

No. A05-0442

STATE OF MINNESOTA
IN SUPREME COURT

Kmart Corporation,

Relator,

vs.

County of Stearns,

Respondent.

BRIEF OF RELATOR KMART CORPORATION

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LEGAL ISSUES

I. Did the Tax Court err in holding that the information supplied by Relator Kmart Corporation (“Kmart”) to the Stearns County Assessor within 60 days of filing its property tax petitions in each of the three petition years at issue was insufficient to satisfy Minn. Stat. § 278.05, subd. 6(a), the so-called “60-Day Rule”?

The Tax Court held that Kmart’s failure to provide its retail business operating expenses with its 60-Day Rule disclosures violated the Rule, notwithstanding Kmart’s undisputed evidence that (i) under the lease in question those expenses were not the responsibility of the landlord, and accordingly were not expenses of the real estate, (ii) Kmart had no information regarding the expenses of operating the underlying real estate available to it, and (iii) numerous previous Tax Court cases consistently interpreted the 60-Day Rule not to require production of retail business operating expenses which were not the obligation of the landlord under the lease.

BFW Company v. County of Ramsey, 566 N.W.2d 702 (Minn. 1997)

Minnesota Timberwolves Limited Partnership v. County of Hennepin, File Nos. TC-26329, TC-26856 (Minn. Tax Ct. April 20, 1999)

Menards, Inc. v. County of Sherburne, File No. C2-98-460 (Minn. Tax Court August 20, 1998)

Kmart Corp. v. County of Otter Tail, File No. C9-00-551 (Minn. Tax Ct. Order dated Nov. 18, 2000)

II. Did the Tax Court err in characterizing its interpretation of undefined statutory terms within Section 278.05, subd. 6(a) as resolving a question of fact, rather than an issue of statutory construction?

The Tax Court held that its prior decisions, interpreting the undefined statutory phrases “income and expense figures . . . and anticipated income and expenses, for income-producing property” to exclude retail business expense statements, did not

qualify as statutory construction, but rather resolved questions of fact unique to each case.

BFW Company v. County of Ramsey, 566 N.W.2d 702 (Minn. 1997)
Baker v. Ploetz, 616 N.W.2d 263 (Minn. 2000)
Amaral v. Saint Cloud Hospital, 598 N.W.2d 379 (Minn. 1999)
State v. Murphy, 545 N.W.2d 909 (Minn. 1996)

III. Did the Tax Court err in its interpretation of Minn. Stat. § 278.05, subd. 6(a) to require “any and all available information relating to the income-producing subject property”?

The Tax Court dismissed Kmart’s petitions on this basis even though this standard departs from prior Tax Court decisions interpreting and applying the Legislature’s requirements under the 60-Day Rule, and significantly expands upon the language actually employed in the statute by the Minnesota Legislature and the actual holding in previous decisions by this Court.

Montgomery Ward & Co., Inc. v. County of Hennepin, 450 N.W.2d 299 (Minn. 1990)
BFW Company v. County of Ramsey, 566 N.W.2d 702 (Minn. 1997)

IV. Did the Tax Court err in failing to apply the principle of *stare decisis*?

In granting dismissal, the Tax Court did not acknowledge that its decision broke new legal ground and penalized Kmart for its reliance on past Tax Court precedents interpreting the 60-Day Rule and applying it to similar facts.

Engdahl v. Commissioner of Revenue, File No. 6600 (Minn. Tax Ct. Order dated Feb. 26, 1996)
Kmart Corp. v. County of Otter Tail, File No. C9-00-551 (Minn. Tax Ct. Order dated Nov. 18, 2000)
Kmart Corp. v. County of Douglas, File No. C7-00-309 (Minn. Tax Ct. Order dated Jan. 11, 2001)
Kmart Corp. v. County of St. Louis, File Nos. C1-00-600670 et al. (Minn. Tax Ct. Order dated Jan. 11, 2001)

V. Did the Tax Court err in failing to follow the statutory construction rule requiring the resolution of any doubt or ambiguity in statutory language in favor of the taxpayer?

The Tax Court held that the 60-Day Rule is clear and unambiguous about the information to be produced, but went on to hold that taxpayers must produce information without any guidance or definition as to what specific information may be required.

BCBSM, Inc. v. Comm’r of Revenue, 663 N.W.2d 531 (Minn. 2003)
Charles W. Sexton Co. v. Hatfield, 116 N.W.2d 574 (Minn. 1962)
Northland Country Club v. Comm’r of Taxation, 241 N.W.2d 806 (Minn. 1976)

VI. Does the Tax Court’s interpretation of the 60-Day Rule, to require production of any information “relating to” a subject property that a County may later deem relevant to valuation after the statutory compliance period, render the statute unconstitutionally vague, by failing to provide taxpayers with adequate notice or due process concerning what is required in order to comply?

The Tax Court held that (i) the information that is required under the 60-Day Rule can only be determined after the fact, on a case-by-case basis, by determining what the assessor’s office may contend is information relevant to the valuation of any given subject property, (ii) to determine such information within the 60-Day period would be premature, and (iii) as a result, taxpayers must produce everything they have, and they are left to guess at what the scope of that may be.

Montgomery Ward & Co., Inc. v. County of Hennepin, 450 N.W.2d 299 (Minn. 1990)
State of Minnesota v. Orsello, 554 N.W.2d 70 (Minn. 1996)
Geiger v. City of Eagan, 618 F.2d 26 (8th Cir. 1980)
Connally v. General Construction Co., 269 U.S. 385 (1926)

STATEMENT OF THE CASE AND OF THE FACTS

Kmart timely filed property tax petitions challenging the Stearns County Assessor's January 2, 1999, January 2, 2000, and January 2, 2001 valuations of Kmart's store located in Waite Park, Minnesota, for taxes payable in 2000, 2001, and 2002, respectively. App. 29, 34, 71.¹ Within 60 days after filing each of its petitions, in compliance with the 60-Day Rule's requirement to produce "information, including income and expense figures, verified net rentable areas, and anticipated income and expenses, for income-producing property," Kmart supplied information to the County Assessor. App. 42-61, 78-96 (Letters from Kmart's counsel² and enclosed documents, attached to Affidavits of Gary Grossinger and Creig L. Andreasen). Years later, in 2004, Stearns County pursued a motion for dismissal under the 60-Day Rule, claiming that Kmart did not produce all required information. App. 76. On January 4, 2005, Chief Judge George W. Perez of the Minnesota Tax Court granted dismissal. App. 20.

¹ References in the form "App. ____" are to specified pages of Relator Kmart's Appendix, and references in the form "Tr. ____" are to specified pages of the Transcript of the September 9, 2004 hearing.

² While Petitioner's file copy of Mr. Andreasen's Affidavit attaches Kmart's 2001, 2003, and 2004 60-Day Rule compliance letters, Kmart's 2002 60-Day Rule compliance letter is inexplicably missing. Kmart did not focus on the missing letter prior to the hearing on the county's motion, because the motion as filed addressed only Kmart's pay-2000 petition. App. 76 (July 30, 2004 Supp'l Notice of Motion). Nonetheless, Kmart noted in its brief and at the hearing that it had timely submitted 60-Day Rule letters for every year from 2000 on. (See, e.g., Tr. 13.) The County did not dispute that fact. At the hearing, when the court inquired whether Kmart would object to the County's informal attempt to extend its motion to cover additional petition years beyond 2000, Kmart agreed, and the court did not invite or require any further submissions to accomplish that informal extension. See Tr. 22-23; App. 22 (Jan. 4 Order at p. 3 n.1). At all times, the County's arguments for dismissal of Kmart's petitions have been identical for all petition years at issue. The County has never suggested that the 2002 letter was not received.

1. **Kmart Produced All Its Available Information About the Income Generated by the Property – the Fixed Rent Under Its Lease.**

Kmart timely produced all income information in its possession, historic and actual, for the subject property. As explained in the Affidavit of Kmart's Assistant Controller William Saad, Kmart is a tenant at the subject property. App. 98. As such, Kmart's only information about the income generated by the real estate is the amount of rent generated under the lease, which Kmart fully disclosed to the County. App. 97-98 (Saad Affidavit at ¶ 4).

The documents Kmart provided to the County Assessor in connection with its first petition for the subject property, in May of 2000, included an Information Sheet with a detailed lease summary, together with a site drawing and selected provisions from the lease, as well as a Supplemental Information Sheet specifying the lease's commencement date. App. 44-61. Together these documents set forth, among other things, that the lease commenced on October 19, 1992, that the net rentable area was 94,841 square feet, and that the rent payable from commencement of the lease throughout its anticipated 25-year term was \$567,150 per year. They also established that no additional percentage or overage rent was required under the lease. Id.

