

No. A09-2229

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***STATE OF MINNESOTA  
IN SUPREME COURT***

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Eden Prairie Mall, LLC,

Relator,

vs.

County of Hennepin,

Respondent.

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**RESPONDENT'S BRIEF**

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## ISSUES RAISED

- 1. DID THE TAX COURT ERR BY REACHING A DECISION ON THE MARKET VALUE OF THE EDEN PRAIRIE MALL THAT WAS BASED UPON FACTS AND OPINIONS PRESENTED BY EXPERTS AND USING THE COURT'S OWN EXPERTISE AND JUDGMENT, RATHER THAN ADOPTING THE VALUE OF EITHER EXPERT?**

RESULT BELOW: The Tax Court determined the cost and sales approaches to value to be unreliable and relied solely on the income approach in valuing the Eden Prairie Mall. The Tax Court agreed with some of the adjustments made by Relator's expert. However, the Court adopted an approach more similar to that of Respondent's expert. The Tax Court applied its own expertise and judgment to select a blended approach; which resulted in a market value ultimately exceeding that of either expert.

**Most Apposite Authority:** Montgomery Ward & Co., Inc. v. County of Hennepin, 482 N.W.2d 785, 791 (Minn. 1992); Harold Chevrolet v. County of Hennepin, 526 N.W.2d 54, 59 (Minn. 1995).

- 2. DID THE TAX COURT ERR IN ACCEPTING THE PERSONAL PROPERTY DEDUCTION ANALYSIS MADE BY RESPONDENT'S EXPERT AND REJECTING THE PERSONAL PROPERTY DEDUCTIONS PROPOSED BY RELATOR'S EXPERT?**

RESULT BELOW: The Tax Court determined that an adjustment for tenant improvement allowances that were incurred prior to the dates of valuation would be inappropriate and that an adjustment for furniture, fixtures and equipment (FF&E) should be based on market value rather than historical costs.

**Most Apposite Authority:** Montgomery Ward & Co., Inc. v. County of Hennepin, 482 N.W.2d 785, 791 (Minn. 1992); Harold Chevrolet v. County of Hennepin, 526 N.W.2d 54, 59 (Minn. 1995).

- 3. DID THE TAX COURT ERR IN REJECTING THE DEDUCTION FOR INTANGIBLE ASSET VALUE PROPOSED BY RELATOR'S EXPERT?**

RESULT BELOW: The Tax Court rejected Relator's expert's adjustment for 2001 start up costs as a factor that would not be considered by a reasonably prudent buyer on the assessment dates at issue.

**Most Apposite Authority:** Montgomery Ward & Co., Inc. v. County of Hennepin, 482 N.W.2d 785, 791 (Minn. 1992); Harold Chevrolet v. County of Hennepin, 526 N.W.2d 54, 59 (Minn. 1995).

**4. DID THE TAX COURT VIOLATE THE AUTOMATIC STAY IMPOSED BY 11 U.S.C. § 362(A)(1)?**

**RESULT BELOW:** The Tax Court concluded that the automatic stay provision did not apply to stay the proceedings following Relator's filing of a voluntary petition for bankruptcy protection under Chapter 11 of the Bankruptcy Code on April 16, 2009.

**Most Apposite Authority:** Carson Pirie Scott & Co. (Southdale) v. County of Hennepin, 508 N.W.2d 200, 202 (Minn. 1993).

**STATEMENT OF THE CASE**

This case involves four Chapter 278 tax petitions filed by Eden Prairie Mall, LLC, challenging the assessor's Estimated Market Value ("EMV") for the subject properties Eden Prairie Center ("Mall") and Von Maur Department Store ("Von Maur") for the assessment dates of January 2, 2005 and January 2, 2006.

Trial was held from February 26, 2009 through March 11, 2009 before the Honorable Sheryl A. Ramstad, Judge of the Minnesota Tax Court. Relator introduced the expert testimony of David C. Lennhoff, MAI, CRE, FRCS, and a summary appraisal report that Mr. Lennhoff co-authored with Harry A. Horstman III, MAI. Respondent introduced the expert testimony and appraisal reports of Jason Messner, MAI. Respondent also introduced the expert testimony and appraisal review report of Mark T. Kenney, MAI, SRPA, who reviewed Mr. Lennhoff's report and testimony.

Respondent's evidence also included the testimony of the Eden Prairie Assessor, Steven Sinell, concerning the remodeling history at the Mall.

On April 16, 2009, Relator and its parent corporation filed a voluntary bankruptcy petition in the United State Bankruptcy Court for the Southern District of New York, pursuant to Chapter 11 of the United States Bankruptcy Code. The parties were preparing to file post-trial briefs which were due to the Tax Court on April 30, 2009. Relator sought to stay its appeal, claiming the Tax Court proceeding was subject to the automatic stay provisions of 11 U.S.C. § 362(a)(1). The Tax Court rejected Relator's argument and directed the parties to submit post-trial briefs as scheduled because Chapter 278 tax appeal proceedings are not subject to the automatic stay.

The Tax Court issued its decision on October 13, 2009. Relator appealed the Tax Court decision by Petition for Writ of Certiorari on December 11, 2009.

### **STATEMENT OF FACTS**

The subject properties are a super regional mall located at 8251 Flying Cloud Drive and an attached anchor department store located at 400 Prairie Center Drive, both in the City of Eden Prairie. The Mall has two primary floors and a lower level with numerous retail spaces, a food court, and an entertainment wing including restaurants and an AMC multi-screen movie theater, on approximately 35.58 acres. Von Maur is a two-story anchor department store that opened in 2001, attached to the Mall with an adjacent 375 stall parking-deck, two-thirds of which is located on the Mall parcel.

