

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

NORTH OMAHA CROWN V LIMITED) PARTNERSHIP,)) Appellant,)) v.)) DOUGLAS COUNTY BOARD OF) EQUALIZATION,)) Appellee.))	Case No. 09R 643 DECISION AND ORDER DISMISSING FOR WANT OF JURISDICTION (Filing Defect) (Untimely Filing)
--	---	--

The above-captioned case was called for a hearing on an Order to Show Cause (Filing Defect), why the appeal by North Omaha Crown V Limited Partnership ("the Taxpayer") to the Tax Equalization and Review Commission ("the Commission") should not be dismissed. 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 April 8, 2010, pursuant to an Order to Show Cause (Filing Defect) issued January 21, 2010. Commissioner Wickersham, Chairperson of the Commission, was the presiding hearing officer. Commissioner Warnes was absent. Commissioner Wickersham as Chairperson designated Commissioners Wickersham, Salmon, and Hotz as a panel of the Commission to hear the appeal. Commissioner Hotz was excused. Commissioner Salmon was present. The proceeding was heard by a quorum of a panel of the Commission.

Andrew R. Willis was present as legal counsel for the Taxpayer.

Thomas S. Barrett, a Deputy County Attorney for Douglas County, Nebraska, participated in the hearing by telephone, as legal counsel for the Douglas County Board of Equalization ("the County Board").

The Commission took statutory notice, and heard argument.

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 (Reissue 2009). The final decision and order of the Commission in this case is as follows.

**I.
ISSUES**

Whether the appeal should be dismissed for failure to timely deliver the filing fee.

**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. The appeal captioned above with the required filing fee and documentation was received on September 11, 2009. (Case File).
3. The appeal in this case was filed based on an action of the County Board pursuant to section 77-1502 of Nebraska Statutes.
4. Douglas County has adopted a resolution extending the date for hearing protests pursuant to section 77-1502 of Nebraska Statutes.

**III.
APPLICABLE LAW**

1. The Commission obtains jurisdiction over an appeal when it is timely filed. Neb. Rev Stat. §77-5013 (Cum. Supp. 2008).
2. An appeal is deemed timely received if placed in the United States mail, postage prepaid,

with a legible postmark for delivery to the commission, or received by the commission, on or before the date specified by law for filing the appeal.

3. An appeal from an action of a county board of equalization pursuant to section 77-1502 of Nebraska Statutes must be filed on or before August 24, or on or before September 10 if the county has adopted a resolution to extend the deadline for hearing protests under section 77-1502.
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. *Creighton St. Joseph Regional Hospital v. Nebraska Tax Equalization and Review Commission*, 260 Neb. 905, 620 N.W.2d 90 (2000).

IV. ANALYSIS

The appeal form with supporting documentation and the required filing fee was delivered to the Commission on September 11, 2009 by a Fed Ex courier. The form had been picked up by Fed Ex on September 10, 2009 at 6:12 p.m. (Case File). The appellant seeks to invoke statutory provisions sometimes referred to as the mail box rule. The mail box rule as stated in section 77-5013 of Nebraska Statutes is as follows: "A petition, an appeal, or other information required by subdivision (1)(d) of this section is timely filed and the filing fee, if applicable, is timely received if placed in the United States mail, postage prepaid, with a legible postmark for delivery to the commission, or received by the commission, on or before the date specified by law for filing of the appeal or petition." The applicable filing date in this instance is September 10, 2009, the date the appeal form was picked up by Fed Ex. A post mark is defined in the Commission's rules and

regulations as "the cancellation mark of the United States Postal Service. The mark of any private delivery or courier service (such as Fed Ex, Airborne, UPS, etc.) is not a postmark." 442 Neb. Admin. Code, ch 2 §01.41 (07/09). The appeal form was not placed in the United States mail at any time and the envelope in which it was delivered to the Commission did not bear a legible postmark. The mail box rule as stated in the statute applicable to filings with the Commission cannot be invoked.

The Appellant asserts that Commission staff approved the method of delivery it choose and therefore strict application of the mail box rule as stated in section 77-5013 should be waived. The Commission cannot waive the provisions of statute. *Creighton St. Joseph Regional Hospital v. Nebraska Tax Equalization and Review Commission*, 260 Neb. 905, 620 N.W.2d 90 (2000). If the Commission acting in its official capacity cannot waive provisions of a statute then a member of its staff, acting independently of the Commission, cannot waive provisions of a statute.

**V.
CONCLUSIONS OF LAW**

1. The Commission does not have subject matter jurisdiction in this appeal.

**VI.
ORDER**

IT IS ORDERED THAT:

1. The appeal in Case No. 09R 643 is dismissed.
2. Each party is to bear its own costs in this proceeding.

Signed and Sealed May 26, 2010.

Nancy J. Salmon, Commissioner

Wm. R. Wickersham, Commissioner

SEAL

**APPEALS FROM DECISIONS OF THE COMMISSION MUST SATISFY THE
REQUIREMENTS OF NEB. REV. STAT. §77-5019 (REISSUE 2009), OTHER
PROVISIONS OF NEBRASKA STATUTES, AND COURT RULES.**