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No. A09-2229

STATE OF MINNESOTA

IN SUPREME COURT

Eden Prairie Mall, LLC,

Relator,

vs.

County of Hennepin,

Respondent.

BRIEF OF RELATOR EDEN PRAIRIE MALL, LLC

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LEGAL ISSUES

I. Did the Tax Court exceed its authority and commit reversible error when the factual basis for the Court's decision is found only in argument contained in Respondent's Post-Trial Brief, for which there was no evidentiary support in the record, to reach a final conclusion many millions of dollars outside the range of facts and opinions in evidence?

The Tax Court copied its final conclusions of value verbatim from several pages of Respondent's post-trial brief. These conclusions included factual statements and mathematical appraisal calculations by Respondent's counsel for which there was no competent evidentiary support. None of the three appraisal experts at trial testified that these factual statements or mathematical calculations were appropriate or complied with generally accepted appraisal practices. Counsel's unsupported factual statements and mathematical appraisal calculations ultimately lead directly to a final decision by the Tax Court which was many millions of dollars higher than the range of values testified to by any expert witness at trial.

Most Apposite Authority:

Hertz v. Hertz, 299 N.W.2d 42, 44 (Minn. 1975).

Northwest Airlines, Inc. v. Commr. of Rev., 265 N.W.2d 825, 831 (Minn. 1978).

In re Northerly Centre Corp. v. County of Ramsey, 248 N.W.2d 923, 927 (Minn. 1976).

II. Did the Tax Court err when it found that Relator submitted sufficient credible evidence to rebut the presumption that the assessor's estimates of market value of the Eden Prairie Mall and Von Maur Department Store were prima facie valid and correct, when the Court resoundingly rejected the methodologies and opinions of Relator's expert and ultimately concluded to values roughly double the values opined to by Relator's expert?

Although the Tax Court stated that the Relator submitted sufficient credible evidence to rebut the presumption that the original assessment was prima facie valid, the Court went on to reject Relator's evidence and concluded to values roughly double the values opined to by Relator's expert for both the Eden Prairie Mall and the Von Maur Department Store.

Most Apposite Authority:

Southern Minn. Beet v. County of Renville, 737 N.W.2d 545, 557 (Minn. 2007).

III. Does the Tax Court's Judgment increasing the 2006 and 2007 real estate taxes on the subject property violate Federal Bankruptcy Laws?

(a) Is the Tax Court's Judgment in violation of the automatic stay imposed by 11 U.S.C. §362(a)(1) of the U.S. Bankruptcy Code, thereby rendering the Judgment void as a matter of law?

The Tax Court determined that the automatic stay imposed by 11 U.S.C. §362(a)(1) did not apply to the Respondent's claim for an increase in the real estate taxes on Relator's property, and ultimately issued its Judgment increasing the Relator's 2006 and 2007 real estate tax obligation, despite prompt notice that Relator had filed a voluntary petition seeking bankruptcy protection under Chapter 11 of the United States Bankruptcy Code after the trial and before post-trial briefs were filed.

Most Apposite Authority:

11 U.S.C. §362(a)(1).

In re Vierkant, 240 B.R. 320 (B.A.P. 8th Cir. 1999).

(b) In the alternative, does the Tax Court's Judgment constitute a pre-bankruptcy petition claim for which the Respondent was required to file a timely proof of claim under Rule 3003 of the U.S. Federal Rules of Bankruptcy Procedure?

If the Tax Court's judgment is not void for violating the automatic stay provisions of 11 U.S.C. §362(a)(1), then the Judgment constitutes a pre-bankruptcy petition claim requiring Hennepin County to file a timely proof of claim under Rule 3003 of the U.S. Federal Rules of Bankruptcy Procedure. The Tax Court did not address this issue in the Judgment at all.

Most Apposite Authority:

Fed. R. Bankr. P. 3003(c)(2).

In re Security Aviation, Inc., Case No. A06-00559-DMD (Bankr. Alaska Aug. 27, 2007).

IV. Did the Tax Court err when it failed to properly apply generally accepted appraisal methodology requiring that personal property and intangible assets be identified and separately analyzed with regard to their effect on value?

The Tax Court failed to address or explain its reasoning regarding the primary valuation issue presented by Relator at trial – the generally accepted appraisal practice that specifically requires that personal property and intangible assets must be identified and separately analyzed with regard to their effect on taxable market value of the real property.

Most Apposite Authority:

Minn. Stat. §272.03, subd. 1.

USPAP, Standard 1-2e(iii).

(a) Did the Tax Court err when it failed to deduct non-taxable personal property including furniture, fixtures and equipment and tenant improvements, from its analysis of taxable real property value?

Despite statements suggesting its recognition of the propriety of doing so, the Tax Court did not deduct any non-taxable personal property from its final conclusion of taxable value.

Most Apposite Authority:

Minn. Stat. §272.03, subd. 1(b).

USPAP, Standard 1-2e(iii).

(b) Did the Tax Court err when it failed to deduct non-taxable intangible assets, including the return on and return of favorable contracts, and a $623,326 investment in grand re-opening marketing costs from its analysis of taxable value?

The Tax Court did not deduct any non-taxable intangible assets from its final conclusion of taxable value.

Most Apposite Authority:

Minn. Stat. §272.03, subd. 1(b).

USPAP, Standard 1-2e(iii).

V. Did the Tax Court err when it issued findings and conclusions regarding the proper capitalization rate, which were internally inconsistent and unsupported by the evidence?

The Tax Court erred in concluding to a capitalization rate applicable to a Class B+ to Class A mall, because the it found that the subject property was a Class B+ mall, and that the Mall's actual retail sales never did place it within the Class A category.

Most Apposite Authority:

Harold Chevrolet, Inc. v. County of Hennepin, 526 N.W.2d 54, 57 (Minn. 1995).

American Express Fin. Advisors v. County of Carver, 573 N.W.2d 651, 654, 658 (Minn. 1998).

STATEMENT OF THE CASE

This appeal originates from the October 13, 2009 decision of the Minnesota Tax Court, the Honorable Sheryl A. Ramstad presiding. The case involved the real property located at 8251 Flying Cloud Drive and 400 Prairie Center Drive in Eden Prairie, Minnesota, commonly referred to as the Eden Prairie Center Mall (the "Mall") and the Von Maur Department Store ("Von Maur"). The ultimate issues at trial were the separate taxable fair market values for the assessment dates of January 2, 2005 and January 2, 2006 for both the Mall and Von Maur.

During nine days of trial, from February 26, 2009 to March 11, 2009, Relator introduced the expert appraisal testimony of David C. Lennhoff, MAI, CRE, FRCS. Respondent introduced the expert testimony of Jason L. Messner, MAI, appraisal review testimony of Mark T. Kenney, MAI, SRPA.

Several weeks after the conclusion of trial, on April 16, 2009, General Growth Properties, Inc. and a substantial number of its subsidiaries and affiliates, including Relator, filed a voluntary petition seeking bankruptcy protection under Chapter 11 of

Title 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York. (Appendix, p. 50.) On April 16, 2009, Relator's counsel in these proceedings wrote to the Minnesota Tax Court informing the Tax Court of the bankruptcy filing, and advising the Tax Court that the procedural posture of the case (i.e. the fact that Respondent introduced written and oral evidence seeking an increase of the 2006 and 2007 real estate taxes at trial) brought the matters under the purview of 11 U.S.C. §362(a)(1), the "automatic stay." (Appendix, p. 43.) Despite reviewing counsel's letter, on April 21, 2009 the Tax Court verbally notified counsel that it would not stay the proceedings and ordered post trial briefs to be filed nine days later as had been scheduled at the close of trial proceedings.

The parties filed their respective post-trial briefs on April 30, 2009. On August 25, 2009, the Tax Court granted, in part, Relator's post-trial motion to strike portions of Respondent's Post-Trial Brief (Appendix, p. 45). The Tax Court issued its Findings of Fact, Conclusion of Law and Order for Judgment ("Judgment") in these matters on October 13, 2009. (Appendix, p. 1.) At no time, either before or after the issuance of the Judgment, did Respondent file with the U.S. Bankruptcy Court a proof of claim with regard to that Judgment or the County's actions during the trial seeking an increase in the 2006 and 2007 real estate taxes. The U.S. Bankruptcy Court issued its Order confirming the Relator's plan of reorganization on December 15, 2009. (Appendix, p. 53.) Pursuant to that Order, the "automatic stay" pursuant to 11 U.S.C. §362(a)(1) will be lifted on or before January 31, 2010. (Appendix, pp. 51, 60, and 130.)

In its decision, the Tax Court expressly recognized that under Minnesota law "(t)he assessor's estimated market value is prima facie valid" (Appendix, p. 9), but that "[Relator] may overcome this presumption by introducing *credible* evidence that the assessor's market value is incorrect." Id. [*Emphasis added.*] The Tax Court then stated that "(i)n this case, [Relator] presented sufficient evidence, through the testimony of its appraisal expert, to rebut the presumption." (Appendix, pp. 9 to 10.) However, in the following pages the Tax Court found Relator's expert wholly not credible and soundly rejected the appraisal methodologies and calculations he used. Instead, the Tax Court adopted *verbatim,* with footnote citation, calculations found only in Respondent's Post-Trial Brief. (Respondent's Post Trial Brief, pp. 42-43; Appendix pp. 29-31.) At no time during trial did any of the three testifying experts opine that the analyses and calculations relied upon by the Tax Court were consistent with their opinion regarding the appropriate methodology for appraising the subject properties or with generally accepted appraisal practices for valuing such properties.