In each subsequent year, Kmart provided supplemental 60-Day Rule information, advising the County that the lease information previously supplied had not changed. Out of an abundance of caution and in furtherance of settlement negotiations on the merits of the valuation issues at hand, in 2001 and beyond Kmart also began providing the County with copies of its net profit reports, to ensure that the County was aware of the amount of

retail income generating by the store, even though no operative overage rent clause existed in its lease for this subject property. App. 94-96.³

2. **As a Tenant, Kmart Did Not Maintain Expense Records for Operation of the Real Estate, But Only for Operation of Its Retail Business.**

Kmart's 60-Day Rule letters further apprised the County that "operating budgets for the real estate are not prepared [by Kmart] in the ordinary course of business and are therefore unavailable." App. 94, 86, 78. They explained that the net profit reports being provided identified "anticipated expenses *for the retail store operation,*" since as Kmart had already noted, Kmart does not prepare any "operating budgets *for the real estate.*" Id. (emphasis supplied). The letters went on to state that operating budgets for the real estate "are therefore unavailable" to Kmart. Id.

As a tenant, Kmart had no information about the expenses, actual or anticipated, incurred by the landlord as owner when operating the underlying real estate. As Mr. Saad's Affidavit explains,

Kmart prepares and maintains expenses to the operation of the business it conducts on the subject property. Kmart does not prepare or maintain any statements or records that separately identify the operating expenses for the real estate of the subject property. Real estate-related expenses relating to the ownership or operation of the real estate are not maintained by Kmart as the tenant. Therefore, the anticipated expense information was not "available" to Kmart under the 60-Day Rule.

³ In 2003 and 2004, based upon additional experience with various counties throughout Minnesota in resolving these valuation disputes, Kmart also voluntarily provided copies of its store expense analysis with its 60-Day Rule compliance letters, even though the Tax Court had consistently held that such information was not required. App. 80-85, 88-92. Presumably for that reason, the Stearns County decision did not extend to Kmart's petitions filed in 2003 and 2004. App. 22 (Tax Court's Jan. 4 Order at p. 3).

App. 98 (Id. at ¶ 5). There would be no business reason, nor any other reason for the matter, for Kmart to prepare statements regarding expenses of the landlord owning and operating the real estate when Kmart did not and would not ever pay those expenses since it was a tenant only, and did not have available to it the information necessary to prepare such statements.

In a number of decisions predating the decision now on appeal, the Tax Court had held that a tenant taxpayer's expense statements for the operation of a retail store are not required under the 60-Day Rule. See, e.g., Kmart Corp. v. County of Otter Tail, File No. C9-00-551 (Minn. Tax Ct. Order dated Nov. 18, 2000); Kmart Corp. v. County of Douglas, File No. C7-00-309 (Minn. Tax Ct. Order dated Jan. 11, 2001); Kmart Corp. v. County of St. Louis, File Nos. C1-00-600670 et al. (Minn. Tax Ct. Order dated Jan. 11, 2001); Kmart Corp. (Anoka) v. County of Anoka, File Nos. CX-01-2784 et al. (Minn. Tax Ct., March 4, 2004) [Anoka I]; Kmart Corp. (Blaine) v. County of Anoka, File Nos. C1-00-2775 et al. (Minn. Tax Ct., March 4, 2004) [Anoka II]; and Kmart Corp. (Columbia Heights) v. County of Anoka, File No. C3-01-2786 (Minn. Tax Ct., March 4, 2004) [Anoka III]. (For ease of reference, copies of these and all other Tax Court decisions cited herein are included in Relator's Appendix.) It should be emphasized that these decisions are precedential not only theoretically as application of one retail store's expense statements to another; these are the same expense reports for the same Kmart stores under the same statute with undeniable comparability to the expense reports for the Stearns County Kmart presently before this Court.

Kmart based its 60-Day Rule compliance efforts on the Minnesota Tax Court's explanations of the requirements of the statutory language itself, as these and other Tax Court decisions consistently hold that the expense information required to be produced under the 60-Day Rule did not include the expenses of operating a retail business generally, and a Kmart store, specifically.

In its motion, Stearns County admitted that Kmart timely provided *information* under the 60-Day Rule, but alleged that Kmart's 60-day information was incomplete because Kmart did not produce its business expense records. Stearns County's motion to dismiss, as originally filed in late 2001, was not scheduled for hearing at that time, but was placed on "hold" pending a decision by the Minnesota Supreme Court on Kmart's appeals in property tax petitions involving Becker County, Douglas County, and St. Louis County. The Supreme Court issued its decisions on February 28, 2002. See Kmart Corp. v. County of Becker, 639 N.W.2d 856 (Minn. 2002); Kmart Corp. v. County of Douglas, 639 N.W.2d 863 (Minn. 2002); Kmart Corp. v. County of St. Louis, 639 N.W.2d 866 (Minn. 2002) ("the Kmart Trilogy"). Before those decisions were issued, Kmart initiated bankruptcy proceedings in January of 2002, which in turn resulted in a stay under federal bankruptcy law of all of Kmart's property tax proceedings in the Minnesota Tax Court.

After Kmart emerged from bankruptcy, Stearns County refiled its 60-Day Rule motion. App. 76. The motion was heard in September of 2004. The Tax Court ruled on January 4, 2005, granting the County's motion to dismiss. App. 20. Kmart sought permission to move for reconsideration, which the Tax Court granted, directing the

parties to prepare briefs focusing on whether the Tax Court's ruling should be given effect only prospectively.⁴ Thereafter, the Tax Court ruled on March 3, 2005, denying Petitioner's motion for reconsideration, and affirming its dismissal of Kmart's petitions. App. 1. This appeal followed. App. 99.

STANDARD OF REVIEW

This Court has summarized the standard of review applicable to a Tax Court summary judgment decision as follows:

On appeal from summary judgment, we must determine "whether there are any genuine issues of material fact and whether the lower court erred in its application of the law." [citation omitted] This case involves the interpretation of a statute. Conclusions of law, including the interpretation of statutes, are reviewed by this court de novo.

Brookfield Trade Center, Inc. v. County of Ramsey, 609 N.W.2d 868, 873-74 (Minn. 2000). See also Amoco Corp. v. Comm'r of Revenue, 658 N.W.2d 859 (Minn. 2000) (when resolution of issue involves interpretation of statutory and case law, Supreme Court reviews the issue de novo). An order granting dismissal, like summary judgment, is a dispositive order subject to de novo review. See, e.g., Kmart v. County of Becker, 639 N.W.2d at 858; BFW Co. v. County of Ramsey, 566 N.W.2d at 704 (60-Day Rule dismissals reviewed on a "de novo" basis). A reviewing court is not bound by and need not give deference to a trial court's decision on a purely legal issue. Frost-Benco

⁴ The Order of the Minnesota Tax Court states that Petitioner's motion for reconsideration was heard on February 9, 2005. On February 9, 2005, the Minnesota Tax Court conducted a telephonic conference with counsel to set a briefing schedule for Petitioner's request for leave to file a motion for reconsideration, which was granted, but there was no hearing on the motion for reconsideration, which was actually filed on or about February 18, 2005.

Electrical Association v. Minnesota Public Utilities Commission, 358 N.W.2d 639, 642 (Minn. 1984). Here, the Tax Court made erroneous rulings of law on a question of statutory interpretation, which this Court should review de novo. IHLC of Eagan, LLC, dba The Commons on Marice v. County of Dakota, ___ N.W.2d ___ (Minn. March 17, 2005), slip op. at p. 11.

ARGUMENT

I. Introduction

One overriding theme underlies this appeal – is there any safe harbor available to a taxpayer seeking to provide information in order to comply with the 60-Day Rule,⁵ or, is the 60-Day Rule so amorphous that no taxpayer may ever safely comply with the rule and avoid dismissal of a meritorious case? The statute states that a taxpayer must produce “information, including income and expense figures, verified net rentable areas, and anticipated income and expenses, for income-producing property.” Minn. Stat. § 278.05, subd. 6(a). The statute does not say “any and all information,” the Legislature chose only to enact the term “information.” None of the terms used in the statute are defined. Indeed, other than the three categories listed following the word “including,” the statute

⁵ The “any and all information” standard for 60-Day Rule compliance, now stated by the Minnesota Tax Court, presumably includes every statement, report, receipt, invoice, or other document relating to the subject property, whether relevant to the valuation issue or not. See footnote 7 below and accompanying text.

does not specify what “information” is required to be produced,⁶ other than that it must bear some unspecified relationship to “income-producing property.”

