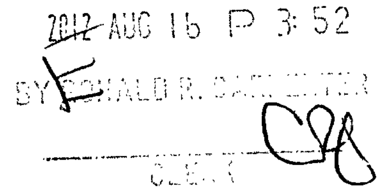

No. 86977-4

SUPREME COURT
OF THE STATE OF WASHINGTON

APL LIMITED, AMERICAN PRESIDENT LINES, LTD. and EAGLE MARINE SERVICES, LTD.,

Plaintiffs-Appellants

v.

WASHINGTON STATE DEPARTMENT OF REVENUE,

Defendant-Appellee

ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT
(Hon. Thomas McPhee)

BRIEF OF APPELLANTS

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I. INTRODUCTION

More than a quarter century ago, the Port of Seattle ("Port") embarked on a strategic plan to convert Terminal 5 into a state-of-the-art cargo container facility, capable of servicing the largest cargo ships in the world. To make that happen, the Port entered into a long-term lease with American Presidential Lines, Ltd. ("APL") that required the Port to install five 800-ton cranes for APL's use (the "T-5 Cranes"). These massive T-5 Cranes operate on rails embedded in the foundation, which enables them to move along the length of the wharf to load and unload the long "Post-Panamax" ships that dock at the terminal. The Port intended the T-5 Cranes to remain at Terminal 5 for their entire useful lives and, indeed, they have remained in service there since their installation.

The Port charges APL for its use of the T-5 Cranes. In conjunction with those use charges, the Port has collected retail sales tax from APL, which the Port passes on to the DOR. This is permissible, however, only if the cranes are "personal property," and not real property "fixtures." Under Washington's common law, which applies here, personal property becomes a fixture if (1) it is annexed to the realty, (2) it is adapted to the use or purpose of the realty, and (3) the annexing party intended the item to be a permanent addition to the realty. Because the T-5 Cranes are

fixtures under this test, APL sought a refund from the DOR and, after the DOR refused, brought this action in Thurston County Superior Court.

The trial court ruled in favor of the DOR, concluding that APL did not prove "annexation" and "intent." That conclusion must be reversed. As to annexation, an item is "constructively annexed" to the realty by gravity when it is particularly adapted to the use and purpose of the realty, and attached as firmly as reasonably possible given its function. The trial court erred as a matter of law when it refused to consider the cranes' adaptation to the realty in its annexation analysis. The undisputed evidence showed that the T-5 Cranes were specially designed for use at Terminal 5 and that the terminal was rebuilt for the specific purpose of accommodating the cranes. Indeed, the T-5 Cranes were attached to Terminal 5 in the only manner possible given the terminal's use as a cargo container facility. APL satisfied the "annexation" requirement.

As to intent, where a property owner attaches an item to its land, the owner is legally presumed to have intended a "permanent" attachment. Because the trial court erred in failing to find annexation, it then erred in refusing to apply the presumption. The DOR did not overcome this legal presumption of intent. In the context of equipment, "permanent" means until the item is worn out or obsolete. The undisputed evidence showed that the Port intended the T-5 Cranes to remain at Terminal 5 for their

expected useful lives and would not have spent tens of millions of dollars rebuilding Terminal 5 to accommodate the T-5 Cranes if it intended only a temporary attachment. APL therefore satisfied the "intent" requirement as well. Because the T-5 Cranes are fixtures for which APL owed no retail sales tax, APL is entitled to a judgment in its favor on its refund claim.

II. ASSIGNMENTS OF ERROR

APL makes the following assignments of error:

1. The trial court erred when it concluded that the T-5 Cranes were not annexed to the realty. CP 197-238 (Findings of Fact ("FF") and Conclusions of Law ("CL"), at FF ¶¶ 13, 23, 24 & 25 and CL ¶¶ 6, 8).[1]

2. The trial court erred when it concluded that the T-5 Cranes' adaptation to the realty cannot be considered on the issue of annexation. CP 214-222 (Tr. (10/14/11) at 4-6, 9-12).

3. The trial court erred when it concluded that the Port did not intend the T-5 Cranes to be permanently attached to the realty. CP 197-238 (FF ¶¶ 26, 27, 29-31, 34, 36, 37 & 40-43 and CL ¶¶ 7-8).

4. The trial court erred when it refused to apply an evidentiary presumption in favor of APL on the issue of the Port's intent. CP 197-238 (FF ¶ 25); CP 217 (Tr. (10/14/11) at 7.

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[1] APL elects to comply with the requirements of RAP 10.3(g) and RAP 10.4(c) by including a copy of the trial court's Findings of Fact and Conclusions of Law, and Order as an Appendix to this brief.

5. The trial court erred when it denied APL's request for a refund of retail sales tax paid from January 1997 through December 2005 and entered judgment for the DOR. CP 209; CP 239-240 (Judgment).

III. ISSUES PRESENTED

As it relates to Washington's common law test for fixtures:

1. Did the trial court err when it refused to consider evidence of the T-5 Cranes' adaptation to the use and purpose of Terminal 5 when determining whether the cranes were annexed to the realty?

2. Did the Port annex the T-5 Cranes to Terminal 5 where (a) the cranes were attached to the terminal by virtue of their massive weight, (b) any other manner of attachment would have rendered the cranes ineffective for the purpose for which they were installed, (c) the cranes were adapted to the terminal's sole function as a cargo container facility, and (d) the Port rebuilt the terminal's foundation, embedded rails and electrical substation for the specific purpose of supporting the cranes?

3. Did the trial court err when it refused to apply the legal presumption that the Port intended to permanently attach the T-5 Cranes to Terminal 5?

4. Did the Port intend to permanently attach the T-5 Cranes to Terminal 5 where (a) the Port owns both the land and the cranes attached thereto, (b) the Port installed the cranes with the expectation that they

remain at the terminal for their expected useful lives, (c) the cranes were not designed to make them easily removable, and (d) the cranes have been continuously attached to Terminal 5 since their construction.

IV. STATEMENT OF THE CASE

A. Statement of Facts.

In September 1985, the Port and APL entered into a 30-year lease agreement (the "Lease"). *See* Tr. Ex. 101; CP 199-200 (FF ¶ 5). Terminal 5 had recently been vacated, and the Port was focused on finding a premier tenant with whom it could partner to redevelop the terminal into a state-of-the-art intermodal cargo container facility. RP (9/27/11) at 85-86, 164.[2] To accomplish this, the Lease required the Port to purchase, construct and install four new cranes at Terminal 5, and granted APL an option on a fifth crane, which APL exercised (collectively referred to as the "T-5 Cranes"). Tr. Ex. 101 (§ 1(d)); RP (9/27/11) at 121; CP 200 (FF ¶ 10). According to the Port's executive director at the time, the Port's commitment to install the T-5 Cranes on Terminal 5 was "extraordinarily instrumental in securing the lease with" APL. RP (9/27/11) at 84-87.

These were no ordinary cranes. The T-5 Cranes were to be bigger and better than any of the Port's existing cranes. At the time of the Lease,

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[2] An intermodal cargo container facility is a terminal where cargo containers are transferred by crane to and from ships and other modes of transportation, such as rail or truck. RP (9/27/11) at 161-62.

the Port had no cranes capable of loading and unloading giant "Post-Panamax" container ships, *i.e.*, ships too large to pass through the Panama Canal. Although Post-Panamax ships were not even being built yet—and, indeed, none would actually dock at the Port until 1995—the Port understood that construction of the T-5 Cranes was critical to the Port's long-term strategic plans. RP (9/27/11) at 87-88, 91, 164, 166-67; RP (9/28/11) at 305; CP 201 (FF ¶ 12). Indeed, the Port's director of leasing agreed that, with the addition of the T-5 Cranes, Terminal 5 "is superior to ... the Port's other container terminals in terms of its efficiency and functionality in loading and unloading containers." RP (9/28/11) at 301.

It took approximately a year to design and fabricate the T-5 Cranes to the Port's specifications. RP (9/26/11) at 68. The cranes were specially manufactured for use at Terminal 5, with design criteria tailored to size, weight and power constraints, as well as seismic and wind conditions. RP (9/26/11) at 55, 73-76; RP (9/27/11) at 88; Tr. Ex. 2. As discussed below, there was no effort to design the cranes so that they could be disassembled or removed from Terminal 5. RP (9/27/11) at 90. The crane components were transported to the Port by ship, rail and truck, and assembled for the first time on the dock after delivery. RP (9/26/11) at 68; RP (9/27/11) at 88. The first four T-5 Cranes were commissioned by the Port in 1986, and the fifth crane was commissioned in 1989. RP (9/27/11) at 128.

The T-5 Cranes are massive steel structures, which allow them to service larger ships and lift heavier cargo containers. Tr. Ex. 7. Each crane weighs approximately 800 tons (1.6 million pounds). RP (9/26/11) at 42; CP 200-201 (FF ¶¶ 10, 14). They are approximately 85 feet wide, 400 feet long and 200 feet tall when the boom is in the horizontal (working) position, and nearly 300 feet tall when the boom is raised. The boom itself is more than 145 feet long, which is long enough to load and unload a container ship that is 17 containers wide (the Panama Canal is only wide enough to accommodate ships that are 13 containers wide). RP (9/26/11) at 39-43; RP (9/27/11) at 167; RP (9/28/11) at 305; CP 201 (FF ¶ 14). Each of the five T-5 Cranes has a lifting capacity of 50 long tons (a long ton is 2,240 pounds). RP (9/26/11) at 50.

The T-5 Cranes operate on rails embedded in the wharf.[3] The rails run parallel to the waterfront, enabling the cranes to move along the length of the dock. RP (9/26/11) at 48-49, 71; RP (9/27/11) at 147; CP 200-201 (FF ¶ 11). This movement is essential to the cranes' ability to load and unload the long container ships that dock at Terminal 5; they could not

[3] Not only were the T-5 Cranes the first Post-Panamax cranes at the Port, they were the first 100-foot gauge cranes—which is the distance between the landside and waterside rails. RP (9/27/11) at 87-88. A larger gauge is necessary to support greater weight, but also allows more trucks to operate underneath the cranes, thereby increasing the number of containers the cranes can load or unload at any given time.

effectively function from a fixed position. RP (9/27/11) at 155. The rails are confined to Terminal 5 and, thus, the T-5 Cranes cannot be moved by rail to any other terminal. RP (9/26/11) at 71. Because of their massive weight, gravity is sufficient to connect the T-5 Cranes to the rails. *Id.* at 69; CP 200-201 (FF ¶¶ 11, 15). The cranes are also physically connected by cable to a dedicated high voltage electrical substation, which the Port built specifically to power the cranes. RP (9/26/11) at 43-44, 52-54, 67, 70-71; RP (9/27/11) at 164; CP 200 (FF ¶ 10).

In addition to a new electrical substation and system, the Lease required the Port to make other major structural improvements to Terminal 5 for the specific purpose of accommodating the massive weight and operation of the T-5 Cranes. RP (9/26/11) at 56; RP (9/27/11) at 87, 164; Tr. Ex. 3. Among other things, these improvements included construction of concrete and steel structural reinforcement to the wharf's "apron," which serves as the foundation for the crane rails and, ultimately, the T-5 Cranes themselves. To accommodate the cranes' 100-foot gauge, the Port also had to upgrade the waterside crane rail and build a new landside crane rail, which it embedded in the concrete apron. RP (9/26/11) at 60-67, 69-70; RP (9/27/11) at 87-88, 164-165.

The Port viewed the T-5 Cranes to be "an integral part" of Terminal 5. RP (9/27/11) at 89, 93. And a permanent one too. The Port

intended the T-5 Cranes to remain at Terminal 5; there was never a plan to remove the cranes from the facility. RP (9/27/11) at 90, 93. Indeed, so that the Port could recoup the cost of the cranes, the Port's executive director personally insisted that the term of the Lease match the expected useful life of the T-5 Cranes, which was 30 years. RP (9/27/11) at 89, 268. It was the longest lease ever entered into by the Port. RP (9/27/11) at 89. Consistent with the Port's long-term strategy, the T-5 Cranes have remained in continuous service at Terminal 5 since their construction. RP (9/28/11) at 298; CP 200 (FF ¶ 8).[4] Even today, the Port considers the cranes to be a "component" of the terminal. RP (9/28/11) at 302.

B. Procedural History.

Under the Lease, APL is required to pay the Port periodic use charges for the T-5 Cranes as part of its rent. Tr. Ex. 101 (§ 3(a)). In conjunction with these crane use charges, the Port has collected retail sales tax from APL, which the Port has remitted to the DOR. Tr. Ex. 30 (sample invoices); RP (9/27/11) at 182, 213; CP 199 (FF ¶ 3). APL paid a total of $1,456,261 in retail sales tax on the T-5 Cranes between 1997 and

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[4] In 1999 one of the T-5 Cranes was temporarily lifted off its crane rails, and placed on temporary perpendicular rails, so that it could be repositioned following modification. RP (9/26/11) at 72; RP (9/27/11) at 143-145; CP 202 (FF ¶ 20). This was an extensive project that took months to engineer and carry out "because the crane wasn't originally designed for that kind of movement." RP (9/27/11) at 156.