The Mall was developed in 1975 by Homart, the development arm of Sears, Roebuck and Company, with Sears and Powers department stores as anchors. (Transcript (“T”) 771: 9-20; Ex. 101 p. 11.) A Target store and skyway entrance between Target and the Mall were added in 1984, requiring a minor remodel of the Mall to accept the skyway entrance. (T 771: 21-25, 772: 1-6.) In 1989, the existing food court and Mall entrances were remodeled and interior walking ramps between the two stories were replaced by escalators and elevators. (T 772: 7-12.) In 1994, a two-story Kohl’s department store was built adjacent to the Mall, as the fourth anchor, requiring a minor addition to connect and align the Kohl’s store to the Mall. (T 772: 13-19.) General Growth Properties (“GGP”), Relator’s parent corporation, acquired Homart’s interest in the Mall in 1999. Between 2000 and 2002, GGP gutted and renovated the Mall and all common spaces, adding a 160,000 square foot (“s.f.”) entertainment wing including an 18-screen multi-plex AMC movie theater, a Barnes & Noble Bookstore and several full-service restaurants. (Ex. 101 p. 11.) The expansion and renovation costs were approximately \$95,500,000. (Ex. 101 p. 12-13.) Von Maur, a fifth anchor, built a 165,051 s.f. department store, on a separate 6.07 acre parcel. (Ex. 102 p. v, 7.) Additionally a two-level parking ramp was constructed adjacent to Von Maur, two-thirds on the Mall parcel and one-third on the Von Maur parcel. (Ex. 101 p. 11.) A grand re-opening was held in October, 2001. (Ex. 1 p. 2.)

After the renovation, the Mall reached stabilized occupancy by the end of 2004. (Ex. 101 p. 14; Ex. 1 p. 20.) The Mall reported inline retail sales increasing from \$311 per s.f. as of year end 2004 to \$344 per s.f. by year end 2006, despite the presence of a

vacant anchor store site. (Ex. 101 p. 27; Ex. 117 p. 1533; Ex. 124 p. 8.) Inline retail sales figures, as reported by the Mall, do not include department store sales or AMC theater sales. (Ex. 117 p. 1533-34; Ex. 124 p. 8-9.) Von Maur also reported increasing sales from 2004 through 2006. (Ex. 102 p. 74.)

The Eden Prairie Assessor set the January 2, 2005 Mall assessment at \$90,000,000. (Ex. 101 p. 16.). Relator's expert opined to a January 2, 2005 market value for the Mall of \$68,750,000, based only on the income approach to value. (Ex. 1 p. 2.) Respondent's expert opined to a January 2, 2005 market value of the Mall of \$110,000,000, based upon a reconciliation of all three approaches to value. (Ex. 101 p. vi.) However, based solely on the income approach, Respondent's expert's opinion of the January 2, 2005 market value for the Mall was \$110,600,000. (Ex. 103.)

The Eden Prairie Assessor set the January 2, 2006 Mall assessment at \$100,000,000. (Ex. 101 p. 16.). Relator's expert opined to a January 2, 2006 market value for the Mall of \$60,550,000, based only on the income approach to value. (Ex. 1 p. 2.) Respondent's expert's opinion of the January 2, 2006 market value of the Mall was \$115,000,000, based upon a reconciliation of all three approaches to value, which increases to \$118,510,000 based only on the income approach. (Ex. 101 p. vii; Ex. 103.)

The Eden Prairie Assessor set the January 2, 2005 Von Maur assessment at \$8,913,000. (Ex. 102 p. 9.) Relator's expert opined to a January 2, 2005 market value for Von Maur of \$3,950,000. (Ex. 1 p. 2.) Respondent's expert's opinion of the January 2, 2005 market value for Von Maur based on the income approach was

\$10,090,000, using a gross leasable area of 165,051 s.f. (Ex. 103 p. 88.) However, after adjusting the Von Maur gross leasable area to account for 3,848 s.f. of rotunda space, the resulting value becomes \$9,859,517. (Relator's Appendix ("RA") A37; T 1774-75.)

The Eden Prairie Assessor set the January 2, 2006 Von Maur assessment at \$9,408,000. (Ex. 102 p. 9.) Relator's expert opined to a January 2, 2006 market value for Von Maur of \$4,750,000. (Ex. 1 p. 2.) Respondent's expert's opinion of the January 2, 2006 market value for Von Maur was \$10,740,000, based on the income approach using a gross leasable area of 165,051 s.f. (Ex. 103 p. 92.) After adjusting the gross leasable area to account for 3,848 s.f. of rotunda space, the resulting value becomes \$10,489,214. (RA A38; T 1774-75.)

The Tax Court did not accept the value conclusions proposed by either expert. Rather the Court relied upon the testimony and appraisals of the experts in determining what a willing, knowledgeable purchaser would pay a willing seller for the Mall and Von Maur on the assessment dates at issue. (RA A41.) The Court determined the market value of the Mall was higher than that of either expert, based on the evidence presented. As a result, the Tax Court found the market value for the Mall to be \$122,876,000 as of January 2, 2005 and to be \$120,142,000 as of January 2, 2006. (RA A42.) The Tax Court found the market value for Von Maur to be \$9,850,000 as of January 2, 2005 and \$10,490,000 as of January 2, 2006. (RA A42.)

## ARGUMENT

### I. STANDARD OF REVIEW

This Court reviews a final order of the Tax Court to determine whether the Tax Court lacked jurisdiction, whether the order is supported by the evidence and is in conformity with the law, and whether the Tax Court committed any other error of law. Southern Minnesota Beet Sugar Coop v. County of Renville, (“SMBSC”) 737 N.W.2d 545, 551 (Minn. 2007), *citing* Hutchinson Tech., Inc. v. Comm’r of Revenue, 698 N.W.2d 1, 6 (Minn. 2005); Jefferson v. Comm’r of Revenue, 631 N.W.2d 391, 394 (Minn. 2001). Legal determinations are subject to de novo review while factual findings are subject to a “clearly erroneous” standard. SMBSC, 737 N.W.2d at 551, *citing* Hutchinson Tech., 698 N.W.2d at 6; 200 Levee Drive Ass’n v. County of Scott, 532 N.W.2d 574, 576 (Minn. 1995). In Equitable Life Assurance Society of the United States v. County of Ramsey, 530 N.W.2d 544, 552 (Minn. 1995), this Court set forth the clearly erroneous standard as: when the Tax Court’s decision is “not reasonably supported by the evidence as a whole.” In State v. Evans, 756 N.W.2d 854 (Minn. 2008) *citing* Fletcher v. St. Paul Pioneer Press, 589 N.W.2d 96, 101 (Minn. 1999) this Court held that “on appeal, a trial court’s findings of fact are given great deference, and shall not be set aside unless clearly erroneous.... If there is reasonable evidence to support the trial court’s finding of fact, a reviewing court should not disturb those findings” and that “if we find ‘reasonable evidence to support the [district]court’s findings of fact,’ we will not disturb those findings.” Additionally, this Court has held that it defers to the decision of the Tax Court, due to the “inexact nature of property

