

Case No. A23-0222

STATE OF MINNESOTA IN SUPREME COURT

Cities Management, Inc.,

Relator,

vs.

Commissioner of Revenue,

Respondent.

**BRIEF OF AMICUS CURIAE MINNESOTA SOCIETY OF CERTIFIED PUBLIC
ACCOUNTANTS AND THE MINNESOTA CHAMBER OF COMMERCE**

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PRELIMINARY STATEMENT¹

The Minnesota Society of Certified Public Accountants (MNCPA) and the Minnesota Chamber of Commerce (MN Chamber) submit this brief as amicus curiae to urge the Court to determine that Minnesota Tax Court decisions serve as binding precedent upon the Respondent, the Commissioner of Revenue.

INTEREST OF THE AMICUS

MNCPA is a not-for-profit professional organization founded in 1904 offering services and professional development for CPAs and other accounting professionals with more than 8,500 members working in public accounting, industry, government, and education. MNCPA's purpose is to help its members succeed professionally while being mindful of its service to the public. MNCPA has four primary initiatives: provide education, encourage leadership, offer member resources, and serve the public. MNCPA is uniquely able to provide the Court information and perspective on the implications of this case for the broader public accounting community. The public and their tax and accounting professionals deserve clarity on Minnesota's tax laws and should be able to rely on Minnesota Tax Court decisions.

MN Chamber is Minnesota's largest business advocacy organization. MN Chamber was founded in 1909 and represents more than 6,300 businesses of all types and sizes

¹ Per Minn. R. Civ. App. P. 129.03: this brief was authored by Kathleen E. Pfitzenreuter and Benjamin A. Wagner on behalf of the Minnesota Society of Certified Public Accountants and the Minnesota Chamber of Commerce. This brief was not authored by counsel for either of the parties to the underlying case at issue (Cities Management, Inc. or the Commissioner of Revenue). No person or entity, other than the amici curiae, made a monetary contribution to the preparation or submission of the brief.

throughout the state. MN Chamber's membership includes small businesses and Fortune 500 companies alike. MN Chamber is uniquely able to provide the Court information and perspective on the implications of this case for the broader business community. Regardless of their size, business taxpayers deserve clarity on Minnesota's tax laws and should be able to rely on Minnesota Tax Court decisions.

ARGUMENT

- I. **Binding the Commissioner to decisions of the Minnesota Tax Court is derived from and consistent with the statutory duties, power, and mission of the Minnesota Department of Revenue. The statutes instruct the Minnesota Department of Revenue to investigate the tax laws, secure just and equal taxation, secure improvement in the system of state revenue laws, prevent unnecessary spending of public money, and increase access to information about the government by providing transparency, clarity, and consistency to taxpayers and their advisors in their good faith efforts to comply with Minnesota's tax laws.**

The funding and operation of the government depend on tax collection and compliance. The government's tax collection interests are best served when taxpayers act in voluntary compliance with the tax laws. Tax law compliance is complicated, particularly for those who do not live and breathe tax law daily, and even for those who do, it can be difficult to navigate consistently. Voluntary, accurate tax compliance is best achieved through a transparent and consistent tax system that makes it as simple as possible for taxpayers and their advisors to understand the tax laws and compliance requirements.

The legislature has tasked the Commissioner with the power and duty not only to collect tax, but also to ensure taxpayer compliance with the tax laws.

To that end, the legislature has developed a system to effectuate the process of tax collection and compliance efficiently and accurately. The system effectively consists of a

hierarchy of authority, beginning with the Commissioner, proceeding to the Tax Court, and ending with the Minnesota Supreme Court.

The Commissioner's binding deference to decisions made within the hierarchical structure, including binding deference to Tax Court decisions in circumstances in which the Commissioner opts not to seek review from the Minnesota Supreme Court, is derived from and consistent with the statutory duties, power, and mission of the Minnesota Department of Revenue. The statutes instruct the Minnesota Department of Revenue to investigate the tax laws, secure just and equal taxation, secure improvement in the system of state revenue laws, prevent unnecessary spending of public money, and increase access to information about the government, by providing transparency, clarity, and consistency to taxpayers and their advisors in their good faith efforts to comply with Minnesota's tax laws, as detailed below.

