NO. 86977-4

SUPREME COURT OF THE STATE OF WASHINGTON

APL Limited, American President Lines, Ltd., and Eagle Marine Services, Ltd.,

Appellants,

v.

Washington State Department of Revenue,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Retail sales tax applies to the lease of tangible personal property, but it does not apply to the lease of real property or fixtures. To determine whether property is tangible personal property or a fixture, the courts apply the common-law fixtures test. Under this test, property is a fixture only if there is: (1) actual annexation to the realty, or something appurtenant thereto; (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 accession to the freehold. *See Department of Revenue v. Boeing Co.*, 85 Wn.2d 663, 667, 538 P.2d 505 (1975).

Since the mid-1980s American President Lines, Ltd. ("APL") has leased from the Port of Seattle ("Port") five large container cranes that APL uses to load and unload cargo ships at Port Terminal number 5. The parties to the lease treated the container cranes as tangible personal property. Consistent with that treatment, the Port collected from APL retail sales tax on the lease payments and remitted that retail sales tax to the Department of Revenue. However, after paying retail sales tax on the lease payments for more than 20 years, APL now contends that the container cranes were attached to the Port's terminal facility as *fixtures* and that the Port incorrectly collected retail sales tax on the lease of the cranes.

After a three-day trial, the superior court rejected APL's assertion that the container cranes were fixtures and concluded that APL had properly paid retail sales tax on the lease of those cranes. Overwhelming

evidence supports the trial court's findings of fact. As the trial court correctly found, the cranes were not affixed to the Port's terminal facility, and the Port did not intend the container cranes to be fixtures, but personal property. Moreover, the trial court clearly understood and correctly applied the three-part common-law fixtures test. This Court should affirm the trial court's decision and deny APL's refund claim.

II. COUNTERSTATEMENT OF THE ISSUE

This appeal presents a single issue: Did the trial court correctly determine that the Port-owned container cranes leased to APL were tangible personal property, not fixtures?

III. COUNTERSTATEMENT OF THE CASE

A. APL Leased Container Cranes From The Port.

In September 1985, the Port entered into a 30-year lease with APL for use of a Port-owned terminal facility known as Terminal 5 and for use of Port-owned container cranes to load and offload cargo containers from ships. CP at 199 (Findings of Fact (FOF) 5).[1] That lease agreement has been amended several times since 1985. CP at 200 (FOF 5).

Under the terms of the initial lease agreement, the Port provided to APL four container cranes "more particularly identified as Port designated Crane nos. 61, 62, 63 and 64, or their equal or better." CP at 200 (FOF 7).

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[1] APL has not challenged Findings of Fact 1-12, 14-22, 28, 32, 33, 35, 38, or 39. *See* Br. of Appellants at 3 (Assignments of Error). Those findings, therefore, are verities on appeal. *In re Dependency of MSR*, 174 Wn.2d 1, 9, 271 P.3d 234 (2012). For the superior court's findings of fact APL has challenged, the Department cites evidence in the record supporting those findings of fact. A copy of the superior court's Findings of Fact and Conclusions of Law, and Order is attached as Appendix A.

The initial lease agreement also granted APL the option to lease a fifth crane. *Id.* APL exercised that option in January 1987. *Id.* The fifth Port-owned container crane leased to APL was crane number 68. *Id.*

Port-owned container crane numbers 61, 62, 63, and 64 were installed at Terminal 5 in 1986 and crane number 68 in 1987 or 1988. CP at 200 (FOF 8). All five cranes (the "T5 cranes") have remained at Terminal 5 since they were commissioned. *Id.* The Port moved a sixth container crane, crane number 66, from Terminal 30 to Terminal 5 in 2004 and leased it to APL. CP 201-02 (FOF 19). That sixth crane is not at issue in this appeal because APL has not sought a refund of the retail sales tax it paid to the Port on the lease of crane number 66. RP (Vol. 2) at 212; Ex. 31 at 248; Ex. 32.

B. The T5 Cranes Operate On Wheels That Move Along Crain Rails As Part Of Their Normal Operation.

The T5 cranes (crane numbers 61, 62, 63, 64, and 68) are all Paceco "Portainer" modified A-frame container cranes. CP at 200 (FOF 10). Each is very large, weighing more than 800 tons and standing close to 200 feet tall with the boom lowered and nearly 300 feet tall when the boom is raised. *Id.* They are powered by a dedicated high-voltage electrical substation and are connected to the electrical substation by an electrical cable. *Id.*

The T5 cranes operate on wheels positioned on 100-foot-gauge rails connected to the terminal apron. CP at 200 (FOF 11). The crane rails extend approximately 2900 feet from one end of the Terminal 5 apron

to the other, and the cranes traverse along the length of the rails as part of their normal operation. CP at 200-01 (FOF 11).

Each crane has 28 wheels, 18 on the waterside and 12 on the dockside. RP (Vol. 2) at 149-50. Some of the wheels are motorized and are used to move the crane along the rails. RP (Vol. 2) at 150. Gravity holds the container cranes on the crane rails. CP at 200-01 (FOF 11, 15).

C. To Meet Tenant Needs, The Port Occasionally Moves Its Container Cranes From One Terminal To Another.

Container cranes are movable and can be relocated from one terminal to another. CP at 201 (FOF 18). There has been a history of moving Port-owned container cranes between terminals at the Port to meet tenant needs. *Id.* The relocation of three Port-owned cranes from terminal 30 provides an example. In or around 2002, Terminal 30 ceased activities as a container crane terminal after the tenant ended its lease with the Port and vacated the terminal. RP (Vol. 2) at 242, 270; Ex. 113 at 2. The Port converted Terminal 30 to a cruise-ship terminal. RP (Vol. 2) at 270-71; Ex. 113 at 2. Consequently, the Port and the new tenant had no use for three Paceco 100-foot-gauge cranes that were located at Terminal 30. These three "sister cranes" to the container cranes at Terminal 5 were "backed off of the rails so that they were not on the dock and stored at the terminal." RP (Vol. 2) at 241, 270-71; Ex. 113 at 2. APL and at least one other tenant at the Port asked about leasing the idle "T30" container cranes. The Port agreed and relocated two of the three container cranes from Terminal 30 to Terminal 46, and relocated the other crane (crane

number 66) from Terminal 30 to Terminal 5, where it was leased to APL. CP at 201-02 (FOF 19).[2]

In addition to moving Port-owned container cranes from terminal to terminal, *tenant-owned* container cranes also are moved occasionally to and from the Port facilities. For instance, in 1992, APL relocated one of its container cranes from Oakland, California to Terminal 5 at the Port. CP at 202 (FOF 21). Two years later, APL removed that container crane from Terminal 5 and sold it to Stevedoring Services of America. CP at 202 (FOF 21).

