

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Midwest Renewable Energy, LLC,
Appellant,

v.

Lincoln County Board of Equalization,
Appellee,

Case No: 09P-005

Order
(on Remand from Supreme Court)

Reversing the Decision of the
Lincoln County Board of Equalization

For the Appellant:
Jerrold L. Strasheim,
Attorney at Law

For the Appellee:
Joe W. Wright,
Deputy Lincoln County Attorney

Commissioners Nancy J. Salmon, Thomas D. Freimuth, and Robert W. Hotz.

I. THE SUBJECT PROPERTY

The Subject Property is tangible personal property owned by Midwest Renewable Energy, LLC (Midwest) and located in Lincoln County, Nebraska.

II. PROCEDURAL HISTORY

The Lincoln County Assessor (Assessor) determined that Midwest did not timely file its personal property tax return, and was therefore subject to a 25% of tax due penalty,¹ in the amount of \$58,400.44. The Lincoln County Board of Equalization (County Board) agreed with the Assessor and made a determination of a 25% penalty in the same amount.² Midwest appealed the decision of the County Board to the Tax Equalization and Review Commission (Commission). Pursuant to a joint motion of the parties, the Appeal to the Commission was submitted without a hearing.³

¹ Pursuant to *Neb. Rev. Stat., §§ 77-1229 and 77-1233.04(4)* (Reissue 2010).

² See Notice of Action by the County Board of Equalization, for Personal Property, dated November 2, 2009. The transcript indicates that the proceedings occurred November 2, 2009.

³ *Neb. Rev. Stat. § 77-5021* (Reissue 2009).

The Commission entered an Order affirming the decision of the County Board.⁴ Midwest appealed the Order of the Commission to the Nebraska Court of Appeals. The Nebraska Court of Appeals affirmed the Order of the Commission.⁵ Midwest filed a Petition for Further Review of the Opinion of the Nebraska Court of Appeals to the Nebraska Supreme Court. The Nebraska Supreme Court reversed and remanded,⁶ with directions “to determine whether the return was timely mailed and filed pursuant to § 49-1201.”⁷ The Nebraska Court of Appeals issued a Mandate to the Commission.⁸ In this Order on remand, the Commission vacates and reverses the Determination of the County Board.

III. STANDARD OF REVIEW

The Commission’s review of the determination by a County Board of Equalization is de novo.⁹ 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.”¹⁰

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.¹¹

⁴ The Order of the Commission was dated October 13, 2010. One Commissioner dissented. The Commission is not authorized to issue a remand to the County Board.

⁵ The Court of Appeals filed its Opinion December 27, 2011. *Midwest Renewable Energy, LLC, v Lincoln Cty. Bd. Of Equal.*, 19 Neb.App. 441, 807 N.W.2d 558 (2011).

⁶ The Nebraska Supreme Court filed its Opinion July 13, 2012. *Midwest Renewable Energy, LLC, v Lincoln Cty. Bd. Of Equal.*, 284 Neb. 34, 815 N.W.2d 922 (2012).

⁷ 284 Neb. at 40, 815 N.W.2d at 927.

⁸ The Nebraska Court of Appeals Mandate was issued September 11, 2012.

⁹ See, Neb. Rev. Stat. §77-5016(8) (2010 Cum. Supp.), *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 286, 753 N.W.2d 802, 813 (2008). “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.” *Koch v. Cedar Cty. Freeholder Bd.*, 276 Neb. 1009, 1019 (2009).

¹⁰ *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

¹¹ *Id.*

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.¹² Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.¹³ The County Board need not put on any evidence to support its valuation of the property at issue unless the taxpayer establishes the Board's valuation was unreasonable or arbitrary.¹⁴

IV. ANALYSIS

This appeal involves the determination by the County Board that Midwest did not timely file a tax return for certain tangible personal property as required by law.¹⁵ Earlier in these proceedings, the Commission granted a joint motion filed by the parties to submit the appeal on stipulated facts and transcripts of the hearing and decision of the County Board with accompanying exhibits, without a hearing before the Commission.¹⁶ The Commission has conducted a de novo review¹⁷ of all of the evidence in the record.¹⁸ The parties' stipulation of facts consists of an affidavit by Penny S. Thelen, dated June 24, 2010, and an affidavit by Mary Ann Long, dated June 21, 2010. The transcript of the County Board proceeding, heard November 2, 2009, has accompanying exhibits, including affidavits by Amy McFarland, James G. Jandrain, and Penny S. Thelen, each dated October 15, 2009.