In rejecting the testimony and calculations of all three testifying experts, and instead, adopting the calculations included only in Respondent's Post-Trial bBief, the Tax Court reached a decision not reasonably supported by the evidence in the record before it. This ultimately resulted in a conclusion of value falling many millions of dollars outside of the range of evidence as demonstrated in the following chart:

Eden Prairie Mall	Assessed Value	Eden Prairie Mall's Expert	Hennepin County's Expert	Tax Court's Decision
January 2, 2005	$90,000,000	$68,750,000	$110,000,000	$122,876,000
January 2, 2006	$100,000,000	$60,550,000	$115,000,000	$120,142,000

(Petitioner's Post Trial Brief, p. 1; Appendix, pp. 5-6.)

STATEMENT OF THE FACTS

The Eden Prairie Mall, in common parlance, is a large enclosed shopping mall which includes four other anchor stores, (Sears, Target, Kohl's and the former Mervyn's/current JC Penney site) which are not included in this proceeding. The defined term "Mall" herein shall refer to the traditional in-line stores, including an AMC Theater and several restaurants, which were added as an addition to the Mall in 2001 (hereafter, the "Entertainment Wing") and the basement area, but not the Von Maur store or the other anchors.

The Tax Court found that the Mall is classified as a "super-regional mall" and includes in-line space totaling 394,912 s.f. net rentable area ('NRA"), including 250,899 s.f. NRA of traditional in-line stores and a food court, 8,379 s.f. NRA of basement space and 135,634 s.f. NRA consisting of the Entertainment Wing. (Exhibit 1, p. 1.) The Mall NRA, as calculated and documented in painstaking detail by Relator's expert in the income approach section of his report, is actually 385,868 s.f. (Exhibit 1, p. 30), and includes the traditional in-line stores and the Entertainment Wing, but excludes 665 s.f. of kiosk and ATM space and the basement. (The basement is functionally obsolete and not rentable in the market.) (Id.)

The Tax Court found that the Von Maur space is a two-level anchor department store physically attached to the Mall and consisting of 150,000 s.f. NRA plus approximately one-third of the parking-deck adjacent to the store. (Exhibit 1, p. 1; Exhibit 102, p. v.; Exhibit 104, p. 2.) The remaining two-thirds of the parking-deck are located on the Mall parcel. (Exhibit 102, p. v.)

The original Mall development was constructed in 1974, and included in-line stores and two anchors (Sears and Carsons). (Exhibit 1, p. 2.) The property was renovated in 1984, 1989, and then again in 1994, over which time two additional anchor stores were added. (Id.) The property was acquired by General Growth Properties ("GGP") in 1999, after which GGP began another renovation and repositioning, which involved the addition of the Von Maur store and the Entertainment Wing. (Id.) The "Grand Re-Opening" of the Mall took place on October 4, 2001. (Id.)

STANDARD OF REVIEW

This Court reviews Tax Court decisions to determine whether the Tax Court lacked jurisdiction, whether the Tax Court's decision is supported by the evidence and is in conformity with the law, and whether the Tax Court committed any other error of law. Jefferson v. Commr. of Revenue, 631 N.W.2d 391, 394 (Minn. 2001). While "(t)his Court will not disturb the tax court's valuation of property for tax purposes unless the court's decision is clearly erroneous, which means the decision is not reasonably supported by the evidence as a whole, The Equitable Life Assurance Society of the

United States v. County of Ramsey, 530 N.W.2d 544, 552 (Minn. 1995); Harold Chevrolet, Inc. v. County of Hennepin, 526 N.W.2d 54, 57 (Minn. 1995), this Court is not bound by decisions of the Tax Court. Bond v. Comm'r of Revenue, 691 N.W.2d 831, 835 (Minn. 2005); A&H Vending Co. v. Commr. of Revenue, 608 N.W.2d 544, 546 (Minn. 2000). This Court will overrule the Tax Court if it concludes that the evidence as a whole does not reasonably support the Tax Court's decision. Lewis v. County of Hennepin, 623 N.W.2d 258, 261 (Minn. 2001).

Reversal is appropriate if this Court is left with a definite and firm conviction that a mistake has been made, or if the Tax Court completely failed to explain its valuation reasoning. Marquette Bank Nat'l Ass'n v. County of Hennepin, 589 N.W.2d 301, 305-306 (Minn. 1999). Where the Tax Court uses illogical reasoning to reject an expert appraiser's valuation, this Court will reverse the Tax Court's valuation as clearly erroneous. American Express Fin. Advisors v. County of Carver, 573 N.W.2d 651, 654, 658 (Minn. 1998). This Court should not uphold the Tax Court's decision if it determines that insufficient evidence exists for Tax Court's conclusions. Schmieg v. County of Chisago, 740 N.W.2d 770, 773 (Minn. 2007).

ARGUMENT

I. THE MINNESOTA TAX COURT EXCEEDED ITS AUTHORITY AND COMMITTED REVERSIBLE ERROR WHEN IT RELIED UPON ARGUMENT CONTAINED IN THE RESPONDENT'S POST TRIAL BRIEF FOR WHICH THERE WAS NO EVIDENTIARY SUPPORT AT TRIAL AND ULTIMATELY REACHED A CONCLUSION FAR OUTSIDE THE RANGE OF EVIDENCE.

A determination of value, including the value of real property, is a finding of fact based upon the opinions of expert witnesses, and is upheld unless clearly erroneous. Maurer v. Maurer, 623 N.W.2d 604, 606 (Minn. 2001). However, value determinations must fall within a "reasonable range of figures." Id. (citing Hertz v. Hertz, 299 N.W.2d 42, 44 (Minn. 1975)). While "[t]he tax court [is] not bound to accept the valuation of either appraiser," American Express Fin. Advisors, Inc. v. County of Carver, 573 N.W.2d 651, 658 (Minn. 1998), longstanding Minnesota precedent has established that a trial court's value is reasonable "if it falls within the limits of credible estimates made by competent witnesses. . ." Hertz, 299 N.W.2d at 44 (citing Lacey v. Duluth M. & I.R.R.Ry. Co., 51 N.W.2d 831 (Minn. 1952); Standard Const. Co., Inc. v. National Tea Co., 62 N.W.2d 201 (Minn. 1953); Hamm v. Commr. of Int. Rev., 325 F.2d. 934 (8th Cir. 1963), cert. denied, 377 U.S. 993 (1964)).

In its review of property tax appeal cases, this Court has adopted the rule establishing that a conclusion of value falling within the range of evidence is reasonable. In Northwest Airlines, Inc. v. Commr. of Rev., 265 N.W.2d 825, 831 n.10 (Minn. 1978), this Court stated "[t]he Tax Court's valuation need not be same as that any particular expert *as long as it is within permissible limits.*" (*Emphasis added*) (citing In re Northerly Centre Corp. v. County of Ramsey, 248 N.W.2d 923, 927 (Minn. 1976) (stating it was "clear that the trial court was well within the perimeters of the opinions given by the real estate appraisers")). See also, Hanson v. County of Hennepin, 527 N.W.2d 89, 95 (Minn. 1995) (upholding the tax court's decision, in part, because the "court's final conclusion as to market value fell between the values presented by the two experts."); and Carson Pirie Scott & Co. (Ridgedale) v. County of Hennepin, 576 N.W.2d 445, 451 (Minn. 1998) (upholding the Tax Court's decision, in part, because the Tax Court "us[ed] the range of values provided by the experts, the Tax Court's own judgment and expertise in property valuation, and [considered] the other testimony in the record.")

Other jurisdictions have adopted similar rules. For example, the Texas Supreme Court has held that the trier of fact, though not bound entirely by expert testimony on market value, may not "leap entirely outside of the evidence in answering any question submitted to [it]." Callejo v. Brazos Electric Power Co-op., 755 S.W.2d 73, 75 (Tex. 1988). Similarly, in Wyoming, it is hornbook law that property value conclusions in condemnation cases must be within the lower and upper end of the range of evidence. Energy Transportation Systems, Inc. v. Mackey, 674 P.2d 744, 746 (Wyo. 1984). Kansas and Kentucky follow the same rule. See e.g., Mettee v. Kemp, 696 P.2d 947, 953 (Kan. 1985); Com. Dept. of Highways v. Stephens Estate, 502 S.W.2d 71, 73 (Ky. 1973).

Some states, such as New York, follow a bit broader rule, upholding a conclusion of value falling outside the range of expert testimony only if other evidence at trial independently supports the conclusion. See e.g., Chester Indus. Park Associates, LLP v. State, 65 A.2d 513, 515 (N.Y. App. Div. 2 Dept. 2009); United States v. 1,162.65 Acres of Land, 498 F.2d 1298, 1300 (8th Cir.1974) (citing Chandler v. United States, 372 F.2d 276, 280-281 (10th Cir. 1967) (upholding a value determination outside the range of expert testimony but in accord with a purchase agreement entered into evidence); McCandless v. United States, 74 F.2d 596, 603-604 (9th Cir. 1935) (holding that jury could rationally find a value lower than that testified to by the landowner in light of evidence that not all of the improvements testified to by the landowner had actually been constructed), *rev'd on other grounds*; Young v. Arkansas State Highway Commission, 414 S.W.2d 87, 88-89 (Ark. 1967) (holding that jury was justified in returning a value lower than that testified to by the landowner where other evidence showed the parcel was not suitable for the landowner's intended use)).

