90222-4

No. 70469-9-I

DIVISION 1, COURT OF APPEALS
OF THE STATE OF WASHINGTON

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

Appellants/Petitioners

v.

WASHINGTON STATE DEPARTMENT OF REVENUE,

Respondent

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

APPELLANTS' PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Appellants APL Limited, American President Lines, Ltd. and Eagle Marine Services, Ltd. (collectively, "APL") respectfully request this Court to accept review and reverse the decision of the Court of Appeals.

II. COURT OF APPEALS DECISION

APL petitions for review of an unpublished decision, filed March 31, 2014, by Division I of the Court of Appeals ("the Decision"). The Decision affirmed the superior court's judgment that 800-ton container cranes the Port of Seattle (the "Port") built on Terminal 5 in the early 1980's are not fixtures and, thus, APL was not entitled to a refund from the Department of Revenue ("DOR") of sales tax paid on crane use charges. A copy of the Decision is attached to the Appendix.

III. ISSUES PRESENTED FOR REVIEW

At common law, which applies here, personal property becomes real property if (1) it is annexed to the land, (2) it is adapted to the purpose or use of the land, and (3) the annexor intends to make a permanent addition to the land. *Dep't of Revenue v. Boeing*, 85 Wn.2d 663, 668, 538 P.2d 505 (1975). A finding of "annexation" under the first element creates a presumption of "intent" under the third element. *Id.* at 669; *Nearhoff v. Rucker*, 156 Wash. 621, 628, 287 P. 658 (1930). In light of these standards, the Decision presents the following issues for review:

1. In determining whether an item is a fixture, are courts required to consider the item's annexation to the land because it is not only highly relevant to the element of intent, but also determinative of whether intent must be presumed in certain cases?

2. In considering annexation, are courts required to consider whether the item is constructively annexed by virtue of its adaptation to the use and purpose of the land, *see Western Ag. Land Partners v. Dep't of Revenue*, 43 Wn. App. 167, 716 P.2d 310 (1986), or are they forbidden from doing so, *see Glen Park Assocs., LLC v. Dep't of Revenue*, 119 Wn. App. 481, 82 P.3d 664 (2003)?

3. When a presumption of intent arises, does the presumption shift the burden of proof or merely create a burden of production?

4. Where the presumption of intent applies, can it be rebutted in the absence of any objective evidence that the annexing party intended to remove the item before the end of its useful life?

IV. STATEMENT OF THE CASE

A. Statement of Facts.

In September 1985, the Port and APL entered into a 30-year lease agreement (the "Lease"). Tr. Ex. 101; CP 199-200 (FF ¶ 5). The Lease required the Port to redevelop Terminal 5 into a state of the art container cargo terminal, the centerpiece of which was five new container cranes

(the "T-5 Cranes"). Tr. Ex. 101 (§ 1(d)); RP (9/27/11) at 121; CP 200 (FF ¶ 10). According to the Port's executive director at the time, the Port's commitment to install the T-5 Cranes on Terminal 5 was "extraordinarily instrumental in securing the lease with" APL. RP (9/27/11) at 84-87.

These were no ordinary cranes. The T-5 Cranes were to be bigger and better than any of the Port's existing cranes. At the time of the Lease, the Port had no cranes capable of loading and unloading giant "Post-Panamax" container ships, *i.e.*, ships too large to pass through the Panama Canal. Although Post-Panamax ships were only then being designed—and none would actually dock at the Port for another 10 years—the Port understood that construction of the T-5 Cranes was critical to the Port's long-term strategic plans. RP (9/27/11) at 87-88, 91, 164, 166-67; RP (9/28/11) at 305; CP 201 (FF ¶ 12).

It took approximately a year to design and fabricate the crane components and another year to assemble the T-5 Cranes on-site. RP (9/26/11) at 68-69; RP (9/27/11) at 88. The T-5 Cranes were specially manufactured for use at Terminal 5, with design criteria tailored to size, weight and power constraints, as well as seismic and wind conditions. RP (9/26/11) at 55, 73-76. The T-5 Cranes are among "only a few cranes in the world that are built with cylindrical" legs, a design feature that "helped

to make these cranes suitable" for Terminal 5 "which had relatively low allowable wheel loads for cranes of this size." RP (9/26/11) at 74.

The T-5 Cranes are massive steel structures, which allow them to service larger ships and lift heavier cargo containers. Tr. Ex. 7. Each crane weighs approximately 800 tons and nearly 200 feet tall when the boom is lowered. CP 201 (FF ¶ 14). The boom itself is more than 145 feet long, which is long enough to load and unload a container ship that is 17 containers wide. RP (9/26/11) at 39-43; RP (9/27/11) at 167; RP (9/28/11) at 305.

The T-5 Cranes operate on rails embedded in the wharf, running parallel with the ship berths. RP (9/26/11) at 48-49, 71; RP (9/27/11) at 147; CP 200-201 (FF ¶ 11). This is essential to the cranes' ability to service the ships that dock at Terminal 5; the cranes could not reach all of the containers from a fixed position. RP (9/27/11) at 155. The crane rails are confined to Terminal 5 and, thus, the T-5 Cranes cannot be moved by rail to any other terminal. RP (9/26/11) at 71. Because of their massive weight, gravity is sufficient to affix the cranes to the rails. *Id.* at 69; CP 200-201 (FF ¶¶ 11, 15).

The Lease required the Port to make millions of dollars of major improvements to Terminal 5 to accommodate the T-5 Cranes. RP (9/26/11) at 56; RP (9/27/11) at 87, 164; Tr. Ex. 3. These improvements

included construction of concrete and steel structural reinforcement to the wharf's "apron," which serves as the foundation for the cranes, new concrete crane rail beams, improvements the waterside crane rail, a new landside crane rail embedded in the concrete apron and a dedicated high voltage electrical substation to power the T-5 Cranes. RP (9/26/11) at 60-67, 69-70; RP (9/27/11) at 87-88, 164-165.