2005. RP (9/27/11) at 182-185. APL petitioned the DOR for a refund on the grounds that the cranes were fixtures and, thus, not subject to retail sales tax. After the DOR denied the petition, APL brought this action against the DOR in Thurston County Superior Court, seeking a refund for the period January 1, 1997 through May 23, 2005. CP 4-7.

The trial court (then Judge Gary Tabor) granted the DOR's motion for summary judgment on the grounds that the T-5 Cranes were not "annexed" to the realty. APL appealed, and the Court of Appeals reversed. CP 13-18; *APL Ltd. v. Dep't of Revenue*, 2010 WL 264992 (Wn. App. Jan. 25, 2010). The Court of Appeals held that the trial court erred when it ignored the Port's "intent" because "annexation is so intertwined with the intent to annex, one cannot be examined without the other." *Id.* at *4. The case was remanded for trial, and later consolidated with a second refund suit covering the balance of 2005. CP 19-21.

APL's refund claim was tried to the bench (now Judge Thomas McPhee) for three days in September 2011. CP 94-97. The court orally ruled in favor of the DOR on October 14, 2011, and entered written Findings of Fact and Conclusions of Law on January 6, 2012. CP 196-238. Although the DOR conceded that APL had satisfied the "adaptation" prong of the common law test for fixtures, the trial court concluded that APL failed to establish the "annexation" and "intent" prongs. CP 207-208

(CL ¶¶ 2, 6 & 7). Consequently, it held that the T-5 Cranes were personal property and, therefore, the Port had properly collected retail sales tax from APL. *Id.* (CL ¶ 8). APL has again appealed, this time seeking direct review by the Supreme Court. CP 241-288.

V. ARGUMENT

The sole issue in this case is whether the T-5 Cranes are personal property or fixtures. If the cranes are personal property, then the Port could properly collect retail sales tax from APL, and APL is not entitled to a refund from the DOR. *See* RCW 82.08.020(1) & RCW 82.04.050(4)(a). If, on the other hand, the T-5 Cranes are fixtures—*i.e.*, real property—then the Port improperly collected the tax from APL, and APL is entitled to a refund. *Id.* For the reasons that follow, the T-5 Cranes are fixtures, and the trial court's conclusion to the contrary must be reversed.

A. Standard of Review.

Whether the T-5 Cranes are fixtures is a mixed question of law and fact. *Dep't of Revenue v. Boeing Co.*, 85 Wn.2d 663, 667, 538 P.2d 505 (1975). Following a bench trial, this Court reviews conclusions of law de novo. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). Challenged findings of fact are reviewed to determine whether they are supported by substantial evidence and, if so, whether they support the conclusions of law. *Hegwine v. Longview Fibre Co.*, 132

Wn. App. 546, 555, 132 P.3d 789 (2006), *aff'd*, 162 Wn.2d 340, 172 P.3d 688 (2007). Substantial evidence exists if the evidence is sufficient to persuade a fair-minded person of its truth. *Id.* at 555–56. Conclusions of law improperly characterized as findings of fact must be reviewed de novo. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 43, 59 P.3d 611 (2002).

B. The Trial Court Erred In Denying APL's Request For A Sales Tax Refund Because The T-5 Cranes Are Fixtures.

Washington applies the common law test of fixtures. *Boeing*, 85 Wn.2d at 667-68; *Western Ag. Land Partners v. Dep't of Revenue*, 43 Wn. App. 167, 171, 716 P.3d 310 (1986). Under this test, personal property becomes real property if (1) it is actually annexed to the realty, (2) its use or purpose is applied to or integrated with the use of the realty to which it is attached, and (3) the annexing party intended a permanent addition to the freehold. *Id.*; *Lipsett Steel Prods., Inc. v. King County*, 67 Wn.2d 650, 652, 409 P.2d 475 (1965). All three prongs must be satisfied for an item to become a fixture. *Western Ag*, 43 Wn. App. at 173. The DOR conceded the second prong, but the trial court erroneously concluded that APL failed to satisfy the "annexation" and "intent" prongs.

1. APL Proved That The T-5 Cranes Were Constructively And Physically Annexed To The Realty.

The trial court's annexation analysis was flawed because the court failed to recognize that the T-5 Cranes were "constructively annexed" to

the realty and, in particular, the court erred in refusing to consider the cranes' "adaptation" to the realty in its annexation analysis. When the undisputed and overwhelming evidence of the cranes' adaptation to Terminal 5's use as a container crane facility is properly considered, it is clear that APL satisfied its burden of proving "annexation." Indeed, even if physical attachment were required, APL made such a showing as well. The trial court's conclusion that the T-5 Cranes were not annexed to the realty was erroneous as a matter of law and must be reversed.

a. Washington Law Required The Trial Court To Consider The T-5 Cranes' Adaptation To The Realty When Deciding Constructive Annexation.

Annexation "refers to the act of attaching or affixing personal property to real property." 35A Am. Jur. 2d Fixtures, § 5. Over a hundred years ago, the Supreme Court rejected the notion that "annexation" requires "an absolute fastening or continued physical union." *Chase v. Tacoma Box Co.*, 11 Wash. 377, 381, 39 Pac. 639 (1895). Instead, the Court recognized the pragmatic concept of "constructive annexation":

> The older cases very generally hold to the idea that an actual physical annexation must be shown. But this strict rule of old law has been much relaxed in favor of trade and manufacture, and the encouragement of new and constantly growing industries, and the doctrine of constructive annexation is now very generally, if not universally, recognized.

Id. at 380. Since *Chase* was decided, Washington courts have consistently applied the doctrine of constructive annexation in fixtures analysis. *See Hall v. Dare*, 142 Wash. 222, 226, 252 Pac. 926 (1927) ("it [is] not necessary that there should be such an absolute physical attachment"); *Western Ag*, 43 Wn. App. at 172 ("a fixture may be constructively annexed to the real property"). At least prior to this case, so has the DOR. *See* DOR Det. No. 00-122, 20 WTD 461 (2001) ("attachment to the realty is a concept broader than physical annexation" (citation omitted)).[5]

Under the constructive annexation approach, "[t]he better opinion … is in favor of viewing everything as a fixture which has been attached to the realty with a view to the purpose for which it is held or employed, however slight or temporary the connection between them." *Chase*, 11 Wash. at 380 (quotation marks and citation omitted). The issue, therefore, is not the manner of attachment, but whether the item is "attached to the real estate as firmly as it appears to have been reasonably possible to attach it," given its purpose. *Strong v. Sunset Copper Co.*, 9 Wn.2d 214, 230, 114 P.2d 526 (1941) (*quoting Reeder v. Smith*, 118 Wash. 505, 508, 203 Pac. 951 (1922)). Indeed, when consistent with a particular use, an

[5] This Court can and should consider written determinations of the DOR's Appeals Division. In ordering a determination published, the DOR has concluded that the decision is "precedential." RCW 82.32.410.

item may be constructively annexed to the realty by gravity alone. *Hall*, 142 Wash. at 227 (700-pound flagpole was annexed by gravity).[6]

For this reason, courts must consider an item's "adaptation" to the use and purposes of the realty—not just in connection with the second prong of the fixtures test—but also to determine "annexation." This rule was spelled out expressly by Division I in *Western Ag*:

> The first prong, annexation, is often considered in light of the actual relationship of the object to the realty—whether the article is 'in use as an essential part' of the overall use of the property. ... Even though the article may not be physically affixed to the realty, it may be constructively annexed because it is specially fabricated for installation or because it is a necessary functioning part of or accessory to an object which is a fixture.

Western Ag, 43 Wn. App. at 172 (citations omitted). *Western Ag*'s holding that an item's adaptation to the realty is relevant to annexation was hardly novel. It was recognized in *Chase* itself, and a myriad of cases thereafter. *Chase*, 11 Wash. at 380 ("whether chattels are to be regarded as fixtures depends less on the manner of their annexation ... than upon

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[6] Many cases are in accord. *See U.S. v. San Diego Cty.*, 53 F.3d 965, 968 (9th Cir. 1995) ("A device can be ... annexed to the property through gravity..."); *Seatrain Terminals of Cal., Inc. v. Alameda Cy.*, 83 Cal. App. 3d 69, 147 Cal. Rptr. 578, 583 (1978) ("The constructive annexation doctrine and the adaptability test have been held especially applicable to ponderous articles, such as heavy machinery, which are annexed to the land only by the force of gravity."); *Waldorf v. Elliott*, 330 P.2d 355, 357 (Or. 1958) ("Heavy and permanent additions to a freehold have been regarded as fixtures although not actually annexed to the realty and held in place only by the force of gravity.").

their own nature and their adaptation to the purposes for which they are used") (quotation marks and citation omitted).[7]

Notably, the DOR has recognized that physical attachment is not necessary to show annexation, and gravity alone is sufficient where an item is specially adapted to the realty. Its own regulation states that an item is to be considered "permanently affixed" where:

> Although not [securely] 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 could be considered as affixed.

WAC 458-12-010(3)(a)(ii) (emphasis added). Not surprising given the clear holding of *Western Ag* and its predecessors, the Court of Appeals correctly noted that the DOR's regulation is not a new rule, but merely a restatement of the common law. *APL*, 2010 WL 264992, at *2 n. 7. Indeed, in a prior tax appeal determination, the DOR quoted *Western Ag* favorably and considered annexation in light of the item's "use as an essential part of the overall use of the property." DOR Det. No. 00-122,

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[7] *See Nearhoff v. Rucker*, 156 Wash. 621, 625, 287 Pac. 658 (1930) (monorail and trolley was fixture where "monorail building [was] designed for … and built around it"); *Hall*, 142 Wash. at 224 (flagpole was fixture where foundation was made "expressly for the erection and holding of this pole"); *Reeder*, 118 Wash. at 508 (mining equipment was fixture where they were "in use and to be used in the actual operation of the mines …, which could not accomplished without these annexations").

20 WTD 461 (2001) (internal quotes omitted) (cables were "specifically fabricated" and a "necessary functioning part of the ... system").

In sum, under Washington case law and DOR rule, whether the T-5 Cranes were constructively annexed to the realty depended, at least in part, on their adaptation to Terminal 5's use as a cargo container facility. The trial court was therefore required, as a matter of law, to consider the undisputed evidence of adaptation in its annexation analysis.

b. The Trial Court Erred When It Refused To Apply The Doctrine Of Constructive Annexation Or Consider The T-5 Cranes' Adaptation.

Relying on Division II's decision in *Glen Park Assocs. v. Dep't of Revenue*, 119 Wn. App. 481, 82 P.3d 664 (2003), the trial court refused to consider whether the T-5 Cranes were constructively annexed to Terminal 5 by reason of their adaptation to the realty—concluding that such an approach would impermissibly "blur the line" between annexation and adaptation. CP 216 (Tr. (10/14/11) at 6 (*quoting Glen Park*, 119 Wn. App. at 489). For the reasons stated below, *Glen Park* does not accurately reflect Washington law, and the trial court was wrong to follow it.

In attempting to distinguish *Seatrain Terminals of Cal., Inc. v. Alameda Cy.*, 83 Cal. App. 3d 69, 147 Cal. Rptr. 578 (1978), a case in which nearly identical container cranes were held to be fixtures, the trial court correctly noted that *Seatrain* contained an "analysis of the extent to

which the cranes are adapted to the function of the freehold, as evidence of annexation." CP 215-216 (Tr. (10/14/11) at 5-6).[8] Even though *Seatrain*'s analysis is entirely consistent with Washington law—and, in particular, Division I's holding in *Western Ag* and the DOR's own regulation—the trial court refused to follow it, noting that "[t]his approach was specifically rejected by Division 2 in *Glen Park* ...." *Id.* Sure enough, when the trial court found facts related to annexation, it (improperly) focused on the T-5 Cranes' movability, but ***not*** its adaptation. CP 200-01 (FF ¶¶ 13-23); CP 219-21 (Tr. (10/18/11) at 9-11).[9] Indeed, other than noting that the issue had been conceded, the court did not mention APL's undisputed evidence of adaptation anywhere in its findings or conclusions. CP 197-209.

The trial court's reading of *Glen Park* was accurate. Albeit dicta to its ultimate holding, the *Glen Park* court criticized *Western Ag* and, without stating so expressly, purported to repudiate the century-old nexus between constructive annexation and adaptation:

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[8] In *Seatrain*, the court found 750-ton 100-gauge container cranes to be fixtures where, like here, the wharf facility was specially constructed to handle the massive cranes, which were "annexed to the railbed only by their weight and the force of gravity." 147 Cal. Rptr. at 582-83.