Container cranes can also be moved from port to port. The Port of Seattle has sold several of its container cranes to other ports. CP at 202 (FOF 22). For instance, the Port sold a 50-gauge container crane to the Port of Olympia. CP at 202 (FOF 22). Because these large container cranes can be moved from port to port, there is a domestic and international market for used container cranes. *Id.*

D. More Than 20 Years After It Began Leasing The T5 Cranes From The Port, APL Sought A Refund Of The Retail Sales Tax It Had Paid On The Lease Of The Cranes.

In 2006, after paying retail sales tax on the lease of the T5 cranes for more than 20 years, APL filed a refund action in Thurston County Superior Court seeking a refund of the retail sales taxes it paid from January 1997 through May 2005 on the lease of those cranes. CP at 109

[2] And recently, the Port relocated three container cranes from Terminal 18 and moved them to Terminal 30. RP (Vol. 2) at 264.

(FOF 4).[3] In its complaint, APL alleged that the T5 cranes were attached to the Port's terminal facility as fixtures and that the Port had incorrectly collected retail sales tax on the lease payments. CP at 6.

The Department moved for summary judgment, asserting that the Port had correctly treated its container cranes as tangible personal property, not fixtures. CP at 8, 9. The superior court granted the Department's motion, concluding that the cranes were not actually annexed to the real property as required under the first prong of the common-law fixtures test. CP at 17. The superior court also reasoned that because APL had to satisfy all three prongs of the common-law test, there was no need to decide the "intent" prong. CP at 17. APL appealed. CP at 11, 12.

The Court of Appeals, in an unpublished opinion, reversed the superior court and remanded the case for further proceedings. *See APL Ltd., v. Dep't of Revenue,* No. 63851-3-I, 2010 WL 264992 (Jan. 25, 2010). The Court of Appeals determined that the trial court erred in granting summary judgment after considering only the "annexation" prong. The Court of Appeals reasoned:

> In its oral ruling, the trial court itself recognized that it had not examined the facts regarding the Port's intent to annex these cranes. Because annexation is so intertwined with the intent to annex, one cannot be examined without the other.

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[3] Effective June 1, 1994, APL assigned the lease agreement to Eagle Marine Services, Ltd. Ex. 107 at 8, 9. However, APL continued to pay the Port all amounts owed under the terms of the agreement, including the retail sales tax due on the lease of the T5 cranes. RP (Vol. 2) at 194; Exs. 30, 31, and 115. Consequently, APL has standing to seek a refund of the taxes at issue.

> Like the trial court, we find it difficult to see how [*Department of Revenue v. Boeing Co.*, 85 Wn.2d 663, 538 P.2d 505 (1975)] is not controlling here. This is particularly so because the lease contains language that indicates the cranes are personality rather than fixtures. However, the factual inferences that can be drawn from the evidence presented should be permitted to be argued to the trial court. Because the trial court did not consider these inferences, summary judgment was inappropriate.

APL Ltd., 2010 WL 264992 at *4 (footnote omitted).

After remand, APL filed an additional refund action, seeking a refund of retail sales tax it had paid on the lease payments for the T5 cranes through the end of 2005. CP at 55. The two cases were consolidated for trial. CP at 56. In total, APL sought a refund of $1,456,261 plus interest covering the 1997 through 2005 tax reporting periods. Ex. 32.

E. The Trial Court Held That The T5 Container Cranes Were Not Annexed To The Real Property And That The Port Intended The Container Cranes To Be Tangible Personal Property, Not Fixtures.

After a three-day bench trial, the superior court held that the T5 cranes were personal property, not fixtures. CP at 197-238. The trial court found that the T5 cranes were not annexed to the Terminal 5 facilities and that the Port intended the T5 cranes "to be equipment in inventory (tangible personal property), not fixtures." CP at 201, 203 (FOF 13-23, 26-43).

The trial court found that the lease agreement between the Port and APL contained objective evidence that the Port intended the container cranes to be personal property, not fixtures. CP at 203 (FOF 30); Ex. 101.

The trial court found objective evidence of the Port's intent from other statements and actions that were consistent with treating the cranes as tangible personal property. Specifically, the Port had classified its container cranes as "inventory," in resolutions and other documents, and had not paid any retail sales tax on its purchase of the cranes. CP at 205-06 (FOF 37-43); Ex. 109 at 9, 11, 13; Ex. 33 at 389-97; Ex. 119, 120, 124, 125.[4] Instead of paying sales tax on the purchase of the T5 cranes, the Port collected sales tax on the lease of those cranes to APL. Exs. 30, 31, 115.

The trial court entered an order and judgment denying APL a sales tax refund. CP at 209, 239. APL appealed directly to the Supreme Court. CP at 241.

IV. ARGUMENT

A. Standard Of Review.

After a three-day bench trial, the superior court held that APL was not entitled to a refund of retail sales tax it paid on the lease of the T5 container cranes. On appeal, the reviewing court determines only "whether the trial court's findings of fact are supported by substantial evidence and, if so, whether the findings support the trial court's conclusions of law." *Nordstrom Credit, Inc. v Dep't of Revenue,* 120

[4] The Port would not owe retail sales tax on its purchase of the cranes if they were purchased "for the purpose of resale *as tangible personal property* in the regular course of business without intervening use." RCW 82.04.050(1)(a)(i) (emphasis added). However, if the cranes were purchased for the purpose of being affixed to real property as fixtures, the "purchase for resale" exemption would not apply and the Port would owe retail sales tax on its purchase of the cranes.

Wn.2d 935, 939, 845 P.2d 1331 (1993). APL does not challenge Findings of Fact 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 28, 32, 33, 35, 38, and 39. Br. of Appellants at 3 (Assignments of Error). Those findings, therefore, are verities on appeal. *In re Dependency of MSR,* 174 Wn.2d 1, 9, 271 P.3d 234 (2012).

With respect to each of the findings of fact APL has challenged, it bears the burden of "demonstrating the finding is not supported by substantial evidence." *Nordstrom Credit,* 120 Wn.2d at 940. Substantial evidence is "evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise." *Group Health Co-op. of Puget Sound, Inc., v. Dep't of Revenue*, 106 Wn.2d 391, 397, 722 P.2d 787 (1986).

B. The Trial Court Correctly Determined That The T5 Cranes Leased To APL Were Tangible Personal Property, Not Fixtures.

To determine whether a chattel is tangible personal property or a fixture, our courts apply the common-law fixtures test. *Dep't of Revenue v. Boeing Co.*, 85 Wn.2d 663, 538 P.2d 505 (1975). 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." *Id.* at 667. Each element of this three-part test must be met before an article may properly be considered a fixture. *Id.* at

668. Whether property is a fixture or tangible personal property depends on the particular facts of each case. *Union Elevator & Warehouse Co., Inc. v. State*, 144 Wn. App. 593, 603, 183 P.3d 1097 (2008). Moreover, under the third element, the court examines the intent of the party making the annexation and "when the intent is discovered it is generally controlling." *W.R. Ballard v. Alaska Theater Co.*, 93 Wash. 655, 662, 161 P. 478 (1916).