In a series of cases prior to the decision now on appeal, the Tax Court developed a working interpretation of the statute that defined the required information as consisting of information in the three listed categories, as it relates to the income-producing property. These cases, discussed more fully at pp. 14-19 below, both precede and succeed this Court’s decisions on the 60-Day Rule commencing with BFW. In the expense category, the Tax Court repeatedly distinguished between the expenses of a retail business operated at the property and the expenses of the owner of the real estate operating the underlying real estate, holding consistently that only the latter, and not the former, need be produced. Many of these decisions specifically held that a Kmart store under appeal was not required to produce the expenses of operating its retail business as a tenant under the 60-Day Rule.

The Tax Court’s Stearns County decision, however, denies that its prior decisions had any precedential effect, or that reliance upon consistent Tax Court precedent was reasonable. Instead, the Tax Court states that all of its prior 60-Day Rule decisions construing the scope of the information to be produced must be viewed as limited to their own facts. The Tax Court reiterates multiple times that its 60-Day Rule decisions may not be read to provide any “bright-line itemization rule” to guide taxpayers’ 60-Day Rule compliance efforts. App. 3, 6, 8, 9, 12, 13, 16, 17, 18. The Stearns County decision

⁶ The words chosen by the Legislature also fail to correspond to identifiable standards used in real estate or business, as the statutory terminology does not derive from any known accounting, appraisal, or property management lexicon.

concludes that “[w]hat is relevant for the 60 Day Rule is determined on a case-by-case basis,” “relevant information is any and all available information relating to the income-producing subject property,” and “[c]ompliance requires production of any and all information available to the petitioner seeking to have a reduction in the assessed value of its property.” App. 6, 19.⁷ In so ruling, the Tax Court cuts the statute adrift from its three informational categories, and blocks the access to any safe harbor by any taxpayer attempting diligently to comply with the 60-Day Rule from access.

The Tax Court’s reinterpretation of the 60-Day Rule raises a new issue that has not come before this Court in previous 60-Day Rule cases – does the 60-Day Rule require specific information, with an objective standard for compliance, or does it require unspecified information, with the scope and content of compliance to be determined subjectively, after the fact and at the leisure of the County? As shown below, the statutory language, legislative history, prior case law, rules of statutory construction, and the constitutional requirements of due process mandate that the statute be interpreted to provide an objective, defined standard with which taxpayers can in fact safely comply.

II. Where Statutory Language Is Capable of Multiple Interpretations, the Court Must Apply the Rules of Statutory Construction to Determine Its Meaning.

Whenever this Court addresses the meaning of a statute, it characterizes its analysis as an issue of statutory interpretation, which is an issue of law to be reviewed de novo on appeal. See, e.g., IHLC, supra; State v. Murphy, 545 N.W.2d 909, 914 (Minn. 1996) (“Whether a statute has been properly construed is a question of law to be

⁷ See footnote 5 above.

reviewed de novo by this court.”). For example, in BFW, in which this Court first had occasion to consider the application of the 60-Day Rule to the facts of a particular controversy, the Court described the issue on appeal as “a question of statutory interpretation . . .” 566 N.W.2d at 703.

This Court has a well-established approach to issues of statutory interpretation.

When interpreting statutes, Minnesota law requires us to “ascertain and effectuate the intention of the legislature.” Minn. Stat. § 645.16 (1996). In doing so, we must first look to a statute’s text, and only if we find those words to be ambiguous are we to look into other matters to determine such intention.

BFW, 566 N.W.2d at 705. Thus, the starting point is the statutory language. If no one can reasonably dispute its meaning, the language alone may be determinative. But a statute will be found to be ambiguous “when the language therein is subject to more than one reasonable interpretation.” Amaral v. Saint Cloud Hospital, 598 N.W.2d 379, 384 (Minn. 1999).

If, as in Amaral, the language is capable of more than one reasonable interpretation, then the Court must resort to the rules of statutory construction to determine its meaning. “If the language of a statute is ambiguous, courts then turn to the statute’s legislative history to determine how the language should be construed.” Baker v. Ploetz, 616 N.W.2d 263, 269 (Minn. 2000).

A. The Tax Court’s Contradictory Interpretations of the Statutory Requirement Necessarily Lead to the Conclusion that the Language Is Ambiguous.

This Court has, in the past, referred to the language of the 60-Day Rule as “clear,” Becker County, 639 N.W.2d at 859. However, this Court has not previously been called

upon to examine the scope of the statutory language describing what information is required to be produced. The 60-Day Rule states that “information” must be provided to the assessor, but does not state “any and all information,” suggesting that some information, but less than any and all, is what was contemplated by the Legislature. The 60-Day Rule does not define what information is required, other than to list three categories that must be included. The terms in the three categories are also undefined, but two of the three categories refer to unspecified expense information: “income and *expense figures . . .* and *anticipated* income and *expenses*, for income-producing property.” The Tax Court had for many years interpreted the statute’s references to “expenses” to mean the property owner’s expenses of operating the real property itself, and not the expenses of a business, such as a retail store operated at the real property. This interpretation is particularly evident when the retail business is a tenant of the property owner. In its ruling in the case presently on appeal, however, the Tax Court held that it is impossible to know in advance what expense information may be required for any particular property, or to distinguish required expenses from expenses that are not required. App. 16 (“a bright line demarcation between business and subject property income and expenses cannot easily be drawn”).

The Tax Court’s consistent history of a contradictory interpretation of the statutory language at issue establishes not just the possibility, but the certainty, that multiple interpretations exist of what the 60-Day Rule requires in the category of expense information. These decisions, measured against the standard adopted by the Tax Court in the case presently before this Court, necessarily led to the conclusion that not only the

respective taxpayers, but more importantly the many and distinguished Tax Court judges who wrote those previous decisions, reasonably reached a completely different interpretation of the statute.

In 1995, in 14041-14051 Aldrich South Premises v. County of Dakota, File No. CX-95-7373 (Minn. Tax Ct. Order dated Aug. 24, 1995), the Tax Court denied a 60-Day Rule motion where the petitioner was a tenant in a strip retail property, and did not have access to the landlord's income and expense data. The court found unpersuasive the county's argument that the petitioner had failed to provide income and expense data on its own lease, and concluded that the data required by the statute (presumably that of the landlord) was unavailable to the petitioner. Nowhere does that case state that the tenant could or should have produced the expense statements related to its own retail business, which obviously were available to that tenant, but neither the Tax Court nor Dakota County identified that as an issue under the 60-Day Rule.

In 1998, in Menards, Inc. v. County of Sherburne, File No. C2-98-460 (Minn. Tax Ct. Order dated Aug. 20, 1998), the Tax Court considered whether the income produced by an owner-occupied retail business triggered the 60-Day Rule. The court held that the 60-Day Rule did not apply, because revenue generated through the sale of goods, unlike rental of the property, was not the kind of income contemplated by the statute. Following that ruling, in Minnesota Timberwolves Limited Partnership v. County of Hennepin, File Nos. TC-26329, TC-26856 (Minn. Tax. Ct. Order dated April 20, 1999), the court stated that the income and expenses of business operations at the Target Center were not required to overcome a 60-Day Rule motion.

The first Kmart precedent on the tenant-paid business expense issue was Kmart Corp. v. County of Otter Tail, File No. C9-00-551 (Minn. Tax Ct. Order dated Nov. 16, 2000).⁸ The court observed that the lease required Kmart “to pay all real estate taxes, special assessments, insurance, parking lot maintenance expenses, exterior and interior repair costs, utilities, and other charges.” Slip op. at 2-3. There, as here, Otter Tail County moved for dismissal under the 60-Day Rule, based upon Kmart’s failure to provide its income and expense information from operation of its retail store, including the expenses Kmart was required to pay under the lease. Id. The court rejected the county’s argument, holding that: “We refuse to interpret the 60-Day Rule to require income and expense information of the business be produced.” Id. at 5. The court went on to hold that the income and expenses required by the 60-Day Rule are those “regarding the ownership and operation of the real estate, not the business operated in or on the real estate.” Id. at 6. They would include “the vacancy loss, management fees, and replacement reserves,” none of which are available to a tenant such as Kmart. Id. Thus, Otter Tail County, like this case, specifically considered whether the expenses paid by a tenant under a net lease, including utilities, insurance, real estate taxes, maintenance, and repairs, were required under the 60-Day Rule. Unlike this case, however, Otter Tail County interpreted the statute not to require production of tenant-paid retail business expenses.

⁸ The first Douglas County ruling, Kmart Corp. v. County of Douglas, File No. C7-00-309 (Minn. Tax Ct. Order dated Oct. 9, 2000), predated Otter Tail County by a few weeks. However, because it was subsequently overturned by the Tax Court upon reconsideration in January 2001, the October 9, 2000 decision had no continuing precedential value.

