

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Archer Daniels Midland Company,
Appellant,

v.

Douglas A. Ewald,
Nebraska Tax Commissioner,
Nebraska Department of Revenue,
Appellee,

Case No: 10E-004

Decision and Order Affirming
The Order of the Tax Commissioner

For the Appellant:

Nicholas K. Niemann & Matthew R. Ottemann,
McGrath North Mullin & Katz, PC LLO.

For the Appellee:

Jon Cannon,
Nebraska Department of Revenue

This appeal was heard by Commissioners Robert W. Hotz, Nancy J. Salmon, and Thomas D. Freimuth.

I. THE SUBJECT PROPERTY

The Subject Property is personal property described as agricultural processing equipment associated with facilities in the city of Columbus, Platte County, Nebraska. A schedule of the property is included at Exhibit 42.

II. BACKGROUND AND PROCEDURAL HISTORY

Pursuant to the Nebraska Advantage Act, Nebraska Statutes §§ 77-5701 to 77-5735 (the “Act”), Archer Daniels Midland Company (“ADM”) applied for an agreement (the “Agreement”) subject to the Act on May 26, 2006.¹ The Agreement was approved and executed on June 26, 2007.² The Agreement stipulated that if ADM met certain investment and employment criteria within a determined time frame, then ADM would be eligible for certain tax incentives, including the exemption of some of its personal property from ad valorem taxes.³ ADM entered the agreement as a Tier 4 applicant.⁴

¹ Stipulation by the parties at Exhibit 41:8, paragraph 7.

² *Id.* at paragraph 8.

³ *Id.* at paragraph 9.

⁴ *Id.*

The parties stipulated that ADM met all required criteria to become eligible for the tax incentives for tax year 2010. The only dispute in this appeal is whether ADM met the statutory filing requirements.

For tax year 2010, ADM filed a series of documents with both the Platte County Assessor (“Assessor”) and with the Tax Commissioner. On April 29, 2010, ADM filed a series of Nebraska Personal Property Returns with the Assessor.⁵ On May 7, 2010, ADM filed three Forms 5725X, dated May 1, 2010, with the Department of Revenue and with the Assessor.⁶ On May 20, 2010, the Department responded to ADM’s May 7, 2010, filing by issuing a Notice of Late Filing of Claim for Exemption of Personal Property to ADM denying the exemption for tax year 2010.⁷ On May 27, 2010, ADM filed three Amended Forms 5725X with the Department of Revenue and with the Assessor.⁸ Finally, on May 29, 2010, ADM filed a protest and requested a hearing with the Department of Revenue concerning the exemptions.⁹

On July 29, 2010, the Tax Commissioner entered an order on ADM’s protest and hearing.¹⁰ The Tax Commissioner denied ADM’s application for exemption due to a failure to timely file the Form 5725X according to Nebraska law. On August 26, 2010, ADM appealed the Tax Commissioner’s decision to the Tax Equalization and Review Commission (the Commission) pursuant to Nebraska Statutes § 77-5007(11). The Commission held a hearing on the appeal on January 23, 2012.

III. APPLICABLE LAW

In order to receive the property tax exemptions contemplated in the Act, a taxpayer is required to file a claim for exemption for that tax year with the Tax Commissioner (previously the Property Tax Administrator) using a form and supporting schedules prescribed by the Tax

⁵ Exhibit 42, page 1.

⁶ May 1, 2010 was a Saturday. The next business day following May 1 was Monday, May 3, 2010. See Neb. Rev. Stat §49-1203 (Reissue 2009).

⁷ Exhibit 42, page 306.

⁸ In this letter, ADM admits that the initial filing was only to the Platte County Assessor, and that such filing was restated using the Form 5725X on May 7, 2010. See Exhibit 42, page 149.

⁹ Case File.

¹⁰ Exhibit 1, and Case File.