A. § 49-1201 Controls

On remand, and as directed by the Supreme Court, the Commission first finds that the County Board failed to recognize the applicability of Neb. Rev. Stat. § 49-1201 to Midwest's

¹² Neb. Rev. Stat. §77-5016(9) (2011 Supp.).

¹³ *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

¹⁴ *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

¹⁵ Neb. Rev. Stat. § 77-1201 (Reissue 2009) requires owners to list and value tangible personal property subject to taxation. Neb. Rev. Stat. § 77-1229(1) (Reissue 2009) requires owners to use the form prescribed, and file by May 1 of each year.

¹⁶ This is authorized under 442 NAC ch. 5§015.

¹⁷ Neb. Rev. Stat. §77-5016(8) (2011 Supp.); *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 286, N.W.2d 802, 813 (2008) (Citations omitted).

¹⁸ In its Opinion to reverse and remand, the Nebraska Supreme Court gave directions to "review all the evidence in the record before it to determine whether the return was filed in accordance with §49-1201." *Midwest Renewable Energy, LLC, v Lincoln Cty. Bd. Of Equal.*, 284 Neb. at 40, 815 N.W.2d at 926 (2012).

filing of the personal property tax return. Section 49-1201 is controlling to the outcome of this appeal, and reads as follows:

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.¹⁹

Midwest has asserted that its tax return was mailed prior to the May 1, 2009, filing deadline. The County Board has asserted that the Assessor did not receive the filing until after August 1, 2009. Midwest asserts that the Commission should consider the tax return “mailed but not received,” as contemplated in the statute, and deem the tax return filed based upon competent evidence the tax return was deposited in the United States mail on or before May 1, 2009. As applicable to the facts at issue, § 49-1201 provides a circumstance when the tax return is deemed to have been filed, even though not received by the Assessor, if Midwest has established by competent evidence that the personal property tax return was deposited in the United States mail on or before the filing deadline. Therefore, the sole issue is whether Midwest has established by competent evidence²⁰ that its tax return was deposited in the United States mail on or before May 1, 2009.²¹

Since the evidence received by the Commission consists largely of submitted affidavits, we first consider whether averments made under oath may constitute competent evidence as contemplated in § 49-1201. In *Boyle v. Welsh*, when a party offered an affidavit to support a requisite finding in relation to a summary judgment motion, the Nebraska Supreme Court found

¹⁹ Neb. Rev. Stat. § 49-1201 (Reissue 2010).

²⁰ 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. *Black’s Law Dictionary, Seventh Edition*.

²¹ Neb. Rev. Stat. § 77-1201(Reissue 2009) and Neb. Rev. Stat. § 77-1229(1) (Reissue 2009).

that the affidavit “presented competent evidence sufficient to support” the finding.²² We find that the uses of the averments in the instant appeal are not substantially unlike the use of the affidavit in *Boyle*. In fact, the averments in the instant appeal have increased reliability in that they were submitted to the Commission under a joint stipulation of facts. We therefore find that such averments can constitute competent evidence for purposes of the requirements of § 49-1201.

1. Tax Return

For the sake of completeness, we will discuss the applicability of § 49-1201 to the facts at issue. In this regard, we must first determine whether the documents Midwest asserts were mailed constituted any of the “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,” as presented in the statute. When completing the tax filings required by § 77-1201, owners of personal property must use a form as prescribed by the Tax Commissioner.²³ Under the applicable rules and regulations, the prescribed form is identified as a tax “return,”²⁴ and as such falls under the ambit of § 49-1201 as a “tax return.” In her affidavit, dated October 15, 2009, Penny Thelen averred that she had prepared and mailed hundreds of personal property tax returns.²⁵ Thelen further averred that she had specifically prepared Midwest’s 2009 “personal property tax returns,”²⁶ and she similarly averred that she prepared Midwest’s 2009 “personal property tax return for filing.”²⁷ By these averments, we may reasonably conclude that Thelen knew what the documents were, and that they were in fact the personal property tax returns being filed for Midwest, as required by law. Therefore, we find that what Thelen averred regarding what was purported to be mailed was a “tax return” as contemplated by § 49-1201.

