

**BEFORE THE COURT OF TAX APPEALS
STATE OF KANSAS**

IN THE MATTER OF THE PROTEST
OF DODGE CITY COOPERATIVE
EXCHANGE FOR THE YEAR 2011
IN GRAY COUNTY, KANSAS

Docket No. 2012-726-PR

ORDER

Now the above-captioned matter comes on for consideration and decision by the Court of Tax Appeals of the State of Kansas. The Court conducted a hearing in this matter on January 22, 2013. Taxpayer, Dodge City Cooperative Exchange, appeared by its counsel of record, Marc E. Kliwer. Gray County appeared by its counsel of record, Curtis E. Campbell. Gray County filed a post-hearing brief on February 18, 2013. Taxpayer filed a post-hearing brief on March 14, 2013 and an amended brief and notice of correction on March 15, 2013.

After considering all of the evidence and arguments presented, the Court finds and concludes as follows:

The Court has jurisdiction of the subject matter and the parties, as a tax protest has been properly and timely filed pursuant to K.S.A. 79-2005.

The subject matter of this tax protest is a grain storage facility or grain elevator located at 706 Bent Street, Ensign, Gray County, Kansas, also known as Parcel ID# 035-167-36-0-30-02-001.00-0. The tax year at issue is 2011.

For tax year 2011, the County classified the subject property as real property with a total appraised value of \$5,319,380. Taxpayer claims that certain assets should be classified as commercial and industrial machinery and equipment (CIME), and therefore, should be exempt from taxation pursuant to K.S.A. 79-223. The parties originally stipulated that the value of the assets at issue totaled \$707,180. A *Joint Stipulation of Respective Values* filed June 11, 2013 provided agreed values for each asset at issue and amended the total value to reflect \$692,661. As a result, the only question presented for this Court's consideration is whether the assets at issue are fixtures to real property or CIME.

The assets at issue are two (2) Essmuller drag conveyors, a Hi Roller belt conveyor, two (2) bin unloading screw conveyors, two (2) belt feeder square spouts, two (2) square transitions, two (2) square unloading spouts including side draw slide gates, two (2) overhead connecting bridges, aeration system components for Bin Nos. R-5 and R-6, temperature monitoring system components for Bin Nos. R-5 and R-6, and Compuweigh Train Loadout remote communications module components (computer weight system).

Jerald Kemmerer, CEO since 2007, testified on behalf of Taxpayer. Mr. Kemmerer explained that Bin Nos. 1 – 4 were constructed in 1999 and that construction of Bin Nos. R-5 and R-6 started in 2008. Mr. Kemmerer described the assets at issue, their function, and how they were constructed. Generally, Mr. Kemmerer testified that each asset did not require out of the ordinary site preparation, the asset is attached by bolts to the bins, removing the asset would not cause damage to the real property or the asset, removing the asset would not require a significant amount of time and cost to restore the real property to its original condition, the asset was not constructed onsite, the asset was assembled onsite, and the asset was not specifically constructed for this particular piece of land. Some assets would need to be disassembled or partially disassembled to be removed. With respect to all the assets at issue, Mr. Kemmerer contended that the assets were designed, constructed, and installed with the intention that they could be removed and transported to another site for installation if business conditions warranted. Taxpayer argues that the assets at issue have not become affixed to the real property. Taxpayer asserts that the CIME was purchased and installed in Bin Nos. R-5 and R-6 in 2009 and that the CIME is used in the operation of Taxpayer's licensed grain warehouse, store and merchandising business.

Jerry Denney, Gray County Appraiser, testified that the director of property valuation instructs the use of a three-prong test – adaptation, annexation, and intent – to determine whether property is personal property or real property. In his opinion, the assets at issue are fixtures to the real estate because the structure was designed to hold this property and designed to hold grain. These items are necessary for the operation of the structure for the purpose for which the structure was built, i.e. the storage and handling of grain. If the items were removed, the structure would no longer function. For example, it could not be used as a dance hall.

