that time, and/or she could have requested additional time to brief the constitutional issues if she believed she had a basis for such a claim, yet she did not do so. Further, even though Relator raised various new constitutional issues in its Supreme Court brief, albeit untimely, this issue concerning the *Erie transfer* was not raised until now, even though Relator had all of the information it needed to raise this issue immediately after it received the Tax Court's order when it was first issued.

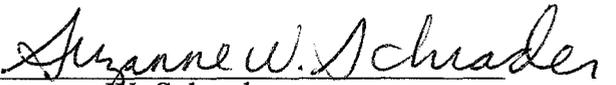
CONCLUSION

Relator has raised new issues concerning the *Erie transfer* that it could have raised in Tax Court or in Relator's Supreme Court brief, yet Relator did not do so. Further, Relator's claim that it raised constitutional arguments in Tax Court have no merit. A review of the record below clearly shows that such issues were not raised, and the Tax

Court therefore was not required to rule on them. In conclusion, Respondent respectfully requests that Relator's petition for rehearing of this matter be denied.

Dated: March 16, 2011.

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