²² *Boyle v. Welsh*, 256 Neb. 118, 128, 589 N.W.2d 118, 126 (1999).

²³ Neb. Rev. Stat. § 77-1229(1).

²⁴ “Every person required to list taxable personal property shall file a return and supporting schedules consisting of all personal property which he or she is required to list.” 20-002.01C

²⁵ Thelen Affidavit, dated October 15, 2009, paragraph 8. Thelen Affidavit, dated June 24, 2010, paragraph 7.

²⁶ Thelen Affidavit, dated October 15, 2009, paragraphs 5-8.

²⁷ Thelen Affidavit, dated June 24, 2010, paragraph 5.

2. Required to be Filed With a Political Subdivision

In order that § 49-1201 be applicable it must also be the case that the “tax return” purported to be mailed was “required ... to be filed... to any political subdivision.” Neither party has disputed that Midwest owned tangible personal property requiring Midwest to file personal property tax returns with the political subdivision, Lincoln County, addressed to the Assessor, by May 1, 2009.²⁸

3. Mailed But Not Received

In order for § 49-1201 to be applicable, the tax return must have been “(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.” In both of her affidavits, Thelen averred that she prepared and mailed the tax return.²⁹ Mary Ann Long averred that she was the Lincoln County Assessor at the applicable time, and that “there is no record in the Lincoln County Assessor’s Office that would indicate that it received a Nebraska Personal Property Tax return for 2009 from Midwest Renewable Energy LLC” until after August 1, 2009.³⁰ In its Joint Stipulation, neither party disputed the averments made by the opposing party to any of these foregoing averments. We therefore find that the “mailed but not received” provision of § 49-1201 is applicable.

4. Deposited in the United States Mail

Having found that § 49-1201 is applicable to the facts in the instant appeal, we turn to what is primarily at issue, that is whether the tax return that was mailed but not received was “deposited in the United States mail” as required by § 49-1201. The Commission received in evidence several averments made by Penny Thelen and James Jandrain that are relevant to this question. Thelen described her responsibilities of preparing and mailing tax returns for Midwest and hundreds of other property tax returns over a period of several years.³¹ She averred that no such envelope was ever returned when following that practice.³² She also averred that she followed

²⁸ Neb. Rev. Stat. § 77-1201 (Reissue 2009) and Neb. Rev. Stat. § 77-1229(1) (Reissue 2009).

²⁹ Thelen Affidavit, dated October 15, 2009, paragraph 6. Thelen Affidavit, dated June 24, 2010, paragraph 5.

³⁰ Long Affidavit, dated June 21, 2010, paragraphs 2 and 3.

³¹ Thelen Affidavit, dated October 15, 2009, paragraph 7. Thelen Affidavit, dated June 24, 2010, paragraph 8.

³² Thelen Affidavit, dated October 15, 2009, paragraphs 6 and 7. Thelen Affidavit, dated June 24, 2010, paragraph 8.

the same practice she had followed in prior filings when preparing and mailing Midwest's tax returns for 2009.³³ Specifically, Thelen averred that she "mailed the personal property tax return by first class mail with sufficient postage affixed to: Lincoln County Assessor, 301 North Jeffers, RM110A, North Platte, NE 69101-3997."³⁴ She further averred that the same envelope included Midwest's return address, and was not returned to Midwest's offices or to her.³⁵

James G. Jandrain³⁶ averred that he had been a licensed Certified Public Accountant for 28 years,³⁷ and that he had been responsible for preparing hundreds of personal property tax returns.³⁸ He described a process of using a list for all tax returns for which he had the responsibility to file to ensure timely filing, and averred that Midwest's tax return was included on that list and shown as being mailed on April 23, 2009.³⁹ Jandrain also averred that he had personally checked that Penny Thelen had noted in a "Return Check List"⁴⁰ that she mailed Midwest's tax return to the Lincoln County Assessor and placed the envelope in the "office's outgoing mail box."⁴¹