A. The Commissioner's collections duties and powers are subject to a hierarchy of review, including appeal to the Minnesota Tax Court and petition for certiorari to the Minnesota Supreme Court.

The Commissioner is tasked with the power and duty to administer and enforce the assessment and collection of taxes and to make determinations, corrections, and assessments with respect to taxes, including interest, additions to taxes, and assessable penalties. Minn. Stat. § 270C.03, Subd. 1. An "assessment of tax made by the commissioner is prima facia correct and valid. The taxpayer has the burden of establishing its incorrectness or invalidity in any related action or proceeding." Minn. Stat. § 270C.33, Subd 6.

If a taxpayer disagrees with assessments made by the Commissioner, “an appeal to the Tax Court may be taken” Minn. Stat. § 271.06, Subd. 1. The legislature created the Minnesota Tax Court, “an independent agency of the executive branch of government” and “court of record,” which consists of three judges who “shall be selected on the basis of their experience with and knowledge of taxation and tax laws,” and instructed that, “[e]xcept 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 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.” Minn. Stat. § 271.01, Subds. 1 & 5.

If a party disagrees with the final order of the Tax Court, “a review of any final order of the Tax Court may be had upon certiorari by the supreme court.” Minn. Stat. § 271.10, Subd. 1. The Minnesota Supreme Court has “jurisdiction as the supreme judicial tribunal of the state.” Minn. Stat. § 480.05. The Minnesota Supreme Court is the court of last resort in cases filed in Minnesota state courts. Minnesota Judicial Branch webpage, “Minnesota Supreme Court” (<https://www.mncourts.gov/supremecourt.aspx>).

B. The Commissioner's duties and powers to effectuate taxpayer compliance with the state tax laws are achieved through transparency and consistency, and these ends would be achieved by binding the Commissioner to orders of the Minnesota Tax Court in circumstances in which the Commissioner opts not to seek review by the Minnesota Supreme Court.

In addition to its collections powers and duties, the Commissioner's statutory powers and duties include: investigating the tax laws, securing just and equal taxation, and improvement in the system of state revenue laws. Minn. Stat. § 270C.03, Subd. 1(4).

The Commissioner's statutory mission includes: prevention of the waste or unnecessary spending of public money and increasing public access to information about government. Minn. Stat. § 270C.03, Subd. 2(1), (4). As stated by Commissioners' counsel in the motion for summary judgement hearing, "ultimately the commissioner's job is to make sure each taxpayer pays the right amount of tax, no more or no less." Summary Judgment Hearing Transcript at 49.

A point of concern in the underlying Minnesota Tax Court case at issue here was the Commissioner's decision to reject the Tax Court's decision in *Nadler v. Comm'r of Revenue*, No. 7736-R, 2006 WL 1084260 (Minn. T.C. Apr. 21, 2006) and the implications of that decision upon taxpayers, including the taxpayer at issue in these proceedings.

MNCPA and MN Chamber do not submit this brief to advocate for or against the *Nadler* decision or its application in this case. Rather, MNCPA and MN Chamber use the *Nadler* situation as an example of why it is important that the Commissioner be bound by decisions of the Minnesota Tax Court.

In summary, in 2006, the Tax Court issued the *Nadler* decision. The Commissioner disagreed with the Tax Court's decision, but the Commissioner did not exercise their statutory right to petition the Minnesota Supreme Court for review of the decision. Instead, for more than a decade, the Commissioner took an internal, non-public position that it would not follow *Nadler*. For approximately 11 years, the Commissioner enforced its non-public policy upon taxpayers in examination, assessing additional tax, penalties, and interest upon taxpayers who reasonably relied on the published Minnesota Tax Court decision in *Nadler* and may have been, and likely were, unaware of the Commissioner's non-public internal policy to not follow *Nadler*.

In 2017, the Commissioner issued Revenue Notice 17-012, which, for the first time, announced to the public that the Commissioner was not following *Nadler*. "Revenue notices are published for the information and guidance of taxpayers, local government officials, the department, and others concerned." Minn. Stat. § 270C.07, Subd. 1. "Revenue notices do not have the force and effect of law and have no precedential effect, but may be relied on by taxpayers until revoked or modified." Minn. Stat. § 270C.07, Subd. 2.