Taxpayer has the evidentiary burden with respect to classification and exemption. Under common law, it has long been held that public officials were presumed to discharge their duties fairly, reasonably and impartially. *See, e.g., Gladen v. State*, 196 Kan. 586, 590, 413 P.2d 124, 127 (1966); *Dauffenbach v. City of Wichita*, 233 Kan. 1028, 1033-1034, 667 P.2d 380, 385 (1983). A taxpayer who challenged an assessment bore the burden of rebutting the validity of the

assessment because it was presumed the government officials had faithfully performed their duties in administering the assessment. *See Quivira Falls Community Ass'n v. Johnson Cty.*, 230 Kan. 350, 359, 634 P.2d 1115, 1122 (1981) (citing *Robinson v. State*, 198 Kan. 543, 426 P.2d 95 (1967)). Under its plain meaning, K.S.A. 79-2005(i) operates to shift the evidentiary burden to the county with respect to certain matters "relating to the determination of valuation." Nothing in the statute, however, shifts the burden with respect to matters of classification, and no such effect should be inferred. In addition, the burden of establishing exemption from *ad valorem* taxation is on the taxpayer. *In re Via Christi Regional Medical Center, Inc.*, 27 Kan. App. 2d 446, 447, 6 P.3d 896 (2000) (citing *T-Bone Feeders, Inc. v. Martin*, 236 Kan. 641, 693 P.2d 1187 (1985)). Taxpayer must prove by a preponderance of evidence that the assets in dispute were misclassified by the County as fixtures (real property) for tax year 2011.

The proper classification is important in this case because it controls whether the property is exempt from taxation. The parties agree that if the assets at issue are determined to be personal property, then the assets qualify for exemption from *ad valorem* taxation pursuant to K.S.A. 79-223 as CIME.

Article 11, Section 1 of the Kansas Constitution delineates how property shall be classified for purposes of *ad valorem* taxation. Under this section, property subject to taxation is divided into two principle classes – real property and tangible personal property. Both classes contain several subclasses, each with its own assessment rate. *See also* K.S.A. 79-1439.

For purposes of *ad valorem* taxation, the terms of classification are further defined by statute. "Real property," "real estate," and "land" are defined as "not only the land itself, but all buildings, *fixtures*, improvements, mines, minerals, quarries, mineral springs and wells, rights and privileges appertaining thereto." K.S.A. 79-102 (emphasis added). "Personal property" is defined as "every tangible thing which is the subject of ownership, not forming part or parcel of real property." *Id.*

As a practical matter, everything found on a given tract of real estate, with the exception of the raw ground, is or at one time was personal property. Buildings and other such improvements are, in essence, amalgams of lumber, cement, bricks, glass, piping, shingles, nails and other building materials. These materials lose their identity as separate items of personal property when they are combined and become part of the real estate by accession. In contrast, a fixture is an item that retains its separate identity when it becomes part of the realty. In short, "a fixture is a former chattel which, while retaining its separate physical identity, is so

connected with the realty that a disinterested observer would consider it to be a part thereof.” See 5 American Law of Property §19.2 (Casner ed. 1952). See also 35A Am. Jur. 2d Fixtures §2.

As the Kansas Supreme Court observed long ago, it is “frequently a difficult and vexatious question to ascertain the dividing line between real property and personal property and to decide on which side of the line certain property belongs.” *Atchison, Topeka & Santa Fe Ry. v. Morgan*, 42 Kan. 23, 27-28, 21 P. 809 (1889).

There is no bright-line rule for determining under what conditions a chattel loses its character as personal property and becomes a fixture of the freehold. That “determination can only be made from a consideration of all the individual facts and circumstances attending the particular case.” *In re Equalization Appeals of Total Petroleum, Inc.*, 28 Kan. App. 2d 295, 300, 16 P.3d 981 (2000) (citing *Kansas City Millwright Co., Inc. v. Kalb*, 221 Kan. 658, 664, 562 P.2d 65 modified 221 Kan. 752, 564 P.2d 1280 (1977)).

To ascertain whether personal property has become a fixture, Kansas has adopted a long standing common law test known as the “fixtures test.” The three-part test requires consideration of the following: “(1) annexation to the realty; (2) adaptation to the use of that part of the realty with which it is attached; and (3) the intention of the party making the annexation.” *Total Petroleum*, 28 Kan. App. 2d at 299-300 (citing *Stalcup v. Detrich*, 27 Kan. App. 2d 880, 10 P.3d 3 [2000]). The three-part fixtures test is not conducive to rigid application and must be applied within the context of the legal problem and the individual facts presented. “[T]here appears to be no single statement in our law defining fixtures which is capable of application in all situations.” *Kansas City Millwright*, 221 Kan. at 664.

