

No. A05-0442

STATE OF MINNESOTA  
IN SUPREME COURT

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**Kmart Corporation,**  
*Relator,*  
vs.  
**County of Stearns,**  
*Respondent.*

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**REPLY BRIEF OF RELATOR KMART CORPORATION**

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## INTRODUCTION

The briefs of Respondent Stearns County and Amicus Curiae the Minnesota County Attorneys Association are as remarkable for what they do not say as for what they do.

They do not confront the overriding issue of statutory construction posed by the opening brief of Relator Kmart Corporation (“Kmart”) – namely, whether the Tax Court properly interpreted the undefined “information” required to be produced under Minn. Stat. § 278.05, subd. 6(a) (the “60-Day Rule”) to include tenant business expenses which previous Tax Court decisions had expressly held were not required under the statute. Instead, they blithely assert that Kmart’s appeal presents only a fact issue.

They do not address the impossible burden placed on Kmart – and countless other tenants who pay real estate taxes – by the Tax Court’s decision, that in order to comply with the 60-Day Rule, “any and all available information” relating to the subject income-producing property must be produced, without any limitations, definitions, or ability to rely on past Tax Court interpretations of the statute to ascertain what that vague and uncertain standard may encompass. Instead, they contend that Kmart should have foreseen that Stearns County’s outside expert appraiser would be interested to see information of a type which the Tax Court had previously held on multiple occasions to fall outside the statutory requirement.

They imply that the doctrine of *stare decisis* has no meaning in the Tax Court, and that the Tax Court’s decisions interpreting undefined statutory terms have no precedential value. Instead, they assert that the Tax Court acted with perfect propriety in ignoring its

own jurisprudence and reaching a conclusion diametrically opposed to at least six of its own previous decisions.

Finally, they ignore the due process violation inherent in the Tax Court's refusal to interpret the 60-Day Rule to provide any certainty about what information is required to taxpayers seeking to comply with the statute. At the same time, they dismiss the long-standing principle of Minnesota law that undefined terms in taxing statutes must be resolved in the taxpayer's favor. Where, as here, the penalty for non-compliance is mandatory dismissal, the requirement of fair play underlying the due process clause mandates that the statute be interpreted to provide an objective and knowable standard to guide taxpayers in their compliance efforts. Where, as here, the Tax Court changes the rules established by its own prior decisions, after those decisions have been relied on by a taxpayer, due process has been denied.

Kmart does not seek to overturn the 60-Day Rule, or to avoid producing required information. What Kmart seeks is the ability to know with some level of certainty what categories of information are required, so that it may comply and exercise its statutory and constitutional rights to seek a fair value. The Tax Court's refusal to provide such a standard or, indeed, to allow any safe harbor for taxpayers to guide their 60-Day Rule compliance efforts, is reversible error.

## ARGUMENT

### **I. The Respondent and Amicus Briefs Fail to Address Directly the Central Issue of Statutory Interpretation Raised by Kmart.**

Kmart presented an issue of statutory interpretation, centering on the definition of what information a taxpayer must provide in order to comply with the 60-Day Rule. The statutory language requires production of undefined “information,” including three categories which themselves consist of undefined terms: “Information, including income and expense figures, verified net rentable areas, and anticipated income and expenses, for income-producing property” must be provided, or the taxpayer’s petition shall be dismissed. Minn. Stat. § 278.05, subd. 6(a). Kmart demonstrated that the statutory requirement has been interpreted in contradictory ways, leaving the question of how to interpret and comply with the statute up in the air. Instead of meeting this issue squarely, Respondent avoids it, asserting: “The Tax Court’s determination that the information was available, is plainly factual.” Respondent’s Brief at 8. The Amicus Curiae Brief at least acknowledges that the Tax Court’s prior decisions support Kmart’s position, but rather than address the ambiguity inherent in the Tax Court’s conflicting opinions, the Amicus Curiae Brief simply dismisses the decisions prior to Stearns County as “clearly erroneous,” “flawed,” “incorrect and without merit.” Amicus Curiae Brief at 8, 10.

