Order of the Thurston County Board of Equalization

Property Owner: CTGW LLC

Parcel Number(s): 99002085874

Assessment Year: 2009 Petition Number: 09-1559

Having considered the evidence presented by the parties in this appeal, the Board hereby:

☐ sustains ☒ overrules the determination of the assessor.

Assessor's True and Fair Value		**BOE True and Fair Value Determination**	
☐ Land	$	☐ Land	$
☐ Improvements	$	☐ Improvements	$
☐ Minerals	$	☐ Minerals	$
☒ Personal Property	$ 8,039,600	☒ Personal Property	$ 8,039,600
TOTAL:	$ 8,039,600	TOTAL:	$ 8,039,600

This decision is based on our finding that: The pivotal question before the board at hearing was whether CTGW, LLC is an arm of the tribe such that it might be *per se* exempt from assessment and taxation on "un-attached business personal property located at Great Wolf Lodge." See Galanda Decl. Exhibit H-01 (Quotation from February 11, 2014 letter from Thurston County Treasurer Shawn Myers to David Burnett, President, CTGW, LLC). As explained below, the Board finds that CTGW, LLC is exempt from all assessments and taxes on the un-attached business personal property used exclusively on tribal trust land and that the taxable assessment for each year subject to a petition must be reduced to zero.

"'[A]lthough tax exemptions generally are to be construed narrowly, in the government's dealings with the Indians the rule is exactly the contrary.'" *Van Mechelen v. State of Washington Dep't of Revenue*, No. 08-011, Wash. Bd. of Tax App., February 26, 2009, at 12 (citing and quoting *Choate v. Trapp*, 224 U.S. 665, 675, 32 S.Ct. 565, 56 L.Ed. 941 (1912)).

"'In the special area of state taxation of Indian Tribes and tribal members we have adopted a *per se* rule. . . . On the narrow question of whether a state can tax Indian activity...the law is clear: when Congress does not instruct otherwise, a State's [] tax is unenforceable if its legal incidence falls on a Tribe or its members [] within Indian Country.'" *Van Mechelen* at 9 (citing and quoting *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 453, 115 S.Ct. 2214, 132 L.Ed.2d 400 (1995)).[1]

CTGW, LLC

The Chehalis Tribe and the Assessor differ on whether CTGW, LLC is an arm of the tribe entitled to *per se* exemption from assessment and taxation on un-attached business personal property located at Great

[1] The board has as one of its duties the resolution of claims of exemption from assessment of property taxes. RCW 84.48.010. The Board of Tax Appeals has reviewed the topic of county board jurisdiction to resolve claims of property tax exemption. In *Draper Mach. Works, Inc. v. Ruthe Ridder, King Cnty. Assessor*, No. 38368, Wash. Bd. of Tax App., June 28, 1991, the BTA stated that county boards have jurisdiction to review and decide claims of exemptions. *Id.* at 3.

Wolf Lodge. CTGW, LLC is the owner of Great Wolf Lodge. Great Wolf Lodge is a destination resort composed of a hotel, restaurants, a very popular water park, and equipment for other recreational activities. Approximately 400,000 guests visit each year.

CTGW, LLC is a Delaware corporation that was formed by the Chehalis Tribe (the CT in the title of the LLC) and Great Wolf Resorts, Inc., a corporation that is non-Indian (the GW in the title). It is undisputed that the Tribe is 51 percent owner of CTGW and that Great Wolf Resorts, Inc. owns the remaining 49 percent. It is undisputed that the lodge is on land controlled by the Chehalis Tribe and held in trust by the United States for the benefit of the Chehalis Tribe, and that the un-attached business personal property at issue is all located at the lodge on tribal trust land.

Unrebutted testimony at the hearing from David Burnett, Tribal Chairman and President of CTGW, is that the Tribe initiated the plan to create a destination resort.[2] His testimony was that before and after CTGW was established to bring the Tribe's plan to fruition, the Tribe always made the final decision respecting all important business issues, and that it continues to exercise a final say in all important decisions such as capital and annual budgeting and what, if any, new recreational attractions will be developed. He testified that, while the Tribe's final say in all important business matters was not spelled out clearly in all the documents related to the creation and operation of CTGW, in practice the Tribe has had the final say on important business decisions since the Tribe's invitation to Great Wolf Resorts Inc. to join in creating an LLC for the purpose of developing the destination resort. As presented by CTGW and the Tribe, the purpose of acquiring the land, having the land taken into trust by the United States, and entering into a joint venture with Great Wolf Resorts Inc. was to further the Tribe's goal of economic development. See Galanda Decl. Exhibit A-03 (Statement of Need declared in the February 17, 2006 Findings of Fact and Conclusions of Law of the United States Department of the Interior provided to David Burnett, Chairman of the Chehalis Tribe).

Chairman Burnett testified that the creation of an LLC was essential to obtain financing for the project. It was also very beneficial that the Tribe chose to join with Great Wolf Resorts, Inc. because Great Wolf Resorts Inc. had a reputation for developing and managing successful destination resorts and that reputation was important in obtaining an essential loan. He testified that, but for the Tribe, CTGW would not exist and there would be no destination resort like the Great Wolf Lodge on tribal trust land.