Commissioner.¹¹ The form prescribed by the Tax Commissioner for this purpose is Form 5725X.¹²

Failure to timely file the Form 5725X and supporting schedules with the Tax Commissioner shall constitute a “waiver of the exemption for that [tax] year.”¹³ No extension in time shall be granted for filing the Form 5725X and supporting schedules.¹⁴ The Form 5725X and supporting schedules shall be considered filed on time if correctly completed, signed, and postmarked by the U.S. Post Office on or before May 1.¹⁵ All amendments to the Form 5725X and supporting schedules shall be filed on or before May 1.¹⁶ A copy of the same filing is required to be made annually on or before May 1 with the County Assessor where the personal property is located.¹⁷

IV. STANDARD OF REVIEW

“In all appeals, excepting those arising under section 77-1606, if the appellant presents no evidence to show that the order, decision, determination, or action appealed from is incorrect, the commission shall deny the appeal. If the appellant presents any evidence to show that the order, decision, determination, or action appealed from is incorrect, such order, decision, determination, or action shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary.”¹⁸

In an appeal, the commission “may determine any question raised in the proceeding upon which an order, decision, determination, or action appealed from is based.”¹⁹ The commission may also “take notice of judicially cognizable facts and in addition may take notice of general, technical, or scientific facts within its specialized knowledge...” and may “utilize its experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to it.”²⁰

¹¹ Neb. Rev. Stat. § 77-5725(8)(c). See also, 350 NAC 43-003.01A.

¹² Title 350 Neb. Admin. Code, ch 43 §003.01A.

¹³ Title 350 Neb. Admin. Code, ch 43 §003.01B.

¹⁴ Title 350 Neb. Admin. Code, ch 43 §003.01C.

¹⁵ Title 350 Neb. Admin. Code, ch 43 §003.01C.

¹⁶ Neb. Rev. Stat. § 77-5725(8)(c), Title 350 Neb. Admin. Code, ch 43 §003.01D.

¹⁷ Neb. Rev. Stat. § 77-5725(8)(c), Neb. Rev. Stat. § 77-1229(2). See also Title 350 Neb. Admin. Code, ch 43 §003.01B.

¹⁸ Neb. Rev. Stat. §77-5016(9) (2011 Supp.).

¹⁹ Neb. Rev. Stat. §77-5016(8) (2011 Supp.).

²⁰ Neb. Rev. Stat. §77-5016(6) (2011 Supp.).

V. FILING REQUIREMENTS UNDER THE NEBRASKA ADVANTAGE ACT

Under the Act,

[i]n order to receive the property tax exemptions allowed by [Neb. Rev. Stat. §77-5725(8)(b)], the taxpayer shall annually file a claim for exemption with the Tax Commissioner on or before May 1.²¹ The form and supporting schedules shall be prescribed by the Tax Commissioner and shall list the property for which exemption is being sought under this section. A separate claim for exemption must be filed for each project and each county in which property is claimed to be exempt. A copy of this form must also be filed with the county assessor in each county in which the applicant is requesting exemption.²²

Additionally,

[a]ny person seeking a personal property exemption under ... the [Act] shall annually file a copy of the forms required pursuant to ... the [Act] with the county assessor in each county in which the person is requesting exemption. The copy shall be filed on or before May 1.²³ Failure to timely file the required forms shall cause the forfeiture of the exemption for the tax year. If a taxpayer pursuant to this subsection also has taxable tangible personal property, such property shall be listed and valued as required under subsection (1) of this section.²⁴

Title 350 Neb. Admin. Code ch 43 §003.01C contains the applicable rules and regulations (the “Rules”) of the Nebraska Department of Revenue (the “Department”) relating to exempt property and the Act.²⁵ Under the Rules, the required form prescribed by the Department is Form 5725X.²⁶

Regarding the filing of the required Form 5725X, the Rules state:

No extension in time shall be granted for filing the Form 5725X and supporting schedules. The Form 5725X and supporting schedules shall be considered filed on time if correctly completed, signed, and postmarked by the U.S. Post Office on or before May 1. If May 1 falls on a Saturday, Sunday, or legal holiday, the next business day shall be the final filing date.²⁷

²¹ Since May 1, 2010 was a Saturday, this filing deadline was extended to Monday, May 3, 2010, as required under Neb. Rev. Stat. § 49-1203.