The next Kmart cases to consider the issue were Kmart Corp. v. County of Douglas, File No. C7-00-309 (Minn. Tax Ct. Order dated Jan. 11, 2001), and Kmart Corp. v. County of St. Louis, File Nos. C1-00-600670 et al. (Minn. Tax Ct. Order dated Jan. 11, 2001).⁹ The Douglas County decision reversed an earlier ruling (see n.8 above) in which the court had granted dismissal for failure to produce tenant-paid business expense data. Upon reconsideration, the Douglas County court decided that, as in Otter Tail County, a tenant taxpayer was not required to produce its business expenses under the 60-Day Rule. Specifically, the court stated:

We hold . . . that because, under normal situations the tenant business data, including expenses relating to the real estate that are paid by the tenant, is not useful in appraising the market value of the property, it is not required to be provided under the 60 Day Rule.

Slip op. at 6-7.

In a similar vein, in St. Louis County, the county sought dismissal under the 60-Day Rule on multiple grounds, one of which was Kmart's failure to provide its business expenses. The court rejected that argument, stating:

Since other operating expenses including insurance, utilities, and common area maintenance and repair expenses that are paid by the tenant do not reduce the income to the landlord, those expenses are not relevant in calculating the value of the property. [citing Douglas County] Therefore, these other operating expenses do not need to be provided (under the 60-Day Rule].

⁹ A third decision not involving Kmart, but also issued on the same day, confirmed the Tax Court's view that the 60-Day Rule does not extend to tenant-paid business expenses. See FACS of New Ulm LLC v. County of Brown, File No. CX-00-222 (Minn. Tax Ct. Order dated January 11, 2001) (income and expense information pertaining to the operation of a business is not normally subject to 60-Day Rule requirements, citing Menards, Timberwolves, Otter Tail County, and Douglas County).

Slip op. at 6 (emphasis added).

After ruling in Kmart's favor on the tenant-paid expense issue, the courts in both Douglas County and St. Louis County went on to find an unrelated ground for dismissal in Kmart's failure to produce certain income information, namely, whether overage rent was generated by the property. Kmart appealed both decisions to this Court on the income information issue. See Section II(C)(5) below. Significantly, however, neither Douglas nor St. Louis County cross-appealed to contest the Tax Court's holdings on the tenant-paid business expense issue. Accordingly, the Tax Court's decisions in both Douglas County and St. Louis County remained good and unchallenged law on the tenant retail business expense issue.

Last year, in Kmart Corp. (Anoka) v. County of Anoka, File Nos. CX-01-2784, *et al.* (Minn. Tax Ct. March 4, 2004), Kmart Corp. (Blaine) v. County of Anoka, File Nos. C1-00-2775, *et al.* (Minn. Tax Ct. March 4, 2004), and Kmart Corp. (Columbia Heights) v. County of Anoka, File No. C3-01-2786 (Minn. Tax Ct. March 4, 2004), the Tax Court took up the tenant-paid business expense issue once again in the context of Kmart tax petitions on three separate properties in Anoka County. In each case, the Tax Court held that the tenant-paid expenses were not required under the 60-Day Rule. The Court cited and followed Otter Tail County, Douglas County, and St. Louis County. Specifically, the Court stated: "We have . . . held that tenant expenses, including tenant paid insurance, utilities, common area maintenance and repairs are not required under the 60-day rule." Anoka I, slip op. at 6; Anoka II, slip op. at 7; Anoka III, slip op. at 6.

In the Stearns County decision now under appeal, however, the Tax Court stated that none of these prior decisions interpreting and applying the 60-Day Rule could be relied on as “guidance in meeting the production requirements of the 60 Day Rule.” App. 12. Instead, the Tax Court warned that taxpayers must not consider the reasoning of any of its prior 60-Day Decisions as precedential, because the Tax Court did not intend them “to create rules of substance or procedure.” Id. The Tax Court went on to hold that precisely the same tenant-paid business expenses which it had previously held were not required under the 60-Day Rule, now were required to be produced in this case. Furthermore, the Tax Court found no inconsistency between its Stearns County decision and any of its prior tenant-paid business expense decisions. App. 17, 25.

Each of the prior Kmart cases discussed above presented virtually indistinguishable facts to the present case. In each case, Kmart was a tenant under a lease. Under each lease Kmart was required to pay certain expenses. In each case, Kmart produced its lease information, but advised the County that as a tenant, it did not have available information about the expenses of operating the real property. In each case, Kmart submitted an affidavit verifying that it did not maintain records of the landlord’s expenses of operating the real estate. In each case the Tax Court interpreted the language of the statute not to require tenant-paid business expense information. See, e.g., Otter Tail (“We refuse to interpret the 60-Day Rule to require income and expense information of the business be produced”); Douglas (“We hold . . . tenant business data, including expenses relating to the real estate that are paid by the tenant . . . is not required to be provided under the 60 Day Rule”); St. Louis (“insurance, utilities, and common area

maintenance and repair expenses that are paid by the tenant . . . do not need to be provided” to comply with the 60-Day Rule).

The statutory language does not define what expense information is required. The Stearns County decision’s departure from the consistent rulings of the Tax Court’s previous interpretations of the statute demonstrates, if nothing else, that more than one interpretation of the statutory language is possible. The ambiguity inherent in the statutory language necessitates use of the tools of statutory construction, including an examination of the legislative history and purpose. See, e.g., Amaral, 598 N.W.2d at 386.

B. The Legislative History Indicates that the Statute Changed from an Exclusionary Rule to a Dismissal Rule, Without Changing or Defining the Information to be Provided.

The statutory origins of what is now commonly known as 60-Day Rule are found in 1994, as an amendment to what was previously known as the 45-Day Rule. See Act of May 4, 1994, ch. 587, § 15, subd. 6(a), 1994 Minn. Laws 1043, 1115, codified at Minn. Stat. § 278.05 subd 6(a). Prior to the 1994 amendment, the statute prescribed an exclusionary rule to apply in property tax petitions involving income-producing property. Taxpayers were required to produce income and expense information they might wish to offer as evidence at the hearing of a Chapter 278 petition for such property at least 45 days before the hearing, or such information could be ruled inadmissible:

Information, including income and expense figures, verified net rentable areas, and anticipated income and expenses, for income-producing property which is not provided to the county assessor at least 45 days before any hearing under this chapter, is not admissible except if necessary to prevent

undue hardship or when the failure to provide it was due to the unavailability of the evidence at that time.

Minn. Stat. § 278.05, subd. 6(a) (1992).

In 1994, the statute was amended, to change it from an exclusionary rule to a mandatory requirement that taxpayers provide information about income-producing property to the county assessor within 60 days after filing a Chapter 278 petition, or face dismissal of their petitions. The red-lined version of the statute as submitted for the State Senate's consideration, indicating the precise language to be added and deleted, reveals that no change was proposed (or made) to the language at the beginning of the statute describing the information to be produced. App. 103.

The legislative history confirms that the county assessors who brought forward the proposed amendment did not seek to change the nature of the information that was to be provided. They testified that the proposed amendment was "not intended to make any major changes," and was "not intended to take rights away from taxpayers or change the manner in which the system is currently scheduled to operate." App. 105 (Hearing on S.F. 2613, S. Comm. on Taxes, 78th Minn. Leg., March 25, 1994 (audiotape) (statement of Steve Kuak, Minnesota Association of Assessing Officers)).¹⁰ Instead, it was simply intended to move up the date that taxpayers would provide the same income and expense data they were then required to provide 45 days before trial. *Id.* ("What this language

¹⁰ "[T]ape recordings of committee hearings are regarded as part of [the] legislative history." *First Nat'l Bank of Deerwood v. Gregg*, 556 N.W.2d 214, 217 (Minn. 1996). "[S]tatements made by a sponsor of a bill on the purpose or effect of the legislation are generally entitled to some weight in construing a statute." *State v. Hanson*, 543 N.W.2d 84, 89 (Minn. 1996).

would simply do is say that this income and expense data . . . would have to be supplied to the assessor in a much more timely fashion, within 60 days after the filing of the petition, rather than being triggered on the court date hearing.”).

The assessors who proposed changing the 45-Day Rule to the 60-Day Rule also testified that they did not intend to use the statute as a trap for the unwary, but instead planned to provide advance notice to taxpayers to facilitate their compliance. This Court took note of that portion of the legislative history in Northwest Airlines, Inc. v. County of Hennepin, 632 N.W.2d 216 (2001). “[The] legislative history indicates that the legislature anticipated that a property owner would get notice of the applicability of section 278.05, subd. 6(a), to a petition . . .” 632 N.W.2d at 223 (P. Anderson, J. concurring). See also id. at 224 (in 1994, in front of the House Tax Committee, “[t]he assessor testified that the county warned property owners that their property was subject to the then-current 45-day rule . . ., suggesting that the county assessor would continue that practice with respect to the 60-day rule”) (Gilbert, J., concurring in part and dissenting in part).

