13-2476
TAX TYPE: PROPERTY TAX
TAX YEARS: 1996-2010
DATE SIGNED: 11-4-2015
COMMISSIONERS: J. VALENTINE, M. CRAGUN, R. PERO, R. ROCKWELL
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

TAXPAYER, Petitioner, vs. BOARD OF EQUALIZATION OF RURAL COUNTY, STATE OF UTAH, Respondent.	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION** Appeal No. 13-2476 Tax Type: Property Tax Tax Year: 1996-2010 Judge: Phan

This Order may contain confidential "commercial information" within the meaning of Utah Code Sec. 59-1-404, and is subject to disclosure restrictions as set out in that section and regulation pursuant to Utah Admin. Rule R861-1A-37. Subsection 6 of that rule, pursuant to Sec. 59-1-404(4)(b)(iii)(B), prohibits the parties from disclosing commercial information obtained from the opposing party to nonparties, outside of the hearing process. Pursuant to Utah Admin. Rule R861-1A-37(7), the Tax Commission may publish this decision, in its entirety, unless the property taxpayer responds in writing to the Commission, within 30 days of this notice, specifying the commercial information that the taxpayer wants protected. The taxpayer must send the response via email to taxredact@utah.gov, or via mail to the address listed near the end of this decision.

Presiding:
John Valentine, Commission Chair
Michael Cragun, Commissioner
Robert Pero, Commissioner
Jane Phan, Administrative Law Judge

Appearances:
For Petitioner: REPRESENTATIVE-1 FOR TAXPAYER, Attorney at Law
REPRESENTATIVE-2 FOR TAXPAYER, Attorney at Law
For Respondent: RESPONDENT-1, Deputy RURAL COUNTY Attorney
RESPONDENT-2, Deputy RURAL COUNTY Attorney
RESPONDENT-3, RURAL COUNTY Assessor

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on April 27 & April 28, 2015, in accordance with Utah Code §59-2-1006 and §63G-4-201 et seq. Based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. This matter is before the Utah State Tax Commission on an appeal filed by Petitioner ("Taxpayer") under Utah Code Sec. 59-2-1006. The Taxpayer is appealing the Final Order of the RURAL COUNTY Board of Equalization ("County's Final Order"), which the County had issued on March 13, 2013. It was the conclusion in the County's Final Order that the Taxpayer owed $$$$$ in property tax and interest for tax years 1996 through 2010.

2. The property at issue is divided into two different categories for purposes of this decision. The first category is the Water Distribution Facilities. It consists of #####-miles of water pipelines, two-thirds of which are laid in public utility easements along, but not under, public roadways and much of the remaining one-third is located in private right of ways on property that is not owned by the Taxpayer. Of the #####-miles of pipeline, only 0.50 to 0.75 are under roadways.[1] The Water Distribution Facility also includes substation facilities, pumping stations, underground water storage tanks or reservoirs and well houses needed to move the water through the pipelines. The well houses are buildings with concrete floors and pumps that go down into the ground 900 feet in some cases, and have an electrical system.[2]

3. Much of the Water Distribution Facilities were in existence as far back as 1996, although there have been some additional pipelines added after 2000. According to a personal property tax assessment which had been issued as an escaped property audit, the value of the Water Distribution Facilities as they existed in 2000 was $$$$$.[3] Additions to the Water Distribution Facilities occurred in 2007, with an extension noted as Section 27, at a cost of $$$$$. In 2008 the Taxpayer added to the Water Distribution Facilities the NAME-1 Pipeline at a cost of $$$$$ and in 2009 the NAME-2 Pipeline with a cost of $$$$$.[4]

4. The second category of property has been referred to as the Water Purification Facility. This is machinery and equipment which in 2001 was installed and interconnected to operate as a water purification plant. A cost summary, provided as an exhibit, indicated the cost for the machinery and equipment that comprise this plant was $$$$$.[5] The plant was constructed inside a building and on land owned by the Taxpayer. For purposes of this decision, the Water Purification Facility is limited to the

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[1] See Exhibit E TAXPAYER *v. Utah State Tax Comm'n., County Board of Equalization of RURAL COUNTY, Civil No.#####,* pg. # & Exhibit X, pg. SUM0305.
[2] TAXPAYER, pg. 8.
[3] Exhibit B, pg. SUM0024.
[4] Exhibit H.
[5] Exhibit G.

machinery and equipment inside the building and does not include the building itself or the land. The cost of $$$$$ is just for the machinery and equipment.

5. At the hearing, NAME-3, a 28 year employee of the Taxpayer, provided testimony describing the Water Purification Facility. He testified that this plant was constructed as a backup plant to purify raw creek water or NAME-2 reservoir water, and was not intended to be a primary system for the Taxpayer. The Taxpayer's primary water source was various wells. It was his statement that there was a high cost to turn this plant on, and it had only been used a few months over the thirteen year period since it had been constructed. For this reason some of the equipment, like the membranes which would generally only have an 8 year useful life, are still functional. He also explained that the plant uses a microfiltration system to purify water, so it does not use heat or distillation. He testified that the sludge tank and containment tanks were built under the floor of the building, so the floor would have to be removed in order to take out these tanks. He testified that when constructed, this was a state of the art facility and that it would not be cost effective to replace the plant with some newer technology. He did acknowledge, however, that various items of machinery, like individual pumps or membranes, could be replaced if needed. Much of the machinery was bolted to the floor and pipelines connected the system together. He testified that the backwash system[6] was one large unit and not a modular system so it would not be economically feasible to replace it.[7] Photographs were submitted at this hearing that show various sections of this machinery and equipment, how they are interconnected and how they are placed within the building.

6. The Taxpayer had not included the Water Distribution Facilities on its Personal Property Affidavits for the years 1996 through 2000. The Property Tax Division of the Utah State Tax Commission performed an escaped property audit for these years and a personal property tax was assessed for the portion of the Water Distribution Facilities in existence at this time. The increase in taxable value for each of the audit years was as follows:[8]

1996	$$$$$
1997	$$$$$
1998	$$$$$
1999	$$$$$
2000	$$$$$

7. The Taxpayer appealed the escaped property audit to the County Board of Equalization and then appealed that decision to the Utah State Tax Commission. The Utah State Tax Commission issued its *Findings of Fact, Conclusions of Law and Final Order in Appeal No. 01-0725*, on January 29,

[6] Exhibit TR7 provides a photograph of this system.
[7] Photographs of the Water Purification Facility are provided in Exhibits TR7 through TR11 and Exhibit DD.
[8] Exhibit B, pgs. SUM0012-0013.

2003, in which the Tax Commission found that the Water Distribution Facilities were personal property and should be taxed as such. The decision also concluded that the Taxpayer had failed to report the Water Distribution Facilities to the County Assessor on its personal property affidavits and so the facilities constituted escaped personal property. The Commission sustained the escaped personal property assessment for the years 1996 through 2000. An additional issue had been addressed in that decision concluding that there was no improper double taxation.

8. The Taxpayer appealed the Tax Commission's *Final Order* in *Appeal No. 01-0725* regarding the 1996 to 2000 escaped personal property audit to the Third District[9] Court of the State of Utah.

9. During the court proceeding, in February 2006, the parties entered into a stipulation to deposit the amount of disputed personal property taxes relating to the appeal, pending that proceeding. This was for the tax years at issue in that proceeding, which were 1996 through 2000. The amount deposited was $$$$$.[10]

10. The Second Judicial District Court issued its decision in TAXPAYER *v. Utah State Tax Comm'n., County Board of Equalization of RURAL COUNTY, Civil No.#####*, on DATE AND YEAR. In this decision the court reversed the Tax Commission on the issue of whether the Water Distribution Facilities were personal property or real property. In the decision Judge Morris found it to be real property for the 1996 through 2000 period that was before him in that case. He also found that the Taxpayer was entitled to a 51% irrigation property tax exemption.[11] On the double taxation issue, he found that the value of the Water Distribution Facilities was not subsumed into the value of the land that it serviced, so there was no double taxation.

11. After the issuance of his decision, the District Court Judge released back to the Taxpayer the $$$$$ deposited estimate of the 1996 through 2000 escaped property taxes that were at issue in that court proceeding.