The trial court applied this common law test. CP at 207 (Con. of Law 3). The Department had conceded the second part of the test before trial. CP at 60; RP (Vol.1) at 19. Consequently, the trial court examined only the first and third parts of the fixtures test.

1. Substantial evidence supports the trial court's findings that the T5 container cranes were not annexed to the realty.

Substantial evidence supports the trial court's findings that the T5 container cranes were not annexed to the realty. Annexation "refers to the act of attaching or affixing personal property to real property." 35A Am. Jur. 2d *Fixtures* § 5 (2012). *See also Black's Law Dictionary* 98 (8th ed. 2004) ("annexation" means "[t]he act of attaching; the state of being attached"). None of the T5 cranes were attached or affixed to Terminal 5. Although each of the container cranes is large and heavy, they operate on 28 wheels and traverse along crane rails as part of their normal operation. CP at 200 (FOF 11); RP (Vol. 2) at 150.

The cranes are held on the crane rails by gravity. CP at 200 (FOF 11, 15). Moreover, container cranes are movable and can be relocated from one terminal to another. CP at 201 (FOF 18). This fact was confirmed at trial by the Port's Director of Seaport Leasing. RP (Vol. 2) at 264 ("Cranes can be moved.") In fact, there has been a history of moving Port-owned container cranes between terminals at the Port to meet tenant needs. CP at 201 (FOF 18). The evidence demonstrates that even though container cranes are large, they are movable and are not actually annexed to the realty.

APL argues that the dedicated electrical cables used to power the T5 cranes conclusively establish that the T5 container cranes were annexed to the realty. Br. of Appellants at 23.[5] APL is mistaken. Connection of the equipment to an electrical substation by an electrical cable is not sufficient to attach the equipment to the Terminal 5 facility. The unchallenged evidence establishes that the T5 cranes operate on wheels and move along rails as part of their normal operation. CP at 200 (FOF 11); RP (Vol. 2) at 149, 150. Moreover, the container cranes can be

[5] To support its argument, APL cites a Board of Tax Appeals decision, *Lincoln Ballinger Ltd. P'ship v. Dep't of Revenue,* No. 51253, 1999 WL 1124058 (Bd. Tax App.1999). Br. of Appellants at 23. The Court of Appeals in *Glen Park Associates, LLC v. Dep't of Revenue*, 119 Wn. App. 481, 492, 82 P.3d 664 (2003), *review denied*, 152 Wn.2d 1016, 101 P.3d 107 (2004) considered this Board decision in its fixtures analysis and rejected it. Additionally, APL ignores two recent decisions from the Board of Tax Appeals in which the Board specifically held that Port-owned container cranes nearly identical to the T5 cranes at issue here were not annexed to the realty. *Hanjin Shipping Ltd., v. Dep't of Revenue,* 2011 WL 823104 (Bd. Tax App. 2011); *Total Terminals Int'l, LLC v. Dep't of Revenue,* 2011 WL 7266153 (Bd. Tax App. 2011). Although both the Hanjin and the Total Terminals cases are being appealed, they demonstrate the Board's view that Port-owned container cranes are not annexed to the Port's terminal facilities.

unplugged and moved from terminal to terminal. The Port actually unplugged and moved container crane number 66 from Terminal 30 to Terminal 5, where it was connected to the same power source as the T5 cranes. CP at 200 (FOF 9, 19).[6] Simply put, the electrical connection of the cranes to the power source does not result in the cranes being attached or affixed to the real property. *Cf. Cherry v. Arthur,* 5 Wash. 787, 788, 32 P. 744 (1893) (a planer that was bolted to the floor and "its only connection with the motive power was by a belt over a pulley wheel" was personal property, not a fixture). None of the cases cited by the Appellants involve equipment such as the T5 cranes that move as part of their normal operation. See Br. of Appellants at 24, n.14.

Substantial evidence supported the trial court's findings that none of the T5 cranes were affixed to Terminal 5. Although each of the container cranes is large and heavy, they operate on 28 wheels and are connected to the crane rails only by gravity and move along the rails as part of their normal operation. Therefore, APL failed to establish the first annexation prong under the common-law fixtures test.

2. Substantial evidence supports the trial court's finding that the Port intended the T5 cranes to be personal property, not fixtures.

After finding that the container cranes were not actually annexed to the realty as required under the first prong of the common-law test, the

[6] APL has not argued that crane number 66 is annexed to the Terminal 5 facilities even though it is connected by electric cable to the same substation as the T5 cranes.

trial court found that the Port intended to treat the T5 container cranes as personal property, not as fixtures. CP at 203 (FOF 26-43).

a. Intent is the most important factor in determining whether an item is tangible personal property or a fixture.

In determining whether an item becomes a fixture, "the cardinal inquiry is into the intent of [the person] making the annexation." *W.R. Ballard v. Alaska Theater Co.*, 93 Wash. 655, 662, 161 P. 478 (1916). And "when the intent is discovered it is generally controlling." *Id.* Intent is determined from the surrounding circumstances at the time of installation, and "all pertinent factors reasonably bearing on the intent of the annexor should be considered in assessing the intent at the time of annexation." *Department of Revenue v. Boeing Co.*, 85 Wn.2d 663, 668, 538 P.2d 505 (1975)

b. To determine the Port's intent, the trial court analyzed the factors identified in *Boeing*.

To determine the Port's intention, the trial court followed the factors identified in *Boeing*. CP at 203 (FOF 23). *Boeing* involved "immense tools" known as "fixed assembly jigs" that were used in manufacturing and assembling the Boeing 747. *Boeing* at 664. The jigs were bolted to the floor and weighed between 70 and 120 tons. *Id.* The jigs could be removed from the building without injuring the building and, over time, they had been moved from plant to plant. *Id.* at 665. Boeing argued the jigs were fixtures and therefore eligible for a manufacturing tax credit. *Id.* at 664. The Department asserted that the jigs were equipment,

i.e. tangible personal property and ineligible for the tax credit. *Id.* The Department conceded the first element of the common-law fixtures test. *Id.* at 667-68, n.3.[7] The court only examined the intent element.

In determining Boeing's intent, the Supreme Court considered five factors: (1) the feasibility of using the premises for a different purpose "in which case the present jigs would have to be discarded and new ones brought into the plant," (2) the manner in which the jigs were secured to the floor, (3) the feasibility of disassembling and moving the jigs "without undue difficulty or harm to the jigs," (4) whether Boeing considered the jigs to be personal property, and (5) "documentary" evidence that Boeing distinguished the jigs from fixtures. *Id.* at 669-70. While none of those factors was, by itself, determinative of Boeing's intent, taken together the totality of the circumstances indicated that Boeing had not intended the jigs to be a permanent accession to the freehold. *Id.* at 670-71. Those same five factors discussed in *Boeing* are also present here.

