

FACTS

The facts are not in dispute. On April 16, 2012, the Department issued a Notice of Deficiency Determination (the "Deficiency Notice") claiming Nebraska sales and use taxes were owed by Lyman-Richey over a three-year period and seeking \$247,545.94 in taxes, interest, and penalties. The Deficiency Notice was mailed on April 16, 2012, and received by Lyman-Richey on April 17, 2012. The parties agree that 60 days after April 16, 2012, was Friday, June 15, 2012.

Lyman-Richey mailed its Protest Petition to the Department on Monday, June 18, 2012. It was received by the Department on June 19, 2012.

On July 2, 2012, the Department issued its final determination denying Lyman-Richey's appeal on the sole grounds that it failed to comply with the timing requirements in Neb. Rev. Stat. § 77-2709.

Lyman-Richey then filed a Petition for Review with this court thereby perfecting the appeal of the Department's final decision.

SCOPE OF REVIEW

An appeal from a decision of the Department is governed by the Administrative Procedure Act, codified from Neb. Rev. Stat. §§ 84-901 to 84-920 (the "APA"). "Proceedings for review of a final decision of an administrative agency shall be to the district court, which shall conduct the review without a jury *de novo* on the record of the agency."¹ See also Neb. Rev. Stat. § 84-917(5)(a) (1999). "In a review *de novo* on the record, the district court is not limited to a review subject to the narrow criteria found in Neb. Rev. Stat. § 84-917(6)(a) (1999), but is required to make independent factual determinations based upon the record, and the court reaches its own independent conclusions with respect to the matters at issue."² The district court

¹ *George Rose & Sons v. Dep 't of Revenue*, 248 Neb. 92, 95, 532 N.W.2d 18, 21 (1995).

² *Schwarting v. Nebraska Liquor Control Comm'n*, 271 Neb. 346, 351, 711 N.W.2d 556, 561 (2006).

is not required to give deference to the findings of fact of the administrative agency.³

A district court may affirm, reverse, or modify the decision of the agency or remand the case for further proceedings.⁴ "If the court determines that the interest of justice would be served by the resolution of any other issue not raised before the agency, the court may remand the case to the agency for further proceedings."⁵

ANALYSIS

The sole issue before the court is whether the Three-Day Rule applies to the Deficiency Notice sent by the Commissioner to Lyman-Richey on April 16, 2012. If so, Lyman-Richey's June 18, 2012, Protest Petition was timely filed and the Department erred in finding otherwise. If not, the Protest Petition was not timely filed and the determination of the Department became final.

a. Positions of the parties.

Distilled to the core issue, Lyman-Richey argues that the Three-Day Rule in § 6-1106(e) adds three days to the 60 day period within which a petition for redetermination can be filed pursuant to §77-2707(7). Lyman-Richey further argues that the decision in *Roubal v. State*⁶ requires application of the Three-Day Rule to this case. The Commissioner argues that the Nebraska Court Rules of Pleadings in Civil Cases (including § 6-1106(e)) do not apply to deficiency notices mailed by the Department pursuant to §77-2709(5).

b. Statutory Construction

The court begins with long standing canons of statutory construction. The meaning of a statute is a question of law.⁷ Statutory language is to be given its plain and ordinary meaning.⁸ In

³ *Id.*

⁴ Neb. Rev. Stat. § 84-917(6)(b) (1999).

⁵ Neb. Rev. Stat. § 84-917(5)(b) (1999).

⁶ *Roubal v. State*, 14, Neb. App. 554, 710 N.W.2d 359 (2006).

⁷ *In re Estate of Fries*, 279 Neb. 887, 782 N.W.2d 596 (2010).

construing a statute, a court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose.⁹ In discerning the meaning of a statute, a court must determine and give effect to the purpose and intent of the legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.¹⁰

*c. Nebraska Revenue Act*¹¹

The first question that becomes apparent and addressed by the court is whether the statutes within the Nebraska Revenue Act (the “Act”), in and of themselves, govern the deadlines for service at issue or whether the court can or should look outside those statutes to determine the required dates of service and/or response deadlines.