The Port viewed the T-5 Cranes as "an integral part" of Terminal 5. RP (9/27/11) at 89, 93. And a permanent one too. The Port had no plans to remove the cranes from the facility prior to the end of their useful life. RP (9/27/11) at 90, 93. There was no effort to design the cranes so that they could be disassembled or removed from Terminal 5. *Id.* Indeed, the Port's executive director insisted on a 30-year lease, the longest in the Port's history, because that was the expected useful life of the T-5 Cranes. RP (9/27/11) at 89, 268. Consistent with the Port's long-term strategy, the T-5 Cranes have remained in continuous service at Terminal 5 since their construction. RP (9/28/11) at 298; CP 200 (FF ¶ 8).

B. Procedural History.

Under the Lease, APL is required to pay the Port periodic use charges for the T-5 Cranes as part of its rent. Tr. Ex. 101 (§ 3(a)). The Port collected retail sales tax on the crane use charges, which it remitted to the DOR. CP 199 (FF ¶ 3). APL petitioned the DOR for a refund on the

grounds that the cranes were fixtures and, thus, not subject to sales tax. *See* RCW 82.08.020(1); RCW 82.04.050(4)(a). When the DOR denied the petition, APL brought this refund action. CP 4-7.

The trial court entered findings and conclusions following a bench trial. CP 196-238. Although the DOR conceded that the T-5 Cranes were specifically adapted for use at Terminal 5 and, therefore, APL had satisfied the "adaptation" prong of the common law fixture test, the trial court concluded that APL failed to establish the "annexation" and "intent" prongs. CP 207-208 (CL ¶¶ 2, 6 & 7). In particular, because the trial court found no annexation, it refused to apply the presumption of intent in APL's favor. *Id.* As a result, it held that the T-5 Cranes were personal property, and therefore subject to sales tax. *Id.* (CL ¶ 8).

The Court of Appeals affirmed, concluding that the trial court's findings on "intent" were dispositive. Decision at 3, 5. Although the Court recognized that "annexation" creates a presumption of intent, it did not address the annexation element at all. *Id.* at 3, 17. Rather, it adopted the trial court's reasoning that where annexation is not "clear," the presumption "serves no useful purpose." *Id.* at 14-15. The Court further held that even if the presumption did apply, it would not shift the burden of proof on the intent element, but was simply part of the "totality of the circumstances" that could be rebutted with "some evidence." *Id.* at 15-16.

V. ARGUMENT

The Decision conflicts with decisions of this Court and the Court of Appeals. RAP 13.4(b)(1) & (2). The Decision also involves an issue of substantial public interest because it reveals a lack of clarity in the law of fixtures that only this Court can resolve. RAP 13.4(b)(4). This Court should accept review and hold that (1) annexation remains a critical element of the fixtures test; (2) a presumption of intent applies where the item is constructively annexed by virtue of adaptation to the land; (3) when the presumption applies, it shifts the burden of proof to show a lack of intent; and (4) the presumption is not rebutted where, as here, there is no objective evidence the owner intended only a temporary annexation.

A. The Decision's Failure To Consider Annexation Is Contrary To Washington Law, Reduces The Test For Fixtures To One Element And Effectively Negates Any Presumption Of Intent.

While "intent" has assumed a primary role in determining whether an item is a fixture, Washington courts continue to uniformly apply the traditional three-element test—of which "annexation" is the first element.[1] Annexation is not only a threshold requirement, it is also an integral component of intent. This is so because "all pertinent factors reasonably

[1] *See Courtright Cattle Co. v. Dolsen Co.*, 94 Wn.2d 645, 656, 619 P.2d 344 (1980); *Boeing*, 85 Wn.2d at 667; *King v. Rice*, 146 Wn. App. 662, 668-69, 191 P.3d 946 (2008); *Union Elev. & Warehouse Co., Inc. v. Dep't of Transp.*, 144 Wn. App. 593, 603, 183 P.3d 1097 (2008); *Glen Park*, 119 Wn. App. at 487; *SSG Corp. v. Cunningham*, 74 Wn. App. 708, 711, 875 P.2d 16 (1994); *Western Ag*, 43 Wn. App. at 171.

bearing on the intent of the annexor should be considered ... including, but not being limited to ... ***the manner of annexation, and the purpose for which the annexation is made.***" *Boeing*, 85 Wn.2d at 668 (emphasis added). This principle, too, is uniformly recognized.[2] Thus, in holding that similar cranes owned by the Port of Oakland were fixtures under the same common law of fixtures, the California Court of Appeals noted that "the element of intent" the most important with the other two elements, annexation and adaptation, serving as "ingredients relevant to the determination of intent." *Seatrain Terminals, Inc. v. County of Alameda*, 147 Cal. Rptr. 578, 581 (1978).

The manner and purpose of annexation is more than simply a factor relevant to intent, it alone can be dispositive of that element. It is equally settled in Washington law that where, as here, the annexor is the landowner, it is presumed that the owner annexed the item with an intent to permanently enrich the land—which, of course, is the same showing that is required to satisfy the element of intent.[3] In short, as the Court of Appeals properly recognized the first time this case was on appeal, but

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[2] *See Strain v. Green*, 25 Wn.2d 692, 699, 172 P.2d 216 (1946); *Ballard v. Alaska Theater Co.*, 93 Wash. 655, 663, 161 P. 478 (1916); *Union Elev.*, 144 Wn. App. at 603-04; *Glen Park*, 119 Wn. App. at 488; *Western Ag*, 43 Wn. App. at 173

[3] *See Boeing*, 85 Wn.2d at 669; *Strain*, 25 Wn.2d at 700; *Nearhoff v. Rucker*, 156 Wash. 621, 628, 287 P. 658 (1930); *Hall v. Dare*, 142 Wash. 222, 229, 252 P. 926 (1927); *Glen Park*, 119 Wn. App. at 490; *Western Ag*, 43 Wn. App. at 173; *see also* 35A Am. Jur. 2d Fixtures, § 115 ("a presumption arises that when a person making an annexation of a chattel to realty is the owner of the realty, the chattel is a fixture").

apparently forgot the second time, "[b]ecause annexation is so intertwined with the intent to annex, one cannot be examined without the other." *APL Ltd. v. Dep't of Revenue*, 2010 WL 264992, *4 (Jan. 25, 2010).

