

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

MID CITY BANK, INC.,)	
)	
Appellant,)	CASE NO. 98P-1
)	
vs.)	
)	FINDINGS AND ORDERS
DOUGLAS COUNTY BOARD OF)	
EQUALIZATION,)	
)	
Appellee.)	
)	

Filed July 13, 1999

Appearances:

For the Appellant: Patrick M. Heng, Esq.
11422 Miracle Hills Drive
Omaha, NE 68154-4420

For the Appellee: Timothy J. Buckley
Deputy Douglas County Attorney
909 Civic Center
Omaha, NE 68183

Before: Commissioners Edwards, Hans and Reynolds

Reynolds, Chairman, for the Commission:

SUMMARY OF DECISION

The Commission affirms the decision of the Douglas County Board of Equalization which denied Taxpayer's protest and denies Taxpayer's request for a reduction in the assessed value of Taxpayer's personal property.

NATURE OF THE CASE

Mid City Bank, Inc. ("Taxpayer") acquired all of the assets and liabilities of Western Security Bank of Omaha ("target corporation") through a merger by paying \$11.5 million to the shareholders of the target corporation, and by exchanging .046960 shares of Taxpayer's stock for each share of the target corporation's stock. (E1:16;E3:1). The effective date of the transaction was December 1, 1996. As a result of the transaction Taxpayer acquired certain tangible personal property located in Douglas County, Nebraska. The Commission must infer that Taxpayer filed a Personal Property Tax Return for tax year 1998. (That document was not made a part of the record.). The Douglas County Assessor ("Assessor") adjusted the reported value raising the value of seven accounts, and lowering the value of three accounts. The Assessor thereafter notified the Taxpayer that the subject personal property had an aggregate assessed value of \$2,252,950. (E5). Taxpayer apparently filed a protest with the Douglas County Board of Equalization ("County") although again that document was not made a part of the record. The County denied the protest, from which decision Taxpayer appeals. (E7).

EVIDENCE BEFORE THE COMMISSION

The Parties waived their right to a hearing before the Commission. The Parties stipulated that the record consist of seven exhibits. For the purposes of deciding this matter the Commission has taken notice of the following documents as authorized by Neb. Rev. Stat. §77-5016 (1998 Cum. Supp.): the Commission's case file for this appeal; the *1998 Nebraska Assessor's Reference Manuals*, Volumes 1 and 2; the Nebraska Constitution; the Nebraska State Statutes and amendments to those laws, including 1999 Neb. Laws, L. B. 140, which has an

effective date of May 26, 1999; *Title 442, Nebraska Administrative Code* (the Tax Equalization and Review Commission's Rules and Regulations); and three standard reference works published by the International Association of Assessing Officers: *Property Assessment Valuation, Second Edition* (1996); *Property Appraisal and Assessment Administration* (1990); and *Glossary for Property Appraisal and Assessment* (1998) and Title 26 of the United States Code.

ISSUES BEFORE THE COMMISSION

The Commission's jurisdiction is limited to those issues presented to the County Board of Equalization. Neb. Rev. Stat. §77-1511 (Reissue 1996). The issues presented to the Commission in this appeal may be summarized as:

- (1) What is the "Nebraska adjusted basis" of tangible personal property acquired as a result of a merger where the acquiring corporation has made an "election" under Title 26, U. S. C., Section 338?
- (2) Is the underlying transaction in this appeal a "purchase" within the meaning of Neb. Rev. Stat. §77-122 (Reissue 1996)?

FINDINGS OF FACT

The Commission, in determining cases, is bound to consider only that evidence which has been made a part of the record before it. No other information or evidence may be considered. Neb. Rev. Stat. §77-5016 (3) (1998 Cum. Supp.). The Commission may, however, evaluate the evidence presented utilizing its experience, technical competence, and specialized

knowledge. Neb. Rev. Stat. §77-5016 (5) (1998 Cum. Supp.).

