SCAP-17-0000816

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

In the Matter of the Appeal of

KAHEAWA WIND POWER, LLC,

Taxpayer-Appellant.

Case Nos. TX 14-1-0266 and consolidated case TX 16-1-0272, TX 14-1-0267 and consolidated case TX 16-1-0273, and 1 TX 16-1-0275, 1 TX 15-1-0238, 1 TX 16-1-0328
(Other Civil Action)

Consolidated Case Nos. CAAP 17-0000816, CAAP 17-0000817, CAAP-17-0000818, CAAP-17-0000819, CAAP-17-0000820

CAAP-17-0000816 - APPEAL FROM **1)** ORDER GRANTING TAXPAYER-APPELLANT KAHEAWA WIND POWER LLC'S MOTION FOR PARTIAL SUMMARY JUDGMENT FILED SEPTEMBER 1, 2016, FILED APRIL 25, 2017, **2)** ORDER DENYING APPELLEE COUNTY OF MAUI'S MOTION FOR SUMMARY JUDGMENT AND FOR DISMISSAL OF TAXPAYER-APPELLANT KAHEAWA WIND POWER LLC'S TAX APPEALS FILED NOVEMBER 12, 2014 AND FEBRUARY 3, 2014, FILED FEBRUARY 3, 2017, FILED MAY 15, 2017, and **3)** STIPULATION FOR ENTRY OF JUDGMENT; FINAL JUDGMENT FILED OCTOBER 4, 2017

CAAP-17-0000817 - APPEAL FROM STIPULATED FINAL JUDGMENT FILED OCTOBER 4, 2017

CAAP-17-0000818 - APPEAL FROM **1)** ORDER GRANTING TAXPAYER-APPELLANT AUWAHI WIND ENERGY LLC'S AUGUST 31, 2016 MOTION FOR SUMMARY JUDGMENT FILED APRIL 26, 2017, **2)** ORDER DENYING APPELLEE COUNTY OF MAUI'S FEBRUARY 3, 2017 MOTION FOR SUMMARY JUDGMENT ET SEQ., FILED MAY 14, 2017; AND STIPULATED FINAL JUDGMENT FILED OCTOBER 4, 2017

CAAP-17-0000819 - APPEAL FROM STIPULATED FINAL JUDGMENT FILED OCTOBER 4, 2017

CAAP-17-0000820 - APPEAL FROM STIPULATED FINAL JUDGMENT FILED OCTOBER 4, 2017

Tax Appeal Court, State of Hawai'i
Judge: Honorable Gary W.B. Chang

MOTION FOR LEAVE TO FILE **RESONSE TO HAWAI'I TAX FOUNDATION OF HAWAI'I'S AMICUS CURIAE BRIEF IN SUPPORT OF APPELLEES**

EXHIBIT A

CERTIFICATE OF SERVICE

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MOTION FOR LEAVE TO FILE RESPONSE TO TAX FOUNDATION OF HAWAI'I'S AMICUS CURIAE BRIEF IN SUPPORT OF APPELLEES

Pursuant to the Order Granting Motion of Tax Foundation of Hawai'i for Leave to File Amicus Curiae Brief in Support of Appellees ("Order"), filed November 19, 2018, Appellant County of Maui respectfully requests leave of Court to file Appellant County of Maui's Response to Hawai'i Tax Foundation of Hawai'i's Amicus Curiae Brief in Support of Appellees.

This Motion for Leave to file is necessary because Appellants' counsel was out of state from November 18, 2018 through November 26, 2018, and only today became aware of the Court's Order setting the response deadline for "seven (7) days from the filing of the amicus brief." *See*, JEFS Dkt. 43. The due date for filing the Response was two (2) days ago on November 26, 2018. Based on the three (3) day deadline for the filing of Amicus Curiae Brief from the date of the Order, the latest date for filing a Response would have been November 29, 2018 if the Tax Foundation of Hawai'i had exercised its prerogative to file the Amicus Curiae Brief on November 22, 2018. In light of this, there does not appear to be any interruption of the orderly process of this appeal by allowing the Response to be filed today, November 28, 2018.

The Response, with the Declaration of Marcy Martin, and *Exhibit 1* to the Response are filed concurrently with this Motion for Leave as **Exhibit A**, and is signed along with Ms. Martin's Declaration. The undersigned respectfully requests the Court allow the Response to be filed, and apologizes for any inconvenience this Motion for Leave may present if allowed.