12. The District Court's decision was appealed on the issue involving the 51% irrigation exemption and the double taxation issue. On DATE AND YEAR, the Utah Supreme Court issued its order, in TAXPAYER *v. Utah State Tax Comm'n*, #####. In this decision, the Utah Supreme Court upheld the District Court's conclusion that the Taxpayer was entitled to a 51% irrigation exemption and upheld the District Court's decision that there was no double taxation. Whether the Water Distribution

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[9] The Third District Court Judge had issued a decision in 2007, but then the decision was withdrawn and that judge was recused from the proceeding. The appeal was then assigned to the Second District Court.

[10] Exhibit TR4.

[11] The District Court found, "On average, 51% of the water provided by TAXPAYER to its shareholder's property is used for outdoor irrigation of lawns, shrubs, trees, and gardens. The remaining 49% is used for indoor domestic purposes, such as drinking water." TAXPAYER *v. Utah State Tax Comm'n., County Board of Equalization of RURAL COUNTY, Civil No. #####,* pg. #.

Facilities were real property or personal property was not an issue argued in the Utah Supreme Court proceeding and was not addressed by the Utah Supreme Court in its decision.

13. The whole appeal process regarding the 1996 through 2000 escaped property assessment going through the Utah State Tax Commission, then the District Court and Utah Supreme Court took years, with the final decision of the Utah Supreme Court being issued in July 2011.

14. The Taxpayer either crossed off or did not include the Water Distribution Facilities or the Water Purification Facility (which may be referred jointly herein as "Facilities") on its personal property affidavits or Signed Statement for the years 2001 through 2010 and did not pay any personal property tax for these Facilities. In general, when assessing personal property the County sends a "Signed Statement" to all businesses located in the County listing all the personal property owned or under the control of the business of which the County is aware. The business is to add to the list any additional personal property, remove from the list personal property which it no longer owned, calculate the tax and sign the statement. For the tax years 2001 through 2005 the County had issued the signed statements every year listing the Water Distribution Facilities that it had become aware of through the 1996 through 2000 escaped property audit.[12] However, the Taxpayer had for the years 2001 through 2005 crossed off from the Signed Statements the portions of the Water Distribution Facilities listed.[13] There were several correspondences, however, in which the Taxpayer notified the County that it had crossed off the Water Distribution Facilities pending the outcome of the various appeals. For years 2006 through 2009 the County no longer listed these properties on the Signed Statements it sent to the Taxpayer and the Taxpayer did not add them to the list, nor did the Taxpayer include on its Signed Statements any of the portions of the Water Distribution Facilities added in 2007 through 2009, or the Water Purification Facility which was constructed in 2001.

15. The County argues that there was a longstanding agreement that the parties would "settle up" when the appeal was finally resolved but at the hearing there was a disagreement between the parties as to what this longstanding agreement entailed. There was no formal written agreement between the County and the Taxpayer, but there were a number of correspondences over the course of the years regarding the taxes.

16. The correspondences between the Taxpayer and County regarding the taxes during these years included the following:

a. A letter from the County dated July 25, 2001,[14] which stated, "this letter is to inform you that RURAL COUNTY is granting an extension for payment of the 2001, 2000

[12] Testimony of NAME-4, Deputy RURAL COUNTYAssessor.
[13] Exhibit R.
[14] Exhibit T-1.

and prior 5 years business personal property taxes, pending the outcome of an appeal to the Utah State Tax Commission . . ." This letter goes on to state that interest will continue to accrue.

b. A letter from the County dated October 23, 2002, indicating that the County would continue to allow the extension to pay pending the Tax Commission appeal for the years 2002, 2001, 2000 and the prior five years.[15]

c. A letter dated November 28, 2005, from the attorney for the Taxpayer, REPRESENTATIVE-1 FOR TAXPAYER, to NAME-5,[16] who at that time was the RURAL COUNTY Assessor. That letter confirms that a meeting between the assessor, her staff and the Taxpayer was to take place on November 30, 2005. It also discusses an extension of payment. REPRESENTATIVE-1 FOR TAXPAYER states:

> In light of that meeting, and in hopes of further discussions between these parties, we have agreed that the deadline for payment of TAXPAYER'S personal property taxes set forth in NAME-6 letter of October 25, 2005 will be extended. In the event you determine that payment of the outstanding personal property taxes must be made, notwithstanding the pending appeal before the Third District Court, you have agreed to provide written notice to TAXPAYER, with a copy to me, at least 20 days prior to the deadline for any such payment.

Although written by REPRESENTATIVE-1 FOR TAXPAYER, there was a place on the letter for NAME-5 signature to sign if she agreed with the letter and she had signed the letter.

d. There was a letter from the Taxpayer dated January 25, 2006, regarding taxes for 2001 through 2005. Attached to the letter were the personal property affidavits or "Signed Statements" for tax years 2001 through 2005,[17] to which the Taxpayer had crossed out all items relating to "Distribution" and left on items not in dispute like office furniture and equipment. The Taxpayer had not added the Water Purification Facility to its signed statement. The "Signed Statements" for the years 2001 through 2005 were all signed and dated in January 2006, so it appears that this is the first time the Taxpayer had submitted the Signed Statements for these years. In the January 25, 2006 letter, the Taxpayer states, "As you will see, we have crossed out all items that are in question due to our stance concerning taxation of distribution system elements. The taxing [of] these items, as you recall, will be resolved by the court."

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[15] Exhibit T-2.
[16] Exhibit Q.
[17] Exhibit R.

e. On February 14, 2006 the Third Judicial District Court entered an Order Re: Stipulation to Deposit Money in Court in which the Taxpayer agreed to deposit pending the court proceedings the amount of disputed personal property taxes at issue.[18] The deposit was for tax years 1996 through 2000, in the amount of $$$$$. The Order was signed as "Approved as to Form" by both the attorney for RURAL COUNTY and the Attorney for TAXPAYER. The Order states the following in relevant part:

> . . .
>
> (i) That Plaintiff TAXPAYER shall deposit in court $$$$$ which is the amount of disputed personal property taxes and interest penalties assessed by RURAL COUNTY against TAXPAYER through December 31, 2000, which is the subject of the present appeal;
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> . . .
>
> (v) That this agreement does not relate to nor is their [SIC] any agreement regarding the personal property taxes owed to RURAL COUNTY for tax lien dates after December 31, 2000.

f. Another letter from the Taxpayer to the County was dated March 16, 2006 and indicated it was in regards to personal property taxes for 2006. In that letter the Taxpayer states, "Thanks for separating the distribution system items from all others as you have. As you know the taxing of these items will be resolved by the court. Hopefully, the court will deal with this matter expeditiously, so that we can all proceed with the same understanding in the coming years, concerning the taxation of all mutual nonprofit water systems infrastructure."[19]

g. The Taxpayer sent a similar letter for the 2007 year.[20]

h. A letter dated May 13, 2008, from the Taxpayer to the County[21] states,

> Thank you for your assistance today concerning TAXPAYER'S personal property tax statement. As per our agreement, the disputed portions of the tax assessment . . i.e. those portions that are in active dispute before the tax court, have not been included in the affidavit. Consequently, the affidavit covers equipment and other personal property subject to our personal property tax and not part of the fixtures contained within the distribution system.

i. The Taxpayer sends a very similar letter for the 2009 tax year dated May 15, 2009.[22] The Personal Property signed statement that the Taxpayer submitted for that year

[18] Exhibit TR4.
[19] Exhibit T-3.
[20] Exhibit T-4.
[21] Exhibit S-3.

indicated personal property with a total taxable value of $$$$$ and listed things like desks, workstations, and office furniture or equipment.[23]

j. For the 2010 tax year, the Taxpayer's Personal Property Tax Signed Statement indicated a total taxable value of $$$$$ with similar office furniture, equipment and computers.[24]

17. NAME-3, who had been employed by the Taxpayer for 28 years, testified at the hearing that it was his understanding regarding the agreement with the County that if the Court found the Facilities were personal property then the Taxpayer would pay the tax. However, if the Court found the Facilities were not personal property, then Taxpayer would not owe any tax. He points out that letters from the County dated July 25, 2001 and October 23, 2002[25] discuss an extension to pay "business personal property taxes." It was his testimony that the longstanding agreement with the County was when the court resolved the issue "taxes would be paid or not."