But that is exactly what the Decision does. Presumably to avoid having to address a split in authority on the proper test for annexation (see below), the Court of Appeals affirmed without examining whether, how or why the T-5 Cranes were annexed to Terminal 5. *See* Decision at 3 & 17. In so doing, the court obviously did not consider "all pertinent factors" on the issue of intent. *Boeing*, 85 Wn.2d at 668. More importantly, because it did not determine whether the Port annexed the T-5 Cranes to Terminal 5, the court did not apply the presumption of intent in APL's favor—which, as explained below, would have shifted the burden of proof to the DOR and resulted in a conclusion that the cranes are, in fact, fixtures.

The Decision suggests it is permissible to simply skip analysis of annexation because, in any event, the presumption of intent would not apply where annexation is "not clear without resorting to examining what the owner intended." Decision at 14-15 & n. 44 (citing CP 217). This circular reasoning lacks any support in Washington law and is flat backwards. Evidence of annexation is relevant to issue of intent—not the other way around. Moreover, to ignore the presumption of intent because annexation is "not clear" simply begs the question of whether, how and

why the item was annexed, which is precisely what courts are required to determine.

This Court should accept review and confirm the continued vitality of the common law three-element test for fixtures, including the role annexation plays in that analysis. While intent is the most important element, as this Court has repeatedly emphasized, the manner and purpose of annexation is directly relevant to that inquiry; intent cannot be analyzed without also considering annexation. This Court should also reaffirm that annexation must be considered because it is determinative of whether intent to enrich the freehold must be presumed. Courts should not be permitted to negate operation of the presumption, as the Court of Appeals did here, by simply skipping over the separate inquiry of annexation.

B. Review Is Required To Resolve A Conflict In The Decisions Of The Court Of Appeals On Whether An Item Is Constructively Annexed By Virtue Of Its Adaptation To The Land.

In failing to decide the issue of annexation, the Decision avoids the primary issue on appeal. The trial court found that the T-5 Cranes were not annexed to Terminal 5 because it ignored the doctrine of "constructive annexation," and refused to consider the cranes' "adaptation" to the land in its annexation analysis. In so doing, the court refused to follow the correct rule set forth in *Western Ag* in favor of the conflicting and incorrect rule set forth in *Glen Park.* Had the Court of Appeals considered

annexation and followed *Western Ag*, as it should have, it would have concluded that APL proved annexation based on the undisputed evidence that the T-5 Cranes were specially adapted to Terminal 5.

Over a hundred years ago, this Court recognized the concept of "constructive annexation" and rejected the notion that annexation requires "an absolute fastening or continued physical union." *Chase v. Tacoma Box Co.*, 11 Wash. 377, 380-81, 39 Pac. 639 (1895). "The better opinion ... is in favor of viewing everything as a fixture which has been attached to the realty with a view to the purpose for which it is held or employed, however slight or temporary the connection between them." *Id.* at 380 (quotation marks and citation omitted). The issue, then, is whether the item is "attached to the real estate as firmly as it appears to have been reasonably possible to attach it," given its purpose. *Strong v. Sunset Copper Co.*, 9 Wn.2d 214, 230, 114 P.2d 526 (1941) (citations omitted).

It is for this reason courts must consider an item's "adaptation" to the realty—not just in connection with the second element of the fixtures test—but also to determine the first element, "annexation." This rule and relationship was spelled out expressly by Division 3 in *Western Ag*:

> The first prong, annexation, is often considered in light of the actual relationship of the object to the realty—whether the article is 'in use as an essential part' of the overall use of the property. ...

Western Ag, 43 Wn. App. at 172 (citations omitted). Put simply, "[t]he

similarity between constructive annexation and the adaptation test ... makes these concepts almost indistinguishable in many cases." 2 Wash. State Bar Ass'n, *Wash. Real Property Deskbook: Real Estate Essentials* § 23.2(a)(ii) (4th ed. 2009). The DOR's own regulation expressly provides that an item is annexed to realty, even if not "securely attached," so long as it "is adapted to use in the place it is located." WAC 458-12-010(3)(a).

In *Glen Park*, Division 2 expressly rejected this rule. There, the court refused to consider whether the article was constructively annexed to the land even though it was "an essential part" of the property's use and purpose and, in so doing, expressly repudiated *Western Ag*:

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

Id. at 489. The *Glen Park* court cited no authority for its holding, and conspicuously failed to cite or refer to WAC 458-12-010(3)(a). The trial court elected to follow *Glen Park* and, sure enough, its findings on annexation are devoid of any reference to the undisputed facts showing the T-5 Cranes' specific adaptation to and fabrication for use at Terminal 5. *See* CP 216 (Tr. (10/14/11) at 5-6); CP 200-01 (FF ¶¶ 13-23).

The trial court's reliance on *Glen Park* to ignore APL's evidence of constructive annexation—a ruling the Decision implicitly accepts—was

erroneous. *Western Ag* and the DOR regulation, not *Glen Park*, state the correct rule. The line between annexation and adaptation is "blurred," and purposely so, because the status of items as fixtures "depends less upon the manner of their annexation ... than upon their own nature and their adaptation to the purposes for which they are used." *Chase*, 11 Wash. at 380. In rejecting the relevance of adaptation, *Glen Park* undermines the doctrine of constructive annexation and revives the discredited notion that physical attachment matters most when it comes to annexation.

