

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

LACOSTA PLENTY,LLC	)	
	)	
Appellant,	)	Case No. 08P 001
	)	
v.	)	DECISION AND ORDER
	)	AFFIRMING THE DECISION OF
DAWES COUNTY BOARD OF	)	THE DAWES COUNTY BOARD OF
EQUALIZATION,	)	EQUALIZATION
	)	
Appellee.	)	

The above-captioned case was called for a hearing on the merits of an appeal by Clifford Bergfeldt, managing member of the LaCosta Plenty, Limited Liability Company ("the Taxpayer") to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the conference room of the Hampton Inn in Scottsbluff, Nebraska on August 27, 2009, pursuant to an Order for Hearing and Notice of Hearing issued June 17, 2009. Commissioners Wickersham, Warnes and Salmon were present. Commissioner Warnes was the presiding hearing officer. Commissioner Hotz was excused from the hearing.

Clifford Bergfeldt, managing member of La Costa Plenty, LLC was present at the hearing. No one appeared as legal counsel for the Taxpayer.

Kent Hadenfeldt, a Deputy County Attorney for Dawes County, Nebraska, was present as legal counsel for the Dawes 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 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 May 15, 2009.
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 June 17, 2009, set a hearing of the appeal for August 27, 2009, at 1:00 p.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. 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).
6. 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).
7. "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).
8. 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).
9. 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).
10. A presumption of receipt of mail by the addressee arises when it is shown that the letter was properly addressed, stamped, and mailed. *Troy & Stalder Co. V Continental Casualty*, 206 Neb.28, 290 N.W.2d 809 (1980) and *Baker v St. Paul Fire and Marine Ins. Co.*, 240 Neb. 14, 480 N.W. 2d 192 (1992).
11. If the presumption of receipt of mail arises, it may be rebutted by any relevant evidence and positive testimony that a letter was not received simply raises a question of fact to be decided by the trier of fact. Even where the evidence of proper addressing and mailing is

sufficient to raise the presumption of receipt and shift the burden of proof on the issue to the opposing party, the presumption is still rebuttable and the factual issue of whether mail was received is for the trier of fact. *Waite Lumber Co., Inc. v Carpenter*, 205 Neb. 860, 290 N.W.2d. 655 (1980).

#### **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 May 15, 2008. (E2:2). A penalty was imposed by the County Assessor pursuant to section 77-1233.04(3) of Nebraska Statutes. (E3:2).

The Taxpayer's managing member testified that he had prepared, signed and mailed a personal property return on April 1, 2008 and had personally taken it to the U.S. Post Office and mailed it. He testified that he had properly addressed, attached postage and checked the return address of the mailing. The Commission finds that the testimony of the Taxpayer raises a presumption of receipt of mail by the County Assessor. *Baker v St. Paul Fire and Marine Ins. Co.*, 240 Neb. 14, 480 N.W.2d 192 (1992). Once a presumption of receipt of mail arises, it may be rebutted by any relevant evidence and positive testimony that a letter was not received simply raises a question of fact to be decided by the trier of fact. Even where the evidence of proper addressing and mailing is sufficient to raise the presumption of receipt and shift the burden of proof on the issue to the opposing party, the presumption is still rebuttable and the factual issue of whether mail was received is for the trier of fact. *Waite Lumber Co., Inc. v Carpenter*, 205 Neb. 860, 290 N.W.2d. 655 (1980).

The managing member also testified that he had made an inquiry of a staff member of the County Assessor's office on April 28, 2008. The Taxpayer's managing member testified that the staff member of the County Assessor's office assured him that the personal property return of La Costa Plenty, LLC, had been received. The Taxpayer's managing member also testified that he did not realize that a personal property return was not on file at the County Assessor's office until he received notice on May 5, 2008 advising him that a return had not been received. His testimony was that he had spoken to the County Assessor several times since May 5, 2008 and had been assured by her that he would not have any penalty.

The Taxpayer's managing member testified that the County Assessor had not sent to him two notices for the year 2008 as she had done in past years. The first notice was sent by the County Assessor by letter dated January 18, 2008. (E5:1). His testimony was that a second reminder notice had been sent in past years reminding him that his personal property return had not been filed. The Commission finds that there is no obligation by the County Assessor to send such "reminder notices" and it is incumbent on each Taxpayer to meet the statutory deadline for filing the personal property return.

The County Assessor testified that she and her staff had carefully checked for filings of the personal property returns before sending out notices of failure to file to Taxpayers for 2008. She testified that a personal property return for the Taxpayer was not on file. Her further testimony was that she had not heard prior to this hearing anything about the Taxpayer's checking with her office prior to the deadline. Her further testimony was that she had attended the protest hearing and did not hear this allegation made at that time by the Taxpayer who was in attendance and provided testimony. She testified that she did not state to the Taxpayer that no

penalty would be imposed for the late filing and that she had not ever waived a penalty when due for other Taxpayers. She testified that she knew that she did not have authority to waive the imposition of a penalty as required by statute.

The Commission finds from all of the evidence provided that the County has rebutted the presumption of the receipt of mail by relevant evidence and finds further that the personal property return due by the Taxpayer for 2008 was not timely filed.

Nebraska law provides for a penalty if the first filing of a personal property return is after the May 1 deadline. Neb Rev Stat § 77-1233.04. A penalty was imposed based on an initial filing of the Taxpayer's personal property return on May 15, 2008. There is no evidence the penalty was calculated incorrectly. The decision of the County Board was required by statute. The Commission finds that there is no allowance for a waiver of the late penalty as the statute requires the assessment of the late penalty and such assessment is mandatory. The appeal of the Taxpayer is denied.

**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 October 23, 2009.

Signed and Sealed. October 23, 2009.

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Nancy J. Salmon, Commissioner

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William C. Warnes, Commissioner

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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.**