

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

Evonik Corporation,
Appellant,

Case No. 22C 0489

v.

**ORDER FOR DISMISSAL
WITH PREJUDICE**

Washington County Board of
Equalization,
Appellee.

THE COMMISSION FINDS AS FOLLOWS:

I. PROCEDURAL HISTORY

The Commission held a jurisdictional show cause hearing on October 17, 2022 at 9:00 AM. Kenneth Bittner (for the Taxpayer) appeared telephonically and was represented by James Cann. Thomas Brantley, Deputy Washington County Attorney, appeared telephonically on behalf of the Washington County Board of Equalization (the County Board). The Tax Equalization and Review Commission (the Commission) took notice of its case files, received evidence, and heard argument regarding its jurisdiction to hear this appeal.

II. APPLICABLE LAW

The Commission obtains jurisdiction over an appeal when the Commission has the authority to hear the appeal, the appeal is timely

filed, the filing fee is timely received and thereafter paid, and a copy of the decision, order, determination, or action appealed from, or other information that documents the decision, order, determination, or action appealed from, is timely filed.¹ Any action of the County Board pursuant to Neb. Rev. Stat. § 77-1502 may be appealed to the Commission in accordance with Neb. Rev. Stat. § 77-5013 on or before August 24, or on or before September 10 if the County Board has adopted a resolution to extend the deadline for hearing protests under Neb. Rev. Stat. § 77-1502.² An appellate tribunal, such as the Commission, cannot acquire jurisdiction over an issue if the body from which the appeal is taken had no jurisdiction of the subject matter.³ If the body from which an appeal was taken lacked jurisdiction, then the appellate tribunal acquires no jurisdiction. When an appellate tribunal is without jurisdiction to act, the appeal must be dismissed.⁴ Parties cannot confer subject matter jurisdiction on a tribunal by acquiescence or consent nor may it be created by waiver, estoppel, consent, or conduct of the parties.⁵

III. FINDINGS OF FACT

For tax year 2022, the County Board did not adopt a resolution to extend hearing protests, so the deadline for filing appeals to the Commission was August 24, 2022.⁶ On August 26, 2022, the

¹ Neb. Rev. Stat. § 77-5013 (Reissue 2018).

² Neb. Rev. Stat. § 77-1510 (Reissue 2018).

³ See, e.g., *Lane v. Burt Cty. Rural Pub. Power Dist.*, 163 Neb. 1, 77 N.W.2d 773 (1956).

⁴ *Carlos H. v. Lindsay M.* 283 Neb. 1004, 815 N.W.2d 168 (2012).

⁵ *Creighton St. Joseph Regional Hospital v. Nebraska Tax Equalization and Review Commission*, 260 Neb. 905, 620 N.W.2d 90 (2000).

⁶ Neb. Rev. Stat. § 77-1502(1) (Reissue 2018).

Commission received an envelope from the Taxpayer containing an appeal form and required filing fee. The envelope containing these materials was postmarked August 22, 2022.⁷ A copy of the County Board's decision was not included in the received materials. On or about August 26, 2022, legal counsel for the Commission sent a letter⁸ to the Taxpayer informing the Taxpayer of the deficiency. On September 28, 2022, the Commission received a letter from the Taxpayer containing the County Board's decision and requesting that the Commission consider it timely filed.

IV. ANALYSIS

The Taxpayer asserted at the hearing as well as in a post-hearing brief that the Commission should find that the Taxpayer substantially complied with the jurisdictional requirements of Neb. Rev. Stat. § 77-5013 and should exercise authority to hear the Taxpayer's appeal on the merits. In support of this position, the Taxpayer asserts that the Commission may invoke the doctrine of substantial compliance because "[t]here is no statute or regulation that specifically prohibits the [County Board decision] from being submitted after the initial timely filing."⁹ We disagree. Neb. Rev. Stat. § 77-5013(1) governs when the Commission has authority to hear an appeal. It states:

The commission obtains exclusive jurisdiction over an appeal or petition when: (a) The commission has the power or authority to hear the appeal or petition; (b) An appeal or

⁷ Neb. Rev. Stat. § 77-5013(2) provides that appeal materials sent via U.S. mail are considered timely if the envelope containing those materials is postmarked on or before the appeal deadline.

⁸ Case File. Providing this letter to the Taxpayer was not statutorily required or does it have any bearing on the outcome of this appeal.

⁹ Taxpayer's Brief, at 2.

petition is timely filed; (c) The filing fee, if applicable, is timely received and thereafter paid; and (d) In the case of an appeal, a copy of the decision, order, determination, or action appealed from, or other information that documents the decision, order, determination, or action appealed from, is timely filed. Only the requirements of this subsection shall be deemed jurisdictional.¹⁰

The statute confers jurisdiction to the Commission only when all four of the requirements (a) through (d) are satisfied, as indicated by the conjunctive “and” before subsection (d). The taxpayer cites no authority and provides no argument in its brief to persuade us that the language of the statute would permit a partial timely filing, when omitting the requirement of subsection (d), followed by a late filing of the documents required by subsection (d). To the contrary, the Taxpayer acknowledges that the requirements of this statute are jurisdictional in nature.¹¹

The Taxpayer acknowledges that in *Archer Daniels Midland Co. v. State*, 290 Neb. 780, 861 N.W.2d 733 (2015) (*ADM*), the Nebraska Supreme Court found “no statutory language that would have allowed TERC¹² to deviate from the mandatory deadline clearly set forth in the Act.”¹³ The Taxpayer attempts to distinguish *ADM* from this case asserting that there is no statutory prohibition on the Commission to allow for a late filing to cure an otherwise-timely partial filing. This argument does not square with the Taxpayer’s earlier admission of the

¹⁰ Neb. Rev. Stat. § 77-5013(1) (Supp. 2020) (emphasis added).

