In the present case, the sworn report includes the following handwritten reasons for Sherman's arrest: "[A]sleep behind wheel with keys in ignition [and] vehicle off, with open beer between legs. Subject pulled parrallel [sic] with east elm street. Subject smelled strongly of alcoholic beverage, glossy eyes[,] trouble walking. Made contact reference suspicious vehicle." While these assertions would be sufficient to establish that Sherman was driving or in physical control of the vehicle and that he was intoxicated, the assertions are not sufficient to allow an inference that Sherman was on a public road or private property open to public access. Unlike the assertions in the cases discussed above, the assertions in the sworn report in this case do not indicate that the location "parrallel [sic]" to a public street was either a public road or private property open to public access. As such, we conclude that the sworn report in this case was insufficient to confer jurisdiction on the Department, and the district court erred in upholding the administrative license revocation.

## V. CONCLUSION

The sworn report in the present case was insufficient to confer jurisdiction on the Department. The district court erred in rejecting Sherman's challenge to the sufficiency of the report and in upholding the administrative license revocation. We reverse, and remand with directions to reverse the revocation.

REVERSED AND REMANDED WITH DIRECTIONS.

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# MIDWEST RENEWABLE ENERGY, LLC, APPELLANT, V. LINCOLN COUNTY BOARD OF EQUALIZATION, APPELLEE.

807 N.W.2d 558

Filed December 27, 2011. No. A-10-1106.

1. **Taxation: Judgments: Appeal and Error.** Appellate courts review decisions rendered by the Tax Equalization and Review Commission for errors appearing on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to

the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.

3. **Taxation: Appeal and Error.** Questions of law arising during appellate review of Tax Equalization and Review Commission decisions are reviewed de novo on the record.
4. **Jurisdiction: Words and Phrases.** Subject matter jurisdiction is the power of a tribunal to hear and determine a case of the general class or category to which the proceedings in question belong and to deal with the general subject matter involved.
5. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, an appellate court must determine whether it has jurisdiction.
6. **Actions: Jurisdiction.** Lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.
7. **Taxation: Jurisdiction: Appeal and Error.** If the board which made a decision, order, or determination that is appealed to the Tax Equalization and Review Commission lacked subject matter jurisdiction, then the commission cannot acquire subject matter jurisdiction.
8. **Jurisdiction: Appeal and Error.** If the tribunal from which an appeal was taken lacked jurisdiction, the appellate court acquires no jurisdiction.
9. **Jurisdiction: Waiver.** Litigants cannot confer subject matter jurisdiction upon a tribunal by acquiescence or consent.
10. **Records: Words and Phrases.** A document is filed with an officer when it is placed in his custody and deposited by him in the place where his official records and papers are usually kept.
11. **Taxation: Stipulations.** Pursuant to 442 Neb. Admin. Code, ch. 4, § 005 (2009), the Tax Equalization and Review Commission is not bound by a stipulation made by the parties.
12. **Taxation: Property: Time.** Under Neb. Rev. Stat. § 77-1229(1) (Reissue 2009), a tax return listing tangible personal property must be filed on or before May 1 of each year.
13. **Taxation: Presumptions.** Under certain circumstances, Neb. Rev. Stat. § 49-1201 (Reissue 2010) requires that a tax return be treated as made and received when it was mailed.
14. **Trial: Notice: Proof.** Absent direct proof of actual deposit with an authorized U.S. Postal Service official or in an authorized depository, proof of a course of individual or office practice that letters which are properly addressed and stamped are placed in a certain receptacle from which an authorized individual invariably collects and places all outgoing mail in a regular U.S. mail depository and that such procedure was actually followed on the date of the alleged mailing creates an inference that a letter properly addressed with sufficient postage attached and deposited in such receptacle was regularly transmitted and presents a question for the trier of fact to decide.

Appeal from the Tax Equalization and Review Commission. Affirmed.

Jerrold L. Strasheim for appellant.

Rebecca Harling, Lincoln County Attorney, and Joe W. Wright for appellee.

