

Case No. A05-0442

OFFICE OF
APPELLATE COURTS

STATE OF MINNESOTA

MAR - 6 2006

IN SUPREME COURT

FILED

KMART Corporation,

Relator,

vs.

County of Stearns,

Respondent.

***RESPONDENT'S OPPOSITION TO PETITION
FOR REHEARING***

We continue to believe that the Tax Court's decision denying KMART's motion for reconsideration provides a carefully reasoned rebuttal of the KMART's assertions in this motion for reconsideration. We think that the parties fully and completely briefed these issues. This Court's decision fully and carefully considered the merits of all of these arguments: the decision evinces a deep and meticulous analysis of the arguments made by both sides. To the extent that reconsideration by this Court is designed to remedy a careless mistake or misstatement of the law, rehearing is plainly inappropriate in this context. While we think that the issues have been fully and completely briefed in previous submissions, we try in this response once again to focus on the errors in KMART's assumptions and logic. KMART's motion should be denied because:

- KMART wrongly asserts that the Tax Court has signified its intent to disregard previous Tax Court decisions. A review of Judge Perez's decision below demonstrates a scrupulous attempt to consider and review the prior decisions and to harmonize those previous decisions with the result obtained here. The suggestion that the Tax Court has

engaged in arbitrary decision making is contradicted by the approach taken by Judge Perez. The Tax Court never held that its legal rulings are not precedential as to other Tax Court cases subsequently issued by the Tax Court. On the contrary, the Tax Court found that its decision in this case was fully consistent with prior Tax Court decisions.

- Judge Perez's decision shows that the Tax Court believed that it was deciding a factual issue: whether property related expense information was in fact unavailable to KMART in Stearns County. KMART's assertion that factual decisions have precedential value is unsupported by any view of the role of precedent even in Article III Courts.
- This Court never ruled that the rulings of prior Tax Court cases are not entitled to some precedential value in decisions by other Tax Court judges. This Court rather enunciated the proposition that a Tax Court decisions cannot trump the powers of the judiciary to find the law. No serious interpretation of the role of precedent in the common law courts has ever suggested that a lower court can bind a higher court with a precedential ruling.
- In this context, KMART has perhaps unintentionally misquoted at page 2 of its memorandum the actual delegation of authority to the Tax Court by the legislature, by omitting the phrase specifically excepting judicial review by this Court. The actual statute clearly and unequivocally states that the Tax Court does not and cannot trump the authority of this Court to determine the meaning of the law.

- KMART seems to misunderstand the context of this Court's statements in McCannel to the effect that in some respects the Tax Court has judicial-like functions. These statements arise in the context of the Court's concern about separation of powers issues arising from the delegation of adjudicative functions to tribunals which are not established under the judiciary. This Court has never suggested that the Tax Court has the authority to bind the judiciary in its function to determine the meaning of laws. Moreover, to the extent that this Court explained that the Tax Court derives court-like powers from the District Court, it follows directly that the Tax Court does not have the precedent setting power ascribed to it by KMART, since District Courts simply do not have the power to set legal precedent.
- KMART fails to recognize that the Anoka County case, which formed the foundation of its change-of-precedent argument, actually held as a factual matter that property related expenses were not available to the KMART in Anoka. In other words, this factual determination was a sufficient ground for the Tax Court's Anoka decision. Thus, even if the Anoka-KMART Tax Court decision had reached beyond that factual decision to hold also that property related expenses need never be produced as a matter of law (and Judge Perez ruled that it did not), that statement would have been dicta, unnecessary to the outcome of the Anoka County KMART decision. What KMART is really saying is that a decision of the Tax Court which contains dicta unnecessary to the outcome of the case binds this Court and future Tax Courts, even though the dicta will escape judicial review, because the dicta was not necessary to the outcome of the decision.