The Commissioner's actions -- taking and enforcing a non-public position counter to a published Tax Court decision on the same matter -- were counter to its prescribed duties and mission and an abuse of its prescribed powers.

In particular, if the Commissioner disagreed with the *Nadler* decision, then the Commissioner should have exercised their statutory right and pursued a public decision by the Minnesota Supreme Court to demonstrate that the Minnesota Tax Court had incorrectly

decided the case. Taking this action would have satisfied the Commissioner's duties and mission as follows:

- 1. The Commissioner's duty to investigate the tax laws is achieved by the Commissioner pursuing a case to its statutory conclusion and seeking a public and precedential decision from the Minnesota Supreme Court in circumstances in which it disagrees with a published Minnesota Tax Court decision or being bound by the Minnesota Tax Court's published decision if it does not seek review by the Minnesota Supreme Court.**

If the Commissioner disagrees with a Minnesota Tax Court decision, the proper response is to seek clarification from the Minnesota Supreme Court as to whether the Commissioner's interpretation is correct, not to take and enforce an internal, non-public position contrary to the Minnesota Tax Court decision. After all, the Commissioner is the only party that is involved in every Minnesota Tax Court decision which concerns the appeal from an order issued by the commissioner.

- 2. The Commissioner's duty to ensure just and equal taxation is achieved by the Commissioner pursuing a case to its statutory conclusion and seeking a public and precedential decision from the Minnesota Supreme Court in circumstances in which it disagrees with a published Tax Court decision or being bound by the Minnesota Tax Court's published decision if it does not seek review by the Minnesota Supreme Court.**

If the Commissioner disagrees with the Minnesota Tax Court decision and the Minnesota Supreme Court agrees with the Commissioner, this would result in a published decision that taxpayers and their advisors could utilize to make business decisions and take compliant positions on tax returns. By not testing its interpretation of the law in the Minnesota Supreme Court and instead taking and enforcing an internal, non-public position contrary to the public decision of the Minnesota Tax Court, the Commissioner acts in direct

opposition of its duty to ensure just and equal taxation. Given that Minnesota Tax Court decisions are published and the Commissioner's internal positions are non-public, taxpayers and their advisors will presumably take positions on tax returns consistent with the published Minnesota Tax Court decision, not the non-public internal determination of the Commissioner. In that respect, only those taxpayers subjected to examination are advised of the Commissioner's internal, non-public determination and assessed the resulting tax, penalty, and interest. This is not just and equal taxation.

Additionally, when the Commissioner rejects Minnesota Tax Court decisions and the statutory right of review by the Minnesota Supreme Court, and instead opts to take a non-public, internal position, this action creates access to justice issues. Challenging a non-public opinion of the Commissioner would require the taxpayer to litigate in Minnesota Tax Court and potentially the Minnesota Supreme Court. Most taxpayers do not have the resources (funds, legal representation, etc.) or wherewithal for this type of litigation. Additionally, taxpayers, particularly the small businesses that are the backbone of Minnesota's tax base, must make a cost-benefit decision in terms of the cost and hazards of litigation relative to the amount of the assessments at issue. Unless the amounts at issue are significant and the taxpayer has significant resources and legal representation, many taxpayers likely would choose to forgo challenging the Commissioner's non-public position because the time, expense, and uncertainty of litigation would outweigh the potential benefit they might receive were they to prevail.

The Commissioner is not bound by these monetary considerations and, most likely, their resources would be more efficiently deployed pursuing their statutory right to receive

a determination from the Minnesota Supreme Court, rather than exerting the administrative resources required to engage in the proverbial game of Whack-A-Mole that is trying to enforce a non-public, internal position.

3. **The Commissioner's duty to improve the system of state revenue law is achieved by the Commissioner pursuing a case to its statutory conclusion and seeking a public and precedential decision from the Minnesota Supreme Court in circumstances in which they disagree with a published Minnesota Tax Court decision or being bound by the Minnesota Tax Court's published decision if they do not seek review by the Minnesota Supreme Court.**

The system is improved by transparency and clarity, i.e., by published decisions which are binding on the Commissioner, not by internal, non-public Commissioner positions.