On this point, the Court of Appeals concluded that "there was no evidence that this 'uncovered sturdy box' kept behind [Midwest's] secretary's workspace was a regular U.S. Postal Service depository,"⁴² and that Midwest "did not establish that its mailbox was an official U.S. Postal Service depository or otherwise operated in connection with the postal service,"⁴³ yet also recited evidence that "every Monday through Saturday, a U.S. postal carrier came to the office to deliver [Midwest's] mail and retrieve outgoing mail."⁴⁴ The Court of Appeals found that because Midwest "did not establish that a U.S. postal carrier picked up the mail on April 23, 2009, and placed it in a regular U.S. mail depository," Midwest's evidence only created an

³³ Thelen Affidavit, dated October 15, 2009, paragraph 7.

³⁴ Thelen Affidavit, dated October 15, 2009, paragraph 6. A similar averment is made at paragraph 5 in Thelen's Affidavit, dated June 24, 2010.

³⁵ Thelen Affidavit, dated October 15, 2009, paragraph 6. Thelen Affidavit, dated June 24, 2010, paragraph 7.

³⁶ Jandrain was a Member of Midwest Renewable Energy, LLC, was on the Board of Managers of Midwest, and was Chairman of that Board at the time he signed his Affidavit.

³⁷ Jandrain Affidavit, dated October 15, 2009, paragraph 4.

³⁸ Jandrain Affidavit, dated October 15, 2009, paragraph 6.

³⁹ Jandrain Affidavit, dated October 15, 2009, paragraph 7.

⁴⁰ Jandrain Affidavit, dated October 15, 2009, paragraph 8.

⁴¹ Thelen Affidavit, dated June 24, 2010, paragraph 5.

⁴² *Midwest Renewable Energy, LLC, v Lincoln Cty. Bd. Of Equal.*, 19 Neb.App. at 449, 807 N.W.2d at 565 (2011).

⁴³ *Midwest Renewable Energy, LLC, v Lincoln Cty. Bd. Of Equal.*, 19 Neb.App. at 450, 807 N.W.2d at 566 (2011).

⁴⁴ *Midwest Renewable Energy, LLC, v Lincoln Cty. Bd. Of Equal.*, 19 Neb.App. at 450, 807 N.W.2d at 566 (2011).

“inference of regular transmission,” a question of fact to be resolved by the Commission, and that the Commission “was not required to accept the inference.”⁴⁵

With respect to this inference, the Supreme Court has provided the rule that:

absent direct proof of actual deposit with an authorized U.S. Postal Service official or in an authorized depository, is that 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.⁴⁶

(emphasis added). Thelen described a mail box that Midwest used for outgoing mail, and that she said was used when placing Midwest’s tax returns in the mail on April 22, 2009.⁴⁷ Her undisputed description of the box and its use both by Midwest and by the U.S. Postal Service is critical to our consideration of this inference and to our determination of whether Midwest’s tax return was “deposited in the United States mail” as required by § 49-1201. Thelen further averred:

The outgoing mail box is a sturdy box located behind the secretary’s workspace, inaccessible to anyone other than the secretary and accountants in our office, and is designated solely for pickup of mail by a US Postperson. The box is approximately 5 inches deep by 20 long by 14 inches wide with no cover. Each morning from Monday through Saturday, our US Postperson comes to our office to deliver the incoming mail and pick up any outgoing mail. I do not recall any day in the past 16 years that the US Postperson failed to pick up our outgoing mail except for a major October blizzard years ago when the entire city of Omaha was basically shut down.⁴⁸

It is important to note that the process described by Thelen is to be distinguished from a business office mailing procedure where individuals place envelopes in a collection box, and then one individual (not a U.S. Postal Service mail carrier) gathers up the mail and hand delivers it to a United States mail box at another location. Midwest’s mailing procedure is quite different in this

⁴⁵ *Midwest Renewable Energy, LLC, v Lincoln Cty. Bd. Of Equal.*, 19 Neb.App. at 450, 807 N.W.2d at 566 (2011).

