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DETERMINATION OF PROPERTY AS TANGIBLE PERSONAL PROPERTY OR REAL PROPERTY FOR PURPOSES OF SALES AND USE TAX

Pursuant to MCL 205.6a, a taxpayer may rely on a Revenue Administrative Bulletin issued by the Department of Treasury after September 30, 2006, and shall not be penalized for that reliance until the bulletin is revoked in writing. However, reliance by the taxpayer is limited to issues addressed in the bulletin for tax periods up to the effective date of an amendment to the law upon which the bulletin is based or for tax periods up to the date of a final order of a court of competent jurisdiction for which all rights of appeal have been exhausted or have expired that overrules or modifies the law upon which the bulletin is based.

RAB 2016-4.

This Revenue Administrative Bulletin (“RAB”) discusses the factors the Department will apply to determine whether property remains tangible personal property or loses its character as personal property and becomes a fixture through its affixation to real estate. The outcome of this determination has consequences under various Michigan tax laws, particularly in the context of the General Sales Tax Act and the Use Tax Act (the “Acts”) which is the primary focus of this RAB. The provisions of law, cases, and examples cited in this RAB are not intended to be exhaustive and are generally provided for illustrative purposes only.¹ Other provisions or exemptions in law may be relevant to a particular set of facts and circumstances. This RAB should not be relied upon for making determinations concerning general ad valorem property taxes, which are generally governed by different laws, legal interpretations and principles than are sales and use taxes.

Background

In general, a retail sale in Michigan by which ownership of *tangible personal property* is transferred for consideration is subject to sales tax.² Likewise, the use, storage, or consumption of *tangible personal property* in Michigan is generally subject to use tax.³ Under the Acts, tangible personal property is “personal property that can be seen, weighed, measured, felt, or touched or that is in any other manner perceptible to the senses and includes electricity, water, gas, steam, and prewritten computer software.”⁴ “Real property” or “real estate” (which refers to

¹ Where specific case law is cited in this RAB (including case examples), this signifies that the cases are either binding on the Department as precedent, or (in the case of unpublished or Michigan Tax Tribunal opinions) are cases that the Department intends to follow for purposes of making the determinations at issue in this RAB.

² MCL 205.52(1).

³ MCL 205.93(1).

⁴ MCL 205.51a(q); 205.92(k).

“[l]and and anything permanently affixed to the land ...”) is not tangible personal property.⁵ Accordingly, property or items which are “found to be fixtures are considered to be part of the realty to which they are connected.”⁶ The term “‘fixture’ necessarily implies something having a possible existence apart from the realty, but which may, by annexation, be assimilated into realty.”⁷ Thus, property that may start out as personal property can be transformed into a fixture when “affixed” to real estate.

A determination that property has lost its character as tangible personal property by becoming a fixture to real property can have significant tax consequences under the Acts. For example, the determination may dictate whether a taxpayer is to be considered a retailer or a contractor.⁸ In addition, the determination is relevant for purposes of evaluating whether a taxpayer can avail itself of statutory exemptions, such as the agricultural production and industrial processing exemptions.⁹ The agricultural exemptions under the Acts expressly exclude “tangible personal property permanently affixed and becoming a structural part of real estate.”¹⁰ Similarly, the industrial processing exemption under the General Sales Tax Act does not apply to “tangible personal property permanently affixed and becoming a structural part of real estate ...” and the industrial processing exemption under the Use Tax Act excludes “tangible personal property affixed and becoming a structural part of real estate in [Michigan]”¹¹

Determining Whether Property is Tangible Personal Property or a Fixture to Real Estate

Michigan case law has recognized that simply because certain property has been (or is usually) classified as either personal property or a fixture does not mean that it must be so classified in other cases.¹² Moreover, “there is no bright-line test for determining whether and when an item of personal property has become sufficiently connected with real property that it should be treated as real estate, [so] Michigan courts have traditionally examined ‘all the relevant factors’ to determine on a ‘case-by-case basis’ whether personal property has become sufficiently affixed to real property that it should be treated as a part of the real estate.”¹³ Therefore, to determine whether property remains personal property or becomes part of realty (i.e., becomes a “fixture”), Michigan courts have traditionally applied the following three factors discussed by the Michigan Supreme Court in *Sequist v Fabiano*: (1) annexation to the real estate, either actual or constructive; (2) adaptation or application to the use or purpose of the real estate, and; (3)

⁵ *In re Estate of Jihad H. Moukalled*, 269 Mich App 708, 716 (2006).