From the pleadings and the evidence contained in the record before it, the Commission finds and determines as follows:

**A.
PROCEDURAL FINDINGS**

- (1) That Taxpayer is the owner of record of certain tangible personal property located in Douglas County, Nebraska ("subject personal property").
- (2) That the Douglas County Assessor ("Assessor") issued a *Notice of Change in Personal Property* on or about March 17, 1998, and thereby proposed valuing the subject personal property for purposes of taxation in the amount of \$2,252,950 as of January 1, 1998 ("assessment date"). (E5).
- (3) That Taxpayer objected to that determination, and a hearing was held before the County April 28, 1998. (E6).
- (4) That the County denied the protest. (E7).
- (5) That thereafter, the Taxpayer timely filed an appeal of the County's decision to the Commission. (Appeal Form).
- (6) That the Parties waived their right to a hearing before the Commission.

**B.
SUBSTANTIVE FINDINGS AND FACTUAL CONCLUSIONS**

- (1) That Taxpayer acquired substantially all of the stock of the target corporation and as a result acquired all of the assets and liabilities of the target corporation through a merger by paying \$11.5 million to the shareholders of the target corporation, and by exchanging

.046960 shares of Taxpayer's stock for each share of the target corporation's stock.
(E:16; E3:1).

- (2) That the transaction did involve a "transfer of stock or other ownership interest."
- (3) That the transaction was, for purposes of federal income taxation, a "tax free reorganization."
- (4) That the effective date of the merger was December 1, 1996. (E1:29).
- (5) That Taxpayer and the target corporation, for purposes of federal taxation, made a joint election to have the transaction treated as a purchase of assets. (E2:5-6).
- (6) That pursuant to Title 26 U. S. C. §338, the Taxpayer reported on its 1996 federal tax return that the subject personal property had an adjusted basis of \$2,730,079. (E2:7 - 13).
- (7) That no evidence of Taxpayer's federal adjusted basis for the tangible personal property at issue was made a part of the record in this case.
- (8) That Title 26 U. S. C. §338 mandates that as a result of the voluntary election made by the Taxpayer and target corporation the asset acquisition be deemed a purchase.
- (9) That *as a result of Taxpayer's election*, the adjusted basis of the tangible personal property acquired from the target corporation increased for federal tax purposes.
- (10) That the intent of the parties to the merger was to have the transaction treated for federal tax purposes as the purchase of the assets and liabilities of the target corporation.
- (11) That Nebraska tangible personal property tax laws are based on federal tax laws.
- (12) That nothing in the state law pertaining to the taxation of tangible personal property allows or permits a taxpayer to selectively apply federal tax laws at the taxpayer's discretion.

- (13) That from the record before it, the Commission finds and determines that the Nebraska Net Book Value of the subject property as of the assessment date was \$2,252,950.
- (14) That therefore the assessed value of the subject property for tax year 1998 as determined by the County is supported by the evidence.
- (15) That insufficient evidence has been adduced to establish that the decision of the County was unreasonable or arbitrary.
- (16) That therefore the decision of the County must be affirmed.

ANALYSIS

I.

ADJUSTED BASIS OF THE PERSONAL PROPERTY

“Net book value” of tangible personal property for purposes of taxation is determined under Neb. Rev. Stat. §77-120 (Reissue 1996). “Net book value” is based on the “Nebraska adjusted basis.” Therefore the issue presented in this appeal requires the Commission to determine the “Nebraska adjusted basis” of personal property acquired as a result of a merger where the acquiring corporation has made an “election” under Title 26, U. S. C. Section 338. The definition of certain terms is essential to a correct resolution of the issue presented.

