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COURT OF APPEALS
DIVISION II

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NO. 38297-1-II

STATE OF WASHINGTON
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**COURT OF APPEALS, DIVISION II
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 DEPARTMENT OF REVENUE

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ORIGINAL

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I. INTRODUCTION

APL Limited, American President Lines, Ltd., and Eagle Marine Services, Ltd. (collectively, “APL”), lease container cranes from the Port of Seattle to load and offload containers from cargo ships. APL paid retail sales tax on the rental of container cranes from the Port of Seattle. APL seeks a refund for sales tax paid on container crane rentals because APL asserts that the container cranes are fixtures constituting real property and not personal property subject to the retail sales tax. The trial court ruled in favor of the Department of Revenue (“Department”) that the container cranes were personal property and retail sales tax was properly paid.

To determine whether an item constitutes a fixture, Washington applies the common law fixture test. Under the three-pronged test, an item constitutes a fixture only if it is actually annexed to the realty, is adapted to the use of the realty to which it is attached, and the annexing party intended a permanent addition to the freehold. Here, the container cranes fail the first and third prongs. The cranes are not “actually annexed” to the realty, as required by the first prong. More importantly, the Port of Seattle – the annexing party – did not intend for the cranes to be a permanent accession to the Port’s land, as required by the third prong. Neither the Port nor APL intended to treat the cranes as real property when entering into the lease agreement. Thus, APL fails to demonstrate the container

cranes are fixtures and is not entitled to a refund. The trial court's order granting the Department summary judgment should be affirmed.

II. ISSUES

1. Did the trial court properly conclude on summary judgment that despite the size of the container cranes, they were not attached to the realty and were not fixtures under the common law test for fixtures?

2. The third prong of the common law fixtures test requires the annexing party to intend the item to be a permanent accession to the realty. Intent is measured objectively. Under the objective intent test, are the container cranes fixtures, when the lease agreement between APL and the Port of Seattle objectively demonstrates that the Port viewed the container cranes as personal property and not as fixtures?

III. COUNTER STATEMENT OF FACTS

A. Container Cranes

APL leases premises and container cranes from the Port of Seattle ("Port").¹ CP at 26, 33-93. Container cranes are used to move containers holding cargo to and from vessels at the Port.² CP at 26. (Declaration of

¹ Appellant Eagle Marine Services is a wholly-owned subsidiary of appellant American President Lines, Ltd., which is a wholly-owned subsidiary of appellant APL Limited. In 1994, American President Lines, Ltd., assigned its interest in the lease with the Port 110. of Seattle to Eagle Marine Services. Eagle Marine Services is the marine terminal operator at Port of Seattle Terminal 5. CP at 109-

² APL provides stevedoring and marine terminal operations for cargo shipping at Terminal 5 at the Port. CP at 6. Loading and off-loading of cargo containers between wharf and vessel occurs at a terminal. CP at 26.

Michael Burke, Director of Container and Leasing Operations at the Port of Seattle). The Port owns the container cranes located at Terminal 5 and leases them to APL. CP at 26. The Port purchased the container cranes from the manufacturer who shipped the newly manufactured component parts for the cranes via ship to Terminal 5. CP at 118. The component parts were off-loaded, assembled and erected. CP at 118.

The container cranes have wheels, which are positioned on crane rails, which are connected to the wharf. CP at 27. The cranes move along the crane rails, powered by electricity. CP at 27. The cranes are movable and can be relocated from one terminal to another at the Port, including Terminal 5. CP at 27. The cranes can be moved without damaging the dock, if proper cautions are taken and if the dock to which the crane is moved can handle the crane. CP at 27, 202. Container cranes can be disassembled and reassembled. CP at 27. For example, a container crane at the Port of Seattle could be used at the Port of Olympia, if the Port of Olympia dock has the capacity for the crane, because most of the crane rails worldwide are standard sized crane rail gauge. CP at 27. APL removed a container crane from its terminal at the Port of Oakland, shipped it to Seattle, used it at Terminal 5 for about two years, and then sold it to another terminal operator who removed the crane from Terminal

5.³ CP at 128 (Amended Answer to Interrogatory No. 24). One of the cranes at issue in this case was moved by barge from one terminal at the Port to Port Terminal 5, where it was off-loaded and placed on the crane rails. CP at 117-118. Container cranes have a useful life of about 30 years, and the five container cranes at issue in this case have been in use between 20 to 23 years.⁴ CP at 108, 113.

