BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Doug Ewald, Tax Commissioner & Ruth Sorenson, Property Tax Administrator,
Appellants,

v.

Keith County Board of Equalization & Central Nebraska Public Power and Irrigation District,
Appellees,

Case No: 11E-005 - 11E-017

Decision and Order Affirming the County Board of Equalization's Determination that the Subject Property Should Not be Individually Assessed Property Tax

For the Appellants:

Jonathan D. Cannon,
Nebraska Department of Revenue

For the Appellee Keith County Board of Equalization:
Randy Fair,
Keith County Attorney

For the Appellee Central Nebraska Public Power and Irrigation District:
Charles D. Brewster,
Anderson, Klein, Swan & Brewster

These appeals were heard before Commissioners Robert W. Hotz and Nancy J. Salmon.

I. THE SUBJECT PROPERTY

The Subject Property consists of several parcels containing residential and commercial improvements on leased public land, commonly known as the K1 Properties located at Lake McConaughy, in Keith County, Nebraska. The parcels are owned by Central Nebraska Public Power and Irrigation District (Central), a political subdivision organized primarily to provide irrigation and electricity. The legal descriptions of the parcels are found at Exhibit 1. The property record cards for the Subject Properties are found at Exhibits 15-27.

II. PROCEDURAL HISTORY

Despite the fact that Central has made an annual in lieu of tax payment per Nebraska Constitution, Article VIII, Section 11 and Nebraska Statutes §§70-651.01-70-651.05 the

Department of Revenue, Property Assessment Division, Ruth Sorensen, Property Tax Administrator, sent Central a "Notice of Taxable Status," that as the State Assessment Office for Keith County, the Property Assessment Division had determined that the Subject Properties were subject to property taxation for tax year 2011.[1] The notice stated that the Subject Properties were not exempt from property taxation because Central was not using them or developing them for use by the state or by a governmental subdivision for a public purpose.[2] Central filed a protest with the Keith County Board of Equalization (County Board) on March 24, 2011.[3] On April 27, 2011, the County Board heard protests concerning the Subject Properties and in all cases took action to approve the protests and "not tax the land."[4] On June 1, 2011, the Property Tax Administrator and Tax Commissioner jointly filed appeals of the determinations of the County Board with the Tax Equalization and Review Commission (Commission).[5]

On June 27, 2011, the Commission sent Notice of Appeal to the County Board, Central, and the Tax Commissioner and Property Tax Administrator as required by Nebraska Statute. The Commission held a hearing on June 28, 2012.

III. STANDARD OF REVIEW

The Commission's review of the determination of the County Board is de novo.[6] 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."[7]

> 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

[1] Exhibit 49
[2] *Id*.
[3] Exhibits 1-13.
[4] *Id*.
[5] E:1-13. The Decision of the County Board in each protest, as indicated on the Property Valuation Protest Form 422, was as follows: "The Board recommends approving Central's protests and not tax the land."
[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). "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).
[7] *Brenner v. Banner Cty. Bd. Of Equal*., 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board.[8]

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.[9] Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.[10]

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."[11] 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."[12]

IV. PAYMENT IN LIEU OF TAXES

The Nebraska Constitution Article VIII, Section 11 states, in part:

> Every public corporation and political subdivision organized primarily to provide electricity or irrigation and electricity shall annually make the same payments in lieu of taxes as it made in 1957, which payments shall be allocated in the same proportion to the same public bodies or their successors as they were in 1957.
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> …
>
> The payments in lieu of tax as made in 1957, together with any payments made as authorized in this section ***shall be in lieu of all other taxes***… (emphasis added).

It is uncontested that Central is a political subdivision organized primarily for the production of irrigation and electricity and that Central has made annual payments in lieu of taxes as required by Article VIII, Section 11 of the Nebraska Constitution. [13]

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[8] *Id.*
[9] Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).
[10] *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).
[11] Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).
[12] Neb. Rev. Stat. §77-5016(6) (2012 Cum. Supp.).
[13] Black's Law Dictionary defines the term in lieu of as, "Instead of or in place of; in exchange or return for." Black's Law Dictionary, Seventh Edition. As is particularly applicable in these appeals, in lieu of tax means "a payment received as substitute for a property tax." 350 Neb. Admin. Chapter 10, § 002.01.

The Appellants assert that the Nebraska Constitution, Article VIII, Section 2 is controlling in this situation. That Section states, in relevant part:

> Notwithstanding Article I, section 16, Article III, section 18, or Article VIII, section 1 or 4, of this Constitution or any other provision of this Constitution to the contrary: (1) The property of the state and its governmental subdivisions shall constitute a separate class of property and shall be exempt from taxation to the extent such property is used by the state or governmental subdivision for public purposes authorized to the state or governmental subdivision by this Constitution or the Legislature. To the extent such property is not used for the authorized public purposes, the Legislature may classify such property, exempt such classes, and impose or authorize some or all of such property to be subject to property taxes or payments in lieu of property taxes except as provided by law; … .

