BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

MIDWEST RENEWABLE ENERGY, LLC, Appellant, v. LINCOLN COUNTY BOARD OF EQUALIZATION, Appellee.	)	Case No. 09P 005 DECISION AND ORDER AFFIRMING THE DECISION OF THE LINCOLN COUNTY BOARD OF EQUALIZATION

The above-captioned case was without hearing after an appeal by Midwest Renewable Energy, LLC ("the Taxpayer") to the Tax Equalization and Review Commission ("the Commission"). Commissioners Wickersham, Warnes, Salmon and Hotz participated in consideration of the appeal.

Jerrold L. Strasheim entered an appearance as legal counsel for the Taxpayer.

Joe W. Wright, a Deputy County Attorney for Lincoln County, Nebraska, entered an appearance as legal counsel for the Lincoln County Board of Equalization ("the County Board").

The Commission considered the evidence submitted by the parties pursuant to their stipulation and motion to submit the appeal without a hearing.

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

The Taxpayer has asserted that a penalty should not be imposed for failure to timely file a taxable tangible personal property list.

The issue before the Commission is whether the County Board's determination that a penalty was properly imposed is arbitrary or unreasonable.

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 County Assessor for Lincoln County determined that the Taxpayer had not filed a taxable tangible property list for tax year 2009, prior to August 1, 2009.
3. After August 1, 2009, the County Assessor prepared and filed a taxable tangible property list on behalf of the Taxpayer.
4. The County Assessor determined that a penalty in the amount of 25% of the tax due based on the taxable tangible personal property tax list filed on behalf of the Taxpayer should be assessed.
5. The Taxpayer protested the County Assessor's determination that a penalty of 25% of the tax due should be assessed.
6. The County Board affirmed the County Assessor's determination that a penalty of 25% of the tax due should be assessed.
7. An appeal of the County Board's decision was filed with the Commission.
8. The parties stipulated that the Commission could consider the appeal based on stipulated facts and the record of the hearing before the County Board.

9. The Taxpayer's taxable tangible personal property list was not timely filed.

III.
APPLICABLE LAW

1. Subject matter jurisdiction of the Commission in this appeal is over all questions raised in the proceedings before the County Board. Neb. Rev. Stat. §77-5016 (7) (Reissue 2009). *See, e.g., Arcadian Fertilizer, L.P. v. Sarpy County Bd. of Equalization*, 7 Neb.App. 655, 584 N.W.2d 353, (1998).

2. "All tangible personal property in this state subject to taxation shall be assessed as of January 1 at 12:01 a.m., which assessment shall be used as a basis of taxation until the next assessment. A complete list of all taxable tangible personal property held or owned on the assessment date shall be made as follows:

   (1) Every person shall list all his or her taxable tangible personal property as defined in section 77-105 having tax situs in the State of Nebraska; ...

   (7) The taxable tangible personal property of a firm or company, by a partner, limited liability company member, or agent thereof; ... ." Neb. Rev. Stat. §77-1201 (Reissue 2009).

3. "Every person required by section 77-1201 to list and value taxable tangible personal property shall list such property upon the forms prescribed by the Tax Commissioner. The forms shall be available from the county assessor and when completed shall be signed by each person or his or her agent and be filed with the county assessor. The forms shall be filed on or before May 1 of each year." Neb. Rev. Stat. §77-1229 Reissue 2009).

4. "(1) The county assessor shall list and value at net book value any item of taxable tangible personal property omitted from a personal property return of any taxpayer. The county assessor shall change the reported valuation of any item of taxable tangible personal property listed on the return to conform the valuation to net book value. 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. The county assessor shall list or change the valuation of any item of taxable tangible personal property for the current taxing period and the three previous taxing periods or any taxing period included therein.

(2) The taxable tangible personal property so listed and valued shall be taxed at the same rate as would have been imposed upon the property in the tax district in which the property should have been returned for taxation.

(3) 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 the property is required to be reported, shall be subject to a penalty of ten percent of the tax due on the value added.

(4) Any valuation added to a personal property return or added through the filing of a personal property return, on or after August 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.

(5) Interest shall be assessed upon both the tax and the penalty at the rate specified in section 45-104.01, as such rate may from time to time be adjusted by the Legislature,

from the date the tax would have been delinquent until paid." Neb. Rev. Stat. §77-1233.04 (Reissue 2009).