DATED: Wailuku, Maui, Hawaii, November 28, 2018.

PATRICK K. WONG
Corporation Counsel
Attorneys for Appellant/Tax-Appellee
COUNTY OF MAUI

By /s/ Brian A. Bilberry
BRIAN A. BILBERRY
Deputy Corporation Counsel

SCAP-17-0000816

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Tax Appeal Court, State of Hawai'i
Judge: Honorable Gary W.B. Chang

APPELLANT COUNTY OF MAUI'S **RESPONSE TO HAWAI'I TAX FOUNDATION OF HAWAI'I'S AMICUS CURIAE BRIEF IN SUPPORT OF APPELLEES**

DECLARATION OF MARCY MARTIN

EXHIBIT 1

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REPLY TO TAX FOUNDATION OF HAWAI'I FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLEES

Contrary to what is stated in the Amicus Curiae Brief of the Tax Foundation of Hawai'i in Support of Appellees, there is nothing at all in the legal decision Kaheawa Wind Power, LLC v. County of Maui, 135 Haw. 202, 347 P.3d 632 (Ct. App. 2014) which determined that the wind turbine generators at issue in this case, or any type of wind energy machinery and/or equipment were or are excluded personal property under the law in 1981. Likewise, there is nothing in the Kaheawa opinion, or any law in Hawai'i whatsoever, which purports to set forth the "Common Definition" of "real property" which the Amicus Brief confusingly attempts to put forth.

While from the 1800's to 1947, Hawai'i had separate personal property tax law and real property tax law, *in 1947 the state legislature repealed the personal property tax law in its entirety*. *See,* Act 111, Sessions Laws of Hawai'i 1947. Without personal property tax law, there have been and are no defined exclusions from real property assessment and taxation for any property affixed to real estate, whether misleadingly characterized as personal property, or otherwise. *See,* **Exhibit 1**, excerpted Procedure and Reference Manual for the Property Assessment Program ("Reference Manual"), State of Hawaii, 1966, at pp. 350.11-1 through 350.11-4, attached. The repeated argument put forth by the Tax Foundation of Hawai'i (and Appellees); i.e., that the state legislature reserved onto the state some power to tax personal property, and/or excluded any transfer of authority by constitutional amendment to the counties of Hawai'i to assess *any* property as an accession to realty, is a misdirection. The notion put forth in the Amicus Curiae Brief that "the 1981 Common Definition necessarily represents an upper bound on the Counties taxing powers" is vague at best, if not completely nonsensical.

The error in the Amicus Curiae Brief argument is further demonstrated by the attached opinion of the Deputy Attorney General, incorporated by reference within the State of Hawai'i Department of Taxation's 1966 Reference Manual, which makes it crystal clear that:

> '[T]he test of whether any item is personal property or real property . . . is the manner in which the article is attached to real estate, the character of the article and adaptation, and the intention of the parties owning such property as to its use,' which is a statement of the tests American courts generally apply in determining what a fixture is.

See, **Exhibit 1**, at p. 350.11-4. The test is factual, *not* by some vague legal exclusion.

Appellant County of Maui in its consolidated opening and reply briefs has canvassed the common law from multiple jurisdictions in this regard. As also demonstrated in Appellant's briefs, the Ohio law mistakenly relied upon by Appellees and by the Amicus Curiae Brief is an outlier. The Ohio law is based on a constitutional and statutory distinction between personal property and real property, which as noted above, has not existed in Hawai'i since 1947.

The Amicus Curiae Brief's reliance on Cartwright, *infra*., for the proposition that certain types of machinery and equipment are *per se* or as a matter of law excluded from assessment as real property, is equally misplaced. In Cartwright v. Wilderman, 9 Haw. 685, 690-91 (1982), the Supreme Court of the Kingdom of Hawai'i articulated the adaptability element of the fixture test as follows:

> Here it is decided that whether fixture or not, ***depends on facts***, and not on the opinion of the person making the annexation, and that moveable machines, whose number and permanency are contingent upon the varying conditions of the business differ from engines and boilers and other articles secured by masonry and designed to be permanent and indispensable to the enjoyment of the freehold.