The 2011 Personal Property Valuation Guide (“Guide”) promulgated by the Division of Property Valuation (PVD) discusses classification as personal property or real property and provides a list of many types of properties and the classification for each one in order to promote uniformity. The Guide instructs that if a county appraiser is faced with a unique situation or property not addressed by the list, the county shall utilize the three-pronged fixtures test.

The first part of the test is annexation to the realty. Annexation is “[t]he act of attaching, adding, joining, or uniting one thing to another; generally spoken of the connection of a smaller or subordinate thing with a larger or principal thing.” Black’s Law Dictionary, Sixth Ed (1990). “Annexation” is the union of property with a freehold. *Webster’s Third New Int’l Dictionary* 87 (1981). Whether an item is sufficiently annexed to the freehold under the fixtures test is a matter of degree and is driven by the attendant circumstances. See *Shoemaker v. Simpson*, 16 Kan. 43, 44 (1876).

In determining whether an item is annexed to real estate, the nature and extent of its physical attachment are relevant considerations. *See Dodge City Water and Light Co. v. Alfalfa Land and Irrigation Co.*, 64 Kan. 247, 252, 67 P. 462 (1902) (declaring that an item is permanently attached to the real estate if “its removal would interfere with the practical use of the land, or in any way injure” the land for its usual use). Annexation is not necessarily indicated where removal of the property in question requires that it be disassembled. *See Stalcup*, 27 Kan. App. 2d at 886 (finding metal farm building not annexed to realty where removal required the unfastening of bolts anchoring it to a concrete pad). Where removal, however, requires a more complex and costly disassembling process in order to preserve the property’s future usefulness, annexation may obtain. *See Farmland Indus., Inc.*, 298 B.R. 382, 388-89 (Bankr.W.D.Mo. 2003) (applying Kansas law to find oil refinery equipment annexed to realty where its removal required a costly process, including match-marking components for reassembly).

Still, an item’s physical attachment and ease of removal are not determinative factors under the fixtures test. As explained by the Kansas Supreme Court,

“There is scarcely any kind of machinery, however complex in its character, or no matter how firmly held in its place, which may not with care be taken from its fastenings, and moved without any serious injury to the structure where it may have been operated, and to which it may have been attached... . On the other hand, there are very many things although not attached to the realty, which become real property by their use, —keys to a house, blinds and shutters to the windows, fences and fence-rails, etc.”

Morgan, 42 Kan. at 29.

It has long been held that certain unattached items may become part of the real property by means of “constructive annexation.” *See, generally, Green v. Chicago R.I. & P.R. Co.*, 8 Kan. App. 611, 56 P. 136 (1899) (in *replevin* action, finding heavy lathe not fastened to ground to be a fixture because it was an essential part of the machinery of a manufactory as originally planned and operated). Constructive annexation may be found where items specially fabricated for installation in a particular structure are introduced upon the land, even though not through physical attachment. *See* 35A Am. Jur. 2d *Fixtures* § 4. The doctrine also may apply in cases where an item, although not attached to the real estate, “comprises a necessary, integral or working part of some other object which is

attached” to the real estate. 35A Am. Jur. 2d *Fixtures* § 10 (observing that constructive annexation occurs “when removal leaves the personal property unfit for use so that it would not of itself and standing alone be well adapted for general use elsewhere.”)

In the instant case, the conveyors, spouts, transitions, overhead connecting bridges, and aeration system components are attached directly to the massive grain elevator bins, which the parties agree are realty. Although they are bolted together and could be removed or replaced, we find that this does not preclude annexation to the realty because they have become part of the whole of the structure. By analogy, a window in a house does not remain personal property once installed merely because it can be replaced to increase energy efficiency and can be easily removed by removing casing and nails. The casing and nails in this example are sufficient for annexation just as the bolts are sufficient in the present case because, once installed, the conveyors, spouts, transitions, overhead connecting bridges, and aeration system components have become part of the elevator structure. These assets are more analogous to the window example, as building materials becoming part of a whole improvement, than the building example of *Stalcup* where the entire structure itself was at issue. The annexation prong of the test is satisfied.