Respondent Stearns County asserts that it is beyond dispute that the statutorily required information includes anything its expert appraiser might later claim affects “the dynamics of the lease transaction we are studying,” including tenant-paid expenses under a net lease, such as common area maintenance, repairs and maintenance, utilities,

insurance, and property taxes. Respondent's Brief at 17. See also Respondent's Brief at 8 ("One must surely concede that the information [Kmart] failed to provide is directly and centrally related to valuation."). Yet the Tax Court, prior to the Stearns County decision, interpreted the statute differently from Respondent, specifically holding that tenant-paid expenses, even those relating to the real estate such as maintenance, repairs, utilities, insurance, and real estate taxes, were not required to be produced under the 60-Day Rule and were not relevant to valuation.

The Tax Court's own differing interpretations of the statute, from its decisions in the Otter Tail County (App. 176), Douglas County (App. 167), St. Louis County (App. 182), Anoka County (Anoka), (App. 135), Anoka County (Blaine), (App. 143), and Anoka County (Columbia Heights) (App. 152) cases, to its 180-degree about-face in the Stearns County decision on appeal, demonstrate that reasonable judges may disagree about the interpretation of the undefined language in the 60-Day Rule. The existence of these contradictory decisions, in and of itself, demonstrates that the statutory language is ambiguous, and in need of statutory interpretation.

Respondent's Brief relies heavily on the affidavit of Respondent's outside appraiser, Dwight Dahlen, to support its position that its interpretation of the statute is the only possible one, and that the prior rulings of the Tax Court holding that tenant-paid expenses fell outside the 60-Day Rule were "flat out dead wrong." Respondent's Brief at 28. Yet Mr. Dahlen did not claim any expertise in statutory interpretation, and indeed acknowledged that "I cannot read the minds of legislators . . . ." App. 66. Instead, he described the purpose of his affidavit as "to explain whether expense information is

important to the appraisal of a property like the subject property.” App. 62. Mr. Dahlen went on to argue that in his opinion, tenant-paid expenses were relevant to valuation. App. 66.

Mr. Dahlen’s Affidavit is at odds not only with the six prior Tax Court decisions holding that tenant-paid expenses were not required, but it also conflicts with his own expert appraisal testimony on behalf of the respondent counties in the two Minnesota Kmart property cases which have been tried on valuation issues thus far. Mr. Dahlen testified on behalf of Crow Wing County in a Kmart case tried in 2001, and on behalf of Becker County in a Kmart case tried in 2004. See Kmart Corp. v. County of Crow Wing, File No. CX-00-768 (Minn. Tax Ct. Order dated July 19, 2001); Kmart Corp. v. County of Becker, File Nos. CX-02-410, CX-03-563, C8-04-328 (Minn. Tax Ct. Order dated Dec. 1, 2004). In both cases, Kmart was the tenant under net leases comparable to that at issue here. In both cases, the property expenses which Mr. Dahlen analyzed and included in his expert appraisal were the landlord’s expenses, and not those of the tenant. See, e.g., Becker, slip op. at 14-15 (expenses Mr. Dahlen analyzed in connection with his income approach to valuing Kmart’s Becker County store included vacancy loss, management fee, and reserves). Thus Mr. Dahlen’s approach in his trial appraisals to date has been exactly in accord with Judge Kroupa’s view in Otter Tail County that “[t]he income and expenses attributable to the real estate include the vacancy loss, management fees and replacement reserves,” all of which “are available to the Landlord, not the tenant.” App. 181. In neither case did Mr. Dahlen include any analysis of the tenant-paid expenses in his appraisals.

In sum, the artificial certainty projected by both Respondent's Brief and the Amicus Curiae Brief, that their view of the statute as extending to tenant-paid business expenses is the only reasonable view, is belied by the uncertainty of the undefined statutory terms themselves and the differing statutory interpretations of the Tax Court from Otter Tail County through Stearns County. Respondent and the Amicus Curiae may hope to divert this Court's attention from the central issue of statutory construction, because the tools of statutory construction do not lead to the result they favor. But wishing an issue would disappear cannot substitute for substantive argument on the merits of the issue. Respondent's failure to address the central issue of statutory construction head-on implicitly concedes the merits of the issue to Relator.

