

Case No. A06-1193

STATE OF MINNESOTA
IN SUPREME COURT

Irongate Enterprises, Inc.,

Relator,

vs.

County of St. Louis,

Respondent.

BRIEF AND APPENDIX OF RESPONDENT COUNTY OF ST. LOUIS

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LEGAL ISSUES

- I. Does Irongate's failure to provide the St. Louis County Assessor with copies of the 15 leases of space in the Irongate Mall require that the Tax Court Petition in this matter be dismissed pursuant to Minn. Stat. § 278.05, Subd. 6(a), the 60-Day Rule?**

The Tax Court held that the 60-Day Rule required Irongate to timely provide the St. Louis County Assessor with copies of the 15 leases for the Irongate Mall.

Most apposite cases and statute:

BFW Co. V. County of Ramsey, 566 N.W.2d 702 (Minn. 1997)
Kmart Corporation vs. County of Becker, 639 N.W.2d 856 (Minn. 2002)
Kmart Corporation vs. County of Stearns, 710 N.W.2d 761 (Minn. 2006)
Outboard Service Co. v. County of Cass, 2005 WL 443884 (Minn. Tax Regular Div.)
Minnesota Statutes § 278.05, Subd. 6(a)

- II. Does the scope of review properly include Irongate's argument that the Tax Court's interpretation of Minn. Stat. § 278.05, Subd. 6(a), renders the statute unconstitutionally vague when this issue was not raised or argued in the Motion to Dismiss?**

This issue was not before the Tax Court.

Most apposite cases:

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State v. Modern Recycling, Inc., 558 N.W.2d 770 (Minn. App. 1997)
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Kmart v. County of Becker, 639 N.W.2d 856 (Minn. 2002)

Kmart v. County of Stearns, 710 N.W.2d 761 (Minn. 2006)

STATEMENT OF THE CASE

Irongate Enterprises, Inc. (hereinafter Irongate) filed a Tax Court petition on January 8, 2005, contesting the assessed value of the Irongate Mall in Hibbing, Minnesota, as of January 2, 2004, for taxes payable in 2005. Respondent St. Louis County (hereinafter County) filed a motion to dismiss for failure to comply with Minn. Stat. § 278.05, subd. 6(a), also known as the 60 Day Rule. The matter was heard in the Tax Court on February 22, 2006, before the Honorable Sheryl A. Ramstad, Judge of the Minnesota Tax Court. Respondent's motion to dismiss was granted by Order dated April 28, 2006. The Tax Court found that Irongate failed to provide even the lease abstract or lease summaries within the required 60 day period, and held that failure to provide leases to the County Assessor was a violation of Minn. Stat. §278.05, Subd. 6(a). RA-97. It was never disputed that Irongate had leases in its possession. Irongate moved the Tax Court for Reconsideration of the Order to Dismiss which was heard on July 28, 2006, and denied by Order of the Tax Court dated August 25, 2006.

Irongate appeals the Order to Dismiss on the grounds that the Tax Court petition should not have been dismissed for failure to provide the County with the leases of space

in the Irongate Mall. Irongate also appeals on the grounds that the Tax Court's interpretation of the 60 Day Rule renders the Rule unconstitutionally vague. This issue was not raised, argued or considered by the Court in the Motion to Dismiss, *RA-45*; *RA-15*, but was raised in Irongate's Motion to Reconsider. *RA-104*. Irongate also appeals on the grounds that the 60 Day Rule does not apply to the facts in this case because the real issue before the Court was a simple discovery dispute and dismissal is not a proper penalty for failure to provide the leases requested pursuant to discovery. Irongate did reference the discovery dispute in its Memorandum of Law in Opposition to the County's Motion to Dismiss, *RA-63*. The Court recited the undisputed facts relative to the use of discovery by the County in its order but did not directly address Irongate's position that a Motion to compel production of the leases and not a Motion to dismiss was the proper motion for the County to achieve its objective. *RA-92*; *RA-62*. Irongate also raised the issue of unconstitutionality of the 60 Day Rule in its Motion for Reconsideration which was rejected by the Court in its Order denying the Motion for Reconsideration. *RA-101*; *RA-146*.