The second part of the test is adaptation to the use of that part of the realty to which it is attached. The focus of the adaptation test is the use to which the item in question is put relative to its surroundings. If an item of property is “placed on the land for the purpose of improving it and to make it more valuable, that is evidence that it is a fixture.” *Morgan*, 42 Kan. at 29. If the property is an integral or essential part of the use that it being made of the realty, that too is evidence that the property is a fixture. See *Total Petroleum*, 28 Kan. App. 2d at 301; 35A Am. Jur. 2d *Fixtures* § 11 (observing that “[a]n article loses its status as simple unrelated personalty and becomes a fixture when it becomes so integrated into the efficient use of the particular parcel of real estate that it has become logically considered more a part of the real estate than not”.)

Property attached for purposes unrelated to the use to which the real estate is devoted, however, fails the adaptation test. See, e.g., *Dodge City Water & Light Co.*, 64 Kan. at 248 (finding pipe installed on land platted for development but later returned to farmland was part of water works and not adapted for farm use). Adaptation also may be lacking where the property in question has no special connection with the real estate to which it is attached and can be put to a similar use at other locations. See *Stalcup*, 27 Kan. App. 2d at 886 (finding metal farm building of a type found across the state not adapted to use of realty).

The Kansas Supreme Court highlighted the distinction between adapted property and general use property in *Board of Education, Unified Sch. Dist. No. 464 v. Porter*, 234 Kan. 690 (1984). In *Porter*, a condemnation case, the court found an above-ground storage tank was not a fixture of the freehold based in part on the adaptation prong. The court noted that the storage tank was not the kind of machinery that when severed “commands only the prices of second-hand articles,” but when attached to an operating plant “may produce an enhancement of value as great as it did when new.” *Id.* at 695. The storage tank, the court said, “had none of those characteristics and [was] as usable at another location as on the land in question.” *Id.*

The Kansas Department of Revenue, Property Valuation Division, has provided illustrative guidance on the adaptation prong of the fixtures test:

“In the adaptability test, the focus is on whether the property at issue serves the real estate or a production process. For example, a boiler that heats a building is considered real property, but a boiler that is used in the manufacturing process is considered personal property.”

2011 PVD Guide at p. ii.

In this case, we are not presented with a general storage building like *Stalcup* which could be similarly used for general storage on an adjacent vacant parcel. Nor are we presented with a system of production assets housed in, or supported by, a general purpose building or structure. Instead, the particular assets at issue herein are interdependent upon and have become part of the large storage elevators or bins which are a part of realty. The elevators were designed to hold or incorporate these assets as part of the whole. The assets at issue are components integrated into the efficient use of the elevators and are logically considered part of the realty. The items at issue cannot be removed and simply placed on an adjacent vacant parcel and have any comparable utility. They do not perform a function or operate independent of the elevator. We conclude that the assets at issue were installed to carry out the particular purpose to which the real estate, including the elevator, has been devoted, and each asset is important to the effective utilization of the real estate for this purpose. The conveyors, spouts, transitions, overhead connecting bridges, and aeration system components are adapted to the property as they make the facility more valuable and usable and are an integral part to the grain facility use.

The third part of the test is intention: that is, whether the annexing party intended to make the personal property in question a permanent part of the real estate. See *Total Petroleum*, 28 Kan. App. at 299-300. "Permanent" should not be taken to mean in perpetuity. See *Kansas City Millwright*, 221 Kan. at 664 (stating that permanency is a matter of degree based on facts and circumstances of the particular case). Permanency may be found if the property in question was intended to remain in place until it wore out or became functionally or economically obsolete. See *Michigan Nat'l Bank v. City of Lansing*, 96 Mich. App. 551, 554, 293 N.W.2d 626 (1980). Intention is determined as of the time of annexation and may be inferred from the nature of the annexed article, the purpose or use for which the annexation is made, and the structure and mode of the annexation. *Eaves v. Eaves*, 10 Kan. 314, 316 (1872).

Taxpayer's witness contends that the assets at issue were designed, constructed and installed with the intention that they could be removed and transported to another site for installation if business conditions warranted. The fact that Taxpayer may decide to replace the assets at issue over time does not equate to a finding that the assets remained personal property. Often certain components of a building or structure wear out faster than others, such as the roof of a house, or are upgraded for more efficient operation, such as a furnace. These components, which start out as personal property, do not remain personal property once they become part of the permanent improvement. The weight of the evidence suggests that Taxpayer intended for the assets at issue to remain in place until they wore out, became obsolete, or needed to be upgraded. Nearly all improvements to real property may be salvaged to a certain extent, but that does not make salvagable parts of an improvement personal property as long as they remain and function as part of the whole improvement. Based upon the facts and circumstances of this case, we find the intention prong of the fixtures test is satisfied.

