

TENNESSEE DEPARTMENT OF REVENUE
LETTER RULING # 15-01

Letter rulings are binding on the Department only with respect to the individual taxpayer being addressed in the ruling. This ruling is based on the particular facts and circumstances presented, and is an interpretation of the law at a specific point in time. The law may have changed since this ruling was issued, possibly rendering it obsolete. The presentation of this ruling in a redacted form is provided solely for informational purposes, and is not intended as a statement of Departmental policy. Taxpayers should consult with a tax professional before relying on any aspect of this ruling.

SUBJECT

The application of the Tennessee sales and use tax to the sale and installation of a [HOME IMPROVEMENT] product.

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 the taxpayer's detriment.

FACTS

[TAXPAYER] (the "Taxpayer") is a [REDACTED] retailer [REDACTED] [OPERATING IN TENNESSEE AND OTHER STATES]. [REDACTED].

The Taxpayer plans to introduce a new product (the “Product”) to [REDACTED – HOME IMPROVEMENT PURPOSES]. The Product is a floor-based solution that rests on the floor but is not connected or attached to it any manner. The Product can be enhanced to include [ADDITIONAL HOME IMPROVEMENT] amenities the customer desires.

The Product is designed to the customer’s specifications using actual [REDACTED] measurements provided by the customer. Depending on the customer’s preference, the Product can be placed freestanding in the center of a room, against a single wall, or configured against multiple walls [REDACTED].

After the Product has been designed to the customer’s specifications, the customer is billed for 50% of the total cost of the Product and related installation charges. After receipt of the initial payment, the Taxpayer orders the Product from its supplier who custom builds the components of the Product to the design specifications provided by the Taxpayer. The component parts are then shipped unassembled on a pallet from the supplier directly to the customer’s location. Given the size and weight of the Product, the Product is shipped in component pieces to be assembled onsite by the Taxpayer. The Product is not pre-assembled and taken apart for shipment by the supplier.

Upon arriving at the customer’s location, the Product is assembled onsite by subcontractors working on behalf of the Taxpayer. After assembly, the Product is placed free-standing in the center of a room or against a wall according to design specifications. [REDACTED].

When the Product is placed against walls, it utilizes “anti-tip brackets” (resembling an L-bracket) to prevent damage and injury that could result from tipping. The Product generally requires one bracket per wall with each bracket securing the Product to the wall with two screws. When the Product is placed freestanding in a room, no anti-tip brackets or additional safety features are required.

When placed against a wall, [REDACTED]. [REDACTED]. Rather than an anti-tip bracket, it is secured using either two or four finishing nails, either one in each top corner or one in each of the four corners, to prevent shifting and tipping. [REDACTED]. The Product’s anti-tip bracket is secured after placement against [REDACTED].

Upon completion of the Product’s installation, the Taxpayer collects the remaining balance due from the customer. The Taxpayer presents the customer with a final receipt stating the charges for assembly and installation separately from the Taxpayer’s cost of materials purchased from the supplier. Both of these stated charges include a profit markup.

Disassembly and removal of the Product is performed by reversing the steps used in the original installation. Should the customer desire to remove the Product from its placement in the future, damage to the realty would be limited to two screw holes for each anti-tip bracket installed and any small holes from finishing nails used to secure [REDACTED].

RULING

Is the sale and installation of the Product subject to the Tennessee sales and use tax?

Ruling: The sale and installation of the Product is subject to the Tennessee sales and use tax because the Product remains tangible personal property after installation.

ANALYSIS

Under the Retailers' Sales Tax Act,¹ the retail sale in Tennessee of tangible personal property and specifically enumerated services is subject to the sales tax, unless an exemption applies.² One specifically enumerated service taxable at retail is the installing of "tangible personal property that remains tangible personal property after installation . . . where a charge is made for the installation."³

Thus, the sale and installation of the Product will be subject to the Tennessee sales and use tax if the Product remains tangible personal property following installation. If, on the other hand, the product becomes affixed to realty upon installation, the sale and installation of the Product will not be subject to the Tennessee sales and use tax.⁴

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 must be resolved by ascertaining the intent of the parties.⁵ The court has explained that "only those chattels are fixtures which are so attached to the freehold that, from the intention of the parties and the uses to which they are put, they are presumed to be permanently annexed, or a removal thereof would cause serious injury to the freehold."⁶

Therefore, if the property is intended to be removable at the pleasure of the owner, it is not a fixture.⁷ Both objective and subjective factors may show such intent.⁸ Objective factors include

¹ Tennessee Retailers' Sales Tax Act, ch. 3, §§ 1-18, 1947 Tenn. Pub. Acts 22, 22-54 (codified as amended at TENN. CODE ANN. §§ 67-6-101 to -907 (2013)).

