

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

The Scoular Company,
Appellant,

v.

Keith County Board of Equalization,
Appellee.

Case Nos: 12P 007, 12P 008 & 12P 009

Decision Reversing County Board's
Determinations for Tax Years 2010, 2011 &
2012

For the Appellant:

Sheila Lenagh, Director of Tax,
The Scoular Company,
Pro Se.

For the Appellee:

Randy Fair,
Keith County Attorney.

Heard before Commissioners Thomas D. Freimuth and Nancy J. Salmon.

I. THE SUBJECT PROPERTY

The Subject Property consists of tangible personal property located in Keith County, Nebraska. The legal description of the parcel where the Subject Property was located for tax years 2010 – 2012 is found at Exhibits 1 through Exhibit 3, respectively. The itemization of the Subject Property for tax years 2010 – 2012 is found at Exhibit 4.

II. PROCEDURAL HISTORY

The Keith County Assessor determined that the Subject Property was tangible personal property and determined the assessed value of the Subject Property was \$271,628 in Case No. 12P-007 (tax year 2010), \$516,617 in Case No. 12P-008 (tax year 2011), and \$591,216 in Case No. 12P-009 (tax year 2012). The Scoular Company (herein referred to as the "Taxpayer") protested these assessments to the Keith County Board of Equalization (herein referred to as the "County Board") and requested an assessed valuation of \$188,920 in Case No. 12P-007, \$391,321 in Case No. 12P-008, and \$338,178 in Case No. 12P-009. The County Board determined that the Subject Property was tangible personal property and determined the assessed

value of the Subject Property was \$266,072 in Case No. 12P-007 (tax year 2010), \$501,326 in Case No. 12P-008 (tax year 2011), and \$568,721 in Case No. 12P-009 (tax year 2012).¹

The Taxpayer appealed the decisions of the County Board to the Tax Equalization and Review Commission (herein referred to as the “Commission”). Prior to the hearing, the parties exchanged exhibits and submitted a Pre-Hearing Conference Report, as ordered by the Commission. The parties also stipulated to the receipt of exchanged exhibits. The Commission held consolidated hearings on June 4, 2013.

III. STANDARD OF REVIEW

The Commission’s review of the determination by a County Board of Equalization is de novo.² 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.”³

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.⁴

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.⁵ Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.⁶

¹ E1 – E3.

² 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). “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).

³ *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

⁴ *Id.*

⁵ Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

⁶ *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued.⁷ 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.⁸

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.”⁹ The commission may also “take notice of judicially cognizable facts and in 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.”¹⁰

IV. PERSONAL V. REAL PROPERTY

A. Law

Under Nebraska law, real property is defined as:

- (1) All land;
- (2) All buildings, improvements, and fixtures, except trade fixtures;
- (3) Mobile homes, cabin trailers, and similar property, not registered for highway use, which are used, or designed to be used, for residential, office, commercial, agricultural, or other similar purposes, but not including mobile homes, cabin trailers, and similar property when unoccupied and held for sale by persons engaged in the business of selling such property when such property is at the location of the business;
- (4) Mines, minerals, quarries, mineral springs and wells, oil and gas wells, overriding royalty interests, and production payments with respect to oil or gas leases; and
- (5) All privileges pertaining to real property described in subdivisions (1) through (4) of this section.”¹¹

⁷ Cf. *Josten-Wilbert Vault Co. v. Board of Equalization for Buffalo County*, 179 Neb. 415, 138 N.W.2d 641 (1965) (determination of actual value); *Lincoln Tel. and Tel. Co. v. County Bd. Of Equalization of York County*, 209 Neb. 465, 308 N.W.2d 515 (1981)(determination of equalized taxable value).

⁸ *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

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

¹⁰ Neb. Rev. Stat. §77-5016(6) (2012 Cum. Supp.).

¹¹ Neb. Rev. Stat. § 77-103 (Reissue 2009).