**II. Respondent's Brief Improperly Discusses Facts and Issues Not in the Record and Not Decided by the Tax Court.**

A. Respondent Goes Outside the Record to Discuss Other Kmart Petitions.

Respondent's Brief starts out with an attempt to paint Kmart in an unfavorable light as a troublesome taxpayer, willy-nilly filing a multitude of property tax appeals on a nationwide basis. See Respondent's Brief at p.1 n.1. Respondent insinuates that Kmart's appeals throughout Minnesota generally lack merit, and that they are "clogging up the court system." See Respondent's Brief at pp. 20, 23 n.9. Respondent's argument is factually unfounded. It also suffers from relying on information outside the record, contrary to the long-established principle that an appellate court may not base its decision on matters outside the record on appeal. Thiele v. Stich, 425 N.W.2d 580, 582-83 (Minn. 1988).

Respondent's Appendix includes a chart of Kmart cases filed throughout Minnesota, without any indication of where the chart originated, or what significance it has for this case. R. App. 1. This chart is not part of the record on appeal. This case concerns only one Kmart store – that located in Waite Park, Minnesota. To the extent Kmart's other property tax filings in Minnesota are a matter of public record, of which this court might take judicial notice, this court may be interested to note that in both Kmart cases which have been tried to conclusion to date, Kmart won a reduction of the subject property's taxable value for property tax purposes. See Crow Wing County and Becker County, cited above at p. 5. In addition, Kmart has settled numerous property tax cases with many other counties throughout Minnesota, and in virtually all of its settlements, Kmart has achieved significant reductions in taxable value. Thus, even if any issue as to Kmart's other property tax petitions were properly raised below and presented on this appeal, it would favor Kmart, not Respondent.

To the extent Respondent may be trying to intimate that it believes Kmart has filed property tax petitions without investigating the merits of its valuation challenges, Stearns County could not be farther from the truth. Neither Kmart nor its counsel have any incentive to file petitions on properties having fair and accurate assessed values. Kmart did not file property tax petitions on all of its Minnesota stores, but only on those locations which it reasonably believed had been over-valued for property tax purposes. Kmart's successes in its trials and settlements to date bear out the legitimacy of its selection process in filing its Minnesota petitions.

Respondent's rhetorical assertion that Kmart has engaged in a "nationwide" campaign to reduce its property taxes is likewise outside the record and far from the truth. The record on appeal contains no such evidence, and in fact, no such campaign exists. Kmart only seeks to challenge its property valuations in jurisdictions where, as here, its property is being over-taxed based upon an unrealistically high assessment.

B. Respondent Misstates Kmart's Position Regarding Unavailability.

Respondent also sets up a straw man argument, which misstates Kmart's position both before the Tax Court and on this appeal, in a vain attempt to ridicule and belittle Kmart's position. Respondent asserts that Kmart claimed the expenses it paid to operate its retail business were unavailable, a claim which Respondent characterizes as unbelievable. See Respondent's Brief at pp. 2-3, 10-11. Contrary to Respondent's argument, however, Kmart never claimed that its tenant business expenses were unavailable. Rather, Kmart claimed that its tenant business expenses were not required to be produced, under a long line of Tax Court cases interpreting the 60-Day Rule. What Kmart proved was unavailable were the landlord's expense statements.<sup>1</sup> Kmart's un rebutted affidavit established that Kmart did not have possession, custody, or control of its landlord's information, and therefore, under the statutory exception for "unavailability" under the 60-Day Rule, could not be required to produce it within the

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<sup>1</sup> Respondent seeks to raise another issue outside the scope of the ruling on appeal, by arguing that Kmart was obligated to produce its landlord's information, and even to sue its landlord, based upon a cooperation clause in Kmart's lease, which Respondent gratuitously characterizes as "airtight." See Respondent's Brief at p. 5 n.5, p. 11. The Tax Court did not rule on this issue, and it is unsupported by any authority.

sixty-day time period. App. 98. See also Anoka County cases, App. 135, 243, 152 (same).