[9] During its oral ruling on annexation, the trial court referred to the movement of the T-5 Cranes on tracks "as an essential element of the adaptation of each crane to the work performed at Terminal 5" but, critically, it concluded that "[n]one of these movements are material to a fixtures analysis." CP 219-20 (Tr. (10/18/11) at 9-10).

> We decline to follow *Western Agricultural*' s suggestion that use may be considered in determining annexation. To do so would blur the lines between the first and second elements of the test and could minimize or eliminate the first.

Glen Park, 119 Wn. App. at 489.[10] The *Glen Park* court cited no authority for the artificial divide it drew between annexation and adaptation, and it conspicuously failed to cite or refer to WAC 458-12-010(3)(a)(ii)—which, as noted above, expressly requires the DOR to consider whether an item is "adapted to use" when deciding annexation.

The trial court's reliance on *Glen Park* to ignore APL's evidence of adaptation was erroneous and must be reversed. *Western Ag* and the DOR regulation, not *Glen Park*, state the correct rule. The line between annexation and adaptation is "blurred," and purposely so, because the status of items as fixtures "depends less upon the manner of their annexation ... than upon their own nature and their adaptation to the purposes for which they are used." *Chase*, 11 Wash. at 380. *Glen Park*'s unprecedented approach undercuts the doctrine of constructive annexation and revives the discredited notion that physical attachment matters most when it comes to annexation. That would lead to perverse results where,

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[10] *Glen Park*'s criticism of *Western Ag* was dicta because it was unnecessary to the outcome of the case. The court simply did not have to consider the issue of constructive annexation because, as it noted itself in distinguishing *Western Ag* on the facts, the household appliances at issue "were not specially fabricated for the apartments and they were not necessary parts of or accessories to" the realty. 119 Wn. App. at 488-89.

as here, an item's character and adaptation make it part and parcel of the realty, yet its specialized function prevents absolute physical attachment.

c. The T-5 Cranes Were Constructively Annexed To Terminal 5 By Virtue Of Their Weight And Adaptation To The Realty.

The evidence of the T-5 Cranes' adaptation to Terminal 5's use as a cargo container facility was overwhelming and justifiably conceded by the DOR. CP 207 (CL ¶ 2).[11] Even without considering that evidence, the trial court found the issue of annexation to be "a close one." CP 221 (Tr. (10/14/11) at 11). When the overwhelming evidence of adaptation is properly considered on the issue of annexation, as it must, the issue is no longer close. This Court must conclude that the T-5 Cranes were constructively annexed to Terminal 5 by gravity, which is "as firmly as ... reasonably possible" or necessary given their size, purpose and function.

Simply put, the T-5 Cranes are annexed by gravity because any other manner of connection would render them useless for the very purpose for which they were installed. The cranes are massive, each weighing more than 800 tons and standing more than 20 stories tall. CP 200-201 (FF ¶¶ 10, 14). They are as big and heavy as buildings and, like buildings, the force of gravity is more than sufficient to connect them to

[11] "Adaptation of personal property to real property occurs when an item has become an important or essential part of the land's use or enjoyment ...." 35A Am. Jur. 2d Fixtures § 11.

the realty. *See Hall*, 142 Wash. at 227 ("Gravity is the only force that holds practically every wooden building to its foundation."). Just as important, it is undisputed that the T-5 Cranes could not effectively function if bolted to fixed points; they must be able to move along the wharf in order to load and unload the long Post-Panamax container ships that dock at Terminal 5. RP (9/27/11) at 155.

The evidence is equally undisputed that the T-5 Cranes are "an essential part of" and "adapted to use in" Terminal 5, which further shows annexation. *Western Ag.*, 43 Wn. App. at 173; WAC 458-12-010(3)(a)(ii). The cranes are integral to Terminal 5's sole function as a cargo container facility. The witnesses at trial agreed that, without the T-5 Cranes, the terminal is "not a functioning container facility" and "has no value." RP (9/27/11) at 88, 177. For that very reason, the cranes' specifications are tailored to Terminal 5's apron, weight-bearing capacity, seismic and wind conditions, ship traffic, and other unique characteristics. RP (9/26/11) at 55, 73-76; RP (9/27/11) at 88. Indeed, the special fabrication of the T-5 Cranes for installation and use at the terminal is alone sufficient to show constructive annexation. *Western Ag.*, 43 Wn. App. at 173 (item "may be constructively annexed because it is specially fabricated for installation").

By the same token, just as the cranes were designed and fabricated for use at Terminal 5, the terminal was substantially redeveloped for the

specific purpose of accommodating the cranes. *See Nearhoff v. Rucker*, 156 Wash. 621, 625, 287 Pac. 658 (1930) (monorail and trolley was fixture where "monorail building [was] designed for ... and built around it"). The Port constructed a concrete and steel structural reinforcement to the apron and waterside rail, and embedded a new landside rail, to support the weight and movement of the T-5 Cranes. It also built a new electrical substation and electrical system to power the cranes. RP (9/26/11) at 43-44, 52-56, 60-71; RP (9/27/11) at 87-88, 164-165. In sum, even beyond the size and character of the T-5 Cranes themselves, their adaptation to Terminal 5, and vice versa, show that the cranes are part of the realty. Even the Port's current director of leasing conceded that the T-5 Cranes are a "component" of Terminal 5. RP (9/28/11) at 302.

Finally, when deciding whether the T-5 Cranes were annexed, the trial court should have looked at all components necessary for their use. Where essential components are physically annexed to the realty, then complimentary items—though not physically attached to the realty themselves—are deemed constructively annexed. In *Western Ag*, the "main arm" of an irrigation system was annexed because it was "an integral part of the irrigation system, which includes the concrete center pivot and underground water lines, both being actually annexed to the property." 43 Wn. App. at 172-73. In *Hall*, a removable flagpole was

annexed in view of "the permanent nature of the foundation and anchor blocks specially constructed for the holding of it." 142 Wash. at 226-27. This case is no different. Because the embedded rails and improved apron are necessary for the T-5 Cranes' operation, their physical annexation to Terminal 5 constructively extends to the cranes.[12]

d. The T-5 Cranes Were Physically Annexed To Terminal 5 Through Their Connection To A Dedicated Electric Power Cable.

Even if annexation required physical attachment, as the trial court apparently believed, APL proved this too. It is undisputed that a dedicated electrical cable connected the T-5 Cranes to the terminal's electrical substation building. CP 200 (FF ¶ 10); RP (9/26/11) at 43, 52-54, 66-67. Without the cable, the cranes could not function. CP 201 (FF ¶ 17). The Washington Board of Tax Appeals has previously determined that this kind of dedicated electrical connection constitutes annexation. *Lincoln Ballinger Ltd. P'ship v. Dep't of Revenue*, No. 51253, 1999 WL 1124058, *4 (Wash. Bd. of Tax App. Jan. 29, 1999) (appliances satisfied annexation

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[12] Indeed, the *Seatrain* court relied on the same facts to find nearly identical container cranes constructively annexed to the realty. "While [the cranes] are annexed to the wharf facility by weight only, the rails upon which the cranes run are embedded in the wharf and constitute an integral part of the structure. Since the cranes comprise a necessary, integral and working part of the rails which are attached to the property, and since without the cranes the rails ... would lose their significance, the cranes must be deemed to be annexed to the realty within the meaning of the constructive annexation doctrine." 147 Cal. Rptr. at 582.

test because they were "attached to the realty by electrical or plumbing connections, or both, and must be so attached in order function").[13] Many courts have likewise found equipment annexed to the realty by dedicated electrical conduits, cables and wires where, as here, an electrical connection is an essential aspect of the item's relationship to the realty.[14] The trial court's annexation ruling was erroneous for this reason as well.

2. APL Proved That The Port Intended To Permanently Affix The T-5 Cranes To The Realty.

The trial court's erroneous ruling on "annexation" had a direct and adverse impact on its ruling on "intent" and, ultimately, its conclusion that the T-5 Cranes are not fixtures. Because the cranes were annexed to the realty, APL was entitled to a legal presumption that the Port intended to permanently enrich the freehold—a presumption that the DOR did not overcome. On the contrary, the evidence showed conclusively that the

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[13] This Court should consider the opinion of the Board of Tax Appeals persuasive authority. *Lamtec Corp. v. Dep't of Revenue*, 170 Wn.2d 838, 846, 246 P.3d 788 (2011); *see also Seattle Filmworks, Inc. v. Dep't of Revenue*, 106 Wn. App. 448, 459, 24 P.3d 460 (2001) ("Although Board opinions are not binding on this court, they can be persuasive.").

[14] *See In re Vic Bernacchi & Sons, Inc.*, 170 B.R. 647 (Bkrtcy. N.D. Ind. 1994) (hydraulic baler); *Household Finance Corp. v. BancOhio*, 577 N.E.2d 405 (Ohio App. 1989) (heat pump); *McCorkle v. Robbins*, 267 N.W. 295 (Wis. 1936) (soft drink bottling machines); *cf. Amer. Radiator Co. v. Pendelton*, 62 Wash. 56, 58-59, 112 Pac. 1117 (1911) (boiler, radiator and appliances held to be fixtures where annexed by pipes). Indeed, *Glen Park* suggested that "hard-wired," but otherwise standard, appliances could be "annexed" to the realty. 119 Wn. App. at 489 n. 4.

Port intended the T-5 Cranes to become part of Terminal 5 for their entire useful lives. The trial court's conclusion that the Port did not intend the cranes to become fixtures was therefore erroneous and must be reversed.

a. The Trial Court Erred In Refusing To Apply A Presumption Of Intent In APL's Favor.

Just as "adaptation" is highly relevant to the issue of "annexation," annexation is highly relevant to the issue of "intent." Indeed, annexation is so important to determining intent that "[w]hen a property owner attaches the article to the land he is rebuttably presumed to have annexed it with the intention of enriching the freehold." *Western Ag*, 43 Wn. App. at 173; *Nearhoff*, 156 Wash. at 628; *see also* DOR Det. No. 91-317, 12 WTD 51 (1993) ("when an annexation to the freehold is made by a landlord, the presumption is that he intends to enrich the freehold"); 35A Am. Jur. 2d Fixtures, § 115 ("a presumption arises that when a person making an annexation of a chattel to realty is the owner of the realty, the chattel is a fixture").[15] Where the presumption applies, the burden shifts to the defendant to prove that, notwithstanding the annexation, the annexor intended the item to remain personal property. *Western Ag*, 43 Wn. App. at 174; *Strain v. Green*, 25 Wn.2d 692, 700, 172 P.2d 216 (1946).

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[15] Indeed, as the Supreme Court has noted, depending upon whether the presumption applies, the very same item annexed in the very same way may be a fixture in one case, and personal property in another. *Ballard v. Alaska Theatre Co.*, 93 Wash. 655, 663, 161 Pac. 478 (1916).

Here, the Port is the property owner, and it likewise owns the T-5 Cranes. CP 200 (FF ¶ 8); RP (9/27/11) at 85. As shown above, the cranes were both constructively and physically annexed to the land. The trial court was therefore required, as a matter of law, to apply the presumption of intent in APL's favor. It refused to do so, concluding in relevant part:

> … The Court finds that the relationship between the annexation element and the intent element impacts the usefulness of the presumption. The presumption works where the evidence of annexation is clear and the issue is whether the owner intended the clear result. But where annexation is not clear, without resorting to examining what the owner intended, application of the presumption serves no useful purpose. …

CP 203 (FF ¶ 25). In effect, the court refused to apply the presumption because it concluded that annexation was not "clear" without considering intent. CP 213-214 (Tr. (10/14/11) at 3-4 (whether an item is "annexed to the freehold depends ultimately on the intent of the owner")). But the presumption exists because "annexation" shows "intent," not the other way around. The trial court's circular reasoning not only reveals its flawed approach to annexation, it fundamentally altered the burden of proof on intent—the most important prong of the test for fixtures. This Court must reverse the judgment below on this basis alone.

b. The Evidence Shows That The DOR Failed To Overcome The Presumption Of Intent.

While the trial court's failure to apply the presumption of intent compels reversal, there is no need for the trial court to re-weigh the

evidence on remand. This Court should conclude that the evidence—even when construed in a light most favorable to the DOR—is insufficient as a matter of law to overcome the presumption. *See Kunkel v. Fisher*, 106 Wn. App. 599, 604-605, 23 P.3d 1128 (2001) (trial court failed to apply presumption in easement case; court of appeals reversed without remand because evidence was insufficient to overcome presumption as a matter of law). Indeed, even without the presumption, substantial evidence does not support the trial court's conclusion that the Port lacked the requisite intent.