²² Neb. Rev. Stat. 77-5725(8)(c) (Reissue 2009).

²³ Again, Since May 1, 2010 was a Saturday, this filing deadline was extended to Monday, May 3, 2010, as required under Neb. Rev. Stat. § 49-1203.

²⁴ Neb. Rev. Stat. 77-1229(2) (Reissue 2009).

²⁵ “Agency regulations properly adopted and filed with the Secretary of State of Nebraska have the effect of statutory law.” *Middle Niobrara Natural Resources Dist. v. Department of Nat. Resources*, 281 Neb. 634, 651, 799 N.W.2d 305, 318 (2011) (citing *In re Interest of Jorge O.*, 280 Neb. 411, 786 N.W.2d 343 (2010)).

²⁶ Title 350 Neb. Admin. Code, ch 43 §003.01A.

²⁷ Title 350 Neb. Admin. Code, ch 43 §003.01C.

VI. GENERALLY APPLICABLE EXEMPTION LAW

“Statutes exempting property from taxation are to be strictly construed, and the burden of proving the right to exemption is on the claimant.”²⁸ The Courts have spoken of two overriding factors to be considered when a request for an exemption is before them. Those factors are: the property tax burden is necessarily shifted from the beneficiary of an exemption to others who own taxable property, and that the power and right of the state to tax is always presumed.²⁹

In addition, the Courts in Nebraska have developed several principles concerning requests for exemptions: (1) an exemption is never presumed;³⁰ (2) the alleged exempt property must clearly come within the provision granting the exemption;³¹ (3), the laws governing property tax exemptions must be strictly construed;³² (4) the courts must give a “liberal and not a harsh or strained construction ... to the terms ‘educational,’ ‘religious,’ and ‘charitable’ in order that the true intent of the constitutional and statutory provisions may be realized;”³³ and (5) this interpretation should always be reasonable.³⁴

VII. EQUITABLE POWERS OF THE COMMISSION

The Commission has only that authority specifically conferred upon it by the Constitution of the State of Nebraska, by Nebraska State Statutes, or by construction necessary to achieve the purpose of the relevant provisions or act.³⁵ The Commission does not generally have equitable powers.³⁶ Therefore, when presented with claims that sound in equity, the Commission does not have the power to render equitable decisions without express constitutional or statutory authority.

²⁸ *United Way v. Douglas Cty. Bd. of Equal.*, 215 Neb. 1, N.W.2d 103(1983).” *Fort Calhoun Baptist Church v. Washington Cty. Bd. of Equal.*, 277 Neb. 25, 30, 759 N.W.2d 475, 480 (2009).

²⁹ See, e.g., *Jaksha v. State*, 241 Neb. 106, 112, 486 N.W.2d, 858, 864 (1992); *Ancient and Accepted Scottish Rite of Freemasonry v. Board of County Com’rs*, 122 Neb. 586, 241 N.W. 93 (1932).

³⁰ *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb. 390, 398, 603 N.W.2d 447, 453 (1999).

³¹ *Nebraska State Bar Foundation v. Lancaster Cty. Bd. of Equal.*, 237 Neb. 1, 4, 465 N.W.2d 111, 114 (1991).

³² *Nebraska Annual Conference of United Methodist Church v. Scotts Bluff County Board of Equalization*, 243 Neb. 412, 416, 499 N.W.2d 543, 547 (1993).

³³ *Lincoln Woman’s Club v. City of Lincoln*, 178 Neb. 357, 363, 133 N.W.2d 455, 459 (1965).

³⁴ *Id.* (citing, *Young Men’s Christian Assn. of City of Lincoln v. Lancaster County*, 106 Neb. 105, 182 N.W. 593 (1921)).