⁶ *Velmer v Baraga Area Schools*, 430 Mich 385, 394 (1988).

⁷ *Kent Storage Co v Grand Rapids Lumber Co*, 239 Mich 161, 164 (1927).

⁸ The former requires that sales tax be paid on the retail sale, while the latter invokes a use tax liability as a consumer of the property. See e.g., *Brunt Assoc, Inc v Dep’t of Treasury*, MTT Docket No. 461270 (May 16, 2015).

⁹ In addition to affixation, property must become “a structural part of the real estate” to not qualify under these exemptions. Although the Department will apply the 3-part test to determine affixation, specifically, the evaluation of the factors in that test are likely to be relevant in determining whether property has become a structural part of real estate.

¹⁰ MCL 205.54a(e); 205.94(f).

¹¹ MCL 205.54t(5)(a); 205.94o(5)(a).

¹² See *Morris v Alexander*, 208 Mich 387, 391 (1919).

¹³ *Granger Land Development Co v Dep’t of Treasury*, 286 Mich App 601, 610-611 (2009); lv den 487 Mich 853 (2010).

intention to make the article a permanent accession to the real estate.¹⁴ Accordingly, this is the test that the Department will utilize for making these determinations as well. For property otherwise categorized as personal property to be considered a fixture by the Department, it must satisfy each of the three factors of the test as no one factor is determinative on its own.

1. Annexation to Real Estate, Either Actual or Constructive

This factor is concerned with the manner in which an item is attached to the real property. The term annexation “refers to the act of attaching or affixing personal property to real property and, as a general proposition, an object will not acquire the status of a fixture unless it is in some manner or means, albeit slight, attached or affixed, either actually or constructively, to the realty. That is, if the object is not attached to the land or to some structure or appliance which is attached to it, it will retain its character as personalty even though intended for permanent use on the premises.”¹⁵

Michigan courts have recognized that there are “innumerable ways that a person can affix personal property to real estate; some items may be physically attached to the real estate whereas other items may be put in place with the intent that the property will become part of the real estate through size and character.”¹⁶ Therefore, even if an object is not “physically affixed to the realty, it may acquire the status of a fixture by constructive annexation.”¹⁷ Constructive annexation “has frequently been applied in the case of articles which are not themselves actually or directly annexed to the realty, but are part of, or accessory to, articles which are so annexed. Thus, where the principal part of machinery is [a] fixture due to actual annexation to the realty, the parts of it, although not actually annexed to the freehold, are fixture[s] where they would, if removed, leave the principal part unfit for use, and where of themselves they are not capable of general use elsewhere.”¹⁸ Moreover, “whatever is affixed to a building by an owner to complement, to facilitate its use and occupation in general, becomes a part of the realty, though capable of removal without injury to the building.”¹⁹

2. Adaptation or Application to the Use or Purpose of the Real Estate

Adaptation refers to the “relationship between chattel and the use which is made of the realty to which the chattel is annexed ... [A]n object introduced onto the realty may become a fixture if it is a necessary or at least a useful adjunct to the realty, considering the purpose to which the latter is devoted.”²⁰ If an item functions as part of the particular building or if it carries out part of the function of real property, that item will likely constitute real property. Examples of property that has been adapted to the use or purpose of the real estate include

¹⁴ 274 Mich 643 (1936); See also *Wayne Co v Britton Trust*, 454 Mich 608, 615 (1997) citing *Morris*, *supra* at 390-391.

¹⁵ *Britton Trust*, *supra* at 615.

¹⁶ *Granger*, *supra* at 610, citing *Baraga Area Schools*, *supra* at 395.

¹⁷ *Id.*

¹⁸ *Id.* at 618.