Evidence of intent must come from objective evidence existing at the time of annexation, not subjective belief. *Boeing*, 85 Wn.2d at 668. "The court should consider all pertinent factors reasonably bearing on the annexor's intent, including but not being limited to, the nature of the article affixed, the relation and situation to the freehold of the annexor, the manner of annexation, and the purpose for which the annexation is made." *Glen Park*, 119 Wn. App. at 487-88 (*citing Boeing*, 85 Wn.2d at 668); *Strain*, 25 Wn.2d at 699. As shown below, the DOR cannot overcome the presumption because there is no evidence to suggest that the Port intended to separate the T-5 Cranes from the realty prior to the end of their useful lives. Neither the Lease nor other documents show a contrary intent.

i. The Port Installed The T-5 Cranes With The Intent That They Remain Part Of Terminal 5 For Their Entire Useful Lives.

The "intent" prong is satisfied if the annexor intends to make a "permanent" addition to the realty. *Boeing*, 85 Wn.2d at 668; *Western Ag.*, 43 Wn. App. at 171. "Permanent" does not mean forever. In the case of equipment and machinery, it means until the item is worn out or becomes obsolete. *Reeder*, 118 Wash. at 510 ("permanent in the sense that it can remain so attached and fixed until destroyed by the elements or worn out by use"); 36A C.J.S. Fixtures § 11 ("it is sufficient if the item is intended to remain where affixed until worn out, ... or until the item is superseded by another item more suitable for the purpose"). "The permanence required is not equated with perpetuity. Just because they have been and can be moved does not mean the intention was not to make them permanent. It is sufficient if the item is intended to remain where affixed until worn out ...." *In re Sheetz, Inc.*, 657 A.2d 1011, 1014 (Pa. Cmnw. 1995) (*quoting Mich. Nat'l Bank v. City of Lansing*, 293 N.W.2d 626, 627 (Mich. App. 1980), *aff'd*, 322 N.W.2d 173 (Mich. 1982)).

To be sure, the T-5 Cranes have never been moved from Terminal 5 since their installation over a quarter century ago. RP (9/28/11) at 298. But more importantly, the evidence confirms the presumption that when the Port annexed the cranes to Terminal 5, it intended them to remain there

until they became obsolete. The Port's executive director at the time—who participated in negotiating the Lease with APL—testified in unequivocal terms that the T-5 Cranes were not designed for disassembly or easy removal because it was the Port's view that they "were an integral part of the container facility and were not going to be moved." RP (9/27/11) at 90, 93. This testimony, which the trial court found credible (CP 227 (Tr. (10/14/11) at 17)), was unrefuted and corroborated by other undisputed objective and contemporaneous evidence.

The permanency of the Port's intent is manifest in its decision to purchase and install the T-5 Cranes, as opposed to upgrading the 50-foot gauge cranes already owned by the Port. Although that option would have been cheaper (*see* Tr. Ex. 33), the Port made a strategic decision to convert Terminal 5 into a modern cargo container facility with state-of-the art cranes. RP (9/27/11) at 86-88, 164; RP (9/28/11) at 305. Indeed, the T-5 Cranes were so state-of-the-art that they were designed to service the Post-Panamax ships that were not yet in service anywhere in the world and would not call on the Port for another decade. RP (9/27/11) at 166-168; RP (9/28/11) at 305. Not only that, but as discussed above, the Port spent tens of millions more dollars rebuilding Terminal 5 to accommodate the massive T-5 Cranes. RP (9/26/11) at 60-71; RP (9/27/11) at 87-88, 164-165. The Port would not have made such a long-term commitment had its

intent for the T-5 Cranes' use at Terminal 5 been anything less than "permanent." As the Port's director of leasing testified, the Port wanted "to buy cranes that last well into the future." RP (9/28/11) at 305.

The Lease between the Port and APL likewise manifests the permanency of the T-5 Cranes' annexation. The original term of the Lease was 30 years—the longest lease ever entered into by the Port at the time. RP (9/27/11) at 89. In exchange, the Lease specifically commits the Port to construct the T-5 Cranes and to keep them in "full operating condition" for the entire 30-year term of the lease. Tr. Ex. 101 (§ 1(d)(i)). The 30-year commitment was not arbitrary. The Port insisted on 30 years because, even with costly upgrades, that is the expected useful life of a T-5 Crane and the Port wanted to ensure that it could amortize the cost of the cranes over the term of the Lease. RP (9/27/11) at 89, 96, 268.[16] In other words, the Port installed the T-5 Cranes at Terminal 5 with the expectation that they would remain there until they became obsolete, which is what Washington law requires. *Reeder*, 118 Wash. at 510 ("permanent in the sense that it can remain so attached and fixed until ... worn out by use").

[16] The trial court discounted this evidence on the grounds that the Port's desire to "recover its cost for this investment and that APL be there for a 30-year term" were "concerns [that] are not inimical to the status of the cranes as either personal property or fixture." CP 227 (Tr. (10/14/11) at 17). But that misses the point entirely. If the Port intended to remove the T-5 Cranes *before* they became obsolete, then it would not have been important to tie the length of APL's lease to the useful life of the cranes.

In the face of the presumption of permanency created by the Port's annexation, *and* the undisputed facts discussed above, there was no evidence—none—that the Port intended to remove the T-5 Cranes prior to the end of their useful life. Rather, when refusing to find intent, the trial court relied on evidence that the cranes *could be* removed and that other cranes have been moved between terminals in the past. CP 203-204 (FF ¶¶ 28, 33); RP (9/27/11) at 152-154, 176, 241-43 264, 276. The court also relied on the cranes' "removability" in its annexation analysis—finding there to be no distinction between intent and annexation on the issue. CP 216 (Tr. (10/14/11) at 12 ("The conclusion about the annexation element ultimately depends on the intention of the Port."); *see* CP 201-202 (FF ¶¶ 18-22).[17] The mere fact that the T-5 Cranes could be removed is insufficient to overcome the presumption of intent as a matter of law.

Washington cases hold that an item may be permanently attached to the realty even if it can be removed with little effort and no damage.

[17] The court's belief that the T-5 Cranes' potential for removal was relevant to annexation further demonstrates its faulty analysis on that issue. As the cases show, the ability of an owner to remove an item is not relevant to whether it has been annexed to the realty, but whether the annexation is "permanent." That issue relates to the "intent" prong of the fixtures test, not "annexation." *See Lincoln Ballinger*, 1999 WL 1124058, at *4 ("'permanency' of annexation is not a requirement of the annexation test; it is a requirement of the third prong—the 'intent' test"); *see also* 35A Am. Jur. 2d Fixtures § 7 ("although the fixture's attachment must be permanent, even if it can be removed, the critical factor is whether its installation was intended to be permanent").

See, e.g., *Strain*, 25 Wn.2d at 700 ("Nor is the fact that the respondents successfully removed the articles from house to house of much, if any, probative value."); *Strong*, 9 Wn.2d at 229-30 ("While it is true ... that most of that equipment was of a stock nature, and could be removed by the mere unscrewing of foundation bolts, those two facts are not determinative of the particular issue.").[18] The issue is not that an item *can be* removed, but whether it was manufactured or installed with an intent that it be removed. *Amer. Radiator v. Pendleton*, 62 Wash. 56, 58, 112 Pac. 1117 (1911) ("[a]though such appliances could after their connection be separated and removed without damage to the building, we do not think they were installed by appellants with any such purpose in view"); DOR Det. No. 89-55, 7 WTD 151 (1989) ("[w]hether the taxpayer could remove the presses without significant damage ... is not a significant factor as to the intent of the owner to permanently affix machine to the freehold, unless the equipment was specifically designed to be removable").

This distinction was evident in *Dep't of Revenue v. Boeing Co.*, 85 Wn.2d 663, 538 P.2d 505 (1975)—a case upon which the DOR and the trial court heavily relied. In *Boeing*, the jigs at issue were designed to assist Boeing manufacture 747 aircraft, but the plant building in which the

[18] For example, no one would question that a house is part of the realty, yet it can be lifted off its foundation and moved. Indeed, the Port itself has moved buildings between the terminals. RP (9/28/11) at 355-56.

jigs were housed was not. The building could be used for purposes other than the manufacture of Boeing 747's, which meant that the jigs would have to be replaced. *Id.* at 665, 669. For that reason, the jigs were "designed in such a manner that they can be disassembled and moved in or out of manufacturing plants without undue difficulty or harm to the jigs." *Id.* at 669. As explained above, the undisputed evidence in this case was exactly the opposite: the T-5 Cranes *were not* specifically designed to be disassembled or moved. RP (9/28/11) at 90. Put simply, there is no evidence that the Port intended to remove the cranes from Terminal 5 before the end of their useful lives. The trial court's erroneous conclusion on the issue of intent must therefore be reversed.

ii. The Port's References To The T-5 Cranes As "Equipment" And/Or Its Sales Tax Treatment Of Them Are Not Evidence That The Port Intended Only A Temporary Attachment At Terminal 5.

Even though there was no evidence to contradict APL's proof that the Port intended to permanently attach the T-5 Cranes to Terminal 5, the trial court relied on two other factors to find that the Port intended the T-5 Cranes to be personal property. CP 203 (FF ¶ 27). Specifically, the court pointed to (a) terminology used in the Lease and other documents that referred to the T-5 Cranes as "equipment" or "inventory," and (b) the Port's purported "tax treatment" of the cranes as personal property. For

the reasons explained below, there was insufficient evidence to support the court's findings on either factor and, in any event, neither factor was sufficient to overcome the presumption of intent as a matter of law.

With respect to so-called "documented categorization," the trial court noted that the Lease describes the T-5 Cranes separately from "the Premises" or "improvements," and that the Lease and a Port development plan (published several years *after* the cranes were installed) refer to the cranes as "equipment" or "inventory." CP 203-205 (FF ¶¶ 30-32, 35-40); Tr. Exs. 33 & 101. But calling an item "equipment" or "inventory" is not remotely inimical to an item's status as a fixture. Indeed, courts often find equipment to be a fixture precisely because, as here, its owner intends to permanently attach the equipment to the realty. *See Courtright Cattle Co. v. Dolsen Co.*, 94 Wn.2d 645, 657, 619 P.2d 344 (1980) (equipment in potato processing plant); *Parrish v. Southwest Wash. Prod. Credit Ass'n*, 41 Wn.2d 586, 589-90, 250 P.2d 973 (1952) (machinery and equipment on cranberry farm); *Strong*, 9 Wn.2d at 229-30 (equipment in mine operations); *Reeder*, 118 Wash. at 508 (same); *Western Ag*, 43 Wn. App. at 172 (irrigation equipment on farm). The DOR's regulation recognizes the same thing. WAC 458-12-010(3).[19]

[19] The regulation defines "real property" to be "[a]ny fixture permanently affixed to and intended to be annexed to land ..., ***including***

Further, even if the Port's references to the T-5 Cranes were indicative of intent, it is not the relevant type of intent. An owner's subjective opinion regarding an item's classification as personal or real property is irrelevant; what matters is whether objective facts show that the owner intended a temporary or permanent annexation. *Boeing*, 85 Wn.2d at 668. Not surprisingly, then, courts consistently refuse to find this kind of "documented categorization" particularly meaningful. *Id.* at 670 ("Boeing's categorization of its equipment certainly is not conclusive as to what is and is not a fixture"); *Parrish*, 41 Wn.2d at 589-90 (disregarding chattel mortgage that classified equipment personalty); *Glen Park*, 119 Wn. App. at 491 (disregarding deed of trust that classified items as fixtures). At bottom, the language used in the Lease and other documents says nothing about the Port's intent; and, of course, there is no evidence that the Port "categorized" the T-5 Cranes as "equipment" or "inventory" because it intended to remove them before the end of their useful lives. As explained above, all the objective evidence—including, in particular, the 30-year term of the Lease itself—shows just the opposite.

The evidence of the Port's purported "tax treatment" of the T-5 Cranes was equally insubstantial. The trial court found that the Port "did

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machinery and equipment which become fixtures." WAC 458-12-010(3) (emphasis added).

not pay sales tax on the purchase of the container cranes because they were purchased for resale as tangible personal property … and, therefore, exempt from the retail sales tax." CP 206 (FF ¶ 42). The only evidence to support this finding were billing statements, which listed "EXEMPT" or "N/A" for "Washington State Sales Tax," and two Port memoranda, which listed "0.00" for "sales tax." *Id.* (FF ¶¶ 41, 43); Tr. Exs. 120, 124 & 125.[20] But, critically, no witness actually knew whether the Port had paid sales tax on the T-5 Cranes or, if not, why not. RP (9/27/11) at 96; RP (9/28/11) at 309-10; 346-47. Indeed, had the Port purchased the cranes for resale, the law required it to issue a "resale certificate." *See* RCW 82.04.470. Here too, the DOR failed to present any evidence that the Port issued such a certificate, nor could it produce one at trial. RP (9/28/11) at 347-49, 354; Tr. Ex. 34. In short, no evidence supports a finding that the Port claimed a resale exemption when purchasing the cranes.