18. NAME-4, Chief Deputy County Assessor, over the Personal Property Department of RURAL COUNTY had worked in that position during the tax years at issue. It was NAME-4 testimony that when someone applied for a business license in the County she would send them out a personal property statement. She stated in the late 1990's they had sent returns out to all the water companies and asked them for a list of the personal property. She indicated that the Taxpayer did not respond. The County did issue an estimate, but the County did not have a list of all of the Taxpayer's property, so when the Taxpayer's personal property account was audited, the amount became much higher. She also testified, which was consistent with Exhibit R, that the Taxpayer filed the statements for tax years 2001 through 2005 all at the same time in January 2006. She stated the County did not advise the Taxpayer to strike out all the Water Distribution Facilities; however, it was something the Taxpayer had done on these statements. For years beginning in 2006, she stated that she began keeping two accounts for the Taxpayer; one was just the office equipment and furniture and the second contained the Water Distribution Facilities. She also testified that the Water Purification Facility was never reported by the Taxpayer; therefore it was not on the personal property statements for any of the years 2002 through 2009. It was her testimony that she believed whether it was real or personal property that it would be taxed either way and would only not be taxed if the Taxpayer won on its double taxation argument. She also trusted that TAXPAYER would pay the tax once the issues were resolved in the court and so she did not see a need to put an agreement in writing. However, she acknowledged that they had no discussion

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[22] Exhibit S-4, pg. SUM0273.
[23] Exhibit S-4, pg. SUM0274-0275.
[24] Exhibit S-4, pg. SUM0276-0277.
[25] Exhibits T-1 & T-2.

about what would happen if the court found the Water Distribution Facility assets to be real property and not personal property as that was not something that she thought would occur.

19. The Water Purification Facility assets had never been reported by the Taxpayer on its personal property affidavits or Signed Statements for any of the years at issue. NAME-3 had testified that the County should have been aware of this property because the Taxpayer had taken out a building permit for the building in which this property was located and there had been inspections during the construction.

20. Much of the pipelines in the Water Distribution Facilities were located in right-of-ways under land not owned by the Taxpayer. It was the County's testimony that none of the Water Distribution Facilities property was included in the real property assessments. Every year from 2001 through 2010 the County had issued real property assessments to the Taxpayer for seven parcels of real property owned by the Taxpayer.[26] Some of these appeared to be land parcels with no improvements. For example, Parcel Nos. #####-1 and #####-2 were assessed as non-primary land for all years at issue.[27] Parcel #####-3 was assessed as agricultural land for the years 1999 through 2001 and then as "non-primary land" for the years 2002 through 2010.[28] However, some of the parcels indicated both land and an improvement. For these assessments, although there is a legal description of the land, there is not a specific description of what is considered to be the improvement. Parcel No. #####-4 was assessed for $$$$$ as "agricultural land" for the years 1999 through 2002. In 2003 the assessed value increased to $$$$$ and was listed as "non-primary improved property." For 2004 through 2006 the property was listed as "non-primary improved property," but the value had been lowered to $$$$$. For 2007 the notice listed this property as "non-primary building" at $$$$$ and "primary land" at $$$$$. For 2008 through 2010 the property was described the same, but there was a small increase in value.[29] Parcel No. #####-5 was assessed as "non-primary improved property" for $$$$$ for the years 2002 through 2006. For 2007 through 2010 the property was assessed as "non-primary building" for $$$$$ and "non-primary land" for $$$$$.[30] Parcel No. #####-6 was assessed as "non-primary improved property" for 1999 through 2006. The 2007 through 2008 Tax Notices break the assessments out to "non-primary building" with a value of $$$$$ and "non-primary land" with a value of $$$$$. The 2009 and 2010 notices assess this as "non-primary building" for $$$$$ and "primary land" for $$$$$.[31]

21. The Water Purification Facility is located in the building on Parcel No. #####-7. Like the other parcels, the description provided for the improvement on this parcel is very general. In 1999 and 2000 this parcel had been valued at $$$$$ and was described as "non-primary land." In 2001 the

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[26] Exhibits I through O.
[27] Exhibits I & N.
[28] Exhibit K.
[29] Exhibit O.
[30] Exhibit L.
[31] Exhibit J.

description changed to "non-primary improved property" and the value was assessed at $$$$$. From 2002 through 2006, after the construction of the building had been completed, this property was assessed as "non-primary improved property" with a value of $$$$$. Like the other improved properties, in 2007 and 2008 the notice broke out a value for the land and a value for the improvement with the description "primary land" for $$$$$ and "non-primary building" for $$$$$. The description was the same for 2009 and 2010, but the value changed significantly to "non-primary building" for $$$$$ and "primary land" for $$$$$.[32]

22. The County provided the Assessment Record for Parcel #####-7,[33] the parcel on which the Water Purification Facility is located. The Assessment Record supported the County's position that the improvement value listed on the County's Tax Notice for this parcel, was, in fact, a value just for the #####-square foot (X) manufacturing building constructed on the property and did not include the machinery and equipment which has been referred to as the Water Purification Facility. That Assessment Record contained a Building Permit Application, dated on August 1, 2000 and a detailed Cost Report on which the County had calculated through a costing method that the basic cost of the #####-square foot building was $$$$$. The Assessment Record also contained photographs of the interior and exterior of this building. Based on this, the real property assessment for Parcel #####-7 was strictly for the land and the building and not for any of the machinery and equipment described herein as the Water Purification Facility.[34]

23. After the District Court decision was issued, on September 30, 2009, the County issued a letter to the Taxpayer,[35] which appears to be the first attempt to get information from the Taxpayer in order to issue an assessment for the Facilities for the tax years 2001 through 2009. The letter also appears to be an attempt to collect taxes for the 1996 through 2000 audit. The letter had been sent by NAME-4, Chief Deputy Assessor. The letter states, "In order for us to comply with the Judge's orders, it will be necessary for our office to receive an update of any and all equipment, whether distribution lines, your water treatment plant (all equipment inside the building), or any other type of equipment that you have purchased or disposed of since the 2000 audit. It will be to your advantage to list all of these types of equipment as personal property so that they will depreciate each year." It does appear from this letter that the County is proposing to tax the Facilities as personal property for all of these years, but was agreeing to apply the 51% exemption ordered in the District Court decision.

25. In response to the County's September 30, 2009 letter attempting to obtain information so it could assess the Taxpayer, the Taxpayer's attorney submitted a letter to the County on October 21,

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[32] Exhibit M.
[33] Exhibit Z.
[34] Testimony of RESPONDENT-3, Exhibit Z.
[35] Exhibit HH-1.

2009.[36] In the letter, REPRESENTATIVE-1 FOR TAXPAYER stated "In her letter, NAME-4 appears to contend that TAXPAYER'S Water Distribution Facilities, as defined at page 5 of the Court's Findings of Fact, Conclusions of Law and Order entered October 7, 2009 ("Order"), may be taxed as personal property under the Court's Order. That position is untenable and contrary to the Court's Order." REPRESENTATIVE-1 FOR TAXPAYER goes on to state, "Notwithstanding the Court's Order, in her September 30, 2009 letter NAME-4 specifically requests that TAXPAYER provide information concerning its Water Distribution Facilities for purposes of personal property tax assessment. That inquiry, and the premise underlying that inquiry, is contrary to the Court's Order and TAXPAYER has no intention of providing the requested information for that purpose." He goes on to note that the Taxpayer had been filing the personal property affidavits and paying personal property tax on the other items of personal property for those years which it owned, but excluding the Facilities. He states, "in light of the Court's clear Order, no additional personal property tax is owed for those years." No follow up letter or additional attempt to tax the Facilities was sent by the County until 2011.