First, it was certainly feasible for the Port to use Terminal 5 for a different purpose, such as a cruise ship terminal or a "post-Panamax" container terminal. RP (Vol. 2) at 270-71. For example, in 2002 or 2003, Terminal 30 ceased activities as a container crane terminal after the tenant ended its lease and the Port converted Terminal 30 to a cruise ship terminal. RP (Vol. 2) at 242, 270-71; Ex. 113 at 2. When Terminal 30

[7] The Department did not concede the second element, but the Court did not address the Department's "application" argument because it determined that Boeing lacked the requisite intent to make a permanent annexation to the land. *Id.* at 668 n.3.

was converted to a cruise ship terminal, the Port removed three "T30" cranes from the rails and moved them to the back of the terminal where they sat idle. RP (Vol. 2) at 270-71; Ex. 113 at 2. A couple of years later, two of the Port's tenants including APL requested the use of these idle container cranes and one was moved to Terminal 5 and two to Terminal 46. *Id.* Although Terminal 5 premises have not been used for a different purpose since 1985, it is certainly feasible for the Port to convert Terminal 5 for other purposes like it did at Terminal 30. Consequently, the T5 cranes were no more "permanent" than the jigs at issue in *Boeing*.

Second, the T5 cranes were not bolted or otherwise fastened to the premises and could be removed without harming the wharf. Rather, they are secured to the crane rails only by gravity. CP at 202, (FOF 20) RP (Vol.2) at 152, 271; Ex.113 at 2. Like the jigs in *Boeing*, this is "indicative of an intent that they be easily removable upon any changes in the current program." *Boeing*, 85 Wn.2d at 669.

Third, the T5 cranes could be disassembled and reassembled, and could be moved without undue difficulty or harm. CP at 202, RP (Vol.2) at 152, 271; Ex.113 at 2. In 1999, to meet APL's business needs, the Port modified two of the T5 cranes by increasing their height by 20 feet and repositioning one of the modified cranes on the Terminal 5 crane rails. RP (Vol. 2) at 137, 141-43. To accomplish this, the Port modified the container crane and then moved the container crane onto temporary rails perpendicular to the Terminal 5 crane rails. CP at 202 (FOF 20). This allowed the crane to be moved back, away from the working rails, and

allowed two other cranes to move past the modified container crane to be repositioned on the crane rails. CP at 202 (FOF 20). Once the two container cranes moved past the modified crane, the modified crane was moved back to the rails. RP (Vol. 2) at 143. Paraphrasing the Supreme Court in *Boeing*, the T5 cranes were "designed in such a manner that they [could] be disassembled and moved in or out of the" terminal facility. *Boeing*, 85 Wn.2d at 669. This undercuts APL's claim that the Port intended the cranes to be a permanent part of the realty "when they can be so readily moved . . . and thus transformed back into personalty." *Id.*

The fourth and fifth factors discussed in *Boeing* about how the owner considers the property to be personal property and documentary evidence from the owner regarding the item are also present here. As discussed below, there is ample "documentary" evidence in the record establishing that the Port considered the T5 cranes to be personal property and distinguishing the cranes from fixtures.

(1) The lease agreement demonstrates the Port considered the container cranes to be tangible personal property, not fixtures.

The lease agreement contains direct evidence that the Port intended the container cranes to be personal property, not fixtures. CP at 203 (FOF 30). Section (1)(a) of the initial lease between the parties described "the Premises" as consisting of approximately 77 acres of land and "improvements" thereto. CP at 203 (FOF 30); Ex. 101 at 3. The improvements covered under this section of the lease "are fully described

on Exhibit B" to the initial lease. The improvements described in Exhibit B do not include container cranes. CP at 203 (FOF 30), Ex. 101 at 32-37.

Section 1(d) of the lease addressed the container cranes separately from the sections of the lease describing the premises and improvements. CP at 204 (FOF 32). The initial lease provided that APL would have preferential use on a non-continuous ship-by-ship basis of four Port-owned container cranes. *Id.* Notably, the use of the container cranes permitted under section 1(d) of the lease is different from the use of the "Premises" permitted under section (1)(a). *Id.* The Premises are leased without the use restriction, except for the rails which support the container cranes. *Id.*

Section 3(a) of the initial lease provided terms relating to "Rent" payments. That section identified three different payments that APL agreed to pay: "rentals, Crane use charges and amortization charges for certain improvements to the premises." CP at 205 (FOF 34); Ex. 101 at 40. The amounts due as crane use charges are specified in Exhibit C to the lease, which identifies the payments as "equipment rental." *Id.* 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 that the Port considered the container cranes to be personal property, not fixtures. CP at 204-05 (FOF 34); Ex. 101 at 7.

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." CP at 205 (FOF 35). The improvements to the lease are described in Exhibit B and do not refer to container cranes. *Id.*

Like the initial lease, the subsequent leases continued to reflect that the Port considered the container cranes to be separate from the leased premises. CP at 205 (FOF 37); Ex. 103 at 6, 7; Ex.105 at 9; Ex. 106 at 12; Ex. 107 at 22, 26. The overwhelming objective evidence contained in the body of the initial lease agreement and the amended lease agreements supports the trial court's finding that the Port did not intend the container cranes to be fixtures.

(2) The Port's long-term strategy documents demonstrate that the Port considered container cranes to be personal property, not fixtures.

In addition to the lease agreements, the Port's intent to treat container cranes as tangible personal property is reflected in two documents setting out the Port's long-range plans for its terminal facilities: the Harbor Development Strategy and the Container Terminal Development Plan. CP at 205 (FOF 38, 39); Ex. 33; Ex. 109.

Both the Harbor Development Strategy and the Container Terminal Development Plan demonstrate that the Port considered its real property separate and apart from its inventory of container cranes that it leased to tenants. CP at 206 (FOF 40); Ex. 33 at 388-97; Ex. 109 at 9, 10, 11, 13.

For example, in the Container Terminal Development Plan, the Port separately identified the financial considerations necessary for capital improvements to its real property and to purchase container cranes. Ex. 109 at 9. It classified container cranes as "inventory" and assessed the needs of upgrading and purchasing container cranes. Ex. 109 at 12. It did not describe its terminals as inventory. Additionally, as part of its plan for container development, it drafted a "Container Crane Modernization and Replacement Program." Ex. 109 at 13. It evaluated the container cranes separate and apart from the realty and described the cranes as "inventory." Evidence demonstrating that the Port treated container cranes separately as personal property from its realty.

(3) The Port's tax treatment of its container cranes demonstrates it considered them as personal property, not fixtures.