Terminals at the Port's seaport can be and have been converted from use as a marine cargo terminal to other uses, such as a cruise ship terminal. CP at 142 (Port of Seattle Memorandum). Because cruise ships could not berth with container cranes on the dock, cranes were moved back from the dock and placed in storage. CP at 142. The container cranes can be relocated to meet marine terminal operator tenant needs. CP at 144. Container cranes have a fixed life in which they have to be replaced or scrapped. CP at 151. Cranes can also be sold like a piece of equipment or disposed of as scrap. CP at 151-152. There is an active international market for used cranes. CP at 27. In the Port's Memorandum discussing relocating three container cranes from Terminal

³ APL explains in its amended answer to Interrogatory No. 24 that this "sixth container crane" is not one of the cranes at issue in this case. CP at 128.

⁴ Although there are currently six container cranes at Terminal 5, CP at 26, APL contests the sales tax charged on five container cranes during the time APL leased the cranes from the Port. APL Br. at 1, 2.

30 to Terminal 46 and to Terminal 5, it considered the option of selling the cranes. CP at 144.

The owner of the container cranes –the Port– considers container cranes personal property. CP at 148-152 (Port Commission Resolution No. 3522; Port of Seattle Memorandum dated March 2, 2004). Thus the Port rents the container cranes as equipment at a rate per hour, not real property. CP at 135, 137 (Port of Seattle Terminals Tariff No. 4). Consistent with the Port’s treatment of the container cranes as personal property, the Port collected state sales and use tax on the container crane rentals. CP at 135.

The Port is not alone among port authorities in classifying container cranes as equipment, the rental of which is subject to retail sales tax. For instance, the Port of Tacoma includes container cranes in its definition of equipment, rents container cranes without an operator, and the crane rental charges are subject to applicable state sales tax. CP at 169-172 (Port of Tacoma Terminals Tariff No. 200). Likewise, the Port of Olympia rents container cranes as equipment and assesses sales tax on the equipment rental. CP 174-176 (Port of Olympia Terminal Tariff No. 10).

In a Container Terminal Development Plan report, the Port refers to its container cranes as “inventory.” CP at 96 (Port of Seattle Container Terminal Development Plan). In the report, the Port considers if it should

acquire larger cranes to serve larger ships, and discusses alternative strategies with respect to container crane “inventory”: (1) continue with the current mix of cranes; (2) move to larger cranes over the long term; or (3) move rapidly to larger cranes. CP at 98. The report suggested the Port move to larger cranes over time, which would entail upgrading wharves, upgrading or overhauling cranes, and selling some older cranes. CP at 98.

B. Lease between Port of Seattle and APL

In 1985, APL and the Port entered into a lease in which APL leased premises and container cranes from the Port. CP at 33-70 (Lease Agreement). Under the lease, the Port agreed to provide for APL’s “preferential use on a non-continuous, ship-by-ship basis” of four certain identified Port owned container cranes, and to provide a fifth container crane upon six months notice from APL. CP at 36. The terms of APL’s lease with the Port demonstrate that the parties viewed the container cranes not as real property, but as equipment subject to retail sales tax.

Throughout the lease the Port distinguishes between real property and equipment and the Port describes the container cranes as equipment. CP at 35-45. The lease separately outlines the terms of the “use of premises and cranes.” CP at 42. APL was to inspect the premises and the container cranes before taking possession. CP at 44. By separately outlining the use and inspection of the premises and the container cranes,

the lease identifies the real property separate and apart from the container cranes. Further, the lease charges rent for the premises and separately charges rent for container “crane use charges” under Item III of Exhibit C. CP at 39. Additionally, APL agreed to be responsible for the taxes for its activities, including “any taxes levied on, or measured by, the sums payable by lessee under this Lease whether imposed on Lessee or on the Port.” CP at 49. These taxes would include sales taxes as demonstrated in the 1987 lease amendment. CP at 73, ¶ 3. Item III of Exhibit C, the parties agreed “[a]ll applicable taxes are payable by Lessee in addition to equipment charges.” CP at 78.