Administrative review of a deficiency assessment is governed by procedures set forth in Neb. Rev. Stat. § 77-2709(5)(b) and (7). Subsection (5) provides:

(a) Promptly after making his or her determination, the Tax Commissioner shall give to the person written notice of his or her determination.

(b) The notice may be served personally or by mail, and if by mail the notice shall be addressed to the person at his or her address as it appears in the record of the Tax Commissioner. In case of service by mail of any notice required by the Nebraska Revenue Act of 1967, the service is complete at the time of deposit in the United States post office.

Subsection (7) provides:

Any person against whom a determination is made under subsection (1) and (2) of this section or any person directly interested may petition for a redetermination within sixty days after service upon the person of notice thereof. For purposes of this subsection, a person is directly interested in a

⁸ In re Interest of Christopher T., 281 Neb. 1008, 801 N.W.2d 243 (2011).

⁹ See, In re Interest of Lisa O., 248 Neb. 865, 540 N.W.2d 109 (1995); In re Interest of Michael M., 6 Neb. App. 560, 574 N.W.2d 774 (1998).

¹⁰ In re Interest of Todd T., 249 Neb. 738, 545 N.W.2d 711 (1996).

¹¹ Neb. Rev. Stat. §§ 77-2701 to 77-27,135.01.

deficiency determination when such deficiency could be collected from such person. If a petition for redetermination is not filed within the sixty-day period, the determination becomes final at the expiration of the period.

Under the plain language of these subsections, service of a notice of deficiency determination is complete at the time of mailing. The person against whom the deficiency is made must file a petition seeking redetermination within 60 days. At 60 days the determination “becomes final.”

Relevant to the consideration is Neb. Rev. Stat. § 77-27,125 which provides, in part,

If any tax, report, claim, statement, notice, petition, or other document including, to the extent authorized by the Tax Commissioner, a return of estimated tax, required to be filed within a prescribed period or on or before a prescribed date under the authority of any provision of the Nebraska Revenue Act of 1967 is, after such period or such date, delivered by United States mail to the Tax Commissioner, or the officer or person with which or with whom such document is required to be filed, the date of the United States postmark stamped on the envelope shall be deemed to be the date of delivery.

Section 77-27,125 provides that the postmark date of a tax petition or protest taken under the Act is the date on which the petition or protest is deemed delivered to the Commissioner even if the document arrives days later. By specifying the effective date for service of the tax determination¹² and the effective date for the petition for redetermination,¹³ it appears that clear guidance has been given as to the effective date of service of the deficiency and effective service date of the response.

Standing independently, the Act contains no language that would lead one to consider statutes or rules outside of the Act to determine service dates. Thus, at this juncture, adding additional time pursuant to the Three-Day Rule for civil pleadings does not appear to be within the contemplation of the Act. The plain and ordinary meaning of statutes within the scope of the Act

¹² “the time of deposit in the United States post office” pursuant to § 77-2709(5)(b).

¹³ “the date of the United States postmark stamped on the envelope shall be deemed to be the date of delivery” pursuant to §77-27,125.

appear to provide for service dates and deemed filing dates between the Commissioner and taxpayer. The court finds merit in the Department's argument that the aforementioned statutes within the Act provide clarity to the parties. On the other hand, it appears looking outside the Act would extend the statutory deadline not contemplated by the Nebraska Legislature.

Neither party cites to any authority in Nebraska that addresses this issue within the scope of the Act and the court finds none. Therefore, at this juncture, the Act does not appear to lack specificity. The Act appears to accomplish the problem to be remedied (setting service dates and deadlines) and the court does not need to strain at the construction of the statute to find the statutory purpose or meaning. With this in mind, the court now examines whether application of statutes outside of those in the Act might affect the deadline in §77-2709(7).

d. The Three-Day Rule.