The cost to build the lodge was $172 million, an amount the board assumes includes money used to purchase un-attached business personal property. See Opening Brief of CTGW and Chehalis Tribe, pp. 10-11. To fund the lodge, the Tribe contributed $6.3 million in cash as common equity; $8 million in preferred equity; contributed nearly $11 million in state construction excise tax savings; and a leasehold valued at $3.6 million. Id. Great Wolf Resources contributed $19.2 million in cash as common equity; $8 million in

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preferred equity; and loaned $14.9 million that the Tribe insisted be subordinate to the Tribe's $8 million of preferred equity. Id. Together, as CTGW, LLC, the balance of the funding was obtained as a loan of $102 million from the Marshall Financing Group with the Tribe responsible for 51 percent of that debt and as well as 51 percent responsible for the $14.9 million CTGW borrowed from Great Wolf Resources. Id.

Based on the undisputed fact that the lodge and the un-attached business personal property is on tribal trust land; on the testimony that but for the tribe there would be no CTGW and no destination resort on tribal trust land; on the testimony that the Tribe has always exercised, and continues to exercise, the final say on all important business matters; and on the level of investment (risk) by the Tribe; and based on the Tribe's 51 percent ownership of CTGW, the board concludes CTGW is "an arm of the tribe" and is nontaxable. *Uniband Inc. v. C.I.R*, 140 T.C. 230, 252 (U.S. Tax Ct. 2013).[3] The board also concludes the form of business is not dispositive; the arrangements between the Tribe, Great Wolf Resources Inc., and CTGW are not uncommon in modern business practices and it is the Tribe's substantial control of the lodge and CTGW and not the form of the business that convinces the board that CTGW is an arm of the Tribe. It follows that the legal incidence of the tax as assessed by the Assessor falls on the Tribe. *Van Mechelen*, No. 08-011, Wash. Bd. of Tax App., at 9.

The Assessor advanced the argument that CTGW is a separate entity with a separate legal existence and that the incidence of the tax falls on CTGW not the Tribe. From that assertion, the Assessor urged the board to conclude that CTGW is *per se* non-Indian and not exempt from taxation on un-attached business personal property. The board finds the Assessor's argument unavailing because it is not supported by statute or case law.

The case on which the Assessor relies in chief concerned a tax assessed and levied on a corporation that had no Indian ownership and whose important business decisions were not controlled by a tribe. See *Yavapai-Prescott Indian Tribe v. Scott*, 117 F.3d 1107 (9th Cir. 1997), *cert. denied* 522 U.S. 1076, 118 S. Ct. 853 (1998). The Assessor urges the board not to look beyond the corporate form and to, in essence, elevate business form over substantive control exercised by the Chehalis Tribe. Case law supports emphasizing substance over form.

The case most on point is *Eastern Navajo Industries, Inc. v. Bureau of Revenue*, 552 P.2d 805 (N.M. Ct. App. 1976), *cert. denied*, 558 P.2d 619 (1976), *cert. denied*, 430 U.S. 959 (1977). The corporation was 51 percent owned by tribal members; the corporation's plant was located on Indian trust land, but not on the Tribe's reservation; and the corporation "was formed at the instigation and under the auspices of the Navajo Tribal Council." *Id.* at 806, 807. The Bureau of Revenue argued, "'organizing a modern business corporation, the character of which is determined by state law, is a departure from the ancestral customs and folkways of Indian people. Once, that step has been taken, the participants have made the choice, for better or worse, to separate themselves, at least for purposes of the corporate activity, from those traditions." *Id.* at 807. In response, and in support of exempting the corporation from state taxation, the court stated that "[t]o

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disregard the Indian ethnicity of taxpayer's shareholders would be to fail to recognize the specific directives" of federal regulations that "look beyond the taxpayer's corporate form to the fact that 51% of the stock is owned by individual Navajo Indians." *Id.* at 809. The court found Eastern Navajo Industries, Inc. exempt from taxation and the New Mexico and United States Supreme Courts declined to grant certiorari.

Similarly, in the *Makah* case, the Washington Supreme Court did not accept the form of ownership of un-attached business personal property as dispositive of the question of Indian ownership. *Makah Indian Tribe v. Clallam County*, 73 Wn.2d 677, 440 P.2d 442 (1968). In that case, Clallam County assessed personal property taxes on Esther Elvrum, a member of the Makah Tribe who operated a resort on the Makah reservation. Ms. Elvrum was married to a non-Indian and Clallam County claimed it was taxing the personal property of the marital community and that the martial community was not exempt from taxation because it was "under the management and control of the husband." *Id.* at 681. "This, of course," stated the court, "is quite a persuasive argument." *Id.* at 683.

Notwithstanding the persuasiveness of the county's argument, the court stated in the immediately following sentences that "[t]he quantum of ownership between spouses, regardless of their moiety, does not affect its taxability if the property is on an Indian reservation exclusively kept there during the taxable period and if it is under the management, control and ownership of a tribal Indian with the authority of the tribe, or under the ownership of the tribe. Under such circumstances, the taxable event upon which the tax is levied has not occurred within the territorial confines of Clallam County." *Id.* Just as was done by the New Mexico Court of Appeals in *Eastern Navajo Industries, Inc.*, the Washington Supreme Court looked beyond the legal status of the un-attached business personal property as community property to determine if actual control was with an Indian, and the court determined that the property was under the control of an Indian and used only on the reservation trust land. Accordingly, the court determined the Elvrum's un-attached business personal property was exempt from assessment and taxation under Washington and federal law.