Subsequent amendments of the lease between the Port and APL demonstrate that container cranes were equipment separate and apart from the real property by having the Port upgrading the container cranes, by adding three crane “manlifts,” the cost for which APL was responsible for repaying the Port. CP at 82-83. This amendment also documented APL’s intent to move a container crane from the Port of Oakland to the Port of Seattle for use at Terminal 5. CP at 82-83. Additionally, these amendments reflected that APL would pay the sales tax:

Lessee shall pay rent to the Port for the container crane(s) based on the cost charged by the manufacturer plus the direct administrative and engineering costs of the Port and permitting, certification costs and sales tax, amortized at a 9.25% per year, over 30 years . . .

CP at 91.

This amendment also contained a provision granting APL the option to purchase container cranes from the Port. CP at 91. When the Port incurred costs for enhancements to Port-owned container cranes, APL was responsible for paying the sales tax included in those costs. CP at 92. Under the lease, APL was also responsible for repaying to the Port sales tax incurred by the Port in connection with the costs of raising the height of the existing container cranes at Terminal 5. CP at 93. Again demonstrating that the container cranes were treated as equipment and personal property, not real property.

Consistent with the lease and its amendments throughout the period at issue in this case, the Port charged and collected retail sales tax from APL on the crane rentals. CP at 154-167 (excerpts of monthly billing statement for crane rental charges).

C. Statement of Procedure

APL petitioned the Department of Revenue (“Department”) for a refund of the sales taxes it paid in the amount of \$1,376,369 on the rental of container cranes during the period January 1, 1997 through May 23, 2005. CP at 7. The Department denied the petition. CP at 7. APL then filed its complaint in Thurston County Superior Court for refund of sales

taxes that it paid. CP at 007. The Department filed a motion for summary judgment and the trial court granted the Department's order on summary judgment. CP at 366-368.

IV. SUMMARY OF ARGUMENT

Container cranes are equipment and as such are personal property. APL fails to establish that container cranes meet the prongs of the common law test for fixtures. The analytical framework is provided in the cases of Glen Park Associates, LLC, v. Dep't of Revenue, 119 Wn. App. 481, 486, 82 P. 3d 664 (2003), review denied, 152 Wn.2d 1016, 101 P.3d 107 (2004) and Dep't of Revenue v. Boeing Co., 85 Wn.2d 663, 668, 538 P.2d 505 (1975). Applying that framework, container cranes are personal property and not fixtures since the cranes can be moved without damaging the dock, container cranes can be assembled and reassembled for transport, and container cranes have a fixed use and can be sold or scrapped.

Additionally, the undisputed facts in the record demonstrate that the Port of Seattle did not intend to permanently annex the cranes to the realty. In the Port's initial lease and subsequent amendments to its lease with APL, it described the container cranes as equipment and charged sales tax for the rental of such equipment. Despite the size and mass of the container cranes, they are not affixed to the realty under the common

law test for fixtures. Nor has APL demonstrated that genuine issues of fact exist to overturn the summary judgment order granted in the Department's favor.

V. ARGUMENT

A. Standard of Review

The appellate court conducts the same inquiry as the trial court when it reviews a summary judgment order. East Wind Express, Inc. v. Airborne Freight Corp., 95 Wn. App. 98, 102, 974 P.2d 369, review denied, 138 Wn.2d 1023 (1999) (citing Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982)). Because the standard of review is de novo, this Court may affirm the trial court's summary judgment order on any basis supported by the record, including on a basis not decided by the trial court. See Int'l Brotherhood of Elec. Workers, Local No. 46 v. Trig Electric Constr. Co., 142 Wn.2d 431, 435, 13 P.3d 622 (2000); Redding v. Virginia Mason Medical Center, 75 Wn. App. 424, 426, 878 P.2d 483 (1994).