assessment,” unless the Tax Court either clearly overvalued or undervalued the subject property, or completely failed to explain its reasoning. Equitable Life Assurance Society of the United States, 530 N.W.2d at 552, *citing* Harold Chevrolet v. County of Hennepin, 526 N.W.2d 54, 58 (Minn. 1995).

**II. THE TAX COURT DID NOT EXCEED ITS AUTHORITY IN REACHING THE MARKET VALUE OF THE SUBJECT PROPERTIES BY APPLYING ITS OWN EXPERTISE AND JUDGMENT TO FACTS AND OPINIONS IN THE RECORD.**

Relator claims that the Tax Court exceeded its authority by adopting a market value that was higher than that opined by Respondent’s appraiser even though the facts in the record support the Tax Court’s value conclusion. In effect, Relator asks this Court to adopt a rule of law that would restrict the Tax Court from applying its expertise and judgment to facts and opinions in the record.

In 1986, the Minnesota legislature amended Minnesota Statutes Section 278.05, subdivision 1, to state, in relevant part: “[t]he Tax Court or district court shall without delay summarily hear and determine the claims, objections or defenses made by the petition and shall direct judgment to sustain, reduce **or increase the amount of taxes due...**” (Emphasis added). The Tax Court was thereby given the authority to increase market value because in order to increase the taxes due there must be evidence that the true market value is higher than the assessment. Evidence that the market value is higher than the assessment can be presented through cross-examination of petitioner’s expert, through respondent’s witness(es), or a combination of both, as occurred in the instant case.

Relator claims the tax court must have disregarded the evidence to conclude to a value for the Mall that was above that of both the assessment and both experts. This simply is not true. The data incorporated in the chart, found as argument in Respondent's Post-Trial Brief and in the Tax Court's decision, was taken from the record and is replicated herein with references to the record added. Of note, the January 2, 2005 valuation contained several mathematical errors that are corrected below.

<b>Eden Prairie Center Direct Cap.<sup>1</sup></b>			
Inline Only			
Date of Value January 2, 2005			
<b>Income</b>			
Minimum Rent-In-Line+AMC		\$9,588,820 <sup>2</sup>	
Less Vacancy & Credit Loss @	6%	\$575,329 <sup>3</sup>	
<i>Effective Gross Minimum-Rent-Inlines</i>		\$9,013,491 <sup>4</sup>	
Overage Rent		\$ --	
Specialty Leasing		\$1,925,000	
Other Income		\$90,000 <sup>5</sup>	
Total Base Rent		\$11,028,491 <sup>6</sup>	
<i>Expense Recoveries</i>			
CAM		\$2,375,000	
Real Estate Taxes			

<sup>1</sup> Ex. 1 facing page 40 – Mr. Lennhoff's Total Assets of the Business is the source of data not otherwise referenced.

<sup>2</sup> T 602-04.

<sup>3</sup> T 604-05.

<sup>4</sup> Subtraction error in Respondent's Post-Trial Brief at p. 42 shows \$8,945,000 which was replicated in the Tax Court decision. (RA A29).

<sup>5</sup> Mistakenly transposed Mr. Lennhoff's 2006 figure of \$96,000 which was replicated in the Tax Court decision on p. 29. Ex. 1 facing page 40 and 57.

<sup>6</sup> Addition error in Respondent's Post-Trial Brief at p. 42 shows \$10,966,000 which was replicated in the Tax Court decision. (RA A29).

Utilities, HVAC, Etc.		\$1,850,000	
Other-Food Court		\$87,000	
Miscellaneous Revenue		\$75,000	
Total Revenue		\$15,415,491 <sup>7</sup>	
<b>Expenses</b>			
<i>Reimbursable</i>			
CAM		\$2,650,000	
Other-Food Court		\$258,000	
Real Estate Taxes			
Personal Property Tax		\$ --	
Utilities & HVAC		\$1,350,000	
<i>Owner's (Non-reimbursable)</i>			
Management Fee (Including Shared Leasing Fees)		\$462,645 <sup>8</sup>	3%
General & Administrative		\$145,000	
Bad Debt		\$ --	
Total Expenses		\$4,865,645 <sup>9</sup>	
Net Operating Income		\$10,549,846 <sup>10</sup>	
Income to Real Property			
<i>Cap Rate to Real Property</i>			
Real Property Rate			7.50000% <sup>11</sup>
Tax Load	30.0%	3.455239%	1.03657% <sup>12</sup>
			8.53657% <sup>13</sup>
<b>Value as of January 2, 2005</b>		<b>\$123,584,133<sup>14</sup></b>	

<sup>7</sup> Addition error in Respondent's Post-Trial Brief at p. 42 shows \$15,353,000 which was replicated in the Tax Court decision. (RA A29.)

<sup>8</sup> Multiplication error in Respondent's Post-Trial Brief at p. 42 based on erroneous total revenue figure, discussed at Footnote 5, shows \$460,590 which was replicated in the Tax Court decision. (RA A30.)

<sup>9</sup> Addition error in Respondent's Post-Trial brief at p. 42 shows \$4,863,590 which was replicated in the Tax Court decision. (RA A30.)

