

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Taulborg Family, LLC,
Appellant,

v.

Douglas County Board of Equalization
Appellee

Case No: 10C-310

Decision and Order
to Obtain Jurisdiction

For the Appellant:

Mark Williams,
Parsonage Vandenack Williams LLC

For the Appellee:

Bernard Monbouchette,
Deputy Douglas County Attorney

Heard before Commissioners Robert W. Hotz and Nancy J. Salmon.

I. THE SUBJECT PROPERTY

The Subject Property is located in Douglas County, at 605 N. 116th Street, Omaha, Nebraska. The legal description is found in the Case File.

II. PROCEDURAL HISTORY

A jurisdictional show cause hearing was held on July 2, 2012. Mark Williams appeared telephonically for Taulborg Family, LLC (Taxpayer). Bernard Monbouchette appeared telephonically for the Douglas County Board of Equalization (County Board). The Tax Equalization & Review Commission (Commission) took notice of its case file for the purposes of determining personal jurisdiction and subject matter jurisdiction. The parties stipulated to the receipt of Exhibits 1-3. The Taxpayer gave oral argument. The County Board offered the telephonic testimony of Michael Goodwillie, and also made oral argument.

III. STANDARD OF REVIEW

Section 77-5013 of the Nebraska Statutes provides that the Commission obtains jurisdiction over an appeal when it 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

¹ See, Neb. Rev. Stat. 77-5013 (2010 Cum. Supp.)

person otherwise having a right to appeal may petition the Commission on or before December 31 of each year to determine the actual value or special value of real property for that year if a failure of notice prevented timely filing of a protest or appeal provided for in §§77-1501 to 77-1510.² 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.³

IV. SUMMARY OF THE EVIDENCE

The Commission has jurisdiction over an appeal of a determination of the County Board's determination of assessed value of the Subject Property for tax year 2010, due to the fact that the Taxpayer timely filed a Protest with the County Board,⁴ and timely filed with the Commission an appeal of the County Board's determination.⁵ However, the Commission notes that while the Taxpayer, in both the Protest and the appeal, has timely filed the protest and appeal in relation to the 2010 tax year, the Taxpayer is seeking relief in this appeal for tax year 2009.

The Taxpayer concedes that no appeal or petition was filed by December 31, 2009, regarding the taxable value of the subject property for the 2009 tax year. The Taxpayer argues, however, that the Commission must obtain jurisdiction regarding the 2009 tax year despite these deficiencies.

The Taxpayer has asserted that the Taxpayer did not receive notice of a "value different than in the previous year" for tax year 2009, as required by 77-1315(2). The County Board asserts that notices were sent to all Taxpayers prior to June 1, 2009. The Taxpayer asserts that absent notice, it did not have the opportunity to protest the valuation for tax year 2009 under 77-1502(1) by June 30, 2009. The Taxpayer also asserts that absent notice, and without a determination by the County Board, it did not have the opportunity to appeal a determination by the County Board to the Commission pursuant to Neb. Rev. Stat. §77-1510. Further, the Taxpayer asserts, that because of said lack of notice it was without the opportunity to file a petition with the Commission by December 31, 2009, for tax year 2009, under Neb. Rev. Stat §77-1507.01.

² See, Neb. Rev. Stat. 77-1507.01 (Reissue 2009) and Neb. Rev. Stat. 77-5013 (2010 Cum. Supp.).

³ *Creighton St. Joseph Regional Hospital v. Nebraska Tax Equalization and Review Commission*, 260 Neb. 905, 620 N.W.2d 90 (2000).

⁴ The Protest was filed June 14, 2010. Exhibit 3:5

⁵ The appeal is found in the Case File. It was timely received by the Commission on September 13, 2010.

The Commission is statutorily authorized to obtain jurisdiction of appeals filed under Neb. Rev. Stat. §77-1510. If a taxpayer has not received notice as required by 77-1315(2), and files a petition according to Neb Rev. Stat. §77-1507.01, the Commission obtains jurisdiction under Neb. Rev. Stat §77-5013. The Taxpayer argues that even though no appeal of a County Board determination was filed with the Commission in 2009, and no petition was filed by December 31, 2009, the Commission may obtain jurisdiction under its Constitutional authority pursuant to Art IV, Section 28 of the Nebraska Constitution. Article IV, Section 28 states:

By January 1, 1997, there shall be a Tax Equalization and Review Commission. The members of the commission shall be appointed by the Governor as provided by law. The commission shall have power to review and equalize assessments of property for taxation within the state and shall have such other powers and perform such other duties as the Legislature may provide. The terms of office and compensation of members of the commission shall be as provided by law.

A Tax Commissioner shall be appointed by the Governor with the approval of the Legislature. The Tax Commissioner may have jurisdiction over the administration of the revenue laws of the state and such other duties and powers as provided by law. The Tax Commissioner shall serve at the pleasure of the Governor.