I. KMART Wrongly Asserts that the Tax Court's Decision Changed the Law in the Tax Court.

In this motion for reconsideration, KMART persists in its erroneous assertion that the Tax Court changed the way in which the Tax Court looked at the law. Judge Perez's decision in this case painstakingly explains why his decision represents a factual decision on whether property related expense information for the Stearns County facility was available to KMART. If another Tax Court judge found that property related expense information was not available to KMART in connection with a different lease, that is not precedential: that is a fact finding. The Tax Court is composed of several independent judges. When KMART filed 54 appeals on KMARTs throughout the state, these cases were apportioned out to different tax court judges. The cases were factually different. Facts relevant to a particular Tax Court's 60-day ruling with regard to expenses would have included the actual content of the disclosure to the County Assessor, the content of the particular lease, the evidence provided to the particular Tax Court Judge on what expense information was contemporaneously available to KMART, and any evidence provided to the Tax Court as to whether expense information of that kind was related to the appraisal process.

As these cases moved forward, different counties raised different arguments about why KMART's disclosures were insufficient in their particular cases. In several cases, County Attorneys argued that KMART had a duty to disclose the income and expenses of operating the business. Evidently, they believed (incorrectly) that the business receipts and business expenses would assist in determining how profitable the KMART was on that particular location, which, the County Attorney reasoned, might shed light on whether the property was valuable or not. As KMART points out, the Tax Court ruled that the 60 day rule does not require disclosure of

business income and business expenses.¹ But we never argued that business expenses had to be produced. Our motion focused on production of the expenses of operating the property being appraised. To emphasize this point, we provided expert testimony explaining why property related expenses were an important component of the appraisal process, and this Court's decision accurately describes the force of that testimony in its decision.

The controversy in the Tax Court involving KMART's failure to produce property related expenses was factual, not legal. We moved for dismissal based on the fact that KMART had not disclosed any property related expenses. We showed that KMART was legally obligated to pay all of the expenses of operating the facility by the terms of the lease. Thus, we argued, it was simply not credible to assert that the amount of these expenses were "unavailable" to KMART. We showed also that property related expenses (such as CAM, insurance, and other maintenance items) were contemporaneously reported in KMART's own internal financial statements. It has never been shown that this kind of evidence was provided to the Tax Court with respect to other cases. We produced actual copies of the contemporaneous financial statements to the Tax Court as evidence, evidence which was never rebutted by KMART. We showed that KMART clearly tracked these expenses and reported them in its contemporaneous periodic financial statements. The Tax Court was thus fully justified in determining that property related expense information was not unavailable. We argued too that these expenses must be tracked and documented for state and federal income tax purposes. It is simply beyond belief that a company like KMART would not keep track of its property related expenses.

Finally, we argued that KMART had a property-tax cooperation clause in its lease,

¹ The exception would be that the taxpayer must disclose rent paid under a percentage lease.

requiring the landlord to supply this information on request so as to allow KMART to perfect and prosecute tax appeals. KMART never provided a shred of evidence that it had asked for the landlord's cooperation in supplying the required information. We showed also that KMART had a long-standing and close working relationship with the management of the landlord, such that it would be unreasonable to assume that KMART could not get information readily on request. Our reliance on the cooperation clause turned out to be unnecessary to our argument, however, because we showed beyond any dispute that KMART actually had in its possession significant property related expenses which it did not disclose.

Now there has been no showing that the same identical availability evidence was presented to two different Tax Court judges, and that one Tax Court judge found that property related expenses were available, and the other found that they were not available. But even if that showing had been made, still that would not substantiate a change in precedent. As this Court's decision correctly points out, precedent has to do with interpretation of the law, not of facts. When KMART says that on the same evidence one judge found property related expense data to be unavailable and another judge found that property related expense data to be available, KMART is simply complaining that two judges found the facts differently in two different cases. By suggesting that one tax court judge's factual findings can bind another tax court judge's factual findings, KMART is asking this Court to go down a dangerous road. It is suggesting that any taxpayer has the right to the same factual ruling in a tax court as any other taxpayer, provided only that the taxpayer can show that the two cases are substantially similar. If KMART were to prevail in this position, it would create a series of satellite litigations, in which a taxpayer would produce the record of one Tax Court decision and compare it to another Tax Court decision, and show that on the same or similar evidence, two Tax Courts made different determinations.