Furthermore, the Amicus Curiae Brief's foray into Section 38 of the IRS Code, now *repealed*, is equally confusing and a further misdirection. Even assuming the 64-year old federal statute pertaining to depreciation of tangible personal property for purposes of income or

investment tax credits could somehow be resurrected, Code of Federal Regulation § 1.48-1 [*Definition of section 38 property*] (c) *Definition of tangible personal property*[,] refutes the Amicus Curiae Brief's position of any relevance or application of the federal statute to local county tax laws. Specifically, CFR § 1.48-1(c) provides that "[c]onversely, property may be personal property for purposes of the investment credit even though under local law the property is considered to be a fixture and therefore real property." Therefore, the concern asserted in the Amicus Curiae Brief about "taxpayer confusion" created by a "discontinuity between income tax and property tax" is not at all credible.

Finally, the wind turbines in issue are not analogous to the "electrical distributions systems" reflected in the IRS decisions, as the Amicus Curiae Brief suggests should somehow be exempt from assessment. The wind turbines are power generating equipment which generate and feed power. They *do not* distribute it.

In light of the above, the Amicus Curiae Brief really does not add anything of substance or merit to this appeal, just more of the same confusion and misdirection which Appellees have already offered in their respective opposition briefs.

DATED: Wailuku, Maui, Hawaii, November 28, 2018.

PATRICK K. WONG
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COUNTY OF MAUI

By /s/ Brian A. Bilberry
BRIAN A. BILBERRY
Deputy Corporation Counsel

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DECLARATION OF MARCY MARTIN

I, Marcy Martin, declare under penalty of law that the following is true and correct:

1. I was and have been a Real Property Technical Officer with the County of Maui from 1995 to 2006, and from 2010 to the present.

2. **Exhibit 1** attached hereto is a true and correct copy of the excerpted Procedure and Reference Manual for the Property Assessment Program ("Reference Manual"), State of Hawaii, 1966, at pp. 350.11-1 through 350.11-4. The Reference Manual came into the custody of the Real Property Assessment Division of the County of Maui from the agency's predecessor, the Department of Taxation of the State of the Hawai'i's Second District Property Assessment Division, in 1978 when the agency came under the authority of the County of Maui.

The undersigned declares under penalty of law that the foregoing is true and correct.

DATED: Wailuku, Maui, Hawaii, November 28, 2018.

MARCY MARTIN

Procedure and Reference Manual

for the

Property Assessment Program

DEPARTMENT OF TAXATION
State of Hawaii

August, 1966

FOREWORD

It is my very pleasant duty to authorize the issuance and use of this Procedure and Reference Manual for the Property Assessment Program. It is the first compilation of appraisal concepts and procedures for property assessment purposes ever developed for the Department.

The manual is to be used as a tool in our continuing efforts to fairly assess all real property in Hawaii.

Special acknowledgement is due the Property Technical Office personnel for their efforts in the preparation of this manual. My appreciation goes to Mr. Frank J. Ferguson of Marshall and Stevens Inc., for his helpful review and recommendations concerning the manual drafts, and to our district office employees for their cooperation, constructive review and comments.

I also thank the California State Board of Equalization, the Ontario Department of Municipal Affairs, the Alaska Local Affairs Agency and various other tax jurisdictions for permitting the use of their assessment manuals for source material.

E. J. BURNS
Director of Taxation

Procedure and Reference Manual

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860.00	(Open at present)
870.00	(Open at present)
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350.11 THE FOLLOWING IS OPINION 64-19 OF THE DEPUTY ATTORNEY GENERAL ON THE DEFINITION OF REAL PROPERTY FOR TAXATION PURPOSES AS CONTAINED IN SECTION 128.1, RLH 1955.

The pertinent portion of said section provides as follows:

> "Sec. 128-1. Property defined. 'Property' or 'real property' means and includes all land and appurtenances thereof and the buildings, structures, fences and improvements erected on or affixed to the same, excluding, however, any growing crops, all machinery and other mechanical or allied equipment and the foundations thereof, telephone, telegraph and electric poles, lines, conduits and appurtenant equipment, pipelines, gas and water mains and appurtenant equipment, penstocks and forebays, railroads (including rails, ties, switches and appurtenant equipment, but not including roadbeds, cuts, fills, bridges, trestles, culverts and the land itself, which latter items shall be deemed real property), and any other fixtures expressly required by law to be assessed and taxed as personal property. . . ."

Specifically, both of your requests deal with the question of whether the assessor is mandated, by the above cited section, to exclude from real property tax assessments those items of fixtures excluded from the definition of real property.

