

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

GARY R. ALDRIDGE,)	
)	
Appellant,)	Case No. 08P 003
)	
v.)	DECISION AND ORDER
)	AFFIRMING THE DECISION OF
LANCASTER COUNTY BOARD OF)	THE LANCASTER COUNTY BOARD OF
EQUALIZATION,)	EQUALIZATION
)	
Appellee.)	

The above-captioned case was called for a hearing on the merits of an appeal by Gary R. Aldridge ("the Taxpayer") to the Tax Equalization and Review Commission ("the Commission"). 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 May 28, 2009, pursuant to an Order for Hearing and Notice of Hearing issued March 13, 2009. Commissioners Wickersham, Warnes and Salmon were present. Commissioner Wickersham was the presiding hearing officer. A panel of three commissioners was created pursuant to 442 Neb. Admin. Code, ch. 4, §011 (10/07).

Gary R. Aldridge was present at the hearing. No one appeared as legal counsel for the Taxpayer.

Michael E. Thew, a Deputy County Attorney for Lancaster County, Nebraska, was present as legal counsel for the Lancaster County Board of Equalization ("the County Board").

The Commission took statutory notice, received exhibits, and heard testimony.

The Commission is required to state its final decision and order concerning an appeal, with findings of fact and conclusions of law, on the record or in writing. Neb. Rev. Stat. §77-5018 (Cum. Supp. 2008).

The Taxpayer moved for a default judgment for the reason that he had not been served with a copy of the Answer of the County Board. The Taxpayer's motion for default judgement was denied for the reasons that an answer had been timely filed with the Commission and that granting a motion for default judgement is permissive and should not be granted when the opposing party has not been prevented, by the failure to receive a copy of an answer, from making a full presentation of their case at the hearing on the merits of the appeal.

The final decision and order of the Commission in this case is as follows.

I. ISSUES

Whether a penalty was correctly imposed pursuant to section 77-1233.04 of Nebraska Statutes for late filing of a personal property return?

II. FINDINGS OF FACT

The Commission finds and determines that:

1. The Taxpayer has a sufficient interest in the outcome of the above captioned appeal to maintain the appeal.
2. A personal property return was filed on July 29, 2008.
3. The County Assessor imposed a fine.
4. Imposition of a fine by the County Assessor was protested.
5. The County Board denied the protest.
6. An appeal of the County Board's decision was filed with the Commission.

7. The County Board was served with a Notice in Lieu of Summons and duly filed an answer with the Commission.
8. An Order for Hearing and Notice of Hearing issued on March 13, 2009, set a hearing of the appeal for May 28, 2009, at 9:00 a.m. CDST.
9. An Affidavit of Service which appears in the records of the Commission establishes that a copy of the Order for Hearing and Notice of Hearing was served on all parties.
10. The decision of the County Board determining that it could not abate or waive the penalty imposed by section 77-1233.04 of Nebraska Statutes for late filing of a personal property return, should be affirmed

III. APPLICABLE LAW

1. Subject matter jurisdiction of the Commission in this appeal if over issues raised during the county board of equalization proceedings. *Arcadian Fertilizer, L.P. v. Sarpy County Bd. of Equalization*, 7 Neb.App. 655, 584 N.W.2d 353 (1998).
2. A person owning taxable tangible personal property is required to annually file a form with the county assessor listing and showing the value of that property on or before May 1. Neb. Rev. Stat. §77-1229(1) (Cum. Supp 2008).
3. A penalty of ten percent of the tax due on added value is imposed on any valuation added to a personal property return or added through the filing of a personal property return after May 1 and on or before July 31 of the year in which the personal property is subject to tax. Neb. Rev. Stat. 77-1233.04(3) (Laws 2008, LB 965 §11)