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[20] The DOR introduced an e-mail from 2003 in which the Port's tax manager wrote that he believed the Port could claim a resale exemption on the purchase of container cranes generally. RP (9/28/11) at 321-23, 335-36; Tr. Ex. 122. The court ruled that the email was largely hearsay, but admitted portions as opinion evidence "concerning the law of taxation." *Id.* at 323-28. The court similarly allowed an email containing opinion on whether the Port could claim a resale exemption on a different set of cranes purchased in 2002. *Id.* at 339-45; Tr. Ex. 123. These "opinions" had nothing to do with the T-5 Cranes and were rendered years after the cranes were installed. The trial court properly gave little weight to this evidence, and did not cite it in either its written or oral rulings.

Even had the Port paid no sales tax on the T-5 Cranes, that fact, standing alone, is far too tenuous to overcome the presumption of intent. *First*, it was undisputed that there are other reasons, besides the resale exemption, why the Port may not have paid sales tax on the cranes. RP (9/28/11) at 346.[21] *Second*, for all the same reasons discussed above, the Port's classification of the T-5 Cranes for tax purposes has little relevance to whether it intended a permanent or only a temporary annexation, which is the only intent that matters. On this issue, the DOR said it best:

> In applying the test of intent, it should be noted that the test is not to determine whether the annexor intended to treat the property in question as personal property or real property for tax purposes, but whether he intended to make what was originally tangible personal property, a permanent accession on the freehold.

DOR Det. No. 89-55, 7 WTD 151 (1989). Put differently, classification of an item for tax purposes is relevant only if is predicated on the taxpayer's contemporaneous and deliberative analysis regarding the permanency of annexation. Otherwise, the classification is irrelevant and, perhaps, self-interested. Here, there is no evidence showing how the Port classified the T-5 Cranes at installation, much less evidence that any such classification was based on an expectation that their annexation was temporary.

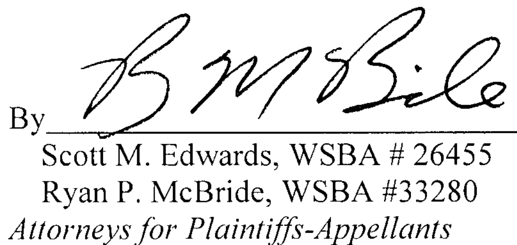
[21] The DOR's own witness conceded that some unregistered out-of-state businesses do not collect sales tax. RP (9/28/11) at 346, 350. The evidence showed that Paceco, Inc., the company that sold the T-5 Cranes to the Port, was not registered with the DOR until September, 1988—several years *after* the purchase of the cranes. *Id.* at 350-51; Tr. Ex. 35.

VI. CONCLUSION

The T-5 Cranes satisfy all three elements of the common law test for fixtures and, thus, it was improper for the Port to collect retail sales tax from APL in connection with its use of the cranes. The judgment below should be reversed, and the trial court ordered to enter judgment in favor of APL on its tax refund claim in the amount of $1,456,261 plus interest.

RESPECTFULLY SUBMITTED this 16th day of August, 2012.

LANE POWELL PC



By________________________

Scott M. Edwards, WSBA # 26455
Ryan P. McBride, WSBA #33280
Attorneys for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on August 16, 2012, I caused to be served a copy of the foregoing **BRIEF OF APPELLANTS** on the following persons in the manner indicated below at the following address:

David M. Hankins
Charles E. Zalesky
Office of the Attorney General of Washington
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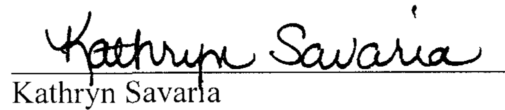
- ☐ **by CM/ECF**
- ☑ **by Electronic Mail**
- ☐ **by Facsimile Transmission**
- ☐ **by First Class Mail**
- ☑ **by Hand Delivery**
- ☐ **by Overnight Delivery**



Kathryn Savarla

APPENDIX

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FILED
SUPERIOR COURT
THURSTON COUNTY, WA

2012 JAN -6 AM 11:24

BETTY J. GOULD, CLERK

☐ EXPEDITE
☐ No Hearing is set:
☐ Hearing is set:
Date: January 13, 2012
Time: 9:00 a.m.
Judge Thomas McPhee/Civil

SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

APL LIMITED, AMERICAN PRESIDENT LINES, LTD., and EAGLE MARINE SERVICES, LTD., Plaintiffs, v. WASHINGTON STATE DEPARTMENT OF REVENUE, Defendant.	06-2-00198-0 NO. 10-2-01307-2 FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND ORDER

I. INTRODUCTION

A. Hearing.

The trial of this matter was held September 26, 2011 through September 28, 2011, before the Honorable Wm. Thomas McPhee. The matter was tried without a jury. On October 14, 2011, the Court rendered its Oral Opinion in favor of the Defendant. That Opinion has been transcribed and is attached hereto as Appendix A. The Oral Opinion is consistent with these findings and conclusions and is hereby incorporated by reference.

B. Appearances.

The Plaintiffs appeared through their attorney of record, Scott Edwards of Lane Powell PC, and the Defendant appeared through its attorneys of record, Robert M. McKenna, Attorney General, David M Hankins, Senior Counsel and Charles Zalesky, Assistant Attorney General.

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ORIGINAL

C. Claim Presented.

The claim presented by Plaintiffs at trial was for a refund of retail sales tax paid during January 1997 through December 2005, on the lease of five Port of Seattle owned container cranes, plus interest on that refund amount. The matter was properly before the Court under RCW 82.32.180. The issue to be determined was as follows:

Are the five Port of Seattle owned container cranes at issue in this case fixtures, and therefore real property, or are they personal property subject to the retail sales tax?

D. Exhibits Received.

Attached as Appendix B is the Exhibit List signed by the parties identifying the exhibits offered and admitted into evidence.

E. Witnesses Called.

The following witnesses were called and testified at trial:

1. **Plaintiffs' Witnesses (Order of appearance):**
   a. David Olsen
   b. James Dwyer
   c. David Pickles
   d. Mark Johnson
2. **Defendant's Witnesses (Order of appearance):**
   e. Rick Blackmore
   f. Michael Burke
   g. Asher Wilson

After considering the sworn testimony of the witnesses and the exhibits admitted into evidence, the Court now makes the following Findings of Fact:

II. FINDINGS OF FACT

A. Background and Procedural History.

1. This is a sales tax case involving five large cranes used by Eagle Marine

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Services, Ltd. to load and offload containers from cargo ships at Port of Seattle terminal number 5. The five container cranes are referred to as the "T5 Cranes" and have been assigned Port identifying numbers 61, 62, 63, 64, and 68.

2. During the periods at issue (January 1997 through December 2005) Eagle Marine Services leased the T5 Cranes from the Port of Seattle.[1] Eagle Marine Services is a subsidiary of APL Limited and is also affiliated with American President Lines, Ltd.

3. The Port treated the T5 Cranes as tangible personal property and collected retail sales tax on the amount it charged Eagle Marine Services for the lease of the cranes. The Port of Seattle remitted the retail sales tax it collected to the Department of Revenue ("Department"). Eagle Marine Services (along with the other Plaintiffs) contends that the T5 Cranes were attached to the Port facility as fixtures and that the Port incorrectly charged and collected retail sales tax on the lease of the cranes.

4. In 2006 APL Limited, American President Lines, Ltd., and Eagle Marine Services (referred to collectively as "Plaintiffs") filed a refund action in Thurston County Superior Court under RCW 82.32.180, seeking a refund of retail sales tax paid on the lease of the T5 Cranes. The 2006 refund action covered the January 1, 1997 through May 23, 2005 tax periods. In June 2010 the Plaintiffs filed another refund action, seeking a refund of sales tax paid on the lease of the T5 Cranes during the May 24, 2005 through December 31, 2005 tax periods. The two cases have been consolidated under the 2006 cause number.

B. Lease Agreement And Physical Characteristics Of The T5 Cranes.

5. In September 1985, the Port of Seattle ("Port") entered into a 30-year lease with American President Lines, Ltd. for use of a Port-owned terminal facility known as Terminal 5 and for use of Port-owned container cranes to offload cargo containers from ships.

[1] American President Lines, Ltd. initially leased the cranes from the Port of Seattle. The lease was assigned to Eagle Marine effective June 1, 1994. Eagle Marine was the lessee of the T5 Cranes during the 1997 through 2005 periods at issue.

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That lease agreement has been amended several times since 1985.

6. In 1994 the lease agreement was assigned from American President Lines to Eagle Marine Services. Eagle Marine Services is a subsidiary of APL Limited, and has provided stevedoring and marine terminal operations at Terminal 5 since 1994.

7. Paragraph 1(d) of the initial lease agreement required the Port to provide American President Lines, Ltd. with four container cranes "more particularly identified as Port designated Crane nos. 61, 62, 63 and 64, or their equal or better." The initial lease agreement also granted American President Lines, Ltd. the option for a fifth crane. That option was exercised in January 1987, as indicated in Recital "C" of the Second Amendment to Lease. The fifth Port-owned container crane was Crane No. 68.

8. Port-owned cranes nos. 61, 62, 63, and 64 were installed at Terminal 5 in 1986. Crane No. 68 was installed at Terminal 5 in 1987 or 1988. All five cranes (the "T5 Cranes") have remained at Terminal 5 since they were commissioned.

9. In 2004 the Port removed Crane No. 66 from Terminal 30, transported it by barge to Terminal 5, and installed it at Terminal 5 for use by Eagle Marine Services. Although Crane No. 66 was leased to Eagle Marine Services during the periods at issue in this case, Plaintiffs are not seeking a refund of retail sales tax paid to the Port on Crane No. 66.

10. The T5 Cranes (cranes 61, 62, 63, 64, and 68) are all Paceco "Portainer" modified A-frame container cranes. Each is a very large item of equipment, weighing more than 800 tons and standing close to 200 feet tall with the boom lowered. They are powered by a dedicated high voltage electrical substation, and are connected to the electrical substation by an electrical cable.

11. The T5 Cranes operate on wheels that are positioned on 100 foot gauge rails connected to the Terminal apron. The cranes are held on the crane rails by gravity and traverse along the rails as part of their normal operation. The crane rails extend approximately

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2900 feet from one end of the Terminal 5 apron to the other.

12. The T5 Cranes are "post-Panamax" cranes designed to load and offload cargo from "post-Panamax" sized cargo ships. A "post-Panamax" ship is a ship that is too large to pass through the Panama Canal.

C. Annexation.

13. The evidence presented at trial, when viewed as a whole but without consideration of the Port's intention, supports a finding that the T5 Cranes were not annexed to the property.

14. The T5 Cranes are very large items of equipment, weighing more than 800 tons each. The T5 Cranes are close to 200 feet tall when the boom is lowered and nearly 300 feet tall when the boom is raised.

15. The cranes are attached to the crane rails by gravity and move along the crane rails as part of their normal operation.

16. The T5 Cranes were purchased complete from the manufacturer, Paceco in Mississippi and Korea, but were shipped in parts and assembled on the dock. The more common method these days is to deliver them already assembled.

17. All movements of this class of crane are driven by electric motors. Some have diesel generators on the cranes: others, including the T-5 Cranes, obtain electricity from an external source.

18. Container cranes are movable and can be relocated from one terminal to another. Over time there has been a history of moving Port-owned container cranes between terminals at the Port of Seattle or removing the container cranes from the Port of Seattle terminal facilities.

19. In 2005, Port-owned "Crane 66" was moved by barge from Terminal 30 to Terminal 5, where it was offloaded and rented to Eagle Marine. At around that same time two

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other Port-owned container cranes (Cranes 65 and 67) were moved from Terminal 30 to Terminal 46.

20. When 100-foot gauge cranes at the Port, including the T5 Cranes, are moved from their crane rails, the practice has been to construct temporary rails perpendicular to the working rails and to move the crane onto those temporary rails where the crane can be moved a distance from the working rails. For instance, when two of the T5 Cranes were modified to increase their height, one of the cranes was moved onto temporary rails perpendicular to the crane rails after being modified. This allowed the crane to be moved back, away from the working rails, and then to be repositioned on the crane rails.

21. In the development of its container shipping terminals, the Port has leased or supplied cranes to tenants and has also allowed tenants to bring in their own cranes. For instance, in 1992, APL relocated one of its container cranes from Oakland, California to Terminal 5. After about two years, APL sold this container crane and had it removed from Terminal 5. Also, Stevedoring Services of America (SSA) currently owns several container cranes that it uses in its operations at Terminal 30.

22. There is a domestic and international market for used 100-gauge container cranes. In the past the Port of Seattle has sold 50 gauge container cranes to smaller ports such as the Port of Olympia. These cranes were not disassembled but were moved by barge. Currently, the market for 50 gauge container cranes is saturated. These 50 gauge container cranes are obsolete for large ports and are sold for scrap.

23. All of the above findings support the conclusion that the T5 Cranes were not annexed to the real property.

24. The annexation element is also intertwined with the intent element. Therefore, the Court's findings pertaining to the Port's intent are also relevant in the Court's finding that the T5 Cranes were not annexed to Terminal 5.