We reply that the cited section does not preclude the assessment of the enumerated items so long as such items are considered to be real property on the basis of the tests applied by the courts to determine what a fixture is.

The section, as presently worded, is in derogation of the common law definition of real property. A discovery of the purpose of its having been so worded should, then, be of aid in determining the legislative intent and thereby permit a proper interpretation of the section.

Where the language of a statute is ambiguous, the courts have referred to the history of the statute and other extrinsic matters to ascertain the legislative intent. In the Matter of Sprinkle, 40 Hawaii 485 (1954). The Civil Code of Hawaii 1858-1859, the first codification of Hawaiian laws, included provisions authorizing the taxation of both personal property and real property. See Article XII, Civil Code of Hawaii 1858-59, sec. 483-484. With respect to personal property, the applicable section therein provided as follows:

> "Section 483. . . . The term 'personal property' shall be construed to include all household furniture, goods and chattels, wares and merchandise . . . and every species of property not included in real estate." (Emphasis added.)

In the next section, real property was defined as follows:

> "Section 484. . . . The term 'real property' with respect to the assessment and collection of revenue, shall be deemed to include all lands and town lots, with the buildings, structures, and other things erected, or affixed to the same."

It appears to be clear that these sections were worded and meant to be mutually exclusive, i.e., those items taxable as personal property were not to be taxed as real property and vice versa.

In 1896, the then legislature amended the definitions of both terms of Act 51, Session Laws of Hawaii 1896, to read, in part, as follows:

> "Section 15. The term 'Real Property' for the purposes of this Act, shall mean and include all lands, and town lots and house lots with the buildings, structures, fences, wharves, improvements and other things erected or affixed to the same."
>
> "Section 16. The term 'Personal Property' for the purposes of this Act, shall mean and include all household furniture and effects, . . . wares and merchandise, machinery, . . . leasehold and chattel interest in land and real property, . . . growing crops . . . and all animals not herein specifically taxed."

The word "machinery" and the phrase "growing crops" appeared for the first time in the definitions but as items to be considered personal property and not as items excluded from the definition of real property as it is presently the case.

In 1932, by Act 40, Second Special Session Laws of 1932, a comphrehensive new act revising the real property tax laws was enacted creating a separate chapter on real property taxes.

In 1933, by Act 9, Special Session Laws of 1933, the personal property tax laws were revised and re-enacted into a separate chapter. Personal property was defined therein to read in part as follows:

> "Section 2. Definitions. . . . (2) 'Personal property' shall mean and include all goods, chattels, wares and merchandise, machinery, . . . growing crops, animals and all other tangible property not included within the definition of real property as the same is defined in the real property tax law . . ." (Emphasis added.)
>
> Section 13 of said Act 9 further provided in part as follows:
>
> ". . . The term property or real property whenever used in said real property tax law (Act 40, Second Special Session Laws of 1932 quoted herein), unless the context shall clearly otherwise indicate, shall mean and include . . . personal property."

Here again the legislature expressed a clear intent that personal property items should not be subjected to real property taxes and, conversely, that real property items should not be subject to personal property taxes. Furthermore, by the terms of section 13 quoted above, it is also clear that the legislature intended that all property, unless otherwise expressly provided, would be subjected either to the real property tax or the personal property tax but not to both.

The definitions of both real and personal property were amended once again in 1935 by Act 153, Session Laws of Hawaii 1935. By this amendment the definition of real property was worded to read as it stands today. The pertinent part of Section 1 of said Act defined real property as follows:

> " '(P)roperty' or 'real property' shall mean and include all land and appurtenances thereof and the buildings, structures, fences and improvements erected on or affixed to the same, excluding, however, any growing crops, all machinery and other mechanical or allied equipment and the foundations thereof, telephone, telegraph and electric poles, lines, conduits and appurtenant equipment, pipe lines, gas and water mains and appurtenant equipment, penstocks and forebays, railroads (including rails, ties, switches and appurtenant equipment, but not including roadbeds, cuts, fills, bridges, trestles, culverts and the land itself, which latter items shall be deemed real property), and any other fixtures expressly required by law to be assessed and taxed as personal property." (Emphasis added.)