C. Respondent Wrongly Asserts that Kmart Failed to Provide Income Information.

Respondent also suggests, contrary to the facts, that Kmart failed to provide information about the subject property's anticipated income, arguing that the expenses paid by a tenant under a net lease somehow constitute both income and expenses under the 60-Day Rule. See, e.g., Respondent's Brief at pp. 6, 10 (arguing that tenant-paid expenses are simultaneously income and expenses). But as the Amicus Curiae Brief notes, "The income is the rent that is paid by the tenant to the landlord." Kmart fully disclosed the rent paid under its lease, both historic and anticipated. See App. 22 (Tax Court states that under Kmart's lease, "the rent payable from its commencement [on October 19, 1992] and throughout its anticipated 25-year term is \$567,150 per year, with no additional percentage or overage rent required.").

Kmart's payment of certain expenses under a net lease does not constitute income to the landlord. Indeed, as the Tax Court noted in one of its earlier tenant-paid expense decisions, "[s]ince other operating 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." St. Louis County, App. 187. This appeal presents no issue regarding Kmart's full disclosure of its available information regarding the income produced by the subject property. The issue is whether, in addition to the extensive lease and other information timely provided, Kmart was also required to provide its tenant-paid business expenses.

Until the Tax Court's reversal of direction in this case, the Tax Court had consistently held, in numerous cases, that the tenant-paid expenses were not required.

**III. Respondent Implicitly Advocates the Abolition of Stare Decisis at the Tax Court and Pays No Heed to the Requirement of Due Process of Law.**

A. Stare Decisis Should Not Be Abandoned in the Tax Court.

The Amicus Curiae Brief argues, based on Care Institute, Inc.-Maplewood v. County of Ramsey, 576 N.W.2d 734, 737 (Minn. 1998), that *stare decisis* is inapplicable because this Court is not bound by decisions of the Tax Court. Kmart has never argued that this Court is bound to follow the decisions of the Tax Court. Instead, Kmart contended that the Tax Court should adhere to its own, well-settled interpretation of the 60-Day Rule as not requiring tenant-paid business expenses, under the doctrine of *stare decisis*. The Tax Court's decision in this case to depart from its previous line of authority, while at the same time refusing to acknowledge the precedential value of any of its prior 60-Day Rule decisions, undermines the operation of *stare decisis* at the Tax Court level. It also emphasizes the ambiguity inherent in the statutory language that led to such contradictory rulings from the same court.

The Amicus Curiae Brief's argument that Kmart is the only taxpayer ever to rely on the Tax Court's 60-Day Rule decisions is also without foundation. Any number of other taxpayers may also have relied on the same Tax Court decisions, but unless they have been faced with a successful 60-Day Rule motion, such reliance may not yet have come to light in a published decision. Given that counties have virtually no time limits for making 60-Day Rule motions, no one knows how many potential motions might be

pending or waiting in the wings. Here, too, the record is void of any evidence to support such an erroneous and nonsensical assertion.

Respondent makes an unusual argument in an attempt to sidestep the *stare decisis* issue raised by Kmart. Without citing any authority, Respondent contends that the Tax Court's prior rulings in Otter Tail County, Douglas County, St. Louis County, and the three Anoka County cases, all holding that tenant-paid expenses need not be produced to comply with the 60-Day Rule, were not precedential, even though they were decided before this case, because this case is "parallel" with the prior cases, covering some of the same tax years. Respondent's Brief at 28. According to Respondent, "The Tax Court decision in one of these cases is no more precedential than the Tax Court decision in another, because they all involve the same tax years." Id. at 27.

Respondent's argument is tantamount to a plea to abolish or significantly curtail the doctrine of *stare decisis* in Tax Court proceedings. As Kmart explained in its opening brief, the Tax Court uses *stare decisis* to promote "uniformity, stability and certainty in the law" and to "foster[] reliance on judicial decisions," thereby contributing to the integrity of the judicial system. See Engdahl v. Commissioner of Revenue, File No. 6600 (Minn. Tax Ct. Order dated Feb. 26, 1996). Respondent apparently prefers a system where it can ignore any Tax Court order with which it disagrees, even where the underlying legal issue has been decided and reaffirmed many times over. Respondent offers no authority for this novel proposition, and it should not be countenanced. If Tax Court rulings henceforward have no precedential effect, the principle of *stare decisis* will become meaningless, and the goals of uniformity, stability, certainty, and reliance on

judicial decisions which it is designed to foster will fall by the wayside. The resulting chaos, with no predictability of outcome, would be a far cry from the adherence to the rule of law which is the hallmark of the American judicial system.