² "Retail sale" is defined as "any sale, lease, or rental for any purpose other than for resale, sublease, or subrent." TENN. CODE ANN. § 67-6-102(76) (Supp. 2014). TENN. CODE ANN. § 67-6-102(78)(A) defines "sale" in pertinent part to mean "any transfer of title or possession, or both, exchange, barter, lease or rental, conditional or otherwise, in any manner or by any means whatsoever of tangible personal property for a consideration."

³ Tenn. Code Ann. § 67-6-205(c)(6) (2013). "Tangible personal property" includes "property that can be seen, weighed, measured, felt, or touched, or that is in any other manner perceptible to the senses." TENN. CODE ANN. § 67-6-102(89)(A).

⁴ However, the Taxpayer would be liable for use tax with respect to all tangible personal property used in the performance of its contract, unless the Taxpayer had already paid sales and use tax on the purchase of such items. See Tenn. Code Ann. § 67-6-209(b) (2013); TENN. COMP. R. & REGS. 1320-5-1-.27(2).

⁵ *Gen. Carpet Contractors, Inc. v. Tidwell*, 511 S.W.2d 241, 242-243 (Tenn. 1974).

⁶ *Magnavox Consumer Elects. v. King*, 707 S.W.2d 504, 507 (Tenn. 1986) (quoting *Hickman v. Booth*, 173 S.W.438 (Tenn. 1914)).

⁷ *Id.*

the type of structure, the mode of attachment, and the use and purpose of the property.⁹ The subjective factor is the expressed intent, if any, of the parties.¹⁰

Courts have also found that tangible personal property becomes a part of realty if removing the personalty would seriously damage the building to which it is affixed.¹¹ Further, courts have held that tangible personal property is more akin to a fixture if removal would destroy its essential character as personalty.¹²

For example, the Tennessee Supreme Court in *Harry J. Whelchel Co.* 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.¹³ 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 of preventing them from blowing over in a high wind when empty.¹⁴ Additionally, the bins were financed as personal property, sold at foreclosure as personal property, and installed by lessees on leased farms.¹⁵ Likewise, the Tennessee Court of Appeals in *Keenan* found that a large ornamental gate remained personalty despite having a substantial concrete foundation poured for its support that would leave craters were it removed.¹⁶ The court lent greater significance to the person's stated intention that the gate would be moveable and that it was designed so as to be moveable if necessary.¹⁷

On somewhat different facts, the Tennessee Court of Appeals in *Hubbard* reached a similar conclusion in holding that two one-story branch bank buildings were personal property.¹⁸ It based its ruling on the facts that the leased buildings were constructed to be portable, such that they could be moved or sold as market conditions or need for the buildings changed, and that the leases expressly provided that the buildings were not to become fixtures.¹⁹

In contrast, the Tennessee Supreme Court in *General Carpet Contractors* examined carpet that was laid using the tackless strip method and was therefore easily removable.²⁰ The court found

⁸ *Hubbard v. Hardeman Cnty. Bank*, 868 S.W.2d 656, 660 (Tenn. Ct. App. 1993).

⁹ *Harry J. Whelchel Co. v. King*, 610 S.W.2d 710, 713-714 (Tenn. 1980).

¹⁰ *Id.*

¹¹ *See Process Sys., Inc. v. Huddleston*, No. 101801-I, 1996 WL 614526, at *3 (Tenn. Ct. App. Oct. 25, 1996) (citing *Memphis Hous. Auth. v. Memphis Steam Laundry-Cleaner, Inc.*, 463 S.W.2d 677, 679 (Tenn. 1971)).

¹² *See id.* (finding that conveyor system's essential character would be destroyed upon removal, which required cutting system components into pieces with an acetylene torch) (citing *Green v. Harper*, 700 S.W.2d 565, 567 (Tenn. Ct. App. 1985)).

¹³ 610 S.W.2d at 714.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Keenan v. Fodor*, No. M2011-01475-COA-R3CV, 2012 WL 3090303, at *8-9 (Tenn. Ct. App. July 30, 2012).

¹⁷ *Id.*

¹⁸ 868 S.W.2d at 660.

¹⁹ *Id.*

²⁰ 511 S.W.2d at 243.

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.²¹ Similarly, the Tennessee Court of Appeals found in *Process Systems, Inc.* that removal of a conveyor system would damage the building in which it was installed and would destroy the system's essential character.²² Accordingly, the conveyor system was held to be an improvement to real property.²³

Likewise, the Tennessee Court of Appeals found in *Hermann Holtkamp Greenhouses, Inc.* that a person's greenhouses became realty upon installation based on their enormous square footage, built-in restrooms and lunchrooms, and concrete tunnels.²⁴ The court expressed that each of these facts reflected an intention that the greenhouses remain permanently installed on the property.²⁵

In the Taxpayer's case, the totality of the circumstances indicates that the Product remains tangible personal property following installation.