THE DISCERNIBLE FEDERAL POLICY OF ENCOURAGING INDIANS TO BECOME ECONOMICALLY SELF-SUFFICIENT

The Washington Supreme Court's 1968 *Makah* case is the most recent decision to address un-attached business personal property located on Indian trust land and under the control of an individual Indian or Tribe.[4] After deciding that the community property of a non-Indian was exempt from taxation as described immediately above, the court went on to place its decision in the context of federal Indian policy. In the only other case to address un-attached business personal property located on trust land, the United States Supreme Court held that Roberts County, South Dakota, could not tax mules, plows, and wagons given by the Indian Department to individual Indians for the purpose of farming the allotted trust lands the federal government expected the Indians to farm to achieve economic self-sufficiency. *See United States v. Rickert*, 188 U.S. 432, 23 S.Ct. 478, 47 L.Ed. 532 (1903). "Holding that this direct tax would not lie, the [United States] Supreme Court said: 'These suggestions entirely ignore the relation existing between the United States and the Indians. It is not a relation simply of contract***. The government would not

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adequately discharge its duty to these people if it placed its engagements with them upon the basis merely of contract, and failed to exercise any power it possessed To (sic) protect them in possession of such improvements and personal property as were necessary to the enjoyment of the land held in trust for them.'" *Makah* at 685-86 (citing and quoting *Rickert*, 188 U.S. 432, Wash. Supreme Court italics omitted).

Once the Washington Supreme Court provided the federal policy context concerning Indian personal property, the court then stated why its decision fit within the federal policy. "Although, in the instant case, the personal property sought to be taxed was not a gift or grant from the United States in the aid of the Indian, but instead had been acquired through work, savings and borrowing, it was put to the modern equivalent usage by a tribal Indian... As we understand federal policy, it is as much the government's desire to foster successful business enterprises on the reservations as it is to encourage farming, ranching and fishing." *Makah* at 686.

Recognition of CTGW as an arm of the tribe is consistent with federal policy on exemption from taxation of Indian personal property and takes the evolution of the nature of Indian business forms beyond gifts of the United States and beyond sole proprietorships that acquire un-attached business personal property from work, savings, and borrowing, to acceptance of modern forms of business chosen by a Tribe as the form of business that will best advance the economic interests of that Tribe.

Because the board has concluded CTGW is an arm of the tribe and exempt from paying taxes on un-attached business personal property used exclusively on tribal trust land, the board determines it need not address other issues raised in this case.

The DECISION of the board is CTGW, LLC is exempt from all assessments and taxes on the un-attached business personal property used exclusively on tribal trust land and that the taxable assessment for each year subject to a petition must be reduced to zero.

Dated this 29th day of September, 2014

Paula M. Strain, Chairman

Ruth J. Elder, Clerk of the Board

NOTICE
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To ask about the availability of this publication in an alternate format for the visually impaired, please call 1-800-647-7706. Teletype (TTY) users use the Washington Relay Service by calling 711. For tax assistance, call (360) 534-1400.

Distribution: • **Assessor** • **Petitioner** • **BOE File**

REV 64 0058 (6/9/14)

SHIPPED OCT 16 2014

Order of the Thurston County Board of Equalization

Property Owner: CTGW LLC
Parcel Number(s): 99002085874
Assessment Year: 2010 Petition Number: 10-1232

Having considered the evidence presented by the parties in this appeal, the Board hereby:
☐ sustains ☒ overrules the determination of the assessor.

Assessor's True and Fair Value		**BOE True and Fair Value Determination**	
☐ Land	$	☐ Land	$
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This decision is based on our finding that: The pivotal question before the board at hearing was whether CTGW, LLC is an arm of the tribe such that it might be *per se* exempt from assessment and taxation on "un-attached business personal property located at Great Wolf Lodge." See Galanda Decl. Exhibit H-01 (Quotation from February 11, 2014 letter from Thurston County Treasurer Shawn Myers to David Burnett, President, CTGW, LLC). As explained below, the Board finds that CTGW, LLC is exempt from all assessments and taxes on the un-attached business personal property used exclusively on tribal trust land and that the taxable assessment for each year subject to a petition must be reduced to zero.

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SHIPPED OCT 16 2014

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Parcel Number(s): 99002085874

Assessment Year: 2011 Petition Number: 11-0778

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☐ sustains ☒ overrules the determination of the assessor.

Assessor's True and Fair Value		**BOE True and Fair Value Determination**	
☐ Land	$	☐ Land	$
☐ Improvements	$	☐ Improvements	$
☐ Minerals	$	☐ Minerals	$
☒ Personal Property	$ 14,687,592	☒ Personal Property	$ 14,687,592
TOTAL:	$ 14,687,592	TOTAL:	$ 14,687,592

This decision is based on our finding that: The pivotal question before the board at hearing was whether CTGW, LLC is an arm of the tribe such that it might be *per se* exempt from assessment and taxation on "un-attached business personal property located at Great Wolf Lodge." See Galanda Decl. Exhibit H-01 (Quotation from February 11, 2014 letter from Thurston County Treasurer Shawn Myers to David Burnett, President, CTGW, LLC). As explained below, the Board finds that CTGW, LLC is exempt from all assessments and taxes on the un-attached business personal property used exclusively on tribal trust land and that the taxable assessment for each year subject to a petition must be reduced to zero.