All real property in Nebraska subject to taxation shall be assessed as of January 1.¹² All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.¹³

[a]ctual value is the most probable price expressed in terms of money that a property will bring if exposed for sale in the open market, or in an arm's length transaction, between a willing buyer and a willing seller, both of whom are knowledgeable concerning all the uses to which the real property is adapted and for which the real property is capable of being used. In analyzing the uses and restrictions applicable to real property the analysis shall include a full description of the physical characteristics of the real property and an identification of the property rights valued.¹⁴

"Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach using the guidelines in section 77-1371, (2) income approach, and (3) cost approach."¹⁵ "Actual value, market value, and fair market value mean exactly the same thing."¹⁶ Taxable value is the percentage of actual value subject to taxation as directed by section 77-201 of Nebraska Statutes and has the same meaning as assessed value.¹⁷

Tangible personal property is a distinct class of property that shall be valued at its net book value.¹⁸ The test for determining whether property qualifies as tangible personal property for ad valorem tax purposes is contained in Nebraska Statute §77-105 and is not the three-part *Northern Natural* test.¹⁹

The term tangible personal property includes all personal property possessing a physical existence, excluding money. The term tangible personal property also includes trade fixtures, which means machinery and equipment, regardless of the degree of attachment to real property, used directly in commercial, manufacturing, or processing activities conducted on real property, regardless of whether the real property is owned or leased, and all depreciable tangible personal property described in subsection (9) of section 77-202 used in the generation of electricity using wind as the fuel source. The term intangible personal property includes all other personal property, including money.²⁰

¹² See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009).

¹³ Neb. Rev. Stat. §77-201(1) (Reissue 2009).

¹⁴ Neb. Rev. Stat. §77-112 (Reissue 2009).

¹⁵ Neb. Rev. Stat. §77-112 (Reissue 2009).

¹⁶ *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb. App. 171, 180, 645 N.W.2d 821, 829 (2002).

¹⁷ Neb. Rev. Stat. §77-131 (Reissue 2009).

¹⁸ Neb. Rev. Stat. §77-201(5) (Reissue 2009).

¹⁹ *Vandenberg v. Butler County Board of Equalization*, 796 N.W.2d 580, 584, 281 Neb. 437, 442 (2011).

²⁰ Neb. Rev. Stat. 77-105 (Reissue 2009).

B. Summary of the Evidence

The Subject Property at issue in the above-captioned appeals for tax years 2010 – 2012 is located at the Taxpayer's facility in Paxton, Nebraska.²¹ The Taxpayer provided an itemization of the property in question for each tax year that includes a side-by-side comparison of the net book taxable value calculations by the Taxpayer and the County for tax years 2010 – 2012.²²

Sheila Lenagh, the Taxpayer's Director of Tax, testified at the hearing before the Commission. Based on her testimony and the documentary evidence received at the hearing, the Taxpayer asserts that the County overvalued its personal property for tax years 2010 – 2012 for the following reasons: (1) the County failed to use the correct recovery period for purposes of calculating net book value due to mischaracterization of the Taxpayer's business as an agricultural service rather than a wholesaler or distributor; (2) the County erroneously treated the Taxpayer's Overhead Tank as personal property; (3) the County erroneously treated the Taxpayer's GA Screen and Tarp as personal property because these assets have a useful life of less than one year and are consequently non-depreciable; and (4) the County failed to adjust for property that becomes depreciable in a year other than the year it is acquired.

The Taxpayer asserts that the correct valuation of its personal property is as follows: (1) \$188,921 for tax year 2010; (2) \$381,856 for tax year 2011; and (3) \$379,942 for tax year 2012.²³ The Taxpayer also asserts that the Commission should waive penalties imposed by the County for late filing of its personal property tax returns for tax years 2010 – 2012. In support of this assertion, the Taxpayer cited uncertainty relating to the definition of real versus personal property in the aftermath of the enactment of Nebraska Statutes section 77-105 in 2007.

Cheryl Shiel, the Keith County Assessor, testified on behalf of the County Board. She stated that the Taxpayer did not file full disclosure personal property tax returns for tax years 2010 – 2012 until mid-2012.²⁴ She also stated that the County's recovery periods were derived in part from a review of personal property tax returns filed by the Taxpayer in Dodge County, Lincoln County and Phelps County.

²¹ See, E4:10.

²² E9:2 (2010); E9:12 (2011); and E9:24 (2012).

²³ E9:2 (2010); E9:12 (2011); E9:24 (2012).