The proposed amendment passed, and the 60-Day Rule became effective in 1994. It was recently amended again, and as before, the legislature left the language designating the information to be produced unchanged.¹¹ Thus, from the enactment of the original

¹¹ As the Tax Court noted, the original version of the 60-Day Rule as enacted in 1994 is the version applicable to all tax years encompassed by this appeal. App. 7 (March 3 Order at 7 n.1). The Tax Court, however, erroneously described the nature of the recent amendment as replacing the phrase “within 60 days” with “no later than 60 days” to “emphasize the strictness of this rule.” Id. In fact, this language change simply altered the starting point when calculating the deadline for compliance. Under the original

45-Day Rule in 1992, to its reincarnation in 1994 as a 60-Day Rule, to its recent amendment, the language stating what information is to be produced has remained consistent: “information, including income and expense figures, verified net rentable areas, and anticipated income and expenses, for income-producing property” must be provided. The legislature has never supplied a definition for any of those terms. Under the 45-Day Rule, no definition was necessary, because at that advanced stage of case preparation the taxpayer could determine for itself what information it wanted to introduce into evidence as its preparations approached trial, and make certain it provided that information to the assessor at least 45 days in advance of trial.

Under the 60-Day Rule, however, the absence of a definition has led to an expanding motion practice by counties seeking information that has not been previously required, and that taxpayers would not have sought to introduce into evidence and thus was not required under the old 45-Day Rule. The contradictory rulings by the Tax Court, combined with the counties’ changing positions on what they may deem relevant to valuation, leave taxpayers with no ability to determine what information is necessary in order to comply. Instead of gauging compliance by what they would anticipate relying upon when proving valuation at trial, taxpayers are left to guess at what information a

version, compliance was required within 60 days after the date a given petition was filed. Under the current version, compliance is required no later than 60 days after the statutory filing deadline, making the deadline the same date for all petitions, regardless of when they are filed. As a result, taxpayers who file petitions before the deadline now have more than 60 days in which to comply. In addition, the amended statute supplements the prior unavailability exception to the dismissal requirement, by adding an ignorance exception, to allow taxpayers who are unaware of the statute’s requirements additional time for compliance under prescribed conditions.

county might argue, long after the 60-day compliance period has passed, was information related to an income-producing property. Moreover, taxpayers must guess with 100% accuracy and produce everything a county might one day seek. Relevance to the valuation analysis is apparently no longer a factor in defining the requisite scope of required information. Such uncertainty is untenable, particularly where the consequence of non-compliance with the statute is the draconian penalty of mandatory dismissal.

C. This Court's 60-Day Rule Jurisprudence Has Not Supplied a Definition.

While this Court has decided a number of previous cases involving the 45-Day and 60-Day Rules, it has never been called upon to define the statutory terminology at issue on this appeal. The Tax Court's stated position is that its decision to broaden the scope of the 60-Day Rule, and hold that the statute's informational requirements have no bounds, was compelled by this Court's decisions in BFW and Becker County. App. 17. Kmart respectfully disagrees with the Tax Court's interpretations of BFW and Becker County. Nevertheless, these cases illuminate the history and purpose of the statute, and provide a useful backdrop against which to analyze the questions raised by this appeal. They leave little doubt that the statute requires "certain" information, not uncertain, boundless and unforeseeable information.

1. Equitable – The 45-Day Rule Allows Late-Disclosed Information.

This Court first had an opportunity to address the 45-Day Rule in Equitable Life Assurance Society v. County of Ramsey, 530 N.W.2d 544 (Minn. 1995). On appeal, the county claimed that expense estimates contained in the reports of consultants for the taxpayer were submitted less than 45 days before trial, and therefore should have been

inadmissible. 530 N.W.2d at 557. The Tax Court had admitted the reports, finding that the county's own expert had reviewed and relied upon the very same information which the county sought to exclude, and had changed his opinion of value in reliance upon it. This Court held that the Tax Court did not abuse its discretion in admitting the reports. Id. at 558. No issue was raised concerning whether the reports fell within the scope of information required by the 45-Day Rule. This Court ruled that the Tax Court had discretion to admit late-disclosed evidence subject to the statute, indicating that the 45-Day Rule was not designed to supplant or obviate all subsequent discovery and disclosure.

2. *BFW* – The Statute's Unavailability Exception Does not Extend to Unreliable or Inaccurate Information.

By the time the statute next came to this Court's attention in 1997, it had been reincarnated as the 60-Day Rule. In *BFW*, the Court considered the scope of the unavailability exception within the statute, which it described as a "question of statutory interpretation." 566 N.W.2d at 703. The subject property in *BFW* was a shopping center. The taxpayer, who owned and operated the subject property, maintained income and expense statements for the property, but did not produce them within the 60-day period, believing them to be unreliable and inaccurate since audited reports were not yet available. Therefore, the taxpayer argued that its failure to produce the information should be excused under the statute, because "it was due to the unavailability of the evidence at that time." Id. at 704.

The BFW opinion interpreted the “unavailability” clause of the 60-Day Rule under the rules of statutory construction, and held that under the plain meaning of the statute, unavailable did not mean unreliable or inaccurate:

[W]e hold that the statute’s text requires the petitioner to provide all information within its possession, even though the petitioner deems certain portions of that information to be incomplete or not fully accurate. In addition, we conclude that the statute clearly requires the petitioner to provide *any* of the required information within its possession on the date of the deadline.

566 N.W.2d at 795 (emphasis in original). The BFW court’s statutory interpretation did not, however, extend to defining the scope of what information the statute required to be produced. Thus, while BFW rented the subject property out to various tenants who operated retail businesses in that shopping center, neither the parties nor this Court suggested that any income or expense information related to the tenant businesses would be necessary for 60-Day Rule compliance. The Court simply stated that BFW, the shopping center owner and landlord, must provide “income and expense figures within its possession on the date of the deadline, along with the other information required by the statute,” to the assessor within the 60 days. 566 N.W.2d at 706.

Though resting its decision on a “plain meaning” analysis, the Court went on to consider whether its interpretation of the unavailability clause served the legislature’s purpose in enacting the statute. It observed that the general purpose of Chapter 278

was to provide “an adequate, speedy, and simple remedy for any taxpayer to have the validity of his claim, defense, or objections determined by the * * * court in matters where the taxpayer claims that his real estate has been partially, unfairly, or unequally assessed * * *.”

566 N.W.2d at 705 (citations omitted). It concluded that “[s]trict enforcement of the 60-day rule is consistent with this purpose, except when the required information is simply not available to a petitioner.” Id.

Neither side in BFW disputed that the taxpayer’s income and expense data – consisting of the owner and landlord’s income and expense records for operation of the income-producing real property – fell within the scope of the 60-Day Rule. The only issue was whether that information’s unreliability (as unaudited) rendered it effectively unavailable, bringing it within the statutory exception to the production requirement. The Court concluded that “any” and “all” information within the taxpayer’s possession must be produced, regardless of its accuracy or unreliability.¹² 566 N.W.2d at 705.

That conclusion was reached, however, in the context of the parties’ implicit agreement that the particular category of information under consideration – the owner and landlord’s income and expense records for the subject property – fell within the 60-Day Rule’s ambit. The Court did not reach beyond that uncontested category to consider what other categories of information might or might not be required. In BFW neither the County, the Tax Court, nor this Court in any manner intimated that BFW, as owner and landlord of the shopping center, was required to furnish the business expenses of the tenant retail businesses in that shopping center.

¹² The Court went on to note, relying on its decision in the Equitable case, that additional data could be submitted after the 60 day deadline to modify or correct a timely production of unreliable data. 566 N.W.2d at 705. As in Equitable, BFW recognized that the statute was not meant to supplant all discovery or obviate the provision of additional information after the expiration of the 60-Day Rule period.

3. Mendota Mall and Doddway Investment Follow and Apply BFW.

One year following BFW, two more unavailability cases came before the Court. In each case, the taxpayer claimed that its income and expense information was “unavailable” for 60-Day Rule purposes because the taxpayer’s accountant was in the process of auditing the information to verify its accuracy. This Court found its BFW holding to be dispositive of both cases. Mendota Mall Assoc. v. County of Dakota, 578 N.W.2d 350 (1998); Doddway Investment Co. v. County of Dakota, 578 N.W.2d 348 (1998). As in BFW, neither case presented any issue about the scope of the income and expense information required by the statute, but instead focused solely on the unavailability exception. As in BFW, neither case intimated that the 60-Day Rule required that the landlord furnish his tenants’ retail business expense information.

