Cite as Det. No. 97-119E, 19 WTD 1 (2000)

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

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. 97-119E
. . .	)	Registration No. . . .
	)	FY. . ./Audit No. . . .

[1] RCW 82.12.020, 84.04.090, RULE 178, WAC 458-12-010: USE TAX -- PERSONALTY -- FIXTURES -- TEST. The Department follows the common law for determining whether an item is a fixture or tangible personal property. Department of Revenue v. Boeing Co., 85 Wn.2d 663, 538 P.2d 505 (1975). The three key factors are: (1) actual annexation; (2) application to use or purpose; and (3) intention to make a permanent part of the realty. The above test supports a finding that standard refrigerators, ranges, washers, dryers, and exercise equipment in an apartment complex were personalty subject to retail sales tax. A 1.1 ton satellite dish wired in and bolted to a special concrete pad was found to be a fixture, not subject to retail sales tax.

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.

NATURE OF ACTION:

A limited partnership protests retail sales tax assessed on refrigerators, ranges, washers, dryers, exercise equipments, and a television satellite dish included in the sale of an apartment complex.[1]

FACTS:

Pree, A.L.J.-- . . . (the taxpayer) owned an apartment complex. On August 4, 1989, it sold the complex with its furnishings, appliances, and fixtures.

[1] Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

The taxpayer's books and records were audited by the Department of Revenue (Department) for the period January 1, 1989 through December 31, 1989. As the result, the Department's Audit Division issued Document No. FY. . . assessing $. . . tax and interest.

At the time the taxpayer sold the apartment complex, it filed a real estate excise tax (REET) return, paying tax on the real estate transferred. Sales or use tax was paid on some of the personal property transferred.[2] The auditors assessed additional sales tax on items they considered personalty.[3] The items at issue are:

1. Appliances[4], including drop-in ranges, refrigerators, washers, and dryers with an assigned value of $. . .

2. Exercise and fitness equipment and a pool table with an assigned value of $. . .

3. A television satellite dish including receiving equipment with an assigned value of $. . .

All apartment units contained the same type of range.[5] According to the taxpayer, none of the ranges had side panels and stood unbolted on the floor surrounded by cabinets. They were not directly wired, but plugged into 220-volt outlets specifically positioned for use of the ranges.
Each unit also contained a free-standing refrigerator plugged into the wall and slid into a recess in the cabinets situated around them. None were plumbed for an ice maker or water tap.

The complex had no community laundry facilities. All apartments contained the same free-standing washers and dryers. They were located in designated spaces with vents, outlets, and drainpipes

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[2] It appears tax was paid on cabana furniture as well as hand and garden tools. The auditors did not intend to include this personal property in the assessment. The taxpayer was given a credit for tax paid on any personal property previously reported that could be identified.

[3] The assessment identifies the tax as use tax and/or deferred sales tax. As the seller, the taxpayer's failure to collect retail sales tax on personal property triggers the liability.

[4] The auditors removed dishwashers, which were plumbed-in, from the assessment.

[5] The appliance exhibit referenced in the 1989 bill of sale specified the 485 self-cleaning ranges, Hotpoint model RB735GA. The taxpayer describes these as "drop in models." The manufacturer's technical assistance staff at its answer center described these units. The manufacturer's consumer representative stated that the model was not a drop-in. Rather she described it as a standard size 30" free standing stove which was installed by merely sliding it between the cabinets. The representative also said that those models had side panels.

available. The dryers were plugged into 220-volt outlets and attached to an external vent. Hoses from the washing machines were connected to water faucets with drains placed in drain pipes.

The exercise equipment consisted of a universal gym, exercise bicycles, and stairsteppers located in a building specifically and, according to the taxpayer who first operated it, intentionally designed as a work-out facility. The taxpayer states that the building could not be efficiently converted to any other use. According to the taxpayer, the exercise equipment manufacturers required the taxpayer to "parabolt" the equipment to the concrete floor.

The satellite TV receiving dish weighed approximately 1.1 tons and measured roughly ten feet by ten feet. It required a crane for installation. It was bolted to a concrete pad built especially for the dish and which had no other use. The dish was wired to a cable system built into the units.

According to the taxpayer, the parties intended that the items included in the assessment become and remain a part of the real property, properly classified as fixtures rather than personal property subject to retail sales tax.

ISSUE:

Were the ranges, refrigerators, washers, dryers, dish washing machines, exercise equipment, and satellite dish personal property subject to retail sales tax?

DISCUSSION:

Retail sales tax is generally imposed on the sale of tangible personal property in this state. RCW 82.08.020 and RCW 82.04.050. If the seller fails to collect the tax on retail sales, the seller is personally liable to the state for the amount of the tax. If, on the other hand, the items are fixtures, i.e., real property, the retail sales tax does not apply.

