TENNESSEE DEPARTMENT OF REVENUE
LETTER RULING #97-32

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

Lease of boat docks and marina facility.

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

[THE TAXPAYER] operates a boat dock and marina facility ("docks"). The current docks accommodate approximately [NUMBER] boats. In addition to dock rentals, the marina operations include boat rental, a restaurant, and a convenience store. The restaurant and convenience store both sit on a part of the floating dock system and are not attached to the ground.

The real property is leased from the U. S. Army Corps of Engineers for a [TIME PERIOD] ending in [YEAR]. In [YEAR], the Taxpayer entered into a sale/leaseback transaction with [COMPANY X] to refinance the docks, including all docks and walkways, the restaurant, and convenience store. The terms of the transaction are embodied in a contract which the Taxpayer and [COMPANY X] signed in [MONTH AND YEAR]. The payments are structured over a [NUMBER] year period with a buyout at the end of the lease of the docks for [$ AMOUNT]. The buyout is mandatory if the Taxpayer is not in breach of the agreement. The Taxpayer has paid sales tax on each lease payment and in the course of refinancing and expanding the facility, will soon make a payoff on the remaining principal and tax to the extent that tax is due.

ISSUES

Whether the docks are realty and not subject to sales tax.

RULINGS

Using the intent of the parties, as evidenced in the lease contract, as the determinative factor in a close case, the docks remain tangible personal property and are subject to sales tax.

ANALYSIS

Tenn. Code Ann. § 67-6-102(24)(A) includes in the definition of sale "any transfer of title or possession, or both, exchanges, barter, lease or rental, conditional, or otherwise, in any manner or by any means whatsoever of tangible personal property for a consideration." The tax on leases is imposed upon the gross proceeds of all leases and rentals of tangible personal property in this state. Tenn. Code Ann. § 67-6-204. "Lease or rental" is defined as the leasing or renting of tangible personal property and the possession or use thereof by the lessee or renter for a consideration, without transfer of the title of such property. Tenn. Code Ann. § 67-6-102(15). The determinative issue is whether the docks are tangible personal property or real property.

As a corollary matter, it should be noted that the structure of the lease contract is that of an installment sales contract rather than a true lease. The definition of leasing requires that title does not transfer during the lease. Tenn. Code Ann. § 67-6-102(15). Written on the first page of the agreement the Taxpayer and [COMPANY X] signed states that

> Lessee shall purchase equipment at lease end for [$ AMOUNT] provided the lease is not in default, notwithstanding any language to the contrary in this contract.

TENN. COMP. R. & REGS. 1320-5-1-.28, with respect to installment and credit sales, provides that

> Persons making conditional, charge, or installment sales must report the total selling price of such sales and pay the Sales or Use Tax thereon in the monthly tax period in which the contracts of sales are entered into.

Accordingly, the full amount of tax should have been collected and paid to the Department in [MONTH AND YEAR], when the contract was signed, if the docks are tangible personal property.

Whether a fixture remains personal property or becomes realty is a mixed question of law and fact. *Fuson v. Whitaker*, 28 Tenn. App. 338, 341, 190 S.W. 2d 305, 307 (1945). The primary test for distinguishing chattels from fixtures is not the manner in which the property is affixed to the freehold, but the intention with which the chattel is connected with the realty. Such intent may be shown by applying an objective test which considers the type of structure, the mode of attachment and the use and purpose of the property. *Harry J. Whelchel Co. v. King,* 610 S.W. 2d 710 (Tenn. 1980). Chattels are fixtures when they are so attached to real property that, from the intention of the parties and the uses to which such chattels are put, they are presumed to be permanently annexed. If the chattel is intended to be removable at the pleasure of the owner, it is not a fixture. *Magnavox Consumer Electronics v. King,* 707 S.W. 2d 504, 507 (Tenn. 1986) quoting *Hickman v. Booth,* 173 S.W. 438 (Tenn. 1914).

The test applied in *Whelchel* was also applied in *General Carpet Contractors, Inc. v. Tidwell,* 511 S.W. 2d 241 (Tenn. 1974), where carpet was installed by the tackless strip method allowing easy removal. The carpet was held to be a fixture improving the real property because the parties intended to install the carpet permanently. The carpet was installed with the intent that it remain attached to the realty for the length of its useful life to the owner of the realty.

Intent may be shown by examining both objective and subjective factors. *Hubbard v. Hardeman County Bank*, 868 S.W. 2d 656 (Tenn. App. 1993). The objective factors include the type of structure, the mode of attachment and the use and purpose of the property. The subjective factor is the expressed intent, if any, of the parties. The court in *Hubbard* determined that branch bank buildings were not realty but remained tangible personal property. The court found that the buildings were constructed to be portable, such that they could be moved or sold as market conditions or a need for the buildings changed. If the land upon which the buildings were located was sold, the owner of the land would not own the buildings. The ground leases for the buildings expressly provided that the buildings were not to become fixtures.

The docks are described as a floating boat dock attached by a winch and cable anchorage system and underwater truss bracing, including covered and open boat slips, a restaurant, and convenience store. These are structures which could be deemed fixtures if the subjective intent of the parties clearly indicated that the docks were intended to be permanently affixed to realty. As in *Hubbard*, the owner of the land to which the marina facility is attached does not own the marina facility. Because this is a close factual question, all relevant facts and evidence must be considered.

The intent of the parties in this case is irrefutably evidenced in the contract constituting the lease contract of the docks to the Taxpayer. The lease provides, in pertinent part, as follows:

> 7. EQUIPMENT TO REMAIN UNATTACHED TO REAL PROPERTY: Each item of equipment leased hereunder shall at all times remain the property of the Lessor and Lessee shall have no right, title, or interest therein or thereto except as expressly set forth in the lease. **The equipment is, and shall at all times remain, personal property irrespective of the way it may be affixed to the realty**, and Lessee shall maintain each item so that it may be removed from any building in which it is placed without damaging such building. . . .

(Emphasis added). The "equipment" is listed on a separate schedule incorporated by reference into the contract and consists of the floating dock system, including all fuel and utility lines, accessories, and fixtures, and all wooden docks, including walkways, bridges, floating platforms, accessories, and fixtures. The Security Agreement, a separate document, contains a provision similar to that in Paragraph 7:

> 5. Use, nature, and location of collateral. Debtor warrants and agrees that the collateral is to be used primarily for business or commercial purposes (other than agricultural).

> **Debtor and Secured Party agree that regardless of the manner of affixation, the collateral shall remain personal property and not become part of the real estate.**

(Emphasis added). These provisions constitute a part of the lease contract between the Taxpayer and the lessor. Although the clearly expressed intent of the parties is not the sole controlling factor in determining whether tangible personal property is a fixture, the clearly expressed intent of the parties evidenced in a lease contract cannot be ignored.

Such intent cannot create realty from what is clearly and irrefutably tangible personal property, nor will an obvious fixture be deemed tangible personal property through expressions of intent. Under the facts presented, however, where the mode of affixation, type of structure, and use of property do not conclusively establish the question and the determination is a close factual question, the subjective manifestation of the parties' intent must be considered.

The intent of the parties, as stated in the lease contract and security agreement, is that the docks are tangible personal property and remain tangible personal property despite the manner of affixation. Because the manner of affixation does not conclusively result in a determination that the docks are realty, the intent and agreement are the determinative factors.

Accordingly, the docks are tangible personal property, the lease of which is subject to sales tax.

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Caroline R. Krivacka, Tax Counsel

APPROVED: ______________________________
Ruth E. Johnson, Commissioner

DATE: 8-11-97