¹⁹ *Sequist*, *supra* at 646 citing *Kent Storage Co.*

²⁰ *Britton Trust*, *supra* at 618-619.

screens that are built to fit the windows of a particular building, drive-up window equipment, vault doors, and theatre seats bolted to the floor of the theatre.²¹

3. Intention to Make Property a Permanent Accession to the Real Estate

It is “well-settled in [Michigan] that whether an article attached to [real estate] becomes a fixture depends largely upon the intention of the parties.”²² The intention which controls “is that manifested by the objective, visible facts.”²³ In other words, the “surrounding circumstances determine the intent of the party making the annexation, not the annexor’s secret subjective intent.”²⁴ As to ascertaining the intent, it “may be inferred from the nature of the article affixed, the purpose for which it was affixed, and the manner of annexation.”²⁵ Importantly, the “permanence required is not equated with perpetuity. It is sufficient if the item is intended to remain where affixed until worn out, until the purpose to which the realty is devoted is accomplished or until the item is superseded by another item more suitable for the purpose.”²⁶ Furthermore, the “permanency of the attachment, and its character in law, do not depend so much upon the degree of physical force with which the thing is attached, or the manner and means of its attachment, as upon the motives and intention of the party in attaching it. If the intention is that the articles attached shall not by annexation become a part of the freehold, as a general rule they will not.”²⁷ In short, the intent to make a structure permanent “is not equated with an intent to make the structure last forever.”²⁸

Characterization of Particular Property as Personal or Real Property

As noted above, determining whether property should be characterized as personal or real property is generally based on the particular facts and circumstances of each case and the application of the three-factor test to those facts.

1. General Characterizations. The chart below provides various examples of general (but not conclusive) characterizations of particular property.²⁹

Property Description	General Characterization
Air Compressor (Portable)	Personal Property
Air Compressor (Central Building System)	Real Property
Awning	Real Property

²¹ See *Greystone Int’l, Inc v Dep’t of Treasury*, MTT Docket No. 429973 (May 10, 2013). Although decisions from the Michigan Tax Tribunal are not binding, the Department will follow it as to the treatment of theatre seats under similar facts.

²² *Morris*, *supra* at 390.

²³ *Mich Nat’l Bank, Landing v Lansing*, 96 Mich App 551, 554 (1980).

²⁴ *Baraga Area Schools*, *supra* at 619 citing *Kent Storage Co.*

²⁵ *Britton Trust*, *supra* at 619.

²⁶ *Mich Nat’l Bank*, *supra* at 554.

²⁷ *Continental Cablevision of Mich v City of Roseville*, 430 Mich 727, 736 (1988).

²⁸ *Tuinier v Charter Twp of Bedford*, 235 Mich App 663, 671-672 (1999).

²⁹ A more comprehensive chart can be found in the Department’s Contractor Manual that is published on the Department’s website.

Appliance (Built-in)	Real Property
Appliances (Freestanding)	Personal Property
Air Conditioner (Window Unit)	Personal Property
Central Air Conditioning System (Building)	Real Property
Building/Home Cabinet	Real Property
Carpeting	Real Property
Ductwork (for Building)	Real Property
Ductwork (for Equipment)	Personal Property
Elevator	Real Property
Fire Protection Sprinkler (Building)	Real Property
Generator (Servicing Building)	Real Property
Generator (Used for Specific Equipment)	Personal Property
Hot Water Heater	Real Property
Plumbing (for Building)	Real Property
Plumbing (for Specific Equipment)	Personal Property
Theater Seat Bolted to Floor	Real Property

2. Characterization in Specific Cases. The examples below summarize particular Michigan court or Tax Tribunal decisions applying the three-factor test.