B. The Container Cranes Are Personal Property

The retail sales tax applies to the renting or leasing of tangible personal property.⁵ To determine whether the container cranes are

⁵ RCW 82.08.020 provides: "(1) There is levied and there shall be collected a tax on each retail sale in this state equal to six and five-tenths percent of the selling

personal property or real property, i.e., fixtures, the court applies the common law test of fixtures. Glen Park Associates, LLC, v. Dep't of Revenue, 119 Wn. App. 481, 486, 82 P.3d 664 (2003), review denied, 152 Wn.2d 1016, 101 P.3d 107 (2004). Ascertaining whether an item is a fixture is a mixed question of law and fact. Western Ag Land Partners v. Dep't of Revenue, 43 Wn. App. 167, 170, 716 P.2d 310 (1986). Whether an item constitutes a fixture or personal property depends on the particular facts of each case. Union Elevator & Warehouse Co., Inc. v. State ex rel. Dep't of Transp., 144 Wn. App. 593, 603, 183 P.3d 1097 (2008).

The common law established a three-pronged test to determine whether an object is a fixture or personal property:

A chattel becomes a fixture if: (1) it is actually annexed to the realty, (2) its use or purpose is applied to or integrated with the use of the realty it is attached to, and (3) the annexing party intended a permanent addition to the freehold.

Glen Park, 119 Wn. App. at 487 (citations omitted).

“Each element of this three-pronged test must be met before an article may properly be considered a fixture.” Glen Park, 119 Wn. App. at 487 (quoting Dep't of Revenue v. Boeing Co., 85 Wn.2d 663, 668, 538 P.2d 505 (1975)).

price.” Retail sale is defined by RCW 82.04.050 and includes “[t]he renting or leasing of tangible personal property to consumers[.]” Id. at 4(a)(i).

In applying this common law test to the container cranes, the trial court properly concluded that the container cranes were personal property and not fixtures. The trial court made its decision under the first prong of the test: that the container cranes were not annexed to the realty. It did not evaluate the second or third elements of the common law test for fixtures. RP at 29.⁶ APL directs the court to its niggling criticisms on the trial court's description of two facts and argues this requires reversal. APL Br. at 8-9.⁷ As this court reviews the entire record de novo, contrary to APL's contention: the undisputed facts in the record support the conclusion that the container cranes were not affixed to the realty.⁸

⁶ The trial court did not consider the second or third prong of the common law test for fixtures because it held that the container cranes were not attached to the realty and were therefore personal property. ("I'm not going to go beyond that to number three, the objective intent. . . . I've not gone into a specific detail here today, because, I never got to that particular decision point.") RP at 29. The Department conceded and continues to concede that the container cranes meet the second prong of the common law test.

⁷ In announcing its decision the trial court stated, "But I find that these cranes are movable, that they're on a rail system that can allow their movement from one terminal to another, that if a cruise ship comes in at a particular part of the dock for that cruise ship to dock at, the crane has to be moved back away from the dock." RP at 27. The trial court's inaccurate description of the rail system at APL's particular terminal and inference that the container cranes had to be moved back from the dock for a cruise ship to dock at APL's particular terminal are inconsequential to the trial court's ultimate determination and support in the record that the container cranes were not fixtures.

⁸ APL may also argue that language in Western Ag, 43 Wn. App. at 173, provides a rebuttable presumption that a property owner attaches the article to the land with the intention of enriching it. However, as the court in Glen Park, 119 Wn. App. at 490, pointed out, it is not the fact that "any attachment to the property gives rise to the presumption; rather, *annexation* creates the presumption." The court then pointed out that the appliances were not annexed to the property and therefore the presumption did not apply. *Id.* Similarly, the trial court here ruled that the container cranes were not affixed to the realty. Therefore, the presumption does not apply.

The cranes are movable and can be relocated from one terminal to another at the Port, including to Terminal 5. CP at 27. The cranes can be moved without damaging the dock, if proper cautions are taken and if the dock to which the crane is moved can handle the crane. CP at 27, 208.

Container cranes can be disassembled and reassembled. CP at 27. In 1997, the Port allowed APL to temporarily install an APL-owned container crane at Terminal 5. CP at 208. APL removed a container crane from its terminal at the Port of Oakland, shipped it to Seattle, used it at Terminal 5 for about two years, and then sold it to another terminal operator who removed the crane from Terminal 5. CP at 128, 208. One of the cranes at issue in this case was moved by barge from one terminal at the Port to Port Terminal 5, where it was off-loaded and placed on the crane rails. CP at 117-11.