After we provided the Tax Court with overwhelming evidence that in the Stearns County context, property related expense information was contemporaneously available to KMART, the taxpayer responded with a two-fold approach. First, it asked for a delay in hearing the motion to dismiss, until the Supreme Court ruled on three 60-day rule cases, which KMART refers to as the KMART trilogy, Becker County,² Douglas County³ and St. Louis County⁴. In each of these cases, KMART was asking this Court to reverse the Tax Court's decision that the 60 day rule must be strictly enforced. If KMART had truly believed that existing Tax Court precedent already had resolved matters in its favor, then it would have had no reason to delay a decision on the motion. KMART was telling the Tax Court that it hoped for a better result in the event that this Court softened its prior interpretation of the 60-day rule in the currently pending three cases.

KMART's request to delay disposition of Stearns County's motion pending decision of the three KMART dismissals is inexplicable if KMART actually thought that the law in the Tax Court mandated a ruling in its favor. KMART was asking this Court to soften what KMART called the harsh rule of dismissal as we have said. KMART, not Stearns County, was asking for a change in the law. This Court had already instructed the Tax Court in BFW Co. v. County of

² See Kmart Corp. v. County of Becker, 639 N.W.2d 856 (Minn. 2002) (The legislature has chosen to limit the remedy by requiring tax petitioners to provide certain information within 60 days and requiring dismissal upon failure to provide that information. We therefore decline to soften the 60-Day Rule and instead, leave the overall balancing of competing tax policy considerations to the legislative branch of government.)

³ See KMART Corp. v. County of Douglas, 639 N.W.2d 863 (Minn. 2002) (Taxpayer did not satisfy its obligation, under 60-Day Rule mandating dismissal of petition challenging county assessor's valuation of income-producing real property if taxpayer does not provide assessor, within 60 days after filing of petition, with income and expense information regarding the property, by merely providing assessor with copy of lease, and lease summary, showing annual minimum rent that taxpayer was required to pay as lessee for its retail store in shopping center).

⁴ See KMART Corp v. County of St. Louis, 639 N.W.2d 866 (Minn. 2002).

Ramsey, 566 N.W.2d 702, 705 (Minn. 1997) that the 60-day rule had to be strictly enforced. BFW had held that the taxpayer must produce any information in its possession under the 60-day rule. KMART was hoping to change this rule in the three cases pending before the Court, and its request to delay a hearing on our motion resulted from its belief that a softening of the 60 day rule might derive from those three cases, each of which had been decided against KMART in the Tax court. Ironically, KMART's request for delay in the hearing on our motion is predicated on the belief that if this Court had softened the 60-day rule, reversing the Tax Court's dismissal, KMART would then have the benefit of that change in precedent in the Tax Court. In other words, in this very case, KMART made the assertion implicitly, that a softening of the rule by the Supreme Court would have applied to all pending cases before the Tax Court whenever filed. It would seem, then, that KMART's real contention is that this Court's decisions benefit KMART when they are favorable to the taxpayer, but do not apply to KMART if they are unfavorable to the taxpayer.