<sup>10</sup> Subtraction error on Respondent's Post-Trial Brief at p. 42 shows \$10,489,410 which was replicated in the Tax Court decision. (RA A30.)

<sup>11</sup> Ex. 101 p. 80.

<sup>12</sup> Ex. 162 p. 12.

<sup>13</sup> Ex. 162 p. 12.

<sup>14</sup> Math error in Respondent's Post-Trial Brief at p. 42 shows \$122,876,142 which was replicated in the Tax Court decision. (RA A30.)

<b>Eden Prairie Direct Cap.</b> <sup>15</sup>			
Inline Only			
Date of Value January 2, 2006			
<b>Income</b>			
Minimum Rent-In-Line+AMC		\$9,515,505 <sup>16</sup>	
Less Vacancy & Credit Loss @	6%	\$570,930 <sup>17</sup>	
<i>Effective Gross Minimum-Rent-Inlines</i>		\$8,945,000 <sup>18</sup>	
Overage Rent		\$ --	
Specialty Leasing		\$2,070,000	
Other Income		\$96,000	
Total Base Rent		\$11,111,000	
<i>Expense Recoveries</i>			
CAM		\$2,400,000	
Real Estate Taxes			
Utilities, HVAC, Etc.		\$1,500,000	
Other-Food Court		\$100,000	
Miscellaneous Revenue		\$100,000	
Total Revenue		\$15,211,000	
<b>Expenses</b>			
<i>Reimbursable</i>			
CAM		\$2,658,000	
Other-Food Court		\$265,000	
Real Estate Taxes			
Personal Property Tax		\$ --	
Utilities & HVAC		\$1,700,000	
Management Fee (Including Shared Leasing Fees)		\$456,330	3%
General & Administrative		\$205,000	
Bad Debt		\$ --	
Total Expenses		\$5,284,330	

<sup>15</sup> Ex. 1 facing page 57 Total Assets of the Business.

<sup>16</sup> T 627-28, 631 ( $\$24.66 \times 385,868 = \$9,515,504.88$ ).

<sup>17</sup> T 632.

<sup>18</sup> T 629-30; Ex. 1 facing page 57 and Ex. 36 list this figure as Minimum Rent-In-Line + AMC Total Assets of the Business.

Net Operating Income		\$9,926,670	
Income to Real Property			
Cap Rate to Real Property			
Real Property Rate			7.25000% <sup>19</sup>
Tax Load	30.0% <sup>20</sup>	3.374732%	1.01242%
			8.26242%
<b>Value as of January 2, 2006</b>		<b>\$120,142,410</b>	

As indicated in the above charts, the underlying source of the data supporting the value conclusion for the Mall was Mr. Lennhoff's "Total Assets of the Business" excluding Von Maur. In Sigurdson v. Isanti County, 408 N.W.2d 654, 657 (Minn. Ct. App. 1987) *rev. den'd*, the Minnesota Court of Appeals held that the "clearly erroneous" standard was the proper standard of review when findings and conclusions developed by one of the parties are adopted by the trial court. In the instant case, the Tax Court heard and evaluated the issues raised by the experts and explained, in detail, its reasoning for adopting a blended approach, as advocated in Respondent's Post-Trial Brief. (RA A19-31.) The Tax Court's incorporation of a chart prepared by Respondent is not "error per se" nor is it "clearly erroneous" where it is supported by the record.

**A) The Tax Court's choice of capitalization rates was supported by the evidence.**

The Tax Court's decision to use Mr. Messner's capitalization rate in the direct capitalization income approach to value for the Mall was supported by the evidence. (RA A27-28.) The Tax Court also agreed with Mr. Messner and Mr. Kenney that Relator's reported inline retail sales per s.f. was the appropriate figure to use in

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<sup>19</sup> Ex. 101 p. 80.

<sup>20</sup> T p. 854-58.

determining the Mall's Korpacz Mall Classification, without adding AMC theater sales. (RA A27-28.)

Mr. Messner testified he used the inline retail sales figures, as reported by Relator to determine the applicable Korpacz Mall Classification in his capitalization rate analysis. (T 1188, 1307-10; Ex. 117 p. 1533-34; Ex. 124 p. 8.) Mr. Messner testified it was not appropriate to add the AMC Theater sales to the inline retail sales in determining the correct Korpacz Regional Mall Classification. His conclusion was verified by the person at Price Waterhouse Coopers responsible for responding to Korpacz survey questions, Susan Smith, MAI, and supported by Mr. Kenney in his review of Mr. Lennhoff's report and testimony. (T 1307-10; Ex. 59; RA A27; T 840-47; Ex. 162 p. 8-9.) As a result, the Tax Court's conclusion had ample support in the record.

The Tax Court's determination that the Mall was a Korpacz Class B+ mall (inline retail sales \$300-\$349) was further supported by Relator's reported inline retail sales of \$311 per s.f. for 2004, \$335 per s.f. for 2005 and \$346 per s.f. for 2006. (RA A27-8; Ex. 108 p. 68; Ex. 111 p. 71; Ex. 117 p. 1533-34; Ex. 124 p. 8; Ex. 101 p. 27-28; Ex. 162 p. 10-11.) The Korpacz Class B+ regional mall capitalization rate range was 7.00% - 9.50% for the Fourth Quarter 2004 and 6.00% - 9.00% for the Fourth Quarter 2005. (Ex. 108 p. 10; Ex. 111 p. 14.) Thus the Tax Court's capitalization rates for the Mall, 7.5% for 2005 and 7.25% for 2006, were supported by the evidence. (RA A29.)

**B) The Tax Court's determination of market value is entitled to deference.**

The purpose of a Tax Court proceeding is to determine the market value of the subject property. SMBSC, 737 N.W.2d at 551. Relator asks this Court to limit the Tax Court's ability to exercise its expertise and independent judgment in reaching that value. Specifically, Relator asks this Court to hold that the Tax Court is limited to the range of values determined by the parties' experts. Contrary to Relator's argument, the Tax Court should be permitted to determine a market value that is higher or lower than the values determined by the parties' experts. So long as there is sufficient evidence supporting the Tax Court's decision as to market value, such a determination should not, in and of itself, be considered erroneous as a matter of law.