5. "For purposes of section 77-1233.04:

(1) The county assessor shall notify the taxpayer, on a form prescribed by the Tax Commissioner, of the action taken, the penalty, and the rate of interest. The notice shall also state the taxpayer's appeal rights and the appeal procedures. Such notice shall be given by first-class mail addressed to such taxpayer's last-known address. The entire penalty and interest shall be waived if the omission or failure to report any item of taxable tangible personal property was for the reason that the property was timely reported in the wrong tax district;

(2) 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. The taxpayer shall preserve his or her appeal by filing a written appeal with the county clerk in the same manner as prescribed for protests in section 77-1502. The action of the county assessor shall become final unless a written appeal is filed within the time prescribed;

(3) 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. 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 property was timely reported in the wrong tax district;

(4) Upon ten days' notice to the taxpayer, the county board of equalization shall set a date for hearing the appeal of the taxpayer. The county board of equalization shall make its determination on the appeal within thirty days after the date of hearing. The county clerk shall, within seven days after the determination of the county board, send notice to the taxpayer and the county assessor, on forms prescribed by the Tax Commissioner, of the action of the county board. Appeal may be taken within thirty days after the decision of the county board of equalization to the Tax Equalization and Review Commission; ... ." Neb. Rev. Stat. 77-1233.06 (Reissue 2009).

6. "Any report, claim, tax return, tax valuation, equalization, or exemption protest, or tax form, petition, appeal, or statement, or any payment required or authorized to be filed or made to the State of Nebraska, or to any political subdivision thereof, which is: (1) Transmitted through the United States mail; (2) mailed but not received by the state or political subdivision; or (3) received and the cancellation mark is illegible, erroneous, or omitted shall be deemed filed or made and received on the date it was mailed if the sender establishes by competent evidence that the report, claim, tax return, tax valuation, equalization, or exemption protest, or tax form, petition, appeal, or statement, or payment was deposited in the United States mail on or before the date for filing or paying." Neb. Rev. Stat. §49-1201 (Reissue 2004).

7. "If any report, claim, tax return, tax valuation, equalization, or exemption protest, or tax form, petition, appeal, or statement, or any payment, referred to in section 49-1201, is

sent by United States mail and either registered or certified, a record authenticated by the United States post office of such registration or certification shall be considered competent evidence that the report, claim, tax return, tax valuation, equalization, or exemption protest, or tax form, petition, appeal, or statement, or payment was delivered to the state officer or state agency or officer or agency of the political subdivision to which addressed, and the date of registration or certification shall be deemed the postmarked date." Neb. Rev. Stat. §49-1202 (Reissue 2004).

8. A presumption of receipt of mailing arises on a showing of mailing properly addressed and stamped. *See*, *e.g*. *National Masonic Accident Ass'n v. Burr*, 57 Neb. 437, 77 N.W. 1098 (1899).

9. Mailing through the U.S. Postal Service is required for the presumption to arise. *Houska v. City of Wahoo*, 235 Neb. 635, 456 N.W.2d 750 (1990).

10. Absent direct proof of actual deposit with an authorized U.S. Postal Service official or in an authorized depository, proof of a course of individual or office practice that letters which are properly addressed and stamped are placed in a certain receptacle from which an authorized individual invariably collects and places all outgoing mail in a regular U.S. mail depository and that such procedure was actually followed on the date of the alleged mailing creates an inference that a letter properly addressed with sufficient postage attached and deposited in such receptacle was regularly transmitted and presents a question for the trier of fact to decide. *Houska v. City of Wahoo*, 235 Neb. 635, 641, 456 N.W.2d 750, 754 (1990).

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).

12. Denial of receipt alone, is not sufficient evidence to rebut a presumption of receipt on proper mailing. *Sherrod v. State Department of Correctional Services*, 251 Neb. 355, 557 N.W.2d 634 (1997).

13. 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) (Reissue 2009).

14. Proof that the order, decision, determination, or action appealed from 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).

15. "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).

16. 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).

17. 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).