4. Northwest Airlines Interprets the Meaning of “Income-Producing.”

The next 60-Day Rule case to come before this Court was Northwest Airlines, Inc. v. County of Hennepin, 632 N.W.2d 216 (2001). As in BFW, Mendota Mall, and Doddway, the taxpayer had not produced any information within the 60-day time period, but for a different reason – Northwest Airlines argued that the subject property did not qualify as income-producing under the statute. The court again took up the question of statutory interpretation, this time focusing on the phrase “income-producing property.” Citing its Equitable decision under the 45-Day Rule, the Court held that “[t]he traditional notion of ‘income-producing’ property is property that generates rental income for its

owner on the basis of an arms-length, market-based lease” 632 N.W.2d at 219.¹³

The Court then held that the subject property was income-producing, and affirmed the dismissal of Northwest Airlines’ petitions.

Once again, the Northwest Airlines case presented no occasion to construe the scope of the information required by the statute. A dissenting opinion noted that the statute “requires petitioners challenging the assessed value of income-producing property to provide *certain historical information* to the county assessor within 60 days after filing the petition,” but made no attempt to define what that information might include. 632 N.W.2d at 224 (Gilbert, J. dissenting) (emphasis added). The majority opinion simply concluded that the taxpayer “must provide income and expense information within 60 days after the petition is filed or the petition must be dismissed,” and that information *about the lease for the building* “was income and expense information relator was required to provide under [the 60-Day Rule].” Id. at 222.

5. The *Kmart Trilogy* – the 60-Day Rule Requires Complete Information About the Rental Income Produced by the Subject Property.

Three years ago, this Court simultaneously decided three 60-Day Rule cases in which Kmart was the petitioner: Becker County, Douglas County, and St. Louis County.

¹³ The Court went on to say that the term “income-producing” “is not necessarily limited to rental property. Montgomery Ward & Co. v. County of Hennepin, 450 N.W.2d 299, 303-04 (Minn. 1990).” 632 N.W.2d at 219. The Montgomery Ward case did not, however, arise under either the 60-Day Rule or the 45-Day Rule, and did not attempt to define the term “income-producing.” In many subsequent cases, that term has been defined to exclude owner-occupied properties from the reach of the 60-Day Rule. See, e.g., Cypress Semiconductor v. County of Hennepin, File Nos. TC-27376, TC-27033 (Minn. Tax Ct., Dec. 16, 1999); and Hubbard Milling Co. v. County of Blue Earth, File Nos. C4-93-641-R, C6-93-642-R (Minn. Tax Ct., Feb. 1, 1994).

The three cases of the Kmart Trilogy presented a shared issue of whether a tenant taxpayer who rents the subject property under a lease containing an overage rent clause must specify whether that clause was triggered in order to comply with the 60-Day Rule. The Becker County case presented an additional issue of the relevant date for determining whether the 60-Day Rule applies, because the subject property in that case changed from income-producing to owner-occupied due to its purchase by Kmart between the assessment date and the filing of the petition.

The Becker County decision addressed the latter issue first, and held that “[b]ecause the purpose of the 60-Day Rule is to provide information that would be useful to the determination of value, the relevant date of inquiry for whether property is income-producing is the date of assessment, not the date the petition is filed.” 639 N.W.2d at 859. In passing, this Court confirmed that the statutory term “income-producing property” means “[p]roperty that generates rental income for its owner.” Id. at 859 n.1.

The Becker County decision next focused on the overage rent issue. The Court concluded that although Kmart disclosed detailed lease information, including the amount of the minimum annual rent it paid and the existence of a contingent overage rent clause in the subject lease, its failure to state that the overage rent contingency had not been triggered [resulting in zero overage rent] deprived the assessor of the ability to determine the amount of rent actually paid, and therefore violated the 60-Day Rule. 639 N.W.2d at 861. The Court reviewed the statutory purpose, and concluded that “strict enforcement of the 60-Day Rule advances the legislative purpose of providing an adequate, speedy, and simple remedy.” Id. at 860. It then followed and applied its

Becker County ruling to the similar overage rent situations in Douglas County, 639 N.W.2d at 865, and St. Louis County, 639 N.W.2d at 868. Once again, however, the Court was not asked to define the full scope of the information required by the 60-Day Rule, because the parties did not dispute that “the rent Kmart paid to the property owner constitutes income relating to the property.” Id. at 861.

In sum, this Court’s 60-Day Rule jurisprudence to date establishes that the purpose of the 60-Day Rule is to advance Chapter 278’s goal of providing an adequate, speedy, and simple remedy for taxpayers who claim their income-producing property has been unfairly assessed. To that end, certain information must be produced within the 60-Day period, including information about the income produced by the property in the form of rent (and, by omission, not including income from a tenant retail business operated on the property). This Court has never, however, stated that what must be produced is unlimited and includes anything that any county might later claim to be relevant to valuation. This Court has never stated that the income and expenses of a retail tenant must be provided. Instead, in every case that has addressed this statute thus far, this Court has focused closely on the statutory language, and has refused to modify the statute by reading into it language that it does not contain. See, e.g., Becker County, 639 N.W.2d at 869 (declining to expand the meaning of “unavailable” to “unaudited,” the Court stated: “we reject the invitation to modify the 60-Day Rule”).

III. The Tax Court Has Significantly Modified the Language of the Statute.

The statutory language at issue states “[i]nformation, including income and expense figures, verified net rentable areas, and anticipated income and expenses, for

income-producing property,” must be provided to the assessor within the 60-day period. The Tax Court has now rewritten this language to expand the three categories boundlessly to require “any and all information available relating to the subject property.” App. 12. The Tax Court even suggests that unavailability may no longer suffice as a defense, because the Petitioner has the burden of proof in a Chapter 278 proceeding. Id. (text pertaining to n.2).

The Tax Court’s ruling unequivocally rejects any responsibility to interpret the statute as having defined boundaries to the scope of the required information, stating that “a bright-line itemization rule is not appropriate and neither is a narrower definition of relevancy that contemplates a valuation process at such an early stage in the assessment challenge.” App. 8. The Tax Court goes on to warn that “a bright-line itemization rule would lead to absurd results.” App. 17. Because the “information involved in a valuation process is complex and varies depending on the subject property,” the Tax Court concludes that the 60-Day Rule cannot be defined or bounded; in the Tax Court’s view, a taxpayer’s 60-Day Rule production must encompass every bit of information that might, at some date in the future, be deemed to relate to an income-producing property. Id. at 17-18.

This Court has warned against construing statutes in such a way as to lead to absurd results. In Wegener v. Comm’r of Revenue, 505 N.W.2d 612, 617 (Minn. 1993), the Court stated:

While we recognize our obligation to follow the plain meaning of the words of a statute when they “are sufficient in and of themselves to determine the purpose of the legislation,” [citation omitted], we are equally obliged to

reject a construction that leads to absurd results or unreasonable results which utterly depart from the purpose of the statute.

The Tax Court's ruling here will lead to absurd and unreasonable results, as here, and departs from the purpose of the statute, as well as its language.

Nowhere does the statutory language or legislative history state that the 60-Day Rule production was intended to encompass all information a respondent county might ever deem related to an income-producing property or otherwise relevant to valuation. On the contrary, the legislature provided three specific information categories, because without them, the statute would unquestionably be so vague as to violate the requirements of due process. (See Section IV below.) By refusing to impose any boundaries on what the statute requires to be produced, the Tax Court's ruling effectively writes the three categories out of the statute, leaving taxpayers with no safe harbor and no objective standard for measuring their compliance with the statute. The net result is what happened here – an unending stream of 60-Day Rule motions, with assessors free to claim that information should have been produced, even where prior case law held that such information did not fall within the three statutory categories.

The 60-Day Rule was not designed to replace formal and/or informal discovery in Chapter 278 petitions.¹⁴ Instead, the 60-Day Rule was intended to allow a county to begin its analysis of an income-producing property's value, by requiring a taxpayer to

¹⁴ Kmart also disagrees with the Tax Court's conclusion, citing Becker (639 N.W.2d at 859), that "tax litigation is not subject to traditional notions of discovery." App. 18. This Court has affirmed that taxpayers have constitutional rights of due process in property tax appeals under Minnesota Statutes Ch. 278 (see following discussion of Montgomery Ward, 450 N.W.2d at 306) and that the parties to a Chapter 278 proceeding have equal rights to discovery. Sandberg v. Commissioner of Revenue, 383 N.W. 2d 277, 281 (Minn. 1986).

turn over certain income and expense information early on, if it is available. See, e.g., LG&E Power Services, Inc. v. County of Lincoln, File No. C4-98-055 (Minn. Tax Ct. May 18, 1999) (the 60-Day Rule was not intended to supplant civil discovery; its primary purpose is “to allow an expert to begin (if not complete) reaching a decision regarding value”). The tools of informal and formal discovery may then be used at any time to gather additional “relevant” information as each party works to complete its valuation analysis. But to allow a county to use the 60-Day Rule to seek dismissal because, even though not defined within the statute and even though substantial information was timely provided, certain unspecified additional information is later claimed to be “related to an income-producing property,” would leave taxpayers with little or no effective ability to exercise their right to pursue a property tax petition for any income-producing property.