i. **Greenhouses.** Michigan Court of Appeals ruled that greenhouses were fixtures annexed to real estate and should be taxed as such.³⁰ Finding that the greenhouses satisfied the annexation factor, the Court noted the following aspects of the greenhouses, among others: (i) they were structures anchored to the ground by being bolted to 20-inch metal “stubs” embedded in concrete-filled holes (12-inch diameter and 24-36 inches deep) in the real estate; (ii) 9 to 10-foot high vertical support posts supporting the roof were bolted to the “stubs”; (iii) garage doors and large wall fans were attached; (iv) installation of gas pipes and heaters to the support bars; (v) 10-foot-wide sidewalks within the greenhouses, and; (vi) they were used continuously rather than seasonally. In support of the conclusion that the greenhouses were adapted to the real estate, the Court noted that the real estate upon which the greenhouses were located was not vacant land but was appropriated for use as a commercial nursery, with greenhouses occupying 11.6 acres of the real estate. Regarding the intent factor, the Court discounted the fact that the greenhouses could be disassembled and moved, and emphasized “the placement of numerous stubs in cement-filled holes,” the concrete sidewalks constructed within the greenhouses, and the ability of the structures to hold large fans and gas heaters as objective evidence that the greenhouses were intended to be permanent accessions to the real estate.

ii. **Grain Storage Bins.** Michigan Court of Appeals held that grain storage bins used as part of a system of agricultural production did not qualify for the agricultural production exemption under MCL 205.94(1)(f) because they were fixtures attached to

³⁰ *Tuinier, supra*. Although this case involved general ad valorem property taxes, it is included in this RAB solely for the purpose of providing an additional example of how Michigan courts have applied the three-factor test.

real estate such that the taxpayer (a corporation in the business of selling and constructing grain storage bins) was liable for use tax as a consumer based upon the cost of the bins.³¹ The taxpayer testified as to the following regarding the construction of the bins: (i) a concrete foundation is poured; (ii) a pole is erected on site where the bin eventually stands; (iii) the roof is added and the first ring of corrugated sheeting is attached; (iv) the sheets are “bolted together” (but the bolts can be removed in order to disassemble the bins), and; (v) the bins can be removed from the foundations to be sold when disassembled. Expert testimony presented on behalf of the taxpayer offered that the bins “are merely bolted to foundations” and can be removed and are often sold independent of farms. Cross-examination of this expert showed that bins are often sold “as part of the farm.” The Court determined that the Michigan Tax Tribunal’s findings of fact were supported by the record and affirmed the Tribunal’s determination that the bins were fixtures. The Court noted that the bins were bolted onto J-shaped anchor brackets which were embedded approximately 10 inches into the concrete foundations poured by the taxpayer and (although sometimes sold separately) the bins were often sold as part of the farm as well.

iii. **Modular Homes.** The Michigan Tax Tribunal ruled that modular housing units sold to Michigan builders constituted tangible personal property subject to use tax rather than real property exempt from use tax.³² The taxpayer was a manufacturer of “modular” homes which consisted of modules (sections) of a custom home. The modules represented approximately 40% to 50% of a completed home. The modular homes were made to conform to local building codes. Similar to “stick-built” homes, the modular homes required the services of the usual skilled trades (such as carpenters, plumbers, electricians, roofers, and drywallers) during their on-site construction and would eventually have a foundation and garage. The modular homes were sold only to licensed builders who would erect the homes in Michigan. The Tribunal noted that the taxpayer testified that it was a “builder’s supply company” that was “not selling a completed house, [but was] supplying a builder with a product.” The Tribunal determined that the taxpayer was supplying products (tangible personal property) from its factory for use or consumption by builders in residential construction projects in Michigan.

³¹ *Miedma Metal Building Systems, Inc v Dep’t of Treasury*, 127 Mich App 533 (1983). Following the *Miedma Metal Building Systems* decision, the Legislature expanded the agricultural production exemptions in the General Sales Tax Act (e.g., MCL 205.54a(1)(e)) and the Use Tax Act (e.g., MCL 205.94(1)(f)) to include “portable grain bins.” Under these statutes, a portable grain bin is “a structure that is used or is to be used to shelter grain and that is designed to be disassembled without significant damage to its component parts.” Accordingly, to the extent grain storage bins constitute “portable grain bins” as defined in these statutes, they would be exempt from sales and/or use tax notwithstanding the *Miedma Metal Building Systems* decision. For example, the Department would characterize the grain storage bins at issue in *Miedma Metal Building Systems* as “portable grain bins” which are exempt from sales and use tax. However, if a grain storage bin is permanently attached to the real property (e.g., has a concrete foundation with poured concrete walls cemented into the foundation), then the bins would not likely qualify as “portable grain bins” under these statutes.

