Kentucky Reclassification of Pipelines for PSC Tax?

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It's property tax time again, and in the Commonwealth, the Kentucky Department of Revenue (the "Department") centrally assesses and collects tax on property owned or operated by public service companies ("PSCs"). PSCs include commercial solar electric generators, private water companies, railroad companies and other utility companies, to name a few. Also included in the list of PSC companies are oil and refined products transmission and gas pipelines. Thus, if a taxpayer owns a pipeline that is located in Kentucky, when taxed as a PSC it must pay property tax based on that and all other non-exempt assets via an apportioned value attributable to the state and local jurisdiction.

The 2023 PSC Tax Forms are now out. At the beginning of the large annual PSC tax return packet (Form 61A200), the Department, as it always has, provides a list of property used by PSC companies, stating whether the property is classified as real property, tangible property, and/or manufacturing machinery. Historically, "underground pipelines (transmission oil, gas, and water)" were included on the list and classified by the Department as "real property" — but not anymore.

According to the 2023 Form 61A200, this list of PSC property no longer includes "underground pipelines," and gives no official guidance as to the classification of these pipelines for taxpayers completing this return. So, is it real or is it tangible? If tangible, is it manufacturing equipment?

Why is the tax classification of pipelines important? The answer is that property classified as real property is subject to a state rate of $0.119 per $100 of assessed value, and alternatively, property classified as tangible property is subject to a state rate of $0.45 per $100 of assessed value; but if taxed as manufacturing equipment, the tangible personal property is only taxed at a rate of $0.15 and exempt from all local tax. Typically, the rate for tangible property is higher than real property on the local level as well, although generally not as drastically different as the state difference in rates.

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Who should care about this? Oil pipelines, water companies, natural gas pipelines and still others.

It can be assumed that this wholesale policy change of the Department's PSC property classification list was the result of the Kentucky Court of Appeals' recent unanimous opinion holding that a pipeline located in Kentucky was considered tangible property instead of real property for Kentucky PSC ad valorem tax classification purposes.[1]

It is unclear what this omission will mean for PSC taxpayers rendering pipelines on their 2023 return. Some might interpret the Department's omission of guidance for underground pipelines as a way to allow taxpayers to determine for themselves based on the nature of the specific pipeline on which it is reporting as to whether it is considered tangible or real property, and if tangible, whether considered manufacturing or not.

However, the Department's guidance is conflicting. According to the Department's 2021-2022 Annual Report, the Department provides that it will be taking the position that *all* underground pipelines, including water, oil, and gas, will be considered tangible property instead of real property. The Annual Report provides at page 24 that, "As a result of the decision, PSC owned and operated underground pipelines transmitting oil, gas and water shall be subject to the ad valorem tax rate imposed on tangible personal property for purposes of both state and local property taxes." Curiously, however, despite this blanket statement, the PSC tax return still notes "pipelines and transmission lines" as *real property* "improvements" on Schedule N1, which is used for reporting *leased real* property in Kentucky for a PSC taxpayer.

This change in policy by the Department could cause a change in some PSC taxpayers' Kentucky tax burden in 2023. It is also important to note that despite *Marathon Pipe Line* being a case involving a petroleum pipeline, it appears that the Department might take this classification position with *all* pipelines in the state, including water and natural gas.

For more information about the PSC tax or other Kentucky tax developments, contact the authors of this article or visit our Tax

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[1] Dep't of Revenue, Fin. & Admin. Cabinet v. Marathon Pipe Line, LLC, 653 S.W.3d 104 (Ky. App. 2022), *disc. rev. denied* 2022 – SC-0233 (Ky. Oct. 12, 2022).

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