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"'In the special area of state taxation of Indian Tribes and tribal members we have adopted a *per se* rule. . . . On the narrow question of whether a state can tax Indian activity...the law is clear: when Congress does not instruct otherwise, a State's [] tax is unenforceable if its legal incidence falls on a Tribe or its members [] within Indian Country.'" *Van Mechelen* at 9 (citing and quoting *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 453, 115 S.Ct. 2214, 132 L.Ed.2d 400 (1995)).[1]

CTGW, LLC

The Chehalis Tribe and the Assessor differ on whether CTGW, LLC is an arm of the tribe entitled to *per se* exemption from assessment and taxation on un-attached business personal property located at Great

[1] The board has as one of its duties the resolution of claims of exemption from assessment of property taxes. RCW 84.48.010. The Board of Tax Appeals has reviewed the topic of county board jurisdiction to resolve claims of property tax exemption. In *Draper Mach. Works, Inc. v. Ruthe Ridder, King Cnty. Assessor*, No. 38368, Wash. Bd. of Tax App., June 28, 1991, the BTA stated that county boards have jurisdiction to review and decide claims of exemptions. *Id.* at 3.

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Unrebutted testimony at the hearing from David Burnett, Tribal Chairman and President of CTGW, is that the Tribe initiated the plan to create a destination resort.[2] His testimony was that before and after CTGW was established to bring the Tribe's plan to fruition, the Tribe always made the final decision respecting all important business issues, and that it continues to exercise a final say in all important decisions such as capital and annual budgeting and what, if any, new recreational attractions will be developed. He testified that, while the Tribe's final say in all important business matters was not spelled out clearly in all the documents related to the creation and operation of CTGW, in practice the Tribe has had the final say on important business decisions since the Tribe's invitation to Great Wolf Resorts Inc. to join in creating an LLC for the purpose of developing the destination resort. As presented by CTGW and the Tribe, the purpose of acquiring the land, having the land taken into trust by the United States, and entering into a joint venture with Great Wolf Resorts Inc. was to further the Tribe's goal of economic development. See Galanda Decl. Exhibit A-03 (Statement of Need declared in the February 17, 2006 Findings of Fact and Conclusions of Law of the United States Department of the Interior provided to David Burnett, Chairman of the Chehalis Tribe).

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Based on the undisputed fact that the lodge and the un-attached business personal property is on tribal trust land; on the testimony that but for the tribe there would be no CTGW and no destination resort on tribal trust land; on the testimony that the Tribe has always exercised, and continues to exercise, the final say on all important business matters; and on the level of investment (risk) by the Tribe; and based on the Tribe's 51 percent ownership of CTGW, the board concludes CTGW is "an arm of the tribe" and is nontaxable. *Uniband Inc. v. C.I.R*, 140 T.C. 230, 252 (U.S. Tax Ct. 2013).[3] The board also concludes the form of business is not dispositive; the arrangements between the Tribe, Great Wolf Resources Inc., and CTGW are not uncommon in modern business practices and it is the Tribe's substantial control of the lodge and CTGW and not the form of the business that convinces the board that CTGW is an arm of the Tribe. It follows that the legal incidence of the tax as assessed by the Assessor falls on the Tribe. *Van Mechelen*, No. 08-011, Wash. Bd. of Tax App., at 9.

The Assessor advanced the argument that CTGW is a separate entity with a separate legal existence and that the incidence of the tax falls on CTGW not the Tribe. From that assertion, the Assessor urged the board to conclude that CTGW is *per se* non-Indian and not exempt from taxation on un-attached business personal property. The board finds the Assessor's argument unavailing because it is not supported by statute or case law.

The case on which the Assessor relies in chief concerned a tax assessed and levied on a corporation that had no Indian ownership and whose important business decisions were not controlled by a tribe. See *Yavapai-Prescott Indian Tribe v. Scott*, 117 F.3d 1107 (9th Cir. 1997), *cert. denied* 522 U.S. 1076, 118 S. Ct. 853 (1998). The Assessor urges the board not to look beyond the corporate form and to, in essence, elevate business form over substantive control exercised by the Chehalis Tribe. Case law supports emphasizing substance over form.

The case most on point is *Eastern Navajo Industries, Inc. v. Bureau of Revenue*, 552 P.2d 805 (N.M. Ct. App. 1976), *cert. denied*, 558 P.2d 619 (1976), *cert. denied*, 430 U.S. 959 (1977). The corporation was 51 percent owned by tribal members; the corporation's plant was located on Indian trust land, but not on the Tribe's reservation; and the corporation "was formed at the instigation and under the auspices of the Navajo Tribal Council." *Id.* at 806, 807. The Bureau of Revenue argued, "'organizing a modern business corporation, the character of which is determined by state law, is a departure from the ancestral customs and folkways of Indian people. Once, that step has been taken, the participants have made the choice, for better or worse, to separate themselves, at least for purposes of the corporate activity, from those traditions." *Id.* at 807. In response, and in support of exempting the corporation from state taxation, the court stated that "[t]o

[3] Uniband, Inc. itself was found to be a shell corporation or, as characterized by the Tribe's attorney, an example of a "rent-a-tribe" corporation intended to take advantage of tribal tax exemptions when the tribe's only connection to Uniband, Inc. was the use of the Tribe's name.

disregard the Indian ethnicity of taxpayer's shareholders would be to fail to recognize the specific directives" of federal regulations that "look beyond the taxpayer's corporate form to the fact that 51% of the stock is owned by individual Navajo Indians." *Id.* at 809. The court found Eastern Navajo Industries, Inc. exempt from taxation and the New Mexico and United States Supreme Courts declined to grant certiorari.

