

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

|                           |   |                        |
|---------------------------|---|------------------------|
| PRIME ALLIANCE BANK, INC, | ) |                        |
|                           | ) |                        |
| Appellant,                | ) | Case No. 10P 003       |
|                           | ) |                        |
| v.                        | ) | DECISION AND ORDER     |
|                           | ) | DISMISSING FOR WANT OF |
| LINCOLN COUNTY BOARD OF   | ) | JURISDICTION           |
| EQUALIZATION,             | ) | (Filing Defect)        |
|                           | ) | (Untimely Filing)      |
| Appellee.                 | ) |                        |

The above-captioned case was called for a hearing on an Order to Show Cause (Filing Defect) to determine if the appeal by Prime Alliance Bank, Inc ("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, 2011. 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 proceeding. Commissioner Salmon was excused. Commissioner Hotz was present. The proceeding was heard by a quorum of a panel of the Commission.

Matthew R. Ottemann appeared as legal counsel for the Taxpayer.

Joe W. Wright, a Deputy County Attorney for Lincoln County, Nebraska, participated in the hearing by telephone as legal counsel for the Lincoln County Board of Equalization ("the County Board").

The Commission took statutory notice, received exhibits 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 was timely filed.

**II.  
FINDINGS OF FACT**

The Commission finds and determines that:

1. On December 3, 2008 Marquette Equipment Finance, LLC leased various items of property to Midwest Renewable Energy Inc. (E7:14-35).
2. On April 30, 2010, Marquette Equipment Finance, LLC filed a Nebraska Personal Property Return showing zero taxable value. (E5:5-8).
3. On May 6, 2010, the Assessor changed value as reported by Marquette Equipment Finance, LLC from zero to \$4,170,149. (E5:2).
4. On June 4, 2010, Prime Alliance Bank protested the assessors valuation of that portion of the property reported by Marquette Equipment Finance, LLC consisting of 2 Alaqua distillation columns. (E5:1).
5. Alaqua Inc., distillation columns had been valued by the assessor at \$776,832 . (E5:2).
6. Prime Alliance Bank as the protestor asserted that taxable value of the 2 Alaqua distillation columns was zero. (E5:1).

7. The interest of Prime Alliance Bank in the Alaquia Inc., distillation columns is derived from an assignment of an interest in the lease described in Exhibit 7 at pages 14-35. (E7:37).
8. The County Board decided the protest on July 19, 2010. (Case File).
9. The appeal captioned above with the required filing fee and documentation was received on August 26, 2010. (Case File).
10. The envelope in which the appeal, filing fee, and documentation was delivered is postmarked August 23, 2010. (Case File).
11. August 23, 2010 is more than 30 days after July 19, 2010.

#### **APPLICABLE LAW**

1. 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. Neb. Rev Stat. §77-5013 (Reissue 2009).
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. Neb. Rev. Stat. §77-5013(2) (Reissue 2009).
3. The county board of equalization shall meet for the purpose of reviewing and deciding written protests filed pursuant to this section beginning on or after June 1 and ending on

- July 25 of each year. Neb. Rev. Stat. §77-1502(1) (Reissue 2009).
4. Protests regarding taxable tangible personal property returns filed pursuant to section 77-1229 from January 1 through May 1 shall be signed and filed on or before June 30. Neb. Rev. Stat. §77-1502(1) (Reissue 2009).
  5. 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. Neb. Rev. Stat. §77-1510 (Reissue 2009).
  6. The county assessor is required to change the reported valuation of any item of taxable tangible personal property listed on the return to conform valuation to net book value. Neb. Rev. Stat. §77-1233.04(1) (Reissue 2009).
  7. 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. Neb. Rev. Stat. §77-1233.04(3) (Reissue 2009).
  8. For purposes of section 77-1233.04 the county assessor is required to give notice to 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. Neb. Rev. Stat. §77-1233.06(1) (Reissue 2009).
  9. 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 the county assessor's notice. Neb. Rev. Stat. §77-1233.06(2) (Reissue 2009).

10. Upon ten days' notice to the taxpayer, the county board of equalization shall set a date for hearing the appeal of the taxpayer and make its determination within thirty days after the date of hearing. Neb. Rev. Stat. §77-1233.06(4) (Reissue 2009).
11. An appeal may be filed with the Tax Equalization and Review Commission within 30 days after the decision of the county board of equalization. Neb. Rev. Stat. §77-1233.06(4). (Reissue 2009).
12. 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).
13. A statute is ambiguous when the language used cannot be adequately understood either from the plain meaning of the statute or when considered in pari materia with any related statutes. *Unisys Corp. v. Nebraska Life & Health Ins. Guar. Assn.*, 267 Neb. 158, 673 N.W.2d 15 (2004).

#### **IV. ANALYSIS**

The County Board argued that the appeal should be dismissed because two appeals were filed from decisions of the County Board and only one filing fee was paid. In *Widtfeldt v. Holt v. Tax Equalization and Review Commission et.al.*, 15 Neb.App. 410, 728.W.2d 295 (2007), the Court considered whether one filing fee could be a basis for 76 appeals. The Court upheld dismissal of 75 cases by the Commission. In this instance, a single appeal was filed relating to

two separate decisions of the County Board. It is true the filing could not support two appeals, that does not mean, however, that the filing could not support one appeal. The Taxpayer has now confined the appeal to consideration of the decision of the County Board relating to valuation of personal property for the year 2010. Like the Taxpayer in *Widtfeldt*, the Taxpayer is allowed to proceed with the one appeal that can be perfected.