But this Court did not soften the rule as requested by KMART in the trilogy of cases. Rather this court specifically declined to soften the 60-day rule as requested by KMART. In its ensuing post trilogy argument to the Tax Court, KMART primarily rested on the factual assertion that property related expenses were unavailable to KMART Stearns County. KMART's actual argument to the TAX Court may be found at Page 7 of its memorandum opposing our motion. That argument clearly identifies KMART's position in the Tax Court as factual, not legal. The heading for this argument is "The 60-day rule Does Not Require KMART to produce Unavailable Information." KMART then proceeded to argue at page 10 of its memorandum that the Tax Court had held in the Anoka KMART case "the County would have to disprove KMART's showing that records of the real estate operation were unavailable to it." According to KMART,

“Anoka County failed to do so in the Anoka cases.” In other words, KMART told Judge Perez that the Anoka County decision had held that Anoka County failed to meet its burden to prove that property related expenses were available to KMART.⁵

To sustain this factual contention of unavailability, KMART merely supplied a cursory conclusory affidavit from one of its executives, Mr. Saad, which maintained, against all of the evidence, that property related rental expenses were unavailable to KMART. Saad's affidavit made no effort to respond to the actual business records that we had supplied the Tax Court showing property related rental expenses on the financial statements of the tenant. The affidavit made no effort to explain what KMART had done to attempt to provide these expenses, and supplied no explanation as to how it could be possible that KMART had tax deductible property related expenses, but was unable to supply these expenses to Stearns County. Instead, KMART's argument to the Tax Court was that if KMART supplies a cursory affidavit contending that expenses were unavailable, then the Tax Court must always find the facts in KMART's favor!

Understandably, here in the Supreme Court, KMART has sought to transform this factual dispute about whether property related expenses were available into a legal dispute. KMART tried to convince the Tax Court that because one tax judge had found that some other store did not have these expenses available, therefore it followed that they were not available in all other stores. But even if the circumstances were exactly factually identical, that would still not constitute

⁵ Since the Anoka County Tax Court decision held that property related expenses were unavailable to KMART, it follows that if the Tax Court also found, as KMART contends, that property related expenses did not have to be produced as a matter of law, then that holding would have been mere dicta, unnecessary to the Tax Court's holding. As discussed below, this would mean that the alleged legal holding by the Tax Court would be binding in all future tax cases, yet escape judicial review by this Court. Since a finding of unavailability in the Anoka decision was sufficient to determine the outcome of the case, a further unnecessary finding that property expenses need never be produced even if they were available would not be precedent.

precedent. Precedent applies to legal holdings, not factual determinations. It may be that in one Tax Court case, the county failed to request or receive the contemporaneous financial records maintained for that store, and thus it may be that the County attorney failed to rebut KMART's contention that the information was unavailable. It may be also that a particular Tax Court judge weighed and balanced the factual evidence differently. The Tax Court judge in the Anoka case apparently accepted Mr. Saad's contention at face value that KMART only keeps business related expenses, and not property related expenses. But whatever the reason, the factual determination that information was not available at one store is simply not precedent. Precedent relates to articulation of a legal principle, not resolution of a factual dispute.

Since the Tax Court's decision did not reverse precedent, but rather made a factual determination that property related expenses were available to KMART, really the rest of our response is unnecessary: this case is not about precedent at all. It is about KMART's contention that since it convinced one tax court judge that property related expenses were unavailable for one store, that every other tax court judge must hold, no matter what the evidence, that property related expenses were unavailable for every other store.

II. Section 271.01 Does Not Grant the Tax Court Authority to Bind the Supreme Court

KMART suggests that this Court misunderstood the responsibility of the Tax Court. At page 2 of its memorandum, KMART omits an important phrase from its quotation of section 271.01 subdivision 5. The statute actually states, with the omitted language underlined: Except for an appeal to the supreme court or any other appeal allowed under this subdivision, the tax court shall be the sole, exclusive, and final authority for the hearing and determination of all questions of law and fact arising under the tax laws of the state, as defined in this subdivision, in

those cases that have been appealed to the tax court and in any case that has been transferred by the district court to the tax court.