Retail sales tax applies to the lease of tangible personal property, but it does not apply to the lease of real property or fixtures. RCW 82.08.020(1)(a);82.04.050(4)(a). *See Glen Park*, 119 Wn. App. at 483-84, n.1. APL, as a party to the lease agreement with the Port, was well-aware that the Port was collecting sales tax on the lease of the container cranes. Testimony from Mr. Mark Johnson, controller for the Pacific Northwest region of APL, established that the Port collected retail sales tax on the lease of all container cranes and that the Port had always collected the tax on the lease of its container cranes:

> Q (by Mr. Zalesky): [A]nd you're personally aware the Port of Seattle is charging Eagle Marine or American President Lines sales tax on the lease of these container cranes?
>
> A (by Mr. Johnson): Yes.
>
> . . .
>
> A: Every crane invoice in the Port of Seattle has sales tax on it.
>
> Q: And as far as you know, has that always been the case?
>
> A: Yes, as far as my time working there and my review of the invoices in this case.

RP (Vol. 2) at 194.

The testimony of Mr. Johnson is supported by objective evidence in the record. The Port publishes a "Terminals Tariff" that governs the rates, charges and rules and regulations for services performed by the Port.[8] *See* Ex. 112 at 2-5. In the section of the Tariff that outlines charges for "Equipment Rental" one of the conditions for "Equipment Rental" was collection of sales tax. The Tariff provided, "(G) Sales/Use Tax Equipment rental rates and sale of materials are subject to applicable state sales/use tax." Ex. 112 at 4. The corresponding invoices from the Port to APL indicate that the charges for the container cranes were "calculated" per Tariff No. 4. See Ex. 115 at 12-14. The Port charged APL rates for the use of the container cranes as equipment rental and pursuant to its published Terminal Tariff on rental of equipment, the Port collected sales tax. The evidence shows not only the intent of the Port, but also shows

[8] The Terminal Tariff is incorporated in the lease agreements with APL for crane use charges. *See* Ex. 101 at 4; Ex. 103 at 2; Ex. 106 at 12.

under the common law fixtures test APL was fully aware of, and acted in accord with the Port's objective intent.

It is also significant that the Port did not pay sales tax when it purchased the container cranes. RCW 82.04.050(1)(a)(i) establishes the "purchase for resale" exemption and provides that items purchased "for the purpose of resale *as tangible personal property* in the regular course of business without intervening use" do not qualify as a retail sale (emphasis added). Based on the evidence, the trial court found that "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). CP at 206 (FOF 42); Ex. 120 at 2-45; Ex. 122; Ex. 123; Ex. 124; Ex.125. Instead, the Port charged sales tax on the lease of the cranes. This course of dealing amply and objectively demonstrates that the Port intended its container cranes, including the T5 cranes, to be tangible personal property. As summarized by the trial court:

> [I]f the Port had intended the cranes to be fixtures, it 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.

CP at 206-07 (FOF 43); Exs. 124 & 125.

c. After considering all the relevant evidence, the trial court correctly concluded that the Port intended the T5 cranes to be tangible personal property.

Applying the factors outlined in *Boeing*, the trial court determined from the evidence that the Port intended the T5 cranes to be personal property. CP at 203 (FOF 27). Specifically, the trial court found that "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." *Id.* There is ample evidence supporting this finding. *See* FOF 28-43. Consequently, APL cannot meet its burden of demonstrating that the trial court's finding of intent is erroneous. Moreover, as explained in *W.R. Ballard v. Alaska Theater Co.*, 93 Wash. 655, 662, 161 P. 478 (1916), "when the intent is discovered it is generally controlling."

Substantial objective evidence supports the trial court's finding of fact that the Port intended the T5 cranes to be tangible personal property, not fixtures. APL's arguments to the contrary are not sufficient to reverse the trial court's judgment. *Cf. Philadelphia Mortg. & Trust Co. v. Miller*, 20 Wash. 607, 610, 56 P. 382 (1899) (on appeal from a jury finding that several items of disputed property were personal property, not fixtures, "we would be loth to disturb their findings, unless we were compelled to say that, as a matter of law, the property sued for was a part of the realty."). APL essentially asks this Court to re-weigh the evidence and come to a different conclusion. But appellate courts will not disturb a trial

court's findings of fact, if supported by substantial evidence, even if there is conflicting evidence. *Eg., McCleary v. State*, 173 Wn.2d 477, 514, 269 P.3d 227 (2012).

C. APL's Criticisms Of The Trial Court's Decision Are Unfounded.

1. The trial court properly rejected APL's overly broad "constructive annexation" argument.

In applying the first prong of the fixtures test, the trial court required APL to show "actual annexation to the realty, or something appurtenant thereto" as stated in *Boeing*. CP at 207-08 (Concl. of Law. 3, 4, 5 & 6). APL argues that it proved "constructive annexation" and therefore met the first prong of the test. Br. of Appellants at 13, 15.

Citing *Chase v. Tacoma Box Co.*, 11 Wash 377, 381, 39 P. 639 (1895), and *Western Ag. Land Partners v. Dep't of Revenue,* 43 Wn. App. 167, 716 P.2d 310 (1986), APL argues that the trial court had to 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.'" Br. of Appellants at 13, 15. APL misapplies the common-law fixtures test. The court in *Chase* stated that adaptability alone does not result in machinery or equipment becoming a fixture:

> We do not think that mere adaptability of machinery to use in the business which happens to be conducted upon the realty is of itself enough to give the character of realty to the machinery. To constitute machinery and apparatus fixtures, it is not alone sufficient that they be placed in the shop or factory with the intent that they should remain there

> for permanent use, but the intent must be to make them a permanent accession to the freehold.

Id. at 385.[9]

Chase does not support APL's argument that the use of the container cranes at the terminal results in annexation, actual or constructive. The trial court properly found that under the "annexation" prong of the common-law test, the container cranes were not annexed to the realty.

Citing *Western* Ag. APL also argues, that the trial court, should have considered the "use and purposes of the realty" in determining annexation. Br. of Appellants at 15. In *Western Ag.* Division III of the Court of Appeals considered whether a center pivot irrigation systems was a fixture or personal property. Each of the irrigation systems consisted of an underground pipe that conveyed water to a riser pipe bolted onto a concrete slab. The riser pipe connected to the main arm of the system that delivered the water to the sprinkler heads. *Western Ag.*, 43 Wn. App. at 168-69. The main arm of the irrigation system rested on several wheeled towers 8 to 10 feet high. The wheeled towers were operated by electric motors that kept the main arm of the system in line as it circled around the center riser pipe. *Id.* at 169.

The court in *Western Ag.* concluded that the center pivot irrigation system was annexed to the real property. *Id.* at 172-73. The Court stated that "[t]he first prong, annexation, is often considered in light of the actual

[9] The Court in *Chase* held that the machinery in question was personal property, not a fixture. *Id.* at 378, 386.

relationship of the object to the realty—whether the article is 'in use as an essential part' of the overall use of the property." *Id.* at 172 (quoting *Courtright Cattle Co. v. Dolsen Co.*, 94 Wn.2d 645, 657, 619 P.2d 344 (1980)). In addition, the court in *Western Ag.* stated that "a fixture may be constructively annexed to the real property . . . [if] it is specially fabricated for installation or [if] it is a necessary functioning part of or accessory to an object which is a fixture." *Id.* In concluding the center pivot irrigation was constructively annexed, the court stated:

> The main arm is an integral part of the irrigation system, which includes the concrete center pivot and underground waterlines, both being actually annexed to the property. The irrigation system, in turn, is also an indispensable addition since the normal use of the semiarid farmland requires additional watering. Further, the record indicates the CPIS were specifically adapted to the particular farmland, commensurate with the size and topography of the land.