See also, Bern-Shaw Ltd. Partnership v. Mayor of Baltimore, 833 A.2d 502, 511 (Md. 2003) (holding that a finding of market value below the range established by expert testimony was not justified by the fact-finder's reliance on the 18-year-old purchase price of subject property); O'Dwyer v. Robson, 103 A.D.2d 1036, 1036 (N.Y. App. Div. 4 Dept. 1984) (stating that value "well within the range of the expert testimony" is supported by sufficient evidence and will not be disturbed on appeal); Wolf v. Board of Revision of Cuyahoga County, 465 N.E.2d 50, 52-53 (Ohio 1984) (finding that the determination of market value "represented a compromise between the conflicting positions of the two experts" and was thus "supported by probative evidence of record."); Airport Inn, Inc. v. County Bd. of Equalization of Lancaster County, 340 N.W.2d 378, 381 (Neb. 1983) (stating that the finding of market value fell "within the range of the conflicts in the evidence" presented by parties' two experts and was therefore, upheld); In re City of New York, West Park (Manhattan Town) Clearance Project, 36 N.E.2d 478, 480-81 (N.Y. 1956) (holding that deviation from the range of values testified to by the experts was not justified, where it was apparent that the fact-finder relied "on its own subjective collective mind" that the property was a "tenement," rather than on evidence in the record).

Here, the Tax Court's final conclusion of value falls many millions of dollars outside of the range of evidence. As described at page eight above, the Tax Court concluded that the taxable fair market value of the Mall as of the January 2, 2005 assessment date was $12,876,000 – (11.7%) higher than the Respondent's expert concluded, $32,876,000 – (36.5%) higher than the original assessment and $54,126,000 – (78.7%) higher than the opinion of Relator's expert. The only way the Tax Court could reach such excessive values was to step outside its proper judicial role as trier of fact and disregard the evidence before it.

A. This Court Should Hold That a Tax Court Decision Falling Outside The Reasonable Range of Evidence Is Unreasonable As a Matter of Law.

While this appears to be a case of first impression in Minnesota[1], Minnesota should follow the narrower rule described above and uphold a determination of taxable market value by the Minnesota Tax Court *only* if it reasonably falls within the range of the expert opinions admitted into evidence. As described at pages ten to 11 above, there is already a significant body of case law in Minnesota holding that a trial court decision regarding market value is reasonable "if it falls within the limits of credible estimates made by competent witnesses. . ." See Hertz, supra, 299 N.W.2d at 44; In re Northerly Centre Corp., supra 248 N.W.2d at 927; Hanson, supra 527 N.W.2d at 95; and Carson Pirie Scott & Co. (Ridgedale), supra 576 N.W.2d at 451. To now hold that a Tax Court

[1] In EOP-Nicollet Mall, LLC v. County of Hennepin, 723 N.W.2d 270 (Minn. 2006), the Tax Court's decision was higher than either of the experts' opinions at trial, but was lower than the assessment. While upholding the Tax Court's decision, this Court did not specifically address the issue of whether a Tax Court decision falling outside the range of expert opinions offered into evidence is *prima facie* in contravention of federal and state laws, including due process.

decision more than $12 million dollars outside the range of the expert opinion testimony and other evidence might also be reasonable would be wholly inconsistent with the cases cited above and would ultimately leave Tax Court litigants with no opportunity to confront and challenge adverse evidence or the ability to evaluate the validity of their claims before proceeding to trial.

Due process entitles the parties to a dispute to know what evidence is being relied upon by the fact-finder. See In re Aughenbaugh, 125 F.2d 887, 889 (3d Cir. 1942). Indeed, "[i]t is fundamental [to due process] that a litigant have an opportunity to be confronted with *all* adverse evidence." Nevels v. Hanlon, 656 F.2d 372 (8th Cir. 1981) (citing Greene v. McElroy, 360 U.S. 474, 496-97 (1959)) (emphasis added). By basing its methodology for calculating value on an argument in Respondent's Post-Trial Brief rather than evidence submitted through expert testimony at trial, the Tax Court relied on adjudicative facts that were not in the record and to which Relator had no opportunity to challenge.

Minn. R. Evid. 201(e) allows judicial notice to be taken of facts not in the record only upon affording the parties notice and an opportunity to be heard. Such opportunity is necessary to allow "an adequate opportunity to refute the likely implications of the record" and "a meaningful determination of objections." Matter of Welfare of D.J.N., 568 N.W.2d 170, 175 (Minn. Ct. App. 1997). In any event, such notice may only be given to facts that are "beyond dispute." Matter of Zemple, 489 N.W.2d 818 (Minn. Ct. App. 1992). In sum, the due process rights guaranteed by the United States and Minnesota Constitutions require that for all matters in dispute, the Tax Court must rely solely on facts that all parties have had a fair opportunity to rebut. The decision of the Court in the present controversy, based on argument in Respondent's Post Trial Brief and not based on evidence in the record, denied Relator due process and should be reversed.

Tax Court litigants typically weigh the pros and cons of proceeding to trial through a careful review of each expert's report, with the expectation that the Tax Court will consider the reliability and credibility of the opinions contained in those reports as testified to at trial in order to reach a final conclusion of value based on that evidence – not a decision based on some independent theory or analysis not in the expert reports or supported at trial by either expert. If this Court were to hold today that the Tax Court is not limited to the evidence before it, but instead may rely upon valuation methodologies and calculations never offered into evidence by any testifying expert appraiser and ultimately reach a conclusion of value many millions of dollars outside the range of values opined to by any expert at trial, then taxpayers will ultimately be left without any meaningful way to contest property tax assessments which may be unconstitutionally excessive, save for the equivalent of throwing a dart at a dart board.

A rule allowing the Tax Court to reach decisions unsupported by the evidence, and many millions of dollars outside the range of the evidence, would be wholly inconsistent with the notions of due process this Court has held are of central importance in cases involving ad valorem taxation. See Montgomery Ward v. County of Hennepin, 450 N.W.2d 299, 306 (Minn. 1990) (holding that a taxpayer's right to due process is at stake in an ad valorem tax proceeding). A "fundamental requisite of due process is the opportunity to be heard, to be aware that a matter is pending, *to make an informed choice* *whether to acquiesce or contest,* and to assert before the appropriate decision-making body the reasons for such choice." Black's Law Dictionary, Sixth Ed. (1990), p. 500 (citing Trinity Episcopal Corp. v. Romney, 387 F.Supp. 1044, 1084 (S.D.N.Y. 1974)) (*emphasis added*).

Article X, Section 1 of the Minnesota Constitution requires that taxes be uniform upon the same class of subjects. Any rule depriving a taxpayer of its right to due process may ultimately result in a violation of the Minnesota Constitution with no means of redress. If the Tax Court is at liberty to reach a decision falling wholly outside the range of appraisal evidence, a Tax Court litigant is left with no means to make an informed choice regarding whether to contest its ad valorem tax assessment at trial.

B. There Was No Legally Sufficient and Credible Independent Evidence Offered at Trial Supporting The Tax Court's Conclusion of Value Falling Millions of Dollars Outside The Range of Expert Opinions.

Even if this Court elects not to adopt a hard and fast rule that a Tax Court's final conclusion of taxable value is only reasonable if it falls within the range of values opined to by the expert witnesses at trial, the Tax Court's decision in this case is, nevertheless, unreasonable and improper.

In the cases cited above following the broader rule holding that a trial court decision of value falling outside the range of the experts' opinions might be proper, the Courts make clear that a conclusion regarding value must still be based on some independent evidence admitted at trial. Here, there was no independent evidence offered or admitted at trial supporting the Tax Court's conclusions many millions of dollars higher than the assessment or the opinion of either expert at trial. Rather, the Tax Court's conclusions were based solely upon its independent theories, analyses and calculations under the income approach, which notably it copied verbatim from the Respondent's Post-Trial Brief at pages 42 and 43.

The Tax Court's use of these calculations constituted reversible error because no evidence was offered at trial supporting any notion that the Tax Court's analysis complied with generally accepted appraisal practices or that the resulting values were reasonable or proper.

The methodology employed by the Tax Court was significantly different from the methodology employed by Mr. Lennhoff in his appraisal report, as the Tax Court failed to make *any* adjustments or deductions from value to account for the significant non-taxable personal and intangible property located at the Mall – a primary theme of Mr. Lennhoff's report and testimony at trial. (See Exhibit 1, p. facing 40 and p. facing 57.) While the Tax Court stated its calculations are "more like that used by Mr. Messner in valuing the Subject Properties," (Appendix, p. 20), that statement also fails to find support in the evidentiary record. Mr. Messner started with projected net operating income, subtracted a management fee and a return on personal property and then added the taxes actually payable to arrive at an adjusted NOI. He then capitalized the adjusted NOI using a capitalization rate loaded with the full effective tax rate. (Exhibit 101, p. 82.) Conversely, in its calculations, the Tax Court started with minimum rent figures not found anywhere in either expert's report. It did not adjust its net operating income at all. Instead, it deducted the management fee before concluding to net operating income, made no deduction for personal property (despite the fact that it agreed with both experts that such a deduction was proper), did not add in any taxes, and used a capitalization rate loaded with only a portion of the effective tax rate. (Appendix, pp. 29-30.)

In Respondent's Post-Trial Brief counsel stepped out of the role of lawyer and into the role of witness, formulating new evidence and a new analysis and methodology, by picking and choosing selected calculations in a process patently designed to maximally enhance market value. The Tax Court's reliance upon the argument in "counsel testimony," instead of the actual evidence and testimony introduced at trial, ultimately lead the Tax Court to a conclusion of value millions of dollars outside the range of values as opined to by the experts at trial and constitutes reversible error.