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25. Proof of annexation by the owner of the freehold may raise a presumption that the owner intended the item annexed to be a fixture. The Court finds that the relationship between the annexation element and the intent element impacts the usefulness of the presumption. The presumption works where the evidence of annexation is clear and the issue is whether the owner intended the clear result. But where annexation is not clear, without resorting to examining what the owner intended, application of the presumption serves no useful purpose. The Court declines to apply the presumption here.

D. Intent.

26. To determine the Port's intention, the Court followed the considerations identified in *Department of Revenue v. Boeing*, 85 Wn.2d 663, 538 P.2d 505 (1975).

27. The Court finds no support for Plaintiffs' contention that the Port intended the T5 Cranes to be fixtures. To the contrary, the evidence presented at trial, when viewed as a whole, supports a finding that the Port intended the T5 Cranes to be equipment in inventory (tangible personal property), not fixtures.

28. As addressed above, the T5 Cranes are movable and have been moved.

29. In addition, the "documented categorization" factor addressed in *Dep't of Revenue v. Boeing* supports the finding that the Port intended the T5 Cranes to be tangible personal property, not fixtures. This evidence is found in two places; the lease agreement and the Port's policy statements.

30. The lease agreement contains direct evidence that the Port intended the container cranes to be personal property and not fixtures. The initial lease between the parties (Def. Ex. 101) under section (1)(a) described "the Premises" as consisting of approximately 77 acres of land and improvements. The improvements covered under this section "are fully described on Exhibit B" to the initial lease. The improvements described in Exhibit B do not include container cranes. Instead, Exhibit B describes three categories of improvements. In

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Part I the listed improvements are not amortized. In Part II, the listed improvements are amortized, and the costs recovered over the term of the lease. In Part III, the listed improvements are amortized but not paid for unless APL terminates the lease early, and then payment is due for those improvements or an amortized schedule. Included in these schedules are many items that could be characterized as personal property, not fixtures. Examples include fencing and gates, truck scales, tanks, and reefer receptacles to name a few. The T5 Cranes are not listed as improvements on Exhibit B.

31. Section 9(a) of the initial lease (Def. ex. 101-13) provides, "All improvements identified in Exhibit B including those the payment of which is amortized by Lessee shall at once, upon completion [become] a part of the realty and become the property of the Port." This is an unmistakable declaration that the improvements listed in Exhibit B are fixtures. As previously noted, the T5 Cranes are not listed on Exhibit B.

32. Section 1(d) of the lease addresses the container cranes separate from the sections of the lease describing the premises and improvements. The lease provides that the tenant shall have preferential use on a non-continuous ship-by-ship basis, in no event to exceed five consecutive days, of four port-owned container cranes. Notably, the use of the container cranes permitted under section 1(d) of the lease is different than the use of the "Premises" permitted under section (1)(a). The Premises are leased without the use restriction, except for the rails which support the container cranes.

33. The container cranes leased by the Port for use at Terminal 5 could legally be moved during the term of the lease as evidenced in the lease agreement. Specifically, section 1(d) permits different cranes to be leased as indicated by the phrase "or their equal or better."

34. Section 3(a) of the initial lease provides terms relating to "Rent" payments. That section identifies three different payments that APL covenants to pay: "rentals, Crane

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use charges and amortization charges for certain improvements to the premises." The amount due as crane use charges are set forth in Exhibit C to the lease, which identifies the payments as "equipment rental." This segregation of the payments due under the terms of the lease agreement, and the fact the crane use charges are specifically identified as equipment rental, provides further evidence of the Port of Seattle's intent to treat the container cranes as personal property and not as fixtures.

35. Section 7(a) of the initial lease is another example of the segregation of "Cranes" from the "Premises." The specific language states that "[b]efore entering into possession of each Crane and of any portion of the Premises or taking possession of any improvements to the Premises, the Lessee shall examine and inspect the same." The improvements to the lease are described in Exhibit B and do not reference container cranes.

36. The Court finds that the terms of the lease show that the Port of Seattle treated container cranes as equipment, not fixtures attached to the "Premises."

37. In addition to the lease agreement, the Port of Seattle's intent to treat container cranes as personal property and not as fixtures is found in two documents setting out the Port's long-range harbor development strategy and container terminal development plan.

38. The lease of Terminal 5 was executed in September 1985 with development and construction work that began shortly thereafter. In 1984, the Port of Seattle began a Harbor Development Strategy called the HDS, which it published in August 1986. In October 1991, the Port completed its Container Terminal Development plan. (Pl. Ex. 33 at 2). The HDS is part of Exhibit 33.

39. Terminal 5 is part of the area encompassed by both the HDS and the CTD plans. Both plans envisioned substantial expansion of the container area over time. The CTD plan included a "Proposed Container Crane Program" which in relevant part provides, "A financial model was prepared which examined the crane inventory on a crane-by-crane basis.

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The model used standard net-present-value and cash flow analysis. Inputs to the model included: crane tariff structure; specific lease terms by terminal; schedule of crane; apron and spreader replacement and upgrade costs; and, variables such as inflation, cargo growth, tariff surcharges, and capital costs." (Pl. Ex. 33 at 34).

40. A close reading of all relevant parts of both these documents supports the Department's contention that the Port of Seattle intended the T5 Cranes to be equipment held as "inventory," not fixtures.

41. Further evidence of the Port's intention to treat the container cranes as personal property and not as fixtures is the Port of Seattle's tax treatment of the container cranes. In purchasing the container cranes, the Port of Seattle did not pay sales tax. See for example Def. Ex. 120, 124, 125. Instead, the Port charged sales tax on the lease of the T5 Cranes to American President Lines and, later, Eagle Marine Services.

42. The Court finds the Port of Seattle did not pay the sales tax on the purchase of the container cranes because they were purchased for resale as tangible personal property in the ordinary course of business and, therefore, were exempt from the retail sales tax under RCW 82.04.050)1)(a)(i) (purchase for resale exemption). Had the Port intended the T5 Cranes to be fixtures, it would have paid retail sales tax on the purchase. This tax treatment by the Port is relevant under *Boeing* and provides additional evidence that the Port intended the T5 Cranes to be tangible personal property, not fixtures.

43. Additional evidence of the Port's intention regarding the sales tax treatment of its purchase of container cranes is found in Exhibits 124 and 125. Exhibit 125 is a report seeking approval of the purchase of the T5 Cranes, with sales tax listed as zero. Exhibit 124 is a slightly later proposal in 1986 with the same tax treatment — sales tax listed as zero. On this record, the only sales tax exemption that would apply to the purchase of these cranes is the purchase for resale exemption. Again, if the Port had intended the cranes to be fixtures, it

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would have paid retail sales tax on the purchase and would not have billed the tax on the subsequent lease of the cranes to the tenant. Instead, the Port did just the opposite; it did not pay the sales tax on the purchase, but charged the tenant the sales tax on the lease. This is persuasive circumstantial evidence that the Port intended the cranes not be affixed to the land.

Based on the above findings, the Court makes the following Conclusions of Law:

III. CONCLUSIONS OF LAW

A. Burden Of Proof.

1. Plaintiffs bear the burden of proving the amount of refund, if any, they are entitled to. RCW 82.32.180. To meet this burden, Plaintiffs must prove all three elements of the common law fixtures test; annexation, adaption, and intent.

2. The Department has conceded that the T5 Cranes at issue meet the second prong of the common law test. Thus, only the first prong and third prong are in dispute.

B. Application Of The Facts To The Common Law Fixtures Test Establishes That The T5 Cranes Were Correctly Treated By The Port As Tangible Personal Property, Not Fixtures.

3. To determine whether chattel is tangible personal property or a fixture, the courts apply the common law test of fixtures. The controlling authority is *Dep't of Revenue v. Boeing Co.*, 85 Wn.2d 663, 538 P.2d 505 (1975).

4. The common law fixtures test requires "(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." Boeing, 85 Wn.2d at 667.

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5. "Each element of this three-pronged test must be met before an article may properly be considered a fixture." *Id.* at 668. Moreover, whether property is a fixture or tangible personal property depends on the particular facts of each case. *Union Elevator & Warehouse Co. v. State*, 144 Wn. App. 593, 603, 183 P.3d 1097 (2008).

6. Applying the material facts presented at trial, as set forth above, the Court concludes that the T5 container cranes are not actually annexed to the real property and, therefore, do not meet the first prong of the fixtures test.

7. Applying the pertinent factors to determine intent as set forth in *Boeing*, 85 Wn.2d at 668, the Court concludes that the Port of Seattle did not intend the T5 container cranes to be treated as fixtures, but as personal property.

8. Plaintiffs have not met their burden of proving the T5 Cranes were fixtures. The clear weight of the evidence confirms that the container cranes were personal property. As a result, the Port of Seattle correctly charged and collected retail sales tax on the lease of the T5 Cranes.

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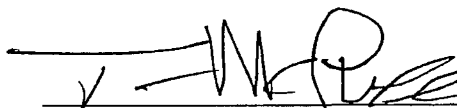
IV. ORDER

Now, Therefore, IT IS HEREBY ORDERED that Plaintiffs' claim for a refund of retail sales tax paid during January 1997 through December 2005 is DENIED. Judgment is entered in favor of Defendant, Department of Revenue.

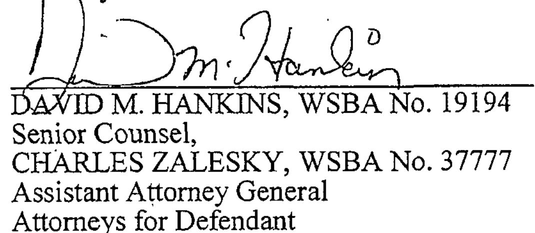
DONE IN OPEN COURT this 6 of January 2012.



JUDGE Wm. THOMAS MCPHEE

Presented by:

ROBERT M. MCKENNA
Attorney General



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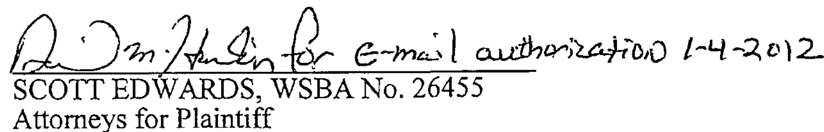

for e-mail authorization 1-4-2012

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APPENDIX A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF THURSTON

APL Limited, AMERICAN PRESIDENT LINES, LTD., and EAGLE MARINE SERVICES, LTD.,, Plaintiffs, vs. STATE OF WASHINGTON, DEPARTMENT OF REVENUE, Defendants.	No. 06-2-00198-0

ORAL OPINION

BE IT REMEMBERED that on the 14th day of October, 2011, the above-entitled and numbered cause came on for hearing before the Honorable Thomas McPhee, Judge, Thurston County Superior Court, Olympia, Washington.

Kathryn A. Beehler, CCR No. 2448
Certified Realtime Reporter
Thurston County Superior Court
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1 October 14, 2011 Olympia, Washington

2 MORNING SESSION

3 Department 2 Hon. Thomas McPhee, Presiding

4 Kathryn A. Beehler, Official Reporter

5 --o0o--

6 THE COURT: Please be seated. Good afternoon,

7 ladies and gentlemen.

8 MR. HANKINS: Good afternoon, Your Honor.

9 MR. EDWARDS: Good afternoon, Your Honor.

10 THE COURT: Here is my decision in this case:

11 This is a refund claim based on APL's contention that

12 no sales tax is due on the T-5 Cranes because they

13 are fixtures. The burden is on the taxpayer who must

14 prove annexation, adaptation, and intent to make a

15 permanent accession to the freehold. Proof of

16 annexation by the owner of the freehold may raise a

17 presumption that the freeholder intended the item

18 annexed to be a fixture.

19 I conclude that *Department of Revenue v. Boeing,*

20 at 85 Wn. 2d 663, is controlling authority. A close

21 reading of the case demonstrates the uncomfortable

22 fit between annexation and intent as elements of the

23 decision to be made here where the item is massive

24 and the question of whether or not the massive item

25 is annexed to the freehold depends ultimately on the

1 intent of the owner. In the first appearance of this
2 case before the Court of Appeals, that court
3 concluded in relevant part, "We find it difficult to
4 see how *Boeing* is not controlling here." *Boeing*
5 concluded that the massive item, the 747 jig, was not
6 a fixture because Boeing did not intend it to be a
7 fixture and manifested that intent in a number of
8 ways. The Supreme Court applied a totality of the
9 circumstances test, finding evidence of intent from
10 surrounding circumstances.
11 In California a different result was reached,
12 notable here because the massive items were cranes
13 very similar to the T-5 Cranes. In *Sealand v. County*
14 *of Alameda*, the California court determined that the
15 cranes were fixtures, adopting many of the same
16 arguments that APL advances here.
17 I conclude that the decision in *Sealand* is not
18 persuasive authority in this case. The reasoning
19 adopted by the court there is not the law of
20 Washington. In *Sealand* the California court
21 identifies three elements for determining fixtures
22 under common law, elevates the intent element to
23 primacy, and recognizes the doctrine of constructive
24 annexation. All of that comports with Washington
25 law.