STATEMENT OF THE FACTS

After filing a Tax Court petition contesting the assessed value of the Irongate Mall in Hibbing, Minnesota, for taxes payable in 2005 and in compliance with Minn. Stat. § 278.05, Subd. 6(a), the 60-Day Rule, Irongate provided the County with income statements, *RA-68 to 73*, and the rent rolls, *RA-74 to 76*, but did not provide the lease

abstract or leases which were in its possession *RA-40*. After the June 30, 2005 deadline to provide income and expense information required by the 60-Day Rule, Irongate provided a lease abstract, *RA-40; County App.-1*, in response to discovery requests from the County but did not provide copies of leases that were requested. *RA-40 to 41*. Irongate instead directed the County to view the leases at a location in California, *RA-41*. (Irongate now states the leases are in New York. See p. 30 of Relator's Brief.)

Contrary to the assertions of Irongate, *Rel. Brief p. 8*, the lease abstract provided after the deadline does not just duplicate the information contained in the income statements or the rent rolls. In addition to information in the rent rolls, the lease abstract also contains additional income and expense information, e.g. scheduled rent increases, overage rent if any for each lessee, Common Area Maintenance (CAM) charges by date for each lessee, insurance, merchant dues, property taxes, and miscellaneous reimbursements. *Co. App.-1*. The income statements include month-to-date and year-to-date totals for overage rent, Common Area Maintenance (CAM), property insurance, merchant dues, property tax and miscellaneous, *RA-68 to 73*, but **only** the lease abstract, *Co. App.-1*, provides that information for each lessee. The income statement also provides total expenses for insurance and property insurance, but does not provide any information about which lessee made such payments or how much those payments were. *RA-034 thru 039*. Irongate does not claim that the leases were unavailable.

STANDARD OF REVIEW

This Court is being asked to review the Tax Court's interpretation of Minnesota Statutes §278.05, Subd. 6(a). There is no dispute of relevant facts, so review of the legal issues is *de novo*. *BFW Company v. County of Ramsey*, 566 N.W.2d 702 (Minn. 1997).

ARGUMENT

I. Irongate's failure to provide the lease abstract or leases within its possession in compliance with Minn. Stat. § 278.05, Subd. 6(a), referred to as the 60 Day Rule warrants dismissal of its tax court petition.

The 60 Day Rule requires a petitioning tax payer to provide any and all income and expense information within its possession. In *BFW Company v. County of Ramsey*, 566 N.W.2d 702 (Minn. 1997) this Court held that: “[T]he statute’s text requires the petitioner to provide all information within its possession even though the petitioner deems certain portions of that information to be incomplete or not fully accurate. In addition, we conclude that the statute clearly requires the petitioner to provide *any* of the required information within its possession on the date of the deadline.” *Id.* at 705.

The Court most recently in *Kmart Corporation vs. County of Stearns*, 710 N.W.2d 761 (Minn. 2006), interpreted the 60 Day Rule to “require production of expense information that is useful and relevant to the appraisal process. Because the undisputed facts of this case and the generally recognized principles of real estate appraisal make it clear that tenant paid real estate expenses are useful and relevant to the appraisal process,

we interpret the 60 Day Rule to require that they be produced within 60 days of the filing of a Chapter 278 petition.” *Id* at 766.

The *Stearns*’ Court discussed the relevancy of lease information to the income approach to the appraisal of real property based on the affidavit of the Stearns County appraisal expert. *Id* at 766-767. In the present case, Mel Hintz, St. Louis County Assessor, explained the appraisal process and the relevancy and importance of leases in the income approach to valuation of property. *RA-9, RA-49*. Hintz states that “Leases of the subject multi-tenant property provide the appraiser with important information about both the level and the durability of the income stream associated with the property.” *RA-42*. In *Stearns* the Court cited *Property Appraisal and Assessment Administration* (Joseph K. Eckert ed., 1990) which states that “because the goal of the appraiser is to determine the potential gross income from the lease, it is important for the appraiser to evaluate leases of comparable properties. *Id. at 253.*” *Stearns at 767*.

