

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Atlantic Southeast Airlines, Inc.,
Appellant,

v.

Kim Conroy, Tax Commissioner,
Appellee

Case Nos: 11SA 001, 11SA 002, 11SA 003,
& 11SA 004

Order Nunc Pro Tunc Correcting
Decision and Order Vacating and Reversing
the Decision of the Tax Commissioner
(Correction of Values)

For the Appellant:

Norman H. Wright,
N.H. Wright & Assoc, L.L.C.,
and
Julia M. Plucker.

For the Appellee:

Jonathan D. Cannon,
Attorney, Property Assessment Division,
Nebraska Department of Revenue

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

I. THE SUBJECT PROPERTY

The subject of these appeals is the assessed value of the flight equipment of Atlantic Southeast Airlines, Inc. (the Taxpayer) for tax years 2006, 2007, 2008 and 2009 (the Subject Property). The legal description of the Subject Property is found in the case files.

II. PROCEDURAL HISTORY

The Taxpayer filed a Nebraska Air Carrier Annual Report as required for tax years 2006 through 2009.¹ Subsequently the Taxpayer received a Notice of Tax Due for Nebraska Air Carrier Assessment for each of these four tax years from the Nebraska Department of Revenue (the Department).² The Taxpayer then protested the personal property tax due to the Tax Commissioner.³ These four tax years were consolidated for hearing and a single order was issued by the Tax Commissioner denying the Taxpayer's protests.⁴

¹ E4:10, E4:22, E4:34, E4:48, Neb. Rev. Stat. 77-1246.

² E4:16, E4:27, E4:39, E4:51, Neb. Rev. Stat. 77-1249.

³ E4:19, E4:31, E4:43, E4:56, Neb. Rev. Stat. 77-1249.

⁴ See, E2:39, E1.

The Taxpayer appealed the decision of the Tax Commissioner to the Tax Equalization and Review Commission (Commission). Prior to the hearing, the parties exchanged exhibits and submitted a Pre-Hearing Conference Report, as ordered by the Commission. In the Pre-Hearing Conference Report, the parties stipulated to the receipt of the exchanged exhibits.⁵ The Commission held a hearing on February 26, 2014, at which the parties presented a stipulated record, which contained stipulated facts, and oral argument, followed by a briefing schedule ending April 30, 2014.

III. STANDARD OF REVIEW

The Commission's review of the determination of the Tax Commissioner is *de novo*.⁶ "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."⁷

"In all appeals, excepting those arising under section 77-1606, if the appellant presents no evidence to show that the order, decision, determination, or action appealed from is incorrect, the commission shall deny the appeal. If the appellant presents any evidence to show that the order, decision, determination, or action appealed from is incorrect, such order, decision, determination, or action shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary."⁸ Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.⁹

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. The commission may consider all questions necessary to determine taxable value of property as it hears an appeal or cross appeal."¹⁰ The Commission may also "take notice of judicially cognizable facts and in

⁵ Case File.

⁶ See, Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.), *Brenner v. Banner Cty. Bd. of Equal.*, 276 Neb. 275, 286, 753 N.W.2d 802, 813 (2008).

⁷ *Koch v. Cedar Cty. Freeholder Bd.*, 276 Neb. 1009, 1019 (2009).

⁸ Neb. Rev. Stat. 77-5016(9)(2012 Cum. Supp.).

⁹ *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

¹⁰ Neb. Rev. Stat. 77-5016(8)(2012 Cum. Supp.).

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.”¹¹

When the Commission considers an appeal of a decision of a County Board of Equalization, a presumption exists that the “board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action.”¹²

That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary. From that point forward, the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon all the evidence presented. The burden of showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board.¹³

The Nebraska Supreme Court’s determinations that there is a presumption that the assessing official has performed his or her duties according to law demonstrates that this presumption should be applied to decisions of the Tax Commissioner.¹⁴

On review from determinations of a question of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court.¹⁵ When questions of law are determined incorrectly by an administrative agency, such decisions are per se unreasonable and arbitrary and thus void.¹⁶

The Commission’s Decision and Order shall include findings of fact and conclusions of law.