IRWIN, MOORE, and CASSEL, Judges.

CASSEL, Judge.

## INTRODUCTION

Midwest Renewable Energy, LLC (MRE), appeals from an order of the Tax Equalization and Review Commission (TERC). TERC affirmed a penalty imposed on MRE for the late filing of a tax return. Because MRE's evidence did not establish that the tax return was placed in an official U.S. Postal Service depository or that the custom of a postal carrier's retrieving the mail from MRE's mailbox actually occurred on the purported date of mailing, we affirm TERC's order.

## BACKGROUND

The Lincoln County assessor imposed on MRE a penalty of 25 percent of MRE's tax due on the value of its personal property as authorized under Neb. Rev. Stat. § 77-1233.04(4) (Reissue 2009). Penny S. Thelen, the controller for MRE, was responsible for preparing and filing MRE's Nebraska personal property tax returns. She prepared MRE's 2009 return based on a depreciation schedule printed on the evening of April 22, 2009. That night, Thelen signed the return as its preparer and the chairperson of MRE's board of managers signed it as the taxpayer. Thelen placed the return in an envelope, and there is no dispute that she correctly addressed the envelope to the Lincoln County assessor. She applied to the envelope a return address sticker and sufficient first-class postage and placed the envelope in the office's outgoing mailbox. The chairperson, who was a certified public accountant, kept a list of all personal property tax returns for all clients required to file such returns in order to ensure that the returns were timely filed. His list included MRE's return and showed that it was mailed on April 23.

MRE's outgoing mailbox was an uncovered "sturdy box" located behind the secretary's workspace. It was inaccessible to anyone other than the office's secretary and accountants, and it was designated solely for the picking up of mail by a

U.S. postal carrier. Each Monday through Saturday morning, a postal carrier came to the office to deliver incoming mail and retrieve outgoing mail.

Mary Ann Long, the Lincoln County assessor, stated that there was no record in the assessor's office that it received a personal property tax return for 2009 from MRE prior to August 1. Amy McFarland, a certified public accountant employed by MRE, stated in an affidavit that she spoke with Long on the telephone prior to September 1 and that Long asked her to mail a copy of MRE's 2009 personal property tax return to the assessor's office. McFarland's understanding of that conversation was that an employee in the assessor's office had inadvertently removed from the assessor's electronic records all of MRE's personal property and that thus, Long requested MRE to mail a duplicate 2009 personal property tax return. On September 1, MRE sent a copy of the 2009 personal property tax return pursuant to a request by the assessor's office.

On August 27, 2009, the assessor sent MRE a notice of failure to file a personal property tax return, which notice showed that the 25-percent statutory penalty had been applied. On September 24, Thelen sent a letter to the Lincoln County assessor's office, requesting that the penalty be removed. The letter stated, "It is our understanding from conversations with your office that . . . the [a]ssessor inadvertently removed the property that is owned by [MRE]." On September 28, the Lincoln County Board of Equalization (Board), through the deputy county clerk, sent a letter to Thelen setting a time and date to consider the penalty protest.

The Board held a hearing on the protest on November 2, 2009. Several unsworn statements were made during the hearing. Thelen stated that there was a typographical error in her affidavit, in that she prepared the return on April 21 rather than April 22, but that it went out of the office on April 23 as averred. McFarland stated that when she spoke with Long on the telephone in late August, Long "did not indicate that the return had not been received." One of the Board members stated during the hearing that he was "not for one second suggesting that anybody with [MRE] was anything other than one

hundred percent honest in their affidavits and their testimony [that day]." He further stated that he did not question whether MRE mailed the return, but that he was questioning whether it was ever "in the hands of the [a]ssessor." The Board ultimately determined that a penalty of $58,400.44 should be applied to MRE's 2009 personal property tax return.