¹¹ Taxpayer’s Brief, at 1.

¹² In its decision, the Court refers to the Tax Equalization and Review Commission as TERC.

¹³ *Archer Daniels Midland Co. v. State*, 290 Neb. 780, 789, 861 N.W.2d 733, 740 (2015). The Act at issue was the Nebraska Advantage Act, Neb. Rev. Stat. § 77-5701 et seq. (Reissue 2009).

jurisdictional nature of the requirements of Neb. Rev. Stat. § 77-5013(1) or the Court's decision in *ADM*.

The Taxpayer also relies upon *Village at North Platte v. Lincoln Cty. Bd. of Equal.*, 292 Neb. 533, 873 N.W.2d 201 (2016), asserting that because the Nebraska Supreme Court analyzed the appellant's substantial compliance argument rather than rejecting the argument outright, the case "demonstrates that the doctrine is viable."¹⁴ This argument is also without merit.

The Court, in *ADM*, stated "in TERC cases, we have required strict compliance with statutory time requirements."¹⁵ The Court further states that "TERC is an agency whose only equitable powers are those conferred upon it by the Legislature."¹⁶ The doctrine of substantial compliance sounds in equity.¹⁷

In 2007, the Legislature saw fit to repeal the section of statute which had previously allowed the Commission to hear appeals "as in equity."¹⁸ Thus, contrary to the Taxpayer's argument, *ADM* itself does not bar the Commission's ability to invoke the doctrine of substantial compliance. Instead, the Commission cannot invoke substantial compliance because the Commission expressly lacks the equitable powers necessary to do so because no specific statute authorizes the Commission to do so. To illustrate the point, the 'mailbox rule,' which

¹⁴ Taxpayer's Brief, at 3.

¹⁵ *Archer Daniels Midland Co. v. State*, 290 Neb. 780, 788, 861 N.W.2d 733, 740 (2015)(citing *Republic Bank v. Lincoln Cty. Bd. of Equal.*, 283 Neb. 721, 811 N.W.2d 682 (2012)).

¹⁶ *Archer Daniels Midland Co. v. State*, 290 Neb. 780, 789, 861 N.W.2d 733, 740 (2015).

¹⁷ *Id.*

¹⁸ *See*, 2007 Neb. Laws LB 167, § 6.

itself is an equitable doctrine, has been statutorily authorized at Neb. Rev. Stat. § 77-5013(2).¹⁹

Rather than the Taxpayer's assertion that the Court's analysis in *Village at North Platte* demonstrates viability of the doctrine in the present appeal, we understand the Court's finding in *Village at North Platte* to simply be that the appellant's argument in that case was meritless because the appellant did not comply with the statutory requirements to any degree. At no time in the Court's discussion of substantial compliance does the Court state, or even imply, that the Commission had any equitable authority to invoke the doctrine of substantial compliance.

In summary, because the Legislature expressly removed the Commission's equitable authority in 2007, the Commission has no general authority to invoke the doctrine of substantial compliance. In addition, Neb. Rev. Stat. § 77-5013(1) expressly states that the Commission does not have the authority to hear the merits of an appeal unless a taxpayer provides an appeal form, the applicable filing fee, and a copy of the appealed decision. All three pieces must be received by the Commission or postmarked on or before the statutory filing deadline. The Taxpayer failed to provide a copy of the appealed decision until it was received by the Commission on September 28,

¹⁹ This section provides that an appeal to the Commission is deemed timely filed if appeal materials are placed in the U.S. Mail system and a legible postmark is affixed to the envelope with a date on or before the filing deadline. It could be noted that in this appeal had the Taxpayer included all of the required documents in its original August 22, 2022, mailing, an application of the mailbox rule would have allowed the Commission to exercise jurisdiction even though the envelope was not delivered to the Commission until August 26, 2022, two days after the filing deadline.

2022, after the statutory filing deadline of August 24, 2022. Therefore, the Commission should not exercise jurisdiction over the appeal.

V. CONCLUSION

The Commission does not have jurisdiction to hear the above captioned appeal.

THEREFORE IT IS ORDERED:

1. The above captioned appeal is dismissed with prejudice.
2. As required by Neb. Rev. Stat. § 77-5018 (Reissue 2018), this decision, if no appeal is filed, shall be certified within thirty days to the Washington County Treasurer, and the officer charged with preparing the tax list for Washington County as follows:

Marjorie Hoier
Washington County Treasurer
PO Box 348
Blair, NE 68008

Steven Mencke
Washington County Assessor
1555 Colfax St
Blair, NE 68008

3. Each party is to bear its own costs in this matter.

SIGNED AND SEALED: November 18, 2022

Robert W. Hotz, Commissioner

James D. Kuhn, Commissioner