This Court has already recognized the importance of the Tax Court's expertise in Carson Pirie Scott & Company (Ridgedale) v. County of Hennepin, 576 N.W.2d 445, 451 (Minn. 1998), *citing* Montgomery Ward & Co., Inc. v. County of Hennepin, 482 N.W.2d 785, 791 (Minn. 1992):

...[A] tax court proceeding is not high-low arbitration where the decisionmaker must chose the figure submitted by one or the other party. The Tax Court brings its own expertise and judgment to the hearing, and its valuation need not be the same as that of any particular expert as long as it is within permissible limits and has meaningful and adequate evidentiary support.

*See also*, Northerly Centre Corp. v. County of Ramsey, 248 N.W.2d 923 (Minn.1976.)

The Tax Court's decision is entitled to deference unless the Tax Court clearly over or

undervalued the subject property or completely failed to explain its reasoning.

Equitable Life Assurance Society of the United States, 530 N.W.2d 5 at 552.

There is no merit to Relator's claim that the Tax Court must have disregarded the evidence and stepped out of its proper role as trier of fact to reach its values for the Mall. Relator claims that for the Tax Court to conclude to a January 2, 2005 value for the Mall that was "\$12,876,000 – (11.7%) higher than Respondent's expert and \$32,876,000 – (36.5%) higher than the original assessment and \$54,126,000 – (78.7%) higher than the opinion of Relator's expert" it must have disregarded the evidence before it. (Relator's Brief p. 14.) While not set forth in Relator's Brief, the Tax Court's January 2, 2006 Mall value was \$5,142,000 – (4.5%) higher than Respondent's expert<sup>21</sup> and \$20,124,000 – (20%) higher than the original assessment and \$59,592,000 – (98%) higher than the opinion of Relator's expert. The fact that there are differences between the value conclusions of the parties' experts and the Tax Court does not necessarily lead to a conclusion that the Tax Court disregarded the evidence where the evidence clearly supports the Tax Court's ultimate conclusions.

Looking at only Mr. Messner's income approach for the Mall, to be consistent with the Tax Court and Mr. Lennhoff, results in a value of \$118,510,000 for January 2, 2006. Thus, the Tax Court's conclusion was only \$1,632,000 – (1.4%) higher than Respondent's expert.

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<sup>21</sup> For January 2, 2005:  $\$122,876,000 - \$110,000,000 = \$12,876,000 / \$110,000,000 = 11.7\%$  (Relator's Brief p. 8; Amicus Brief p. 2.) For January 2, 2006:  $\$120,142,000 - \$115,000,000 = \$5,142,000 / \$115,000,000 = 4.5\%$ .

Additionally, adjusting Mr. Messner's income approach for the Mall to be tax neutral, the method used by Mr. Lennhoff and adopted by the Tax Court, the 2005 value increases to \$121,000,000 while the 2006 value increases to \$136,500,000 as follows:

INCOME AND EXPENSE SUMMARIES <sup>22</sup>		
<i>Revenue</i>	2005	2006
<i>Rental Revenue</i>		
Minimum Rent	\$8,972,898	\$8,920,866
Overage Rent <sup>23</sup>	\$413,037	\$363,412
Specialty Leasing	\$1,951,240	\$2,079,48
Other Rental Income	\$111,336	\$552,324
Total Rental Revenue	\$11,448,511	\$11,916,083
<i>Expense Recoveries</i>		
Common Area Revenue	\$2,294,095	\$2,325,636
RE Tax Revenue <sup>24</sup>	NA	NA
Food Court Revenue	\$96,974	\$100,852
HVAC Revenue	\$981,637	\$1,221,245
Utility Revenue	\$580,495	\$719,478
Total Expense Recoveries	\$3,953,201	\$4,367,211
Total Misc. Revenue	\$98,506	\$106,286
<i>Total Gross Operating Revenue</i>	\$15,500,218	\$16,389,590
<i>Expenses</i>		
<i>Operating Expenses</i>		
Common Area Expenses	\$2,622,517	\$2,711,545
RE Tax Expense <sup>25</sup>	NA	NA
Food Court Expense	\$257,732	\$256,580
HVAC Expense	\$876,465	\$1,052,256

<sup>22</sup> From the Mall's actual operating results adjusted to remove tax expense and recovery to reflect a tax neutral analysis. (Ex. 101 p. 76; Ex. 161.)

<sup>23</sup> Does not include Von Maur's ground rent. (T 96:22-23.)

<sup>24</sup> Removed from calculation to be tax neutral.

<sup>25</sup> Removed from calculation to be tax neutral.

Utility Expense	\$539,938	\$711,100
Total Recoverable Expenses	\$4,296,652	\$4,731,481
Owner's Expense		
Marketing & Promotion Expense	(\$1)	\$142,276
Bad Debt Expense	(\$346,154)	(\$26,272)
General & Admin. Expense	\$128,533	\$107,624
Total Owner's Expense	(\$147,622)	\$223,628
<i>Total Operating Expenses</i>	\$4,149,030	\$4,955,109
Net Operating Income	\$11,351,188	\$11,434,481
Prior Year Adjustment	(\$141,927)	\$830,680
Net Operating Income	\$11,209,261	\$12,265,161
<i>Estimated Net Operating Income<sup>26</sup></i>	\$11,000,000	\$12,000,000
Plus taxes payable for prior year <sup>27</sup>	NA	NA
Management 2% <sup>28</sup>	(\$300,000)	(\$325,000)
Personal Property <sup>29</sup>	(\$300,000)	(\$300,000)
<i>Adjusted NOI:</i>	\$10,400,000	\$11,375,000
Cap Rate	7.5%	7.25%
Plus ETR <sup>30</sup>	1.038%	1.014
Tax-loaded Capitalization Rate – (Divide by)	8.538%	8.264%
<i>Sub-total</i>	\$121,808,386	\$137,645,208
Less Deferred Maintenance <sup>31</sup>	(\$800,000)	(\$800,000)

<sup>26</sup> Ex. 101 p. 76, 79-80.