IV. The Tax Court’s Interpretation Renders the Statute Unconstitutionally Vague.

Contrary to the rules of statutory construction, the Tax Court took arguably clear language and created an ambiguous and unachievable compliance standard, leaving taxpayers at the mercy of county attorneys and assessors who may, after the compliance period has expired, claim with impunity that additional information should have been produced.

In Montgomery Ward & Co., Inc. v. County of Hennepin, 450 N.W.2d 299, 306 (Minn. 1990), this Court stated that “in a property tax matter such as the present case, relator’s constitutional right to due process is at stake.” The Tax Court’s interpretation of the 60-Day Rule to require production within 60 days of any and all information that

might later be argued by a county to be related to an income-producing property, all the while explicitly recognizing that no one could know within the 60-day period what that encompasses, renders the statute unconstitutionally vague.

“The doctrine of vagueness is embodied in the due process clauses of the Fifth and Fourteenth Amendments. Due process incorporates notions of fair notice or warning.” Geiger v. City of Eagan, 618 F.2d 26, 28 (8th Cir. 1980). In order to comply with due process, “statutes must be written in such a manner that persons of ordinary intelligence need not guess at their meaning or differ as to their application.” State v. Orsello, 554 N.W.2d 70, 76 (Minn. 1996). Orsello relied upon the seminal Supreme Court opinion of Connally v. General Construction Co., 269 U.S. 385, 391 (1926), in which the Court held:

[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

As the Supreme Court explained in Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972):

Vague laws offend several important values. . . . Vague laws may trap the innocent by not providing fair warning. . . . A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

The Tax Court’s interpretations of the 60-Day Rule prior to its Stearns County decision did not raise constitutional issues, because they interpreted the statute’s three information categories as creating a defined, consistent, and objective standard for

compliance. They did not view the statute as requiring any and all information that any assessor might one day claim to be related to an income-producing property, but instead interpreted it to require specific income and expense information for income-producing property – namely, the income and expenses of owning and operating the real estate. That led the Tax Court to make a legal distinction between the expenses attributable to the real estate and the expenses incurred by a tenant in operating a retail business at the subject property. The Tax Court held, on multiple occasions, that the 60-Day Rule did not require a tenant to produce its business expense records, even where its expenses included items related to the real estate such as insurance, utilities, repairs, and maintenance. See, e.g., Otter Tail County, Douglas County, St. Louis County, Anoka I, Anoka II, and Anoka III.

Countless taxpayers, not just Kmart, rely on the Tax Court’s interpretation of undefined statutory language, such as that found in the 60-Day Rule, to provide guidance to assist them in ensuring they have complied with the statute. Historically, the Tax Court has viewed its decisions on legal issues as precedential, and has followed the rule of *stare decisis*, recognizing that where the same issue was raised and resolved in a prior case, and a litigant in a later case disagrees with the prior decision and seeks to relitigate it, *stare decisis* precludes reconsideration to an inconsistent or incongruous result. “Stare decisis promotes uniformity, stability and certainty in the law and ‘fosters reliance on judicial decisions and contributes to the actual and perceived integrity of the judicial process.’” Engdahl v. Commissioner of Revenue, File No. 6600 (Minn. Tax Ct. Order

dated Feb. 26, 1996), slip op. at p. 4, quoting Payne v. Tennessee, 501 U.S. 808, 827 (1991).

In this case, however, the Tax Court side-stepped the doctrine of *stare decisis* by holding that all of its previous 60-Day Rule decisions interpreting the scope of the information required under the statute were either purely case-specific determinations on different facts¹⁵ or dicta¹⁶, and therefore of no precedential value. App. 12-17. The Tax Court further stated that “[w]hat is relevant for the 60 Day Rule is determined on a case-by-case basis,” that it would be “premature” to define what that might be during the 60-day period itself, and therefore for purposes of the 60-Day Rule, “relevant information is any and all available information relating to the income-producing subject property.”

¹⁵ The Tax Court initially asserted that the other Kmart cases presented different facts, because Kmart’s lease agreement for its Stearns County location specifically required Kmart to pay taxes, repairs, maintenance, and utilities. App. 26 (Jan. 4 Order at 7). No such distinction exists. The leases in all of the prior six Kmart cases also required Kmart to pay the same categories of expenses. Indeed, the Otter Tail County decision specifically noted that Kmart’s lease required it to pay “all real estate taxes, special assessments, insurance, parking lot maintenance expenses, exterior and interior repair costs, utilities and other charges,” and went on to hold that those were not the type of expenses required to be disclosed in order to comply with the 60-Day Rule. Otter Tail County, slip op. at 2-3, 5-6.

¹⁶ The Tax Court suggests that when a dispositive motion is made on several grounds, and it denies dismissal on one ground while granting it on another, the denial portion of its decision is dicta. Considerations made in a judicial opinion that are unnecessary to the decision in the case are dicta. See State v. Rainer, 258 Minn. 168, 178, 103 N.W.2d 389, 396 (1960). None of the Tax Court’s prior tenant-paid expense rulings qualify as dicta, because all were necessary to its decisions not to grant dismissal under the 60-Day Rule on the stated basis. Moreover, in Douglas County, the Tax Court initially ruled that tenant-paid expenses including insurance, utilities, etc. must be provided, but then granted reconsideration and expressly reversed that ruling, holding that such expenses were not required. The tenant-paid expense ruling was unquestionably necessary to the Tax Court’s decision to grant reconsideration in Douglas County.

App. 6. Indeed, the Tax Court later emphasized that “[w]hether or not the information is necessary for the purposes of valuation is determined after the 60 Day period.” App. 18.

The net effect of the Tax Court’s ruling is to gauge compliance with the 60-Day Rule by a purely subjective and inherently unachievable standard, governed by whatever a county, its assessors or attorneys, might subsequently argue is related to an income-producing property after the 60-day period has expired. According to the Tax Court’s ruling, in order to ensure compliance, “a petitioner would be well-advised to produce all information rather than withhold when unsure about meeting the 60 Day Rule requirements.” App. 18. Thus, not only does the Stearns County ruling set a subjective, not objective, standard for compliance, the scope of what must be produced is, simply, everything any County might one day later claim to be related to an income-producing property.

Taxpayers have no way to know what information creative county assessors and attorneys may seek in the future. They should not be required to read the minds of their adversaries in litigation and to predict the future in order to comply with the 60-Day Rule. Likewise, the 60-Day Rule should not be interpreted as a requirement that in order to pursue a Chapter 278 petition for income-producing property, a taxpayer must within the 60-Day Rule compliance period turn over every file, every document, every receipt, invoice and cancelled check, and every scrap of information in its possession that in any way, shape, or form relates to the subject property. To do so would ignore the specific categories of information as established by the legislature, and would render the statute so

vague and ambiguous that its application would become wholly arbitrary and capricious, leaving taxpayers to guess at what they must do in order to comply.

V. **Any Doubt about the 60-Day Rule's Application Should Be Resolved in Favor of the Taxpayer.**

Given the extensive preceding litigation over the meaning of the undefined statutory language at issue in this case, it would be unfair and contrary to traditional and accepted rules of construction to countenance the adoption of a new statutory interpretation, where it would have the effect of retroactively penalizing taxpayers for not being clairvoyant enough to predict that the case law upon which they relied would one day suffer a 180-degree reversal. For that is precisely what happened at the Tax Court in this case.

When the courts interpret taxing statutes, the rules of construction include a presumption not ordinarily applicable to other types of statutes. “[W]here the meaning of a taxing statute is doubtful, the doubt must be resolved in favor of the taxpayer. [The court is] not permitted to extend the scope of a tax-levying statute beyond the clear meaning of the language used.” Charles W. Sexton Co. v. Hatfield, 116 N.W.2d 574, 580 (Minn. 1962). Where “the precise meaning which the legislature intended to convey through several crucial but undefined terms is sufficiently doubtful,” the doubt must be resolved in the taxpayer’s favor. Northland Country Club v. Comm’r. of Taxation, 241 N.W.2d 806, 807-808 (Minn. 1976). “It is a settled rule in the construction of tax laws, that, where a statute is capable of two constructions and the intent of the Legislature is in doubt, such doubt should as a rule be resolved in favor of the taxpayer.” State ex rel.

