

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Diane L. Battiato,
Appellant,

v.

Douglas County Board of Equalization,
Appellee,

and

American Title,
Appellee.

Case No: 16P 0002

Decision and Order Vacating and Reversing
the Decision of the Douglas County Board
of Equalization

Submitted for decision on the record by Commissioners Steven Keetle and James Kuhn.

I. THE SUBJECT PROPERTY

The Subject of this appeal is a Personal Property Return for American Title and a late payment penalty imposed pursuant to Neb. Rev. Stat. §77-1233.04.

II. PROCEDURAL HISTORY

On or about July 27, 2016, Diane L. Battiato, the Douglas County Assessor (the Assessor) notified American Title (the Taxpayer) that the Taxpayer had failed to timely file a personal property return for 2016.¹ The Assessor prepared an estimated assessment for the Taxpayer that determined the estimated assessed value of the subject property was \$491,980 for tax year 2016 and further determined that a statutory penalty of 25% of the tax due should be applied.² On or about August 22, 2016, the Taxpayer filed a 2016 personal property tax return listing personal property valued at \$845,452.³ On or about August 23, 2016, the Taxpayer filed a protest of the penalty imposed with the Douglas County Board of Equalization (the County Board).⁴ The County Board granted the Taxpayer the requested relief on August 30, 2016.⁵

¹ E1

² E3. It is unclear from the Notice of Failure to File a Personal Property Return (E3) whether the 25% penalty is included in the estimated assessment.

³ E4

⁴ E5:8

⁵ E1

The Assessor appealed the decision of the County Board to the Tax Equalization and Review Commission (the Commission). Prior to the hearing, the parties submitted a Joint Waiver of Hearing and Stipulation submitting the matter for determination by the Commission without a hearing.⁶

III. STANDARD OF REVIEW

The Commission's review of the determination of the County Board of Equalization is de novo.⁷ "When an appeal is conducted as a 'trial de novo,' as opposed to a 'trial de novo on the record,' it means literally a new hearing and not merely new findings of fact based upon a previous record. A trial de novo is conducted as though the earlier trial had not been held in the first place, and evidence is taken anew as such evidence is available at the time of the trial on appeal."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.⁹ Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.¹⁰

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."¹¹ 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."¹² The Commission's Decision and Order shall include findings of fact and conclusions of law.¹³

⁶ See, Case File, Title 442, Neb. Admin. Code, ch 5 §015 (6/11).

⁷ See, Neb. Rev. Stat. §77-5016(8) (2016 Cum. Supp.), *Brenner v. Banner Cty. Bd. of Equal.*, 276 Neb. 275, 286, 753 N.W.2d 802, 813 (2008).

⁸ *Koch v. Cedar Cty. Freeholder Bd.*, 276 Neb. 1009, 1019 (2009).

⁹ Neb. Rev. Stat. §77-5016(9) (2016 Cum. Supp.).

¹⁰ *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

¹¹ Neb. Rev. Stat. §77-5016(8) (2016 Cum. Supp.).

¹² Neb. Rev. Stat. §77-5016(6) (2016 Cum. Supp.).

¹³ Neb. Rev. Stat. §77-5018(1) (2016 Cum. Supp.).

IV. PERSONAL PROPERTY RETURN

A. Law

All tangible personal property in this state subject to taxation shall be assessed as of January 1 at 12:01 a.m., and a complete list of all taxable tangible personal property held or owned on the assessment date shall be made.¹⁴ Every person required to list and value taxable tangible personal property shall list such property on forms proscribed by the Tax Commissioner and file such forms on or before May 1 of each year.¹⁵

If a taxpayer fails or refuses to file a personal property return, the assessor shall, on behalf of the taxpayer, file a personal property return which shall list and value all of the taxpayer's taxable tangible personal property at net book value.¹⁶ 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 June 30 of the year the property is required to be reported, shall be subject to a penalty of ten percent of the tax due on the value added.¹⁷ Any valuation added to a personal property return or added through the filing of a personal property return, on or after July 1 of the year the property is required to be reported, shall be subject to a penalty of twenty-five percent of the tax due on the value added.¹⁸

The county assessor shall notify the taxpayer, on a form proscribed by the Tax Commissioner, of the action taken, the penalty, and the rate of interest.¹⁹ The taxpayer may appeal the action of the county assessor, either as to the valuation or the penalties imposed, to the county board of equalization within thirty days after the date of notice.²⁰ 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.²¹ The county board of equalization shall have no authority to waive or reduce any penalty which was correctly imposed and calculated.²² The entire penalty and interest on the penalty shall be waived if the omission or failure to report any item of taxable tangible personal property was for the reason that the

¹⁴ Neb. Rev. Stat. §77-1201 (Reissue 2009)

¹⁵ Neb. Rev. Stat. §77-1229 (Reissue 2009)

¹⁶ Neb. Rev. Stat. §77-1233.04(1)(2016 Cum. Supp.)

¹⁷ Neb. Rev. Stat. §77-1233.04(3)(2016 Cum. Supp.)

¹⁸ Neb. Rev. Stat. §77-1233.04(3)(2016 Cum. Supp.)