³⁵ See, e.g., *Grand Island Latin Club v. Nebraska Liquor Control Commission*, 251 Neb. 61, 67, 554 N.W.2d 778, 782 (1996).

³⁶ From the time of its inception in 1995 until 2001, the Commission was authorized by statute to hear appeals “as in equity.” See e.g., 1995 Neb. Laws LB 490, §153; 2001 Neb. Laws LB 465 §7; 2004 Neb. Laws LB 973 §51. This was the same language that had previously applied to valuation appeals heard by the district courts prior to the creation of the Commission. In 2007, the Legislature repealed the section of statute which had authorized the Commission to hear appeals “as in equity.” See, 2007 Neb. Laws LB 167, §6.

VIII. SUBSTANTIAL COMPLIANCE

The evidence in this appeal is undisputed that ADM did not file the required Form 5725X with both the Platte County Assessor and the Nebraska Department of Revenue until May 7, 2010, four days after the statutorily required filing deadline of May 3, 2010.³⁷ Nevertheless, ADM argues that despite its failure to timely file for exemptions for the tax year, its filings should be deemed to be timely under the equitable doctrine of substantial compliance.

While the doctrine of substantial compliance has been recognized by the Nebraska Supreme Court as an equitable remedy in certain circumstances,³⁸ the Commission has found no authority to conclude that ADM substantially complied with the filing requirements of the Act when the Form(s) 5725X was not filed with the Department of Revenue by May 3, 2010. In addition, as discussed above, the Commission has no authority to render equitable decisions without express constitutional or statutory direction.

IX. REMAND AND WRIT OF MANDAMUS

ADM argues that the Commission has the authority to remand this appeal to the Tax Commissioner for further consideration involving several issues relating to the hearing officer. The Commission has no express authority to order such a remand.³⁹

Likewise, ADM argues the Commission has the authority to issue a writ of mandamus to compel the Tax Commissioner to appoint a new hearing officer. The Commission has the authority to issue a writ of mandamus, but such authority is limited to “compelling compliance with its orders and compelling the Tax Commissioner to enforce its orders.”⁴⁰ In the instant appeal, since the Commission does not have the authority to remand the matter to the Tax Commissioner, such a writ of mandamus would be without effect; the Tax Commissioner would

³⁷ As noted above, Since May 1, 2010 was a Saturday, this filing deadline is extended to Monday, May 3, 2010, as required under Neb. Rev. Stat. § 49-1203.

³⁸ See, *Niemoller v. City of Papillion*, 276 Neb. 40, 752 N.W.2d 132, (2008), *Chicago Lumber Co. of Omaha v. School District No. 71*, 227 Neb. 355, 417 N.W.2d 757, (1988).

³⁹ The most recent effort by the Legislature to grant remand authority to the Commission was indefinitely postponed. See LB 168 (2007). Otherwise, the Commission is not a “court” of the judicial branch of the State, as contemplated in Neb. Rev. Stat. § 25-1926, but is instead an “intermediate appellate tribunal” of the executive branch of the State. *Brenner v. Banner Cty. Bd. of Equal.*, 753 N.W.2d 802, at 812, 276 Neb. 275, at 284 (2008).

⁴⁰ Neb. Rev. Stat. § 77-5008.

have no jurisdictional authority to act on the writ as it relates to this particular appeal. The Commission finds that such a writ of mandamus, even if ordered, would be without effect.

X. CONCLUSION

The Commission finds that the evidence is undisputed that the required filings were not made until after the statutorily required filing deadlines. The Commission finds that there is not sufficient evidence to conclude that the Tax Commissioner's decision was arbitrary or unreasonable.

XI. ORDER

IT IS ORDERED THAT:

1. The Order of the Tax Commissioner determining that the Subject Property is not exempt from taxation for tax year 2010 is affirmed.
2. This Decision and Order, if no appeal is timely filed, shall be certified to the Platte County Treasurer and the Platte County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (2012 Cum. Supp.).
3. Any request for relief, by any party, which is not specifically provided for by this Decision and Order is denied.
4. Each party is to bear its own costs in this proceeding.
5. This Decision and Order shall only be applicable to tax year 2010.
6. This Decision and Order is effective for purposes of appeal on July 18, 2014.

