Cite as Det. No. 91-317, 12 WTD 51 (1993).

BEFORE THE INTERPRETATION AND APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

| | | |
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| In the Matter of the Petition For Correction of Assessment of | ) | D E T E R M I N A T I O N |
| | ) | No. 91-317 |
| . . . | ) | Registration No. . . . |
| | ) | . . ./Audit No. . . . |

[1] RULE 130: USE TAX -- REALTY -- TRADE FIXTURES -- LANDLORD-TENANT. Where the relationship between the annexor of personal property and the realty is landlord-tenant, the annexed property remains the tenant's personal property, no matter how firmly it may be attached to the landlord's realty, unless the lease agreement specifically provides that such items are to be considered as part of the real property and are to be left with the real property when the occupant vacates the premises.

Headnotes are provided as a convenience for the reader and are not in any way a part of the decision or in any way to be used in construing or interpreting this Determination.

TAXPAYER REPRESENTED BY: . . .

DATE OF TELECONFERENCE: . . .

NATURE OF ACTION:

A taxpayer protests additional use and/or deferred sales taxes and interest assessed in an audit report.

FACTS:

Okimoto, A.L.J. -- . . . (taxpayer) operates a gasoline and heating fuel distribution business in [Washington]. The taxpayer's books and records were examined by a Department of Revenue (Department) auditor for the period January 1, 1985

through December 31, 1988. As a result of the audit, Document No. . . . was issued [in December 1989] for additional taxes and interest in the amount of $ . . . . The taxpayer has paid the unprotested portion of the assessment, and the balance remains due.

TAXPAYER'S EXCEPTIONS:

Schedule VII: Capital Assets Purchased Ex-Tax

In this schedule, the auditor assessed use tax on the following leasehold improvements which were included in the sales price of the business assets purchased by the taxpayer from [annexor].

14) [Location A Cardlock System]
15) [Location B] Pumps and Cardlock System (not including underground tanks) . . .
16) [Location B] Pumps and Misc. Equipment . . .
17,18,&19) [Location C] Codelock & Pump . . .

The auditor described a sample [card] Lock System in his audit report as follows:

I. Outside Equipment - located on island at the station.
   1. Card Box - like a magnetic reader (cash machine at bank) with a key punch to enter the customers access code.
   2. Pumps/Dispensers - activated by the card box.

II. Inside a small building
   1. Computer box - houses computer chip and related parts, also houses electrical panel, with fuses and on/off terminals.
   a. Purpose - used for switching, processing of the details of the sale, i.e., date, time, customer, number of gallons sold...
   b. Attached to the wall of little building.
   c. Linked to main office by phone modem, actual billing performed at main office.
   2. Printer - located at each site and is used as a safeguard in case of a loss in phone transmission.

The taxpayer disputes the assessment of use tax on the above items because it maintains that they are permanently attached fixtures to the freehold and have therefore lost their identity as personal property. The taxpayer contends that these items are now part of the real property. The taxpayer states in its brief:

> The items in dispute consist of underground petroleum fuel storage tanks, pumps, electrical distribution

> lines, and pipes; and above-ground petroleum dispensing units.
> The principal value of the below-ground improvements is generated through the labor involved in installing them, and the below-ground improvements would not have sufficient value to offset the costs of removal and/or reinstallation at a new site. The value of the above-ground improvements (the dispensing units) would allow them to be removed to a new location and retain some value. The above-ground dispensing units are mounted on concrete pads affixed to the property, and are themselves bolted to the concrete pads. The dispensing units are attached to the underground wiring, the underground piping, the underground tanks, and the underground pumps, as well. The dispensing units cannot work separate from the underground improvements, and the underground improvements have no function without the above-ground dispensing units.

The taxpayer also cites RCW 84.04.090 and WAC 458-12-010 in support of its position.

ISSUE:

1. If the relationship between the annexor of personal property and the realty is landlord-tenant, under what circumstances does the personal property lose its identity and become part of the realty?

DISCUSSION:

[1] The courts in Washington have adopted the following three-part common law test for determining whether an item is a fixture and therefore real property or if it remains personal property.

> The true criterion of a fixture is the united application of these requisites: (1) Actual annexation to the realty, or something appurtenant thereto; (2) application to the use or purpose to which that part of the realty with which it is connected is appropriated; and (3) the intention of the party making the annexation to make a permanent accession to the freehold.

Department of Rev. v. Boeing Co., 85 Wn.2d 663, 667 (1975).

The first two components of the test are beyond dispute. From the facts, it is clear that actual annexation has taken place and that these items have uniformly been applied to the purpose of operating a gasoline distributorship.

The third component of the test is the most important, and also the most difficult to apply. Intention must be determined:

> ... from the circumstances surrounding the annexation, including the nature of the article affixed, the annexor's situation in relation to the freehold, the manner of annexation, and the purpose for which it was made. The test is objective rather than subjective intent.

Liberty Lk. Sewer v. Liberty Lk. Utilities., 37 Wn.App. 809, 813 (1984).
However, in determining the intent of the annexor at the time of annexation, the courts have been guided by certain presumptions depending on the annexor's relationship to the real property.