The parties filed a joint motion for TERC to decide the case upon a stipulation of facts by affidavits and upon the transcripts of the hearing and decision of the Board with accompanying exhibits. TERC granted the joint motion, and on October 13, 2010, TERC affirmed the Board's decision, with one commissioner dissenting. The TERC majority concluded that MRE had not adduced sufficient clear and convincing evidence that the Board's decision was unreasonable or arbitrary. TERC's decision stated that it gave the affidavits greater weight than the unsworn statements made to the Board. TERC recognized that there was "no direct proof that the envelope was mailed using the United States Postal Service." Thus, TERC reasoned that the lacking element did not give rise to a presumption of receipt by the assessor.

MRE timely appeals.

## ASSIGNMENTS OF ERROR

MRE assigns eight errors. MRE alleges, consolidated, restated, and reordered, that TERC erred in (1) affirming the Board's decision imposing the penalty when there was insufficient competent evidence to support the decision, (2) failing to accept the stipulated facts and give them proper weight, and (3) failing to hold that MRE's 2009 tax return was deemed to have been filed and received when mailed as provided by Neb. Rev. Stat. § 49-1201 (Reissue 2010) and finding that there was insufficient competent evidence that the tax return was mailed on April 23, 2009.

## STANDARD OF REVIEW

[1-3] Appellate courts review decisions rendered by TERC for errors appearing on the record. *Vandenberg v. Butler County Bd. of Equal.*, 281 Neb. 437, 796 N.W.2d 580 (2011). When reviewing a judgment for errors appearing on the record, an

appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.* Questions of law arising during appellate review of TERC decisions are reviewed de novo on the record. *Id.*

## ANALYSIS

*Jurisdiction.*

[4-6] The Board asserts in its brief that it never had subject matter jurisdiction to hear the case. Subject matter jurisdiction is the power of a tribunal to hear and determine a case of the general class or category to which the proceedings in question belong and to deal with the general subject matter involved. *In re Interest of Devin W. et al.*, 270 Neb. 640, 707 N.W.2d 758 (2005). Before reaching the legal issues presented for review, an appellate court must determine whether it has jurisdiction. *Cargill Meat Solutions v. Colfax Cty. Bd. of Equal.*, 281 Neb. 93, 798 N.W.2d 823 (2011). Lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte. *Davis v. Choctaw Constr.*, 280 Neb. 714, 789 N.W.2d 698 (2010).

[7-9] If the board which made a decision, order, or determination that is appealed to TERC lacked subject matter jurisdiction, then TERC cannot acquire subject matter jurisdiction. See 442 Neb. Admin. Code, ch. 5, § 016.03 (2009). And if the tribunal from which an appeal was taken lacked jurisdiction, the appellate court acquires no jurisdiction. See *State v. Yos-Chiguil*, 278 Neb. 591, 772 N.W.2d 574 (2009). Litigants cannot confer subject matter jurisdiction upon a tribunal by acquiescence or consent. *Anderson v. Houston*, 274 Neb. 916, 744 N.W.2d 410 (2008).

The Board argues that it lacked jurisdiction because MRE failed to properly file a written appeal with the county clerk. Under Neb. Rev. Stat. § 77-1233.06(2) (Reissue 2009), a taxpayer can appeal a penalty imposed by the county assessor "by filing a written appeal with the county clerk in the same manner as prescribed for protests in section 77-1502." Neb. Rev. Stat. § 77-1502(2) (Supp. 2009) states that a protest "shall be signed and filed with the county clerk" and that it "shall

contain or have attached a statement of the reason or reasons why the requested change should be made and a description of the property to which the protest applies." Here, MRE wrote a letter to the county assessor on September 24, 2009, asking that the penalty be removed because "the original 2009 personal property tax return for [MRE] was mailed on or before April 30, 2009." The only apparent deficiency is that the protest was mailed to the county assessor rather than the county clerk. But on September 28, the Board, through a deputy county clerk, sent MRE a letter notifying it of the time and date of a hearing on the protest.