II. THE TAX COURT ERRED AS A MATTER OF LAW WHEN IT FOUND THAT THE RELATOR SUBMITTED SUFFICIENT CREDIBLE EVIDENCE TO REBUT THE LEGAL PRESUMPTION THAT THE ASSESSMENTS ARE *PRIMA FACIE* VALID, BECAUSE IT THOROUGHLY REJECTED THE THEORIES AND METHODOLOGIES FOLLOWED BY RELATOR'S EXPERT AND ULTIMATELY CONCLUDED TO VALUES ROUGHLY DOUBLE THE VALUE OPINED TO BY RELATOR'S EXPERT FOR BOTH THE MALL AND VON MAUR.

When a taxpayer contests the assessed market value of real property in the Minnesota Tax Court, the assessment is presumed to be *prima facie* valid. Southern Mn. Beet v. County of Renville, 737 N.W.2d 545, 557 (Minn. 2007). However, merely showing up for trial is not sufficient to rebut this presumption. Id. at 558-559. Rather, the taxpayer must offer sufficient credible evidence to rebut the presumption. Id. This longstanding rule of law was described by former Tax Court Judge Earl B. Gustafson in his often cited treatise, Minnesota Tax Appeals (1992), as follows:

> The assessor's estimated market value (EMV) is prima facie valid. This is a presumption that remains until some credible evidence to the contrary is

> introduced. It then disappears from the case and the market value issue is decided, as in all civil cases, by a fair preponderance of the evidence. The presumption of validity allows the court to affirm the assessor's value if the petitioner fails to appear at the hearing or if no significant credible evidence on market value is introduced by the petitioner.

Gustafson, Earl B., Minnesota Tax Appeals (Butterworth 1992) at Section 8.06, page 50. Where credible evidence is offered and the taxpayer meets it burden to show the assessment does not reflect the true market value of the property, then the Tax Court must determine the market value of the property. Southern Minn. Beet, 737 N.W.2d at 559 (citing McNeilus Truck & Mfg., Inc. v. County of Dodge, 705 N.W.2d 410, 413 (Minn. 2005)).

Here, the Tax Court found that the Relator presented sufficient evidence, through the testimony of its appraisal expert, to rebut the *prima facie* presumption of validity of the assessments. (Appendix, pp. 9-10.) Accordingly, the Tax Court was then charged with making a determination of value based upon the preponderance of the evidence standard. (Appendix, p. 11.) The decision of the Tax Court, however, is irreconcilably inconsistent with its own findings that Relator's expert was credible and that the Relator had therefore met its initial burden. This Court has held on numerous occasions that a Tax Court decision that is illogical or fails to adequately explain its reasoning should be afforded no deference by this Court. See e.g., Hansen, 527 N.W.2d at 93. This Court recently observed in that:

> "to meet its burden to overcome the presumed validity of the county's estimated market value, [the taxpayer] need not necessarily put forth evidence that would allow the tax court to determine the market value of the subject property. Rather, [the taxpayer] need only put forth evidence to

show that the county's assessed value does not reflect the true market value of the property."

Southern Minn. Beet, 737 N.W.2d at 559. Here, the overwhelming rejection of Mr. Lennhoff's analysis and conclusions obliterates any notion that his testimony "show[ed] that the county's assessed values 'did not reflect true market value.'"

In sum, the Tax Court's conclusion that the Relator met its burden to submit legally sufficient credible evidence through the testimony of its appraisal expert is wholly contradicted by the Tax Court rejecting Mr. Lennhoff's adjustments for landlord provided tenant allowances, specialty leasing income, costs of occupancy, start-up costs, capitalization rate, furniture, fixtures and equipment and Mr. Lennhoff's valuation of Von Maur in its entirety . (Appendix, pp. 24-28 and 31-36.) The *only* adjustment the Tax Court utilized in common with Mr. Lennhoff was his management fee of 3%. (Appendix, p. 28.) However, the Tax Court copied that management fee adjustment from Respondent's Post-Trial Brief at pp. 42 and 43. Accordingly, upon careful review, the Tax Court did not actually find Mr. Lennhoff credible or rely upon Mr. Lennhoff's appraisal report or testimony at all.

III. THE DECISION OF THE MINNESOTA TAX COURT CONTRAVENES FEDERAL BANKRUPTCY LAWS.

A. The Tax Court's Judgment Increasing the 2006 and 2007 Real Estate Taxes on the Subject Property Violates the Automatic Stay Imposed by 11 U.S.C. §362(A)(1) of the U.S. Bankruptcy Code and is Therefore Void as a Matter of Law.

Section 362(a) of the United States Bankruptcy Code is titled "Automatic Stay" and provides in relevant part:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or *to recover a claim against the debtor that arose before the commencement of the case under this title*.

11 U.S.C. §362(a) (1). (*emphasis added.*)

The automatic stay is "among the most basic of debtor protections." In re Vierkant, 240 B.R. 317, 320 (B.A.P. 8th Cir. 1999). It is designed to protect both debtors and creditors, by giving the debtor "a breathing spell" from collection efforts while providing an orderly liquidation procedure under which all creditors are treated fairly and equally. Id. It applies to any action involving the debtor from the moment the bankruptcy petition is filed, regardless of whether the other parties to the stayed proceeding are aware of the bankruptcy petition, and its protections cannot be waived. Constitution Bank v. Tubbs, 68 F.3d 685, 691 (3d Cir. 1995). The automatic stay is "of broad scope...suspend[ing] any non-bankruptcy court's authority to continue judicial proceedings then pending against the debtor." Vierkant, 240 B.R. at 321 (citing Constitution Bank, 68 F.3d at 691). The automatic stay thus prohibits further action on any underlying pre-petition proceeding. See In re Security Aviation, Inc., Case No. A06-00559-DMD (Bankr. Alaska Aug. 27, 2007) (Appendix, p. 287) (holding that because the "source" of a post-petition state court award of attorney's fees against a debtor was an underlying pre-petition proceeding, the attorney's fees award is a continuation of that pre-petition proceeding.)

The protection of the automatic stay applies to any non-ministerial judicial action, including entry of judgment after the conclusion of trial. Bonilla v. Trebol Motors Corp., 150 F.3d 77, 87 (1st Cir. 1998) (vacating the judgment of District Court where fact-finding was concluded one month before the defendants filed for bankruptcy, but the judgment was entered ten days after bankruptcy petition). Any judgment entered in derogation of an automatic stay is void *ab initio*. See In re Vierkant, 240 B.R. at 325 (holding that a default judgment against debtor entered by Minnesota District Court after initiation of bankruptcy proceedings violated the automatic stay and was therefore, void); In re General Associated Investors Ltd. Partnership, 159 B.R. 551, 556 (Bankr. Ariz. 1993) (holding that a judgment by the state Tax Court dismissing the debtor's property tax petition after the initiation of bankruptcy proceedings violated the automatic stay and was therefore void).

The trial in this matter concluded on March 11, 2009, and Relator filed its bankruptcy petition on April 16, 2009. The Tax Court did not enter its judgment, however, until October 13, 2009, well after Relator sought bankruptcy protection. Accordingly, entry of the Judgment by the Tax Court increasing the real estate taxes payable by Relator constituted the continuation of a judicial proceeding against the debtor that arose before the commencement of the bankruptcy petition. Because the Tax Court failed to stay the proceedings pending the bankruptcy, the Tax Court violated the automatic stay under 11 U.S.C. §362(a)(1) and its Judgment is void.

The Tax Court apparently based its actions on the premise that the automatic stay under 11 U.S.C. §362(a)(1) only applies to actions brought *against* a debtor, and that here, Relator was the petitioner in the Tax Court proceeding. However, "a single case may include several 'actions or proceedings.' Thus, *who* filed the complaint is not dispositive of whether the case involves an action or proceeding against the debtor." Parker v. Bain, 68 F.3d 1131, 1137 (9th Cir. 1995) (citing Carlson v. Norman (In re Duncan), 987 F.2d 490, 491 n. 2 (8th Cir. 1993); Maritime Elec. Co. v. United Jersey Bank, 959 F.2d 1194, 1204-06 (3d Cir. 1992)). "Multiple claims and multiple party litigation must be disaggregated so that particular claims, counterclaims, cross claims and third-party claims are treated independently when determining which of their respective proceedings are subject to the bankruptcy stay." Maritime, 959 F.2d at 1204-05. Even within the scope of a single case, "actions *against* a debtor will be suspended even though closely related claims asserted *by* the debtor may continue." Id. at 1205.

The automatic stay thus applies to a counterclaim brought against a debtor, even though the debtor initiated the lawsuit. Koolik v. Markowitz, 40 F.3d 567, 568 (2d Cir. 1994).[2] "Since a defendant who is awarded judgment on a counterclaim is no less a judgment creditor than is a plaintiff who is awarded judgment on a claim...a counterclaim against a plaintiff who becomes a bankruptcy debtor is 'an action or proceeding against the debtor' within the meaning of §362(a)(1)." Id. See also, E3 Biofuels-Mead LLC v. QA3 Financial Corp, 384 B.R. 580, 582 (Bankr. Kan. 2008)

[2] The converse is likewise true; the Third Circuit notes in *Maritime* that "counterclaims...asserted by a defendant-debtor are not stayed, while same case proceedings arising out of claims asserted by the plaintiff are stayed." Id.

(stating the "automatic stay clearly bars the counterclaims and third-party claims [for breach of contract, fraud and conversion] against [debtor] Biofuels"); In re Hagerstown Fiber Ltd. Partnership, 277 B.R. 181, 215 (Bankr. S.D.N.Y. 2002) (stating that §362(a)(1) "enjoins the commencement or continuation of lawsuits against the debtor, including counterclaims asserted against the debtor in a lawsuit initiated by the debtor.")