4. **The Commissioner's mission to prevent waste or unnecessary spending of public money is achieved by the Commissioner pursuing a case to its statutory conclusion and seeking a decision from the Minnesota Supreme Court in circumstances in which they disagree with a published Minnesota Tax Court decision or being bound by the Minnesota Tax Court's published decision if they do not seek review by the Minnesota Supreme Court.**

Presumably it is significantly less costly for the Commissioner to pursue a case to its statutory conclusion and seek a determination from the Supreme Court than for the Commissioner, for more than a decade, to issue internal publications and instruct its staff to pursue an internal, non-public position counter to published caselaw. All the taxpayers subject to the resulting examinations relating to that non-public, internal position are also exhausting resources to defend a position that was stated in published caselaw.

5. The Commissioner’s mission to increase public access to information about government is achieved by the Commissioner seeking finality and public precedent from the Supreme Court in circumstances in which it disagrees with a published Tax Court decision or being bound by the Tax Court’s published decision if it does not seek review by the Supreme Court.

Taking an internal, non-public position contrary to published caselaw is the antithesis of increasing public access to information.

As noted by Justice Paul H. Anderson in his dissent in *Kmart Corp. v. Cnty. of Stearns*, 710 N.W.2d 761, 775 (Minn. 2006), with regard to the Tax Court’s position as an executive branch court, its “interpretation of its own rule may be overturned by our court just as the agency's interpretation of the statute it administers may be; and a taxpayer must respect both the agency's rule and statutory interpretation until such interpretation is overturned by our court. *St. Otto’s Home v. Minn. Dept. of Human Servs.*, 437 N.W.2d 35, 39–40 (Minn.1989).”

“The Minnesota Supreme Court has emphasized that, to foster confidence in the State's tax system, the Commissioner of Revenue and the tax court must be consistent in applying the law. *Mauer v. Comm’r of Revenue*, 829 N.W.2d 59, 76 n. 2 (Minn. 2013). The precedential effect of Regular Division decisions in subsequent tax court cases materially advances this objective.” *CenterPoint Energy Res. Corp. v. Comm’r of Revenue*, No. 8763-R, 2016 WL 6068337, at *13 (Minn. Tax Oct. 14, 2016).

The Commissioner has the power, duty, and mission to get the law right and to promulgate the correct interpretations of the law. It has the resources, in the form of funds, legal representation, and expertise to pursue a case to its statutory conclusion and seek

review in the Minnesota Supreme Court challenging a Minnesota Tax Court determination. Such public, published clarification would set the record straight for all the stakeholders in Minnesota's tax system— the Commissioner, the Minnesota Tax Court, taxpayers, and their advisors. In light of its powers, duties, mission, and resources, the Commissioner should seek clarification from the Minnesota Supreme Court if it disagrees with a Minnesota Tax Court determination, otherwise it should be bound by the Minnesota Tax Court determination.

II. Binding the Commissioner to decisions of the Minnesota Tax Court properly places the burden on the Commissioner to seek clarification to or correction of the law if the Commissioner believes that the law has been incorrectly interpreted by the Courts. Placing this burden on the Commissioner, rather than the taxpayer, is proper, given the Commissioner's powers, duties, mission, and resources.

During the summary judgment hearing in the underlying Tax Court case, the Commissioner's counsel noted that if the Tax Court issues a decision that the Commissioner disagrees with, "the Commissioner can issue revenue notices, as it did with Nadler," or the taxpayer can: contact the Commissioner's office with questions about their filings and returns (however, as Commissioner's counsel noted, "the Department certainly won't give out advice." Summ. J. Hr'g Transcript at 47); request penalty abatement via administrative appeal or penalty abatement request; or seek a change to the law. Summ. J. Hr'g Transcript at 47.

