

**BEFORE THE NEBRASKA TAX EQUALIZATION
AND REVIEW COMMISSION**

HCS CRETE, LLC,)	
)	
Appellant,)	CASE NO. 07P-001
)	
vs.)	
)	FINDINGS AND ORDER DETERMINING
SALINE COUNTY BOARD OF)	THAT THE COMMISSION DOES NOT
EQUALIZATION,)	HAVE JURISDICTION
)	
Appellee.)	

The above-captioned case was called for a hearing pursuant to an Order to Show Cause and Notice of Hearing (Jurisdictional Authority of the Commission) entered by the Tax Equalization and Review Commission ("the Commission"), on May 11, 2007. The hearing was held in the Commission's Hearing Room on the sixth floor of the Nebraska State Office Building in the City of Lincoln, Lancaster County, Nebraska, on June 1, 2006. Commissioners Wickersham, Lore, Warnes, and Sorensen were present. Commissioner Wickersham presided.

John V. Harker, manager for HCS Crete, LLC, ("the Taxpayer"), appeared by teleconference. The Saline County Board of Equalization ("the County Board") appeared, by teleconference, through legal counsel, Mr. Tad Eickman, County Attorney, for Saline County, Nebraska. The Commission took statutory notice, received and heard testimony.

The Commission is required by Neb. Rev. Stat. §77-5018 (Cum. Supp 2006) to state its final decision, with findings of fact and law, on the record or in writing.

**I.
ISSUE**

Does the Commission have subject matter jurisdiction to consider an appeal from a decision of a County Board concerning a request for modification of net book value for taxable personal property listed in the tax years 2004 and 2005?

**II.
FINDINGS**

The Commission finds and determines that:

1. The County Assessor for Saline County prepared and filed personal property tax schedules for the Taxpayer for the tax years 2004 and 2005 pursuant to Neb. Rev. Stat. §77-1233.04 (Reissue 2003).
2. Notice of the action taken and penalty assessed was given to the Taxpayer by the Saline County Assessor as required by Neb. Rev. Stat. §77-1233.06 (Reissue 2003).
3. The Taxpayer filed amendments to the lists of taxable personal property as prepared by the Saline County Assessor for the tax years 2004 and 2005 with the Saline County Assessor on or about February 22, 2007.
4. The Saline County Assessor refused to act on the proposed amendments.
5. The Saline County Board of Commissioners denied relief.
6. The Taxpayer appealed the decision of the Saline County Board of Commissioners to the Commission.
7. An Order to Show Cause and Notice of Hearing (Jurisdictional Authority of the Commission) was issued by the Commission on May 11, 2007, directing the Taxpayer to show why the appeal should not be dismissed for want of jurisdiction.

**III.
APPLICABLE LAW**

1. The Commission, while making a decision, may not consider testimony, records, documents or other evidence which is not a part of the hearing record except those

identified in the Commission's rules and regulations or Neb. Rev. Stat. §77-5016(3) (Cum. Supp. 2006).

2. Administrative bodies have only that authority specifically conferred upon them by statute or by construction necessary to achieve the purpose of the relevant act. *Arcadian Fertilizer, L.P. v. Sarpy County Bd. of Equal.*, 7 Neb. App. 499, 583 N.W.2d 353, (1998).
3. To inquire into a statute's legislative history, the statute in question must be open to construction, and a statute is open to construction when its terms require interpretation or may reasonably be considered ambiguous. *American Employers Group v. Department of Labor*, 260 Neb. 405, 617 N.W.2d 808 (2000).
4. A statute is ambiguous when the language used cannot be adequately understood either from the plain meaning of the statute or when considered in pari materia with any related statutes. *Unisys Corp. v. Nebraska Life & Health Ins. Guar. Assn.*, 267 Neb. 158, 673 N.W.2d 15 (2004).
5. Where, because a statute is ambiguous, it is necessary to construe it, the principal objective is to determine the legislative intention. *Matzke v. City of Seward*, 193 Neb. 211, 226 N.W.2d 340.
6. The legislative intention is to be determined from the general consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found, and the intent deduced from the whole will prevail over that of a particular part considered separately. *Equal Opportunity Commission v. Weyerhaeuser Co.*, 198 Neb. 104, 251 N.W.2d 730.