²⁴ See, E4:2 (2010 tax year amended return filed 8/7/2012); E4:5 (2011 tax year amended return filed 7/30/2012); E4:10 (2012 tax year amended return filed 7/30/2012).

C. Analysis – Recovery Period

Nebraska taxes the net book value of personal property.²⁵ Under Nebraska Statutes section 77-120(1), net book value is defined as "that portion of the Nebraska adjusted basis of the property as of the assessment date for the applicable recovery period." For purposes of Nebraska Statutes section 77-120(1), the term "Nebraska adjusted basis" is defined as "the adjusted basis of property as determined under the Internal Revenue Code increased by the total amount allowed under the code for depreciation and amortization or pursuant to an election to expense depreciable property under section 179 of the code."²⁶

In order to arrive at net book value, Nebraska Statutes section 77-120(1) through (3) requires the assignment of a class life to the property, together with a recovery period and a Nebraska book depreciation factor. The class life is based on the "anticipated useful life" as determined under the Internal Revenue Code ("IRC").²⁷

Under Nebraska Statutes section 77-120 (2), five-year recovery period property includes property with a class life of more than four years and less than ten years; seven-year recovery period property includes property with a class life of ten or more but less than sixteen years; and ten-year recovery period property includes property with a class life of sixteen years or more but less than twenty years.

The Internal Revenue Service ("IRS") has issued guidance concerning class lives and recovery periods in Publication 946. The Commission received in evidence an excerpt of IRS Publication 946 for tax year 2012, including "Appendix B – Table of Class Lives and Recovery Periods."²⁸

For purposes of determining class lives and recovery periods for tangible personal property, IRS Publication 946 establishes two categories of depreciable assets: (1) asset classes 00.11 – 00.4, which consist of specific assets used in all business activities (Table B-1 - "asset categories"); and (2) asset classes 01.1 through 80.0, which consist of assets used in specific business activities (Table B-2 - "activity categories").²⁹

²⁵ Neb. Rev. Stat. §77-120(1) (Reissue 2009).

²⁶ Neb. Rev. Stat. §77-118 (Reissue 2009).

²⁷ Neb. Rev. Stat. §77-120(3) (Reissue 2009).

²⁸ E9:36 – E9:39.

²⁹ E9:37 – E9:39.

Table B-1 of IRS Publication 946 received in evidence by the Commission does not include guidance concerning the Taxpayer's depreciable assets.³⁰ Table B-2, however, references "Agriculture" under classification 01.1 (10-year class life, which equates to a 7-year recovery period under Nebraska Statutes section 77-120(2)(c)), and "Distributive Trades and Services" under classification 57 (9-year class life, which equates to a 5-year recovery period under Nebraska Statutes section 77-120(2)(b)).³¹

The Taxpayer and the County Board agree that the Tarp is subject to a five-year recovery period for tax year 2012.³² The County Board, however, asserts that the Taxpayer's primary business activity involves agriculture, thereby subjecting its other depreciable assets to at least a seven-year recovery period under asset class 01.1 of IRS Publication 946 Table B-2.

In contrast, the Taxpayer asserts that all of its depreciable assets qualify under the five-year recovery period set forth by asset class 57 of Table B-2 because it is engaged in the primary activity of wholesaling agricultural commodities.³³ In support of this assertion, the Taxpayer submitted documentation issued by the U.S. Census Bureau entitled "North American Industry Classification System."³⁴

For purposes of determining proper asset classification under Table B-2, the pertinent IRC regulation that governs Publication 946 focuses on the "primary activity" in which the property is used.³⁵ In this regard, the regulation states as follows: "[p]roperty shall be classified according to primary use even though the activity in which such property is primarily used is insubstantial in relation to all the Taxpayer's activities."³⁶

The United States Tax Court addressed the appropriate class life for depreciable assets associated with a grain elevator operation in *Illinois Cereal Mills, Inc. v. Commissioner of Internal Revenue*.³⁷ *Cereal Mills* involved the acquisition and subsequent operation of a country grain elevator by a large corn milling company.³⁸ The grain elevator, like Scoular, stored grain, dried grain and sold grain on the market for producers.³⁹ The Tax Court held that the grain

³⁰ E9:37.

³¹ E9:38 – E9:39.