Hintz explained that “ Analysis of leases is necessary in order to identify the specific sources of income, expense caps or stops, details on expense recoveries, noncompete clauses, and renewal options, among other items, which may affect the valuation of the property using the income approach. Additionally, operating expenses, along with non-operating expenses such as leasing commissions or tenant improvement allowances, are also critical in the formulation of the income approach. Leases may also include escape clauses or rent concessions if one or more of the anchor spaces becomes

vacant.” *RA-40*. Hintz also states that the “differing components of the income stream will vary by tenant”*** and*** “cannot be truly understood by reviewing summary information provided on the lease abstract. A review of the actual lease documents is required to prepare a credible appraisal.” *Id.*

Hintz states that “ If only summary information is available, such as that provided by the petitioner in this case, the appraiser is left to guess at why variation exists within the rent roll itself.***When a lease covers several years, much can be omitted from a review of the rent role alone.”*RA-89* Hintz discusses tenant improvements, exclusives, expense reimbursements and percentage rent as major issues in the reliable valuation of a mall that require the review of leases. *Id.* If the lease abstract had been provided before the 60 Day Rule deadline, it would not have been sufficient because it does not identify the current tenants that have a percentage rent clause in their lease, nor does it provide information as to the sales volume trigger point for the percentage rent and the percentage rent rates that apply. In addition, there may be some offsets between the percentage rent and other tenant-paid expenses on the property which can only be understood by reading the lease.

Within the 60 days after the filing deadline, Irongate was required to provide all income and expense information within its possession but provided only income statements and rent rolls, although it also had in its possession leases and a lease abstract.

The purpose of the statute compelling production of such information and setting forth the severe consequences for untimely production was explained by the Court in the *BFW* case:

We have determined that the legislature's purpose in passing chapter 278 was to provide "an adequate, speedy, and simple remedy for any taxpayer to have the validity of his claim, defense or objections determined by the * * * court in matters where the taxpayer claims that his real estate has been partially, unfairly, or unequally assessed * * *" (case citations omitted). "Strict enforcement of the 60 day rule is consistent with this purpose, except when the required information is simply not available to a petitioner."

We know that Irongate had in its possession a lease abstract, because it was provided on September 22, 2005, almost three months after the 60 day rule deadline. We also know that, on that same date, Irongate objected to the request for copies of leases and stated in its response to discovery, "If Respondent wants to review complete copies of all tenant leases, such leases will be made available to respondent for inspection at the office of Commercial Property Management, Inc., in Los Angeles, California, where such leases are ordinarily kept in the usual course of business."

In *Kmart Corp. v. County of Becker*, 639 N.W.2d 856 (Minn. 2002), the Court reaffirmed its policy of strictly enforcing the 60 Day Rule and adopted a broad standard of relevancy stating, "Without this information, the assessor could not begin the valuation process." *Id.* at 861. In the *Kmart v. Becker* case, the Court held that a percent rent clause in a lease triggered a duty for Kmart to disclose its business income even though it ultimately became irrelevant to the amount of rent paid, because its income did not

actually exceed the threshold amount. *Id* at 860. The Court went on to state that a broad standard of relevancy was consistent with the legislature's charge to "every assessor and board, in estimating and determining the value of lands for the purpose of taxation to consider and give due weight to every element and factor affecting the market value thereof." Minn. Stat. § 273.12 (2004)

The Minnesota Tax Court has consistently held that a lease is income and expense information required under the 60 Day Rule, and failure to produce the lease and lease information alone warrants dismissal. *1100 Nicollet Mall, LLP v. County of Hennepin*, 2004 WL 612763 (Minn. Tax Regular Div.) "We do not reach the issue of the other financial data provided by Petitioner, as the failure to produce the Lease and Lease information alone warrants dismissal." *Id* at 3; *Outboard Service Co. v. County of Cass*, 2005 WL 443884 (Minn. Tax Regular Div.) "[T]he 60 Day Rule requires that Petitioner ensure that the entire Lease was provided to Respondent within the required time frame.*** The rationale for requiring that the information be produced at the time each petition is filed is evidenced here where Respondent had only a partial copy of the lease in its file from an earlier proceeding." *Id* at FN4. The Tax Court in the *Outboard Service* case also held that a Court-ordered stipulation that effectively amended the lease ought to have been produced and did not reach the issue of the sufficiency of the other financial data provided by Petitioner since failure to provide the Lease and the Stipulation warranted dismissal. *Id.* at 3.