Here, Respondent introduced evidence at trial seeking to increase the real estate taxes on the Mall and Von Maur, and specifically requested such an increase in its post-trial brief, thereby effectively bringing a counter-claim against the debtor when it sought a judgment increasing the debtor's taxes at trial. No answer or further pleadings by Respondent are statutorily permitted in a Chapter 278 proceeding. Minn. Stat. §278.05, subd. 1 (providing "without any answer, return or other pleadings thereto"). Thus, the introduction of evidence at trial seeking to increase the real estate taxes on the Mall effectively constituted a judicial proceeding against the debtor, bringing the post-trial proceedings including the filing of Respondent's briefs and the Tax Court's Judgment within the purview of the automatic stay, and rendering that Judgment void as a matter of law.

B. Alternatively, the Tax Court's Judgment Constitutes a Pre-Bankruptcy Claim for Which Respondent Hennepin County Should Have Filed a Timely Proof of Claim Under Rule 3003 of the U.S. Federal Rules of Bankruptcy Procedure.

In the event this Court determines that the Tax Court's Judgment did not violate the automatic stay imposed by 11 U.S.C. §362(a)(1), the Judgment, nevertheless, constitutes a pre-bankruptcy petition claim, which was resolved by the Bankruptcy

Court's Order Confirming the Plan Debtors' Joint Plan of Reorganization.[3] (Appendix, p. 53.)

Through its bankruptcy filings, Relator publicly disclosed its contingent interest in the outcome of the pending property tax appeal as well as its then-current obligation to the Hennepin County treasurer for outstanding property taxes of $0. (Appendix, pp. 226 and 236.) Accordingly, Respondent had notice and opportunity to challenge the validity and amount of these disclosures before the Bankruptcy Court. Respondent elected not to do so. Because Respondent did not do so, the Judgment will be discharged no later than January 31, 2009, pursuant to the U.S. Bankruptcy Court's December 15, 2009 Order confirming the Relator's plan of reorganization. (Appendix, p. 60.)

Specifically, on September 23, 2009, Relator filed its schedule of liabilities pursuant to 11 U.S.C. §521(1) and Rule 3003(b)(1) of the Federal Rules of Bankruptcy Procedure ("Fed. R. Bankr. P."). Schedule B-21 listed Relator's "contingent or unliquidated" interest in its then-pending property appeal against Respondent. (Appendix, p. 226.) Schedule D-3 listed Relator's secured property tax liability to Respondent as $0, which was likewise noted as contingent and unliquidated. (Appendix, p. 236.) A debtor's scheduled claim amount serves as a deemed proof of claim unless the debt was listed as contingent, disputed, or unliquidated. 11 U.S.C. §1111(a). Because Respondent's claim was scheduled as contingent and unliquidated, Respondent was required to file a proof of claim pursuant to Fed. R. Bankr. P. 3003(c)(2), which provides in relevant part:

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[3] Eden Prairie Mall, L.L.C. is listed among the several plan debtors in Exhibit A to the Order. (Appendix, p. 117.)

> [a]ny creditor or equity security holder whose claim or interest is not scheduled *or scheduled as disputed, contingent, or unliquidated* shall file a proof of claim or interest within the time prescribed by subdivision (c)(3) of this rule; any creditor who fails to do so shall not be treated as a creditor with respect to such claim for the purposes of voting and distribution.

(*emphasis added.*) Respondent had notice and opportunity to dispute Relator's disclosures by filing a proof of claim. The Affidavit of Service, dated October 14, 2009, shows that proof of claim forms were served on Respondent. (Appendix, pp. 268-271). Because Respondent did not file a timely proof of claim,[4] it was not entitled to a distribution under Relator's plan of reorganization. Instead, the claim will be discharged by the Bankruptcy Court when the Relator emerges from bankruptcy no later than January 31, 2009, pursuant to the U.S. Bankruptcy Court's December 15, 2009 Order, rendering the Judgment moot. (Appendix, p. 51 (terminating all existing claims pursuant to the Reorganization Plain and enjoining any attempt to assert claims arising prior to the effective date of the Order)).

Likewise, Respondent may not argue that property taxes constitute an administrative expense under 11 U.S.C. §503(b), which may be assessed by a governmental entity without the filing of a proof of claim. 11 U.S.C. §503(b)(1)(B)(D). Only taxes *incurred post-petition* are properly characterized as administrative expenses. See In re Anchor Glass Container Corp., 375 B.R. 683, 686 (Bankr. M.D. Fla. 2007) (holding "only liabilities incurred by the estate post-petition, as distinguished from taxes for which the debtor already had a pre-petition liability, may be allowed as administrative

[4] The deadline to file a proof of claim in the General Growth bankruptcy case was Nov. 12, 2009. (Appendix, p. 186.)

expenses"); Matter of Midland Indus. Service Corp., 35 F.3d 164, 166 (5th Cir. 1994) (stating "a claim cannot be both a pre-petition secured claim against the debtor and a post-petition administrative claim against the bankruptcy estate").

In re Security Aviation, Inc., Case No. A06-00559-DMD (Bankr. Alaska Aug. 27, 2007), cited above, provides this Court significant guidance with regard to this issue. In that case, Security Aviation Inc., the debtor, was the Plaintiff in a state court action prior to filing a Chapter 11 bankruptcy case. After commencement of the bankruptcy case, one of the Defendants in state court action, Air USA, filed a priority proof of claim for the attorney's fees it anticipated would be owed as a part of the state court action. The issue before the Bankruptcy Court was whether the anticipated expense constituted an administrative expense under 11 U.S.C. §503, giving it priority status. The Court concluded that the expense did not qualify as an administrative expense, because it did not arise out of a post-petition transaction. Rather, the Court concluded that the "source" of the award of attorney's fees was the pre-petition state court action. Accordingly, because the state court action is "unitary," any anticipated attorney's fees award arising out of that action is a pre-petition expense.

Here, while the Judgment was issued by the Tax Court after the filing of the bankruptcy petition, the case was initially filed and the trial occurred pre-petition. Thus, the "source" of the Judgment in this case is the pre-petition Tax Court proceeding, which renders it a claim for a pre-petition expense. If Respondent wanted to collect on that pre-petition Judgment, it should have timely filed a proof of claim. It did not. Thus, the claim is not entitled to receive a distribution under Relator's plan of reorganization and will be discharged by the Bankruptcy Court when the Relator emerges from bankruptcy no later than January 31, 2010, rendering the Judgment moot.

IV. THE TAX COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO PROPERLY APPLY THE GENERALLY ACCEPTED APPRAISAL METHODOLOGY REQUIRING THAT PERSONAL PROPERTY AND INTANGIBLE ASSETS BE IDENTIFIED AND SEPARATELY ANALYZED WITH REGARD TO THEIR EFFECT ON VALUE.

The primary reason the Tax Court ultimately concluded to a value many millions of dollars outside the range of evidence was because it wholly ignored the main issue at trial. That issue involves a valuation concepts commonly referred to as "business enterprise value" and "total assets of the business" within the appraiser community.

Identification and quantification of business enterprise value as a component of the total assets of the Mall business was *the* issue of highest significance in this case at trial. As explained in The Appraisal of Real Estate, 13th Ed., (2008), business enterprise value includes the market value of both the tangible assets of the business (*i.e.*: the real property and personal property) plus the intangible assets, such as reputation, work force, contracts and good will, which in combination make up the going concern or the total assets of the business. (Exhibit 4, p. 30; Exhibit 1, p. facing 5.) All three experts ***agreed*** that generally accepted appraisal practice promulgated through the Uniform Standards of Professional Appraisal Practice and Advisory Opinions (2008-2009 Ed.) (hereinafter "USPAP") ***requires*** that any personal property and intangible assets of the business, which do not constitute real property but are included in the property appraised, must be identified and separately analyzed with regard to their effect on value. (USPAP, Standard 1-2e(iii); Exhibit 23; Exhibit 1, p. 3; Exhibit 101, pp. 1-2; Tr. 1046: 10–1047: 2.) Despite the fact that all three experts agreed that such an analysis is absolutely mandatory, the Tax Court failed to address this requirement or conduct any such an analysis or calculations in its decision at all.

The issue of identifying and segregating personal property and intangible assets from the total assets of the business is of particular input in Chapter 278 appeal before the Minnesota Tax Court, because Minn. Stat. §272.03, subd. 1(b) provides that taxable real property is limited to:

> all improvements or fixtures annexed to [a] building or structure, which are integrated with and of permanent benefit to the building or structure, . . . and which cannot be removed without substantial damage to itself or to the building or structure.

Accordingly, personal property and intangible assets not falling within the above definition of real estate are not taxable as real property under Minnesota law.

A. The Minnesota Tax Court Erred as a Matter of Law When it Failed to Deduct Personal Property, including Furniture, Fixtures and Equipment and Tenant Improvements From Its Final Conclusion of The Taxable Value of the Real Property in Dispute.

Because personal property does not fall within the scope of the statutory definition of real property under Minn. Stat. §272.03, subd. 1(b), the value of personal property included within the real property must be excluded from the taxable value of the real property concluded to by the Minnesota Tax Court in a real estate tax case. See e.g. FACS of New Ulm, LLC v. County of Brown, File No. CX-00-222 (Minn. Tax Ct. May 25, 2001) (refrigeration and frozen storage improvements are personal property and equipment, not real property); Sentinal Management Company v. County of Hennepin, File Nos. TC-18600, TC-21855 (Minn. Tax Ct., Jan. 18, 1996) (Appendix, p. 277) (confirming that personal property is non-taxable); See also Southern Minnesota Beet Sugar Coop v. County of Renville, 737 NW2d 545, 551 (Minn. 2007). In this case, the non-taxable personal property located within the Mall falls into two categories: (1) furniture, fixtures and equipment; and (2) tenant improvements.