IV. ANALYSIS

¹¹ Neb. Rev. Stat. § 77-5016(6)(2012 Cum. Supp.).

¹² *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

¹³ *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

¹⁴ See, *State ex rel. Bee Building Co. v. Savage*, 65 Neb. 714 (1902); *Woods v. Lincoln Gas & Electric Co.*, 74 Neb. 526 (1905); *Brown v. Douglas Co.*, 98 Neb. 299 (1915); *Gamboni v. County of Otoe*, 159 Neb. 417 (1954); *Ahern v. Board of Equalization*, 160 Neb. 709 (1955); *Collier v. Logan County*, 169 Neb. 1 (1959); *In re Union Pacific R. R. Co.* 170 Neb. 139, 101 N.W.2d (Neb. 1060); *Josten-Wilbert Vault Co. v. Board of Equalization*, 179 Neb. 415 (1965).

¹⁵ See, *In re Trust Created by Isvik*, 274 Neb. 525, 530, 741 N.W.2d 638, 643 (2007), *Domjan v. Faity Regional Health Services*, 273 Neb. 877,884, 735 N.W.2d 360 (2007).

¹⁶ See, *Blakely v. Lancaster County*, 284 Neb. 659, 670, 825 N.W.2d 149, 160 (2012), *Middle Niobrara Natural Resources Dist. v. Department of Natural Resources*, 281 Neb. 634, 799 N.W.2d. 305 (2011).

The Taxpayer is an air carrier undertaking to engage in the carriage of persons or cargo for hire by an aircraft.¹⁷ As an air carrier operating in Nebraska the Taxpayer is subject to personal property taxation pursuant to Neb. Rev. Stat. §§77-1244 to 77-1250.05 (Reissue 2009). The Taxpayer alleges that its property tax assessments, as determined by the Property Tax Administrator and the Department of Revenue for tax years 2006, 2007, 2008, and 2009, violates federal law, the Commerce Clause, the Due Process Clause, and the Equal Protection Clause of the United States Constitution, and the Nebraska Constitution Uniformity Clause. The Tax Commissioner denied the Taxpayer's claims finding that the Nebraska Department of Revenue correctly determined the property tax assessments for tax years 2006, 2007, 2008 and 2009.

There is no dispute between the parties as to whether the personal property of Atlantic Southeast Airlines was correctly assessed pursuant to Neb. Rev. Stat. §§77-1244 et seq. The parties disagree as to whether the Taxpayer is entitled to a further reduction in the assessed value of its personal property tax assessment pursuant to federal law.

The Taxpayer argues that it is entitled to relief under the federal law equivalent to the relief that carline companies receive in Nebraska under Neb. Rev. Stat §77-693.

The Tax Commissioner argues that the Department cannot abide by the antidiscrimination provisions of federal law because Nebraska Law does not provide for discrimination relief for air carriers as it does for railroad and carline companies.

At all times relevant to these appeals a federal law known as the Tax Equity and Fiscal Responsibility Act (TEFRA) was in effect.¹⁸ TEFRA does not allow states to

assess air carrier transportation property at a value that has a higher ratio to the true market value of the property than the ratio that the assessed value of other commercial and industrial property of the same type in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.¹⁹

The language of TEFRA is very similar to the language found in another federal law, known as the Railroad Revitalization and Reform Act of 1976 (4-R Act), which does not allow states to

¹⁷ See, Neb. Rev. Stat. 77-1244 (Reissue 2009)

¹⁸ 49 U.S.C. § 40116.

¹⁹ 49 USC § 40116(2)(A)(i).

[a]ssess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.²⁰

The 4-R Act protects the rail transportation industry, which includes carline companies, from discrimination in state administered tax systems.