26. On July 29, 2011, the Utah Supreme Court issued its decision in *TAXPAYER v. Utah State Tax Commission, #####.* On August 8, 2011, RESPONDENT-3, who was now the RURAL COUNTY Assessor, issued a formal assessment letter requesting payment of taxes for years 1996 through 2010. This assessment was based on the property being real property for the years 1996 through 2003 and personal property for the years 2004 through 2010. In the letter RESPONDENT-3 stated as follows:[37]

> In September 2009, Judge Morris reversed the Tax Commission and found that the Facilities were "real property" and not "personal Property," but he allowed to stand the Tax Commission's ruling on escaped property. Pursuant to UCA §59-2-217, and in accordance with the Tax Commission Findings and Conclusions, as well as the tolling of any limitations period during the pendency of the tax case which was concluded on July 29, 2011, the County is entitled to collect "real property" taxes for years 1996-2000 as "escaped property." According to the Utah Supreme Court, the total assessed tax was $$$$$ for those years. With a 51% exemption plus outstanding interest, the taxes due are $$$$$.
>
> Pursuant to our agreement between the County and TAXPAYER, as documented in NAME-3 various letters to the County over the years, TAXPAYER paid personal property taxes on office equipment only and real property taxes on buildings and well houses from 2001 to 2010 with the understanding that all time periods would be tolled until the resolution of the court case, whereupon the parties would settle up on the "escaped property," to wit: the Facilities. As a result, TAXPAYER specifically did not list any of the Facilities as either "personalty" on the "Personal Property Tax Affidavit" or as "improvements" to the "real property." Now that the case has concluded, we need to settle up the remaining taxes for years 2001-2010.

[36] Exhibit HH-2.
[37] Exhibit V.

> If you will recall, the statute on personal property changed and empowered the Tax Commission to define classes of personal property, effective for the 2004 tax year. UCA §59-2-107. Pursuant to an official published schedule, the Tax Commission determined that water pumps and water purification equipment are Class 8 personal property, and that pipelines and pipe systems are Class 16 personal property. Consequently, from 2001 to 2003, the Facilities were "real property" pursuant to Judge Morris' 2009 ruling, but have been "personal property" since 2004 pursuant to the Tax Commission's official published schedule.
> . . .
> The final tally shows that for tax years 1996-2010, TAXPAYER owes property taxes of $$$$$ with interest of $$$$$ giving a total tax liability of $$$$$. Pursuant to UCA §59-2-1302, such has been attached as a lien on Parcel Number #####-7.

RESPONDENT-3's letter goes on to note that his decision is appealable to the RURAL COUNTY Board of Equalization.

27. The Taxpayer did appeal the decision to the RURAL COUNTY Board of Equalization. The RURAL COUNTY Board of Equalization issued an Order on August 8, 2012 ("Order")[38] and a Final Order on March 13, 2013 ("Final Order"), which is the subject of this appeal.[39]

28. In the Final Order, the County affirmed conclusions in its Order and revised its assessment to a total tax and interest of $$$$$, with additional interest at the applicable rate from August 28, 2012.[40] This property tax assessment was issued as a real property assessment for the years 1996 through 2003 based on the Judge's Order in the District Court proceeding. However, for tax years 2004 through 2010 the County concluded in its Order and Final Order that the assessment on the Facilities was properly issued as a personal property assessment. It was the County's conclusion that effective for the 2004 tax year at Utah Code Sec. 59-2-102(19)(c) and 59-2-107 the Tax Commission had statutory authority to reclassify from real to personal certain property including the Facilities and that it had done so.[41] The County argues beginning with tax year 2004, the Tax Commission reclassified the Facilities to personal property.

29. NAME-7, Personal Property Appraiser Manager in the Property Tax Division of the Utah State Tax Commission and employee in that division for 31 years, testified at the hearing that the Water Purification Facilities were personal property. It was his opinion that the machinery and equipment that made up this facility were Class 8 machinery and equipment. He noted that any type of manufacturing equipment would be bolted to the floor or may even have some type of cement footings for stability. He testified that in his opinion machinery and equipment that produced a product, was not part of the

[38] Exhibit X, pgs. SUM0304-0313.
[39] Exhibit X, pgs. SUM0314-0318.
[40] Exhibit X, pg. SUM0317.
[41] Exhibit X, pg. SUM0306.

building structure itself, and would not substantially damage the real property if removed, was personal property.

30. NAME-7 also testified that the Utah Admin. Rule R884-24P-33 had been adopted in 1995. He explained that every year this rule is reviewed and may be updated to add new classes or change the percent good tables of existing classes. Before a change is made to the rule, it goes to the Tax Commission. The Tax Commission holds a public hearing and then the Tax Commission would determine whether or not to make the change or revision to the rule. He also testified that the Property Tax Division publishes “Guidelines” to make it easier for taxpayers. He acknowledged the “Guidelines” were not part of the rule, that the Property Tax Division auditors use the “Guidelines” in practice as they audit personal property and the Division’s auditors themselves may update the “Guidelines” as they determine necessary.[42]

31. NAME-7 testified that the Division had treated pipelines as personal property for many years, that it had been treated as such when he started working at the Tax Commission and it was his position that if they were personal property they would be valued as Class 16 long life property.

APPLICABLE LAW

Utah Code §59-2-103(2010)[43] provides for the assessment of property, as follows:

> (1) All tangible taxable property located within the state shall be assessed and taxed at a uniform and equal rate on the basis of its fair market value, as valued on January 1, unless otherwise provided by law.

The property at issue in this appeal is of the type assessed by the County Assessor. Utah Code Sec. 59-2-301(2010) provides:

> The County Assessor shall assess all property located within the county which is not required by law to be assessed by the Commission.

The County Assessor is to assess the property annually. Utah Code Sec. 59-2-303(1) (2010) provides:

> Prior to May 22 each year, the county assessor shall ascertain the names of the owners of all property which is subject to taxation by the county, and shall assess the property to the owner, claimant of record, or occupant in possession or control at 12 o’clock midnight of January 1 in the tax year . . .

Utah Code Sec. 59-2-311(1) (2010) provides:

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[42] The Division’s Personal Property Classification Guidelines are included in Exhibit P.

[43] This appeal covers a period from 1996 through 2010. For convenience, the Commission will cite to the substantive provisions in effect for the 2010 tax year, which, unless noted, were substantially the same throughout the period at issue, although statutes have been renumbered or have had some revisions. The Commission cites to the current provisions on procedural statutes.

> Prior to May 22 each year, the assessor shall complete and deliver the assessment book to the county auditor.

Procedures for appealing the assessment of personal property are set out at Utah Code Sec. 59-2-1005 (2015) and provide:

> (1)(a) A taxpayer owning personal property assessed by a county assessor under Section 59-2-301 may make an appeal relating to the value of the personal property by filing an application with the county legislative body no later than: (i) the expiration of the time allowed under Section 59-2-306 for filing a signed statement, if the county assessor requests a signed statement under Section 59-2-306; or (ii) 60 days after the mailing of the tax notice, for each other taxpayer.
> (b) A county legislative body shall: (i) after giving reasonable notice, hear an appeal filed under Subsection (1)(a); and (ii) render a written decision on the appeal within 60 days after receiving the appeal.
> (c) If the taxpayer is dissatisfied with a county legislative body decision under Subsection (1)(b), the taxpayer may file an appeal with the commission in accordance with Section 59-2-1006.
> . . .

In situations where the Assessor has failed to assess a property on an annual basis, the law provides for property that has escaped assessment at Utah Code §59-2-309 (2010) as follows:

> (1) Any escaped property may be assessed by the original assessing authority at any time as far back as five years prior to the time of discovery, in which case the assessor shall enter the assessments on the tax rolls and follow the procedures established under Part 13 of this chapter.
> (2) Any property found to be willfully concealed, removed, transferred, or misrepresented by its owner or agent in order to evade taxation is subject to a penalty equal to the tax on its value, and neither the penalty nor assessment may be reduced or waived by the assessor, county, county Board of Equalization, or the commission, except pursuant to a procedure for review and approval of waivers adopted by county ordinance, or by administrative rule adopted in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act.

Escaped property is defined at Utah Code §59-2-102(11) (2010) to be:

> (a) "Escaped property" means any property, whether personal, land, or any improvements to the property, subject to taxation and is: (i) inadvertently omitted from the tax rolls, assigned to the incorrect parcel, or assessed to the wrong taxpayer by the assessing authority; (ii) undervalued or omitted from the tax rolls because of the failure of the taxpayer to comply with the reporting requirements of this chapter; or (iii) undervalued because of errors made by the assessing authority based upon incomplete or erroneous information furnished by the taxpayer.
> (b) Property which is undervalued because of the use of a different valuation methodology or because of a different application of the same valuation methodology is not "escaped property."