KMART wrongly suggests that this Court elevated the power of the Tax Court in the McCannel case. McCannel is one of several decisions which struggled with the constitutionality of affording quasi-judicial powers to a creature of the executive branch. In re McCannel, 301 N.W.2d 910 (Minn. 1980). The language quoted by KMART was not a holding by the Supreme Court that the Tax Court could trump the power of the judiciary to construe laws. On the contrary, the McCannel Court found that the constitutionality of the Tax Court rested upon the fact that Tax Court legislation preserved the role of the judiciary allocated to it by the Minnesota Constitution. The McCannel court wrote: “Although we have never addressed the issue of the scope of the tax court's jurisdiction over constitutional questions, we upheld the constitutionality of establishing a tax court as the sole arbiter of disputes assigned to it, subject to review by this court, in the recent case of Wulff v. Tax Court of Appeals, 288 N.W.2d 221 (Minn. 1979) (emphasis added).” The statement “the tax court, unlike other administrative agencies, is given uniquely judicial powers” was an indication that this Court was troubled by the scope of delegation, and felt constrained to make sure that this delegation was properly circumscribed by judicial review.

In this context, KMART makes far too much of this Court's statement that “Decisions of the tax court are accorded the same finality and deference as those of the district court.” KMART is correct that this Court found that separation of powers concerns raised by creation of the Tax Court were negated to some extent by the fact that Tax Court cases are referred by the District Court. To this extent, the Tax Court has District-Court like powers to render a final adjudication of taxes, subject to judicial review. Yet, even the District Court, from which the Tax Court

derives some of its legitimacy, lacks the precedent creating powers ascribed to the Tax Court by KMART. In fact, if KMART were here claiming that this Court must rule in its favor because of a precedent setting decision in the District Court for Anoka County, KMART's position would be seen as totally baseless. KMART is not arguing that the Tax Court is like the District Court: KMART is arguing that the unpublished decisions of the Tax Court have precedent setting effect which exceed even the powers of the Court of Appeals in connection with published decisions. No district court can create precedent binding on the Court of Appeals or Supreme Court. As the Wulff decision stated, "This legislative grant takes nothing from the district court that it does not voluntarily relinquish. At the same time, we find no violation of Minn.Const. art. 1, s 8, since an individual with a tax dispute does not go remediless. A remedy is provided by the tax court, subject to and including judicial review." The Court continued:

This is perhaps the saving feature of this statutory scheme. Because the taxpayer has this opportunity to elect a judicial determination, because any transfer to the Tax Court is discretionary with the district court, and because there is always an ultimate check on administrative power in the form of review as of right in this court, we are satisfied that the Tax Court statute does not usurp judicial functions nor deprive taxpayers of constitutional rights. Therefore, in its present form, it is not an impermissible delegation by the legislature.

III. KMART Wrongly Asserts that Dicta in the Anoka Decision is Precedent Setting

In its argument to the Tax Court, KMART rested its claim of precedent on the decision of the Tax Court regarding the Anoka County KMART. But KMART actually told Judge Perez that the Anoka County decision stood for two propositions. One was that KMART defeated KMART because property related expenses were factually unavailable. (This is the holding of the Anoka County decision as found by Judge Perez). The second was that KMART prevailed because the Tax Court judge allegedly found that property related expenses are never required to be produced, even if they are available. (This is the interpretation of the Anoka County decision that Judge

Perez rejected). But our point is that KMART's interpretation of the Anoka County holding actually establishes that the second alleged holding was dicta, because it was unnecessary to the outcome of the case. KMART explained to Judge Perez at page 10 of its Memorandum in Opposition to the motion to dismiss that the Tax Court found that Anoka County had failed to establish that property related expenses were available to Anoka KMART at the time that the 60 day disclosure was provided. As we explained above, KMART went on to tell Judge Perez that he should rule that Stearns County had failed to meet its burden to prove availability.

This admission by KMART that the Anoka County decision found in favor of KMART because property related expenses were unavailable destroys KMART's current contention that this same court in the same case also created binding legal precedent that establishes that property related expenses need not be provided even if they are available to the taxpayer. Even if were the intention of the learned Tax Court Judge to make that remarkable holding, (and Judge Perez ruled that it was not), still such a "holding" would be insufficient to create a precedent on which future parties could rely. That is because once KMART conceded that the Anoka County decision factually found that KMART of Anoka lacked access to property related expense data, then Anoka County was necessarily conceding that statement that property related expenses need never be produced would be mere dicta.