³² *Hi-Tech Housing, Inc v Dep’t of Treasury*, MTT Docket No. 241717 (June 8, 1999), aff’d by *Hi-Tech Housing, Inc v Dep’t of Treasury*, unpublished opinion per curiam of the Court of Appeals issued September 14, 2001 (Docket No. 220543); lv den 466 Mich 866 (2002). Please note that unpublished decisions do not constitute binding precedent.

iv. **Methane Producing Landfill Cells.** In a case involving use tax, the Michigan Court of Appeals held that cells operated on landfills which were designed to capture methane gas from waste, and to circulate wastewater, so that the methane gas could be sold at retail to generate electricity were not fixtures. Accordingly, the cells were not tangible personal property permanently affixed to and becoming a structural part of real estate in Michigan, which is excluded from the industrial processing exemption under MCL 205.94o(5)(a).³³ The cells at issue in *Granger* were made of an impermeable barrier that was placed on the ground (in an area that could span several acres) to ensure that liquids did not contaminate groundwater and to help capture wastewater. To further prevent the cells from affecting the surrounding land, the cells were sprayed with an organic cover and another barrier was placed over the cells to prevent gas from escaping and to prevent water from entering the cells. This barrier was covered with two feet of soil and vegetation to prevent erosion. In deciding whether the cells were fixtures, the Court applied the three-factor test discussed in *Sequist*. Regarding the first factor (annexation), the Court determined that “under the unique facts” of the case, the cells were not actually or constructively annexed to the real property. Relevant facts applicable to this factor included: (i) no affirmative steps were taken to actually attach the cells to real property; (ii) significant steps were taken to insulate the cells from the real property, and; (iii) the cells did not improve the land or make it more valuable. Concerning the second factor (adaptation), the Court reasoned that “significant steps” were taken to insulate the waste contained in the cells from the real property and found no evidence that the cells improve the land or make it more valuable. Instead, the cells served as the means to facilitate both the processing and storage of the raw material (e.g., waste) in the industrial process. Accordingly, the Court concluded that the land was adapted to facilitate erection of the cells, rather than the cells facilitating the use of the land. As to the third factor (intent), the Court ruled that the objective, visible facts did not show an intent that the cells remain in place permanently, as they were intended to be maintained as separate processing units, and thereafter were abandoned on the property when they ceased to be commercially viable.

v. **Wooden Pole-Mounted Outdoor Warning Sirens.** Applying the three-factor test discussed in *Sequist*, the Michigan Court of Appeals held that warning sirens and the 50-foot wooden poles to which the sirens were attached constituted fixtures; resulting in petitioner being liable for use tax liability as a construction contractor.³⁴ As to the first factor (annexation), the Court determined that the poles were physically annexed to the realty as evidenced by the fact that the poles were placed in 8-foot deep holes in the ground and required the use of heavy equipment (e.g., a crane) to do so. Concerning the second factor (adaptation), the Court ruled that the poles and sirens were adapted to the use of the realty (e.g., land devoted to public use as a public right-of-way) as they were dedicated for public use. The Court analogized the warning system to road signs and other warning signs that are often present in public rights-of-way. Regarding the final factor (intent), the Court found that the objective, visible facts demonstrated an intent that the poles and sirens be a permanent accession to the realty. In support of this

³³ *Granger*, *supra*.

³⁴ *West Shore Services, Inc v Dep’t of Treasury*, unpublished opinion per curium, issued July 21, 2015 (Docket No. 321085). Please note that unpublished decisions do not constitute binding precedent.

finding, the Court pointed to the following facts: (i) the poles were 50 feet in height; (ii) the poles were only moved through the use of heavy equipment by trained workers, and; (iii) the purpose of the sirens manifested an intent that the poles and sirens remain in place, as they were designed to withstand the very weather conditions they warn the public about. The Court also distinguished the facts at issue from those in *Granger* by pointing out that, unlike in *Granger*, the petitioner took affirmative steps to attach the property to the ground and integrated the property into the land. In addition, the Court reiterated that *Granger* involved “unique facts” and that the *Granger* Court was influenced by the pyramiding of taxes, an issue not present in this case.