The two remaining items at issue have slightly different considerations. We find that the temperature monitoring system components for Bins Nos. R-5 and R-6 are not sufficiently annexed and adapted to the realty to be considered a fixture. The temperature monitoring system components include a box situated outside the bins and cables running inside the bins to monitor the temperature and moisture of the grain. The removal of the system would not incapacitate the function of the elevator or leave large holes in the structure. The temperature monitoring system does not operate any functional or physical part of the structure itself. Its function or use relates only to the grain, not to the physical structure which is part of the realty. For these reasons, we conclude that the temperature monitoring system is personal property.

On the other hand, the Compuweigh Train Loadout remote communications module components are distinguishable from the temperature monitoring system in that these components function to control physical portions of the facility. These components control how high the gates open to allow grain to flow to the train cars. These components function more like a highly sophisticated automatic door opener, which through adaptation becomes part of real estate, than a personal computer or telephone which are personal property. These components have become integrated into the efficient use of the elevator. When weighing all three factors – annexation, adaptation and intent, we conclude that these Compuweigh Train Loadout remote communications module components are fixtures to the real estate.

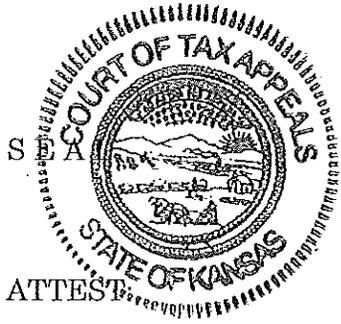
Therefore, in light of the stipulations of the parties, the Court concludes that (1) the appropriate value is \$5,261,480 (\$5,319,380 less \$57,900 rounded) and (2) the temperature monitoring system is exempt from ad valorem taxation.

IT IS THEREFORE ORDERED that these are the findings and conclusions of the Court.

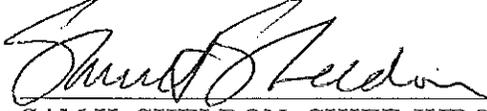
IT IS FURTHER ORDERED that the appropriate officials shall correct the county's records to comply with this Order, re-compute the taxes owed by the taxpayer and issue a refund for any overpayment.

Any party to this action who is aggrieved by this decision may file a written petition for reconsideration with this Court as provided in K.S.A. 2012 Supp. 77-529. The written petition for reconsideration shall set forth specifically and in adequate detail the particular and specific respects in which it is alleged that the Court's order is unlawful, unreasonable, capricious, improper or unfair. Any petition for reconsideration shall be mailed to: Secretary of the Court, Kansas Court of Tax Appeals, Eisenhower State Office Building, Suite 1022, 700 SW Harrison St., Topeka, KS 66603. A copy of the petition, together with any accompanying documents, shall be mailed to all parties at the same time the petition is mailed to the Court. Failure to notify the opposing party shall render any subsequent order voidable. The written petition must be received by the Court within fifteen (15) days of the certification date of this order (allowing an additional three days for mailing pursuant to statute). If at 5:00 pm on the last day of the specified period the Court has not received a written petition for reconsideration of this order, no further appeal will be available.

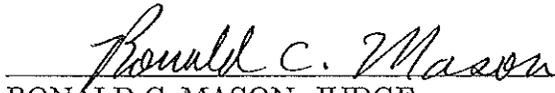
IT IS SO ORDERED



THE KANSAS COURT OF TAX APPEALS


SAM H. SHELDON, CHIEF JUDGE


JAMES D. COOPER, JUDGE


RONALD C. MASON, JUDGE


JOELENE R. ALLEN, SECRETARY

CERTIFICATION

I, Joelene R. Allen, Secretary of the Court of Tax Appeals of the State of Kansas, do hereby certify that a true and correct copy of this order in Docket No. 2012-726-PR and any attachments thereto, was placed in the United States Mail, on this 19th day of September, 2013, addressed to:

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IN TESTIMONY WHEREOF, I have hereunto subscribed my name at Topeka, Kansas.


Joelene R. Allen, Secretary