The Appellants assert that read together, Article VIII, Sections 2 and 11 authorize the taxation of the property owned by Central that is not used for a public purpose in addition to an annual in lieu of tax payment. We disagree. The Appellants assert that because Article VIII, Section 2 begins with the word "notwithstanding," Article VIII, Section 2 somehow trumps Article VIII, Section 11, and that because subsection (1) of Article VIII, Section 2 implements a public purpose test, the issue before the Commission is whether the current use of the Subject Properties fits this public purpose test. The Appellants argue that, "the Legislature intended public power districts to pay both an in lieu of tax on property held by them and for leased public property not being used for a public purpose to be subject to taxation as if owned by the leaseholder." (emphasis added).[14]

Central's annual in lieu of tax payments are required to be made in an amount equivalent to the payments made in 1957, plus that portion of 5% of gross revenue of retail sales of electricity which exceeds the 1957 payment in lieu of taxes, as authorized by Article VIII, Section 11 and required by Nebraska Statutes §70-651.03. It is important to note that these payments are in lieu of "all other taxes" per Article VIII, Section 11, and Nebraska Statutes §70-651.05 and that the payments relate only to gross revenues received by Central from retail sales of electricity.[15] Central's annual in lieu of tax payments are not based upon any ad valorem property tax scheme. Rather, the annual payments are made instead of or in place of "all other

[14] Appellant's Reply Brief, page 8. We find there is a very important distinction between property "not subject to taxation" and property which is subject to taxation but for which a payment is received "instead of or in place of" a property tax payment. To be exempt from taxes means to not be subject to taxation. *Hanson v. City of Omaha*, 154 Neb. 72, 46 N.W.2d 896 (1951). The Property Assessment Division's rules and regulations define exempt property: "[e]xempt shall mean real property that receives a property tax exemption pursuant to Neb. Rev. Stat. Section 77-202 (1) (a) (b) (c) (d). See, Property Tax Exemption Regulations, Chapter 40." 350 Neb. Admin. Chapter 10, § 001.05G.

[15] Neb. Rev. Stat. §70-651.03.

taxes." Therefore, the Commission finds that the term "all other taxes" in Article VIII, Section 11, includes property taxes within its scope, and that by its plain language does not authorize any property tax obligation in addition to the annual in lieu of tax payment.

The Commission finds that Article VIII, Section 2(1), is consistent and harmonious with Article VIII, Section 11, when it says:

> To the extent such property is not used for the authorized public purposes, the Legislature may classify such property, exempt such classes, and impose or authorize some or all of such property to be subject to property taxes or payments in lieu of property taxes except as provided by law[.]

(emphasis added). In other words, while the first sentence establishes a general public purpose test, the second sentence nevertheless specifically limits the ability of the Legislature to impose or authorize property taxes or further payments in lieu of property taxes to those instances as provided by law. And Article VIII, Section 11 states that the obligation for "all other taxes" is to be included in the annual in lieu of tax payment.

Even though the Appellants assert that the applicable issue in these appeals is the use of the Subject Properties, and in spite of the characterizations of this appeal as an exemption case, the Commission finds from the foregoing that the applicable issue is the payment made in lieu of taxes pursuant to Article VIII, Section 11, when the real property is owned by a political subdivision primarily organized to provide irrigation and electricity.

The Commission finds that under Article VIII, Section 11, it is clear that Central is not liable for additional tax obligations for real property in these appeals, but that any such tax obligation is included in the annual payment in lieu of taxes made by Central.

V. CONCLUSION

The Commission finds that there is not competent evidence to rebut the presumption that the County Board faithfully performed its duties and had sufficient competent evidence to make its determination. The Commission also finds that there is not clear and convincing evidence that the County Board's decision was arbitrary or unreasonable.

For all of the reasons set forth above, the appeals of the Tax Commissioner and Property Tax Administrator are denied and the Commission affirms the County Board's determination that the

Subject Properties should not be taxed. What is not at issue in these appeals, and what we do not address in this decision and order, is the value of the improvements on the leased public property or any related leasehold values.

VI. ORDER

IT IS ORDERED THAT:

1. The decision of the Keith County Board of Equalization determining that there should be no separate property tax obligation for the Subject Properties for tax year 2011 is affirmed. [16]
2. There should be no assessed value of the Subject Property for tax year 2011; any and all property tax obligations having been included in Central's payment in lieu of taxes.
3. 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.).
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 year 2011.
7. This decision and order is effective for purposes of appeal on February 26, 2013.

Signed and Sealed: February 26, 2013

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Robert W. Hotz, Commissioner

SEAL

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Nancy J. Salmon, Commissioner

Appeals from any decision and order 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.

[16] The determination by the county board was based upon the evidence at the time of the Protest proceeding. At the appeal hearing before the Commission, the parties were permitted to submit evidence that may not have been considered by the county board at its proceeding.