This court has acknowledged that expecting the county to rely on incomplete or vague information could result in unequal and inaccurate valuations contrary to legislative intent. *Becker at 860*. Furthermore, requiring the county to conduct further discovery to obtain necessary information shifts the burden of proof in a chapter 278 proceeding from the petitioner to the county assessor. *Id.* Irongate has characterized the County's position that leases were required to be provided in compliance with the 60 Day Rule as a discovery dispute. It is irrelevant that when the leases were not provided in compliance with the 60 Day Rule, Respondent requested the leases pursuant to discovery.

Respondent tried to avoid the "draconian penalty" (*Relator's brief p. 31*) of enforcing the 60 day rule by asking for the necessary information but was not successful. Hence, the motion to dismiss. Respondent was not required to bring a motion to compel, nor did it waive its right to bring the motion to dismiss by asking for the information through discovery. Irongate bears the burden of proving that an assessment is excessive and the burden of providing evidence that refutes the original valuation. *BFW at 704*.

While the County firmly believes that complete leases should have been provided by the 60 Day Rule deadline, the Tax Court could have dismissed Irongate's petition for failure to provide the lease abstract by that deadline because the lease abstract contained income and expense information not included in the rent rolls and income statement. Appellate Courts generally will not consider issues raised for the first time on appeal; however, in *Zip Sort, Inc., v. Commissioner of Revenue*, 567 N.W.2d 34 (Minn. 1997),

this court pointed out that “an exception to the general rule is that an appellate court may base its decision on a theory not presented to nor considered by the trial court where the question raised for the first time on appeal is plainly decisive of the entire controversy on its merits and where there is no possible advantage or disadvantage to either party in not having had a prior ruling on the question by the trial court.”

The finding that the lease abstract which contained income and expense information was not provided by the deadline, is sufficient reason for dismissing the petition and this court can affirm the decision of the Tax Court on that basis alone.

II. The scope of review does not properly include Relator’s argument that the Tax Court’s interpretation of Minn. Stat. § 278.05, Subd. 6(a), renders the statute unconstitutionally vague when this issue was not raised or argued in the Motion to Dismiss.

Irongate, raises a constitutional challenge to the statute which should not be considered by this Court because it was not raised in the Trial Court except in Petitioner’s Motion for Reconsideration which was denied. An order denying reconsideration is not appealable. *Ebenezer Soc’y v. Dryvit Sys., Inc.* 453 N.W. 2d 545 (Minn. Ct. App. 1990) Since this appeal is from the Tax Court’s Order to Dismiss, the only record regarding the issue of constitutionality is found in the Motion For Reconsideration which was denied.

All arguments in Relator’s Brief on the issue of constitutionality and the record of Relator’s Motion for Reconsideration, including document Nos. 16 through and including 22 in Relator’s index, should be stricken. While the appellate court may consider any order involving the merits of a matter on appeal, in this case there were no new facts or

materials submitted with the Motion for Reconsideration for this court to consider in its review of the Tax Court's Order. Motions for reconsideration are not opportunities for presentation of arguments available when the prior motion was considered and should not be allowed to expand or supplement the record on appeal. See *Sullivan v. Spotweld Inc.*, 560 N.W.2d 712 (Minn. App. 1997); *Progressive Cas. Ins. Co. v. Fiedler*, 1997 WL 292332 (Minn. App. 1997) (unpublished).

The Tax Court's decision in the present case does not expand the statute as claimed by Irongate (Relator Brief p. 25), but applies previous Supreme Court decisions in *BFW Company v. County of Ramsey*, 566 N.W.2d 702 (Minn. 1997); *Kmart Corp. v. County of Becker* 639 N.W.2d 856 (Minn. 2002); and *Kmart Corp. v. County of Stearns*, 710 N.W.2d 761 (Minn. 2006); as well as other Tax Court decisions: *1100 Nicollet Mall, LLP, v. County of Hennepin*, 2004 WL 612763 (Minn. Tax Regular Div.); *Outboard Service Co. v. County of Cass*, 2005 WL 443884 (Minn. Tax Regular Div.).