1. The Tax Court Failed to Deduct the Value of the Furniture, Fixtures and Equipment From Taxable Value of the Real Property as Required by Minnesota Law.

At trial, all three experts agreed that furniture, fixtures and equipment are not taxable real estate and therefore, must be deducted from the final value of the Mall to arrive at its taxable value. (Exhibit 1, p. 38; Exhibit 162, p. 6; and Exhibit 101, p. 82.) The Tax Court stated it agreed with Respondent's expert that the market value of the furniture, fixtures and equipment located at the Mall should be deducted. (Appendix, pp. 28-29[5].) However, because the Tax Court's final conclusion was not based on the evidence offered at trial, but instead on argument contained in Respondent's Post Trial Brief for which there was no supporting testimony at trial, the Tax Court failed (perhaps inadvertently) to actually make the acknowledged deduction for furniture, fixtures and equipment in its final calculations. (Appendix, pp. 29-31.) Because personal property is not taxable under Minn. Stat. §272.03, subd. 1(b), the Minnesota Tax Court's failure to deduct the value of the furniture, fixtures and equipment from its final conclusions of taxable value constitutes a reversable error.

[5] "Thus, we find that it would be appropriate to use the market value rather than the historical cost."

2. Tenant Improvements Constitute Personal Property Under Minnesota Law, and Therefore, Also Must Be Deducted From The Taxable Value of the Real Property.

The second category of personal property located at the Mall is tenant improvements. Tenant improvements are defined as the original installation of finished tenant space in a construction project. The Dictionary of Real Estate Appraisal, 4th Ed. (2002), p. 290. Often, a landlord will pay for the tenant improvements before the tenant moves in and then charge those costs back to the tenant by amortizing the cost of the improvements over the lease term as an add-on. The Appraisal of Real Estate, 13th Ed. (2008), p. 480. (See also, Tr. 926: 19–927: 5.) At the conclusion of the lease, the tenant improvements are then demolished and replaced with new tenant improvements designed and suited to the new tenant. The Dictionary of Real Estate Appraisal, 4th Ed. (2002), p. 290. (See also, Tr. 836: 18-20; 934: 8-23; 149: 13-19; 527: 14-19.)

The evidentiary record before this Court provides further clarification of the nature of the tenant improvement dollars in issue. In some instances the funds provided by the landlord to the tenant for tenant improvements were not used to build out the space, but instead were used to purchase furniture, fixtures and equipment or even pocketed as cash. (Tr. 1055: 11-17.) As acknowledged by Respondent's review appraiser, Mr. Kenney, additions to rent for amortized amounts used by a tenant to purchase furniture, fixtures and equipment or that are pocketed as cash, are not funds received by a landlord for the rental of real estate and are therefore, appropriately deducted when capitalizing income under the income approach. (Tr. 936: 14-22.) The Tax Court did not make any such deductions for amortized amounts used by the Mall tenants to purchase funiture, fixtures and equipment or that were pocketed as cash, and as a result, erred as a matter of law.

The question remains, however, whether additions to rent for amortized amounts actually used to build out the space constitute a rental payment for real estate or are properly recognized as payment for personal property or its use by the tenant.

Under Minnesota law, tenant improvements including flooring or wall coverings, which are generally integrated with the building or structure, are not necessarily real property. Under Minnesota law, taxable real property *only* includes improvements to a structure, which are:

> integrated with ***and*** of permanent benefit to the building or structure, regardless of the present use of the building ***and*** which cannot be removed without substantial damage to itself or to the building or structure.

Minn. Stat. §272.03, subd. 1, *emphasis added.* The pertinent sentence in Minn. Stat. §272.03 contains three separate clauses, all connected by the conjunctive word "and," clearly indicating that a conjunctive interpretation of the statute is required. In other words, not just one, but all three elements must be satisfied for property to constitute taxable real property under Minnesota law. The Minnesota Tax Court has previously interpreted Minn. Stat. §272.03, subd. 1 to require that all three elements must exist for something to constitute taxable real property in Minnesota. See, e.g., Fullerton Building Systems, Inc. v. County of Nobles, File No. C1-00-727 (Minn. Tax Ct. Feb. 4, 2002) (Appendix, p. 272).

At trial, the undisputed testimony established that tenant improvements still have physical useful life but nevertheless are removed every time a new tenant moves into or out of a space in the Mall. (Tr. 934: 8-23; 149: 13-19.; 527: 14-19.) They are demolished long before the end of the physical life of the tenant improvement without substantial damage to the building or structure. (Tr. 927: 12-19; 934: 8–936: 5.) Accordingly, as admitted by Respondent's own rebuttal expert, tenant improvements are not "of permanent benefit to the building." (Tr. 936: 2-5.) Therefore, while tenant improvements might be considered real estate by appraisers in other jurisdictions, they do not constitute taxable real property under Minnesota law.

Additionally, despite Respondent arguing in its post-trial brief that the cost of amortized tenant improvements should not be removed from the income stream of the Mall, it is quite compelling that Respondent's own expert included that very deduction in his separate analysis of market rent for Von Maur. Specifically, Mr. Messner indicated that the rents in his Von Mauer rental comparable number two were actually \$17 and \$16.50 per square foot, but that those rental amounts included amortized tenant improvements. (Exhibit 102, p. 87.) Accordingly, Mr. Messner estimated effective rent for the real property in his rental comparable number two at \$5.02 per square foot. (Exhibit 102, p. 76.) Similarly, on cross examination, Mr. Messner admitted that the \$3.83 per square foot rent he identified for his rental comparable number three was the rental amount after he amortized the tenant improvements and backed them out. (Tr. 1728: 15-17.)

The Tax Court, in its decision, held that Mr. Lennhoff's deduction from income to account for the amortized cost of tenant improvements was improper, because the costs were incurred prior to the dates of valuation. (Appendix, p. 25.) Accordingly, the Tax

Court concluded, the amortized tenant improvement amounts, which are included in the income stream, should not be deducted because the landlord actually receives the full rent plus the amortized tenant improvement amounts. (Id.)

The Tax Court's reasoning fails to respond to the issue before the Court. The Relator does not dispute that a landlord actually receives the full rent for use of the real property plus the amortized tenant improvement amounts. The issue, however, is whether the amortized tenant improvement amounts constitute payment for personal property or its use, as opposed to payment for use of real property as defined by Minn. Stat. §272.03, subd. 1. As described above, payments for amortized tenant improvements under governing Minnesota statutes constitute payments not for use of real property, but instead for personal property or its use by the tenants.

Accordingly, to capitalize income which includes payments amortizing tenant improvements under the income approach, but fails to identify and separately analyze the effect of that personal property on the business enterprise value or total assets of the business, is contrary to the opinion and testimony of all three experts at trial and does not comply with the requirement of generally accepted appraisal practices and USPAP. (USPAP, Standard 1-2e(iii); Exhibit 23; Exhibit 1, p. 3; Exhibit 101, pp. 1-2; Tr. 1046: 10–1047: 2.) By failing to deduct the income attributable to the tenant improvements before capitalizing that income into value, the Minnesota Tax Court has contravened the requirement of the Minnesota Statutes by effectively taxing those tenant improvements, which legally constitute personal property, since they are not "of permanent benefit to the building or structure," as if they constitute real property.

B. The Tax Court Also Erred When It Failed to Deduct The Value of Non-Taxable Intangible Assets Contributing to the Income Capitalized Into Value, Including the Return on and of Favorable Contracts and a $623,326 Investment in Grand Re-Opening Marketing Costs, From Its Final Conclusion of Taxable Real Property Value.

The total assets of the business include the market value of both the tangible assets of the business (*i.e.*: the real and personal property) plus intangible assets, such as reputation, work force, contracts and good will, which together make up the going concern or the total assets of the business. (Exhibit 4, p. 30; Exhibit 1, p. facing 5.) Under Minn. Stat. §272.03, subd. 1, only the real property components of the total assets of the business are taxable under Minnesota law. Generally accepted appraisal practice as promulgated by USPAP requires that the intangible assets of the business, including things like reputation, work force, contracts and good will, must be identified and separately analyzed with regard to their effect on the value as a whole, just like personal property. (USPAP, Standard 1-2e(iii); Exhibit 23; Exhibit 1, p. 3; Exhibit 101, pp. 1-2; Tr. 1046: 10–1047: 2.)

In his appraisal report and at trial, the Relator's expert identified several intangible assets in the Mall. Mr. Lennhoff analyzed these intangible assets with regard to their effect on the income generated by the total assets of the business as required by USPAP. The intangible assets analyzed by Mr. Lennhoff included a return on and of certain identified favorable contracts, as well as a return on and of a $623,326 investment in grand re-opening marketing costs. (Exhibit 1, p. 38.)

1. The Relator's $11 Million Investment In Von Maur Constitutes a Favorable Contract Related to Property not Included in the Mall Tax Parcel, Which is An Intangible Asset That is Not Taxable as Real Estate Under Minnesota Law.

As Mr. Lennhoff explained in his report, when the Von Maur store was constructed in 1999, the Relator provided Von Maur with an $11 million cash payment to build the store. This payment was made to assure that Von Maur would build and continuously operate the store under the Von Maur name for a period of ten years, and possibly an additional five to ten years, subject to Von Maur's option to purchase the real estate for $10. (Id.; Tr. 1594: 10-11.) As Mr. Lennhoff explained, a fundamental appraisal concept is that a transaction such as the one described above constitutes an intangible asset, because a property owner simply would not enter into such a contract (i.e.: an agreement whereby they contribute $11 million to construct a department store, when the department store tenant has the option to "purchase" the store at a later date for $10) without expecting to receive a return on their investment from the in-line stores in the Mall. (Tr. 697: 17-23.)