MRE responds that § 77-1233.06(2) merely imposed a condition precedent to the right of a taxpayer to litigate a penalty and that as such, the presentation of the protest to the county clerk could be, and was, waived. MRE relies upon cases such as *Millman v. County of Butler*, 235 Neb. 915, 458 N.W.2d 207 (1990), addressing the claim required by statute before a suit may be commenced against a political subdivision under the Political Subdivisions Tort Claims Act.

Even if we assume that the requirement of § 77-1233.06(2) is controlled by the mandatory requirement of § 77-1502(2) that the protest shall be "filed with the county clerk of the county where the property is assessed," the record shows that the protest was received by the county clerk on or before the last day for appeal. The Board relies on cases such as *JEMCO, Inc. v. Board of Equal. of Box Butte Cty.*, 242 Neb. 361, 495 N.W.2d 44 (1993). In that pre-TERC case, the Nebraska Supreme Court held that the taxpayer's failure to present the question of the property's valuation to the county board of equalization precluded an appeal to the district court. In that case, it was "clear from the record" that the taxpayer never filed a protest with the county board of equalization. *Id.* at 363, 495 N.W.2d at 46. In the case before us, the situation is materially different. Here, MRE's letter of protest, dated September 24, 2009, appears in the record and the transcription of the hearing before the Board clearly shows that it was provided to the Board. While the record does not contain a copy showing any file stamp affixed by the county clerk, the record also contains the September 28 letter from a deputy county clerk to MRE notifying it that

the Board would "meet to consider the protest of penalty" and that the Board would "consider the protest [MRE] filed on the penalty that was assessed on [its] personal property tax schedule for late filing." Thus, the record is clear that by September 28, the protest had come into the possession of, i.e., had been received by, the county clerk. Because the assessor notified MRE of the penalty on August 27, the 30-day period for appeal would have expired on September 26. But because that date fell on a Saturday, MRE had until Monday, September 28, to accomplish the filing. See Neb. Rev. Stat. § 49-1203 (Reissue 2010). The record shows that by such date, the county clerk had received MRE's protest.

[10] The county clerk's receipt of the document constituted the "filing" required by § 77-1233.06(2). A document is filed with an officer when it is placed in his custody and deposited by him in the place where his official records and papers are usually kept. *Prucka v. Eastern Sarpy Drainage Dist.*, 157 Neb. 284, 59 N.W.2d 761 (1953). Because the county clerk had clearly received MRE's protest, the Board had the power and duty to correct a penalty which was wrongly imposed or incorrectly calculated. See § 77-1233.06(3). We find no merit to the Board's argument that it lacked subject matter jurisdiction of MRE's appeal. It naturally follows that TERC also had jurisdiction of the appeal taken to it and that we have jurisdiction of the instant appeal.

*Stipulated Facts and Weight Given.*

[11] MRE argues that TERC erred in giving affidavits greater weight than unsworn statements because the parties stipulated to the facts. There is no doubt that parties to a proceeding before TERC may agree upon facts by written stipulation. See 442 Neb. Admin. Code, ch. 4, § 005 (2009). However, "[TERC] is not bound by a stipulation." *Id.* Further, it appears from the transcript that the stipulation of facts was "by affidavits." Thus, we find no error by TERC in according the affidavits greater weight.

*Propriety of Penalty.*

[12] The crux of MRE's appeal is that TERC erred in upholding the penalty imposed for the late filing of a tax

return. Under Neb. Rev. Stat. § 77-1229(1) (Reissue 2009), a tax return listing tangible personal property must be filed on or before May 1 of each year. MRE asserts that it mailed its 2009 return before May 1, but the assessor claims not to have received it until after September 1.

During the hearing before the Board, the deputy county attorney stated that the assessor had to actually receive the tax return in order for MRE to have filed it. MRE argues that such advice does not conform to the law because the return did not have to be actually received in order to be filed. Of course, this court reviews questions of law de novo. See *Vandenberg v. Butler County Bd. of Equal.*, 281 Neb. 437, 796 N.W.2d 580 (2011).