Signed and Sealed: July 18, 2014.

Robert W. Hotz, Commissioner

Nancy J. Salmon, Commissioner

Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. §77-5019 (2011 Supp.) and other provisions of Nebraska Statutes and Court Rules.

Commissioner Freimuth, concurring in the result,

I concur with the majority opinion that the Commission lacks the general equitable power necessary to grant the Appellant (ADM) relief based on the equitable doctrine of substantial compliance. I limit my analysis to the Commission's authority to apply equitable doctrine.

The Commission is an administrative agency of limited jurisdiction.⁴¹ The Commission only has that authority granted to it by the Legislature through statute.⁴² The Nebraska Supreme Court has held that general equitable powers cannot be conferred on an administrative agency by the Legislature, but instead, such a conferral would require constitutional amendment.⁴³

As noted in the majority opinion, prior to 2007, Nebraska Statutes granted the Commission the authority to hear appeals "as in equity." In *Creighton St. Joseph Regional Hosp. v. Nebraska Tax Equalization and Review Com'n*, the Nebraska Supreme Court clarified that this statutory phrase did not grant the Commission general equitable powers.⁴⁴ The Court held that the Commission could not use equitable principles to expand its jurisdiction, but that the Commission had authority to hear appeals in equity regarding issues placed before it once jurisdiction was established.⁴⁵

In 2007, a statutory change removed the words "as in equity" from the language concerning the Commission's powers.⁴⁶ In *Brenner v. Banner Cty. Bd. Of Equal.*, the Nebraska Supreme Court interpreted this statutory change.⁴⁷ The Court concluded that the new statutory language "simply restates the concept of a de novo review in a manner more appropriate for a nonjudicial tribunal, and specifically authorizes TERC to consider any issues it deems pertinent to a

⁴¹ See, *Blakely v. Lancaster County*, 284 Neb. 659, 669, 825 N.W.2d 149, 159-160 (2012) (citations omitted). See also; *Falotico v. Grant County Board of Equalization*, 262 Neb. 292, 631 N.W.2d 492 (2001) (holding Commission has limited jurisdiction).

⁴² See, *Falotico v. Grant County Board of Equalization*, 262 Neb. 292, 631 N.W.2d 492 (2001).

⁴³ See, *In re 2007 Administration of Appropriations of the waters of the Niobrara River. Jack Bond and Joe McClaren Ranch v. Nebraska Public Power District and Department of Natural Resources*, 283 Neb. 629, 650, 820 N.W.2d 44, 62 (2012) (quoting *Stoneman v. United Neb. Bank*, 254 Neb. 477, 492, 577 N.W.2d 271, 281 (1998)).

⁴⁴ See, *Creighton St. Joseph Regional Hosp. v. Nebraska Tax Equalization and Review Com'n*, 260 Neb. 905, 921, 620 N.W.2d 90,102 (2000) (superseded in part by subsequent amendments to Neb. Rev. Stat. §77-5013 granting the Commission jurisdiction in additional instances).

⁴⁵ *Id.*

⁴⁶ See, 2007 Neb. Laws, L.B. 167, §6.

⁴⁷ *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 286, 753 N.W.2d 802, 813 (2008) (Citations omitted).

valuation determination, whether or not the issue was raised before the board of equalization.”⁴⁸ In light of the Court’s interpretation in *Brenner*, together with the legal principle that the Commission only has the authority specifically granted to it, I concur that the Commission does not have the equitable power to apply the principle of substantial compliance.

ADM submitted briefs in support of its assertion that the Commission should apply the doctrine of substantial compliance in this case. These briefs refer to this doctrine as equitable in nature. Notwithstanding the above outline regarding the Commission’s lack of equitable powers, ADM cites *Knoefler Honey Farms v. County of Sherman*, 196 Neb. 435 (1976) in support of its assertion that the Commission has the legal power to apply the doctrine of substantial compliance.