IV.
ANALYSIS

The evidence in this appeal consists of affidavits and the transcript of proceedings before the County Board of Equalization. The transcript of proceedings before the County Board contains various representations of fact by the Taxpayer's counsel. The unsupported assertions of counsel do not establish the facts asserted unless the other appropriate parties stipulate to such facts. *Schroeder v. Barnes*, 5 Neb.App. 811, 565 N.W.2d 749 (1997). None of the persons appearing before the County Board as witnesses were placed under oath. The affidavits submitted were necessarily under oath and have been given greater weight than statements made to the County Board. With the caveats stated, the evidence shows that on April 21, 2009, or April 22, 2009, the Controller of Midwest Renewable Energy, LLC prepared its personal property tax return. (Submittal p. 23 lines 15-16 County Board Proceedings and p. 68 Affidavit of Taxpayer's Controller). The prepared return was mailed by first class mail with sufficient postage affixed to Lincoln County Assessor 301 North Jeffers, Rm 110A North Platte, NE 69101-3997. (Submittal p. 68 Affidavit of Taxpayer's Controller). 301 North Jeffers Rm 110A, North Platte, NE 69101-3997 was the correct address for the Lincoln County Assessor. (Submittal p. 75 & 80). The envelope was run through a postage meter and placed in the mailbox. (Submittal p. 24 lines 1-3).

A presumption of receipt of a mailed item arises on a showing of mailing, properly addressed, and stamped. *See*, *e.g.*, *National Masonic Accident Ass'n v. Burr*, 57 Neb. 437, 77 N.W. 1098 (1899). Mailing through the U.S. Postal Service is required for the presumption to arise. *Houska v. City of Wahoo*, 235 Neb. 635, 456 N.W.2d 750 (1990). There is evidence that an envelope with a "personal property tax return" was addressed and stamped. There is no direct proof that the envelope was mailed using the United States Postal Service. Absent direct proof of actual deposit with an authorized U.S. Postal Service official or in an authorized depository, proof of a course of individual or office practice that letters which are properly addressed and stamped are placed in a certain receptacle from which an authorized individual invariably collects and places all outgoing mail in a regular U.S. mail depository and that such procedure was actually followed on the date of the alleged mailing creates an inference that a letter properly addressed with sufficient postage attached and deposited in such receptacle was regularly transmitted and presents a question for the trier of fact to decide. *Houska v. City of Wahoo*, 235 Neb. 635, 641, 456 N.W.2d 750, 754 (1990). There is evidence of office practices, a preparation check list, copying for the file and mailing by first class mail. Counsel for the Taxpayer stated that the envelope was placed in a area of the office from which it would be picked up by a postman or postwoman. (Submittal p. 7 lines 7-9). As noted, however, the statements of counsel are not evidence. The affidavit of the Taxpayer's controller speaks only of mailing by first class mail. (Submittal p. 68). In *Baker v. St. Paul Fire & Marine Insurance Company*, 240 Neb. 14, 480 N.W.2d 192 (1992), the court determined that placing an envelope with sufficient postage in a mail chute was not sufficient evidence to raise a presumption of receipt. The lacking element in proof was the mailroom was operated under the auspices of the U. S. Postal Service or that it

was a U. S. Postal Service depository. *Id.* That element is also lacking from the evidence of the Taxpayer and does not give rise to a presumption of receipt of mail by the County Assessor.

A list of taxable tangible personal property must be filed on or before May 1 of each year and the form for filing the list is prescribed by the Tax Commissioner. Neb. Rev. Stat. §77-1229(1) (Reissue 2009). A tax form required to be filed with the State of Nebraska or a political subdivision that is properly mailed through the United States mail on or before May 1 is deemed timely filed even though received on a later date. Neb. Rev. Stat. §49-1201 (Reissue 2004). "If any report, claim, tax return, tax valuation, equalization, or exemption protest, or tax form, petition, appeal, or statement, or any payment, referred to in section 49-1201, is sent by United States mail and either registered or certified, a record authenticated by the United States post office of such registration or certification shall be considered competent evidence that the report, claim, tax return, tax valuation, equalization, or exemption protest, or tax form, petition, appeal, or statement, or payment was delivered to the state officer or state agency or officer or agency of the political subdivision to which addressed, and the date of registration or certification shall be deemed the postmarked date." Neb. Rev. Stat. §77-1202 (Reissue 2004). There is no evidence of a mailing to the County Assessor either registered or certified mail. The other evidence of mailing was not sufficient to raise the general presumption of receipt. The limited evidence of mailing by first class mail is likewise not sufficient to raise the presumption provided for in section 77-1202.