³² See, E9:24 (2012 tax year side-by-side comparison, assuming that the Tarp is deemed to be personal property); (as indicated on the side-by-side comparisons at E9:2 (2010) and E9:12 (2011), the Tarp is not listed as an asset for tax years 2010 and 2011).

³³ E9:39.

³⁴ E9:40 – E9:44.

³⁵ 26 CFR 1.167(a)-11(b) (4) (iii) (b).

³⁶ 26 CFR 1.167(a)-11(b) (4) (iii) (b).

³⁷ 46 T.C.M. 1001 (1983).

³⁸ *Id.* at 1017.

³⁹ *Id.*

storage tanks associated with the elevator operation were used in the production of crops or to provide an agricultural service and were therefore properly included in asset class 01.1.⁴⁰

Significantly, despite the fact that Cereal Mills purchased a large percentage of the grain for use in its manufacturing processes, the Tax Court looked only to the activity associated with the use of the grain storage tanks.⁴¹ Because the storing and drying of grain involved an activity that a farmer could duplicate in the case where the farm included the necessary assets to perform such services, the Tax Court reasoned that the activity associated with the grain storage tanks was necessarily connected to the production of crops or the agricultural services within the meaning of asset class 01.1.⁴²

With the exception of the Tarp that is itemized only for tax year 2012, the evidence indicates that the Taxpayer utilized all of the personal property identified in its asset schedules for tax years 2010 - 2012 for purposes of providing agricultural services to farmers. Thus, consistent with the reasoning in *Cereal Mills*, because Scoular's primary use of the personal property subject to appeal herein is to provide agricultural services, the Commission finds that the Subject Property other than the Tarp has a ten-year class life under asset class 01.1 of IRS Publication 946 Table B-2.

Under Nebraska Statutes section 77-120(2)(c), seven-year recovery period property includes property with a class life of ten or more but less than sixteen years. Thus, with exception of the Tarp, the Commission finds that all of the Taxpayer's personal property is subject to a seven-year recovery period for tax years 2010 – 2012.

D. Analysis – Overhead Tank: Real vs. Personal Property

The Taxpayer asserts that the Overhead Tank depicted in the photograph found at page 1 of Exhibit 5 is real property. Thus, the Taxpayer asserts that the Overhead Tank should not be taxed as personal property.

The definition of real property is controlled by Nebraska Statutes section 77-103.⁴³ Personal property and trade fixtures are defined at Nebraska Statutes section 77-105.⁴⁴ Nebraska Statutes

⁴⁰ *Id.* at 1031.

⁴¹ *Id.* at 1030 – 1031.

⁴² *Id.*

⁴³ Neb. Rev. Stat. §77-103 (Reissue 2009).

⁴⁴ See, Neb. Rev. Stat. §77-105 (Cum. Supp. 2012); *Vandenberg v. Butler County Board of Equalization*, 281 Neb. 437, 796 N.W.2d 580 (2011).

section 77-103(2) specifically states that trade fixtures are not real property. While the degree of attachment to the real property is a generally accepted factor in determining whether an item is personal property in other jurisdictions, Nebraska Statutes define trade fixtures as items of personal property regardless of the degree of attachment of the item.⁴⁵

Nebraska Statutes section 77-105 includes trade fixtures within the definition of personal property. Nebraska Statutes section 77-105 also defines a trade fixture as follows: “machinery and equipment, regardless of the degree of attachment to real property, used directly in commercial, manufacturing, or processing activities conducted on real property, regardless of whether real property is owned or leased.” Whether property is real or personal, therefore, will depend on whether it is: (1) machinery or equipment; and (2) used directly in commercial, manufacturing or processing activities.⁴⁶

Machinery means “[a]n assemblage of parts that are usu. solid bodies but include in some cases fluid bodies or electricity in conductors and that transmit forces, motion, and energy on to another in some predetermined manner and to some desired end.”⁴⁷ The Nebraska Department of Revenue’s Property Assessment Division issued Directive 11-5 (herein referred to as “NDR Directive 11-5”) on August 16, 2011, which states that “[e]quipment is a tool used for the performance of some operation.” NDR Directive 11-5 illustrates this definition of the word “equipment” by explaining that a pipe could be considered machinery or equipment because it is used to transport water from one location to another. Thus, the commonly accepted definitions of machinery or equipment involve (1) the transmission of motion, energy or forces in some predetermined manner; (2) the modification of the application of force, power, or motion; and (3) implements or objects used to conduct processing work.