<sup>27</sup> Removed to reflect tax neutral analysis. (Ex. 103 p. 83; Ex. 162 – Apdx. E-1; T 855:20-25, 856:1-4.)

<sup>28</sup> Ex. 103, Estimated management fee based on 2% of projected total gross revenue.

<sup>29</sup> Ex.. 103 p. 82. Return to personal property – amortized Furniture, Fixtures and Equipment (FF&E) over 7 year period.

<sup>30</sup> Ex. 101 p. 82; Ex. 103. Estimated Tax Rate adjusted to reflect the owner paid 30% of total taxes in each year.

<sup>31</sup> Ex. 101 p. 64. Deferred maintenance based on projected escalator replacement and upgrades scheduled for 2008.

<i>Indicated Market Value</i>	\$121,008,386	\$136,845,208
<i>Rounded</i>	\$121,000,000	\$136,500,000

Under a tax neutral income approach, Mr. Messner's Mall value under increases from \$110,600,000 to \$121,000,000 for January 2, 2005, and from \$118,510,000 to \$136,500,000 for January 2, 2006 - right in line with the Tax Court's ultimate conclusion.

The Tax Court's increases in value are supported by the evidence and are not erroneous simply because they exceed the values reported by the parties' experts.

**C) Relator was not denied due process when it was afforded a full and fair trial on the merits.**

Relator claims due process violations based on the Tax Court's adoption of a chart found in Respondent's Post-Trial Brief and because the Tax Court concluded to a value for the Mall exceeding that opined to by the parties' experts. These claims are without merit.

There is no merit to Relator's claim that an argument in Respondent's Post-Trial Brief is an adjudicative fact. (Relator's Brief p. 15.) Adjudicative facts implicate prior court records and proceedings and Relator's argument has no application in the instant case because there were no prior court proceedings. Matter of Welfare of D.J.N. et al., 568 N.W.2d 170, 174-5 (Minn. 1997.)

As noted above, Respondent relied upon the evidence of record to develop a chart in its Post-Trial Brief. Relator claims that it did not have an opportunity to challenge Respondent's argument but the record belies that claim. In its Post-Trial Reply Brief, Relator specifically responded to the capitalization rate, tenant

improvements, cost of occupancy, start up costs, construction cost contribution to Von Maur, specialty leasing, and miscellaneous revenues - in other words, all of the items adjusted in Mr. Lennhoff's income approach. Petitioner's Post-Trial Reply Brief (May 22, 2009.) Moreover, Relator did not object to Respondent's chart at any point in its Post-Trial Reply Brief. Id. In fact, in its Post-Trial Reply Brief, Relator objected to a different argument raised in Respondent's Post-Trial Brief, while failing to make any objection to the chart that was ultimately adopted by the Tax Court. Id. Additionally, Relator brought a Motion to strike portions of Respondent's Post-Trial Brief and Attached Exhibits, and that Motion was granted by the Tax Court. (RA A45-49.) Relator made no such Motion to strike Respondent's Chart. For Relator to now claim that it "had no opportunity to challenge" an argument in Respondent's Post-Trial Brief is demonstrably false. (Relator's Brief p. 15.)

Relator claims its due process rights were somehow violated because the Tax Court's conclusion of value exceeded that of the parties' experts. Through this claim, Relator effectively asks this Court to afford special treatment to tax court litigants. Relator seeks an absolute limit with respect to a tax petitioner's potential risk, something not afforded to other litigants. Specifically, Relator asks this Court to limit the risk of a tax appeal by prohibiting the Tax Court from reaching a value conclusion that exceeds the opposing expert's opinion. (Relator's Brief p. 16.) All litigants, whether before the Tax Court or otherwise, must evaluate the economic consequences of litigation, with the assistance of counsel and their experts. Yet Relator wants a tax petitioner to have the deck stacked in its favor as compared to litigants in other courts.

Contrary to the bald assertions of Relator, tax petitioners are not a special class of litigant and should not be afforded special treatment. The possible consequence of litigation is that the Tax Court might find that the evidence supports a value higher than the taxpayer's expert's opinion, higher than the assessment, and higher than respondent's expert's opinion. If a tax petitioner does not agree with the outcome of its case, it may seek appellate review similar to any other litigants.

Relator had a full and fair trial lasting approximately 9 days. Relator had the opportunity to present witnesses and to cross-examine Respondent's witnesses. Relator further submitted a Post-Trial Brief and Reply Brief, and it had an opportunity to object to Respondent's Post-Trial Brief. Indeed, Relator exercised its rights by filing a successful Motion to strike part of Respondent's Post-Trial Brief. This is all that due process requires and Relator's due process claims should be rejected as without merit.

**D) A tax petitioner can rebut the prima facie validity of the assessed value and be subject to an increase in property value.**

Relator claims that because the Tax Court rejected most of Mr. Lennhoff's adjustments in his income approach for the Mall, the Tax Court could not find he was a credible witness and therefore none of his testimony could have been sufficiently credible to rebut the prima facie validity of the assessment. The Tax Court did not explicitly reject all of Mr. Lennhoff's testimony; instead it found Mr. Messner's methodology more credible. (RA A20.) Despite Relator's assertions, the Tax Court found Mr. Lennhoff's Total Assets of the Business credible as a starting point in its blended income approach to value for the Mall. (RA A29-31.) That evidence alone,

from Mr. Lennhoff, was sufficient to rebut the presumption. Additionally, that was not the only evidence presented by Relator and considered by the Tax Court. (RA A1-42.)

In SMBSC v. County of Renville, 737 N.W.2d at 559, this Court held that a taxpayer need only offer evidence to show that the county's assessed value does not reflect the true market value of the property, not that the assessment is excessive, to meet its burden to overcome the prima facie validity of the assessment. As a result, Relator's claim is without merit. The Tax Court correctly found that Relator "presented sufficient evidence, through the testimony of its appraisal expert, to rebut the presumption." (RA A10.)