That leads to perverse results where, as here, an item's adaptation make it integral to the land, yet its specialized function prevents physical attachment. The DOR conceded the T-5 Cranes were adapted to Terminal 5's use as a cargo container facility. CP 207 (CL ¶ 2). When adaptation is properly considered, it is clear the 800-ton cranes were annexed to the land by gravity, which is "as firmly as ... reasonably possible" given Terminal 5's use as a cargo container facility. The T-5 Cranes could not effectively function if bolted to fixed points; they must move along the wharf to load and unload the Post-Panamax ships that dock at Terminal 5.

The evidence was equally undisputed that the cranes are "an essential part of" and "adapted to use in" Terminal 5. *Western Ag.*, 43 Wn. App. at 173; WAC 458-12-010(3)(a)(ii). They were specifically designed and built for permanent installation at Terminal 5, without any

consideration for later disassembly or removal. By the same token, the terminal was substantially redeveloped, at the cost of tens of millions of dollars, to specifically accommodate the cranes. In sum, even beyond the size of the T-5 Cranes themselves, their adaptation to Terminal 5, and vice versa, show that the cranes are part of the realty.

This Court should accept review, resolve the conflict between *Glen Park* and *Western Ag*, reaffirm the critical role adaptation plays in annexation analysis, and hold that the T-5 Cranes are constructively annexed to land by virtue of their integral adaptation to Terminal 5 use as a state-of-art cargo container facility. For the reasons explained below, that conclusion, which the Decision erroneously ducks, would have shifted the burden of proof to the DOR—a burden the DOR did not overcome.

C. Review Is Required To Determine Whether The Presumption Of Intent Applied In Fixture Cases Works To Shift The Burden Of Proof, Or Merely The Burden Of Production.

Because the Court of Appeals refused to reverse the trial court's ruling on annexation, it did not apply the presumption of intent in APL's favor. Nevertheless, the court suggested that, even if the presumption applied, it would be nothing more than a "factor" the court could consider when looking at the "totality of the circumstances"—one easily rebutted by "some evidence" to the contrary. Decision at 15-16. Wrong. The presumption is not, as the DOR argued below and the Decision implies, a

fleeting burden of production. When the presumption applies, it shifts the burden of proof to the other party to show that the annexing party intended only a temporary attachment. 35A Am. Jur. 2d Fixtures § 114 ("when a chattel is annexed by an owner to the owner's land" the "party asserting that affixed goods were to remain personalty and not become fixtures ***bears the burden of proof.***") (emphasis added). Any other approach would render the presumption effectively meaningless.

To be sure, the presumption is described as "rebuttable." *Western Ag*, 43 Wn. App. at 173. The issue, however, is not whether the presumption can be rebutted, but how. Tegland, 5 Wash. Prac., *Evidence Law and Prac.* § 301.8 (5th ed. 2012) ("A presumption is, by definition, rebuttable."). In most cases, a party against whom a presumption applies has the burden of disproving the presumed fact by a preponderance of the evidence. *Id.*, § 301.15; 6 Wash. Prac., Wash. Pattern Jury Instr.—Civ., WPI 24.05 (6th ed. 2012). This is one of those cases. Although the issue has never been addressed in the fixtures context, the cases—most of which were decided before the concept of a "burden of production" was even recognized—cast the presumption squarely in terms of ultimate proof.[4]

Neither *Boeing* nor *Western Ag*, the only authority cited in the

[4] *See Strain*, 25 Wn.2d at 700 (presumption not "overcome" by evidence of secret intent or fact that item had been removed); *Cutler v. Keller*, 88 Wash. 334, 337, 153 Pac. 15 (1915) (presumption controls in the "absence of evidence of a contemporaneous contrary intention").

Decision, support a contrary conclusion. In *Boeing*, this Court found the presumption "arguably" applied, but held that the "cumulative effect" of countervailing evidence showed a Boeing intended only a temporary use of the jigs; if anything, that holding shows that, unlike here, the DOR met its burden of proof on the issue. 85 Wn.2d at 669. In *Western Ag*, the court applied the presumption, and found no countervailing evidence; again, the holding is entirely consistent with a presumption that shifts the burden of proof, not a burden of production. 43 Wn. App. at 173-74.

That this is a tax refund case doesn't change the result. It is the taxpayer's burden to prove that the tax is incorrect. RCW 82.32.180. But in so doing, courts are required to apply the common law fixtures test. *Western Ag*, 43 Wn. App. at 171. The presumption is a critical component of that test. Just as RCW 82.32.180 does not forbid courts from applying rules of construction against the DOR, *see Agrilink Foods, Inc. v. Dep't of Revenue*, 153 Wn.2d 392, 399 n. 1, 103 P.3d 1226 (2005), the statute does not forbid courts from applying a legal presumption against the DOR on one element of the taxpayer's case. This Court should accept review and confirm that the presumption of intent shifts the burden of proof, and that RCW 82.32.180 does not trump the common law.

D. The Decision Erroneously Upholds The Trial Court's Findings On Intent In The Absence Of Any Objective Evidence That The Port Intended Only A Temporary Annexation.

The Decision's refusal to consider annexation and resulting failure to apply the presumption of intent in APL's favor infected its ultimate conclusion that the trial court's findings on intent were dispositive. This Court should accept review and hold that when the presumption of intent applies, it cannot be overcome in the absence of objective evidence showing that the annexing party intended to remove the item before the end of its useful life. There was no such objective evidence here.

"Moveability" Evidence. The Decision focused on the fact that the T-5 Cranes *could* be removed from Terminal 5 and/or they *could* be relocated to another port. Decision at 8-10. The court noted that, in concluding that Boeing did not intend the 747 assembly jigs to be permanently annexed to the plant, the *Boeing* court emphasized that the jigs "were designed so that they could be disassembled and moved without undue difficulty." 85 Wn.2d at 669-70. The Decision upheld the trial court's findings on intent, in part, because they were "consistent" with the "moveability" factors identified in *Boeing*.