> ... It is a general rule, also, that many things will be held to be a fixture as between a vendor and purchaser, or a mortgagor or mortgagee, that will not be so held as between a landlord and a tenant; the reason for the difference being that, when an annexation to the freehold is made by a landlord, the presumption is that he intends to enrich the freehold; while as to an annexation made by the tenant, the presumption is the other way. So, too, the earlier common law rule relative to fixtures put upon property by a tenant has been much relaxed, and it is now generally held that trade fixtures may be removed by the tenant when it can be done without substantial injury to the freehold.

Olympia Lodge No.1 F & A.M. v. Keller, 142 Wash. 93 (1927).

These common law tests and presumptions have been embodied in RCW 84.04.080 and RCW 84.04.090 and its accompanying regulations. Although the definitions in Title 84 do not specifically apply to the use tax, in the absence of specific definitions for real or personal property in Title 82, the courts have looked to these statutes and regulations for insight. Western Ag Land Partners v. Department of Rev., 43 Wn.App. 167 (1986).

RCW 84.04.080 states:

> "Personal property" for the purposes of taxation, shall be held and construed to embrace and include, without especially defining and enumerating it, all goods, chattels, stocks, estates or moneys;...

(Emphasis supplied.)

WAC 458-12-005 is the lawfully-promulgated regulation implementing the above statute and states:

> ... The category of tangible personal property includes but is not limited to the following:
>
> (9) Trade fixtures. This concept, which is peculiar to the landlord-tenant relationship, refers to the machinery or equipment of any commercial or industrial business which operates on leased land or in rented quarters. Such machinery or equipment is a trade fixture; i.e., the tenant's personal property, no matter how firmly it may be attached to the landlord's realty, unless it could not be removed without virtually destroying the building housing it, or otherwise seriously damaging the landlord's realty.

RCW 84.04.090 states:

> The term "real property" for the purposes of taxation shall be held and construed to mean and include the land itself, whether laid out in town lots or otherwise, and all buildings, structures or improvements or other fixtures or whatsoever kind thereon, . . .

WAC 458-12-010 is the lawfully-promulgated regulation implementing this statute and states:

> ... real property includes but is not limited to:
> (3) Machinery, equipment or fixtures affixed to land or to building, structure, or improvement on land.
> (a) Such items shall be considered as affixed when they are owned by the owner of the real property and
> (i) They are securely attached to the real property; or
> (ii) Although not so attached, the item appears to be permanently situated in one location on real property and is adapted to use in the place it is located; for example a heavy piece of machinery or equipment set upon a foundation without being bolted thereto.
> (b) Such items shall not be considered as affixed when they are owned separately from the real property unless the agreement specifically provides that such items are to be considered as part of the real property and are to be left with the real property when the occupant vacates the premises.
> ... The foregoing definitions will not answer the question whether an article is a fixture in all cases. In such cases the numerous decisions of the Washington

> supreme court digested in 6 Wash. Digest Ann., "Fixtures" will have to be consulted.

(Emphasis supplied.)

We believe that the above property tax statutes and regulations adequately restate the common law definitions of personal property and real property as they relate to fixtures.

Therefore, for each of the properties in question, we must first analyze the annexor's relationship to the freehold at the time the property was annexed.

Concerning the cardlock systems located at [Location A, B & C] the . . . asset purchase agreement executed between [annexor] and [the taxpayer] clearly indicates that [annexor] did not own the real property at the time [annexor] installed its card lock system and related equipment[1]. As a result, we can only conclude that the relationship between the annexor ( . . . ) and the freehold at the time of annexation, was one of landlord-tenant. Therefore, the equipment installed by [annexor] is presumed to remain its tangible personal property and; absent a clear provision in the lease stating otherwise, it may remove or dispose of equipment installed by it upon termination of the lease.

In applying this standard, we first note that the taxpayer has not submitted a copy of the leases that were in effect between the landowners and the annexor ( . . . ) of the equipment at the time the equipment was installed into the realty at the above three locations. Therefore, we must assume that there was no specific provision in these leases that would have transferred the ownership of the installed equipment to the landowners during or at the termination of the leases. Accordingly, we find that the underground pumps, tanks and related equipment remained the personal property of [annexor] at the time it was sold to the taxpayer. As such, it has been correctly subjected to use and/or deferred retail sales tax in the taxpayer's audit report. We believe that this holding is both consistent with the above

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[1]The Purchase agreement states: " 5. Leases. No real estate is being sold by the Seller . . . to the Purchaser . . . pursuant to this Agreement. The Seller is the owner and operator of [the] locations generally referred to as [Location A, B, & C]. The Seller is not the owner of the real property at those locations but is the owner of the . . . equipment and improvements related thereto." (Brackets and emphasis supplied.)

regulations and the Washington common law[2]. The taxpayer's petition is denied on this issue.

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

DATED this 25th day of November of 1991.

[2] In particular, see Olympia Lodge No.1 F & A.M. v. Keller, 142 Wash. 93 (1927) and Liberty Lk. Sewer v. Liberty Lk. Utilities, 37 Wn.App. 809 (1984).