The term “commercial activity” is not defined by the Nebraska Statutes for purposes of determining whether property is a trade fixture under Nebraska Statutes section 77-105. In *Vandenberg v. Butler County Board of Equalization*, however, the Nebraska Supreme Court determined that a for-profit activity met the “commercial activity” requirement under Nebraska Statutes section 77-105.⁴⁸

⁴⁵ Neb. Rev. Stat. §77-105 (Cum. Supp. 2012); See, *Vandenberg v. Butler County Board of Equalization*, 281 Neb. 437, 796 N.W.2d 580 (2011).

⁴⁶ See, Nebraska Department of Revenue Directive 11-5 (issued August 16, 2011).

⁴⁷ Webster’s Third New International Dictionary, Merriam-Webster, Inc., (2002) p. 1353. See, Department of Revenue Directive 11-5 (August 16, 2011).

⁴⁸ *Vandenberg v. Butler County Board of Equalization*, 281 Neb. 437, 796 N.W.2d 580 (2011) (citing Title 350 Neb. Admin. Code, ch. 14, § 002.58 (2009)).

Use “directly” in a commercial activity is the final requirement for purposes of determining whether an asset meets the definition of a trade fixture under Nebraska Statutes section 77-105. NDR Directive 11-5 issued in 2011 states as follows with respect to this requirement:

The final consideration is whether the item is being used directly in the commercial, manufacturing, or processing activities. “Directly” means that the machinery or equipment item is in immediate use for the commercial, manufacturing, or processing activities, without any intervening application. The example of the underground pipe used to irrigate agricultural or horticultural land is a trade fixture and is tangible personal property for property assessment purposes. Underground pipe used in a lawn sprinkler system is considered real property since it is not being used directly in a commercial, manufacturing, or processing activity. An exception would be if the lawn sprinkler system was being used by a sod farm, or for demonstration purposes by a sprinkler system installer.⁴⁹

Based on a review of the photograph of the Overhead Tank found at page 1 of Exhibit 5, the evidence shows that the Taxpayer uses this asset to transfer grain from its storage facility to trucks for commercial purposes. Thus, the Commission finds that the Overhead Tank is “machinery” or “equipment” within the meaning of Nebraska Statutes section 77-105 because it is an amalgam of parts that works to move grain as a part of the Taxpayer’s commercial operations.

With respect to whether the Overhead Tank was used “directly” in a “commercial activity” within the meaning of Nebraska Statutes section 77-105, the Commission notes that the Taxpayer engages in the business of grain storage and the transfer of grain to available transportation for shipment to purchasers. Thus, for the reason that this is a for-profit business within the meaning of the *Vandenberg* case noted above, the Commission finds that the Overhead Tank is an item of machinery or equipment directly used in a commercial activity and is therefore a trade fixture taxable as personal property under Nebraska Statutes section 77-105.

E. Analysis – GA Screen & Tarp: Whether Taxable Depreciable Assets

The Taxpayer asserts that the GA Screen and the Tarp have useful lives of less than one year and therefore do not qualify as depreciable tangible personal property. Consequently, the

⁴⁹ Nebraska Department of Revenue Property Assessment Division Directive 11-5 (August 16, 2011).

Taxpayer asserts that these assets are exempt from personal property tax under Nebraska Statutes.

Nebraska Statutes section 77–202 (3) states that “[t]angible personal property which is not depreciable tangible personal property as defined in section 77–119 shall be exempt from property tax.”⁵⁰ Nebraska Statutes section 77–119 states that “[d]epreciable tangible personal property shall mean tangible personal property which is used in a trade or business or used for the production of income and which has a determinable life of longer than one year.”

The Taxpayer’s evidence regarding the useful life of the GA Screen and the Tarp is limited. The Taxpayer’s Director of Tax testified that the company considers the property to have a useful life of less than one year.