For property tax purposes, "personal property" is defined in Utah Code §59-2-102(27)(2010), as follows:

"Personal property" includes: (a) every class of property as defined in Subsection (28) which is the subject of ownership and not included within the meaning of the terms "real estate" and "improvements"; (b) gas and water mains and pipes laid in roads, streets, or alleys; (c) bridges and ferries; (d) livestock which, for the purposes of the exemption provided under Section 59-2-1112, means all domestic animals, honeybees, poultry, fur-bearing animals, and fish; and (e) outdoor advertising structures as defined in Section 72-7-502.

Real estate is defined at Utah Code Sec. 59-2-102(30) (2010) to be:

"Real estate" or "real property" includes: (a) the possession of, claim to, ownership of, or the right to possession of land; (b) all mines, minerals, and quarries in and under the land, all timber belonging to individuals or corporations growing or being on the lands of this state or the United States, and all rights and privileges appertaining to these; and (c) improvements.

Improvements are defined at Utah Code Sec. 59-2-102(19)(2010)[44]:

(a) Except as provided in Subsection (19)(c), "improvement" means a building, structure, fixture, fence, or other item that is permanently attached to land, regardless of whether the title has been acquired to the land, if: (i)(A) attachment to land is essential to the operation or use of the item; and (B) the manner of attachment to land suggests that the item will remain attached to the land in the same place over the useful life of the item; or (ii) removal of the item would: (A) cause substantial damage to the item; or (B) require substantial alteration or repair of a structure to which the item is attached.
(b) "Improvement" includes: (i) an accessory to an item described in Subsection (19)(a) if the accessory is: (A) essential to the operation of the item described in Subsection (19)(a); and (B) installed solely to serve the operation of the item described in Subsection (19)(a); and (ii) an item described in Subsection (19)(a) that: (A) is temporarily detached from the land for repairs; and (B) remains located on the land.
(c) Notwithstanding Subsections (19)(a) and (b), "improvement" does not include: (i) an item considered to be personal property pursuant to rules made in accordance with Section 59-2-107; (ii) a moveable item that is attached to land: (A) for stability only; or (B) for an obvious temporary purpose; (iii)(A) manufacturing equipment and machinery; or (B) essential accessories to manufacturing equipment and machinery; (iv) an item attached to the land in a manner that facilitates removal without substantial damage to: (A) the land; or (B) the item; or . . .

A definition of "tax roll" is provided at Utah Code Sec. 59-2-102(36) (2010) as follows:

"Tax roll" means a permanent record of the taxes charged on property, as extended on the assessment roll and may be maintained on the same record or records as the assessment roll or may be maintained on a separate record properly indexed to the assessment roll. It includes tax books, tax lists, and other similar materials.

[44] For tax years up through 2004, "improvement' was defined at Utah Code Sec. 59-2-102(17)(2004) as, "Improvements" means a building, structure, fixture, fence, or other item that is permanently attached to land, regardless whether the title has been acquired to the land." Effective for 2005 the definition was revised and was substantially the same up through 2011.

Effective beginning with the 2004 tax year and through the current year, the legislature adopted Utah Code Sec. 59-2-107 which provides:

> The commission shall make rules:
> (1) in accordance with [the] Utah Administrative Rulemaking Act;
> (2) defining classes of items considered to be personal property for purposes of this chapter;
> (3) defining items that fall into the classes established under Subsection (2); and
> (4) defining any class or item as personal property if the commission defined that class or item as personal property prior to January 1, 2004, by: (a) a rule made in accordance with [the] Utah Administrative Rulemaking Act; (b) a published decision of the commission; or (c) an official schedule published by the commission.

The County Assessor may require the filing of a signed statement listing personal property. Utah Code Sec. 59-2-306(1)(a) (2010) provides:

> The county assessor may request a signed statement from any person setting forth all the real and personal property assessable by the assessor which is owned, possessed, managed, or under the control of the person at 12 noon on January 1.

A person may appeal a decision of a county board of equalization, as provided in Utah Code §59-2-1006 (2015), in pertinent part, below:

> (1) Any person dissatisfied with the decision of the county board of equalization concerning the assessment and equalization of any property, or the determination of any exemption in which the person has an interest, may appeal that decision to the commission by filing a notice of appeal specifying the grounds for the appeal with the county auditor within 30 days after the final action of the county board.

DISCUSSION

As noted by the County Board of Equalization in its August 8, 2012 Order, which congruent with the County's Final Order issued March 13, 2013, is the subject of this appeal, "This matter comes before us with a long and tortuous history, wending its way over almost 11 years from a 2000 Utah Tax Commission audit, to this Board, to the Tax Commission on appeal, to a trial de novo in Utah Second District Court, to the Utah Supreme Court, and now back to this Board."[45] Subsequent to the County Board's Final Order, there has now been an Initial Hearing at the Utah State Tax Commission, an Initial Hearing Order issued on August 5, 2014, and then the matter proceeded to this Formal Hearing before the Utah State Tax Commission on April 27 & 28 of 2015.

The facts on the most basic level are not complicated. The Taxpayer had not included the Water Distribution Facilities on its personal property Signed Statements during the years 1996 through 2000. The Taxpayer was then audited for those years by the Property Tax Division of the Utah State Tax

[45] Exhibit X, pg. SUM0304.

Commission, and based on the audit the County issued an escaped personal property assessment against the Taxpayer for the Water Distribution Facilities for the years 1996 through 2000. The Taxpayer appealed to the County Board, which affirmed, and then to the State Tax Commission, which also upheld the escaped property assessment for the period of 1996 through 2000. One of Taxpayer's arguments at the Tax Commission was that the Water Distribution Facilities were real property and not personal property. The Taxpayer appealed the State Tax Commission's decision to the District Court arguing that there was a double taxation issue, that it was entitled to a 51% irrigation exemption and that the Water Distribution Facilities were real property and not personal property. The District Court agreed with the Taxpayer on two issues, overturning the Tax Commission on the 51% irrigation exemption and the Tax Commission's decision that the Water Distribution Facilities were personal property. On the third issue, the District Court found that there was no double taxation.

The District Court's decision, not issued until 2009, was appealed to the Utah Supreme Court on the double taxation issue and the 51% irrigation exemption issue. The District Court's finding that the Water Distribution Facilities were real property was not appealed. While the appeals were pending over the course of many years, until the Supreme Court's decision in 2011, the Taxpayer did not pay to the County[46] either real or personal property taxes on the Water Distribution Facilities, any of the new additions to the Water Distribution Facilities, or on the Water Purification Facility.

It is clear that this property is tangible taxable property subject to property tax under Utah Code 59-2-103. If personal property, the Taxpayer is required to report the Facilities on its annual personal property "Signed Statement" on which the Taxpayer is required make the calculation of the personal property tax owed and pay the personal property tax amount calculated by the Taxpayer under Utah Code Sec. 59-2-306. Basically, a taxpayer is required to self assess personal property and failure to do so could give rise to an escaped property assessment under Utah Code Sec. 59-2-309. The Taxpayer did not include these Facilities on its personal property Signed Statements and did not pay personal property tax on the Facilities based on those statements for any of the years 1996 through 2010.

In the alternative, if the facilities are real property the County Assessor was required to assess the property annually under Utah Code Sec. 59-2-303(1). The County did not tax any portion of the Facilities as part of its real property assessments for the years 1996 through 2010. Although not disputed that the Facilities were tangible property subject to property tax, no property tax was paid and no tax was assessed for the years 2001 through 2010. For the years 1996 through 2000 the County had issued the escaped personal property assessment against the portion of the Water Distribution Facility in existence at that

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[46] A deposit to the District Court had been made in the amount of $$$$$, which was calculated to be the amount at issue for the 1996 through 2000 personal property audit, during the pendency of that proceeding. However, after the District Court issued its decision this amount was released back to the Taxpayer.

time, but no tax was ever collected by the County based on that assessment, as the District Court had concluded the Water Distribution Facilities were real property and returned to the Taxpayer the disputed amount deposited with the court in that proceeding.