The Department applies the general common law test for characterizing items as personalty or realty. See, e.g., Det. No. 89-55, 7 WTD 151 (1989); Det. No. 88-342, 6 WTD 361 (1988). This test was applied to a tax issue in Department of Rev. v. Boeing, 85 Wn.2d 663, 667, 538 P.2d 505 (1975) which quoted the common law principle from Lipsett Steel Products, Inc. v. King County, 67 Wn.2d 650, 652, 409 P.2d 475 (1965):

> 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.

As we noted in Det. No. 88-342:

> [A]ccording to the common law and case law development, whether an item is personal property turns upon the application of the three general tests (quoted above), all of which must be satisfied. Western Ag Land Partners v. Department of Revenue, 43 Wn.App. 167 (1986).[6]

(Emphasis in the original.)

The second test, whether the item is applied "to the use or purpose to which that part of the realty with which it is connected is appropriated," is not at issue. The items have always been used in connection with the use of the realty as apartments. For example, the refrigerators have always been used in the kitchens of the apartments in which they are located.

The first and third tests, both of which are at issue, are somewhat interrelated. The first test addresses whether the property has been actually annexed to the realty or something appurtenant thereto. The third test addresses the annexor's intent.

> Intent is 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 Dist. v. Liberty Lk. Utils. Co., 37 Wn. App. 809, 813, 683 P.2d 1117 (1984) (citations omitted; emphasis added).

In other words, intent "is not to be gathered from the testimony of the annexor as to his actual state of mind." Boeing, supra at 668. When a property owner attaches an article to the land, he is rebuttably presumed to have annexed it with the intention of enriching the freehold. Western Ag, supra at 173.

The first and third tests interrelate because the permanency of the annexation is relevant both for purposes of determining whether the item has been annexed and for purposes of determining the annexor's intent. Specifically, in Det. No. 89-55, supra, at 153, the Department held annexation to be "the actual attachment or affixation of personal property to realty in more than a temporary way." (Emphasis added.) Thus, to satisfy the first test, "annexation," the item must be attached to the realty with some degree of permanency.

In Boeing, the court also addressed permanency, but in the context of the third test, i.e., in determining whether the annexor intended to make a permanent accession to the freehold. Boeing, supra at 668-69. In holding that the jigs at issue were not fixtures, the court stated:

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[6] 716 P.2d 310, ("Western Ag.").

> [T]he manner in which the jigs are secured to the floor of the plant is indicative of an intent that they be easily removable upon any changes in the current program.

Id.

Another factor relevant to both the first and third tests is whether the item could be removed from the realty without damage. In determining whether annexation had occurred, the Washington Supreme Court considered whether a piece of equipment "could not be removed without substantial damage both to itself and to the realty." Courtright Cattle Co. v. Dolsen Co., 94 Wn.2d 645, 656-57 (1980). Because the equipment at issue could not be removed without damage, the court held the equipment to be a fixture. See also Boeing, supra at 665. However, with respect to the third test, the Department has noted that whether the taxpayer could remove the item without damage to the item or the realty is not a significant factor as to the intent of the owner to permanently affix the item to the realty, unless the item was specially designed to be removable. Det. No. 89-55, supra at 154.

Because the use tax statute defines neither "personal property" nor "fixtures," the Washington appellate courts have relied on definitions in real property tax statutes and regulations. Western Ag supra; see Det. No. 89-55, supra at 156. RCW 84.04.090 provides:

> The term "real property" . . . include[s] the land itself . . . and all . . . fixtures of whatsoever kind thereon . . . and all property which the law defines or the courts may interpret, declare and hold to be real property under the letter, spirit, intent and meaning of the law for the purposes of taxation.

WAC 458-12-010 subsection (3) defines real property as including:

> [F]ixtures affixed to land or to a 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
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> (i) They are securely attached to the real property; or
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> (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.

Before applying these tests to the individual items at issue, we note that because the taxpayer owned the complex at the time the items at issue were installed, the owner is rebuttably presumed to have intended to enrich the freehold. There is no indication that the negotiations between taxpayer and purchaser of the complex contemplated the removal of any of the items. This is further evidence of the taxpayer's intent to make a permanent accession to the freehold.

Kitchen ranges. The ranges were free-standing, but according to the taxpayer without their side panels in place. They were plugged into wall outlets and placed in spaces provided between the cabinets. Although custom cabinets surrounded or abutted the ranges, we note that the spaces in the cabinets would accommodate any standard-sized kitchen range. The cabinets were not specifically designed for the ranges now in place, nor were the ranges designed specifically for the cabinets. Special wiring may have been needed to plug in the ranges in that location, so the ranges could not be used in any other location in the apartments.