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1 But in *Sealand* the court does not discuss any
2 direct or circumstantial evidence of Sealand's
3 intention when installing the cranes. Instead it
4 does a lengthy analysis of the extent to which the
5 cranes are adapted to the function of the freehold,
6 as evidence of annexation.
7 "The adaptability test lends further
8 support to the trial court's holding that
9 the cranes at issue were intended to be
10 permanent installations rather than movable
11 personal property. As pointed out by legal
12 authorities, the most favored indicia of
13 implied intention of permanence of annexation
14 are the various circumstances surrounding the
15 use of the property. The question most
16 frequently asked is whether the real property is
17 peculiarly valuable in use because of the
18 continued presence of the annexed property thereon.
19 Thus, it has been said that an object placed on the
20 realty may become a fixture if it is a necessary or
21 at least a useful adjunct to the realty, considering
22 the purposes to which the latter is devoted. This
23 principle variously referred to as the 'adaptability
24 test' or the 'institution doctrine' is often given
25 great weight in determining whether a

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1 particular object has assumed the status of fixture."

2 That's quoting from the case of *Seatrain*

3 *Terminals of California, Inc., v. County of Alameda*,

4 83 Cal. App. 3d 69, at page 76.

5 This approach was specifically rejected by

6 Division 2 in *Glen Park Associates v. The Department*

7 *of Revenue*. In that case Division 2 declined to

8 follow the decision in *Western Agricultural Land*

9 *Associates v. The Department of Revenue* and observed,

10 "We decline to follow *Western Agricultural's*

11 suggestion that use may be considered in determining

12 annexation. To do so would blur the lines between

13 the first and second elements of the test and could

14 minimize or eliminate the first."

15 That is citing the case of *Glen Park Associates v.*

16 *The Department of Revenue*, 119 Wn. App. 481 at 489.

17 So I mentioned there at the beginning there is

18 this uncomfortable fit between intent and annexation

19 as two of the three elements for determining a

20 fixture. It is uncomfortable in this respect:

21 Intent is the most important element; and in this

22 case involving massive cranes, the evidence of intent

23 to make a permanent accession to the freehold, in

24 other words, to annex, would seemingly be the same

25 evidence used to determine annexation. But APL seems

1 to argue that I must determine annexation first,
2 without determining intent, because annexation would
3 create a presumption that the Port intended to annex
4 the cranes.
5 Perhaps this ambiguity in the relationship between
6 the two elements of fixture is the reason why the
7 Supreme Court used the phrase "arguably presumed" in
8 *The Department of Revenue v. Boeing*. In any event, I
9 decline to apply the presumption here. The
10 presumption works where the evidence of annexation is
11 clear and the issue is whether the owner intended
12 that clear result. But where annexation is not clear
13 without resort to examining what the owner intended,
14 application of the presumption serves no useful
15 purpose.
16 In *Boeing* the Supreme Court specifically
17 identified three areas of evidence for objective
18 manifestations of Boeing's intent.
19 First, was the item easily removable. I can't
20 think of a more relative term in this context
21 than "easily removable." In *Glen Park Associates*,
22 "easily removable" was quantified in minutes - less
23 than ten minutes. In *Boeing*, I can't imagine that
24 time for moving would be other than days or possibly
25 weeks where the project was to move one of these

1 massive jigs. But the Supreme Court went further.
2 It identified the facts that the jigs, although
3 secured to the floor, were not secured in a permanent
4 manner, and that the jigs could be disassembled
5 without undue difficulty or harm to the jig as
6 important factors in determining the ease of moving.
7 These are obviously important considerations in this
8 case, as well.
9 Second, in *Boeing* the Supreme Court identified
10 Boeing's tax treatment of the jigs as an important
11 fact to consider. This factor is directly applicable
12 to this case.
13 Third, the Supreme Court identified Boeing's
14 categorization of the jigs in its code chart manual
15 as important evidence. In the decision, the court
16 observed,
17 "Finally Boeing's own code chart manual
18 categorizes the equipment and distinguishes between
19 fixtures and other 'tools.' The jigs are not listed
20 along with the other equipment that Boeing considers
21 to be fixtures. Instead, the jigs are referred to as
22 'tools.' While Boeing's categorization of its
23 equipment certainly is not conclusive as to what is
24 and is not a fixture, the reference to the jigs as
25 'tools' and not as fixtures is hardly indicative of

1 an intent for the jigs to be a permanent part of the
2 realty. If Boeing had intended for the jigs to be a
3 permanent accession to the freehold, it seems more
4 likely that they would have been listed with the rest
5 of the fixtures."
6 In the present case, the categorization is in the
7 Lease Agreement and the attached exhibits. The
8 categories are more equivocal here than in *Boeing*,
9 but here there were two parties with adverse
10 interests that were affected by the categorization,
11 and both signed off on it.
12 From that discussion of the factors identified in
13 *Boeing* as important to this case, I make the
14 following findings of fact:
15 First, regarding the physical characteristics of
16 the cranes, these are very large items of equipment.
17 100 gauge post-Panamax cranes. The height and weight
18 is in evidence, and there should be findings of fact
19 entered on these characteristics.
20 Second, as an essential element of the adaptation
21 of each crane to the work performed at Terminal 5,
22 the cranes move on tracks along the dock, and the
23 trolley moves in and out, over the dock and over the
24 docked ship, and the hoist moves up and down. None
25 of these movements are material to a fixtures

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1 analysis.

2 Third, these cranes were purchased complete from
3 the manufacturer, Paceco in Mississippi and Korea,
4 but were shipped in parts and assembled on the dock.
5 The more common method these days is to deliver them
6 already assembled.

7 Fourth, all movements of this class of crane are
8 driven by electric motors. Some have diesel
9 generators on the cranes; others, including the four
10 T-5 Cranes here, obtain electricity from an external
11 source.

12 Fifth, when the 100-gauge cranes at the Port,
13 including the T-5 Cranes, are moved from their
14 working tracks, the practice has been to construct
15 temporary tracks perpendicular to the working tracks
16 and move the crane back away from the water, or to
17 load the crane on a barge and move them across the
18 water. The process of loading the crane on a barge
19 was not described in the evidence, but it seems
20 logical that the process would be undertaken similar
21 to a shore movement; in other words, on temporary
22 perpendicular tracks onto the barge.

23 Sixth, over time there has been a history of
24 moving cranes on or between terminals at the Port.
25 At Terminal 5, APL brought in its own 100-gauge crane

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1 for about two years and then moved it out. Two of
2 the original T-5 Cranes were moved back from the dock
3 for modifications and shifting of positions in an
4 exercise that caused them to be moved back off their
5 tracks away from the water and then back onto their
6 tracks at the water. Three Port owned post-Panamax
7 cranes were moved from Terminal 30; two were moved to
8 terminal 46; one was moved to Terminal 5.
9 Seventh, in the development of its terminals, the
10 Port has both supplied cranes and permitted tenants
11 to bring in their own cranes. Examples are at
12 Terminal 5 and the SSA cranes at Terminal 30.
13 Eighth, there is a market for used 100-gauge
14 cranes, both domestic and international. In the
15 past, the Port has sold 50-gauge cranes to smaller
16 ports such as Olympia. These cranes were not
17 disassembled but were moved by barge. The market for
18 50-gauge cranes is saturated. These cranes are
19 obsolete for large ports and are sold for scrap.
20 These findings, all related to the element of
21 annexation, and viewed as a whole but without
22 consideration of the Port's intention, support a
23 conclusion that the T-5 Cranes were not annexed to
24 the property. But the question is a close one, and
25 coupled with evidence of the Port's intention to

1 annex the cranes to Terminal 5, would support that
2 conclusion, as well.
3 The conclusion about the annexation element
4 ultimately depends on the intention of the Port. To
5 determine this intention, I follow the considerations
6 identified in *Department of Revenue v. Boeing*.
7 First was the moveability of the cranes. As
8 addressed above, I find these cranes are movable and
9 have been moved.
10 Second, I address the factor identified in *Boeing*
11 as documented categorization. Here the evidence is
12 in two places, the Lease and the Port's policy
13 statements.
14 In the lease at section 1(a), the lease is of the
15 premises, which is identified as 77 acres of land and
16 improvements. The provisions identify improvements
17 covered by this section as "all of which improvements
18 are fully described on Exhibit B."
19 Section 1(d) of the lease addresses the cranes in
20 a different section than the premises and
21 improvements. There the lease promises preferential
22 use on a non-continuous ship-by-ship basis, in no
23 event to exceed five consecutive days of four
24 port-owned container cranes.
25 I find that this use described in section 1(d) is

1 different than described in section 1(a). There the
2 premises are leased without the use restriction,
3 except the rails which support the cranes. They have
4 the same use restriction as are found for the cranes
5 in section 1(d).
6 I note also that APL argued that it was these four
7 cranes and only these four cranes that are the
8 subject of the lease, that they could not legally be
9 moved during the term of the lease. I don't find
10 that accurate. Section 1(d) permits different
11 cranes, using the phrase, "or their equal or better."
12 Section 3(a) of the lease relates to rent and
13 identifies three different payments that APL
14 covenants to pay. First are the rentals; second, the
15 crane use charges; and third, amortization charges
16 for certain improvements to the premises.
17 In section 7(a) is another example of separation
18 of the cranes from improvements. The language there
19 is,
20 "Before entering into possession of each Crane and
21 of any portion of the Premises or taking possession
22 of any improvements to the Premises, the Lessee shall
23 examine and inspect the same."
24 Exhibit B to the Lease is where the improvements
25 are described. They are described there in three

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1 categories related to amortization. In Part I the
2 improvements described there are not amortized. In
3 Part II the improvements described there are
4 amortized, and the costs recovered over the term of
5 the lease. In Part III, the improvements are
6 amortized but not paid for unless APL leaves early,
7 and then payment is due for those improvements on an
8 amortized schedule.
9 Included in these schedules are many items that
10 could be characterized as personal property, not
11 fixtures. Examples include fencing and gates, truck
12 scales, tanks, reefer receptacles to name a few.
13 Section 9 A(a) of the lease then provides,
14 "All improvements identified on Exhibit B,
15 including those the payment of which is
16 amortized by Lessee shall at once, upon
17 completion, become a part of the realty and
18 become the property of the Port."
19 Here is an unmistakable declaration that the
20 improvements listed in Exhibit B are fixtures.
21 I find that the terms of the lease show that the
22 Port treated the cranes as equipment, not affixed to
23 the leasehold. The distinction between the cranes
24 and the other improvements, including equipment that
25 was affixed to the leasehold include identification,

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1 rent, and treatment at the end of the lease.

2 As I indicated, I don't agree with APL's
3 contention that regardless of the separation of the
4 items in the lease, these four cranes were affixed to
5 the land by a legal obligation undertaken in the
6 lease. I observe that where the cranes are
7 identified, the Port is also given the right to
8 supply same or similar cranes. I can't find that
9 language right now.

10 The second evidence of the Port's intention in the
11 documentation is located in the Port's policy
12 statements. The lease of Terminal 5 was executed in
13 September 1985. Development and construction work
14 began shortly thereafter. In 1984, the Port began a
15 Harbor Development Strategy called the HDS, which it
16 published in August 1986. In October of 1991, the
17 Port completed its Container Terminal Development
18 Plan, Exhibit 33. The HDS is part of Exhibit 33.