7. “Components of a series or collection of provisions pertaining to the same subject matter which are in pari materia may be conjunctively considered so that different provisions are consistent, harmonious, and sensible. Where possible, effect should be given to all provisions of a statute or regulation.” (Citations omitted). *Elsome v. Elsome*, 257 Neb. 889, 900, 601 N.W.2d 537, 545 (1999).
8. “In construing a statute, it is presumed that the Legislature intended a sensible rather than an absurd result... Statutory language is to be given its plain and ordinary meaning . . .” *Metropolitan Utilities Dist. v. Twin Platte Natural Resources Dist.*, 250 Neb. 442, 451, 550 N.W.2d 907, 913 (1996).

IV. ANALYSIS

Tangible personal property subject to taxation in Nebraska, is assessed as of January 1, at 12:01 a.m. each year. Neb. Rev. Stat. §77-1201 (Reissue 2003). Various persons are required to file lists of taxable tangible personal property held or owned by them as of the assessment date. *Id.* A person responsible for filing a tangible personal property tax list is required to list and value taxable tangible personal property on a form prescribed by the Property Tax Administrator. Neb. Rev. Stat. §77-1229 (Reissue 2003). The filing deadline is May 1, of each year. *Id.* Taxable tangible personal property may be valued for taxation at its depreciated cost using the same depreciation methods with reasonable class lives as determined by the Legislature, or shall be taxed by valuation uniformly and proportionately. *Neb. Const.* art VIII, §1. The Legislature has directed that taxable tangible personal property be valued for taxation at its net book value.

Neb. Rev. Stat. §77-201 (Cum. Supp 2006). Net book value is defined as a percentage of the Nebraska adjusted basis of the property. Neb. Rev. Stat. §77-120 (Reissue 2003). Nebraska adjusted basis is defined in Neb. Rev. Stat. §77-120 (Reissue 2003).

The appeal in the above captioned case concerns an attempted correction of net book value. The net book value for which a correction is sought was determined by the Saline County Assessor after the Taxpayer failed to file a tangible personal property tax list as required by law. The Taxpayer asserts that the provisions of Neb. Rev. Stat. 77-1233.04 (Reissue 2003) are applicable. The first sentence of section 77-1233.04 is composed of two parts. The first part is as follows: "The county assessor shall list and value at net book value any item of tangible personal property omitted from a personal property return of any taxpayer". Neb. Rev. Stat. 77-1233.04 (Reissue 2003). The second part contains an additional direction "and change the reported valuation of any item or tangible personal property listed on the return to conform the valuation to net book value" *Id.* One interpretation of the two parts is that an assessor can only change values after omitted property has been discovered and that the reference to "change in the reported valuation" refers to the value of the omitted property. That reading ignores the fact that omitted property would not, by definition, have a value to change until listed by the assessor. An alternative is to read the second portion of the sentence as an independent clause allowing the Assessor to make necessary changes to "reported valuation" based on a source other than omitted property. The Commission concludes that section 77-1233.04 is ambiguous.

A variety of statutory provisions provide for changes of value or identification of tangible personal property subject to tax. First, a statutory provision exists for changes occasioned by an amendment to income tax returns or resulting from audits. Neb. Rev. Stat. §77-1230 (Reissue

2003). Second, a complete failure to file a tangible personal property list is addressed. Neb. Rev. Stat. §77-1233.04 (Reissue 2003). Third there is a provision for inclusion of tangible personal property omitted from a tangible personal property list. *Id.* At least two other potential sources of change to a list come readily to mind; the first is clerical errors, for which a correction process is provided if the taxable property is real property. Neb. Rev. Stat. §77-1507 (Cum. Supp. 2004). Another source of change could be other corrections discovered by either the Taxpayer or the Assessor.