The County asserts that the GA Screen and Tarp each have a useful life exceeding one year and are therefore subject to Nebraska personal property tax. In support of this assertion, the County noted that the amended personal property returns filed by the Taxpayer provide that the GA Screen and the Tarp each have a useful life of five years.⁵¹ The County also noted that the Taxpayer’s federal income tax return for 2011 included the GA Screen and Tarp as depreciable assets, which requires a useful life exceeding one year.⁵²

For analysis purposes, it is instructive to review the treatment of the term “useful life” under the Internal Revenue Code for the reason that the Nebraska Statutes rely thereon in substantial part in the personal property tax area.⁵³ IRC § 167 governs depreciation under the Internal Revenue Code, and the IRC Regulations relating to that statute state as follows regarding the definition of “useful life:”

For the purpose of section 167 the estimated useful life of an asset is not necessarily the useful life inherent in the asset but is the period over which the asset may reasonably be expected to be useful to the taxpayer in his trade or business or in the production of his income. This period shall be determined by reference to his experience with similar property taking into account present conditions and probable future developments. Some of the factors to be considered in determining this period are (1) wear and tear and decay or decline from natural causes, (2) the normal progress of the art, economic changes, inventions, and current developments within the industry and the taxpayer's trade or business, (3) the climatic and other

⁵⁰ Neb. Rev. Stat. §77-202(3) (2012 Cum. Supp.).

⁵¹ See, E4:6 & E4:11.

⁵² See, E9:52.

⁵³ See, Neb. Rev. Stat. §77-118 (Reissue 2009) (“Nebraska adjusted basis shall mean the adjusted basis of property as determined under the in Internal Revenue Code.”).

local conditions peculiar to the taxpayer's trade or business, and (4) the taxpayer's policy as to repairs, renewals, and replacements.⁵⁴

The Taxpayer did not provide sufficient evidence to establish the useful life of the GA Screen and the Tarp. The Taxpayer acquired the GA Screen in 2010 for \$11,135 and the Tarp for \$21,608 in 2011.⁵⁵ The Taxpayer did not provide clear evidence regarding the company's general policy concerning the useful life of these assets. Additionally, the Taxpayer offered no evidence demonstrating that either the GA Screen or the Tarp was in fact replaced within one year of use. Thus, the Commission finds that the acquisition cost of the GA Screen and the Tarp must be capitalized and taxed as personal property.

F. Analysis –Depreciation Factor for Assets Placed in Service After Acquisition Year

The Taxpayer placed the Corn Hog Drive and the Radial Stacker in service in tax year 2011 after purchasing these assets in September 2010.⁵⁶ The Taxpayer asserts that these assets are subject to the year-two depreciation factor contained in the Nebraska Statutes and Personal Property Regulations for the first taxable year rather than the higher year-one depreciation factor.⁵⁷

Section 001.06A of the Nebraska Personal Property Regulations provides that “[w]hen property becomes depreciable in a year other than the year it is acquired, it shall be subject to taxation on the first assessment date following the date it became depreciable. The net book depreciation factor for such property shall be based on the year acquired.”⁵⁸ The Nebraska Personal Property Regulations further provide that property becomes depreciable in the year placed in service.⁵⁹ Thus, under the Nebraska Personal Property Regulations, the assets that the Taxpayer acquired in 2010 and placed in service in 2011 were subject to taxation on January 1, 2012.

⁵⁴ 26 CFR 1.167(a)-1(b).

⁵⁵ E9:52.

⁵⁶ See, E9:53 (receipt regarding the September 2010 purchase of the Corn Hog Drive and the Radial Stacker). Acquisition in 2010 and placement in service in 2011 subjects these assets to personal property tax in tax year 2012.

⁵⁷ See, Neb. Rev. Stat. §77-118 (Reissue 2009), Title 350 Neb. Admin. Code, ch. 20, § 001.06A (2009).

⁵⁸ Title 350 Neb. Admin. Code, ch. 20, § 001.06A (2009).

⁵⁹ See, Neb. Rev. Stat. §77-119 (Reissue 2009); Title 350 Neb. Admin. Code, ch. 20, § 001.02 (2009); IRC 167(a)(1)-(2); 26 CFR 1.167(a)-10(b) (“The period for depreciation of an asset shall begin when the asset is placed in service”); 26 CFR 1.167(a)-11(e)(1)(i) (an asset has been placed in service when it is in a “condition or state of readiness and availability for a specifically assigned function”); *Brown v. Commissioner of Internal Revenue*, T.C. Summary Opinion 2009-171 (U.S. Tax Court 2009).