Cranes can also be sold like a piece of equipment. There is an active international market for used cranes. CP at 27. In the Port's Memorandum discussing relocating three container cranes from Terminal 30 to Terminal 46 and to Terminal 5, it considered the option of selling the cranes. CP at 144. If the Port could not sell some of its older 50 foot gauge cranes, it would dispose of them as scrap. CP at 208.

Further, the common law test does not exempt large items of industrial machinery or equipment from being classified as personal

property. See Union Elevator & Warehouse Co., Inc. v. State ex rel. Dep't of Transp., 144 Wn. App. 593, 599, 183 P.3d 1097 (2008) (machinery and equipment to operate a grain elevator including a manlift, conveyers, and a scale, which could be moved from one grain elevator to another and could be disassembled, were personal property, not fixtures, because the evidence supported an inference the owner did not intend to permanently affix the equipment to the elevator); Boeing, 85 Wn.2d 663, 664, 538 P.2d 505 (1975) (immense jigs that weighed anywhere from 20 to 103 tons, which were bolted to the floor and specially designed to assemble the 747 airplane, were personal property and not fixtures because the totality of the circumstances indicated Boeing did not intend the jigs to be a permanent accession to the realty); Lipsett Steel Products v. King County, 67 Wn.2d 650, 651, 409 P.2d 475 (1965) (huge, steel scrap shear installed on pilings and a 3-foot thick reinforced concrete base, capable of exerting 880 tons of pressure, was not permanently affixed to the realty).

A straightforward application of the common law test to the undisputed facts in this case demonstrates the container cranes should be classified as personal property, like the massive assembly jigs were in Boeing, the steel scrap shear in Lipsett, and the grain elevator machinery and equipment in Union Elevator. In Boeing, the court relied upon the fact the massive jigs could be removed from the building and the building

could still be used for airplane manufacturing and assembly. Boeing, 85 Wn.2d at 669. Similarly here, the container cranes could be removed from the marine terminal and the terminal could still function as a seaport, for cargo or for cruise ships, or other purposes.

In Lipsett, a taxpayer sought a refund of personal property taxes paid with respect to certain equipment at a steel plant. Lipsett, 67 Wn.2d at 650-51. The equipment was a “huge” shear used for preparing scrap steel which Lipsett had purchased, and then installed on land leased from the owner. Id. The shear “was capable of exerting a pressure of 880 tons, [and] was installed on pilings and a reinforced concrete base which was 3 feet thick.” Id. at 651. A building and a crane way was constructed over and around the shear. Id. The taxpayer claimed the shear was real property. Id. at 652. The court disagreed, holding the shear was properly classified as personal property, not a fixture constituting real property, for property tax purposes. Id. at 653. In the decision, the court noted, “In passing, it can be said that the physical nature of the huge scrap shear – its immense size and weight, the physical aspects of its installation – could be quite misleading as to whether it is real or personal property.” Id. at 652. Furthermore, “[d]espite great expense and difficulties, the shear could have been removed by appellant from its present location” Id. at 653. In this case, the fact that the container cranes can be disassembled,

transported, and sold either as equipment or as scrap metal demonstrates that the container cranes are personal property and not fixtures.

C. Glen Park Has Rejected APL's Argument That Use Of The Property Can Be Considered To Decide Annexation.

APL stresses that the container cranes at "Terminal 5 were specifically fabricated for Terminal 5" and "are essential for Terminal 5 to function for its sole purpose as a marine container facility." APL Br. at 13. APL equates the cranes' relationship to the marine terminal to that of the irrigation system to farmland in Western Ag Land Partners v. Dep't of Revenue, 43 Wn. App. 167, 716 P.2d 310 (1986). APL Br. at 12-13. Under Western Ag, APL argues the cranes are fixtures because the cranes are integral to Terminal 5.