The Decision's reliance on *Boeing* regarding the "moveability" of the T-5 Cranes demonstrates a fundamental misreading of that case, and an equally flawed understanding of the law. The fact that the item can be

moved or removed is inherent to all fixtures (and necessary when equipment and machinery becomes broken down or obsolete), and is not itself indicative of intent. Washington cases uniformly hold that an item may be permanently annexed to the realty even if it can be easily removed; the issue is not that an item *could* be moved or removed, but whether the annexing party manufactured or installed the item with an intent that it be moved or removed before the end of its useful life.[5]

It was this evidence of intent, not bare "moveability," on which *Boeing* relied. There, the assembly jigs could only be used to manufacture 747's. Boeing never intended the jigs to be permanently annexed because it needed flexibility to be able to build different types of airplanes at the plant in the future. In order to replace the jigs when Boeing made "changes in the current program," they were "designed in such a manner that they can be disassembled and moved in or out of manufacturing plants without undue difficulty or harm to the jigs." 85 Wn.2d at 669. In other words, it wasn't the fact that Boeing *could* remove the jigs that proved a temporary annexation, it was that Boeing *planned* to remove the jigs.

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[5] *See Strain*, 25 Wn.2d at 700 ("Nor is the fact that the respondents successfully removed the articles from house to house of much, if any, probative value."); *Strong*, 9 Wn.2d at 229-30 ("While it is true ... that most of that equipment ... could be removed by the mere unscrewing of foundation bolts, those two facts are not determinative of the particular issue."); *Amer. Radiator v. Pendleton*, 62 Wash. 56, 58, 112 Pac. 1117 (1911) ("[a]though such appliances could after their connection be separated and removed without damage to the building, we do not think they were installed by appellants with any such purpose in view"); 35A Am. Jur. 2d Fixtures § 7 ("even if it can be removed, the critical factor is whether its installation was intended to be permanent").

The evidence here was exactly the opposite. The T-5 Cranes were specially manufactured for installation and use at Terminal 5 for their full expected useful lives (30 years) as part of the Port's long-term plan for the terminal as a state-of-the art cargo container facility, with no effort to design them to be disassembled, removed and reassembled somewhere else. Even the temporary removal of one of the cranes from the rails to raise its height (a fact cited in the Decision) proves the point; the crane was modified at great expense and engineering effort to enhance its *permanent* value to the Port. RP (9/26/11) at 73; RP (9/27/11) at 138, 143-46, 155-56. This fact supports, rather than disproves, the presumption that the Port intended to make a permanent annexation.

"Classification" Evidence. Again analogizing to *Boeing*, the Decision defends the trial court's conclusion with reference to findings regarding "the Port's categorization of the cranes for tax purposes." Decision at 10-13. Unlike *Boeing*, however, there was no direct evidence of categorization as personalty.[6]

Regardless, the issue is not whether the trial court's findings are supported by substantial evidence, as the Decision frames it. The issue is whether this kind of subjective classification evidence, which is all there

[6] *Compare Boeing*, 85 Wn.2d at 665 ("Boeing lists and reports these jigs as personalty to Snohomish Country for property tax purposes") & 670 (Boeing's manual categorized equipment as either tools or fixtures; "the jigs are referred to as 'tools'").

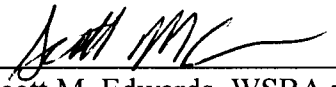
was below, is sufficient to rebut the presumption of intent. It is not. An owner's subjective classification of an item is rarely relevant; what matters is whether objective facts show that the owner intended a temporary or permanent annexation. For this reason, courts properly refuse to consider "classification" evidence meaningful unless, like *Boeing*, it reflects a contemporaneous and deliberative analysis regarding the permanency of annexation.[7] Here, there is no evidence showing how the Port classified the T-5 Cranes at installation, much less that it did so because it intended only a temporary annexation. The objective evidence shows the contrary.

VI. CONCLUSION

The T-5 Cranes are fixtures. This Court should grant the Petition for Review, reaffirm the common law of fixtures and reverse the Decision.

RESPECTFULLY SUBMITTED this 30th day of April, 2014.

LANE POWELL PC

By 

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[7] *Boeing*, 85 Wn.2d at 670 ("Boeing's categorization of its equipment certainly is not conclusive as to what is and is not a fixture"); *Parrish v. Southwest Wash. Prod. Credit Ass'n,* 41 Wn.2d 586, 589-90, 250 P.2d 973 (1952) (disregarding chattel mortgage that classified equipment personalty); *Glen Park*, 119 Wn. App. at 491 (disregarding deed of trust that classified items as fixtures); DOR Det. No. 89-55, 7 WTD 151 (1989) ("the test is not to determine whether the annexor intended to treat the property ... as personal property or real property for tax purposes, but whether he intended to make what was originally tangible personal property, a permanent accession on the freehold.").

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on April 30, 2014, I caused to be served a copy of the foregoing **PETITION FOR REVIEW** on the following persons in the manner indicated below at the following address:

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- ☐ **by CM/ECF**
- ☑ **by Electronic Mail**
- ☐ **by Facsimile Transmission**
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Linda R. Mitchell

APPENDIX 1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

APL LIMITED; AMERICAN PRESIDENT LINES, LTD.; and EAGLE MARINE SERVICES, LTD., Appellants, v. WASHINGTON STATE DEPARTMENT OF REVENUE, Respondent.	No. 70469-9-I DIVISION ONE UNPUBLISHED FILED: March 31, 2014

Cox, J. — For the purposes of taxation, real property includes "land itself . . . and all buildings, structures or improvements or other ***fixtures*** of whatsoever kind thereon . . . ."[1] At issue in this retail sales tax refund action by APL Limited, American President Lines Ltd., and Eagle Marine Services Ltd. (collectively APL) is whether five 800-ton cranes leased by APL from the Port of Seattle constitute

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[1] RCW 84.04.090 (emphasis added); see also WAC 458-12-010(3) (emphasis added) ("'Real property' includes . . . [a]ny ***fixture*** permanently affixed to and intended to be annexed to land or permanently affixed to and intended to be a component of a building, structure, or improvement on land, including machinery and equipment which become ***fixtures***.").

personalty, which is subject to retail sales tax, or fixtures, which is not.[2] Because this record fails to show one of the three essential elements to prove a fixture—the Port's intent— we affirm the trial court's judgment denying a refund of taxes that APL paid.