Lyman-Richey asserts that the notice of deficiency assessment was issued pursuant to statute and therefore it is a "proceeding" covered by Neb. Rev. Stat. §25-534 and the Nebraska pleading rules that establish the Three-Day Rule. The Commissioner argues the reliance of Lyman-Richey on a broad definition of "proceeding" is misplaced and that §25-534 has no application to this case. The ultimate question is whether the Three-Day Rule¹⁴ applies to the sixty day time deadline for Lyman-Richey's response to the Deficiency Notice.

For the analysis the court starts with an examination of the underlying authority for the Three-Day Rule. Neb. Rev. Stat. § 25-520.02 provides:

The term action or proceeding means all actions and proceedings in any court and any action or proceeding before the governing bodies of municipal corporations, public corporations, and political subdivisions for the equalization of special assessments or assessing the cost of any public improvement.

That statute does not include any reference to the processes or procedures of governmental

¹⁴ Neb. Ct. R. Pldg. § 6-1106(e).

agencies.

Neb. Rev. Stat. §25-234¹⁵ takes its authority from §25-520.02. §25-234 provides:

Whenever in any action or proceeding, any order, motion, notice, or other document, except a summons, is required by statute or rule of the Supreme Court to be served upon or given to any party, the service or delivery shall be made in accordance with the rules of pleading in civil actions promulgated by the Supreme Court pursuant to section 25-801.01.

Neb. Rev. Stat § 25-801.01 provides:

(1) By January 1, 2003, the Supreme Court shall have rules of pleading in civil actions promulgated which are not in conflict with the statutes governing such matters.

(2) For all civil actions filed on or after January 1, 2003: (a) The rules of pleading promulgated by the Supreme Court shall apply.

Neb. Ct. R. Pldg. § 6-1101 provides:

These rules govern pleading in civil actions filed on or after January 1, 2003. They apply to the extent not inconsistent with statutes governing such matters.

Finally, Neb. Ct. R. Pldg. § 6-1106(e) provides:

(e) Additional Time After Service by Mail, Electronic, or Certain Other Methods. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served under § 6-1105(b)(2)(B), (D), (E), or (F), three days shall be added to the prescribed period.

Lyman-Richey argues that the Three-Day Rule and the statutes underpinning that rule are to be read broadly and uses a Black's Law dictionary definition of "proceeding" to make the point. Ultimately the court finds no language within the statutes or the Supreme Court Rules that suggest the Three-Day Rule would apply to the time of service attributed to the Deficiency Notice from the Department so the court's final step is to examine the cited case law.

*e. Roubal v. State of Nebraska*¹⁶ and other authority.

¹⁵ The three day mailing rule was directly found in section 25-534 before 2008. That rule is now incorporated into Nebraska law, via section 25-534, through the Supreme Court's Rules of Pleadings.

¹⁶ *Roubal v. State*, 14 Neb. App. 554, 710 N.W.2d 359 (2006)

Lyman-Richey argues *Roubal*¹⁷ has application in this case and compels the court to apply the Three-Day Rule to the Deficiency Notice to extend the sixty day deadline for a request for redetermination by Lyman-Richey. In *Roubal* the appellant employee's petition for review of a determination of employee medical benefits by the Nebraska Department of Health and Human Services (“DHHS”) was dismissed by the district court as having been filed out of time. The appeal of the decision was then affirmed by the Nebraska Court of Appeals. As part of the decision the Court of Appeals stated:

In the present case, the Department entered its final decision and served a copy of that decision by mail on Roubal's attorney on March 16, 2005. Roubal argues that service was not completed until March 21, when the order was received by her attorney. However, §25-534 provides that service by mail is complete upon mailing. Thus, service was completed on March 16 and the 30 day period specified in § 84-917, computed as required by §25-2221 (i.e., excluding the day of the act, event, or default), would have expired on April 15. Because service was by mail, however, an additional 3 days are added to the prescribed period pursuant to §25-534. Thus, Roubal would have had until April 18 to file a petition for review, making her petition filed on April 20 untimely.¹⁸

Thus, the Court of Appeals in *Roubal* determined that in calculating the time period to file a petition for judicial review under the APA¹⁹ an additional three days was mandated by the application of §25-534. The *Roubal* court did not address whether the additional three days applied to any time deadlines in the case within the framework of DHHS's statutory procedures prior to the appeal of the final order and therefore the decision was fact specific.