APL's argument has been made before, and soundly rejected by Division II in Glen Park. The taxpayer in Glen Park relied on Western Ag and argued that any object that is essential to use of the overall property is constructively annexed thereto. Glen Park, 119 Wn. App. at 488. In declining to follow Division III of the Court of Appeals, Division II criticized the Western Ag court's statement that the essential use of an article may be considered in deciding whether the item is constructively annexed to the realty:

We decline to follow *Western Agricultural'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.

Glen Park, 119 Wn. App. at 489.⁹

Here, the cranes bear more similarities to the jigs in Boeing than the irrigation system in Western Ag. The cranes can be removed without damage to the underlying property, can be moved from one terminal to another, can be taken apart and put back together, moved to a different port, and can be used worldwide on standard- sized crane rail gauge. CP at 26-27. Furthermore, the purported adaptability of the cranes for use at Terminal 5 is not sufficient to convert the cranes from personal property into the character of a fixture constituting real property: “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 machinery.” Chase v. Tacoma Box Co., 11 Wash. 377, 385, 39 P. 639 (1895).

⁹ Outside of Division III, no Washington court has directly addressed the issue of constructive annexation. As Glen Park indicates, Division III adopted an overly expansive interpretation of the common law fixtures test. The problem with using a “constructive annexation” rule as in Western Ag. is that if an item of personal property need only be integral to use of real property, any item having any essential use would satisfy the annexation prong. That is dubious and would lead to an absurd result. Furthermore, Division III in its recent decision of Union Elevator, 144 Wn. App. at 605, rejected the “essential use or function” test, “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.”

APL further relies upon the Western Ag. court's citation to Seatrain Terminals of California, Inc. v. County of Alameda, 83 Cal. App. 3d 69, 147 Cal. Rptr. 578 (1978). APL Br. at 14. Seatrain is not controlling authority in Washington. Although Seatrain held that container cranes were fixtures for California property tax purposes, a subsequent California decision held that the container cranes were not fixtures in applying the sales tax. United States Lines, Inc. v. State Board of Equalization, 182 Cal. App. 3d 529, 227 Cal. Rptr. 347 (1986).

Based upon this evidence and under the common law test, the trial court did not err in concluding that container cranes were personal property and not fixtures attached to the realty. Further, APL has not demonstrated that a genuine issue of material fact exists negating the summary judgment order.

D. The Undisputed Facts Amply Demonstrate The Port Did Not Intend The Cranes To Be A Permanent Accession To The Real Estate.

Even if the court determines that the container cranes are annexed to the realty under the first prong of the common law test for fixtures, APL cannot meet the third prong of the common law test: objective intent. APL fails to brief to the court the common law test for fixtures, but focuses only on the first prong of the test, whether the container cranes were actually annexed to the realty. Although the trial court focused only

on the first prong of the test, it is well established that on appeal, the appellate court reviews a summary judgment order de novo and applies the same standards of review as if it were the trial court.¹⁰ Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

In determining whether an object has become affixed to realty, the “cardinal inquiry” is the intent of the owner who “affixed” the item. W.R. Ballard v. Alaska Theatre Co., 93 Wash. 655, 663, 161 P. 478 (1916). The court determines the party’s intent to affix an item “through objective evidence rather than through the party’s subjective belief.” Glen Park, 119 Wn. App. at 490-91 (quoting Boeing, 85 Wn.2d at 668). “Evidence of intent is gathered from the surrounding circumstances at the time of installation.” Glen Park, 119 Wn. App. at 487. “The court should consider all pertinent factors reasonably bearing on the annexor’s intent, including, but not 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.” Id. at 487-488.

The intent prong is an objective standard. Boeing, 85 Wn.2d at 668-669. Intent is not determined by the secret intention of the owner who “affixed” the item. Strain v. Green, 25 Wn.2d 692, 699, 172 P.2d 216

¹⁰ APL fails to brief the court on all three prongs of the common law test. As counsel for APL acknowledges, APL Br. at 6, “intent is the most important part of the fixtures test.” Id. at 490.