Id. at 172-73.

Western Ag. does not support APL's claim that the T5 cranes were annexed to the Terminal 5 facility. First, the court in *Western Ag.* found that the center pivot irrigation system was actually annexed to the farmland through its attachment to the concrete center pivot as well as its connection to underground waterlines. By contrast, the superior court in this case found that the container cranes were not actually annexed to the realty. CP at 202.

Second, it appears that the Court of Appeals in *Western Ag.* relied upon the facts that the land was semiarid and the irrigation system was specifically adapted to the farmland making it "indispensable." Unlike the semiarid farmland that requires additional watering, the terminals at the Port can be adapted and used for purposes other than as cargo container terminals. For example, in 2002 or 2003, the Port converted Terminal 30 from a container terminal facility to a cruise ship terminal. RP (Vol. 2) at 270-71; Ex. 113 at 2. The Port's Director of Seaport Leasing testified that the Port was investigating ways in which it could diversify its operations. Diversifying the Port's business activities was beneficial because the Port had become too dependent on container cargo business:

> Q (Scott Edwards): The expectation, even when Terminal 30 was converted to a cruise terminal, was that it--on the--in a long-term basis, its highest and best use would be as a container terminal?
>
> A (Michael Burke): I wouldn't necessarily say that was a definitive strategy of the Port at that time. We were really investigating how we could diversify our business model, because we felt we were too dependent on the container cargo business and subject to those downturns. . . So we didn't really have a specific strategic direction for Terminal 30 or 25, beyond that interim container --or-- and cruise terminal that we built in there.

RP (Vol. 3) at 291-92.

The fact that the Port's terminal could be adapted for different uses, makes the circumstances of this fixture case materially different from the circumstances the court in *Western Ag.* relied on.

As Division III more recently observed, "determining what constitutes a fixture as opposed to personal property is a difficult task that depends on the particular facts of each case." *Union Elevator & Warehouse Co. v. Dep't of Transp.*, 144 Wn. App. 593, 603, 183 P.3d 1097 (2008). Because fixtures cases are extremely fact-specific, Division III in *Western Ag.* did not intend to mandate a particular "standard" that must always be employed when considering whether property is annexed to the realty. When *Western Ag.* is read in context, it is clear that Division III did not hold that Washington law requires consideration of the use or adaptation of the property when determining if that property is actually annexed to the realty.

Even if *Western Ag.* could have been interpreted so requiring consideration of the use or adaptation of the property, Division III in *Union Elevator* has implicitly abandoned any such inflexible and rigid approach. The court in *Union Elevator* clearly used an approach different than that advocated by APL in this appeal:

> The DOT focuses on the second and third prongs, correctly noting that the equipment at issue was crucial to the operation of the grain elevator, and indicative of Union Elevator's intent to permanently affix the equipment to the elevator. But the fact that an item is essential to the use or function of a building is not dispositive of whether it was intended to be a permanent part of the realty.

144 Wn. App at 605 (emphasis added).

The trial court did not err when it applied the actual annexation standard of the common-law fixtures test enunciated in *Boeing* to the unique set of facts before it. Even if the container cranes were considered constructively annexed to the realty, APL fails to meet its burden because the Port intended the container cranes to be personal property, not fixtures.

2. The trial court properly rejected APL's argument that the "presumption of intent" should control over the actual evidence of the Port's intent.

Applying the facts to the common-law fixtures test, the trial court properly concluded that the Port intended the T5 container cranes to remain tangible personal property, not fixtures. CP at 207-08. APL first attacks the trial court's conclusion that the T5 container cranes were not annexed. Br. of Appellants at 24. APL then argues that the trial court should have presumed that the Port intended the container cranes to be fixtures. Br. of Appellants at 24-25. But that presumption is rebuttable. *Boeing*, 85 Wn.2d at 669; *Ballard*, 93 Wash. at 663. At most, it only shifts the burden of producing evidence to rebut the presumed fact. *See* Karl B. Tegland, Wash. Prac., *Evidence Law and Prac.* § 301.14. The only purpose of a presumption is "to establish which party has the burden of going forward with evidence on an issue." *Taufen v. Estate of Kirpes*, 155 Wn. App. 598, 604, 230 P.3d 199 (2010). Under the so-called "Thayer theory," once evidence contrary to the presumed fact is presented, "the presumption disappears like a 'bursting bubble' and no longer

operates for any purpose." The party relying on the presumption "must then carry on without it." Tegland, *supra* at § 301.14 (footnote omitted).

Moreover, by shifting the burden to the Department, APL's "presumption argument" conflicts with the statutory framework established for a taxpayer seeking a refund. *See* RCW 82.32.180 ("At trial, the burden shall rest upon the taxpayer to prove that the tax as paid by the taxpayer is incorrect, either in whole or in part, and to establish the correct amount of the tax.)

In the present case, the Department offered ample evidence to rebut the alleged presumption that the Port intended its container cranes to be fixtures. Not only did the lease agreement specifically treat the cranes as "equipment" separate and apart from the "premises" and "improvements," but the Port's tax treatment of the cranes (both at the time of the Port's purchase and the subsequent lease to APL) and other objective evidence in the record establishes that the Port intended its cranes to be personal property. Thus, regardless of whether the presumption applied to shift the burden of going forward with evidence, that presumption disappeared in the light of the actual evidence. *Taufen*, 155 Wn. App. at 604. *See also In re Indian Trail Trunk Sewer*, 35 Wn. App. 840, 843, 670 P.2d 675 (1983) ("Presumptions are the bats of the law flitting in the twilight but disappearing in the sunshine of actual facts.") (Internal quotation and citation omitted.)

V. CONCLUSION

After a three-day trial, the trial court properly found and concluded that container cranes that traverse along rails on 28 wheels as part of their normal operation are not attached to the realty. More importantly, the trial court properly found and concluded that the best objective evidence to demonstrate the Port's intent was the lease agreements between APL and the Port. The overwhelming evidence shows that the Port intended the container cranes to be equipment, not as part of the premises, and collected sales tax on the lease payments for more than 20 years. The trial court's judgment should be affirmed and its findings and conclusions should not be disturbed on appeal. APL's refund claim for sales tax should be denied.

RESPECTFULLY SUBMITTED this 24th day of October, 2012.

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CERTIFICATE OF SERVICE

I certify that I served a true and correct copy of the BRIEF OF RESPONDENT via electronic mail on the following:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 24th day of October, 2012, at Tumwater, WA.

Julie Johnson, Legal Assistant

☐ 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.	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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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 6th of January 2012.