Article VIII, Section 1(7) of the Nebraska Constitution provides:

[I]n furtherance of the purposes for which such a law of the United States has been adopted, whenever there exists a law of the United States which is intended to protect a specifically designated type, use, user, or owner of property or franchise from discriminatory state or local taxation, such property or franchise shall constitute a separate class of property or franchise under the laws of the State of Nebraska, and such property or franchise may not be taken into consideration in determining whether taxes are levied by valuation uniformly or proportionately upon any property or franchise, and the Legislature may enact laws which statutorily recognize such class and which tax or exempt from taxation such class of property or franchise in such manner as it determines ... (emphasis supplied).

The Legislature, acting under the discretion allowed by this section of the Nebraska Constitution, enacted Neb. Rev. Stat. §77-693 (Reissue 2009), which sets forth a procedure for reducing the assessed value of railroad and carline companies if it is determined that the ratio of assessed value to actual value of railroad and car line personal property or real property exceeds the ratio of the comparable commercial and industrial property by more than five percent, mirroring the language of the 4-R Act.²¹

TEFRA contains language similar to the 4-R Act, which does not allow states to

assess air carrier transportation property at a value that has a higher ratio to the true market value of the property than the ratio that the assessed value of other commercial and industrial property of the same type in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.²²

Under the Nebraska Constitution, air carrier transportation property constitutes a separate class of property, and the Legislature may enact laws that recognize such a class and tax or exempt

²⁰ 49 USC § 11501(b)(I).

²¹ 49 USC § 11501(c).

²² 49 USC § 11501(b)(I).

from tax such class in such manner as it determines.²³ Essentially this provision of the Nebraska Constitution allows, but does not require, the Legislature to enact laws such as Neb. Rev. Stat. §77-693 (Reissue 2009). In relation to the assessment of air carrier personal property (the subject of this appeal), the Legislature has not enacted a law that recognizes and taxes air carrier personal property in a manner different from other personal property.

The first question the Commission must determine is whether TEFRA applies to the parties in this appeal. The answer to this question seems clear that, “state laws that conflict with federal law are invalid,”²⁴ While the Nebraska Constitution allows the Legislature to adopt laws consistent with federal laws,²⁵ the failure of the Legislature to do so does not invalidate the federal law.

The Tax Commissioner alleges that regardless of the conflict between federal law and state law, the Tax Commissioner, Department of Revenue, and the Commission, as administrative agencies are unable to grant relief under TEFRA. The Tax Commissioner alleges that while the Court did, in fact, hold that the Supremacy Clause of the United States Constitution preempted the state statute, the Court also stated that, “[U]nder the Supremacy Clause of the U.S. Constitution, *state courts* have a concurrent duty to enforce federal law.”²⁶ The Tax Commissioner further alleges that the Commission, while it has “quasi-judicial powers,” is not a state court, but rather an administrative agency which may not go beyond the powers specifically granted it in granting relief.²⁷

The Commission is specifically granted the exclusive jurisdiction to hear and determine appeals of any decision of the Tax Commissioner regarding property valuation, exemption, or taxation.²⁸ When carrying out this duty, the Commission may consider all questions necessary to determine taxable value of property as it hears an appeal.²⁹ Further, the Commission may consider and utilize the laws of the United States and Nebraska as well as any decision of the

²³ *Nebraska Constitution* Art. VIII §1(7).

²⁴ *In re Lincoln Elec. System.*, 265 Neb. 70, 655 N.W.2d 363 (Neb. 2003).

²⁵ *Nebraska Constitution* Art. VIII §1(7).

²⁶ *In re Lincoln Elec. System.*, 265 Neb. 70, 79, 655 N.W.2d 363, 371 (Neb. 2003)(emphasis supplied),

²⁷ See, *Creighton St. Joseph Regional Hospital v. Nebraska Tax Equalization and Review Commission*, 260 Neb. 905, 620 N.W.2d 90 (2000).

²⁸ See, Neb. Rev. Stat. §77-5007(11)(2012 Cum. Supp.), Neb. Rev. Stat §25-1901(Reissue 2008).