B. Due Process Requires the 60-Day Rule to be Interpreted to Provide Reasonable and Defined Categories of Required Information.

Neither Respondent nor Amicus Curiae acknowledges the full extent of the Tax Court's decision, which refuses to set any limit on the information required to be produced under the 60-Day Rule, or to provide any standards to guide the compliance efforts of taxpayers seeking to comply with the statute. Instead each implicitly acknowledges that a standard must be defined somehow. Respondent argues that the scope of the statute should be defined by its expert's affidavit of what he believes is relevant to valuation, and Amicus Curiae argues that the required expense information should be defined based upon a particular real estate appraisal textbook. Yet the Tax Court's decision disavows any obligation to provide any definition whatsoever. The Tax Court reiterates at least nine separate times that it did not intend any of its decisions to provide any "bright-line itemization rule" to guide taxpayers' 60-Day Rule compliance. See App. 3, 6, 8, 9, 12, 13, 16, 17, 18. Instead, the Tax Court states that 60-Day Rule compliance will be judged post hoc, by a subjective standard, based upon whatever information a respondent's assessor or expert may claim is relevant to valuation of the subject property.

Because, as the Tax Court acknowledges, no one can know within the first 60 days what that may turn out to encompass, taxpayers are left with an impossible compliance

task. They must either produce “everything,” without knowing what the full scope of that may be, or they must become clairvoyant mind-readers, to guess precisely what all respondent counties may in the future suggest is relevant to valuation. Otherwise they will find themselves at the mercy of any county who can come up with an after-the-fact rationalization, such as Mr. Dahlen’s, to support requiring production of information never before required or produced in any previous case.

Due process does not permit such an unfair and unknowable procedural hurdle, particularly where the penalty for non-compliance is mandatory dismissal. See Montgomery Ward & Co., Inc. v. County of Hennepin, 450 N.W.2d 299, 306 (Minn. 1990), (“in a property tax matter such as the present case, relator’s constitutional right to due process is at stake.”). Such an expansive and uncertain interpretation of the statute also contradicts the long line of cases cited in Kmart’s opening brief requiring ambiguity in taxing statutes to be resolved in favor of taxpayers. See Relator’s Brief at pp. 39-40. Respondent’s sole response to these cases is a single footnote, asserting that in property tax cases, taxpayers have the burden of proving that an assessment is excessive. See Respondent’s Brief at p. 26 n.10. Respondent’s footnote is a non sequitur. To interpret the 60-Day Rule in such a way that taxpayers can understand and comply with it would have no adverse effect on the ultimate burden of proof. It would simply ensure that the 60-Day Rule’s threshold procedural requirement is administered fairly, to give each taxpayer a reasonable opportunity to comply in order to proceed on the merits of its property tax petition.

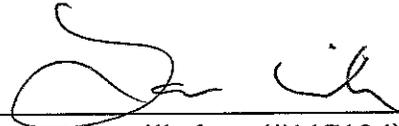
C. If the Tax Court's New Interpretation of the 60-Day Rule Is Adopted, It Should Be Prospective Only.

Finally, Respondent ignores the retroactivity authority cited by Kmart, which establishes that the reversal of a settled statutory interpretation like the Tax Court's ruling on appeal may warrant a Court's decision to apply the new interpretation only prospectively, in order to avoid unfairly prejudicing parties who relied on the prior interpretation. See Relator's Brief at 42-43. Respondent argues that prospective relief can only ever apply to parties not before the Court, and that a changed interpretation must always apply to the parties to the case which generated the change. Contrary to Respondent's argument, this Court has, in the past, announced that a new interpretation will apply prospectively only, and will not apply to the parties before the Court. See, e.g., 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). If this Court were to affirm the Tax Court's decision to change its settled statutory interpretation of the scope of the 60-Day Rule, that decision should likewise be prospective only, in order to avoid unjustly penalizing Kmart, who relied on the prior statutory interpretation to guide its compliance efforts.

**CONCLUSION**

Kmart respectfully requests that this Court reverse the Tax Court's decision to dismiss Kmart's petitions, and remand its petitions to the Tax Court for further proceedings to determine the taxable value of the subject property.

Dated: May 31, 2005



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