Section 77-1233.04 can best be read with a broader context than changes initiated by the discovery of omitted property. That interpretation of the section is consistent with its legislative history. Prior to the enactment of LB 194 in the 2000 session of the Nebraska Legislature the section pertained to both omitted property and property whose net book value should be corrected. See. 2000 Neb. Laws, LB 194 §12. The purpose of the change enacted in LB 194 was to rearrange the section and provide for penalties. See, Committee statement for 2000 Neb. Laws, LB 194 §11. A reading of section 77-1233.04 to allow for changes to value as initiated by a Taxpayer is clearly the better interpretation of the section. That interpretation is reinforced by an amendment made to section 77-1233.04 in the last session of the Nebraska Legislature. By amendment to section 77-1233.04 the legislature deleted the word “and”, and added the “The County Assessor shall.” 2007 Neb. Laws. LB 166 § 5. The change makes clear that the section is applicable both to omissions discovered by the Assessor and self reported corrections proposed by a Taxpayer. The Commission finds that section 77-1233.04 is applicable to the Taxpayer’s proposed change. Changes to net book value may be made within the current taxing period and the three previous taxing years. Neb. Rev. Stat. 77-1233.04 (Reissue 2003). The Taxpayer’s

proposed amendments were filed in 2007. The three previous taxing years would be 2006, 2005, and 2004. The Taxpayer's proposed amendments for the tax years 2004 and 2005 were timely filed. The County Assessor denied the Taxpayer's proposed amendments. The County Assessor did not notify the Taxpayer that the proposed amendments were rejected. The Taxpayer's proposed amendments were referred to the County Board of Commissioners after rejection by the County Assessor. The County Board of Commissioners considered the Taxpayer's proposed amendments and rejected them. Notice of rejection was given by the County Attorney by letter dated April 23, 2007. An appeal to the Commission was filed May 8, 2007. The procedure prescribed by statute is for the County Assessor to give notice of a refusal to amend, for the Taxpayer to appeal to the County Board of Equalization and for the County Board of Equalization to consider that appeal after 10 days notice to the Taxpayer. Neb. Rev. Stat. 77-1233.06 (Reissue 2003). The Commission only has jurisdiction over appeals from decisions of a County Board of Equalization. *Id.* There is no evidence that the Saline County Board of Equalization has considered the amendments proposed by the Taxpayer. Because the Saline County Board of Equalization has not acted on the amendments proposed by the Taxpayer the Commission does not have jurisdiction. The Commission notes that the tax years at issue are still open and new amendments could be filed or the Saline County Board of Equalization could still act on the current amendments proposed by the Taxpayer.

**V.
CONCLUSION OF LAW**

The Commission does not have subject matter jurisdiction over the above captioned appeal. Neb. Rev. Stat. §77-5013 (Cum. Supp. 2006)

**VI.
ORDER**

IT IS ORDERED THAT:

1. The appeal of HCS Crete LLC is dismissed for want of jurisdiction.
2. Each party is to bear its own costs in this matter.
3. This order is effective for purposes of appeal June 8, 2007.

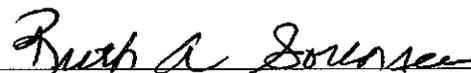
Signed and Sealed. June 8, 2007



SEAL


Wm. R. Wickersham, Commissioner


Susan S. Lore, Commissioner


Ruth A. Sorensen, Commissioner


William C. Warnes, Commissioner

ANY PARTY SEEKING REVIEW OF THIS ORDER MAY DO SO BY FILING A PETITION WITH THE APPROPRIATE DOCKET FEES IN THE NEBRASKA COURT OF APPEALS. THE PETITION MUST BE FILED WITHIN THIRTY DAYS AFTER THE DATE OF THIS ORDER AND MUST SATISFY THE REQUIREMENTS OF STATE LAW CONTAINED IN NEB. REV. STAT. §77-5019 (CUM. SUPP. 2006). IF A PETITION IS NOT TIMELY FILED, THIS ORDER BECOMES FINAL AND CANNOT BE CHANGED.