

**TENNESSEE DEPARTMENT OF REVENUE
LETTER RULING # 08-18**

WARNING

Letter rulings are binding on the Department only with respect to the individual taxpayer being addressed in the ruling. This presentation of the ruling in a redacted form is informational only. Rulings are made in response to particular facts presented and are not intended necessarily as statements of Department policy.

SUBJECT

Application of the Tennessee sales and use tax to the installation of above-ground swimming pools.

SCOPE

This letter ruling is an interpretation and application of the tax law as it relates to a specific set of existing facts furnished to the Department by the taxpayer. The rulings herein are binding upon the Department, and are applicable only to the individual taxpayer being addressed.

This letter ruling may be revoked or modified by the Commissioner at any time. Such revocation or modification shall be effective retroactively unless the following conditions are met, in which case the revocation shall be prospective only:

- (A) The taxpayer must not have misstated or omitted material facts involved in the transaction;
- (B) Facts that develop later must not be materially different from the facts upon which the ruling was based;
- (C) The applicable law must not have been changed or amended;
- (D) The ruling must have been issued originally with respect to a prospective or proposed transaction; and
- (E) The taxpayer directly involved must have acted in good faith in relying upon the ruling and a retroactive revocation of the ruling must inure to his detriment.

FACTS

[TAXPAYER] is a Tennessee corporation engaged in the business of selling and installing above-ground swimming pools. The pools range in size from [MEASUREMENTS], not including a standard patio deck. The pools come with a 30-year limited warranty.

To install a swimming pool, the installation crew levels the ground to provide a stable platform for the pool. On perfectly flat, level ground, the crew removes the sod and digs to a depth of between six and eight inches; five tons of sand are then placed in the depression. On unlevel ground, the grade is cut to a depth necessary to provide a “virgin” pad four to six feet larger than the outside dimension of the pool; five tons of sand are then placed on the site to provide protection between the pool liner and the ground. Concrete blocks are then positioned under each of the pool’s vertical support beams to provide a stable base for the swimming pool. If a site does not have firm soil, patio blocks must be used under the base straps around the pool circumference and under the base straps at the patio. A solid foundation, such as a concrete slab or patio blocks, must be placed so that the pool ladder rests firmly and securely when in the “down” position. The pool is then assembled using nuts and bolts.

No electrical work is performed by the Taxpayer. Rather, the homeowner has the responsibility of providing an electrical connection for the pool filter motor. The pool filtration system is a closed, recirculating system with no connection to the owner’s home’s water supply.

While the swimming pool can be, and occasionally is, moved from one site to another, the original site requires that the five tons of sand be excavated and removed. Topsoil must also be brought in and graded over the site, and grass seed must be applied.

QUESTION

Is the sale and installation of an above-ground swimming pool subject to the Tennessee sales and use tax?

RULING

Yes.

ANALYSIS

The sale and installation of an above-ground swimming pool is subject to the Tennessee sales and use tax, because the pool remains tangible personal property following installation.

Tenn. Code Ann. § 67-6-202 (2007) generally imposes sales tax on all retail sales of tangible personal property in Tennessee, unless specifically exempted from the tax. Tenn. Code Ann. § 67-6-102(80) (2007) defines “tangible personal property” as “personal property that may be seen, weighed, measured, felt, or touched, or is in any other manner perceptible to the senses.” Additionally, Tenn. Code Ann. § 67-6-205(c)(6) (2007) imposes the Tennessee sales and use tax on the service of installing tangible personal property that remains tangible personal property after installation. However, Tenn. Code Ann. § 67-6-209(c) (2007) provides that the transfer of tangible personal property by a contractor who “contracts for the installation of such tangible personal property as an improvement to realty” does not constitute a sale for purposes of the sales tax. Additionally, TENN. COMP. R. & REGS. 1320-5-1-.27 provides that charges made for installing tangible personal property that becomes a part of real property are not subject to the sales tax.

Because a swimming pool comes within the definition of “tangible personal property,” the sale and installation of the pool is potentially subject to the Tennessee sales and use tax. However, if the sale and installation of a swimming pool is considered an improvement to realty, the transaction will not be subject to the sales and use tax.

The issue of whether an item of tangible personal property becomes part of realty depends upon the application of the law of fixtures to the particular factual circumstances. The Tennessee Supreme Court has held that the question of when an item is considered a fixture is resolved by ascertaining the intent of the parties. *General Carpet Contractors, Inc. v. Tidwell*, 511 S.W.2d 241, 242-243 (Tenn. 1974). The Court has also stated that “only those chattels are fixtures which are so attached to the freehold that, from the intention of the parties and the use to which they are put, they are presumed to be permanently annexed, or a removal thereof would cause serious injury to the freehold.” *Magnovox Consumer Electronics v. King*, 707 S.W.2d 504, 507 (Tenn. 1986).