(1946). Rather, intent is determined by the surrounding circumstances at the time the item was installed. Boeing, 85 Wn.2d at 668. The intent of the parties “is to be inferred, *when not determined by an express agreement*, from the nature of the article affixed, the relation and situation to the freehold of the party making the annexation, the manner of the annexation, and the purpose for which it is made.” Strain v. Green, 25 Wn.2d 692, 699, 172 P.2d 216 (1946) (quoting W.R. Ballard v. Alaska Theater Co., 93 Wash. 655, 663, 161 P. 478 (1896)) (emphasis added).

Here, there is an express agreement, the written lease. Therefore, summary judgment is the appropriate avenue to apply these factors to the Port’s lease with APL, which amply demonstrates that the Port did not intend the container cranes to be permanently affixed to the freehold.

The lease entered into between the parties at the time of annexation shows that the cranes were viewed as personal property. Throughout the lease it distinguishes between real property and describes the cranes as equipment. CP at 35-45. The lease was amended in 1987 to reflect that the Port provided APL a fifth container crane. CP at 72-78 (Second Amendment to Lease). It specified APL agreed to pay “crane use charges” according to Item III of Exhibit C to the second amended lease. CP at 73, ¶ 3. In Item III of Exhibit C, the parties agreed “[a]ll applicable taxes are payable by Lessee in addition to equipment charges.” CP at 78.

Exhibit C demonstrates that the container cranes were viewed as the rental of equipment which would be consistent for personal property and APL would have to pay the “applicable taxes,” i.e., sales tax.

The lease was amended a fifth time, in 1992. CP at 81-86 (Fifth Lease Amendment). The Port added three crane “manlifts,” for which APL was responsible for repaying the Port. CP at 82-83. This amendment also documented APL’s intent to move a container crane from the Port of Oakland to the Port of Seattle for use at Terminal 5. CP at 82-83. In 1994, the parties executed a sixth amendment to the lease. CP at 88-93 (Sixth Lease Amendment). The Port agreed it would purchase, at APL’s request, up to two container cranes of APL’s choice. CP at 90. It provided that APL would pay the sales tax:

Lessee shall pay rent to the Port for the container crane(s) based on the cost charged by the manufacturer plus the direct administrative and engineering costs of the Port and permitting, certification costs and sales tax, amortized at a 9.25% per year, over 30 years . . .

CP at 91.

This amendment also contained a provision granting APL the option to purchase container cranes from the Port. CP at 91. When the Port incurred costs for enhancements to Port owned container cranes, APL was responsible for paying the sales tax included in those costs. CP at 92. Under the lease, APL was also responsible for repaying to the Port sales

tax incurred by the Port in connection with the costs of raising the height of the existing container cranes at Terminal 5. CP at 93.

Consistent with the lease and throughout the period at issue in this case, the Port charged and collected retail sales tax from APL on the crane rentals. CP at 154-167 (excerpts of monthly billing statement for crane rental charges). The fact the Port collected retail sales tax on the cranes further evidences the Port's intent that the cranes are personal property. CP at 78, 91, 92, 135, 154-167. The lease demonstrates that the container cranes were viewed as personal property and not real property fixtures.

The decision and analysis by the Washington Supreme Court in Boeing is directly on-point. At issue in Boeing was whether “fixed assembly jigs” weighing from 20 to 103 tons constituted fixtures for purposes of a manufacturing tax credit. Boeing, 85 Wn.2d at 664.¹¹ Boeing built a manufacturing and assembly plant for the 747. Id. The assembly jigs were specially designed for the 747, were used to hold large parts of the aircraft “steady and in alignment,” and could not be used in assembly of any other airplane. Id. The jigs were not built into the floor, but were bolted to the floor or to the concrete foundations arising from the floor. Id. They could be disassembled and removed without damaging the

¹¹ The tax credit at issue in Boeing allowed a taxpayer to take as a credit against manufacturing business and occupation tax certain sales and use taxes paid. Boeing, 85 Wn.2d at 665.

building, and “Boeing has moved similar, although smaller, jigs from plant to plant in previous aircraft assembly projects.” Id. at 665.

Boeing did not consider the jigs to be fixtures, as evidenced by Boeing’s reporting the jigs as personal property for property tax purposes. Boeing at 670. Internally, Boeing categorized the jigs as equipment and tools, not fixtures. Id. The court held the fixed assembly jigs were personal property rather than fixtures. Id. at 670. The court stated: “[W]e do not think that the totality of the circumstances can reasonably be construed to indicate intent by Boeing for the jigs to be a permanent accession to the freehold.” Id.