All of these options put an unfair burden on the taxpayer, a burden which, given the availability of access and resources, is more properly borne by the Commissioner. An

examination of each of Commissioner's counsel's suggestions confirms which party should bear the burden:

A. Revenue notices.

The Commissioner's issuance of revenue notices when it disagrees with a Tax Court determination is problematic for numerous reasons, including but not limited to the fact that, by statute, revenue notices do not have the force and effect of law and have no precedential effect. Minn. Stat. § 270C.07, Subds. 1, 2. This puts taxpayers and their advisors in a precarious position in deciding whether to act in compliance with a revenue notice or a published Tax Court decision. This problem is resolved if the Commissioner simply pursues a case to its statutory conclusion and seeks review by the Minnesota Supreme Court when it disagrees with a decision of the Minnesota Tax Court.

Additionally, as was the case in *Nadler*, there is no specific timeframe within which taxpayers can expect (if ever) the Commissioner to issue a revenue notice stating publicly the Commissioner's disagreement with a published Minnesota Tax Court decision, leaving taxpayers and their advisors in a precarious position of not knowing whether the positions they take on their tax returns are in compliance with the Commissioner's internal, non-public interpretations of the tax laws. This problem is resolved if the Commissioner simply pursues a case to its statutory conclusion and seeks review of the Minnesota Supreme Court when it disagrees with a decision of the Minnesota Tax Court.

B. Contacting the Commissioner's office with questions.

As noted by Commissioner's counsel, taxpayers may contact the Commissioner's office with questions about their filings and returns; however, "the Department certainly

won't give out advice." Summ. J. Hr'g Transcript at 47. Even if the Commissioner's office were to provide a taxpayer with advice, such advice generally will not be in writing and, even if a taxpayer receives oral or written advice from the Commissioner's office, taxpayers are not allowed to rely on that advice in taking a tax position on their returns.

Additionally, when taxpayers contact the Minnesota Department of Revenue, the contact is generally via the customer service telephone line, and the taxpayer is talking to a customer service representative, usually not a tax policy expert or attorney from the Minnesota Department of Revenue.

Given the extent and breadth of the tax laws, it seems improbable that a non-policy expert would be able to provide helpful guidance to a taxpayer with regard to the position the taxpayer should take on their return, particularly in light of the of the nuanced issue we have in our case at hand.

To that that end, Commissioner's counsel's suggestion that taxpayers can simply contact the Commissioner's office for guidance to determine the existence or application of an internal, non-public Commissioner position seems like a hollow and ineffective alternative to the Commissioner simply pursuing a case to its statutory conclusion and seeking Minnesota Supreme Court review when it disagrees with a published Minnesota Tax Court decision or being bound by the unchallenged decision.

C. Penalty abatement request or administrative appeal.

Commissioner's counsel suggested that in the circumstance that the Commissioner opts not to seek review by the Minnesota Supreme Court and instead opts to take an internal, non-public position in opposition to a published Minnesota Tax Court decision, if

a taxpayer relies on the published Minnesota Tax Court decision on its return, the Commissioner will consider abating penalties on that basis via a formal penalty abatement request or administrative appeal by the taxpayer. Why is the taxpayer being penalized in the first place for taking a position in compliance with published Minnesota Tax Court guidance when the taxpayer has no reason to know that the Commissioner has taken an internal, non-public position against the Minnesota Tax Court decision?

Again, this presents an access to justice issue. Pro-se and low-income taxpayers may not realize they can request abatement or may not understand the requirements to make a formal penalty abatement request or administrative appeal to request abatement of penalties and may then be stuck paying penalties for taking a position in reasonable reliance on the only public guidance available.

The Commissioner may suggest that it would not reject a Minnesota Tax Court determination that would impact pro-se or low-income taxpayers and that its actions in the *Nadler* case would only impact sophisticated taxpayers and their representatives. However, how are we to know the breadth of internal, non-public positions of the Commissioner and the extent to which they apply to the broad spectrum of Minnesota taxpayers? The Commissioner's current pattern of behavior would suggest that no taxpayer is safe from the consequences of the Commissioner's decision to opt for the ambiguity of a non-public, internal position.

These problems are resolved if the Commissioner simply pursues a case to its statutory conclusion and seeks review of the Minnesota Supreme Court when they disagree with a decision of the Minnesota Tax Court.

D. Request for change of law.

Commissioner's counsel suggested that if a taxpayer disagrees with an internal, non-public Commissioner position, a taxpayer can simply request a change of law from the legislature, as though this is an easy and accessible process for the general public.