It would be a dangerous proposition indeed for this Court to rule that the a single judge of the Tax Court can create legally binding precedent by issuing dicta unnecessary to the outcome of the case.⁶ Property Tax Court cases are characterized by extremely high transactional costs as

⁶ In this regard, dicta issued by the Tax Court, or a District Court falls in an entirely different category than dicta issued by this Court. When this Court issues dicta, it may be assumed that the Supreme Court, as the highest judicial authority in Minnesota is intentionally issuing guidance to the lower courts. As explained in the main text of this memorandum, when the Tax Court issues dicta, it is making statements that are likely to escape judicial review,

compared to the amount in controversy. In part this results from the fact that a relatively large change in assessed valuation has a much smaller impact on the amount of taxes paid by the taxpayer and received by the taxing authority. In part, it results from the very high cost of conducting and presenting a trial ready appraisal in the Tax Court. For many counties in rural Minnesota, the cost of litigating a Tax Court case can be a significant undertaking. If the Tax Court issues a decision which includes an unnecessary statement on the law, it is extremely unlikely that the taxpayer or the County will appeal that statement to the Supreme Court. Indeed, this Court would likely affirm a challenge to an erroneous “holding” which is dicta by summarily ruling that since the statement is mere dicta, the case can be affirmed on other grounds. Courts do not, and should not, reach legal issues which are not necessary to the outcome of the case.

Anoka had no reason to appeal the alleged legal finding in its case, because Anoka had every reason to believe that it had lost its motion to dismiss on the grounds that the Court had determined that the property related expense information was unavailable. If Anoka discerned in the opinion that the District Court were also “holding” that even available information need not be produced, then Anoka likely would have had no reason to appeal from this determination. As a result, a Tax Court's gratuitous statement that expenses are never required to be produced would become binding precedent without any meaningful opportunity for judicial review.

A subsidiary side effect of a ruling which would afford legally binding precedent status to gratuitous dicta would be to increase the judicial review duties of this Court. By holding that dicta issued by a single Tax Court judge creates legally binding precedent, this Court would be forcing the tax bar to find an excuse to appeal every Tax Court decision that contains a stray

simply because the losing party cannot change the result of the decision by reversing the statement which is dicta.

comment with which they disagree, even if the amount in controversy in that particular case were small and of little moment to the parties.

Finally, we disagree with KMART's broad characterization of the consequences of the Tax Court's decision here. The Tax Court below never suggested that it intended to ignore the prior persuasive rulings of the Tax Court. There is not a hint in Judge Perez's decision that he thinks that it is his prerogative to act arbitrarily, or to ignore the persuasive and well reasoned decisions of other judges. Thus, this case simply does not implicate the intention of the Tax Court to rule one way today and another way tomorrow.

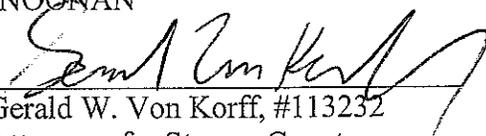
What happened in the Tax Court is that Judge Perez rejected KMART's interpretation of this Court's prior precedent and of prior Tax Court precedent. Judge Perez knew that KMART was hyping the result in the Anoka County decision far beyond the intention of the Tax Court. KMART's quarrel is not with the legal principle of whether precedent should be followed. KMART's real contention is that the Tax Court didn't understand the meaning of its own precedent in this case. It is ironic that KMART makes this contention wearing the mantle of deference to the expertise of the court supposedly lodged with the power to make final determinations on matters of tax law. Judge Perez correctly found that prior authoritative Tax Court precedent did not determine that expenses need not be provided. His decision was plainly correct.

Dated: March 3, 2006

Respectfully submitted,

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By


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