This is the second time this case is before this court on appeal.[3] In the prior appeal, we reversed and remanded for further proceedings.[4] A bench trial followed in which the court denied the refund sought by APL.

The historical facts are largely undisputed. APL entered into a long-term lease with the Port in 1985 for use of a Port-owned facility known as Terminal 5 and for use of Port-owned container cranes.

Four of these cranes were installed at Terminal 5 in 1986. The fifth was installed about a year later. All five cranes (the "T5 Cranes") have remained at Terminal 5. The cranes weigh more than 800 tons and stand close to 200 feet tall. They are powered by a dedicated high voltage electrical substation and are connected to the substation by an electrical cable. The cranes operate on wheels that are positioned on 100-foot gauge rails connected to the terminal. They are held on the rails by gravity and move along the rails as part of their normal operation. The rails extend 2,900 feet from one end of the terminal to the other.

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[2] See RCW 82.04.050(4)(a) ("'Retail sale' includes the renting or leasing of tangible personal property to consumers.").

[3] APL Ltd., Am. President Lines, Ltd., & Eagle Marine Servs., Ltd. v. Dep't of Revenue, noted at 154 Wn. App. 1020, 2010 WL 264992 (2010).

[4] Id. at *4.

In 2006, APL sued the Department of Revenue, under RCW 82.32.180, for a refund of sales tax paid on the lease of these five cranes. APL alleged that "[b]ecause the container cranes became real property when they were permanently annexed to and integrated with Terminal 5 by the Port," APL's lease of Terminal 5 and the cranes was not subject to sales tax.

To determine whether the cranes are personal property or real property for tax purposes, the common law fixtures test is applied.[5]

The Department moved for summary judgment, which the trial court granted. APL sought review, and this court reversed.[6]

A bench trial followed. The court orally ruled in favor of the Department of Revenue. It later entered its written findings of fact and conclusions of law.

APL appeals.

COMMON LAW OF FIXTURES

APL argues that the trial court erred when it denied APL's request for a sales tax refund after concluding that APL had not met its burden of proving the cranes were fixtures. The essence of the argument is that the cranes satisfy all three of the essential elements of the common law fixtures test. We hold that this record shows that the trial court correctly concluded that one of the required elements, intent of the Port, has not been proven. Thus, we need not address the other disputed element, annexation.

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[5] Dep't of Revenue v. Boeing, 85 Wn.2d 663, 667, 538 P.2d 505 (1975).

[6] APL Ltd., 2010 WL 264992 at *4.

The determination of whether an article is a fixture is a mixed question of law and fact.[7] Following a bench trial, the reviewing court determines "whether substantial evidence supports the findings and whether the findings support the court's conclusions of law."[8] "Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the stated premise."[9] The party challenging a finding of fact bears the burden of demonstrating that the finding is not supported by substantial evidence. [10] "If the standard is satisfied, a reviewing court will not substitute its judgment for that of the trial court even though it might have resolved a factual dispute differently."[11]

Unchallenged findings are verities on appeal.[12] Where the trial court mislabels a conclusion of law as a finding of fact, a court reviews the conclusion de novo.[13]

"It is well recognized that determining what constitutes a fixture as opposed to personal property is a difficult task that depends on the particular

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[7] Boeing, 85 Wn.2d at 667.

[8] Casterline v. Roberts, 168 Wn. App. 376, 381, 284 P.3d 743 (2012).

[9] Schmidt v. Cornerstone Invs., Inc., 115 Wn.2d 148, 158, 795 P.2d 1143 (1990).

[10] Nordstrom Credit, Inc. v. Dep't of Revenue, 120 Wn.2d 935, 939-40, 845 P.2d 1331 (1993).

[11] Sunnyside Valley Irr. Dist. v. Dickie, 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003).

[12] Robel v. Roundup Corp., 148 Wn.2d 35, 42, 59 P.3d 611 (2002).

[13] Hegwine v. Longview Fibre Co., Inc., 132 Wn. App. 546, 556, 132 P.3d 789 (2006).

facts of each case."[14] Under the common law test for fixtures, which is applied in tax cases of this type, a court considers the following three elements:

> "(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."[15]

The annexation element, the adaption element, and the intent element must all be established before an article may be deemed to be a fixture.[16] Thus, if any one of these elements is absent, proof of a fixture is lacking.

In this case, both parties agree that the adaption element is met. For purposes of this appeal, the dispositive question is whether the intent element is satisfied.

Intent of Port of Seattle

APL argues that the trial court erred when it concluded that the Port did not intend the cranes to be permanently attached to the realty. We disagree.

Intent is the most important element of the fixtures test.[17] "'[W]here the intent is discovered it is generally controlling.'"[18] "In fact, the other two criteria,

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[14] Union Elevator & Warehouse Co., Inc. v. Dep't of Transp., 144 Wn. App. 593, 603, 183 P.3d 1097 (2008).

[15] Boeing, 85 Wn.2d at 667 (quoting Lipsett Steel Prods. v. King County, 67 Wn.2d 650, 652, 409 P.2d 475 (1965)).

[16] Id. at 668.

[17] Union Elevator, 144 Wn. App. at 603.