The Commissioner certainly has the connections, proximity, resources, and expertise to request a tax law change from the legislature. In particular, some of the Commissioner's enumerated powers and duties include advising the legislature and governor,² Minn. Stat. § 270C.03, Subd. 1(4), (5), and the Commissioner's offices are conveniently located across the street from the Capital. There is a department of people in the Commissioner's office whose sole responsibilities relate to drafting and developing tax laws. However, the general public does not have such expertise, resources, access, or influence as is enjoyed by the Commissioner to make these kinds of requests.

In this respect, the burden of seeking a legislative change most squarely falls upon the Commissioner, not taxpayers. In either case, these problems are resolved if the Commissioner simply seeks review by the Minnesota Supreme Court when it disagrees with a decision of the Minnesota Tax Court. If the Commissioner does not agree with the

² In addition to the previously detailed powers and duties, the Commissioner's statutory powers and duties also include: formulating and submitting to the legislature such legislation as the commissioner may deem expedient to secure just and equal taxation and improvement in the system of state revenue laws and consulting and conferring with the governor upon the subject of taxation, the administration of the laws in regard thereto, and furnishing the governor assistance and information as the governor may require relating to tax matters. Minn. Stat. § 270C.03, Subd. 1(4), (5).

determination of the Minnesota Supreme Court, the Commissioner can utilize their expertise, resources, access, or influence to seek a change in the tax law from the legislature. The Commissioner is in a significantly advantaged position to make such a request relative to members of the general public.

III. Binding the Commissioner to follow Tax Court decisions avoids access to justice issues.

As it stands, the Commissioner is essentially allowed to take internal, non-public positions with regard to published Minnesota Tax Court decisions. In the example we have here, *Nadler*, it took more than a decade before the Commissioner issued public guidance regarding its position. In the interim, taxpayers were audited and assessed additional taxes, penalties, and interest in light of the Commissioner's internal, non-public position.

Commissioner's counsel stated that there have only been two cases in which the *Nadler* issue has been invoked. Summ. J. Hr'g Transcript at 46. Commissioner's counsel might be correct that these are the only two *litigated* cases in these regards. However, litigation is generally a privilege exercised by taxpayers with an amount at stake substantial enough to justify the time, cost, and risk of litigation and the means to afford counsel, etc. to pursue such ends.

Presumably, during the 11-year period during which the Commissioner took its internal, non-public position there were innumerable other such cases in which small business taxpayers with lower amounts at stake or without the resources, council, etc. to afford or navigate the litigation process to challenge the Commissioner's internal, non-public policy were assessed additional tax, penalties, and interest related to the

Commissioner's internal, non-public position. Those taxpayers took a position on their returns in accordance with the only public guidance available, i.e. the unchallenged, published Minnesota Tax Court decision, and they were effectively punished with additional tax, penalties, and interest associated with the Commissioner's enforcement of its internal, non-public policy.

How many other internal, non-public Commissioner positions exist contrary to current, unchallenged Minnesota Tax Court decisions? Given that the *Nadler* case was not the first time the Commissioner rejected a Minnesota Tax Court decision, how can taxpayers and their advisors know whether the positions they take on their tax returns are in accordance with such internal, non-public positions? Why, when the Commissioner has the power, duties, mission, and resources to seek and establish the correct guidance for the taxpayers through public determinations or changes to tax law, does the Commissioner not exercise its power and resources to effectuate its duties and mission to these ends?

The result is unequal access to justice for those taxpayers without the resources, connections, legal counsel, etc. to challenge such internal, non-public determinations. Rather than put this burden on those least capable of bearing it, it should be the duty of the Commissioner to pursue a case to its statutory conclusion and seek Minnesota Supreme Court review when they disagree with a published Minnesota Tax Court decision, or the Commissioner should be bound by the decision. This way, the Commissioner and the public are on equal footing in understanding and making good faith efforts at voluntary compliance with the tax laws.

CERTIFICATE OF COMPLIANCE

This brief complies with the word/line limitations of Minn. R. Civ. App. P 132.01, subd. 3(c). This brief was prepared using Microsoft Word Version 2302 in 13-pt. font, which reports that the brief contains 387 lines and 4,616 words.

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