The Taxpayer argues that rules of the Nebraska Supreme Court concerning service of process in civil actions as promulgated pursuant to section 25-534 of Nebraska Statutes are applicable. The Court's rules are applicable to filings in the several courts of Nebraska. The Commission is not a Court and section 25-534 is therefore not applicable to it. The Taxpayer's argument is without merit.

The Taxpayer contends that the provisions of section 77-1510 of Nebraska Statutes determine the filing deadline for its appeal. The section noted provides for appeals of actions pursuant to section 77-1502 of Nebraska Statutes. Neb. Rev. Stat. §77-1510 (Reissue 2009). Protests regarding taxable tangible personal property returns filed pursuant to section 77-1229 of Nebraska Statutes from January 1 through May 1 signed and filed on or before June 30 are considered pursuant to section 77-1502. Neb. Rev. Stat. 77-1502(1) (Reissue 2009). Marquette Equipment Finance, LLC filed a Nebraska Personal Property Return on April 30, 2010. (E5:5). The return was filed to report taxable tangible personal property. (E5:5). Value of the undescrbed property reported on the Nebraska Personal Property Return filed by Marquette Equipment Finance LLC was \$0. (E5:5). The value protested by Prime Alliance Bank was \$776,832. (E5:1). Clearly Prime Alliance Bank was not protesting the return filed on April 30, 2010.

On May 6, 2010, the County Assessor determined that personal property held by Marquette Equipment Finance, LLC had a taxable value of \$4,170,149 as opposed to \$0, the reported value. (E5:2). The taxable value of Alaqua Inc, distillation columns was determined by the County Assessor to be \$776,832. A taxable value of \$776,832 was protested by Prime Alliance Bank and the property to which the protest pertained was described as 2 Alaqua Distillation Columns. (E5:1). Clearly the protest did not relate to the filing made pursuant to section 77-1229 on April 30. The filing of the protest was not made pursuant to section 77-1502.

Section 77-1233.04 requires a county assessor to change the reported valuation of any item of taxable tangible personal property listed on the return to conform valuation to net book value. Neb. Rev. Stat. §77-1233.04(1) (Reissue 2009). Whatever the basis for her determination, the county assessor made a determination that property reported with a \$0 value had a value of \$4,170,149. (E5:20). After making that determination the county assessor notified the Taxpayer and a protest was filed. Notice of the county assessor's determination is required by section 77-1233.06. Neb. Rev. Stat. §77-1233.06 (Reissue 2009). Section 77-1233.06 of Nebraska Statutes allows a protest to be filed within 30 days of the assessor's notice. A protest was filed and heard by the County Board. The Clerk gave notice of the County Board's decision. To this point in the sequence of actions and events, the provisions of section 77-1233.06 had been complied with by the parties. The form on which the County Assessor gave notice of the change in value noted that it was authorized by section 77-1233.06. (E5:2). Section 77-1233.06 allows the filing of an appeal from a decision of the County Board within thirty days of the decision. Neb. Rev. Stat. §77-1233.06 (Reissue 2009). The appeal in this case was filed more than 30 days after the County Board's decision.

It is true that two statutory paths appear in statute for the reporting and valuation of taxable tangible personal property. One is the self reporting accomplished pursuant to section 77-1229 and the other is the county assessor's determinations pursuant to section 77-1233.04. It is also true that each of the statutory paths for reporting and the valuation of taxable tangible personal property has its own procedural requirements including protest and appeal from the County Board decisions. A protest based on the self reporting provided for in section 77-1229 may be protested to the County Board pursuant to section 77-1502, and the County Board's decision may be appealed pursuant to section 77-1510. On the other hand, county assessor determinations provided for in section 77-1233.04 have procedures for protest and appeal of County Board decisions as found in section 77-1233.06.

The facts show that the Taxpayer self reported what it considered the taxable value of various items of personal property to be for the year 2010 by filing pursuant to section 77-1229. The county assessor thereafter determined, pursuant to section 77-1233.04, that the personal property reported by the Taxpayer had a taxable value exceeding the reported value. The provisions of section 77-1233.06 are applicable to this appeal. The appeal was not timely filed and must be dismissed.

The Taxpayer argues that instructions contained on the appeal form and other material promulgated by the Commission are misleading. The instructions on the appeal form caution filers that the filing deadline for appeals varies with the subject and type of decision, action, order, or determination being appealed. (E8:2). The instructions also state that it is the filer's responsibility to review the statutes and to determine whether an appeal may be made to the Commission and to determine the applicable filing deadline. (E8:2). The instructions also note

that the deadline for filing various appeals is 30 days after the date of the decision being appealed from. (E8:2). Even if the Commission's form is unclear, there are several cautions that were ignored by the Taxpayer. In addition, the Taxpayer has not shown how even an incorrect instruction would affect the result in this appeal. The Taxpayer's position seems to be that misleading instructions from the Commission will trump the provisions of statute. The Commission has only the authority granted to it by statute and may not enlarge or detract from that authority. *See Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm.*, 260 Neb. 905, 620 N.W.2d 90 (2000). The Commission has been unable to find any grant of authority allowing it to vary from the provisions of 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. 10P 003 is dismissed.
2. Each party is to bear its own costs in this proceeding.

**Signed and Sealed** May 25, 2011.

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Robert W. Hotz, 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.**