The term “basis” is not defined under Nebraska Law. However, Neb. Rev. Stat. §77-118 (Reissue 1996) states “Nebraska adjusted basis shall mean the adjusted basis of property as determined under the Internal Revenue Service Code increased by the total amount allowed under the code for depreciation or amortization or pursuant to an election to expense depreciable property under section 179 of the code.” The term “Basis” is defined in Title 26 of the United States Code (“the Code”) as the cost of property “. . . except as otherwise provided in this

subchapter and subchapters C (relating to corporate distributions and adjustments) . . .” 26 U. S. C. §1012. The “adjusted basis” of property “whenever acquired. . . shall be the basis (determined under section 1012 or other applicable sections of this subchapter and subchapters C (relating to corporate distributions and adjustments)), . . . adjusted as provided in section 1016.” 26 U. S. C. §1011. The “cost of property” is dependent upon the mode of acquisition under the Code. If the property is purchased, the “acquisition cost” is the purchase price. 26 U. S. C. §1012. Special rules, however, govern the determination of the “cost of property” acquired through a transaction other than an outright purchase. See, for example, 26 U. S. C. §1014 (property acquired from decedent), 26 U. S. C. §1015 (property acquired as a gift from another), and 26 U. S. C. §362 (property transferred to a corporation).

The record establishes that Taxpayer has elected to have the merger treated for federal tax purposes as a “purchase.” The “adjusted basis” of the property acquired under a §338 transaction is governed by §338, which is part of Subchapter C of the Code. This “adjusted basis” is the “adjusted basis” defined in 26 U. S. C. §1016.

Taxpayer reported the “adjusted basis” of the acquired personal property to the Internal Revenue Service in its *Depreciation and Amortization Schedule* for 1996. (E4). The exhibit lists the items of personal property which were placed in service as a result of the merger. (E4:3-17). The items of personal property placed into service by the Taxpayer on December 1, 1996, totals \$2,872,248 according to the Commission’s calculations. The “current depreciation” (for tax year 1996) totals \$142,169. Therefore the “Nebraska adjusted basis” of the subject personal property as of January 1, 1997, is $\$2,872,248 - \$142,169 = \$2,730,079$. No evidence of Taxpayer’s adjusted basis for federal tax purposes for tax year 1997 was made a part of the

record in this case.

II. THE MERGER AND THE DEFINITION OF "PURCHASE"

Taxpayer alleges that the subject personal property was not acquired through a "purchase" under the provisions of Neb. Rev. Stat. §77-122 (Reissue 1996) and that the federal adjusted basis does not apply in this case. Taxpayer cites a statute in support of this position which holds:

"Purchase shall include taking by sale, discount, negotiation, or any other transaction for value creating an interest in property except liens. Purchase shall not include transfers for stock or other ownership interests upon creation, dissolution, or any other tax-free reorganization for income tax purposes of any corporation. . ."

Taxpayer contends that since the property was not acquired as part of a "purchase," the provisions of Neb. Rev. Stat. §77-201(3) (1996 Reissue) are triggered. This statute provides:

". . . Tangible personal property transferred . . . as part of a transaction which is not a purchase shall be subject to taxation based upon the date the property was acquired by the previous owner and at the previous owner's Nebraska adjusted basis."

Neither Party has submitted any citation which would construe these statutes.

Taxpayer's argument hinges on the definition of the term "purchase." Taxpayer urges the Commission to adopt only a portion of the statutory definition of the term "purchase" as the basis for a decision in Taxpayer's favor. Taxpayer contends that the statute defines "purchase"

as “including the taking by sale, discount, negotiation, or any other transaction for value which creates an interest in property.” *Taxpayer’s Brief at p. 5*. This definition ignores the critical clause which follows Taxpayer’s abbreviated definition. That clause reads “upon creation, dissolution or any other tax-free reorganization for income tax purposes of any corporation”

The statutory rules of construction adopted by the Supreme Court dictate whether the Commission can use the abbreviated definition advocated by Taxpayer. The Court has held that when construing a statute effect must be given to all parts of the statute. No word or sentence can be rejected as superfluous or meaningless. *Brunges v. Brunges*, 255 Neb. 837, 587 N.W.2d 554, 558 (Neb. 1998). The Commission must therefore, consider the entire provision of §77-122 in resolving the issue presented.

It is uncontroverted that a transfer of stock formed a substantial part of the underlying transaction. It is also uncontroverted that the resulting merger was a “tax-free reorganization.” The remaining provisions of Neb. Rev. Stat. §77-122 (Reissue 1996) are the essential points to be considered.