²⁹ See, Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

several courts of the United States or the laws of the State of Nebraska.³⁰ So while the Commission is not a court, in an appeal of a decision of the Tax Commissioner it is specifically granted the authority to determine any question necessary to determine the taxable value of property as it hears an appeal. It is also important to note that it would appear that bringing an appeal of these issues to the federal courts is not an option for this Taxpayer because under federal law, “the [federal] district courts shall not enjoin, suspend, or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.”³¹ There is no exception to this requirement for claims brought under TEFRA.³²

At the Taxpayer’s request, the Property Tax Administrator and the Department had a determination made of the calculations of the ratios set forth in TEFRA concerning the ratio of assessed values to taxable values.³³ These calculations demonstrate significantly different ratios for the assessment of air carrier personal property versus other commercial and industrial personal property in Nebraska. This difference in the ratios is sufficient to demonstrate that the Taxpayer is entitled to relief under TEFRA.

The parties to the present appeal stipulated to the adjustments that would be required if it were determined that the Taxpayer is entitled to relief under TEFRA.³⁴ Those adjustments would lead to a 32.4934% adjustment for tax year 2006, a 41.4956% adjustment for tax year 2007, a 55.3578% adjustment for tax year 2008 and a 67.5944% adjustment for tax year 2009.³⁵ As set forth in the stipulated exhibits of the parties, the Commission finds that the resulting assessed value of the Taxpayer’s flight equipment is as follows:³⁶

	Tax Year 2006
Assessed Value:	\$3,692,860
	Tax Year 2007
Assessed Value:	\$2,418,124

³⁰ See, Neb. Rev. Stat. §77-5016(3) (2012 Cum. Supp.).

³¹ 28 USC §1341.

³² The Commission notes just such an exception applies to federal district courts for 4-R Act discrimination cases but no exception exists for TEFRA Claims. See. 49 USC §11501(c).

³³ E4:3-5, E4:364.

³⁴ E4:5.

³⁵ E4:364 (also referred to as Exhibit 16).

³⁶ E4:364.

Tax Year 2008
Assessed Value: **\$2,496,181**
Tax Year 2009
Assessed Value: **\$1,800,291**

V. CONCLUSION

The Commission finds that the Taxpayer has provided competent evidence to rebut the presumption that the Tax Commissioner faithfully performed her duties and had sufficient competent evidence to make her determination. The Commission also finds that the Taxpayer has provided clear and convincing evidence that the Tax Commissioner's determinations were arbitrary or unreasonable.

For all of the reasons set forth above, the decision of the Tax Commissioner is Vacated and Reversed.

VI. ORDER

IT IS ORDERED THAT:

1. The Decision of the Tax Commissioner determining the value of the Subject Property for tax years 2006, 2007, 2008, and 2009 are Vacated and Reversed³⁷.
2. The assessed value of the Subject property for each tax year is:

Tax Year 2006
Total Value: **\$3,692,860**
Tax Year 2007
Total Value: **\$2,418,124**
Tax Year 2008
Total Value: **\$2,496,181**
Tax Year 2009
Total Value: **\$1,800,291**

³⁷ Assessed value, as determined by the Tax Commissioner, was based upon the evidence at the time of the Protest proceeding. At the appeal hearing before the Commission, both parties were permitted to submit evidence that may not have been considered by the County Board of Equalization at the protest proceeding.

3. This Decision and Order, if no appeal is timely filed, shall be certified pursuant to Neb. Rev. Stat. §77-5018 (2012 Cum. Supp.).
4. Any request for relief, by any party, which is not specifically provided for by this Decision and Order is denied.
5. Each Party is to bear its own costs in this proceeding.
6. This Decision and Order shall only be applicable to tax years 2006, 2007, 2008, and 2009.
7. This Decision and Order is effective for purposes of appeal on **July 31, 2014**.

Signed and Sealed: August 13, 2014.

Robert W. Hotz, Commissioner

SEAL

Nancy J. Salmon, Commissioner

Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. §77-5019 (2012 Cum. Supp.) and other provisions of Nebraska Statutes and Court Rules.