Western Union Tel. Co. v. Lord, 155 N.W. 1061, 1064 (Minn. 1916). This Court recently applied and summarized this principle, saying “we construe ambiguous taxation provisions in favor of the taxpayer . . .” BCBSM, Inc. v. Comm’r of Revenue, 663 N.W.2d 531, 534 (Minn. 2003). See also Dahlberg Hearing Systems, Inc. v. Comm’r of Revenue, 546 N.W.2d 739, 743 (Minn. 1996) (same).

Instead of resolving doubt in favor of the taxpayer, the Tax Court took what was a well-settled and long-established statutory interpretation, namely, that the expenses called for by the 60-Day Rule are the owner’s expenses of operating the underlying real estate, and not those of a retail tenant whose business is operated at the subject property. The Tax Court then created doubt and ambiguity by reinterpreting and undermining a host of prior Tax Court precedents, and finally proceeded to resolve the doubt it had created against the taxpayer. The Tax Court justified its decision by merely denying that any doubt could exist about what the statute requires. App. 10-11. Yet the existence of doubt is beyond dispute, given the contradictory decisions previously rendered by the Tax Court on virtually identical facts. See, e.g., Otter Tail County, Douglas County, St. Louis County, Anoka I, Anoka II, Anoka III. Indeed, the Tax Court’s decision suggests that in the previous cases as many as five highly respected Tax Court judges have misinterpreted the 60-Day Rule as applied to virtually identical facts.

In the Tax Court’s view, Kmart was inviting the Court to engage in inappropriate judicial activism by creating “an itemized list of business expenses that will never be required for production under the 60 Day Rule.” Id. But Kmart has never sought such a list. Its request has always been for a definition of what is required, so that it can have an

objective standard to guide its compliance with the statute. The Tax Court had created such an identifiable standard in the many previous decisions, but now has changed the rules after Kmart has relied on the previous decisions.

In this case, the doubt created by the Tax Court should have been resolved in favor of the taxpayer by adhering to the consistent prior Tax Court rulings interpreting the statute to set an objective, defined standard for compliance, which taxpayers are able to understand and follow, namely, the expenses of the owner and landlord in owning the operating income-producing property. In the alternative, to the extent that this Court may see fit to now assign a different definition, as discussed in the next section, that new definition should only apply prospectively, in order to avoid penalizing taxpayers who relied upon the old definition.

VI. The Tax Court's Radical Change in Statutory Interpretation, if Constitutional, Should Have Been Made Prospective Only.

The Tax Court granted Kmart's request for leave to move for reconsideration, and asked the parties to focus their briefs on the issue of whether its Stearns County ruling should be made prospective only, in order not to harm taxpayers who, in reliance on the Tax Court's prior statutory interpretations, believed that tenant-paid expenses fell outside the scope of the 60-Day Rule's informational categories. While acknowledging that Minnesota law permits a court to make a ruling prospective only, the Tax Court refused to do so in this case, holding that its decision did not establish a new principle of law. App. 3. Kmart respectfully disagrees, and submits that under the test adopted by this

Court, the Tax Court's radical departure from its prior 60-Day Rule precedents, if constitutional, should have been made prospective only.

This Court has recognized that courts have the power and authority to decide whether to give their decisions purely prospective as opposed to retroactive effect. Hoff v. Kempton, 317 N.W.2d 361, 363 (Minn. 1982). Hoff quoted the three-factor test established by the United States Supreme Court in Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07, 92 S.Ct. 349, 355, 30 L.Ed.2d 296 (1971), for determining whether circumstances exist that support giving prospective-only effect to a ruling:

“First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, * * * or by deciding an issue of first impression whose resolution was not clearly foreshadowed * * *. Second, it has been stressed that ‘we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.’ * * * Finally, we have weighed the inequity imposed by retroactive application, for ‘[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the “injustice or hardship” by a holding of nonretroactivity.’”

317 N.W.2d at 363.

In cases such as this, where the decision concerns an issue of statutory construction, retroactive effect is limited in the same manner that an amendment to a statute ordinarily operates only prospectively. “A decision that overrules the judicial interpretation of a statute generally has only prospective effect equal to the effect ordinarily inherent in a legislative change of a statutory rule . . .” 20 Am. Jur.2d Courts § 175 (collecting cases). This is particularly so where the evidence shows strong reliance on the earlier, overruled interpretation.

[W]here there has been strong reliance on an earlier decision, the most equitable way of overturning the earlier decision may be to hold that the parties to a particular case are to have their rights governed by the earlier decision, but to warn, by means of dictum, that anyone who subsequently relies upon the earlier decision – after the date of the court’s opinion or after some other date specified by the court – will be doing so at his peril.

Note, *Prospective or Retroactive Operation of Overruling Decision*, 10 A.L.R.3d 1371, 1396 (citing Spanel v. Mounds View School Dist., 264 Minn. 279, 118 N.W.2d 795, 804 (1962) (strong reliance interests would be defeated if overruling the doctrine of governmental tort immunity were not limited to purely prospective application)).

Here, as in Spanel, the Tax Court’s ruling represents a new judicial construction, not previously foreshadowed, which will defeat strong reliance interests unless it applies only prospectively. All three Chevron elements are present. First, while the Tax Court denied that it was overruling past precedent, its ruling is clearly inconsistent with the Tax Court’s previous statutory interpretation decisions that the 60-Day Rule did not require production of tenant business expenses. It also purports to establish a new, all-encompassing production requirement, which effectively rewrites the statute, and judges compliance subjectively, from the adversary’s perspective, and after the fact, instead of objectively at the time of compliance.

Second, to make the ruling retrospective does not comport with the history and purpose of the statute. This Court has held that Chapter 278 exists “to provide ‘an adequate, speedy, and simple remedy’ *for a taxpayer* who claims that real estate has been unfairly assessed,” and that the 60-Day Rule advances that purpose. Becker County, 639 N.W.2d at 859 (citation omitted). It does not further providing a remedy for the unfair

assessment of property, taxpayer to now penalize taxpayers for relying on authoritative interpretations of the statutory language with which they must comply in order to pursue their rights under Chapter 278. Such a result as the Tax Court's decision below hardly advances the statutory purpose. Instead, it arbitrarily deprives taxpayers of the very remedy the legislature created.

Finally, retroactive application creates injustice and hardship for all taxpayers who relied to their detriment on prior rulings of the Tax Court reaching the opposite conclusion from that reflected in the Stearns County decision. Kmart submits that the Tax Court's novel approach violates due process, but if it is constitutional, it certainly departs from past precedent and establishes a new principle of law which should apply only prospectively.

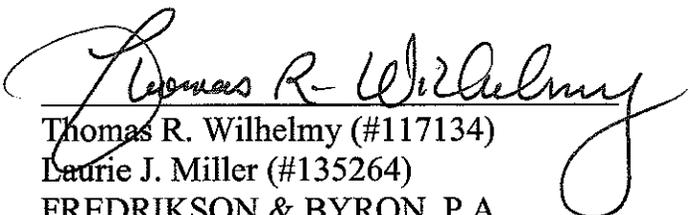
CONCLUSION

The Tax Court's ruling creates an impossible situation for taxpayers – they no longer have any guidance or standards for 60-Day Rule compliance, but instead must guess at what is encompassed within the scope of “any and all information relating to the subject property.” Under the Stearns County ruling, even the most massive production effort by a taxpayer may be vulnerable to a respondent's claim that some additional scrap of undefined “information” exists which was not produced. Indeed, the more information a taxpayer might produce, the more opportunities a respondent would have for sifting through it and following leads and references to identify other allegedly missing scraps of information which could give rise to a motion for dismissal under the 60-Day Rule.

The Tax Court's interpretation is at odds with the 60-Day Rule's purpose and legislative history, the Tax Court's previous interpretations of the statute, and the obligation of the courts to resolve doubts in favor of taxpayers whenever statutory language may be ambiguous. Moreover, the Tax Court's ruling transforms the 60-Day Rule from a clear requirement that specified information be produced, with an objective standard for compliance, into an ambiguous obligation that indefinite and potentially endless information be produced, with a subjective compliance standard. Such a ruling has stark constitutional implications. If a taxpayer must guess at the meaning of what is required in order to comply with the 60-Day Rule, due process is violated. The Tax Court's ruling leaves all taxpayers guessing, with no way to know in advance what information is required, and with dismissal as the penalty for failing to predict what any given assessor may later claim was relevant for purposes of the 60-Day Rule.

Kmart therefore respectfully requests that the Tax Court Orders dated January 4, 2005, and March 3, 2005 be reversed, and that these cases be remanded to the Tax Court for further proceedings to determine the taxable value of the subject property.

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