It was not until August 8, 2011 that the County Assessor issued an assessment for property tax for the Facilities for the years 2000 through 2010 and reassessed as real property the Water Distribution Facility for the years 1996 through 2000. In addition to the 1996 through 2000 years being a real property assessment, the County assessed 2001 through 2003 as real property. For the years 2004 through 2010 the County issued the assessment against all of the Facilities as a personal property assessment. This was the first time the County formalized an assessment for property tax on the Facilities for the years 2001 through 2010.[47]

The issues presented at the hearing are first, whether the Facilities are real or personal property for the years 2004 through 2010.[48] The second issue is whether the County in 2011 could issue an assessment for all the years 1996 through 2010, either based on an agreement that the parties would "settle up" after the appeals had been decided, or based on the escaped property provisions of Utah Code Sec. 59-2-309. The third issue is for how many years back the County may issue its assessment based on the five year look back period provided in Utah Code Sec. 59-2-309 and if equitable tolling provisions may apply.

In considering whether the Facilities are real or personal property, the Water Distribution Facilities are a separate type of property from the Water Purification Facilities. The Water Distribution Facilities were the only facilities in existence for the years 1996 through 2000, were the properties at issue in the original escaped property audit and were the properties considered by the District Court in its decision in *TAXPAYER v. Utah State Tax Comm'n., County Board of Equalization of RURAL COUNTY, Civil No. #####* (2009). In its decision the District Court concluded, "The plain language of the Property Tax Act is unambiguous: "improvements" are not personal property." *Id* at pg. 16. The Court goes on to find, "The water mains and pipes comprising the Water Distribution Facilities are incontrovertibly "erected upon or affixed to the land," and are therefore improvements; and except for "water mains and pipes laid in roads, streets, or alleys," which are expressly excluded, they are not personal property or taxable as personal property under the Property Tax Act." *Id*. at pg. 17.

Although an appeal of the District Court's Decision had been made to the Utah Supreme Court, this issue of whether the property was real or personal was not addressed further and the District Court's finding is, therefore, the final word on this issue. However, the District Court's order was in regards to

[47] The County did send on September 30, 2009, a letter requesting information, but this did not rise to the level of an actual assessment.
[48] The parties are in agreement that for the years 1996 through 2003 this issue was resolved in TAXPAYER *v. Utah State Tax Comm'n., County Board of Equalization of RURAL COUNTY, Civil No. #####.*

the personal property audit for the tax years 1996 through 2000. Utah Code 59-2-107 was adopted effective for tax year 2004 which gave the Utah State Tax Commission rule making authority and the definition of "improvement" was revised. The County argues that with these statutory revisions, the Water Distribution Facilities were once again personal property beginning in 2004.

Utah Code 59-2-107 provides that, "The Commission shall make rules in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act . . . defining classes of items considered to be personal property for purposes of this chapter . . . and . . . (4) defining any class or item as personal property if the commission defined that class or item as personal property prior to January 1, 2004, by (a) rule made in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act; (b) a published decision of the commission; or (c) an official schedule published by the Commission." Although the County's argument assumes otherwise, the Taxpayer is correct in its conclusion that this statute is not self executing with regards to Subsection 4. Therefore, even if the Commission had defined an item as personal property in a published decision or had published an official schedule prior to January 1, 2004, the Commission was required to go through the extensive process set out in the Utah Administrative Rulemaking Act, and adopt by rule that classification. The Commission has not done so in regards to pipeline or pipeline systems.

The County has proffered the argument that in the Commission's order on the 1996 through 2000 escaped property audit, *Findings of Fact, Conclusions of Law and Final Order, Appeal No. 01-0725*, (2003), the Commission had found the Water Distribution Facilities to be personal property. The County argues under Utah Code Sec. 59-2-107(4)(b) this basically "set in stone" this classification for 2004 and subsequent tax years. The Taxpayer argues that the de novo appeal to the District Court that set aside the Commission's Order and that court's determination to vacate and reject the Commission's decision would make this implementation of Utah Code Sec. 59-2-107 unconstitutional. However, regardless of whether a decision was published or not, the Commission has not adopted through rulemaking a personal property classification for pipelines.

It is clear that the Property Tax Division of the Utah State Tax Commission has published schedules or guidelines on its website as the Personal Property Classification Guide[49] listing more specifically the items of property that fall into the personal property classes established under Utah Admin. Rule R884-24P-33 ("Rule 33"). From the testimony at the hearing, this guideline is determined and amended by Property Tax Division employees as they see the need for changes. Changes to these schedules are not made or approved by the Tax Commissioners. A decision on whether or not these would qualify as an "official schedule published by the commission" under Utah Code Sec. 59-2-107(4)(c) is not

[49] The Personal Property Classification Guide is published at propertytax.utah.gov/personal-property/valuation-guide/classification-guide?tmpl=co…, See Exhibit P, pgs. SUM0225-SUM0239.

controlling, because Subsection 107(4)(c) is not a self executing provision. The Commission has not adopted these schedules by rulemaking process pursuant to Utah Code Sec. 59-2-107.

The County had also argued that Utah Admin. Rule R884-24P-33 was adopted pursuant to Utah Code Sec. 59-2-107. This is simply an error. Although Rule 33 does provide the Personal Property Valuation Guides and Schedules, this rule had been first adopted in 1995, years prior to the enactment of Utah Code Sec. 59-2-107. The Utah State Tax Commission has over the years made revisions to Rule 33. For instance, the Commission has added new classes of property and has revised percent good schedules on some classifications. However, the rule continues to state in its title, "Personal Property Valuation Guides and Schedules Pursuant to Utah Code Ann. Section 59-2-301." The Tax Commission has not adopted by rule the provision that pipeline systems are personal property.

As noted by the County, beginning for the 2004 tax year the definition of "improvement" at Utah Code Sec. 59-2-102(19) was revised. The Commission has previously considered in two appeal decisions involving water pipelines systems whether under these revisions the pipelines would be considered personal or real property for property tax purposes for 2004 and going forward. The Tax Commission had issued on November 9, 2011, its *Initial Hearing Order, Appeal No. 09-0192*, in which it considered this issue. In the decision, the Commission took note of the analysis provided by Judge Morris in *TAXPAYER v. Utah State Tax Comm'n., County Board of Equalization of RURAL COUNTY, Civil No. #####* (2009), as well as the 2004 statutory revision of the definition of "improvement" and had concluded that for years 2004 and later, the pipeline systems were real property except for those portions statutorily designated as personal property under Utah Code Sec. 59-2-102(27)(b). A second decision was issued by the Tax Commission on March 7, 2012, *Initial Hearing Order, Appeal No. 09-2793,* which held the same result.[50] The County had argued regarding *Appeal No. 09-0192*, that this decision had been from an Initial Hearing and after the issuance of the Initial Hearing Order a formal hearing was requested, therefore the Initial Hearing Order was set aside. Then the matter never proceeded to a formal hearing, as the parties reached a stipulated settlement and an Order of Approval was the final order issued by the Commission. The County is correct on the proceeding of this appeal and the same procedure occurred with *Appeal No. 09-2793*. Although not technically precedential, the analysis as noted in these two orders is helpful and shows the collective knowledge and expertise of the Tax Commission when those decisions were issued. There was nothing presented at this Formal Hearing that would indicate the Commission's

[50] Both of these decisions are published at *tax.utah.gov/commission-office/decisions*. The Tax Commission also considered whether pipelines were real property or personal property for purposes of the Sales and Use Tax Act and found them to be real property in its decision in *Findings of Fact, Conclusions of Law and Final Order Appeal No. 11-1774*. This decision is also published at *tax.utah.go/commission-office/decisions*. The Petitioner in *Appeal No. 11-1774* has appealed the decision to the District Court and that appeal is pending.

conclusions in these prior cases were incorrect. Except for the very small portion of the Water Distribution Facilities that are laid in roads, streets, or alleys, the Water Distribution Facilities are real property for the entire period from 1996 through 2010.

The Water Purification Facility is however, a very different type of property. This is basically machinery and equipment, typical of most types of manufacturing equipment, which is located inside a building. The land and building itself are not included in the Water Purification Facility as it has been defined for purposes of this decision. The machinery and equipment may be bolted to the floor, there may be some special footings, or even some storage tanks under the floor, but as NAME-7 testified at the hearing, this equipment is typical of manufacturing equipment. It produces a product, drinkable water, and is properly classified as personal property.