The first part of the provision requires the Commission to determine whether there was a transfer “upon creation . . . of any corporation” The creation of a corporation is governed by statute. See, generally, Neb. Rev. Stat. Chapter 21. No “new” corporation was created in the transaction which led to the transfer of the subject personal property. In fact, the transaction has no effect on the Articles of Incorporation of the Taxpayer, the rights of any of the shareholders of the Taxpayer, or the stock held by the shareholders of the Taxpayer. (E3:1-2). The first part of the statutory exception to the definition of “purchase,” i. e., a transfer upon the creation of a corporation does not apply in this case.

There is also a statutory exemption from the definition of "purchase" for transfers upon the "dissolution of any corporation." Dissolution of a corporation may be made voluntarily, or by administrative or judicial action. *See, generally*, Neb. Rev. Stat. §21-20,151, *et seq.* The record contains no information which would establish that the target corporation was "dissolved" as provided for by statute. Therefore the second part of the statutory exception to the definition of "purchase," i. e., "transfers of stock or other ownership interests upon . . . dissolution . . . of any corporation . . ." does not apply.

The final provision which might exempt the underlying transaction from the definition of "purchase" states that "Purchase shall not include transfers for stock or other ownership interests upon . . . any other tax-free reorganization for income tax purposes of any corporation . . ." It is uncontroverted that the transaction which led to the transfer of the subject personal property to Taxpayer was a "merger." (E1:28). The effects of a "merger" are as follows:

"When a merger takes effect: (a) Every other corporation party to the merger shall merge into the surviving corporation and the separate existence of every corporation except the surviving corporation shall cease . . . (b) The title to all real estate and other property owned by each corporation party to the merger shall be vested in the surviving corporation . . . (c) The surviving corporation shall have all liabilities of each corporation party to the merger." Neb. Rev. Stat. §21-20,133(1) (Reissue 1997).

Under these facts, Taxpayer's request for relief can only be granted under the provisions of Neb. Rev. Stat. §§77-122 and 77-201(3) (Reissue 1996) if the underlying transaction was a

“transfer for stock or other ownership interest.” The underlying transaction is based on a “Purchase Agreement” which is found in Exhibit I at pages 16 through 18. The Purchase Agreement calls for the Taxpayer to purchase “all” of the target corporation for \$11.5 million and shares in Taxpayer’s corporation. (E1:16). The “Plan of Merger” recites that the target corporation will be “merged” into Taxpayer, and that Taxpayer will be the “surviving” corporation. (E3:1). The ultimate purpose of the transaction is according to the Findings of Fact and Conclusions of Law of the Nebraska Department of Banking and Finance, for Taxpayer to acquire by merger “the assets and liabilities of Western Security Bank.” (E1:19). Taxpayer’s own evidence reiterates this ultimate purpose in several locations: “Also, on May 14, 1996, Mid City submitted an application with the State of Nebraska Department of Banking and Finance (herein DOBF) to acquire by merger the assets of Western Security” (E1:2); and again that “Subsequent to the acquisition by merger . . .” (E1:2); and finally that “For federal income tax purposes, Mid City elected under Internal Revenue Code (IRC) Section 338 to treat the purchase of the stock of Western Security as an asset acquisition.” (E1:2). The Commission must therefore conclude that the ultimate purpose of the merger was the purchase of the target corporation’s assets.

This conclusion is supported by a number of facts. First, the Commission hears cases as in equity. Neb. Rev. Stat. §77-1511 (Reissue 1996). See also, 1999 Neb. Laws, L. B. 140. Equity looks through forms to substance. *Dillon Tire, Inc. v. Fifer*, 256 Neb. 147 (Neb. 1999). The substance of this transaction was the purchase of assets by the Taxpayer’s own admission *and by its own voluntary election*. This conclusion is also supported by the record which establishes that both Taxpayer and the target corporation made the “election” under the