In instances where the Product is placed freestanding in a room, no anti-tip brackets or additional safety features are required. In those circumstances, the Product clearly remains tangible personal property after installation, as it is not attached in any way to the realty.

Second, in instances where the Product is placed against a wall and stabilized through the use of anti-tip brackets, screws, and/or finishing nails, the facts indicate that the Product remains tangible personal property after installation. As noted above, 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.²⁶ In other words, tangible personal property becomes a fixture following installation only if the relevant parties intend that it remain with the real property.²⁷

First, and perhaps most significantly, the Product remains resting on the floor at all times. As previously discussed, the Product's form can range from free-standing placement [REDACTED] to placement against every wall [REDACTED]. [REDACTED], the wall-positioned Product remains resting on the floor throughout its various forms and is attached only by anti-tip brackets and perhaps finishing nails.

Of course, personalty can still become a part of the realty even if its mode of attachment is quite minimal. As discussed above, the court in *General Carpet Contractors* concluded that minimally installed carpet became affixed to the realty because it was intended to remain for its useful life.²⁸ The facts there revealed that the carpet was installed using a tackless method just so that it

²¹ *Id.*

²² 1996 WL 614526 at *3.

²³ *Id.*

²⁴ *Hermann Holtkamp Greenhouses, Inc. v. Metro. Nashville & Davidson Cnty.*, No. M2009-00345-COA-R3-CV, 2010 WL 366697, at *9 (Tenn. Ct. App. Feb. 2, 2010).

²⁵ *Id.*

²⁶ *Gen. Carpet Contractors*, 511 S.W.2d at 242-243.

²⁷ *See Magnavox Consumer Elects.*, 707 S.W.2d at 507.

²⁸ 511 S.W.2d at 242-243.

could be easily replaced once it was worn out.²⁹ Given the nature and quality of this Product, ease-of-replacement is an improbable purpose here. Rather, much like the grain bins in *Harry J. Whelchel Co.* it is clear that the Product's "attachment is solely for the purpose of [stability] and is not for the purpose of affixing [it] to the realty."³⁰ Thus, the Product's attachment, and the purpose thereof, strongly supports a finding that it remains tangible personal property after installation.

Second, while the Product is fabricated and installed to appear and function like a built-in feature, it was obviously designed in a way to avoid the intrinsic permanence and immobility of such a fixture. The intention behind this unique design choice is reaffirmed by the customer each time he or she chooses to purchase the Product from the Taxpayer at its retail store, instead of hiring a contractor to design and build a custom built-in feature. These deliberate acts by both parties are reflective of a collective intention for the Product to retain its characterization as personalty after installation.³¹

Third, the Product is easily removed and causes little or no damage upon removal. Unlike the large fuels tanks determined to have become realty in *Magnavox Consumer Electronics* uninstalling this Product is a straightforward and expedient process.³² To do so, the customer simply reverses the installation process by unscrewing any anti-tip brackets, [REDACTED], and disassembling the component pieces. Anti-tip brackets are generally installed one per wall and leave only two small screw holes once removed. [ITEM], if included, leaves but four small holes per [ITEM] where the finishing nails are removed. This process is significantly less onerous and damaging than that contemplated for removal of the gate found to have remained personalty in *Keenan*.³³ Therefore, the Products' ease of removal and lack of damage caused upon removal further indicate an intention that the Product remains tangible personal property.

Finally, the Product's removal would not destroy its essential character as personalty.³⁴ A customer could easily transport, reassemble, and reinstall the Product in whole or in part in another [LOCATION] with little effort or expense and no loss of functionality.³⁵ This factor therefore also weighs in favor of finding that the Product remains personalty.

For the foregoing reasons, it appears that the parties intend for the Product to remain personalty following its installation. Thus, the Product must be treated as tangible personal property and charges for both the sale and installation of the Product are subject to the Tennessee sales and use tax.

²⁹ *Id.*

³⁰ 610 S.W.2d at 714.

³¹ *See id.* (finding the circumstances surrounding item's sale significant).

³² 707 S.W.2d at 506-07.

³³ 2012 WL 3090303, at *8-9.

³⁴ *See Process Sys., Inc.*, 1996 WL 614526, at *3.

³⁵ The Product certainly retains greater mobility than the bank buildings held to have remained personalty after installation in *Hubbard*, 868 S.W.2d at 661.

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