Similarly, in the *Makah* case, the Washington Supreme Court did not accept the form of ownership of un-attached business personal property as dispositive of the question of Indian ownership. *Makah Indian Tribe v. Clallam County*, 73 Wn.2d 677, 440 P.2d 442 (1968). In that case, Clallam County assessed personal property taxes on Esther Elvrum, a member of the Makah Tribe who operated a resort on the Makah reservation. Ms. Elvrum was married to a non-Indian and Clallam County claimed it was taxing the personal property of the marital community and that the martial community was not exempt from taxation because it was "under the management and control of the husband." *Id.* at 681. "This, of course," stated the court, "is quite a persuasive argument." *Id.* at 683.

Notwithstanding the persuasiveness of the county's argument, the court stated in the immediately following sentences that "[t]he quantum of ownership between spouses, regardless of their moiety, does not affect its taxability if the property is on an Indian reservation exclusively kept there during the taxable period and if it is under the management, control and ownership of a tribal Indian with the authority of the tribe, or under the ownership of the tribe. Under such circumstances, the taxable event upon which the tax is levied has not occurred within the territorial confines of Clallam County." *Id.* Just as was done by the New Mexico Court of Appeals in *Eastern Navajo Industries, Inc.*, the Washington Supreme Court looked beyond the legal status of the un-attached business personal property as community property to determine if actual control was with an Indian, and the court determined that the property was under the control of an Indian and used only on the reservation trust land. Accordingly, the court determined the Elvrum's un-attached business personal property was exempt from assessment and taxation under Washington and federal law.

THE DISCERNIBLE FEDERAL POLICY OF ENCOURAGING INDIANS TO BECOME ECONOMICALLY SELF-SUFFICIENT

The Washington Supreme Court's 1968 *Makah* case is the most recent decision to address un-attached business personal property located on Indian trust land and under the control of an individual Indian or Tribe.[4] After deciding that the community property of a non-Indian was exempt from taxation as described immediately above, the court went on to place its decision in the context of federal Indian policy. In the only other case to address un-attached business personal property located on trust land, the United States Supreme Court held that Roberts County, South Dakota, could not tax mules, plows, and wagons given by the Indian Department to individual Indians for the purpose of farming the allotted trust lands the federal government expected the Indians to farm to achieve economic self-sufficiency. *See United States v. Rickert*, 188 U.S. 432, 23 S.Ct. 478, 47 L.Ed. 532 (1903). "Holding that this direct tax would not lie, the [United States] Supreme Court said: 'These suggestions entirely ignore the relation existing between the United States and the Indians. It is not a relation simply of contract***. The government would not

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adequately discharge its duty to these people if it placed its engagements with them upon the basis merely of contract, and failed to exercise any power it possessed To (sic) protect them in possession of such improvements and personal property as were necessary to the enjoyment of the land held in trust for them.'" *Makah* at 685-86 (citing and quoting *Rickert*, 188 U.S. 432, Wash. Supreme Court italics omitted).

Once the Washington Supreme Court provided the federal policy context concerning Indian personal property, the court then stated why its decision fit within the federal policy. "Although, in the instant case, the personal property sought to be taxed was not a gift or grant from the United States in the aid of the Indian, but instead had been acquired through work, savings and borrowing, it was put to the modern equivalent usage by a tribal Indian... As we understand federal policy, it is as much the government's desire to foster successful business enterprises on the reservations as it is to encourage farming, ranching and fishing." *Makah* at 686.

Recognition of CTGW as an arm of the tribe is consistent with federal policy on exemption from taxation of Indian personal property and takes the evolution of the nature of Indian business forms beyond gifts of the United States and beyond sole proprietorships that acquire un-attached business personal property from work, savings, and borrowing, to acceptance of modern forms of business chosen by a Tribe as the form of business that will best advance the economic interests of that Tribe.

Because the board has concluded CTGW is an arm of the tribe and exempt from paying taxes on un-attached business personal property used exclusively on tribal trust land, the board determines it need not address other issues raised in this case.

The DECISION of the board is CTGW, LLC is exempt from all assessments and taxes on the un-attached business personal property used exclusively on tribal trust land and that the taxable assessment for each year subject to a petition must be reduced to zero.

Dated this 29th day of September, 2014

Paula M. Strain, Chairman

Ruth J. Elder, Clerk of the Board

NOTICE
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Distribution: • **Assessor** • **Petitioner** • **BOE File**

REV 64 0058 (6/9/14)

SHIPPED OCT 16 2014

Order of the Thurston County Board of Equalization

Property Owner: CTGW LLC

Parcel Number(s): 99002085874

Assessment Year: 2012 Petition Number: 12-0894

Having considered the evidence presented by the parties in this appeal, the Board hereby:

☐ sustains ☒ overrules the determination of the assessor.