19 The CTD Plan [the Container Terminal Development
20 Plan] in 1991 listed its strategic goals:

21 "The plan addresses long-term container facility
22 needs in light of Port-wide strategic goals and the
23 existing harbor development policy framework by:"

24 And it goes on to list in No. 4 of the list,
25 "Responding to industry trends such as asset

1 sharing and the need for maximum flexibility."
2 The CTD Plan explained its relationship to the
3 HDS, developed at the time of the lease:
4 "At the conclusion of the HDS process, the
5 advisory committee unanimously recommended Port
6 Commission adoption of the final HDS draft. This
7 plan carried forward the HDS policy directives and
8 findings."
9 T-5 is part of the area encompassed by both HDS
10 and CTD plans. In 1991 the container terminal area
11 at the Port was 345 acres. It included 40 acres
12 added by the expansion in 1985 and 1986. Both plans
13 envisioned substantial expansion of the container
14 terminal area over time, with an additional 235 acres
15 predicted by the year 2000.
16 The CTD Plan included a Proposed Container Crane
17 Program. It provides, in relevant part,
18 "A financial model was prepared which
19 examined the crane inventory on a crane-by-crane
20 basis. The model used standard net-present-value
21 and cash flow analysis. Inputs to the model
22 included: crane tariff structure; specific
23 lease terms by terminal; schedule of crane;
24 apron, and spreader replacement and upgrade
25 costs; and, variables such as inflation,

1 cargo growth, tariff surcharges. And
2 capital costs."
3 After a close reading of all relevant parts of
4 both these documents and considering the totality of
5 that information, I find support for the Department's
6 contention that the Port intended the T-5 Cranes to
7 be equipment in inventory, not fixtures. I find no
8 support for APL's contention that the Port intended
9 the T-5 Cranes to be fixtures.
10 I would note here, however, that the evidence is
11 not all one sided. Clearly APL offered important
12 evidence from Mr. Dwyer, the Port's executive
13 director at the time. He was credible, but he was
14 testifying from memory of events 26 years ago. Where
15 his recollections are directly refuted by the Lease,
16 as for example, the right of the Port to change out
17 the cranes, I attribute those differences to his
18 focus on his two primary concerns: That the port
19 recover its costs for this investment, and that APL
20 be there for a 30-year term. Those concerns are not
21 inimical to the status of the cranes as either
22 personal property or fixture.
23 Third, I address the factor identified in *Boeing*
24 as Boeing's tax treatment. Exhibit C to the Lease is
25 important evidence in this regard. This is the

1 equipment rental schedule for four cranes. No. 64 is
2 scheduled as Tariff 3. And it includes there
3 successors and reissues of Tariff 3.
4 Throughout the Port billed APL for crane rental
5 and billed a separate sales tax as a separate item;
6 and APL paid that sales tax. It is not disputed that
7 the Port remitted those amounts to the Department of
8 Revenue.
9 In purchasing the cranes, the Port did not pay
10 sales tax. The Department of Revenue contends the
11 reason for nonpayment was the resale exemption; APL
12 suggested that it was because Paceco was not licensed
13 and therefore would not owe that tax, that the Port
14 would not have to pay at the time of transaction.
15 But that contention is not persuasive. The exhibits
16 show that after Paceco became licensed, the Port
17 continued to claim sales tax exemption in its
18 purchases from Paceco.
19 Additional persuasive evidence of the Port's
20 intention regarding sales is contained in Exhibits
21 124 and 125. Exhibit 124 is a report seeking
22 commission approval of the purchase of the T-5 Cranes
23 with sales tax listed as zero. Exhibit 125 is a
24 slightly later proposal in 1986 with the same
25 treatment.

1 I find that the Port did not pay sales tax because
2 it intended the cranes to be personal property exempt
3 from sales tax in the transaction with Paceco under
4 the resale exemption. I find that the tax listed in
5 both Exhibits 124 and 125 is zero and is the sales
6 tax on the Port's purchase of the cranes. On this
7 record, the only exemption would be the resale
8 exemption. If the Port had intended the cranes to be
9 fixtures, it would have paid tax on the purchase and
10 would have billed tax on the rental. Instead, it did
11 just the opposite. This is persuasive circumstantial
12 evidence that the Port intended that the cranes not
13 be affixed to the land.
14 From those findings of fact I conclude that APL
15 has not shown that the T-5 Cranes were fixtures or
16 that the rent payments for the cranes were exempt
17 from sales tax. The Department has prevailed, and so
18 should prepare findings and conclusions and a
19 judgment consistent with that decision.
20 MR. HANKINS: We will do that, Your Honor.
21 MR. ZALESKY: Yes, sir.
22 THE COURT: Counsel, thank you for your work
23 in this case. I found it to be a fascinating subject
24 matter and an interesting subject, and I appreciated
25 the work of all parties in presenting the matter to

1 me. I will be away, as you know, for a period of
2 three weeks and then will return on the 18th. That
3 will be a crowded calendar -- well, I will return
4 before then, but then the 11th and the 25th are
5 holidays, and so there won't be court on those days
6 and no calendars.
7 So I invite you to note this for presentation. If
8 presentation is necessary sometime in December. If
9 you can submit it to me by agreed language, it can be
10 presented at any time and I will sign it as soon as I
11 return from the vacation.
12 MR. HANKINS: All right.
13 THE COURT: Thank you, gentlemen. We will
14 stand in recess.
15
16 (Conclusion of October 14, 2011, Proceedings.)
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SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF THURSTON

Department No. 2 Hon. Wm. Thomas McPhee, Judge

APL, Plaintiff, vs. DOR, Defendant.	No. 06-2-00198-0 REPORTER'S CERTIFICATE

STATE OF WASHINGTON)
) ss
COUNTY OF THURSTON)

I, Kathryn A. Beehler, Official Reporter of the Superior Court of the State of Washington, in and for the county of Thurston, do hereby certify:

That the foregoing pages, 1 through 21, inclusive, comprise a true and correct transcript of the proceedings held in the above-entitled matter, as designated by Counsel to be included in the transcript, reported by me on the 14th day of October, 2011.

Kathryn A. Beehler, Reporter
C.C.R. No. 2248

APPENDIX B

0-000000232

6

FILED
SUPERIOR COURT
THURSTON COUNTY, WA

2011 SEP 28 PM 4:33

BETTY J. GOULD, CLERK

SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

APL LIMITED, AMERICAN PRESIDENT LINES, LTD.
Plaintiff,

vs.

STATE DEPARTMENT OF REVENUE
Defendant.

NO. 06 2 00198 0

EXHIBIT LIST
(EXLST)

JUDGE THOMAS MCPHEE
Clerk: Steve Shackley
Court Reporter: Kathy Beehler
Date: September 26 - 28, 2011
Type of Hearing: Civil Bench Trial

Offered By	Number of Exhibit	Admitted? Date	Title or Name of Exhibit
Plaintiff	1	Yes 09-26-11	Lease Agreement Between POS and APL
Plaintiff	2	Yes 09-26-11	50-Long Electric Container Crane Manual
Plaintiff	3	Yes 09-26-11	Terminal 5 Phase III Apron Modifications
Plaintiff	4	Yes 09-26-11	Port of Seattle Map of Seaport Terminals
Plaintiff	5	Yes 09-26-11	Page MF-2 of the Port of Seattle Pier and Terminal Facility Plans Schematic
Plaintiff	6	Yes 09-26-11	Diagram of T-5 Crane Design
Plaintiff	7	Yes 09-26-11	Photograph:
Plaintiff	8	Yes 09-26-11	Photograph:
Plaintiff	9	Yes 09-26-11	Photograph:
Plaintiff	10	Yes 09-26-11	Photograph:

Offered By	Number of Exhibit	Admitted? Date	Title or Name of Exhibit
Plaintiff	11	Yes 09-26-11	Photograph:
Plaintiff	12	Yes 09-26-11	Photographs:
Plaintiff	13	Yes 09-26-11	Photograph:
Plaintiff	14	Yes 09-26-11	Photograph:
Plaintiff	15	Yes 09-26-11	Photograph:
Plaintiff	16	Yes 09-26-11	Photograph:
Plaintiff	17	Yes 09-26-11	Photograph:
Plaintiff	18	Yes 09-26-11	Photograph:
Plaintiff	19	Yes 09-26-11	Photograph:
Plaintiff	20	Yes 09-26-11	Photographs:
Plaintiff	21	Yes 09-26-11	Photograph:
Plaintiff	22	Yes 09-26-11	Photograph:
Plaintiff	23	Yes 09-26-11	Photograph:
Plaintiff	24	Yes 09-26-11	Photograph:
Plaintiff	25	Yes 09-26-11	Photograph:
Plaintiff	26	Yes 09-26-11	Photograph:
Plaintiff	27	Yes 09-26-11	Photograph:
Plaintiff	28	Yes 09-26-11	Photograph:

Offered By	Number of Exhibit	Admitted? Date	Title or Name of Exhibit
Plaintiff	29	Yes 09-26-11	Photograph:
Plaintiff	30	Yes 09-26-11	Representative Invoices from Port of Seattle to APL
Plaintiff	31	Yes 09-26-11	Summary of Sales Tax Paid on T-5 Cranes
Plaintiff	32	Yes 09-27-11	*New* Summary of Sales Tax Paid "Invoiced To"
Plaintiff	33	Yes 09-26-11	Container Terminal Development Plan 1991
Plaintiff	34	Yes 09-28-11	E-mail: Linton to Hankins 05-13-11
Plaintiff	35	Yes 09-28-11	Washington State Department of Revenue State Business Records Database Detail
Defendant	101	Yes 09-27-11	Initial Lease between Port of Seattle and American President Lines, Ltd. Dated September 26, 1985
Defendant	102	Yes 09-27-11	First Amendment to Lease between Port of Seattle and American President Lines, Ltd. Dated March 25, 1986
Defendant	103	Yes 09-27-11	Second Amendment to Lease between Port of Seattle and American President Lines, Ltd. Dated August 11, 1987
Defendant	104	Yes 09-27-11	Third Amendment to Lease between Port of Seattle and American President Lines, Ltd. Dated February 27, 1989
Defendant	105	Yes 09-27-11	Fourth Amendment to Lease between Port of Seattle and American President Lines, Ltd. Dated August 8, 1989
Defendant	106	Yes 09-27-11	Fifth Amendment to Lease between Port of Seattle and American President Lines, Ltd. Dated August 11, 1992
Defendant	107	Yes 09-27-11	Sixth Amendment to Lease between Port of Seattle and American President Lines, Ltd and Assignment to Eagle Marine Services, Ltd. Dated

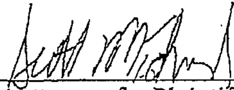
Offered By	Number of Exhibit	Admitted? Date	Title or Name of Exhibit
			June 1, 1994
Defendant	108	Yes 09-27-11	Seventh Amendment to Lease between Port of Seattle and Eagle Marine Service, Ltd. Dated March 29, 1995
Defendant	109		Excerpts from Port of Seattle Container Terminal Development Plan dated October 1991
Defendant	110	Yes 09-27-11	Excerpts from Plaintiffs' Answers and Responses to Defendant's First Set of Interrogatories and Requests for Production. Dated November 21, 2006
Defendant	111	Yes 09-27-11	Plaintiffs' Amended Answers and Responses to Defendant's First Set of Interrogatories and Requests for Production. Dated May 11, 2007
Defendant	112	Yes 09-27-11	Port of Seattle Terminals Tariff No. 4, pp. 110-117
Defendant	113	Yes 09-27-11	Port of Seattle Memorandum, Commission Agenda. Dated December 24, 2003
Defendant	114	Yes 09-27-11	Port of Seattle Resolution No. 3522, dated April 13, 2004, and Port of Seattle Memorandum Commission Agenda pertaining to April 13, 2004 meeting
Defendant	115	Yes 09-27-11	Representative examples of billing statements and invoices from Port of Seattle to American President Lines, Ltd. pertaining to lease of container cranes
Defendant	116		Port of Tacoma Terminals Tariff Schedule No. 2000 Section 2, pp. 34-36, effective November 1, 2003
Defendant	117		Port of Olympia Terminal Tariff Schedule Equipment Rules and Equipment Rates, pp. 45-47, effective January 31, 2003
Defendant	118		Port of Seattle Map of Seaport Terminals and Facilities as of July 24, 2008
Defendant	119		E-mail from Paul Powell to Asher Wilson sent February 26, 2007

Offered By	Number of Exhibit	Admitted? Date	Title or Name of Exhibit
Defendant	120	Yes 09-27-11	Paceco Cranes Summary Sheet and attached progress billing statements pertaining to Port of Seattle cranes 61 through 68
Defendant	121		E-mail string starting April 24, 2008, among Port of Seattle employees, Bob Watson, Linda Nelson, and Asher Wilson
Defendant	122	Yes 09-28-11 (Partially)	E-mail dated April 4, 2003, from Asher Wilson to Tom Tanaka and Sherry Pittman
Defendant	123	Yes 09-28-11	E-mail dated April 19, 2002, from Asher Wilson to Tim Jayne
Defendant	124	Yes 09-27-11	Port of Seattle Commission Agenda dated December 4, 1986
Defendant	125	Yes 09-27-11	Port of Seattle Commission Agenda dated September 24, 1984

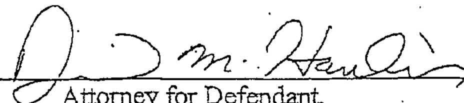
STIPULATION TO EXHIBIT LIST

I have examined the exhibits in the above-entitled case and stipulate the exhibits noted as admitted are acceptable for review by the judge.

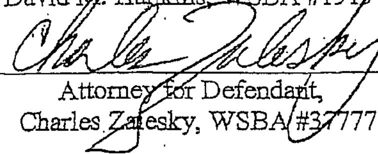
DATED this 28th day of September, 2011.



Attorney for Plaintiffs,
Scott M. Edwards, WSBA #26455



Attorney for Defendant,
David M. Hankins, WSBA #19194



Attorney for Defendant,
Charles Zalesky, WSBA #37777