### **III. THE TAX COURT DID NOT ERR IN REJECTING THE PERSONAL PROPERTY DEDUCTIONS PROPOSED BY RELATOR'S APPRAISER.**

#### **A) The Tax Court could not deduct for Fixtures, Furniture & Equipment given the lack of credible evidence.**

Mr. Messner and Mr. Lennhoff agreed to a deduction for FF&E based upon historical cost rather than market value.<sup>32</sup> (Ex. 1 p. 38, 54; Ex. 101 p. 81-2; T 1197-99.) However, Mr. Kenney testified that using 2001 FF&E historical costs probably overstated the value because depreciation was not taken into consideration. (Ex. 162 p. 6; T 827-29.) Mr. Kenney also testified that market value was likely to be less than historical cost. (Ex. 162 p. 6; T 957.)

The Tax Court agreed with Mr. Kenney's conclusions. (RA A28.) *See also* Sentinel Management Company (Stagecoach) v. County of Hennepin, File Nos.

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<sup>32</sup> Mr. Messner did not use market value for FF&E as indicated in the Tax Court's chart. (RA A24.)

TC-18600, 21855 (Minn. Tax Ct. Jan. 8, 1996) (concluding it was more appropriate to subtract the depreciated market cost of personal property from the value conclusion, under the income approach, rather than capitalize the return of and on personal property). However, in the instant case, there was no evidence in the record from which the Tax Court could derive a market value for the FF&E. Thus, the Tax Court could not make any deduction, given the lack of evidentiary support. In re Petition of Gamble Devel. Co., File Nos. 135535, 137374, et al. (Minn. Tax Ct. July 20, 1981) (Amicus Apdx. p. 36) (Three appraisers acknowledged it was appropriate appraisal practice to include a reserve for replacements but failed to do so, therefore the Court had no evidence from which to base a finding).

**B) The Tax Court properly rejected a deduction for Tenant Improvement Allowances.**

Relator's claim that the Tax Court erred by not deducting the amortized cost of the tenant improvement allowance from the net operating income (NOI) in the income approach to value for the Mall is without merit. The Tax Court's rejection of such a deduction is supported by the record. (RA 24-5.)

Whether or not it is appropriate to deduct for tenant improvement allowances depends on a fact-specific inquiry. An appraiser's decision whether to deduct tenant improvement allowances depends on the methodology used in the income approach: direct capitalization or discounted cash flow ("DCF") analysis. In the instant case, both experts used the direct capitalization method in the income approach, not the DCF

analysis.<sup>33</sup> (Ex. 1 p. 24; Ex. 101 p.73.) As a result, the method for deriving the capitalization rate determines whether a deduction for tenant improvement allowances is appropriate because the two items must be in conformity. The Appraisal of Real Estate, 13<sup>th</sup> Ed. (2008) p. 503 (“When rates derived from comparable sales are used, the overall capitalization rate is applied to the subject property in a manner consistent with its derivation.”). The Tax Court recognized this requirement in Space Center Enterprises, Inc. v. County of Ramsey, File Nos. C4-97-3360, C4-98-3241 (Minn. Tax Ct. Nov. 4, 1999) (Amicus Apdx. 94, 98), *citing* St. Louis Park Corp. v. County of Hennepin, File Nos. TC-24719, TC-25694 (Minn. Tax Ct. Apr. 12, 1998):

[I]t is well settled that a capitalization rate derived from the sale of a comparable property is valid only if it is applied to the subject on the same basis.... Either deducting the expenses or not deducting expenses is acceptable as long as net operating income for the subject property is derived in the same manner as net operating income was derived for calculating the capitalization rate on the sold property. Consequently, **if tenant improvements and leasing commissions are not deducted from the net operating income in deriving the capitalization rate from market data, then they must not be deducted before capitalizing net operating income for the subject.**

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<sup>33</sup> If a discounted cash flow is used in the income approach, tenant improvements are generally expensed in the year forecasted during the holding period. Equitable Life Assurance Society of the United States v. County of Ramsey, File Nos. C8-91-6247, C8-92-5934 (Minn. Tax Ct. Sept. 24, 1993) (Amicus Apdx p. 11, 18) (The Court accepted a deduction of tenant improvements during the first five years of the DCF, with a 13-year holding period, because the timing was supported by actual property records.); Northwestern National Life Insurance Company v. County of Hennepin, File No. TC-18794 (Minn. Tax Ct. June 21, 1995) (Amicus Apdx p. 79) (The Court based the finding of value on its own DCF analysis using parts of each appraiser’s analysis.) Since neither Mr. Lennhoff nor Mr. Messner used a discounted cash flow analysis the cases cited by Amicus provide minimal guidance.

(Emphasis added.)

In the instant case, the Tax Court adopted Mr. Messner's capitalization rates. (RA A28.) Mr. Messner derived his capitalization rate based on the Korpacz Investor Survey. Mr. Messner testified that the rates reported by Korpacz capitalize the NOI before tenant improvements, leasing commissions and capital replacement reserves. (T 1196; Ex. 101 p. 80; Ex. 108 p. 10, 36; Ex. 111 p. 14, 40.) Therefore, in order to correctly apply a Korpacz capitalization rate in the direct capitalization method, the subject NOI had to be calculated before deducting for tenant improvements, leasing commissions and capital replacement reserves. Both Mr. Messner and the Tax Court correctly followed this methodology.

Thus, the evidence supports the Tax Court's rejection of a deduction for tenant improvement allowances, in order to be consistent with the capitalization rate. To apply a deduction for tenant improvement allowances would have understated the Mall's revenue as explained by the Tax Court. (RA A24-25.) See Meritex Enterprises, Inc. v. County of Ramsey, File No CX-06-4506 (Minn. Tax Ct. July 24, 2009) (Amicus Apdx. p.60, 67) (The Court held that deducting a market level of tenant improvements from the direct capitalization income approach to value was inappropriate because a lump sum deduction for a tenant improvement that occurs only once in five or ten years skews the direct capitalization method.) The Tax Court's treatment of tenant improvement allowances was appropriate and should be affirmed.