¹⁹ Neb. Rev. Stat. §77-1233.06(1)(Reissue 2009)

²⁰ Neb. Rev. Stat. §77-1233.06(2)(Reissue 2009)

²¹ Neb. Rev. Stat. §77-1233.06(3)(Reissue 2009)

²² Neb. Rev. Stat. §77-1233.06(3)(Reissue 2009)

property was timely reported in the wrong tax district.²³ An appeal of the determination may be taken within thirty days after the decision of the county board of equalization to the Tax Equalization and Review Commission.²⁴

B. Summary of the Evidence

The question before the Commission is the waiver of a penalty of twenty-five percent of the tax due on the Taxpayer's tangible personal property for tax year 2016. There is no allegation or indication that the twenty-five percent penalty in the present case was wrongly imposed or incorrectly calculated. The Taxpayer admits that it had taxable personal property that required that a Nebraska Personal Property Return be filed, but that it did not file as required by May 1, 2016.²⁵ On or about July 27, 2016, the Assessor notified the Taxpayer that it had failed to timely file a personal property return for 2016.²⁶ The Assessor prepared an estimated assessment for the Taxpayer that determined the estimated assessed value of the subject property was \$491,980 for tax year 2016.²⁷ After receiving a Notice of Failure to File a Personal Property Return from the Assessor the Taxpayer filed a Nebraska Personal Property Return with the Assessor on or after August 22, 2016, listing a total taxable value of \$845,452.²⁸ The Taxpayer then filed a protest of the late filing penalty applied to the Taxpayer's 2016 Nebraska Personal Property Return on or about August 23, 2016.²⁹

The County Board heard the protest of the Taxpayer on August 30, 2016, seeking a waiver of the late-filing penalty imposed by statute.³⁰ The County Board admits that it was advised by legal counsel that this late-filing penalty imposed on the Taxpayer was mandatory under Nebraska law and that the County Board has no authority to waive personal property penalties other than those imposed incorrectly or incorrectly calculated.³¹ Nonetheless, the County Board on August 30, 2016, waived the penalty imposed on the Taxpayer.³²

²³ Neb. Rev. Stat. §77-1233.06(3)(Reissue 2009)

²⁴ Neb. Rev. Stat. §77-1233.06(4)(Reissue 2009)

²⁵ E5:2

²⁶ E1

²⁷ E1

²⁸ E5:2

²⁹ E4:14, E5:3, E5:8

³⁰ E6:2

³¹ E6:1

³² E1, E6:2

The statute states that “[a]ny valuation added to a personal property return or added through the filing of a personal property return, on or after July 1 of the year the property is required to be reported, shall be subject to a penalty of twenty-five percent of the tax due on the value added.”³³ As a general rule, in the construction of statutes, the word “shall” is considered mandatory and inconsistent with the idea of discretion, which demonstrates that the penalty is mandatory.³⁴ The statutes go on to say that the action of a county board of equalization, in an appeal of the penalties imposed, shall be limited to correcting penalties which were wrongly imposed or incorrectly calculated.³⁵ The county board of equalization shall have no authority to waive or reduce any penalty which was correctly imposed and calculated.³⁶ The statute’s use of the word “shall” again indicates that the imposition of the penalty is mandatory and may not be disturbed by the County Board unless wrongly imposed or incorrectly calculated.

V. CONCLUSION

The Commission finds that there is competent evidence to rebut the presumption that the County Board faithfully performed its duties and had sufficient competent evidence to make its determination. The Commission also finds that there is clear and convincing evidence that the County Board’s decision was arbitrary or unreasonable.

For all of the reasons set forth above, the decision of the County Board is vacated and reversed.

VI. ORDER

IT IS ORDERED THAT:

1. The decision of the Douglas County Board of Equalization vacating the penalty imposed on valuation added to a personal property return after July 1 of tax year 2016 is vacated and reversed.³⁷

³³ Neb. Rev. Stat §77-1233.04(3)(2016 Cum. Supp.)

³⁴ See, *Board of Trustees of the City of Omaha Police & Fire Retirement System v. City of Omaha*, 289 NE. 993, 1004, 858 N.W.2d 186, 195 (2015).

³⁵ Neb. Rev. Stat. §77-1233.06(3)(Reissue 2009)

³⁶ Neb. Rev. Stat. §77-1233.06(3)(Reissue 2009)

³⁷ All parties were permitted to submit evidence that may not have been considered by the County Board of Equalization at the protest proceeding.

2. The penalty of twenty-five percent of the tax due on the Taxpayer's tangible personal property for tax year 2016 is reinstated.
3. This decision and order, if no appeal is timely filed, shall be certified to the Douglas County Treasurer and the Douglas County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (2016 Cum. Supp.).
4. Any request for relief, by any party, which is not specifically provided for by this order is denied.
5. Each party is to bear its own costs in this proceeding.
6. This decision shall only be applicable to tax year 2016.
7. This order is effective for purposes of appeal on October 31, 2018

Signed and Sealed: October 31, 2018

Steven A. Keetle, Commissioner

SEAL

James D. Kuhn, Commissioner

Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. §77-5019 (2016 Cum. Supp.), other provisions of Nebraska Statute and Court Rules.