The Taxpayer asserts that the phrase “the net book depreciation factor for such property shall be based on the year acquired” means that the year-two depreciation factor for property acquired in 2010 but not subject to tax until tax year 2012 is applicable, thereby effectively voiding application of the year-one depreciation factor.⁶⁰ The County, on the other hand, asserts that the year-one depreciation factor should apply in order to prevent the Taxpayer from avoiding a year of taxation.

The Commission is mindful that avoidance of the use of the year-one depreciation factor effectively converts the seven-year property at issue to six-year property and thereby enables the Taxpayer to avoid a year of taxation. Under the plain reading of Section 001.06A of the Nebraska Personal Property Regulations, however, the yearly depreciation factors set forth in Nebraska Statutes section 77-120 and Section 001.06 relate back to the year of acquisition rather than the year placed in service.

Language contained in a rule or regulation is to be given its plain and ordinary meaning. An appellate court will not resort to interpretation to ascertain the meaning of words in a rule or regulation which is plain, direct, and unambiguous.⁶¹

Based on the above analysis, the Commission finds that the depreciation factor for the Taxpayer’s assets placed in service in a year after the date of acquisition is determined by reference to the year of acquisition rather than the year of service. Thus, the Commission further finds that the Taxpayer’s assets purchased in 2010 and placed in service in 2011 are subject to the 70.16 year-two depreciation factor for tax year 2012.

G. Analysis –Penalties

The Taxpayer also asserts that it should not be subject to late-filing penalties for tax years 2010 – 2012 due to the uncertainty surrounding the distinction between real and personal property in the aftermath of the passage of Nebraska Statutes section 77-105 in 2007. Under Nebraska Statutes section 77-1233.04(3), any personal property valuation added to a personal property return between May 1 and July 31 of the year in which filing is required is subject to a

⁶⁰ In support of this assertion, the Taxpayer offered a document that was received by the Commission (E9:55) entitled “NE Dept. of Property Assessment & Taxation Personal Property Taxation Summary as of 6-28–2010.” This document states that in the case were “a Taxpayer acquires an item (title and possession) in one year but the item does not become “depreciable” (and thus taxable) until a year later, we still use the year acquired for determining the personal property tax value.”

⁶¹ *Vinci v. Nebraska Dept. of Correctional Services*, 253 Neb. 423, 434-435, 571 N.W.2d 53, 61 (1997) (Citations omitted).

10% penalty based on the tax due.⁶² Under Nebraska Statutes section 77-1233.04(4), any valuation added to a personal property return after August 1 of the year in which filing is required is subject to a 25% penalty based on the tax due.⁶³

Nebraska Statutes section 77-1233.06(2) permits appeals of penalties imposed under Nebraska Statutes sections 77-1233.04(3) and 77-1233.04(4).⁶⁴ Under Nebraska Statutes section 77-1233.06(3), however, appeal rights are limited as follows: “[t]he county board of equalization shall have no authority to waive or reduce any penalty which was correctly imposed and calculated.”⁶⁵

The Taxpayer does not assert that the penalties assessed by the County for tax years 2010 – 2012 were incorrectly imposed or calculated. Rather, the Taxpayer asserts that penalties for tax years 2010 – 2012 should not be imposed due to uncertainty relating to the application of a statute enacted in 2007 regarding the distinction between real and personal property.

The Taxpayer’s request for relief from personal property tax return late-filing penalties sounds in equity. The Nebraska Supreme Court has held that the Commission does not have equity powers.⁶⁶

V. CONCLUSION

The Commission finds that the Taxpayer has provided competent evidence to rebut the presumption that the County Board faithfully performed its duties and had sufficient competent evidence to make its determinations. The Commission also finds that the Taxpayer has provided clear and convincing evidence that the County Board’s determinations were arbitrary or unreasonable for tax years 2010 - 2012.

For all of the reasons set forth above, the 2010 – 2012 tax year decisions of the County Board are Vacated and Reversed. Based on this conclusion, following are the findings of the Commission with respect to the valuation of each item of personal property for tax years 2010 – 2012:

⁶² Neb. Rev. Stat. §77-1233.04(3) (2013 Supp.).