Like the jigs in Boeing, the Port of Seattle considered the cranes to be personal property, as evidenced by the fact they collected sales tax on the rental of the cranes and the lease distinguishes between rental of premises and rental of equipment such as cranes. CP at 35-45, 78, 91, 92, 93, 135, 154-167. Unlike the jigs in Boeing, that were bolted to the concrete, the container cranes could be removed, disassembled, re-assembled, sold or scrapped. Thus, the parties’ intent regarding the classification of the crane as personal property or fixture is determined from the lease. Specifically, by including a lease provision specifying sales tax is due on the rental of the cranes, the parties expressly intended the cranes to be considered personal property.

Other factors demonstrate the Port did not intend a permanent accession of the container cranes to the realty. First, the cranes are movable and can be moved from one terminal to another within the Port, and moved from one Port to another. CP at 26. Second, the cranes can be moved without damage to the wharf. Id. Third, the Port and APL treated the cranes as personal property in the lease agreement. Fourth, the course of performance between the parties – the Port charging sales tax on crane rentals and APL paying the sales tax to the Port – demonstrates the Port and APL considered the container cranes tangible personal property. Fifth, the Port did not intend for the cranes to be a permanent accession to the realty is evidenced by the Port’s 1991 Container Terminal Development report, which shows the use of cranes at the Port is dependent on the Port’s continued use of the marine terminals to service a particular class of vessels. Cranes could or would be replaced depending on whether the Port decided to service larger vessels. The report suggests the Port did not intend Port-owned container cranes to become a permanent accession to Port-owned land. Sixth, the cranes have a fixed useful life, there is an active market for used cranes, and cranes at the end of their useful life are scrapped. CP at 151, 208.

The APL option to purchase container cranes from the Port is further objective evidence the Port did not intend for the container cranes

to become permanent accessions to the real property. If the Port intended the cranes to be permanent additions to the Port's land, it would not have provided APL the option to purchase the cranes. CP at 88-93. Similarly, in Lipsett Steel Products, Inc., v. King County, 67 Wn.2d 650, 651, 409 P.2d 475 (1965), the owner of the realty had an option in its lease to purchase the huge steel scrap shear, Lipsett installed on pilings and a reinforced concrete base which was 3 feet thick with a building and a craneway over and around the huge scrap shear. Even though the huge steel scrap shear was annexed to the realty, the court found the lease explicitly expressed the intent of the parties not to change the title, ownership or characterization of the scrap shear. Id. at 653. As the court stated, "Despite great expense and difficulties, the shear could have been removed by appellant from its present location on the land" Id.

This objective evidence manifests that the parties intended to treat the cranes as personal property for purposes of the lease of the property. All these factors rebut any claim by APL that the cranes are fixtures constituting real property. Rather, the intent of the parties is clearly stated in the lease. In the hands of APL, the container cranes are personal property. In sum, the undisputed facts demonstrate the Port did not intend to make the container cranes a permanent part of the Seaport. APL fails to satisfy the third prong of the common law fixture test.

VI. CONCLUSION

Under the first prong of the common law test for fixtures, the trial court properly concluded that the container cranes were personal property and not fixtures. Under the third prong of the test, undisputed facts objectively demonstrate that the Port did not intend to annex the container cranes to the realty. The Court should affirm the trial court's order granting the Department's motion for summary judgment.

RESPECTFULLY SUBMITTED this 24th day of April, 2009.

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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

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

Appellant,

v.

Washington State Department of
Revenue,

Respondent.

CERTIFICATE OF
SERVICE

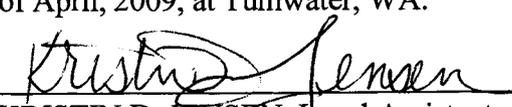
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I certify that I served a true and correct copy of the Brief of Respondent and this Certificate of Service, via Electronic Mail and U.S. Mail, postage prepaid, through Consolidated Mail Services, on the following:

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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 April, 2009, at Tumwater, WA.


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