THOMAS McPHEE

JUDGE Wm. THOMAS MCPHEE

Presented by:

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Attorney General

DAVID M. HANKINS, WSBA No. 19194
Senior Counsel,
CHARLES ZALESKY, WSBA No. 37777
Assistant Attorney General
Attorneys for Defendant

Notice of Presentation Waived
Approved as to form:

LANE POWELL, PC

SCOTT EDWARDS, WSBA No. 26455
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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
2000 Lakeridge Drive S.W.
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October 14, 2011 Olympia, Washington

MORNING SESSION

Department 2 Hon. Thomas McPhee, Presiding

Kathryn A. Beehler, Official Reporter

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THE COURT: Please be seated. Good afternoon, ladies and gentlemen.

MR. HANKINS: Good afternoon, Your Honor.

MR. EDWARDS: Good afternoon, Your Honor.

THE COURT: Here is my decision in this case: This is a refund claim based on APL's contention that no sales tax is due on the T-5 Cranes because they are fixtures. The burden is on the taxpayer who must prove annexation, adaptation, and intent to make a permanent accession to the freehold. Proof of annexation by the owner of the freehold may raise a presumption that the freeholder intended the item annexed to be a fixture.

I conclude that *Department of Revenue v. Boeing*, at 85 Wn. 2d 663, is controlling authority. A close reading of the case demonstrates the uncomfortable fit between annexation and intent as elements of the decision to be made here where the item is massive and the question of whether or not the massive item is annexed to the freehold depends ultimately on the

intent of the owner. In the first appearance of this case before the Court of Appeals, that court concluded in relevant part, "We find it difficult to see how *Boeing* is not controlling here." *Boeing* concluded that the massive item, the 747 jig, was not a fixture because Boeing did not intend it to be a fixture and manifested that intent in a number of ways. The Supreme Court applied a totality of the circumstances test, finding evidence of intent from surrounding circumstances.

In California a different result was reached, notable here because the massive items were cranes very similar to the T-5 Cranes. In *Sealand v. County of Alameda*, the California court determined that the cranes were fixtures, adopting many of the same arguments that APL advances here.

I conclude that the decision in *Sealand* is not persuasive authority in this case. The reasoning adopted by the court there is not the law of Washington. In *Sealand* the California court identifies three elements for determining fixtures under common law, elevates the intent element to primacy, and recognizes the doctrine of constructive annexation. All of that comports with Washington law.

But in *Sealand* the court does not discuss any direct or circumstantial evidence of Sealand's intention when installing the cranes. Instead it does a lengthy analysis of the extent to which the cranes are adapted to the function of the freehold, as evidence of annexation.

"The adaptability test lends further support to the trial court's holding that the cranes at issue were intended to be permanent installations rather than movable personal property. As pointed out by legal authorities, the most favored indicia of implied intention of permanence of annexation are the various circumstances surrounding the use of the property. The question most frequently asked is whether the real property is peculiarly valuable in use because of the continued presence of the annexed property thereon. Thus, it has been said that an object placed on the realty may become a fixture if it is a necessary or at least a useful adjunct to the realty, considering the purposes to which the latter is devoted. This principle variously referred to as the 'adaptability test' or the 'institution doctrine' is often given great weight in determining whether a

particular object has assumed the status of fixture."

That's quoting from the case of *Seatrain Terminals of California, Inc., v. County of Alameda*, 83 Cal. App. 3d 69, at page 76.

This approach was specifically rejected by Division 2 in *Glen Park Associates v. The Department of Revenue*. In that case Division 2 declined to follow the decision in *Western Agricultural Land Associates v. The Department of Revenue* and observed,

"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."

That is citing the case of *Glen Park Associates v. The Department of Revenue*, 119 Wn. App. 481 at 489.

So I mentioned there at the beginning there is this uncomfortable fit between intent and annexation as two of the three elements for determining a fixture. It is uncomfortable in this respect: Intent is the most important element; and in this case involving massive cranes, the evidence of intent to make a permanent accession to the freehold, in other words, to annex, would seemingly be the same evidence used to determine annexation. But APL seems

to argue that I must determine annexation first, without determining intent, because annexation would create a presumption that the Port intended to annex the cranes.

Perhaps this ambiguity in the relationship between the two elements of fixture is the reason why the Supreme Court used the phrase "arguably presumed" in *The Department of Revenue v. Boeing*. In any event, I decline to apply the presumption here. The presumption works where the evidence of annexation is clear and the issue is whether the owner intended that clear result. But where annexation is not clear without resort to examining what the owner intended, application of the presumption serves no useful purpose.

In *Boeing* the Supreme Court specifically identified three areas of evidence for objective manifestations of Boeing's intent.

First, was the item easily removable. I can't think of a more relative term in this context than "easily removable." In *Glen Park Associates*, "easily removable" was quantified in minutes - less than ten minutes. In *Boeing*, I can't imagine that time for moving would be other than days or possibly weeks where the project was to move one of these

massive jigs. But the Supreme Court went further. It identified the facts that the jigs, although secured to the floor, were not secured in a permanent manner, and that the jigs could be disassembled without undue difficulty or harm to the jig as important factors in determining the ease of moving. These are obviously important considerations in this case, as well.

Second, in *Boeing* the Supreme Court identified Boeing's tax treatment of the jigs as an important fact to consider. This factor is directly applicable to this case.

Third, the Supreme Court identified Boeing's categorization of the jigs in its code chart manual as important evidence. In the decision, the court observed,

"Finally Boeing's own code chart manual categorizes the equipment and distinguishes between fixtures and other 'tools.' The jigs are not listed along with the other equipment that Boeing considers to be fixtures. Instead, the jigs are referred to as 'tools.' While Boeing's categorization of its equipment certainly is not conclusive as to what is and is not a fixture, the reference to the jigs as 'tools' and not as fixtures is hardly indicative of

an intent for the jigs to be a permanent part of the realty. If Boeing had intended for the jigs to be a permanent accession to the freehold, it seems more likely that they would have been listed with the rest of the fixtures."

In the present case, the categorization is in the Lease Agreement and the attached exhibits. The categories are more equivocal here than in *Boeing*, but here there were two parties with adverse interests that were affected by the categorization, and both signed off on it.

From that discussion of the factors identified in *Boeing* as important to this case, I make the following findings of fact:

First, regarding the physical characteristics of the cranes, these are very large items of equipment. 100 gauge post-Panamax cranes. The height and weight is in evidence, and there should be findings of fact entered on these characteristics.

Second, as an essential element of the adaptation of each crane to the work performed at Terminal 5, the cranes move on tracks along the dock, and the trolley moves in and out, over the dock and over the docked ship, and the hoist moves up and down. None of these movements are material to a fixtures

analysis.

Third, these 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.

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

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

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

for about two years and then moved it out. Two of the original T-5 Cranes were moved back from the dock for modifications and shifting of positions in an exercise that caused them to be moved back off their tracks away from the water and then back onto their tracks at the water. Three Port owned post-Panamax cranes were moved from Terminal 30; two were moved to terminal 46; one was moved to Terminal 5.