⁶³ Neb. Rev. Stat. §77-1233.04(4) (2013 Supp.).

⁶⁴ Neb. Rev. Stat. §77-1233.06(2) (2013 Supp.).

⁶⁵ Neb. Rev. Stat. §77-1233.06(3) (2013 Supp.).

⁶⁶ *Creighton St. Joseph Regional Hosp. v. Nebraska Tax Equalization and Review Com'n*, 260 Neb. 905, 921, 620 N.W.2d 90,102 (2000).

TAX YEAR 2010

Property	Year Acquired/Service Year	NE Adjusted Basis	Recovery Period	Depreciation Factor	Net Book Value
Grain Leg	2009/2009	\$147,084	7	0.8929	\$131,331
Leg Tower	2009/2009	\$75,175	7	0.8929	\$67,124
Meridian Overhead Tank	2009/2009	\$63,665	7	0.8929	\$56,846
TOTAL					\$255,301

TAX YEAR 2011

Property	Year Acquired/Service Year	NE Adjusted Basis	Recovery Period	Depreciation Factor	Net Book Value
Grain Leg	2009/2009	\$147,084.00	7	0.7016	103,194
Leg Tower	2009/2009	\$75,175.00	7	0.7016	52,743
Meridian Overhead Tank	2009/2009	\$63,665.00	7	0.7016	44,667
Receiving Drag	2010/2010	\$85,300.00	7	0.8929	76,164
Reclaim Conveyor	2010/2010	\$151,055.00	7	0.8929	134,877
Grain Probe	2010/2010	\$22,540.00	7	0.8929	20,126
Intercom/Camera	2010/2010	\$34,766.00	7	0.8929	31,043
GA Screen	2010/2010	\$11,135.00	7	0.8929	9,942
TOTAL					472,756

TAX YEAR 2012

Property	Year Acquired/Service Year	NE Adjusted Basis	Recovery Period	Depreciation Factor	Net Book Value
Grain Leg	2009/2009	\$147,084.00	7	0.5513	\$81,087
Leg Tower	2009/2009	\$75,175.00	7	0.5513	\$41,444
Meridian Overhead Tank	2009/2009	\$63,665.00	7	0.5513	\$35,099
Receiving Drag	2010/2010	\$85,300.00	7	0.7016	\$59,846
Reclaim Conveyor	2010/2010	\$151,055.00	7	0.7016	\$105,980
Grain Probe	2010/2010	\$22,540.00	7	0.7016	\$15,814
Intercom/Camera	2010/2010	\$34,766.00	7	0.7016	\$24,392
GA Screen	2010/2010	\$11,135.00	7	0.7016	\$7,812
Radial Stacker	2010/2011	\$43,361.00	7	0.7016	\$30,422
Corn Hog Drive	2010/2011	\$33,760.00	7	0.7016	\$23,686
Tarp	2011/2011	\$21,608.00	5	0.85	\$18,367
24' Axial Aeration	2011/2011	\$43,443.00	7	0.8929	\$38,790
PVC Papi, Fans, Elec	2011/2011	\$35,093.00	7	0.8929	\$31,335
TOTAL					\$514,074

VI. ORDER

IT IS ORDERED THAT:

1. The Decisions of the Keith County Board of Equalization determining the value of the Subject Property for tax years 2010, 2011, and 2012 are Vacated and Reversed.
2. That the Subject Property is Tangible Personal Property.

3. That the Assessed value of the Subject Property for tax year 2010 is: \$255,301.
4. That the Assessed value of the Subject Property for tax year 2011 is: \$472,756.
5. That the Assessed value of the Subject Property for tax year 2012 is: \$514,074.
6. This decision and order, if no appeal is timely filed, shall be certified to the Keith County Treasurer and the Keith County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (2012 Cum. Supp.)
7. Any request for relief, by any party, which is not specifically provided for by this order is denied.
8. Each Party is to bear its own costs in this proceeding.
9. This decision shall only be applicable to tax years 2010 - 2012.
10. This order is effective for purposes of appeal on August 29, 2014.

Signed and Sealed: August 29, 2014.

Thomas D. Freimuth, 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.), other provisions of Nebraska Statute and Court Rules.