In *State v. Modern Recycling, Inc.*, 558 N.W.2d 770 (Minn. App. 1997), the Minnesota Court of Appeals declined to consider due process arguments raised by appellants for the first time on appeal stating that, "Appellants did not present to the district court the remaining due process arguments they make on appeal. Constitutional issues not presented to the district court will not be considered for the first time on appeal.", citing *St. Paul Citizens for Human Rights v. City Council*, 389 N.W.2d 402, 407 (Minn. 1979).

This court may review any order affecting the order appealed from but the order denying reconsideration does not in any way affect the order granting the County's motion to dismiss. *Rules of App. Procedure 103.04*

III. The Tax Court's interpretation of Minn. Stat. § 278.05, subd. 6(a) does not render the statute unconstitutionally vague.

Minn. Stat. § 278.05, subd. 6(a) provides:

Subd. 6. Dismissal of petition; exclusion of certain evidence. (a) Information, including income and expense figures, verified net rentable areas, and anticipated income and expenses, for income-producing property must be provided to the county assessor no later than 60 days after the applicable filing deadline contained in section 278.01, subdivision 1 or 4. Failure to provide the information required in this paragraph shall result in the dismissal of the petition, unless (1) the failure to provide it was due to the unavailability of the evidence at the time that the information was due, or (2) the petitioner was not aware of or informed of the requirement to provide the information. If the petitioner proves that the requirements under clause (2) are met, the petitioner has an additional 30 days to provide the information from the time the petitioner became aware of or was informed of the requirement to provide the information, otherwise the petition shall be dismissed.

Irongate argues that the tax court's interpretation of this statute, commonly referred to as the 60 Day rule, by finding that Irongate must provide leases of the subject property to the County Assessor, renders the statute unconstitutionally vague in that taxpayers effectively are without notice as to application of the rule. "The doctrine of vagueness is embodied in the due process clauses of the Fifth and Fourteenth Amendments. Due Process incorporates notions of fair notice or warning." *Geiger v. City of Eagan*, 618 F.2d 26, 28 (8th Cir.1980). At the time Irongate filed this petition, this

court had interpreted the 60 Day rule to require a Tax Court Petitioner to provide any and all income and expense information within its possession on the date of the deadline.

BFW at 705; Kmart v. Stearns at 765. Interpretation of Minn. Stat. § 278.05, subd. 6(a) by the Tax Court as well as this court included much discussion about leases as income and expense information required to be provided to County Assessors. *Stearns at 767; 1100 Nicollet Mall, LLP at 3; Outboard Service Co. at 4.* These decisions as well as *Kmart v. Becker, 639 N.W.2d 856*, provided ample notice that leases containing income and expense information must be provided in order to comply with the 60 Day rule.

Irongate characterizes the Tax Court's decision as requiring a taxpayer to "guess at what they must do", and to "read the minds of their adversaries in litigation and to predict the future in order to comply with the 60 Day Rule." Brief at 29. As Judge Ramstad stated in her Order dismissing the present case, "As early as 2004, there as been no question as to whether a lease containing income and expense information should be provided under the 60 Day Rule." *RA-92.*

Decisions of the Tax Court and this Court provided Irongate with ample notice and warning that at least the lease abstract if not the leases must be provided in order to comply with the 60 Day rule.

CONCLUSION

Irongate appeals from the Order of the Tax Court dismissing its petition contesting the assessed value of the Irongate Mall in Hibbing, Minnesota as of January 2, 2004. The

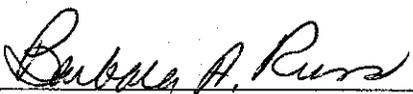
Tax Court found that Irongate failed to provide required income and expense information contained in the leases within 60 days as required by Minn. Stat. § 278.05, subd. 6(a). The Tax Court also found that not even a lease abstract or lease summaries were provided within the 60 Day period. The lease abstract contained income and expense information not provided within the 60 day period. The Tax Court held that Irongate's failure to provide copies of the leases constituted failure to comply with the 60 Day Rule and required that the Petition be dismissed.

St. Louis County respectfully requests that this Court affirm the Tax Court Order that Irongate did not comply with the 60 Day Rule and that the Petition must be dismissed.

Dated this _____ day of December 2006.

Respectfully submitted,

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).