[18] Strong v. Sunset Copper Co., 9 Wn.2d 214, 230, 114 P.2d 526 (1941) (quoting Ballard v. Alaska Theatre Co., 93 Wash. 655, 662, 161 P. 478 (1916)).

annexation and adaption, have been reduced by the courts to simply indications of intention."[19]

Intent is "not to be gathered from the testimony of the annexor as to his actual state of mind."[20] Rather, evidence of intent is gathered from the circumstances at the time of installation.[21] "[A]ll pertinent factors reasonably bearing on the intent of the annexor should be considered in assessing the intent at the time of annexation including, but not being limited to, the nature of the article affixed, the relation and situation to the freehold of the annexor, the manner of annexation, and the purpose for which the annexation is made."[22]

State of Washington Department of Revenue v. The Boeing Co. is the leading case in this state addressing the question of fixtures for tax purposes and is substantially similar to this case.[23] There, the supreme court considered whether immense tools known as Boeing "fixed assembly jigs" were fixtures for tax purposes.[24] The jigs were used in the assembly of the Boeing 747 and worked to hold steady large sections of the aircraft.[25]

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[19] 2 Wash. State Bar Ass'n, Real Property Deskbook §23.2(2)(c), at 23-6 (2009) (citing Boeing, 85 Wn.2d at 663).

[20] Boeing, 85 Wn.2d at 668.

[21] Id.

[22] Id.

[23] 85 Wn.2d 663, 538 P.2d 505 (1975).

[24] Id. at 666.

[25] Id. at 664.

In concluding that the jigs were not fixtures, the court determined that the third element, "the intent of Boeing to make a permanent annexation to the freehold," was lacking.[26] For this conclusion, the court considered seven pertinent factors.[27]

The court determined that two factors supported Boeing, who argued that the jigs were fixtures.[28] Those factors were:

> (1) Since Boeing was the owner of the freehold, it "arguably could be presumed that the intent of the annexation was to benefit the freehold and not to preserve the jigs as personalty."[29]
>
> (2) The jigs in question were "necessary to the production of the Boeing 747 and the record does not disclose any plans by Boeing to end the production of such aircraft."[30]

Nevertheless, the court then identified several other factors, which it stated "the cumulative effect of which convinces us that the annexation was not intended to be a permanent benefit to the freehold."[31]

> For this conclusion it cited the following factors:
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> (3) The plant itself could be used to manufacture other aircraft in which case the jigs would have to be discarded and new ones brought into the plant;

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[26] Id. at 668.

[27] Id. at 668-670.

[28] Id. at 668-69.

[29] Id. at 669.

[30] Id.

[31] Id.

> (4) The jigs were secured to the floor in such a manner that they could be easily removed without harm to the building itself;
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> (5) The jigs were designed so that they can be disassembled and moved without undue difficulty or harm and could be readily moved and transformed back into personalty;
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> (6) Boeing itself had considered the jigs to be personalty as they had reported them as such for tax purposes;
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> (7) The jigs were not listed as fixtures in the "code chart manual" which distinguished between fixtures and other tools.[32]

The court stated, "In sum, we do not think that the totality of the circumstances can reasonably be construed to indicate an intent by Boeing for the jigs to be a permanent accession to the freehold."[33]

Here, to determine the Port's intent, the trial court looked to the factors identified in Boeing. The court made 18 findings regarding the Port's intent.

First, the trial court considered "the moveability of the cranes." The court made several written findings on this. Specifically, the court found:

> 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.
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> . . .
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> 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

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[32] See id. at 669-70.

[33] Id. at 670-71.

> 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.
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> . . .
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> 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.[34]

These unchallenged findings are verities on appeal. Additionally, they are consistent with two of the factors considered in Boeing. They are consistent with the fourth Boeing factor—that the manner in which the items are secured is indicative of intent that they be easily removable.[35] Additionally, they are consistent with the fifth Boeing factor—that the items were designed in such a manner that they could be moved without undue difficulty or harm and transformed back into personalty.

APL argues that "[t]he issue is not that an item ***can be*** removed, but whether it was manufactured or installed with an intent that it be removed." While this is the overall inquiry, whether an item can be removed is relevant to the fourth and fifth considerations identified in Boeing.[36] Thus, this argument is not persuasive.

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[34] Clerk's Papers at 201-02.

[35] Boeing, 85 Wn.2d at 669.

[36] Id.

APL attempts to distinguish Boeing by arguing that there, the jigs were designed to be disassembled and moved, and here, the cranes were not specifically designed to be disassembled or moved. APL cites to testimony from the executive director of the Port to support this assertion.

But, in Boeing, the court relied on this fact to show that the jigs could be disassembled without harm and transformed back into personalty.[37] Here, even if the jigs were not designed to be easily disassembled, the unchallenged findings show that they could be moved, had been moved in the past, could be sold, and had been sold in the past.

Further, the court found that there is a domestic and international market for used 100-gauge container cranes, and in the past, the Port had sold cranes that were not disassembled. Accordingly, even if these cranes were not designed to be disassembled, they could be readily moved and thus transformed back into personalty. Thus, despite the factual distinction, this evidence is nonetheless consistent with the fifth Boeing factor.

Next, the court looked to the Port's categorization of the cranes for tax purposes.

The court made three findings on the Port's tax treatment of the cranes, including the following:

> 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

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[37] Id.

> 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 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.[38]

As the court points out, Exhibits 124 and 125, reflect that the estimated sales tax is zero. Additional documents in the record show that the state sales tax was listed as "Exempt." This is substantial evidence to support the trial court's findings. Additionally, it is consistent with the sixth factor identified in Boeing.

APL argues that "critically, no witness actually knew whether the Port had paid sales tax on the T-5 Cranes, or, if not, why not." It also argues that if the Port had purchased the cranes for resale, the law required a "resale certificate," and the DOR did not present any evidence of such a certificate. Thus, it argues that "no evidence supports a finding that the Port claimed a resale exemption when purchasing the cranes." This argument is not persuasive.

The essence of this argument is that APL disagrees with the trial court's factual finding because other evidence allegedly undercuts the evidence on which the court relied for its finding. This is a dispute over whether substantial evidence supports the finding. As we previously discussed, the billing statements and memorandums in the record support the trial court's findings that

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[38] Clerk's Papers at 206-07.

the Port did not pay sales tax. It was for the trial court to determine the weight of this evidence, and it did so.