Section 3 of the same Act also amended the definition of personal property to read as follows:

> " 'Personal property' shall mean and include all goods, chattels, wares and merchandise; growing crops to mature and be harvested during the taxable year, all machinery and other mechanical or allied equipment and the foundations thereof; ships or vessels, whether at home or abroad; telephone, telegraph and electric poles, lines, conduits and appurtenant equipment; pipe lines; gas and water mains and appurtenant equipment; penstocks and forebays; railroads, permanent or temporary, including rails, ties, switches and appurtenant equipment, but not including roadbeds, cuts, fills, bridges, trestles, culverts and the land itself; and all other tangible property not included within the definition of real property as the same is defined in Chapter 61; excluding, however: growing crops, not maturing or to be harvested during the taxable year . . ." (Emphasis added.)

The reason for so defining real and personal property becomes clear upon examination of the committee report prepared by the Committee on Ways and Means of the Senate of the Eighteenth Legislature of the Territory of Hawaii in the regular session of 1935. In its committee report, printed in the 1935 Senate Journal, with respect to the definitions given in said Act 153, the committee stated on page 464:

> "Since the revenues derived from the taxation of real property is allotted for the support of the City and County and County governments, and those taxes from personal property to the support of the territorial government it was found necessary to as accurately as possible draw the line as to what is real and personal property by carefully defining each. . . ."

That the legislature intended the definitions to be mutually exclusive and complementary cannot be doubted. The definition of real property adopted in 1935, which is, with one minor exception, exactly the same as that being considered here, has excluded from its scope, almost item by item, those same items expressly defined to be personal property in the very same amendatory act. The one minor change appears to be an unauthorized changing of the phrase "shall mean and include", which appears in the 1935 definition, to read "means and includes" which appears in the Revised Laws of Hawaii 1955.

In 1947, the then legislature, by Act 111, Session Laws of Hawaii 1947, repealed the personal property tax law in its entirety. Effective as of January 1, 1948, there was no tax law applicable to personal property. In repealing it, however, the legislature did not amend the definition of real property.

It might be argued that the legislature intentionally did not amend the present definition and purposely excluded from real proerty taxation those items enumerated therein. This argument probably would not stand, however, in the light of the case of Territory v. Overbay, 23 Hawaii 91 (1915), where the Supreme Court of Hawaii held that unless clearly otherwise shown, statutes carried into a revision retain their original effect. If the legislature had intended to retain the exclusions despite the repeal of the personal property tax, it appears that such intent should have been clearly manifested. This was not done.

To determine legislative intent with respect to a statute, the history of its enactment may be relied upon but only where the language used is of doubtful meaning. Where the language of the statute is plain and unambiguous, which appears to be the case here, the statute must be given effect according to its plain and obvious meaning. Territory v. Fase, 40 Hawaii 478 (1954). A perusal of the present definition of real property shows that the exclusions in the definition, by plain and unambiguous language, are clearly made subject to a condition. The exclusions appear to apply only to those fixtures which are "expressly required by law to be assessed and taxed as personal property."

It might be argued that the clause quoted in the foregoing paragraph is surplusage inasmuch as there no longer is any personal property tax law in Hawaii, and that the legislature cannot be presumed to have created the exclusions in vain. Our Supreme Court, however, has held in Pringle v. Bicknell, 15 Hawaii 323 (1903), that the courts are bound to give effect to all parts of a statute and "no sentence, clause or word shall be construed as unmeaning or surplusage if a construction can be legitimately found which will give force to and preserve all the words of the statute." Furthermore, in Cooper v. Island Realty Co., 16 Hawaii 92 (1904), the court stated that the presumption that the legislature intends every clause of a statute to have some effect is stronger than the presumption that the legislature will not require the doing of a vain thing.

It would appear that the legislative intent, whether determined on the basis of the historical development of the section or by the plain language of the statute itself, can properly be expressed by paraphrasing said section 128-1 as follows: that "property" or "real property" means and includes all lands and appurtenances thereof and the buildings, structures, fences and improvements erected on or affixed to the same excluding, however, any growing crops, and all fixtures, including but not limited to, all machinery and other mechanical or allied equipment and the foundations thereof, etc., but only if they are required by law to be assessed and taxed as personal property. There being no personal property tax, the condition permitting the exclusion cannot be met.

On the basis of the foregoing, it is our view and conclusion that said section 128-1 does not exclude from real property taxation those items enumerated therein and excluded from the definition of real property. We concur with your view, as expressed in your letter of request, that "the test of whether any item is personal property or real property . . . is the manner in which the article is attached to real estate, the character of the article and its adaptation, and the intention of the parties owning such property as to its use", which is a statement of the tests American courts generally apply in determining what a fixture is.