The distinctions between *Roubal* and the case at hand are significant in that Lyman-Richey was not filing a petition for judicial review under the APA. *Roubal* only addressed the appeal of a final order of an administrative agency pursuant to the APA. That appeal was to the district court (the judicial system) not to DHHS. In this case, the issue is whether Lyman-Richey timely filed

¹⁷ It is noted that the *Roubal* decision predates the 2008 amendment to §25-534.

¹⁸ *Roubal v. State*, 14 Neb. App. at 559, 710 N.W.2d at 8. (Emphasis added.)

¹⁹ Neb. Rev. Stat. §84-917(2)(a),

its Protest Petition with the Department of Revenue within the statutory framework governing tax deficiencies under the Act, not whether the appeal of a final order was appealed to the district court under the APA.

Roubal is also distinguished by *Lienemann v Hillyer*,²⁰ in which a claimant to an estate filed a petition for allowance of a claim on the sixty-first day following notice of the disallowance. The claimant relied on §25-534 and suggested that three additional days would apply to the time deadline. The Nebraska Supreme Court found it was unwarranted and not sensible to add the three days due to mailing because the statutes so explicitly stated that an action was barred sixty days after the mailing. Accordingly, the Supreme Court found that §25-534 did not apply and held the trial court correctly dismissed the claimant's petition.

As in *Lienemann*, this court would be required to read beyond the plain, direct and unambiguous statutes governing the filing of a petition for reconsideration with the Department. Taken as a whole, the plain language of §77-2709(7) appears to clearly provide the deadlines applicable to a petition for reconsideration. It is apparent the Legislature chose the deadlines and explicitly set them. The court finds, like *Lienemann*, that it is unwarranted and not appropriate to extend the date the determination is "final" by three days. The Nebraska Legislature did not add the additional three days to the statutory provisions in the Act and plain meaning of Neb. Rev. Stat. §25-520.02 does not support the premise of Lyman-Richey.

The parties did not argue the import of *Lienemann*. The court, however, believes the case to be authoritative in this instant. The argument that a three-day mailing extension should apply seems to be much more apparent in *Lienemann* than under the facts now before the court. The *Lienemann* Court also noted the use of the word "barred" in the statute under consideration and said it was clear language preventing an expanded interpretation of the deadline at issue. In this

²⁰ *Lienemann v. Hillyer* (In re Estate of Lienemann), 277 Neb. 286, 761 N.W.2d 560, (2009).

case, § 77-2709 (7) provides “[i]f a petition for redetermination is not filed within the sixty-day period, the determination becomes final at the expiration of the period.” There is no reading of the word “final” that supports Lyman-Richey’s argument which urges adding three days to the deadline. The language is precise and unequivocal and, taken as a whole, is complete and unambiguous. The court is not at liberty to ignore the very specific statutory language and treated as generalized has urged by Lyman-Ritchie.

In sum, the *Roubal* decision does not provide authority for the decision in this case and the court looks more towards *Lienemann* for guidance. Further, the conclusion of the court can be reached without doing damage to either the civil procedure rules or the statutes within the Act.

f. Forfeitures and traps.

The court acknowledges the obvious severity of its application of the law in this case. The law (and trial courts) abhors forfeitures and traps set by the Legislature for the unwary. Equity courts unhesitatingly grant relief when the facts present a situation that heralds forfeiture and enforce such laws reluctantly. However, justice is best served by adherence to straightforward statutory commands. Adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.

CONCLUSION

For the foregoing reasons, the Court finds the Protest Petition filed by Lyman-Richey was not timely filed with the Commissioner. The appeal is dismissed at Plaintiff’s costs.

SO ORDERED on the 25th day of FEB, 2013.

BY THE COURT:



ROBERT R. OTTE
DISTRICT JUDGE

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