In this case, the Relator did receive such a return. The evidence established that net operating income at the Mall increased each year after the Von Maur department store opened in the Mall. (Exhibit 1, p. facing 25.) That return on an investment "off-site" relative to the Mall tax parcel is an "intangible asset" with respect to the Mall, in significant part because it relates to real and personal property constructed on a tax parcel which is adjoining but separate from the Mall tax parcel.

At trial, both the Relator's and the Respondent's experts acknowledged that similar deals subsidizing anchor department stores are customary and typically occur in the market. In fact, Mr. Messner even acknowledged that such deals create a transfer in value from a department store to a mall. (Tr. 1640: 24–1641: 4.) While Mr. Messner argued this transfer of value constitutes real estate, his argument made no logical sense, and he ultimately admitted that no actual bricks or mortar or other real property assets were being transferred across property lines from the department store to the mall. (Tr. 1641: 5-15.) [6]

The asset actually being transferred when a mall subsidizes an anchor department store is the intangible value created by the synergy between the department store and the mall in-line stores. As Mr. Lennhoff explained, having a higher-end department store, such as Nordstrom's or Von Maur creates value because it assists the mall in obtaining what he described as "glitter" tenants, who not only pay more in rent, but also attract more shoppers, more consumer spending dollars and other tenants to the mall. (See, e.g., Lennhoff general discussion of mall/department store relationships at Tr. 134: 24–136:4.) This intangible value must, pursuant to USPAP and generally accepted appraisal practices, be identified, valued and deducted from the total assets of the business in order to fairly arrive at the value of the taxable real estate of the Mall.

[6] See The Equitable Life Assurance Society of the United States v. County of Ramsey, 530 N.W.2d 544, 557 (Minn. 1995). This Court affirmed the judgment, reasoning in part that it could not conclude that the Minnesota Tax Court's decision with regard to "off-site" contributions from Rosedale Mall to Dayton's were clearly erroneous, "(b)ecause the testimony of both expert appraisers supports the Tax Court's decision to deduct what it characterized as 'off-site' expenses from its DCF analysis." In the Rosedale case, the shopping center promised to pay Dayton's, among other payments, a "non shareholder capital contribution" of $28,750,000 to build a new three-story Dayton's at Rosedale. Id. at 548.

In this case, Mr. Lennhoff reasonably valued this intangible asset by assuming an 8.33% expected return on the Relator's $11 million investment over a 20 year term. This resulted in a $1,148,027 yearly adjustment from income from the total assets of the business of the Mall in order to focus on the income from the real estate alone.

Despite lengthy testimony by all three expert witnesses at trial regarding this issue, in its decision the Tax Court incredibly identified the favorable contract, but failed to address this issue at all. The Tax Court did not described the reasoning it relied upon in implicitly rejecting this generally accepted appraisal practice and legally required adjustment in order to calculate the value of the taxable real property. This Court has held on numerous occasions that a Tax Court decision that fails to adequately explain its reasoning should be afforded no deference by this Court. See e.g., Hansen v. County of Hennepin, 527 N.W.2d 89, 93 (Minn. 1995). Here, the Tax Court's failure to discuss or address this issue or to make any corresponding adjustment in the capitalization of income to determine the market value of taxable real property constitutes reversible error.

2. The Relator's $623,326 Investment in Grand Re-Opening Marketing Costs is Not Taxable Real Property Under Minnesota Law.

Similarly, the Relator's $623,326 investment in grand re-opening marketing costs is an intangible asset that must be separately identified and excluded from value under Minnesota law. As explained in Mr. Lennhoff's report, the Relator spent $623,326 in marketing expenses for its grand re-opening event after the Mall's 2002 renovation. (Exhibit 1, p. 38.) Again, as Mr. Lennhoff explained, a property owner simply would not make such an investment without expecting to receive a return on that investment. (Tr.

221: 1-7.) That investment did not add any bricks and mortar or other real property improvements to the Mall, but the income was nonetheless increased, due in part, to that investment. The evidence established that net operating income at the Mall increased each year after the renovation and grand re-opening of the Mall. (Exhibit 1, p. facing 25.) Similar to the $11 million investment in Von Maur, Mr. Lennhoff reasonably valued this intangible asset by assuming an 8.33% expected return on the Relator's $623,326 investment, but this time he used a 12 year, as opposed to a 20 year term, based on the typical periodic renovation cycle in the marketplace for significant Mall remodeling and repositioning, a cycle indicated by the market of super regional shopping centers. (Exhibit 1, p. 38.)

Unlike the issue of favorable contracts, the Tax Court did address Mr. Lennhoff's decision to amortize the grand re-opening marketing costs. The Tax Court concluded that because there had been only one grand re-opening event at the mall, Mr. Lennhoff's decision to amortize the expense over a 12 year period was unsupported by the Mall's history. (Appendix, p. 26.) A review of the evidence in the record, however, establishes that the Tax Court's conclusion is factually wrong.

The Mall was originally constructed in 1976 as a two anchor mall. (Exhibit 1, p. 2.) Respondent's witness Mr. Sinell testified that the Mall was then renovated in 1984, when a third anchor department store was added to the Mall. (Tr. 777:21–772:3.) Mr. Sinell further testified that in 1989 the Mall was renovated a second time, when the food court and entry areas were remodeled and escalators and elevators were installed. (Tr. 772: 7-12.) Mr. Sinell further testified that the Mall was renovated a third time in

1994 when a fourth anchor department store was added to the Mall. (Tr. 772: 13-19.) While these three previous renovations may have been on a smaller scale than the renovation that occurred in 2002, they consequently occurred more frequently than the 12 year cycle incorporated by Mr. Lennhoff in his testimony.

The Tax Court's conclusion that renovation and associated marketing costs incurred in connection with the 2002 renovation did not occur in a cyclical fashion is contrary to the facts testified to by Mr. Sinell regarding prior renovations as well as the testimony of Mr. Lennhoff. The evidence was undisputed that the Mall underwent a total of four renovations in 26 years (as of the 2002 renovation). Mr. Lennhoff's decision to amortize the grand re-opening start up costs over a 12 year period was wholly supported by the evidence. Moreover, because the expenditure of these costs did not result in any identifiable bricks and mortar or other taxable real property, but instead created a non taxable intangible asset, the Tax Court committed reversible error when it rejected Mr. Lennhoff's analysis and adjustment.

V. THE TAX COURT ERRED WHEN IT ISSUED FINDINGS AND CONCLUSIONS REGARDING THE PROPER CAPITALIZATION RATES, WHICH WERE INTERNALLY INCONSISTENT AND UNSUPPORTED BY THE EVIDENCE.

The Tax Court used a capitalization rate of 7.5% in 2005 and 7.25% in 2006 based on its factual finding that Mr. Messner correctly classified the Mall as a Class B+ mall. (Appendix, pp. 27-28.) The Tax Court's conclusion is internally inconsistent with its own factual findings, unsupported by the evidence admitted at trial, and is therefore clearly erroneous and constitutes reversible error. See e.g., Harold Chevrolet, Inc., 526 N.W.2d at 57.

Both Mr. Lennhoff and Mr. Messner gave strong consideration to the class of the Mall in choosing their respective capitalization rates. (Exhibit 1, p. 39; Exhibit 101. p. 80.) While Mr. Messner concluded the Mall was a high B+ or low Class A mall, Mr. Lennhoff concluded the Mall was a low Class B mall. (Exhibit 1, p. 39.) Both experts relied in significant part on the classification of malls published in the Price Waterhouse Cooper Korpacz Real Estate Investor Survey ("Korpacz Report"), a publication commonly relied upon by appraisers. (Appendix, p. 27.) In the Korpacz Report, malls are classified based on their gross retail sales per square foot of available in-line space. The question, therefore, was what were the gross sales per square foot of the available in-line space at the subject Mall?

Mr. Messner and Mr. Lennhoff disagreed regarding this factual issue, with their initial dispute relating to whether the Tax Court should include or exclude the retail sales (and corresponding area) achieved at the AMC theater in its calculation of in-line store sales. (Appendix, p. 27.) The Tax Court agreed with Mr. Messner, and excluded the AMC theater sales. (Id.) The Tax Court's decision is not logical and therefore, should be reversed.

A. Even Assuming Arguendo That The Theater's Sales Are Excluded From The Analysis, The Trial Court's Selection of Capitalization Rates and Its Determination That the Mall is a Class B+ Mall Remain Unsupported By the Evidence.

The Tax Court adopted the capitalization rates used by Mr. Messner based on its incorrect conclusion that Mr. Messner correctly classified the Mall as a B+ Mall. Rather, Mr. Messner selected his capitalization rate on his conclusion that the Mall was a high B+ or low Class A mall. (Exhibit 101, p. 80). Mr. Messner selected a capitalization rate significantly different (i.e., lower) than the rate indicated for a Class B+ mall. Accordingly, the Tax Court's adoption of a capitalization rate based on Mr. Messner's conclusion that the Mall is a Class B+ mall is unsupported by the evidence submitted at trial.

The evidence submitted at trial established that, even if *arguendo*, one excludes the theater's retail sales and square footage, the Mall did not have sales per square foot putting it in the high B+ to low A Class range as reported by Korpacz.