In reviewing case law to determine whether the doctrine of substantial compliance can somehow be transformed to a legal principle that can be applied by a body like the Commission that does not possess equitable powers, the United States Tax Court’s recent 2012 opinion in *Storey v. Commissioner of Internal Revenue* is notable. In that case, the Tax Court applied the doctrine of substantial compliance in finding relief for the taxpayer.⁴⁹

The *Storey* case is notable because, similar to the Nebraska Tax Equalization and Review Commission, the United States Supreme Court stated in *Commissioner v. McCoy* that the United States Tax Court lacks general equitable powers.⁵⁰ Notwithstanding this United States Supreme Court case, however, the *Storey* case is one recent example of the United States Tax Court’s application of the doctrine of substantial compliance to issues other than jurisdictional matters.⁵¹

United States Tax Court Judges have supported their use of equitable remedies, including substantial compliance, by asserting that the United States Supreme Court’s statement in *Commissioner v. McCoy* was based on a previous United States Supreme Court ruling in *Commissioner v. Gooch Milling & Elevator Co.*, 320 U.S. 418 (1943), wherein the United States Supreme Court determined that the doctrine of equitable recoupment could not be used by the

⁴⁸ *Id.*

⁴⁹ *Storey v. Commissioner of Internal Revenue*, T.C. Memo. 2012-115 (2012).

⁵⁰ *Commissioner v. McCoy*, 484 U.S. 3, 7 (1987).

⁵¹ See, e.g., *Am. Air Filter Co v. Commissioner*, 81 T.C. 709, 720 (1983); *Tipps v. Commissioner*, 74 T.C. 458, 468 (1980); *Taylor v. Commissioner*, 67 T.C. 1071 (1977); *Hewlett—Packard Co. v. Commissioner*, 67 T.C. 736, 748 (1977); *Sperapani v. Commissioner*, 42 T.C. 308, 330-333 (1964).

United States Tax Court's predecessor (the Board of Tax Appeals) to expand its jurisdiction.⁵² Within a footnote in *Commissioner v. Gooch Milling & Elevator Co.*, the United States Supreme Court indicated that the Board of Tax Appeals' authority to apply the doctrine of equitable recoupment had been specifically revoked by previous statute.⁵³

Some Judges serving on the United States Tax Court have asserted that *Commissioner v. Gooch Milling & Elevator Co.* is better interpreted as holding that the United States Tax Courts only lack that equitable power specifically removed from it by legislative action, as well as any equitable authority to expand its own jurisdiction.⁵⁴ These Judges assert that because the legislative branch has not specifically removed its authority to apply some general equitable principles, including substantial compliance, the United States Tax Court retains some equitable power.⁵⁵

I note that this position of some Judges serving on the United States Tax Court is contrary to the Commission's status. The Commission only has that authority granted to it, and because the Legislature specifically removed the Commission's equity authority in 2007 pursuant to Neb. Laws, L.B. 167, §6, the Commission cannot utilize the equitable remedies available to the United States Tax Court.

I maintain that especially for cases involving self-represented taxpayers and in this case where ADM has contributed substantially to Nebraska in terms of investment and jobs, it would be beneficial for the Commission to have the authority to apply equitable remedies that would lead to the fair and just resolution of cases. I recognize, however, that the Commission's authority is limited by elected officials who, as of 2007, determined that these remedies were no longer available in appeals to the Commission.

Based on my foregoing opinion, I concur with the majority opinion that the decision of the Tax Commissioner must be affirmed by the Commission.

Thomas D. Freimuth, Commissioner

⁵² See, *S. Dwight Woods and Marilyn Woods v. Commissioner*, 92 T.C. 776 (1989).

⁵³ See, *Id.* at 786 (quoting *Commissioner v. Gooch Milling & Elevator Co.*, 320 U.S. 418, 421 n. 7 (1943)).

⁵⁴ See, *Id.*

⁵⁵ See, *Id.*