Finally, the burden on the Taxpayer is to show by clear and convincing evidence that the decision of the County Board was arbitrary or unreasonable. The evidence presented to the County Board was identical to the evidence presented to the Commission. Different conclusions

might be drawn if different weight is given to elements of the evidence, however, merely being able to reach differing conclusions is not evidence that the decision of the County Board was unreasonable or arbitrary.

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.
3. 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 a penalty of 25% of the tangible tax is due is affirmed.
2. This decision, if no appeal is timely filed, shall be certified to the Lincoln County Treasurer, and the Lincoln County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Reissue 2009).
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 2009.

6. This order is effective for purposes of appeal on October 13, 2010.

Signed and Sealed. October 13, 2010.

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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 (REISSUE 2009), OTHER PROVISIONS OF NEBRASKA STATUTES, AND COURT RULES.

Commissioner Hotz, dissenting.

I respectfully dissent, and would reverse the decision of the Lincoln County Board of Equalization imposing a twenty-five percent penalty of the tangible personal property tax due.

Neb. Rev. Stat.§49-1201creates a receipt-of-mail presumption by allowing that if the tax form at issue is mailed but not received it shall be deemed filed on the date it was mailed if the sender establishes by competent evidence that it was deposited in the United States mail on or before the date for filing. I believe the Taxpayer has met that burden.

Competent evidence means "evidence that tends to establish the fact in issue." *Ahmann v. Nebraska Dept. Of Correctional Serv's*, 278 Neb. 29, 767 N.W.2d 104 (2009). Competent evidence is evidence that is admissible and relevant on the point in issue. *See, Black's Law Dictionary, Seventh Edition.*

The Taxpayer presented sworn testimony of its controller, Penny Thelen, that she prepared the tax form and then mailed it on April 23, 2009, "by first class mail with sufficient postage." (Thelen Affidavit, paragraph 6). Further, the same Affiant stated,

> "For several years, Affiant's duties at MRE have included preparation and timely filing of MRE's personal property tax returns in Lincoln County. For several years before that, Affiant was employed by a certified public accountant (the "CPA office") in the same office as MRE. Affiant's duties while employed at the CPA office included the preparation and timely filing of hundreds of personal property tax returns. In mailing MRE's 2009 property tax return to the Lincoln County Assessor, Affiant followed the same practice as she had done for the CPA office in filing hundreds of personal property tax returns. None of those timely mailed from the CPA office (i.e. same office as MRE), first class mail, to the appropriate Assessor's office, have ever failed to be timely received." (Thelen Affidavit, paragraph 7).

The Affidavit was offered into evidence by a joint stipulation of the parties and received by the Commission.

The Commission's Decision and Order finds there is an absence in the evidence of direct proof that the mailing was by United States Postal Service.

> "Absent direct proof of actual deposit with an authorized U.S. Postal Service official or in an authorized depository ... proof of a course of individual or office practice that letters which are properly addressed and stamped are placed in a certain receptacle from which an authorized individual invariably collects and places all outgoing mail in a regular U.S. mail depository and that such procedure was actually followed on the date of the alleged mailing creates an inference that a letter properly addressed with sufficient postage attached and deposited in such receptacle was regularly transmitted and presents a question for the trier of fact to decide."

Baker v. St. Paul Fire & Marine Ins. Co., 240 Neb. 14, 480 N.W.2d 192 (1992). I would find that Thelen's sworn statement is competent evidence supporting the inference that the tax form was mailed as required by Neb. Rev. Stat. §49-1201.

In this appeal, the only evidence presented to rebut the receipt-of-mail presumption is that the County Assessor had no record of receiving it. "A letter properly addressed, stamped, and

mailed raises a presumption that the letter reached the addressee in the usual course of the mails." *Id*. "This presumption may be rebutted with any relevant evidence; however, positive testimony by the addressee that a letter was not received simply raises a question of fact to be decided by the trier of fact." *Id*., citing *Waite Lumber Co., Inc. v. Carpenter*, 205 Neb. 860, 290 N.W.2d 655 (1980). Other than the assertion that the tax filing was not received by the County Assessor, no other evidence was offered to rebut the presumption.

Under these facts, I would find that the receipt-of-mail presumption has been established by competent evidence, and that presumption has not been rebutted. I would reverse the decision of the County Board of Equalization imposing a penalty of twenty-five percent.

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Robert W. Hotz, Commissioner