**IV. THE TAX COURT DID NOT ERR IN REJECTING THE DEDUCTION FOR INTANGIBLE ASSET VALUE PROPOSED BY RELATOR'S APPRAISER.**

Relator claims that start-up costs and the \$11,000,000 capital cost contribution to Von Maur were intangible assets for which an adjustment in the income approach for the Mall was necessary. The Tax Court correctly rejected this claim as without merit.

The Tax Court identified the ultimate issue at trial as “[w]hat would a willing, knowledgeable purchaser pay a willing seller for the property on the assessment dates” (RA A41.) The Court stated that its task was “to determine, from the evidence, the market value of the Mall and Von Maur as of January 2, 2005 and January 2, 2006.” (RA A41.) Respondent’s appraiser and Relator’s appraiser differed in their opinions as to what, if anything, was considered an intangible asset for the Mall and how to account for intangible assets, if any, in their income approaches to value. Mr. Messner testified that in his opinion there was no intangible business value associated with the Mall and that a deduction for management fees was appropriate. (Ex. 101 p. 2-3; Ex. 103; T 1118-19.) He further testified that there was no consensus among appraisers that intangible assets existed in super-regional malls. (T 1118 :11-16; Ex. 53; Ex. 137.)

In response to a hypothetical proposed by Relator, Mr. Messner testified that it was not appropriate to deduct a return to start-up costs. (Ex. 70; T 1489: 20-21, 1500: 16-23.) Mr. Messner also testified that it was not appropriate to deduct a return to favorable contracts and that he did not agree that the Mall’s contribution toward building the Von Maur store was an intangible asset. (Ex. 70, T 1489-90, 1500-02.) In his review of Mr. Lennhoff’s appraisal report and testimony, Mr. Kenney similarly

testified that Mr. Lennhoff's deduction for amortized start-up costs was not correct.

(T 830.) Mr. Kenney further testified that Mr. Lennhoff's deduction for the 2001

\$11,000,000 capital incentive contribution to Von Maur was not appropriate.

(T 830-34.)

In its decision, the Tax Court explicitly rejected Mr. Lennhoff's deduction for intangible assets, instead adopting the opinions of Mr. Messner and Mr. Kenney. This finding is entitled to deference and should be affirmed.

**V. THE TAX COURT DID NOT VIOLATE THE AUTOMATIC STAY IMPOSED BY 11 U.S.C. § 362(A)(1).**

Relator wrongly claims that the Tax Court violated the automatic stay provision of the United States Bankruptcy Code, 11 U.S.C. § 362(a)(1), because it did not stay the proceeding after Relator filed its bankruptcy petition on April 16, 2009. The Tax Court did not violate the automatic stay provision because the proceedings before the Tax Court were brought by Relator, not against Relator.

The automatic stay provision of the United States Bankruptcy Code, 11 U.S.C. § 362(a)(1), provides, in relevant part:

(a) Except as provided by subdivision (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....**

(Emphasis added.)

This Court has already addressed the applicability of the automatic bankruptcy stay to tax appeals. In Carson Pirie Scott & Co. v. County of Hennepin, 508 N.W.2d 200, 202 (Minn. 1993), this Court explicitly held that “tax petitions filed by Carson are proceedings initiated *by* the debtor, not *against* the debtor, and, consequently, the automatic bankruptcy stay of subparagraph (a)(1) does not apply to the petitions and proceedings thereunder.” In reaching its conclusion, the Carson Court examined the inception of the tax appeal proceeding and determined that because the proceeding was initiated by the taxpayer-debtor, the action was not **against** the debtor.

The instant case is indistinguishable. Here, Relator filed the tax petitions which initiated the proceedings before the Tax Court. Thus, the proceedings were not against the debtor, and the automatic bankruptcy stay provisions do not apply. Relator fails to acknowledge this Court’s prior precedent. Moreover, Relator has not cited any case that addresses a proceeding initiated by the debtor. Each of the cases relied on by Relator found the automatic stay applied only because the actions were brought against the debtor. Relator has not cited any case that would support a wholesale reversal of Carson, nor has it presented any cogent reason to do so.

There is no merit to Relator’s claim that Respondent “effectively” brought “a counter-claim against the debtor when it sought a judgment increasing the debtor’s taxes at trial,” nor is there any merit to its claim that “the introduction of evidence at trial seeking to increase the real estate taxes on the Mall effectively constituted a judicial proceeding against the debtor[.]” (Relator’s Brief p. 25.) In Objections to Real Property Taxes, Southdale Circle Partnership v. County of Hennepin, 424 N.W.2d 536

(Minn. 1988), this Court explicitly rejected an analogous argument. In that case, the County argued that the amendment to Minnesota Statutes Section 278.05, subdivision 1, that authorized the Tax Court to increase the amount of taxes due, implicitly created a counterclaim in the taxing authority. As a result, the County argued that a tax petitioner could not voluntarily dismiss a tax petition once the County sought an increase in value. Id. However, this Court rejected the County's argument, holding that "a taxing authority has no avenue ... to bring an express counterclaim in an assessment challenge." Id. at 537.

Here, Relator cites three cases involving counterclaims, however, those cases provide no support for Relator's argument given this Court's prior holding that no counterclaim lies against a tax petitioner.

Finally, Relator claims that "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 Procedures." (Relator's Brief p. 25-29.) The ability to collect on the increase in value is not relevant to this Court's review of the Tax Court's decision in this matter.

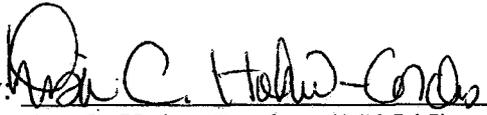
**CONCLUSION**

The Tax Court's decision should be affirmed in all respects.

Respectfully submitted,

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