Korpacz Class of Mall	Level of Retail Sales	Exhibit 18 Average Overall Capitalization Rates 4th Qtr 2004	Exhibit 19 Average Overall Capitalization Rate 4th Qtr 2005
Class B Mall	\$250 to \$299	8.72	8.21
Class B+ Mall	\$300 to \$349	7.75	7.48
Class A Mall	\$350 to \$449	6.92	6.68

According to Mr. Messner, even excluding the theater, the subject property had sales per square foot of only \$303 per square foot in 2003; \$311 per square foot in 2004; and \$325 in 2005 – all three of which fall squarely *in the bottom to the middle* of the B+ range. (Exhibit 101, p. 27.) It is not until 2006, two years *after* the first assessment date in issue, that the sales are $344 per square foot, approaching the "high B+ range." (Id.) At no time does Mr. Messner opine that the Mall would ever have retail sales that actually fall within the category of the low Class A range, nor does the level of retail sales ever achieve the low Class A range.

According to the Retrospective Valuation Rule under USPAP, generally accepted appraisal practices preclude Mr. Messner or the Tax Court from considering information not reasonably foreseeable. (Exhibit 38.) Additionally, in 2007, retail sales go back down to $337 per square foot, again placing them *in the middle* of the B+ range. (Exhibit 101, p. 27.)

Mr. Messner only supported his selection of capitalization rates, which were roughly 250 basis points higher than the average capitalization rates reported in the Korpacz Reports for Class B+ malls, by calling the Mall Class A. (Exhibit 1, pp. 39 and 56.) (Id.) There was simply no evidence presented at trial that the Eden Prairie Center is, ever was, or ever will be a Class A mall, and thus no support for the Tax Court applying a capitalization rate lower than the Class B+ capitalization rate.

B. Considering Their Respective Experience and Expertise, The Tax Court's Reliance on The Opinions of Mr. Messner and Mr. Kenney Over Those of Mr. Lennhoff Is Illogical.

In agreeing with Mr. Messner that the theater's sales should be excluded, the Tax Court also relied upon Mr. Kenney, who testified that it was customary in the industry to omit sales associated with a theater. (Appendix, p. 27.) In disagreeing with the testimony of Mr. Lennhoff, the Tax Court wholly ignored the vast differences in experience and expertise between the three experts in the valuation of super-regional malls.

On the one hand, Mr. Lennhoff is nationally acclaimed for his extensive experience and expertise in the valuation of super-regional malls, among other types of properties. (Tr. 9: 18-19; 27: 18-21.) His professional designations, affiliations and honors are too numerous to list. (See Exhibit 1, p. 63-68.) He has authored, developed or reviewed numerous articles, seminars and courses regarding fundamental appraisal concepts and generally accepted appraisal methods. (Id.)

Mr. Lennhoff's most formidable reputation and the national respect for his analysis and opinions in the appraisal profession are unmatched. He was expressly acknowledged as one of the leading contributors to the 13th Edition, the premier textbook on real estate appraisal principles. (Tr. 17: 21-22; 23: 3-15; Exhibit 21.) He has been involved in the development of many if not most of the classes and courses offered by the Appraisal Institute, and taught the most advanced of those courses, himself. (Tr. 23: 18-19.) Mr. Lennhoff sits on the editorial Board of the Appraisal Journal, the Appraisal Institute's highly respected quarterly journal, and participates in the decision making process regarding what articles are published by the Journal. (Tr. 17: 4-10; 25: 18 – 25: 15.) Mr. Lennhoff himself has edited two widely-cited volumes, one dealing specifically with the issue of business enterprise value, which as described above is of special significance in this case. (Exhibit 1, p. 66.) Mr. Lennhoff was also one of the developers and presenters of *Course 800, Separating Real and Personal Property from Intangible Business Assets* ("Course 800"), a course offered by the Appraisal Institute specifically teaching the proper valuation methodologies for segregating business enterprise value from real property value. Mr. Lennhoff testified that although the Appraisal Institute is not currently offering many of its major courses, including Course 800, because of its efforts to redevelop and expand its curriculum to respond to changes in continuing education requirements, the Appraisal Institute plans to offer it again in the near future. (Tr. 20: 19–22: 23.)

Neither Mr. Messner nor Mr. Kenney brought to the Tax Court such qualifications or credentials. Mr. Messner's experience valuing super regional malls was nominal at best, and his learned writing is limited to being a "participant" in the drafting of one article sixteen years ago in 1993 about the wholly unrelated issue of contamination. (Exhibit 101, p. 109.) While Mr. Kenney has written on the issue of business enterprise value, the last of his articles was published nine years ago, in 2000. (Tr. 800: 2–801: 4.) However, the dialogue regarding business enterprise value did not end in 2000. As Mr. Kenney himself admitted, generally accepted appraisal techniques in segregating business enterprise value have evolved and continue to evolve today. (Tr. 808: 12–14.) The 13th Edition at pages 29-31 (see Exhibit 4), which reflects the most current consensus on generally accepted appraisal practices on these issues, was published in 2008, eight years after Mr. Kenney's last involvement. The fact that Mr. Kenney has not participated in the ongoing professional dialogue regarding business enterprise value during the past nine years severely limits the authoritativeness and credibility of his opinions.

Mr. Lennhoff more reliably states the generally accepted appraisal practices on these issues before this Court, and his views are whole heartedly endorsed in the 13th Edition, The Appraisal of Real Estate.

C. The Tax Court's Failure to Include The Theater Retail Sales In Its Analysis, While Applying The Resulting Conclusion to a Mall Area That Includes The Theater Space, Effectively Ignores The Impact of 77,500 Square Feet of Lower Retail Sales and Associated Risk When Valuing the Mall.

Significant evidence and testimony was offered at trial establishing that Mr. Lennhoff's decision to include the theater in his calculation of retail sales was proper. For example, the Relator introduced the page describing the Eden Prairie Center from the 2003 Directory of Major Malls. (Exhibit 13.) The Directory of Major Malls is an authoritative source relied upon by real estate development companies, shopping center owners, retail tenants and others in the real estate profession. (Tr. 120: 2-8.) The theater is not listed as an anchor tenant at the Mall in the 2003 Directory of Major Malls. Rather, it is identified, along with all of the other in-line tenants in its appropriate category, "entertainment." (Exhibit 13.) More significantly, according to the 2003 Directory of Major Malls, Petitioner reported the sales per square foot at the Mall, which are identified as excluding only the anchor tenants, as $213 per square foot. Considering the other evidence introduced at trial (i.e.: Exhibits 156 – 159; Exhibit 101, p. 27; Exhibit 39), the information reported by Relator to the real estate world compromising its tenants and lenders included the lower level of retail sales and corresponding square footage of the theater located in the Mall.

The generally utilized definitions of "anchor tenant" and "in-line store" further support Mr. Lennhoff's decision to classify the theater as an in-line tenant, as opposed to an anchor tenant, at the Mall. An "anchor tenant" is defined as:

> The major store within a shopping center that attracts or generates traffic for the facility, *e.g.* a supermarket at a neighborhood shopping center, a major chain or department store in a regional shopping center.

(Exhibit 44.) The definition of "in-line store" is: "A store that is contiguous with its neighbors, in contrast to a free standing store." (Exhibit 43.) Here, the theater space is contiguous with its neighbors, and it is not a supermarket, a major chain or a department store.

Ultimately, the issue is identification of the proper measure of risk for a prospective investor in the Mall. If the theater is removed from the analysis for the proper capitalization rate for the "in-line" stores at the Mall, it follows that the same capitalization rate should not apply when capitalizing the income from the theater space either. However, this is, in effect, what the Tax Court has done. While the Tax Court deducted the 77,500 square feet comprising the theater when calculating the level of retail sales per square foot at the Mall, it nevertheless applied the capitalization rate it derived using that sales per square foot number to the *entire* income and square footage of the mall, including the 77,500 square feet comprising the theater. This is an artificial distortion of the return analysis of the statutorily required prudent buyer. The theater, by nature of its size higher cost of occupancy (security, expenses for cleaning and the like) and lower level of retail sales carries significant risk, which suggests a higher capitalization should be applied to the theater space. If one were to exclude the theater space, as the Tax Court has done, the resulting artificially lower capitalization rate may be applicable when capitalizing the in-line store rental income, but a different and significantly higher capitalization rate is properly applied when capitalizing the theater rental income.

CONCLUSION

Based on the foregoing, the Relator respectfully requests this Court hold that the Tax Court's Judgment is illogical, inconsistent with the evidence admitted at trial and constitutes reversible error in violation of both Minnesota state law as well as U.S. federal bankruptcy law. Accordingly, Relator respectfully requests that this Court reverse the decision of the Tax Court and remand with directions to properly determine the value of the taxable real property components of the Mall by making the deductions for personal property and intangible assets described herein, and capitalizing the real property income into value based on the overall capitalization rate estimated by Relator's expert. In the alternative, Relator respectfully requests that this Court vacate the Judgment entered by the tax Court as void or enter its decision that the claim of Respondent for additional real estate taxes is extinguished under federal bankruptcy laws.

Respectfully submitted,

Dated: January 25, 2010

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CERTIFICATE OF COMPLIANCE
WITH MINN. R. APP. P 132.01, Subd. 3

The undersigned certifies that Relator's Brief submitted herein contains 13,742 words, exclusive of the pages containing the table of contents and table of authorities, and complies with the type/volume limitations of the Minnesota Rules of Appellate Procedure 132. This Brief was prepared using a proportional spaced font size of 13 pt. The word count is stated in reliance on Microsoft Office Professional Edition 2003, the word processing system used to prepare this Brief.

Judy S. Engel

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