Assessor's True and Fair Value		**BOE True and Fair Value Determination**	
☐ Land	$	☐ Land	$
☐ Improvements	$	☐ Improvements	$
☐ Minerals	$	☐ Minerals	$
☒ Personal Property	$ 12,216,765	☒ Personal Property	$ 12,216,765
TOTAL:	$ 12,216,765	TOTAL:	$ 12,216,765

This decision is based on our finding that: The pivotal question before the board at hearing was whether CTGW, LLC is an arm of the tribe such that it might be *per se* exempt from assessment and taxation on "un-attached business personal property located at Great Wolf Lodge." See Galanda Decl. Exhibit H-01 (Quotation from February 11, 2014 letter from Thurston County Treasurer Shawn Myers to David Burnett, President, CTGW, LLC). As explained below, the Board finds that CTGW, LLC is exempt from all assessments and taxes on the un-attached business personal property used exclusively on tribal trust land and that the taxable assessment for each year subject to a petition must be reduced to zero.

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The DECISION of the board is CTGW, LLC is exempt from all assessments and taxes on the un-attached business personal property used exclusively on tribal trust land and that the taxable assessment for each year subject to a petition must be reduced to zero.

Dated this 29th day of September, 2014

Paula M. Strain, Chairman

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Distribution: • **Assessor** • **Petitioner** • **BOE File**

SHIPPED OCT 16 2014

Order of the Thurston County Board of Equalization

Property Owner: CTGW LLC

Parcel Number(s): 99002085874

Assessment Year: 2013 Petition Number: 13-0607

Having considered the evidence presented by the parties in this appeal, the Board hereby:

☐ sustains ☒ overrules the determination of the assessor.

Assessor's True and Fair Value		**BOE True and Fair Value Determination**	
☐ Land	$	☐ Land	$
☐ Improvements	$	☐ Improvements	$
☐ Minerals	$	☐ Minerals	$
☒ Personal Property	$ 10,266,849	☒ Personal Property	$ 10,266,849
TOTAL:	$ 10,266,849	TOTAL:	$ 10,266,849

This decision is based on our finding that: The pivotal question before the board at hearing was whether CTGW, LLC is an arm of the tribe such that it might be *per se* exempt from assessment and taxation on "un-attached business personal property located at Great Wolf Lodge." See Galanda Decl. Exhibit H-01 (Quotation from February 11, 2014 letter from Thurston County Treasurer Shawn Myers to David Burnett, President, CTGW, LLC). As explained below, the Board finds that CTGW, LLC is exempt from all assessments and taxes on the un-attached business personal property used exclusively on tribal trust land and that the taxable assessment for each year subject to a petition must be reduced to zero.

"'[A]lthough tax exemptions generally are to be construed narrowly, in the government's dealings with the Indians the rule is exactly the contrary.'" *Van Mechelen v. State of Washington Dep't of Revenue*, No. 08-011, Wash. Bd. of Tax App., February 26, 2009, at 12 (citing and quoting *Choate v. Trapp*, 224 U.S. 665, 675, 32 S.Ct. 565, 56 L.Ed. 941 (1912)).

"'In the special area of state taxation of Indian Tribes and tribal members we have adopted a *per se* rule. . . . On the narrow question of whether a state can tax Indian activity...the law is clear: when Congress does not instruct otherwise, a State's [] tax is unenforceable if its legal incidence falls on a Tribe or its members [] within Indian Country.'" *Van Mechelen* at 9 (citing and quoting *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 453, 115 S.Ct. 2214, 132 L.Ed.2d 400 (1995)).[1]

CTGW, LLC

The Chehalis Tribe and the Assessor differ on whether CTGW, LLC is an arm of the tribe entitled to *per se* exemption from assessment and taxation on un-attached business personal property located at Great

[1] The board has as one of its duties the resolution of claims of exemption from assessment of property taxes. RCW 84.48.010. The Board of Tax Appeals has reviewed the topic of county board jurisdiction to resolve claims of property tax exemption. In *Draper Mach. Works, Inc. v. Ruthe Ridder, King Cnty. Assessor*, No. 38368, Wash. Bd. of Tax App., June 28, 1991, the BTA stated that county boards have jurisdiction to review and decide claims of exemptions. *Id.* at 3.

Wolf Lodge. CTGW, LLC is the owner of Great Wolf Lodge. Great Wolf Lodge is a destination resort composed of a hotel, restaurants, a very popular water park, and equipment for other recreational activities. Approximately 400,000 guests visit each year.

CTGW, LLC is a Delaware corporation that was formed by the Chehalis Tribe (the CT in the title of the LLC) and Great Wolf Resorts, Inc., a corporation that is non-Indian (the GW in the title). It is undisputed that the Tribe is 51 percent owner of CTGW and that Great Wolf Resorts, Inc. owns the remaining 49 percent. It is undisputed that the lodge is on land controlled by the Chehalis Tribe and held in trust by the United States for the benefit of the Chehalis Tribe, and that the un-attached business personal property at issue is all located at the lodge on tribal trust land.

Unrebutted testimony at the hearing from David Burnett, Tribal Chairman and President of CTGW, is that the Tribe initiated the plan to create a destination resort.[2] His testimony was that before and after CTGW was established to bring the Tribe's plan to fruition, the Tribe always made the final decision respecting all important business issues, and that it continues to exercise a final say in all important decisions such as capital and annual budgeting and what, if any, new recreational attractions will be developed. He testified that, while the Tribe's final say in all important business matters was not spelled out clearly in all the documents related to the creation and operation of CTGW, in practice the Tribe has had the final say on important business decisions since the Tribe's invitation to Great Wolf Resorts Inc. to join in creating an LLC for the purpose of developing the destination resort. As presented by CTGW and the Tribe, the purpose of acquiring the land, having the land taken into trust by the United States, and entering into a joint venture with Great Wolf Resorts Inc. was to further the Tribe's goal of economic development. See Galanda Decl. Exhibit A-03 (Statement of Need declared in the February 17, 2006 Findings of Fact and Conclusions of Law of the United States Department of the Interior provided to David Burnett, Chairman of the Chehalis Tribe).