The Taxpayer argues that under the definitions provided in the rule, the Water Purification Equipment did not meet the general description for Class 8 Equipment provided in Rule 33 because there is little functional or economic obsolescence or technological advancement. It was the Taxpayer's contention that due process would require a more specific definition. However, this argument is without merit. If this property was treated as property with a long physical life with little obsolescence it would be under Class 16-Long-Life Property, which depreciates at a lower rate, resulting in higher values, rather than Class 8 property. Utah Admin. Rule R884-24P-33(6)(h) provides, "Class 8-Machinery and Equipment. Property in this class is subject to considerable functional and economic obsolescence created by competition as technologically advanced and more efficient equipment becomes available." The rule gives a number of examples of Class 8 property, which include manufacturing machinery, bakery equipment, distillery equipment, refrigeration equipment, processing equipment, bottling or cannery equipment, packaging equipment and pollution control equipment. As noted by the Taxpayer it does not expressly list water purification equipment. However, the Taxpayer's argument is misplaced as the Water Purification Facility is not personal property because it falls within one of the classes set out in Rule 33. It is personal property based on Utah Code Sec. 59-2-102(27) which states, "Personal Property" includes (a) every class of property . . . which is the subject of ownership and not included within the meaning of the terms "real estate" and "improvements . . ." The Water Purification Facility is personal property because it is not real estate and it is not an improvement.

Therefore, because the Water Purification Facility is personal property based on the provisions of Utah Code Sec. 59-2-102(27), it was proper for the County to look to Utah Admin. Rule R884-24P-33(6) to determine how it is valued. Further, it was proper for the County to classify it as Class 8 Machinery and Equipment. This is the type of personal property that the Taxpayer should have reported on its Signed Statements and had failed to do so. Therefore, an escaped property assessment is appropriate

against this property, but how many years the County may now go back is another issue that is discussed below.

After concluding that for all of the years at issue the Water Distribution Facilities were real property, the issue becomes whether the County may issue its first real property assessment against this property in 2011. It was the County's position that the parties had an agreement which the County describes as a "Tolling Agreement" that once the appeals process had concluded, the Taxpayer would pay the tax. The County's representative argued that the following described this agreement:[51]

> From July 25, 2001 until July 29, 2011, the County Assessor entered into an agreement with TAXPAYER (the "Tolling Agreement") as to the disposition of all property taxes concerning the Pipeline and Pipe system and any new water distribution facilities, which would have included the Water Purification Equipment installed in the Treatment Plant during 2001. That Tolling Agreement provided that the taxes on the Pipeline and Pipe System and Water Purification Equipment (together, the "TAXPAYER Assets") would be put on hold until the conclusion of the Original Tax Appeal, at which time the parties would settle up. This was understood to be that property taxes would be held in abeyance (tax extension) and paid on the appropriate value and for the appropriate classifications of the property.

The Taxpayer, however, disputed that there had been such an agreement and argued instead that it was the Taxpayer's understanding that if the Facilities could not be assessed as personal property, that it would be "the end of the line" as far as property tax.[52] Although there was the correspondence which has been listed in detail in the Findings of Fact, a formal "Tolling Agreement" was never put in writing or signed by the parties. The correspondence and witness testimony received into evidence at the hearing was never as specific as the representative for the County now argues; especially regarding what would occur if the property was ultimately found to be real property. The County's witness, NAME-4, testified that she did not think it was discussed what would happen if the Facilities were determined to be real property as that was not something that she thought would occur. The witness for the Taxpayer, NAME-3, testified he thought "settle up" meant if the Facilities were determined to be personal property the Taxpayer would pay the tax, but if they were real property the Taxpayer would not owe any tax, which, in fact, was consistent with the District Court's determination to release to the Taxpayer the amount of tax placed on deposit while that appeal had been pending. Once the District Court issued its decision that the property was real property, the District Court returned the deposit to the Taxpayer.

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[51] County's Hearing Brief, pg. 8.
[52] Taxpayer's Hearing Brief, pg. 27.

Upon review, the correspondence and testimony do not reach the level of having sufficient definiteness to be enforced concerning a real property assessment going back to tax year 1996.[53] Even if there had been a specific written contract signed by the parties, it is unclear whether based on the statutory provisions the County could postpone issuing an assessment every year until the matter was resolved. Under Utah Code Sec. 59-2-303(1), the County Assessor is required to assess the property annually. There are escaped property provisions that allow the County to go back and assess some prior years if it had failed to make the annual assessment, but these are limited statutorily at Utah Code Sec. 59-2-309 and 59-2-102(11). Additionally, even if it qualifies as "escaped property" under those provisions, the County is limited to assessing "as far back as five years prior to the time of discovery." Utah Code Sec. 59-2-309. In *Beaver County v. Property Tax Division*, *2006 UT 6 ¶20*, the Utah Supreme Court upheld the conclusion that "discovery" for purposes of the five year look back occurred when both the escaped property had been "discovered" and the assessing authority had issued the assessment.

The Taxpayer points to *Beaver County v. Property Tax Division*, *2006 UT 6* for the position that the Commission should deny the County's claim regarding equitable tolling of the five year look back period. The Utah Supreme Court overturned a decision by the Tax Commission to apply equitable tolling in that case. The Court noted that the five year provision in the escaped property statute was a "look back statute" which "prescribes a period in which certain rights . . . must be enforced or lost." Id. ¶18. In *Beaver County* ¶32, the Utah Supreme Court held:

> The doctrine of equitable tolling should not be used simply to rescue litigants who have inexcusably and unreasonably slept on their rights, but rather to prevent the expiration of claims to litigants who, through no fault of their own, have been unable to assert their rights within the limitations period.

In this case, the County could have asserted its rights by making an assessment within the limitation periods, but even after the decision from the District Court continued to take the position that the property was personal and not asses it as real property.

"Escaped Property" is defined at Utah Code Sec. 59-2-102(11) to include property "inadvertently omitted from the tax rolls, assigned to the incorrect parcel, or assessed to the wrong taxpayer by the assessing authority." In this matter the Water Distribution Facilities were first treated as personal property in the 1996 through 2000 escaped property audit, which was consistent with how the Property Tax Division of the Tax Commission had treated pipeline systems for years. This classification was upheld by the Tax Commission in its decision on that appeal, in *Findings of Fact, Conclusions of Law and Final Order, Appeal No. 01-0725* (2003). That this was personal property would have been the

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[53] The Taxpayer cites to U.S. Fid. V. U.S. Sports Specialty, 2012 UT 3, ¶16 n.19, 270 P.3d 464, which noted "A condition precedent to the enforcement of any contract is that there be a meeting of the minds of the parties, which must be spelled out, either expressly or impliedly, with sufficient definiteness to be enforced."

precedent that the County would have had to follow, until the District Court finally issued its decision otherwise, in August 2009. The Water Distribution Facilities had not been assessed as real property up until this point in time because the County had considered it to be personal property. Certainly the District Court's decision would constitute "discovery" of property inadvertently omitted from the real property tax rolls or assigned to the incorrect parcel because instead of being in a personal property account, it should have been assessed with real property.[54] Had the County actually issued an escaped real property assessment when it received the District Court's decision, it could have gone back five years from 2009. The property's classification as real or personal property was settled by the District Court's decision as it was not an issue argued to the Utah Supreme Court. Regardless, it was not until August 8, 2011, that the County issued a real property assessment against the Facilities for the tax years 1996-2003.

However, the County has never issued a real property assessment against the Water Distribution Facilities for the years 2004 through 2010, maintaining that the statutory revisions in 2004 changed it back to personal property. The County may have inadvertently omitted this property from the real property rolls or not assigned it to the correct real property parcel number based on its interpretation of the statutory revisions. As this decision from the Commission again puts this argument to rest for the years 2004 through 2010, this decision could constitute a further "discovery" if the County now issued an assessment regarding these later tax years, but because of the five year look back limitation period the County could not now reach back to years 2004 through 2010. At this late point in time, it does not appear that the County has the authority to issue an escaped real property assessment on the Water Distribution Facilities because it is outside of the five year look back period for any of these years.