applicable provisions of Title 26, U. S. C. Section 338. Taxpayer admits that “. . . if Mid City Bank so elected under §338 it may treat its purchase of the stock of Western Security Bank as an asset acquisition and have the associated basis with such a transaction. There is no dispute in this matter that Mid City Bank has done so and made the proper federal filings to effectuate its intent.” *Reply Brief of Appellant at pp. 1 - 2*. This election is informative. “A corporation desiring to acquire all of the assets of another corporation and unable to purchase these assets directly must purchase the corporation’s stock and either merge with or force the liquidation of the acquired corporation. These arrangements are usually called two-step asset acquisitions or indirect asset purchases and are functionally equivalent to a direct asset purchase transaction.” *Section 338, The Result of the Legal Evolution of the Tax Treatment of Two -Step Asset Acquisitions*, 61 Tex. L. Rev. 1109. The purchase of the target corporation’s assets and liabilities is the purpose as shown by both the form and the substance of the underlying transaction. Taxpayer, in sum, would have the Commission ignore the substance of the underlying transaction, and base its decision solely on the form of part of the transaction, rather than substance. It is not the function of the law to exalt form over substance. See, for example, *State v. Green*, 185 Neb. 673, 178 N.W.2d 271 (Neb. 1970).

There is an additional factor which much be considered. The rules of statutory construction provide that where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain their meaning, nor can plain, direct, and unambiguous language be read out of statute. *City of Grand Island v. Hall County*, 196 Neb. 282, 286, 242 N.W.2d 858, 861 , (Neb. 1976). The underlying transaction was transfer of stock that the Parties chose to have treated as a purchase of assets and liabilities. The Commission cannot conclude

under these circumstances that the underlying transaction fits the exception provision of the definition of purchase under Neb. Rev. Stat. §77-122. Taxpayer fails the first part of the test, and the statutory exception to the definition of "purchase" does not apply in this case.

Finally, Taxpayer's purpose in this appeal is to have the Commission approve of a practice where a taxpayer can pick and choose how and when tax laws will be applied under Nebraska law. The Nebraska statutes governing the valuation of tangible personal property clearly rest on the federal determination of "adjusted basis." Taxpayer seeks to have the benefit of application of "stepped up basis" for federal tax purposes, but the preceding owner's basis for Nebraska tax purposes. The Commission can find no basis in law or in fact which would justify such a decision.

III. CONCLUSION

The evidence provided by Taxpayer establishes that the acquisition date of the tangible personal property was December 1, 1996. As of January 1, 1997, the adjusted basis of the acquired personal property was \$2,730,079 according to Taxpayer's federal tax return. The assessment date at issue, however, is January 1, 1998. Taxpayer adduced no evidence of the adjusted basis as reported for tax year 1997 to the Internal Revenue Service. The County determined that the taxable value for the subject tangible personal property as of the assessment date was \$2,252,950. (E1:1).

State law requires that personal property be valued essentially at a percentage of adjusted basis under the Internal Revenue Code. Neb. Rev. Stat. §77-118 and §77-120 (Reissue 1996). The subject personal property was acquired as a result of a merger where both the acquiring corporation and the target corporation made an "election" under Title 26, U. S. C., Section 338,

CONCLUSIONS OF LAW

The Commission, from the record before it, concludes as a matter of law as follows:

- (1) That the "Nebraska Adjusted Basis" for tangible personal property acquired as a result of a merger where the target corporation and the surviving corporation have jointly and voluntarily elected to have the transaction treated for federal tax purposes as a purchase of assets under 26 U. S. C. §338 is that adjusted basis determined under §338.
- (2) That where a transfer is in substance a purchase of assets and liabilities, and where a transfer is not merely for stock or other ownership interest, but rather includes something else of value, then the exception from the definition of "purchase" under Neb. Rev. Stat. §77-122 (Reissue 1996), does not apply.
- (3) That Taxpayer has not met its burden of proof as required by *Kawasaki, supra*.
The Commission must therefore conclude that the decision of the Douglas County Board of Equalization should be affirmed.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

1. That the decision of the Douglas County Board of Equalization which denied Taxpayer's protest is affirmed.
2. That Taxpayer's personal property located in Douglas County, Nebraska, shall be valued as follows for tax year 1998:

STANDARD OF REVIEW

The Nebraska Supreme Court has held that in an appeal from a denial of exemption from taxation for real or tangible personal property is made pursuant to §77-202.04 and Neb. Rev. Stat. §§77-1510 and 77-1511 (Reissue 1990). *Evangelical Lutheran Good Samaritan Soc. v. Buffalo County Bd. of Equalization*, 243 Neb. 351, 358, 500 N.W.2d 520, 525 (Neb. 1993). Under this holding, an appeal of the valuation of personal property would be subject to the same provisions of Neb. Rev. Stat. §§77-1510 and 77-1511. The Legislature has reflected the same intent in 1999 Neb. Laws, L. B. 140 (effective date May 26, 1999), which is in effect as the Commission decides this appeal.

The Commission is required by Neb. Rev. Stat. §77-1511 (Reissue 1996) to affirm the decision of the County unless evidence is adduced establishing that the action of the County was unreasonable or arbitrary. Neb. Rev. Stat. §77-1511 (Reissue 1996). The Nebraska Court of Appeals, in interpreting this statute, has held that "There is a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action. That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence on appeal to the contrary. From that point on, 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." *Kawasaki Motors v. Lancaster Cty. Bd. Of Equal.*, 7 Neb. App. 655 (1998).

to have the transaction treated as a purchase of assets. The substantive provisions of this section provide that “. . . the assets of the target corporation *shall be treated as purchased* . . . ”

(emphasis added) 26 U. S. C. A. §338 (b)(1).

Taxpayer's argument regarding the issue is summarized as follows: “The fact that a taxpayer in such a transaction may make an election to have the asset basis be at a level for *federal* purposes is irrelevant for Nebraska valuation purposes.” *Taxpayers Brief at p. 7*. Given the fact that State Law mandates otherwise, this argument has no merit.

The Commission therefore resolves the issues presented as follows: (1) the “Nebraska Adjusted Basis” for tangible personal property acquired as a result of a merger where the target corporation and the surviving corporation have jointly and voluntarily elected to have the transaction treated for federal tax purposes as a purchase of assets and liabilities under 26 U. S. C. §338 is that adjusted basis determined under §338; and (2) where a transfer is in substance a purchase of assets, and where a transfer is not merely for stock or other ownership interest, but rather includes something else of value, then the exception from the definition of “purchase” under Neb. Rev. Stat. §77-122 (Reissue 1996), does not apply.

JURISDICTION

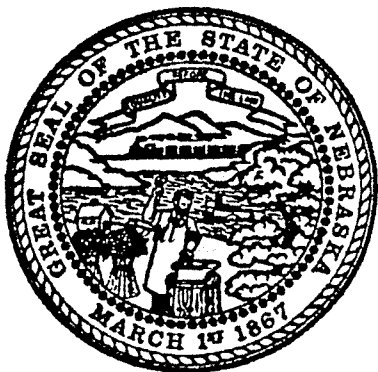
Jurisdiction of the Tax Equalization and Review Commission is set forth in Neb. Rev. Stat. §77-5007 (1998 Cum. Supp.).

<u>Account Number</u>	<u>Location</u>	<u>Assessed Value</u>
382947-05-B	7201 Military	\$1,074,015
382948-20-B	352 N 114 St	\$ 548,115
382949-07-B	3303 N 108 St	\$ 320,620
382950-05-B	8901 Fort St	\$ 215,245
382951-10-B	1113 Howard St	\$ 30,955
382952-21-B	11901 Pacific St	\$ 28,620
382953-07-B	2048 N 117 Ave	\$ 35,380
Total		\$2,252,950

3. That this decision, if no appeal is filed, shall be certified to the Douglas County Treasurer, and the Douglas County Assessor, pursuant to Neb. Rev. Stat. §77-1511 (Reissue 1996).
4. That this decision shall only be applicable to tax year 1998.
5. That each party is to bear its own costs in this matter

IT IS SO ORDERED.

Dated this 13th day of July, 1999.



Mark P. Reynolds, Chairman

Jane L. Edwards
Jane L. Edwards, Commissioner

Robert L. Hans, Commissioner