Chairman Burnett testified that the creation of an LLC was essential to obtain financing for the project. It was also very beneficial that the Tribe chose to join with Great Wolf Resorts, Inc. because Great Wolf Resorts Inc. had a reputation for developing and managing successful destination resorts and that reputation was important in obtaining an essential loan. He testified that, but for the Tribe, CTGW would not exist and there would be no destination resort like the Great Wolf Lodge on tribal trust land.

The cost to build the lodge was $172 million, an amount the board assumes includes money used to purchase un-attached business personal property. See Opening Brief of CTGW and Chehalis Tribe, pp. 10-11. To fund the lodge, the Tribe contributed $6.3 million in cash as common equity; $8 million in preferred equity; contributed nearly $11 million in state construction excise tax savings; and a leasehold valued at $3.6 million. Id. Great Wolf Resources contributed $19.2 million in cash as common equity; $8 million in

[2] The hearing convened at 10:00 a.m. and concluded at 2:25 with an hour break. Throughout the process leading to the hearing, and at the hearing, the board took care to be sure that all parties had an opportunity to prepare and present their case in full, including thorough cross-examination. Rebuttal, surrebuttal and cross-examination were permitted beyond the normal three phases of a hearing. Gabriel Galanda, Anthony Broadman, and Amber Penn-Roco represented CTGW and the Tribe. Mr. David Burnett, Tribal Chairman, sat at the counsel table and gave testimony and was cross-examined. The Assessor was represented by Deputy Prosecuting Attorneys Jane Futterman and Scott S. Cushing. The Administrative Manager for the Assessor, Mr. Jeff Gadman, sat at the counsel table and answered one question posed by a member of the board.

preferred equity; and loaned $14.9 million that the Tribe insisted be subordinate to the Tribe's $8 million of preferred equity. Id. Together, as CTGW, LLC, the balance of the funding was obtained as a loan of $102 million from the Marshall Financing Group with the Tribe responsible for 51 percent of that debt and as well as 51 percent responsible for the $14.9 million CTGW borrowed from Great Wolf Resources. Id.

Based on the undisputed fact that the lodge and the un-attached business personal property is on tribal trust land; on the testimony that but for the tribe there would be no CTGW and no destination resort on tribal trust land; on the testimony that the Tribe has always exercised, and continues to exercise, the final say on all important business matters; and on the level of investment (risk) by the Tribe; and based on the Tribe's 51 percent ownership of CTGW, the board concludes CTGW is "an arm of the tribe" and is nontaxable. *Uniband Inc. v. C.I.R*, 140 T.C. 230, 252 (U.S. Tax Ct. 2013).[3] The board also concludes the form of business is not dispositive; the arrangements between the Tribe, Great Wolf Resources Inc., and CTGW are not uncommon in modern business practices and it is the Tribe's substantial control of the lodge and CTGW and not the form of the business that convinces the board that CTGW is an arm of the Tribe. It follows that the legal incidence of the tax as assessed by the Assessor falls on the Tribe. *Van Mechelen*, No. 08-011, Wash. Bd. of Tax App., at 9.

The Assessor advanced the argument that CTGW is a separate entity with a separate legal existence and that the incidence of the tax falls on CTGW not the Tribe. From that assertion, the Assessor urged the board to conclude that CTGW is *per se* non-Indian and not exempt from taxation on un-attached business personal property. The board finds the Assessor's argument unavailing because it is not supported by statute or case law.

The case on which the Assessor relies in chief concerned a tax assessed and levied on a corporation that had no Indian ownership and whose important business decisions were not controlled by a tribe. See *Yavapai-Prescott Indian Tribe v. Scott*, 117 F.3d 1107 (9th Cir. 1997), *cert. denied* 522 U.S. 1076, 118 S. Ct. 853 (1998). The Assessor urges the board not to look beyond the corporate form and to, in essence, elevate business form over substantive control exercised by the Chehalis Tribe. Case law supports emphasizing substance over form.

The case most on point is *Eastern Navajo Industries, Inc. v. Bureau of Revenue*, 552 P.2d 805 (N.M. Ct. App. 1976), *cert. denied*, 558 P.2d 619 (1976), *cert. denied*, 430 U.S. 959 (1977). The corporation was 51 percent owned by tribal members; the corporation's plant was located on Indian trust land, but not on the Tribe's reservation; and the corporation "was formed at the instigation and under the auspices of the Navajo Tribal Council." *Id.* at 806, 807. The Bureau of Revenue argued, "'organizing a modern business corporation, the character of which is determined by state law, is a departure from the ancestral customs and folkways of Indian people. Once, that step has been taken, the participants have made the choice, for better or worse, to separate themselves, at least for purposes of the corporate activity, from those traditions." *Id.* at 807. In response, and in support of exempting the corporation from state taxation, the court stated that "[t]o

[3] Uniband, Inc. itself was found to be a shell corporation or, as characterized by the Tribe's attorney, an example of a "rent-a-tribe" corporation intended to take advantage of tribal tax exemptions when the tribe's only connection to Uniband, Inc. was the use of the Tribe's name.

disregard the Indian ethnicity of taxpayer's shareholders would be to fail to recognize the specific directives" of federal regulations that "look beyond the taxpayer's corporate form to the fact that 51% of the stock is owned by individual Navajo Indians." *Id.* at 809. The court found Eastern Navajo Industries, Inc. exempt from taxation and the New Mexico and United States Supreme Courts declined to grant certiorari.