The Taxpayer argues that its filing of the 2010 appeal, coupled with lack of notice regarding the 2009 tax year, gives the Commission the authority to obtain jurisdiction in this 2010 appeal for the purpose of allowing the Taxpayer to have a hearing on the merits regarding its 2009 taxable value. We disagree.

Article IV, Section 28 was first adopted as an amendment to the Nebraska Constitution in 1920. The amendment created the office of Tax Commissioner, as well as creating the State Board of Equalization (State Board).⁶ Under the 1920 amendment, the Tax Commissioner “shall have jurisdiction over the administration of the revenue laws of the state,” and, in conjunction with the State Board, “shall have power to review and equalize assessments of property for taxation within the state.” In addition, per the 1920 amendment, the Tax Commissioner “shall have such other powers and perform such other duties as the Legislature may provide.”

⁶ The State Board of Equalization consisted of elected State officials including the Governor, Secretary of State, State Auditor, and State Treasurer. The State Board of Equalization functioned under the authority of Art. IV, Section 28 until January 1, 1997.

With the adoption of the 1995 amendment, the State Board was dissolved and the Commission was created. The Commission was vested with the same authority in the 1995 amendment as the Board had held under the 1920 amendment in relation to its “equalization” powers by the retention of the language, “shall have power to review and equalize assessments of property for taxation within the state.” However, in the 1995 amendment, the Commission was vested with powers the State Board had not previously held with the addition of the language, “and shall have such other powers and perform such other duties as the Legislature may provide.” The Taxpayer argues that the language in Article IV, Section 28, is self-executing, and that under the language the Commission has the authority to obtain jurisdiction regarding the taxable value of the subject property for tax year 2009. We disagree with the Taxpayer’s construction of Article IV, Section 28.

In *State v. Odd Fellows Hall Ass’n*, the Nebraska Supreme Court gave a construction to the provisions of Article IV, Section 28, applicable to the Tax Commissioner under the 1920 amendment.⁷ The Court concluded that certain language within Article IV, Section 28 was self-executing,⁸ and determined that it gave the Tax Commissioner “equity jurisdiction.”⁹ The Court emphasized that terms similar to “shall have jurisdiction,” as applied to the District Courts, had a “definite and settled construction” as being self-executing, and that “under them district courts have constitutional equity jurisdiction which may be exercised without legislative enactment.”¹⁰ The Court concluded that the Tax Commissioner had jurisdiction under the language of Article IV, Section 28, without further legislative action.

The Taxpayer’s argument regarding the Commission’s jurisdiction does not follow. The 1995 amendment retained similar jurisdictional language -- “may have jurisdiction” -- but it is still applicable only to the Tax Commissioner, not to the Commission. The 1995 amendment grants to the Commission the same “power to review and equalize assessments of property for taxation within the state” as had been granted to the State Board under the 1920 amendment.¹¹ The 1995 amendment includes language applicable to the Commission that had not applied to the

⁷ *State v. Odd Fellows Hall Ass’n*, 123 Neb. 440, 243 N.W. 617 (1932).

⁸ The Court referred Constitutional provisions being self-executing when they “may be exercised without legislative enactment.” 123 Neb. at 449, 243 N.W. at 620.

⁹ *Id.*

¹⁰ *Id.*

¹¹ The function then performed by the State Board and, as of January 1, 1997, by the Commission, has been commonly known as “Statewide Equalization.”

State Board (“and shall have such other powers and perform such other duties as the Legislature may provide”¹²), but there is no basis for a conclusion that this language, added to the retained language, could be self-executing authority for the Commission to obtain jurisdiction over the 2009 taxable value of the subject property.

V. CONCLUSIONS OF LAW

The Commission has jurisdiction for this appeal as it relates to the decision of the County Board determining the assessed value of the Subject Property for tax year 2010. The Commission does not have jurisdiction regarding the assessment of the Subject Property for the 2009 tax year.

VI. ORDER

IT IS ORDERED THAT:

1. The appeal of the Decision of the Douglas County Board of Equalization determining the assessed value of the Subject Property for tax year 2010 shall be set for hearing.
2. The Commission does not have jurisdiction regarding the Decision of the Douglas County Board of Equalization determining the assessed value of the Subject Property for tax year 2009.
3. Each Party is to bear its own costs in this proceeding.
4. This order is effective for purposes of appeal on July 11, 2012.

Signed and Sealed: July 11, 2012

Robert W. Hotz, Commissioner

Nancy J. Salmon, Commissioner

SEAL

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

¹² At no time, under Article IV, Section 28 did the State Board ever obtain jurisdiction to hear valuation appeals from a County Board of Equalization determination as the Commission has done under 77-5001 et seq. since January 1, 1996 under 2005 Neb. Laws LB 490. Prior to the Commission obtaining jurisdiction to hear these appeals, they were adjudicated in the District Courts.