⁴⁶ *Houska v. City of Wahoo*, 235 Neb. 635, 641, 456 N.W.2d 750, 754 (1990).

⁴⁷ In Thelen’s Affidavits, dated October 15, 2009, paragraph 6, and dated June 24, 2010, paragraph 5, she averred she placed the envelope containing the tax return in the mailbox on April 22, 2009. In her statement to the County Board, Thelen stated that she put the envelope in the mailbox on the night of April 22, 2009. Transcript of the November 2, 2009 hearing, page 44.

⁴⁸ Thelen Affidavit, dated June 24, 2010, paragraph 6.

important respect: the United States mail carrier recognized and consistently used the sturdy box as the receptacle for all delivery to and collection of mail from Midwest's office. After collecting Midwest's mail, the United States mail carrier then placed Midwest's "outgoing mail in a regular U.S. mail depository."⁴⁹

We conclude that the actions described by Thelen and Jandrain in their averments, wherein Thelen prepared the tax return, placed it in an envelope affixed with sufficient first class mail postage and the addresses of both Midwest and the Assessor, and then placed the envelope in the box that was consistently used by both Midwest and the United States Postal Service for delivery and collection of Midwest's mail six days per week, is sufficient evidence to create the inference that the tax return was "properly addressed with sufficient postage attached and deposited." We also conclude that these actions constitute competent evidence satisfying the requirement of § 49-1201 that the tax return was "deposited in the United States mail." Therefore, we find there is sufficient competent evidence that the tax return was deposited in the United States mail.

5. Filing Date

Finally, §49-1201 also requires that the tax return be mailed "on or before the date for filing" in order to be deemed timely filed. The applicable deadline for filing was May 1, 2009.⁵⁰ Penny Thelen averred that she placed the envelope with the tax return in the mail box on the evening of April 22, 2009,⁵¹ and that the envelope was mailed on April 23, 2009.⁵² These averments were undisputed in the evidence. Further, James Jandrain's description of the process used to ensure timely filing, including a "Return Check List," as described above, is further evidence that Thelen did in fact place the tax return in the mail box on April 22, 2009.

Therefore, we find there is competent evidence that the tax return was mailed on or before the date for filing of May 1, 2009.

⁴⁹ *Houska v. City of Wahoo*, 235 Neb. at 641, 456 N.W.2d at 754.

⁵⁰ Neb. Rev. Stat. § 77-1229(1).

⁵¹ Thelen Affidavit, dated June 24, 2010, paragraph 5.

⁵² Thelen Affidavit, dated October 15, 2009, paragraph 6.

B. The Requirements of § 49-1201 have been Satisfied

We find that when Midwest placed the tax return in its mail box and it was collected by the mail carrier of the United States Postal Service on April 23, 2009, such action constituted filing⁵³ as of that same day, satisfying the requirements of § 49-1201.

CONCLUSIONS OF LAW

The Commission has considered all of the evidence received. We conclude there is competent evidence that Midwest's tax return was deposited in the United States mail on April 23, 2009, and was therefore timely filed. We conclude therefore that the decision of the Lincoln County Board of Equalization was arbitrary or unreasonable and should be vacated and reversed.

ORDER

IT IS ORDERED THAT:

1. The decision of the Lincoln County Board of Equalization ordering a 25% of tax due penalty amounting to \$58,400.44 is vacated and reversed.
2. This Order, 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 (2011 Supp.)
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.

⁵³ “[I]f the requirements of § 49-1201 are met, mailing can constitute filing.” *Midwest Renewable Energy, LLC, v Lincoln Cty. Bd. Of Equal.*, 284 Neb. at 39, 815 N.W.2d at 926 (2012).

6. This order is effective for purposes of appeal on November 21, 2012.

IT IS SO ORDERED.

Dated: November 21, 2012.

Nancy J. Salmon, Commissioner

Thomas D. Freimuth, Commissioner

SEAL

Robert W. Hotz, Commissioner

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