Similarly, in the *Makah* case, the Washington Supreme Court did not accept the form of ownership of un-attached business personal property as dispositive of the question of Indian ownership. *Makah Indian Tribe v. Clallam County*, 73 Wn.2d 677, 440 P.2d 442 (1968). In that case, Clallam County assessed personal property taxes on Esther Elvrum, a member of the Makah Tribe who operated a resort on the Makah reservation. Ms. Elvrum was married to a non-Indian and Clallam County claimed it was taxing the personal property of the marital community and that the martial community was not exempt from taxation because it was "under the management and control of the husband." *Id.* at 681. "This, of course," stated the court, "is quite a persuasive argument." *Id.* at 683.

Notwithstanding the persuasiveness of the county's argument, the court stated in the immediately following sentences that "[t]he quantum of ownership between spouses, regardless of their moiety, does not affect its taxability if the property is on an Indian reservation exclusively kept there during the taxable period and if it is under the management, control and ownership of a tribal Indian with the authority of the tribe, or under the ownership of the tribe. Under such circumstances, the taxable event upon which the tax is levied has not occurred within the territorial confines of Clallam County." *Id.* Just as was done by the New Mexico Court of Appeals in *Eastern Navajo Industries, Inc.*, the Washington Supreme Court looked beyond the legal status of the un-attached business personal property as community property to determine if actual control was with an Indian, and the court determined that the property was under the control of an Indian and used only on the reservation trust land. Accordingly, the court determined the Elvrum's un-attached business personal property was exempt from assessment and taxation under Washington and federal law.

THE DISCERNIBLE FEDERAL POLICY OF ENCOURAGING INDIANS TO BECOME ECONOMICALLY SELF-SUFFICIENT

The Washington Supreme Court's 1968 *Makah* case is the most recent decision to address un-attached business personal property located on Indian trust land and under the control of an individual Indian or Tribe.[4] After deciding that the community property of a non-Indian was exempt from taxation as described immediately above, the court went on to place its decision in the context of federal Indian policy. In the only other case to address un-attached business personal property located on trust land, the United States Supreme Court held that Roberts County, South Dakota, could not tax mules, plows, and wagons given by the Indian Department to individual Indians for the purpose of farming the allotted trust lands the federal government expected the Indians to farm to achieve economic self-sufficiency. *See United States v. Rickert*, 188 U.S. 432, 23 S.Ct. 478, 47 L.Ed. 532 (1903). "Holding that this direct tax would not lie, the [United States] Supreme Court said: 'These suggestions entirely ignore the relation existing between the United States and the Indians. It is not a relation simply of contract***. The government would not

[4] *Van Mechelen*, No. 08-011, Wash. Bd. of Tax App., considered the applicability of the state's motor vehicle excise tax to an Indian who took possession of a truck on allotted trust land.

adequately discharge its duty to these people if it placed its engagements with them upon the basis merely of contract, and failed to exercise any power it possessed To (sic) protect them in possession of such improvements and personal property as were necessary to the enjoyment of the land held in trust for them.'" *Makah* at 685-86 (citing and quoting *Rickert*, 188 U.S. 432, Wash. Supreme Court italics omitted).

Once the Washington Supreme Court provided the federal policy context concerning Indian personal property, the court then stated why its decision fit within the federal policy. "Although, in the instant case, the personal property sought to be taxed was not a gift or grant from the United States in the aid of the Indian, but instead had been acquired through work, savings and borrowing, it was put to the modern equivalent usage by a tribal Indian... As we understand federal policy, it is as much the government's desire to foster successful business enterprises on the reservations as it is to encourage farming, ranching and fishing." *Makah* at 686.

Recognition of CTGW as an arm of the tribe is consistent with federal policy on exemption from taxation of Indian personal property and takes the evolution of the nature of Indian business forms beyond gifts of the United States and beyond sole proprietorships that acquire un-attached business personal property from work, savings, and borrowing, to acceptance of modern forms of business chosen by a Tribe as the form of business that will best advance the economic interests of that Tribe.

Because the board has concluded CTGW is an arm of the tribe and exempt from paying taxes on un-attached business personal property used exclusively on tribal trust land, the board determines it need not address other issues raised in this case.

The DECISION of the board is CTGW, LLC is exempt from all assessments and taxes on the un-attached business personal property used exclusively on tribal trust land and that the taxable assessment for each year subject to a petition must be reduced to zero.

Dated this 29th day of September, 2014

Paula M. Strain, Chairman

Ruth J. Elder, Clerk of the Board

NOTICE
This order can be appealed to the State Board of Tax Appeals by filing a notice of appeal with them at PO Box 40915, Olympia, WA 98504-0915 or at their website at bta.state.wa.us/appeal/forms.htm within thirty days of the date of mailing of this order. The Notice of Appeal form is available from either your county assessor or the State Board.

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REV 64 0058 (6/9/14)

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