When the County issued in 2011 its assessment against all the Facilities, it included a personal property assessment against the Water Purification Facility. The County correctly classified the Water Purification Facility as personal property. The Water Purification Facility also meets the definition of "escaped property" under Utah Code Sec. 59-2-102(11) as it was "undervalued or omitted from the tax rolls because of the failure of the taxpayer to comply with the reporting requirements of this chapter . . ." The County had issued its assessment on August 8, 2011, which was prior to the 2011 County Board of Equalization. Under provisions at Utah Code Sec. 59-2-1002 and 59-2-1003 the County Board could have made an assessment for 2011 at its County Board of Equalization. Under the escaped property provision at Utah Code Sec. 59-2-309 the County Assessor could have gone back as far as five years prior to the time of discovery. Based on this, the five years should begin with 2010 and go back from there. With the five year limitation period provided at Utah Code Sec. 59-2-309 this was a lawful escaped

[54] This does lead to the difficulty in assessing pipeline systems as real property because, like the subject, most pipelines are laid in rights of way across land owned by other people. Therefore, the owner of the pipeline is often not the owner of the land to which the pipeline is attached.

property assessment for the years 2006 through 2010 and this portion of the assessment should be upheld for this five year period.

CONCLUSIONS OF LAW

1. The decision issued by the court in *TAXPAYER v. Utah State Tax Comm'n., County Board of Equalization of RURAL COUNTY, Civil No. #####* (2009) resolved the issue of whether the Water Distribution Facilities that were in existence for 1996 through 2000 were real or personal property. The Court found, "The water mains and pipes comprising the Water Distribution Facilities are incontrovertibly "erected upon or affixed to the land," and are therefore improvements; and except for "water mains and pipes laid in roads, streets, or alleys," which are expressly excluded, they are not personal property or taxable as personal property under the Property Tax Act." *Id.* at pg. 17. As there was no law change for the period from 2000 through 2003, it is unrefuted that this decision carries over to these years as well. Although an appeal of the District Court's Decision had been made to the Utah Supreme Court, the issue of whether the property was real or personal was not addressed in the appeal and the District Court's finding is, therefore, the final word on this issue.

2. There were two statutory changes beginning in tax year 2004. They did not, however, change the classification of the Water Distribution Facility back into personal property as was argued by the Counties. Utah Code 59-2-107, adopted effective for tax year 2004, gave the Utah State Tax Commission rule making authority for " . . . defining classes of items considered to be personal property for purposes of this chapter . . ." It also enacted at Subsection 107(4) rulemaking authority for the Commission to adopt rules "defining any class or item as personal property if the commission defined that class or item as personal property prior to January 1, 2004, by (a) rule made in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act; (b) a published decision of the commission; or (c) an official schedule published by the Commission." This is not a self executing statutory provision. The Commission did not adopt a rule classifying pipeline systems as personal property.

3. Effective for the 2004 tax year the definition of "improvement" at Utah Code Sec. 59-2-102(19) was revised, however, this revision did not change pipelines from real to personal property. For the years 2004 through 2010, the pipeline systems were real property except for those portions statutorily designated as personal property because they are laid under roads, streets or alleys pursuant to Utah Code Sec. 59-2-102(27)(b). Therefore, except for the very small portion of the Water Distribution Facilities that are laid in roads, streets, or alleys, the Water Distribution Facilities are real property for the entire period from 1996 through 2010.

4. The Water Purification Facility is personal property based on Utah Code Sec. 59-2-102(27) which states, "Personal Property" includes (a) every class of property . . . which is the subject of ownership and not included within the meaning of the terms "real estate" and "improvements . . ." The

Water Purification Facility is not real estate and it is not an improvement. It is machinery and equipment typical of many types of manufacturing equipment. Because this machinery and equipment is personal property, it was proper for the County to look to Utah Admin. Rule R884-24P-33(6) to determine which class it would fall under for purposes of valuation. Although the Taxpayer argues that it does not fit within Class 8-Machinery and Equipment, Class 8 is the most appropriate classification for this property. Therefore, because it is personal property based on the provisions of Utah Code Sec. 59-2-102(27), the County properly looked to Utah Admin. Rule R884-24P-33(6)(h) Class 8 to determine how it should be valued and taxed it as such.

5. The next issue is whether or not the County has the authority to issue in 2011 an assessment against the Water Distribution Facilities for tax years 1996 through 2010. It was not until 2011 that the County issued its first formal real property assessment against the Water Distribution Facilities for years 1996 through 2003, and then the first personal property assessment for years 2004 through 2010 based on what the parties had described as a verbal "Tolling Agreement" or agreement to "settle up" once the court cases had concluded. As there was no specific written agreement, the testimony is not consistent and the correspondence not particularly conclusive on what would happen if the Facilities were determined to be real property, there is not sufficient basis to allow the assessment based on this agreement. Even if there had been a specific written contract signed by the parties, it is unclear whether based on the statutory provisions, that the County could postpone issuing a real property assessment every year until the matter was resolved. Under Utah Code Sec. 59-2-303(1) the County Assessor is required to assess real property annually.

6. There are escaped property provisions that allow the County to go back and assess some prior years if it had failed to make the annual assessment, but these are limited statutorily at Utah Code Sec. 59-2-309 and 59-2-102(11). Under Utah Code Sec. 59-2-309, "Any escaped property may be assessed by the original assessing authority at any time as far back as five years prior to the time of discovery . . ." "Escaped Property" is defined at Utah Code Sec. 59-2-102(11) to be, among other options, property "inadvertently omitted from the tax rolls, assigned to the incorrect parcel, or assessed to the wrong taxpayer by the assessing authority." Until the District Court issued its decision in 2009, the County had reasonable precedent for the position that the Water Distribution System was personal property and, therefore, it had not issued real property assessments or assigned the property to the real property parcels. The District Court's decision would constitute "discovery" of property inadvertently omitted from the real property tax rolls or assigned to the incorrect parcel. Had the County issued an escaped real property assessment after the District Court's decision, it could have gone back five years from 2009. In *Beaver County v. Property Tax Division*, *2006 UT 6 ¶20*, the Utah Supreme Court upheld

the conclusion that "discovery" for purposes of the five year look back occurred when both the escaped property had been "discovered" and the assessing authority had issued the assessment.

7. The County still has never issued a real property assessment against the Water Distribution Facilities for the years 2004 through 2010, due to the County's continued argument that beginning in 2004 it was personal property. However, it is now too late for the County to issue a real property assessment for the years 2004 through 2010 due to the expiration of the five year look back period under Utah Code Sec. 59-2-309. At this late point in time, the County does not have the authority to issue an escaped real property assessment on the Water Distribution Facilities because it is outside of the five year look back period for any of these years.

8. When the County issued its 2011 assessment against the Facilities, the assessment included the Water Purification Facility and this assessment had been issued as a personal property assessment on that Facility. The Water Purification Facility was properly classified as personal property. The Water Purification Facility meets the definition of "escaped property" under Utah Code Sec. 59-2-102(11) as "undervalued or omitted from the tax rolls because of the failure of the taxpayer to comply with the reporting requirements of this chapter . . ." The County's 2011 assessment against the Water Purification Facility is a valid escaped property assessment. With the five year limitation period provided at Utah Code Sec. 59-2-309 this was a lawful escaped property assessment for the years 2006 through 2010.

9. The doctrine of equitable tolling does not apply to the facts in this case to extend for the County the five year look back period. *Beaver County v. Property Tax Division*, *2006 UT 6.*

Based on the evidence presented at the hearing and the arguments of the parties, the County's 2011 assessment was not a proper escaped real property assessment against the Water Distribution Facilities either because the assessment was beyond the five year look back period for the years that the County had assessed as real property or, because the County had assessed it as personal property for the years that were still within the five year look back period. As the Water Purification Facility is personal property, the County's assessment issued in August 2011 is appropriate but limited to five years back based on the look back period.

Jane Phan
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Tax Commission finds the County's assessment of the Water Distribution Facilities for the years 1996 through 2010 to be invalid. The Tax Commission upholds the escaped property assessment of the Water Purification Facility for the years 2006 through 2010.

DATED this ___________day of __________________, 2015.

John L. Valentine Commission Chair	Michael J. Cragun Commissioner
Robert P. Pero Commissioner	Rebecca L. Rockwell Commissioner

Notice of Appeal Rights: You have twenty (20) days after the date of this order to file a Request for Reconsideration with the Tax Commission Appeals Unit pursuant to Utah Code Ann. §63G-4-302. A Request for Reconsideration must allege newly discovered evidence or a mistake of law or fact. If you do not file a Request for Reconsideration with the Commission, this order constitutes final agency action. You have thirty (30) days after the date of this order to pursue judicial review of this order in accordance with Utah Code Ann. §59-1-601 et seq. and §63G-4-401 et seq.