Thus, if the property is intended to be removable at the pleasure of the owner, it is not a fixture. *Id.* Both objective and subjective factors may show such intent. *Hubbard v. Hardeman County Bank*, 868 S.W.2d 656, 660 (Tenn.Ct.App. 1993). Objective factors include the type of structure, the mode of attachment, and the use and purpose of the property. *Harry J. Welch Company v. King*, 610 S.W.2d 710, 713-714 (Tenn. 1980). The subjective factor is the expressed intent, if any, of the parties. *Id.*

The courts have also held that tangible personal property becomes a part of the realty if removing the personal property would seriously damage the building to which it is affixed. *See Process Systems, Inc. v. Huddleston*, 1996 Tenn.Ct.App. LEXIS 695 (Tenn.Ct.App. October 25, 1996) (citing *Memphis Housing Authority v. Memphis Steam Laundry-Cleaners, Inc.*, 463 S.W.2d 677, 679 (Tenn. 1971)). Tangible personal property also becomes a part of the realty if removal would destroy its essential character as personalty. *See id.* (citing *Green v. Harper*, 700 S.W.2d 565, 567 (Tenn.Ct.App. 1985)).

For example, the Tennessee Supreme Court in *Harry J. Welch Co.*, 610 S.W.2d at 714, looked at both the stated intent of the farmers, as well as the objective factors noted above, and reached the conclusion that the grain bins at issue were personalty. Although the bins were large in size and bolted to a concrete base, the court found that they were attached to the concrete base solely for the purpose preventing them from blowing over in a high wind when empty. *Id.* Also, the bins were financed as personal property, sold at foreclosure as personal property, and installed by lessees on leased farms. *Id.* Likewise, the Tennessee Court of Appeals in *Hubbard*, 868 S.W.2d at 660, found that two one-story branch bank buildings were personal property because they were constructed to be portable, such that they could be moved or sold as market conditions or need for the buildings changed. Further, the ground leases for the buildings expressly provided that the buildings were not to become fixtures. *Id.*

In contrast, the Tennessee Supreme Court in *General Carpet Contractors*, 511 S.W.2d at 243, examined carpet that was laid using the tackless strip method and was therefore easily removable. The court found that the carpet became realty because the parties installed it with the intent that it remain in place for the length of its useful life. The method of installation simply allowed for easy replacement of the carpet when it was worn out. *Id.* Similarly, the Tennessee

Court of Appeals found in *Process Systems, Inc.*, 1996 Tenn. App. LEXIS 695, that removal of a conveyor system would damage the building in which it was installed and would destroy the essential character of the conveyor system. Accordingly, the conveyor system was held to be an improvement to real property. *Id.*

In the Taxpayer's case, the facts indicate that the swimming pools remain tangible personal property following installation.

First, the swimming pools are intended to be removable at the pleasure of the owner. Tangible personal property that is intended to be removable does not become a fixture following installation. *Magnovox Consumer Electronics*, 707 S.W.2d at 507. The Taxpayer has stated that installed swimming pools can be, and occasionally are, moved from one site to another; this fact indicates that the swimming pools are constructed so that owners may remove them at will.

Second, removal of a swimming pool does not cause serious injury to the real property on which it is installed. The courts have held that tangible personal property becomes a part of the realty only if removing the personal property would seriously damage the real property to which it is affixed. *Magnovox Consumer Electronics*, 707 S.W.2d at 507; *Process Systems, Inc.*, 1996 Tenn. App. LEXIS 695; *Memphis Housing Authority*, 463 S.W.2d at 679. Here, no serious damage results to the real property from which the pool is removed. On level ground, the Taxpayer digs a hole no deeper than eight inches to install a pool; it is very unlikely that a shallow hole such as this cannot be refilled with topsoil and reseeded or otherwise restored to its original condition. The concrete blocks used to support the pool are also readily removed from the site without serious damage to the real property. Additionally, the pool is not connected to the water supply of the owner's home, and its removal therefore does not threaten to damage the owner's home. The facts all indicate that no serious damage to the underlying real property occurs upon removal of a swimming pool.¹

Third, removal of a swimming pool does not destroy its essential character as personal property. The Tennessee Court of Appeals has stated that tangible personal property becomes a part of the realty if removal would destroy its "essential character as personalty." *See Process Systems, Inc.*, 1996 Tenn.Ct.App. LEXIS 695; *Green*, 700 S.W.2d at 567. The Taxpayer has stated that a swimming pool may be removed from the site upon which it is installed and moved to a new location. This indicates that the swimming pool's "essential character" remains intact upon removal and relocation.

These facts indicate that the swimming pools remain tangible personal property following installation. Accordingly, sale and installation of an above-ground swimming pool by the Taxpayer is subject to the Tennessee sales and use tax.

¹ While considerable effort may be required to remove a swimming pool, the cost or inconvenience of removal is not a determinative factor. As discussed above, the court have found that large items, such as a one-story bank building, remained tangible personal property following installation; presumably, the removal of an entire building requires considerable effort and expense. *Hubbard*, 868 S.W.2d at 660.

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