Seventh, in the development of its terminals, the Port has both supplied cranes and permitted tenants to bring in their own cranes. Examples are at Terminal 5 and the SSA cranes at Terminal 30.

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

These findings, all related to the element of annexation, and viewed as a whole but without consideration of the Port's intention, support a conclusion that the T-5 Cranes were not annexed to the property. But the question is a close one, and coupled with evidence of the Port's intention to

annex the cranes to Terminal 5, would support that conclusion, as well.

The conclusion about the annexation element ultimately depends on the intention of the Port. To determine this intention, I follow the considerations identified in *Department of Revenue v. Boeing*.

First was the moveability of the cranes. As addressed above, I find these cranes are movable and have been moved.

Second, I address the factor identified in *Boeing* as documented categorization. Here the evidence is in two places, the Lease and the Port's policy statements.

In the lease at section 1(a), the lease is of the premises, which is identified as 77 acres of land and improvements. The provisions identify improvements covered by this section as "all of which improvements are fully described on Exhibit B."

Section 1(d) of the lease addresses the cranes in a different section than the premises and improvements. There the lease promises preferential use on a non-continuous ship-by-ship basis, in no event to exceed five consecutive days of four port-owned container cranes.

I find that this use described in section 1(d) is

different than described in section 1(a). There the premises are leased without the use restriction, except the rails which support the cranes. They have the same use restriction as are found for the cranes in section 1(d).

I note also that APL argued that it was these four cranes and only these four cranes that are the subject of the lease, that they could not legally be moved during the term of the lease. I don't find that accurate. Section 1(d) permits different cranes, using the phrase, "or their equal or better."

Section 3(a) of the lease relates to rent and identifies three different payments that APL covenants to pay. First are the rentals; second, the crane use charges; and third, amortization charges for certain improvements to the premises.

In section 7(a) is another example of separation of the cranes from improvements. The language there is,

"Before 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."

Exhibit B to the Lease is where the improvements are described. They are described there in three

categories related to amortization. In Part I the improvements described there are not amortized. In Part II the improvements described there are amortized, and the costs recovered over the term of the lease. In Part III, the improvements are amortized but not paid for unless APL leaves early, and then payment is due for those improvements on 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, reefer receptacles to name a few.

Section 9 A(a) of the lease then provides,

"All improvements identified on 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."

Here is an unmistakable declaration that the improvements listed in Exhibit B are fixtures.

I find that the terms of the lease show that the Port treated the cranes as equipment, not affixed to the leasehold. The distinction between the cranes and the other improvements, including equipment that was affixed to the leasehold include identification,

rent, and treatment at the end of the lease.

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

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

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

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

And it goes on to list in No. 4 of the list,

"Responding to industry trends such as asset

sharing and the need for maximum flexibility."

The CTD Plan explained its relationship to the HDS, developed at the time of the lease:

"At the conclusion of the HDS process, the advisory committee unanimously recommended Port Commission adoption of the final HDS draft. This plan carried forward the HDS policy directives and findings."

T-5 is part of the area encompassed by both HDS and CTD plans. In 1991 the container terminal area at the Port was 345 acres. It included 40 acres added by the expansion in 1985 and 1986. Both plans envisioned substantial expansion of the container terminal area over time, with an additional 235 acres predicted by the year 2000.

The CTD Plan included a Proposed Container Crane Program. It provides, in relevant part,

"A financial model was prepared which examined the crane inventory on a crane-by-crane basis. 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."

After a close reading of all relevant parts of both these documents and considering the totality of that information, I find support for the Department's contention that the Port intended the T-5 Cranes to be equipment in inventory, not fixtures. I find no support for APL's contention that the Port intended the T-5 Cranes to be fixtures.

I would note here, however, that the evidence is not all one sided. Clearly APL offered important evidence from Mr. Dwyer, the Port's executive director at the time. He was credible, but he was testifying from memory of events 26 years ago. Where his recollections are directly refuted by the Lease, as for example, the right of the Port to change out the cranes, I attribute those differences to his focus on his two primary concerns: That the port recover its costs for this investment, and that APL be there for a 30-year term. Those concerns are not inimical to the status of the cranes as either personal property or fixture.

Third, I address the factor identified in *Boeing* as Boeing's tax treatment. Exhibit C to the Lease is important evidence in this regard. This is the

equipment rental schedule for four cranes. No. 64 is scheduled as Tariff 3. And it includes there successors and reissues of Tariff 3.

Throughout the Port billed APL for crane rental and billed a separate sales tax as a separate item; and APL paid that sales tax. It is not disputed that the Port remitted those amounts to the Department of Revenue.

In purchasing the cranes, the Port did not pay sales tax. The Department of Revenue contends the reason for nonpayment was the resale exemption; APL suggested that it was because Paceco was not licensed and therefore would not owe that tax, that the Port would not have to pay at the time of transaction. But that contention is not persuasive. The exhibits show that after Paceco became licensed, the Port continued to claim sales tax exemption in its purchases from Paceco.

Additional persuasive evidence of the Port's intention regarding sales is contained in Exhibits 124 and 125. Exhibit 124 is a report seeking commission approval of the purchase of the T-5 Cranes with sales tax listed as zero. Exhibit 125 is a slightly later proposal in 1986 with the same treatment.

I find that the Port did not pay sales tax because it intended the cranes to be personal property exempt from sales tax in the transaction with Paceco under the resale exemption. I find that the tax listed in both Exhibits 124 and 125 is zero and is the sales tax on the Port's purchase of the cranes. On this record, the only exemption would be the resale exemption. If the Port had intended the cranes to be fixtures, it would have paid tax on the purchase and would have billed tax on the rental. Instead, it did just the opposite. This is persuasive circumstantial evidence that the Port intended that the cranes not be affixed to the land.

From those findings of fact I conclude that APL has not shown that the T-5 Cranes were fixtures or that the rent payments for the cranes were exempt from sales tax. The Department has prevailed, and so should prepare findings and conclusions and a judgment consistent with that decision.

MR. HANKINS: We will do that, Your Honor.

MR. ZALESKY: Yes, sir.

THE COURT: Counsel, thank you for your work in this case. I found it to be a fascinating subject matter and an interesting subject, and I appreciated the work of all parties in presenting the matter to

me. I will be away, as you know, for a period of three weeks and then will return on the 18th. That will be a crowded calendar -- well, I will return before then, but then the 11th and the 25th are holidays, and so there won't be court on those days and no calendars.

So I invite you to note this for presentation. If presentation is necessary sometime in December. If you can submit it to me by agreed language, it can be presented at any time and I will sign it as soon as I return from the vacation.

MR. HANKINS: All right.

THE COURT: Thank you, gentlemen. We will stand in recess.

(Conclusion of October 14, 2011, Proceedings.)

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

6

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

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