4. The action of the county board of equalization in an appeal of the penalties imposed, shall be limited to correcting penalties which were wrongly imposed or incorrectly calculated. The county board of equalization shall have no authority to waive or reduce any penalty which was correctly imposed and calculated. Neb. Rev. Stat. §77-1233.06(3) (Laws 2008, LB 965 §11).
5. A presumption exists that the County Board has faithfully performed its duties and has acted on competent evidence. *City of York v. York County Bd. Of Equalization*, 266 Neb. 297, 64 N.W.2d 445 (2003).
6. The presumption in favor of the county board may be classified as a principle of procedure involving the burden of proof, namely, a taxpayer has the burden to prove that action by a board of equalization fixing or determining valuation of real estate for tax purposes is unauthorized by or contrary to constitutional or statutory provisions governing taxation. *Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987).
7. The presumption disappears if there is competent evidence to the contrary. *Id.*
8. The order, decision, determination, or action appealed from shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016 (8) (Cum. Supp. 2006).
9. Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence. See, e.g. *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).

10. "Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved."
Castellano v. Bitkower, 216 Neb. 806, 812, 346 N.W.2d 249, 253 (1984).
11. A decision is "arbitrary" when it is made in disregard of the facts and circumstances and without some basis which could lead a reasonable person to the same conclusion. *Phelps Cty. Bd. of Equal. v. Graf*, 258 Neb 810, 606 N.W.2d 736 (2000).
12. A decision is unreasonable only if the evidence presented leaves no room for differences of opinion among reasonable minds. *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb 390, 603 N.W.2d 447 (1999).

IV. ANALYSIS

The Taxpayer owned taxable tangible personal property as of January 1, 2008. A return listing that property and its value was filed on July 29, 2008. (E3:1). A penalty was imposed by the County Assessor pursuant to section 77-1233.04(3) of Nebraska Statutes.

The taxpayer asserts that the statute does not provide for imposition of a penalty because until he filed a return there was no value to which the value shown in his return could be added. Section 77-1233.04(3) of Nebraska Statutes provided for the imposition of a penalty if any valuation is added to a personal property return or added through the filing of a personal property return. A personal property return may be amended. Neb. Rev. Stat. §77-1230 (Laws 2008, LB 965 §11). If a filed personal property return is amended the provision of Section 77-1233.04(3) providing for a penalty when value is added to a personal property return is applicable. The statutes also provide for a penalty if the first filing of a personal property return is after the May 1

deadline. A penalty was imposed based on an initial filing of the Taxpayer's personal property return on July 29. There is no evidence the penalty was calculated incorrectly. The decision of the County Board was required by statute.

**V.
CONCLUSIONS OF LAW**

1. The Commission has subject matter jurisdiction in this appeal.
2. The Commission has jurisdiction over the parties to this appeal.
4. The Taxpayer has not adduced sufficient, clear and convincing evidence that the decision of the County Board is unreasonable or arbitrary and the decision of the County Board should be affirmed.

**VI.
ORDER**

IT IS ORDERED THAT:

1. The decision of the County Board determining that it could not abate or waive the penalty imposed by section 77-1233.04(3) of Nebraska Statutes for late filing of a personal property return, is affirmed.
2. This decision, if no appeal is timely filed, shall be certified to the Lancaster County Treasurer, and the Lancaster County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Cum. Supp. 2008).
3. Any request for relief, by any party, which is not specifically provided for by this order is denied.
4. Each party is to bear its own costs in this proceeding.

5. This decision shall only be applicable to tax year 2008.
6. This order is effective for purposes of appeal on June 2, 2009.

Signed and Sealed. June 2, 2009.

Nancy J. Salmon, Commissioner

William C. Warnes, Commissioner

Wm R. Wickersham, Commissioner

SEAL

APPEALS FROM DECISIONS OF THE COMMISSION MUST SATISFY THE REQUIREMENTS OF NEB. REV. STAT. §77-5019 (CUM. SUPP. 2008), OTHER PROVISIONS OF NEBRASKA STATUTES, AND COURT RULES.