[13] We agree with MRE that § 49-1201 applies and, under certain circumstances, requires that a tax return be treated as made and received when it was mailed. Section 49-1201 states in pertinent part:

> Any . . . tax return . . . which is: (1) Transmitted through the United States mail; (2) mailed but not received by the state or political subdivision; or (3) received and the cancellation mark is illegible, erroneous, or omitted shall be deemed filed or made and received on the date it was mailed if the sender establishes by competent evidence that the . . . tax return . . . was deposited in the United States mail on or before the date for filing or paying.

MRE focuses on that part of § 49-1201 which says that the return "shall be deemed filed . . . and received on the date it was mailed." But, first, that statute requires the sender to establish that the return was "deposited in the United States mail."

MRE's evidence established that Thelen placed the envelope containing the tax return in MRE's outgoing mailbox. But there was no evidence that this uncovered "sturdy box" kept behind MRE's secretary's workspace was a regular U.S. Postal Service depository.

This evidence failed to trigger a receipt-of-mail presumption. In *Baker v. St. Paul Fire & Marine Ins. Co.*, 240 Neb. 14, 480 N.W.2d 192 (1992), an insured testified that she dropped

an envelope into a mail chute in the hallway of her employer's building, which chute goes to the basement, where the mailroom is located. The Nebraska Supreme Court stated, "As a matter of law, [the insured's] evidence did not entitle her to the receipt-of-mail presumption, nor was the evidence sufficient to submit the issue of payment to the jury." *Id.* at 18, 480 N.W.2d at 196. The Supreme Court reasoned that the insured failed to show that her mailing was properly mailed for two reasons: First, "[t]here is no evidence that the mailroom was operated under the auspices of the U.S. Postal Service or that it was a U.S. Postal Service depository." *Id.* at 18, 480 N.W.2d at 197. Similarly, MRE did not establish that its mailbox was an official U.S. Postal Service depository or otherwise operated in connection with the postal service. Second, the Supreme Court stated that there was no evidence "showing that an authorized individual invariably collected and placed all outgoing mail collected from the mailroom in a regular U.S. mail depository or that such a procedure was actually followed on [the purported date of mailing]." *Id.* According to MRE's evidence, each Monday through Saturday, a U.S. postal carrier came to the office to deliver MRE's mail and retrieve outgoing mail. Thelen recalled only one occasion in the past 16 years in which the postal carrier did not pick up mail. But MRE did not establish that a U.S. postal carrier picked up the mail on April 23, 2009, and placed it in a regular U.S. mail depository.

[14] While MRE's evidence did create an inference of regular transmission, it presented a question of fact for TERC's resolution, and TERC was not required to accept the inference.

> [A]bsent direct proof of actual deposit with an authorized U.S. Postal Service official or in an authorized depository, . . . proof of a course of individual or office practice that letters which are properly addressed and stamped are placed in a certain receptacle from which an authorized individual invariably collects and places all outgoing mail in a regular U.S. mail depository and that such procedure was actually followed on the date of the alleged mailing creates an inference that a letter properly addressed

> with sufficient postage attached and deposited in such receptacle was regularly transmitted and presents a question for the trier of fact to decide.

*Houska v. City of Wahoo*, 235 Neb. 635, 641, 456 N.W.2d 750, 754 (1990). MRE's evidence concerning its mailing procedure created only an inference that its tax return was "regularly transmitted." See *id.* TERC rejected this inference. Accordingly, because the assessor otherwise did not receive the tax return until after September 1, 2009, the penalty was properly imposed.

## CONCLUSION

Although MRE mailed its protest of the penalty to the county assessor rather than the county clerk, the county clerk had clearly received, i.e., filed, the protest prior to the deadline for filing of the appeal. Thus, the Board timely had notice of the protest and was not deprived of subject matter jurisdiction. TERC also had jurisdiction to consider MRE's appeal from the Board's decision, and we have jurisdiction of the appeal from TERC's decision. Because we conclude that TERC's decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable, we affirm its order.

AFFIRMED.