Finally, the court addressed "documented categorization." For this, the court made several findings about the lease agreement and the Port's policy statements. Among those are the following:

> 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 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.
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> 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.[39]

The trial court made four other similar findings related to other lease terms.

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[39] Id. at 203-04.

Additionally, it looked to the Port Harbor Development Strategy and the Container Terminal Development Plan. The court found that "[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."[40] For example, the trial court pointed to specific language in the plan that refers to the "crane inventory."

The language in the lease and in these documents is similar to the evidence presented in Boeing.[41] The Port's own categorization of the cranes is objective evidence that it did not intend for the cranes to be fixtures. As Boeing noted, "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."[42] Similarly, here, if the Port intended for the cranes to be fixtures, it is more likely that it would have listed them as "improvements" in the lease. It did not do so. Overall, this documented categorization, including the language of the lease agreement, and the Port's policy statements, is consistent with Boeing's seventh factor.

In sum, there is substantial evidence to support the trial court's challenged findings. Additionally, these findings, along with the unchallenged findings, show that most of the factors considered pertinent in Boeing are also present in this case. The cranes could be easily removed, the cranes could be readily moved

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[40] Id. at 205-06.

[41] Boeing, 85 Wn.2d at 670.

[42] Id.

and transformed back into personalty, the Port considered the cranes personalty for tax purposes, and the Port did not list the cranes as improvements in the lease. Looking to this evidence, and considering the totality of the circumstances, the findings support the trial court's conclusion that the Port did not intend for the cranes to be treated as fixtures.

APL makes a number of additional arguments that the trial court erred when it concluded that the Port did not intend to permanently affix the cranes to the realty. None are persuasive.

First, APL argues that "[b]ecause the cranes were annexed to the realty, APL was entitled to a legal presumption that the Port intended to permanently enrich the freehold," and that the trial court erred in refusing to apply a presumption of intent in APL's favor. It is true that "when the annexation of a fixture is made by the owner of the property, the presumption is that it was annexed with the intention of enriching the freehold."[43] But APL is wrong in its assertion about how the presumption applies for several reasons.

To start with, the trial court declined to apply the presumption because it stated that "[t]he 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 resorting to examining what the owner intended, application of the presumption serves no useful purpose."[44] This approach is

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[43] Nearhoff v. Rucker, 156 Wash. 621, 628, 287 P. 658 (1930).

[44] Clerk's Papers at 217.

logical under these circumstances, and APL's argument to the contrary is not persuasive.

Next, APL cites to Western Ag Land Partners v. Department of Revenue and Strain v. Green for the proposition that, "Where the presumption applies, the burden shifts to the defendant to prove that, notwithstanding the annexation, the annexor intended the item to remain personal property."[45] While those cases acknowledge that such a presumption would arise, they do not discuss shifting the burden of proof on the intent element.[46] And, in this case, the burden of proof is on APL, because APL is the taxpayer.[47] APL fails to cite any relevant authority that supports the implicit argument it makes that this general rule does not apply to this case. Further, in Western Ag, the court indicated that the intent prong was satisfied given the presumption and "[a]bsent some evidence rebutting this presumption."[48] In contrast, here, it is clear that there is more than "some evidence" to rebut the presumption. Accordingly, APL's reliance on these cases is not helpful.

Finally, even if the presumption did apply, in Boeing, the court considered the presumption only as one factor that supported Boeing's argument that the

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[45] Brief of Appellants at 25 (citing Western Ag Land Partners v. Dep't of Revenue, 43 Wn. App. 167, 174, 716 P.2d 310 (1986); Strain v. Green, 25 Wn.2d 692, 700, 172 P.2d 216 (1946)).

[46] See Western Ag, 43 Wn. App. at 173-74; Strain, 25 Wn.2d at 700.

[47] See RCW 82.32.180; Clerk's Papers at 207.

[48] Western Ag, 43 Wn. App. at 174.

jigs were fixtures.[49] Looking at the totality of the circumstances, the Boeing court nonetheless concluded that the jigs were not fixtures, given the other factors that did not support Boeing. Similarly, here, even if we agreed that the presumption supported APL, this would only suggest that the first factor identified in Boeing favors APL. But still, considering all other pertinent factors and the totality of the circumstances, the trial court's conclusion is firmly supported by Boeing.

Second, APL argues that the Port installed the cranes with the intent that they remain part of Terminal 5 for their entire useful lives. It first points to the testimony of the Port's executive director who stated that it was the Port's view that the cranes were "an integral part of the container facility and were not going to be moved." APL also argues that the Port spent tens of millions of dollars to rebuild Terminal 5 to accommodate the cranes, and that the lease term was for 30 years, which is the expected useful life of a T5 crane.

Notwithstanding the above points, evidence of intent comes from objective evidence existing at the time of annexation, not subjective belief.[50] Accordingly, evidence relating to subjective intent, such as the Port director's opinion, is not relevant to the inquiry.

Moreover, the trial court did not make findings for any of these evidentiary points on which APL relies. And an appellate court "will not 'disturb findings of

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[49] Boeing, 85 Wn.2d at 668-69.

[50] Id.

fact supported by substantial evidence even if there is conflicting evidence.'"[51] Accordingly, because there is substantial evidence to support the trial court's findings, any conflicting evidence does not alter our analysis.

To summarize, APL fails in its burden to show that the Port intended to make a permanent accession to the Port's property when it allegedly annexed the cranes to the property. Accordingly, we need not address whether there was truly an annexation of the cranes to the Port's property.

We affirm the judgment.

COX, J.

WE CONCUR:

[51] McCleary v. State, 173 Wn.2d 477, 514, 269 P.3d 227 (2012) (quoting Merriman v. Cokeley, 168 Wn.2d 627, 631, 230 P.3d 162 (2010)).