Applying the first common law test of whether an item is a fixture, we find that the ranges were not annexed to the apartments. The ranges were not permanently attached to the apartments; the ranges simply slid into spaces in the cabinets and plugged into an electrical outlet. The fact that the voltage in the electrical outlets was different from that in other outlets in the apartments does not make the connections between the electrical plugs and the electrical outlets any more permanent. Further, the ranges could easily be removed without damage to either the ranges or the apartments.

It is questionable whether the ranges pass the third common law test, i.e., intent. Although the taxpayer owned the realty at the time the ranges were installed and is, therefore, rebuttably presumed to have intended to enrich the freehold, several facts rebut this presumption. The ranges were designed to be removable; the ranges could be accommodated in any of the apartments or in any other structure designed to accommodate a standard-sized range; and the ranges could be easily removed from the apartments without damage to either the ranges or the apartments.

As noted above, all three of the common law tests must be met for an item to be considered a "fixture." Based on our finding that the ranges were not "annexed" to the apartments, we conclude that the ranges were not fixtures.

The property tax regulations cited above support our conclusion. The ranges were not securely attached to the real property; they were simply slid into place and plugged into electrical outlets. Nor were the ranges "permanently situated in one location on real property and . . . adapted to use in the place . . . located." We understand that the ranges could not be conveniently used in any other location in the apartments. However, that fact alone does not prove that the ranges were permanently situated and adapted to use in their location. The example of a fixture provided in the property tax regulations supports our conclusion that more is required. The example is "a heavy piece of machinery or equipment set upon a foundation without being bolted thereto." The example implies that the weight of the machinery precludes it from being moved easily, i.e., it is "permanently situated." Further, by noting that machinery is placed on a foundation, the example demonstrates how the machinery is adapted to use in its location. In contrast, the ranges are relatively lightweight and could be moved easily.

Further, the taxpayer's argument that the ranges could not be conveniently used in any other location in the apartments, if carried to its logical extreme, would lead to our classifying the following as fixtures: beds because they are adapted to use in bedrooms, television sets by the cable outlets, pots

and pans because they are adapted to use in kitchens, etc. We do not believe that this is the test envisioned by the property tax regulations.

Based on our finding that the ranges are not fixtures, we conclude that the ranges are subject to use tax.

Refrigerators. The refrigerators, like the ranges, are free-standing, plugged into electrical outlets, and placed in openings in the cabinets. Thus, for the same reasons outlined above, we find that the refrigerators are not fixtures and are, therefore, subject to use tax.

Clothes dryers. The clothes dryers, like the ranges and refrigerators, are free-standing and plugged into electrical outlets. The only distinctions between the clothes dryers and the ranges and refrigerators are: (1) rather than being placed in openings in cabinets, the clothes dryers are placed in spaces specially designed for laundry; and (2) the clothes dryers are connected to vents. Although taxpayer presented little evidence regarding the permanency of the attachment between the dryers and the vents, we presume that they are connected by ordinary dryer hoses that can be disconnected from the vents by simply unclamping them. Neither of the distinctions supports a different result from that reached with respect to the ranges and refrigerators. Therefore, we conclude that the clothes dryers are not fixtures. The clothes dryers are subject to use tax.

Washing machines. The washing machines are also free-standing, plugged into electrical outlets, and placed in spaces specially designed for laundry. The only difference between the washing machines and the dryers is that the washing machines are connected to water faucets and drains by ordinary washing machine hoses. Although taxpayer presented little evidence regarding the permanency of the attachment between the washing machines and the water faucets and drains, we presume that the hoses can be disconnected from the water faucets and drains by simply disconnecting the hoses. Again, this distinction does not support a different result from that reached with respect to the other appliances. We, therefore, conclude that the washing machines are subject to use tax because they are not fixtures.

Exercise equipment. The manufacturers required this equipment to be bolted to the floor. The taxpayer intended and used the building as a workout facility. The taxpayer stated that it could not convert it efficiently to any other use.

We presume the manufacturer's concern for safety required the taxpayer to bolt the equipment to concrete. Therefore, bolting them to the floor was not a reflection of the annexor's intent of permanence. This equipment could be easily used in another work-out facility. The assertion that the equipment could not be efficiently adopted to other uses does not support a different result from that reached with respect to the appliances.

Satellite dish. The dish weighed over one ton. It was bolted to a concrete pad. Unlike the floors in the workout facilities, the pad was poured specifically to affix the satellite dish to the land and had

no other purpose. The satellite receiving equipment was wired in and adopted to use in the place located. There is no indication that it was designed to be removable for use in another location.

Regarding the satellite dish, we find that the annexor intended to permanently attach it to the freehold. Therefore, it qualifies as a fixture, part of the real estate, not subject to retail sales tax.

DECISION AND DISPOSITION:

The taxpayer's petition is granted in part and denied in part.

DATED this 9th day of June, 1997.