

## Tangible Personal or Real Property? An Illinois Sales Tax Quandary

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### Introduction

Anybody who has ever purchased a house or condominium knows that you do not pay sales tax on that purchase. Why? Sales tax 101: The house or condo is considered *real* property and sales tax applies to sales of tangible *personal* property. But after buying that house or condominium, what if you have cabinets or countertops installed? Are they tangible personal property subject to sales tax or real property that escapes sales tax?

For Illinois sales and use tax purposes, the distinction between tangible personal and real property is not only meaningful but often unclear. What might appear for all intents and purposes to be tangible personal property might actually be considered real property for sales and use tax purposes – and vice versa. This distinction can have significant tax ramifications. Using the example above, a local home improvement store that sells cabinets over the counter without installation is required to collect state and local sales tax on the

### INSIDE THIS ISSUE

Notes from the inside .....2



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## NOTES FROM THE INSIDE. . .

By Carol S. Portman

In this month's issue of *Tax Facts*, David Hughes of Horwood, Marcus & Berk takes readers through a legal review of how the distinction between real and personal property impacts the application of Illinois sales tax. While the real vs. personal property tax question is often thought of as a property tax issue, this article shows that the difference matters in sales tax too. We will revisit the property tax question in a future issue.

Among the most striking aspects of David's article is the reminder of how complex Illinois sales tax has become, particularly around the question of whether tangible personal property is "incorporated into real estate." Different answers, can result in significant differences in tax treatment. It all reminds us why we at TFI champion the principle of simplicity in taxation and prompts us to again wonder whether Illinois sales tax could not be simplified.

Finally, though not specifically raised in the piece, David's article reinforces the point that when an Illinois business stumbles and makes an error trying to determine the correct amount of tax, it should not be subject to the additional penalties and legal costs under the False Claims Act. We will revisit qui tam actions in a future *Tax Facts*.

retail selling price of the cabinets from its customer. By contrast, a contractor who sells and installs cabinets – such that the cabinets become a permanent fixture of the house or condo – is generally deemed to sell real property and therefore does not have to collect sales tax from its customer. Instead, the contractor pays use tax to its supplier on its cost price. The difference in the tax base and rate in these two scenarios could be significant, especially if the contractor purchases its materials from an out-of-state supplier.<sup>2</sup>

The distinction between tangible personal and real property has a long history in Illinois case law and the cases are not limited to sales and use tax. This article will first look at how courts have distinguished real property from tangible personal property outside the tax context before looking at how courts have handled the issue for sales and use tax purposes. This article will also explore the tangible personal and real property distinction as drawn by the Illinois Department of Revenue in its sales and use tax regulations.

### *Tangible Personal Property vs. Real Property* *Generally*

In Illinois, tangible personal property is generally understood to mean "that which may be seen, weighed, measured, and estimated by the

physical sense and which is capable of being possessed.”<sup>3</sup> Real property is “land, and generally whatever is erected or growing upon or affixed to land.”<sup>4</sup> Common law distinguishes between tangible personal property and real property using the rules for determining whether an item is considered a “fixture” and therefore real property because it is attached to or incorporated into realty. In determining whether an item is personalty or realty, courts consider three factors: attachment, adaptation, and intent.<sup>5</sup>

As explained by the Illinois Appellate Court (Fifth District) in *Nokomis Quarry Co. v. Dietl*,<sup>6</sup> the first factor concerns the nature of the item’s attachment to the realty; the second factor refers to the item’s adaptation to and necessity for the purpose for which the realty is devoted; and the final factor considers whether the item was intended to be considered part of the realty.

Regarding the first factor – attachment – the Illinois Appellate Court (First District) in *Sw. Bank of St. Louis v. Pouloukefalos*<sup>7</sup> upheld a trial court’s determination that removal of certain manufacturing machines, electrical fixtures, and air pipes from a building would cause substantial damage to the building. According to the Court, these items were fixtures – and not tangible

personal property – because they had been permanently attached to the realty. Some of the equipment had been bolted to the floors, ceilings, and walls and the building had been “permanently modified to accommodate installation and connection of the equipment to the real estate.”

Regarding the second factor – adaptation – the Illinois Appellate Court (Second District) in *Commonwealth Edison Co. v. Prop. Tax Appeal Bd.*,<sup>8</sup> considered whether certain machinery and equipment, including pumps, turbine generators, and a nuclear reactor vessel, used at a Zion power plant was tangible personal or real property. In finding that the machinery and equipment was real property, the Court noted that the property was specifically adapted for use in a power plant.

Regarding the third factor – intent – the Illinois Appellate Court (First District), in *A & A Mkt., Inc. v. Pekin Ins. Co.*<sup>9</sup> noted that intent is the dominant factor in determining whether an item is a fixture and that “the other considerations are primarily evidence of intent.” The court found that gasoline pumps bolted into a concrete island in the ground at a gas station were part of the realty because they were intended to remain permanently in place and were “essential to the

completeness of the gas station, for the purposes for which it ha[d] been built and [wa]s being operated.”

Finally, the Illinois Supreme Court, in *Owings v. Estes*,<sup>10</sup> elaborated on the intent factor, explaining that priority is given to the question of whether the item was intended to become a permanent accession to the realty and that the other factors “derive their chief value as evidence of such intention.” In that case, a building owner who used the premises for manufacturing and as a showroom had purchased showcases, racks, and hangers and attached them to the interior of the building. The court noted that the cases, racks, and hangers were not only securely attached to the building, but that they had been purchased for a specific use and were adapted to that purpose in the building. The Supreme Court also found that the owner had attached the items to the building intending that they would become a permanent part of the building. As a result, they were fixtures and considered part of the real estate.

Tangible Personal Property vs. Real Property in the Illinois Sales and Use Tax Context

For Illinois taxpayers, distinguishing between tangible personal and real property can be a definite challenge with significant tax consequences. As the cases above highlight, the distinction between tangible personal and real property is often fuzzy. This is especially true when the same item – think the cabinets in our first example – can be tangible personal or real property depending on the circumstances, including who sells it and how it is sold. The distinction can also have material tax consequences, including the proper tax base, tax rate, and any available exemption. In addressing these sales and use tax issues, Illinois courts often look to non-tax cases for the rules on how to distinguish tangible personal from real property.

For example, in *Thomas M. Madden and Co. v. Dep’t of Revenue*, the Illinois Appellate Court (Second District) addressed the issue of whether a slip form paver that was used to spread ready-mix concrete was eligible for the state’s manufacturing exemption from use tax, which

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applies to “manufacturing and assembling machinery and equipment used primarily in the process of manufacturing or assembling tangible personal property for wholesale or retail sale or lease.” The question for the Court was whether the ready-mix concrete sold by the taxpayer was tangible personal property, which would then qualify the paver for the manufacturing exemption. In holding that the manufacturing exemption did not apply, the court found that while the ready-mix concrete was tangible personal property when it was first delivered and discharged onto the roadbed, it was ultimately changed into real property through the use of the paver as the concrete was spread, smoothed, and flattened into a roadway. As a result, the paver was not exempt from use tax because it was not used to manufacture “tangible personal property.” Instead, the paver transformed tangible personal property into real property.

In a much older case, the Illinois Supreme Court also addressed the distinction between tangible personal property and real property in the context of sales tax in *Swain Nelson & Sons Co. v. Dep’t of Finance*. This case dealt with a rare situation in which real property was transformed into tangible personal property. The taxpayer grew trees and shrubs on its nursery for sale to the public and also acted as a landscape architect, severing the trees

and shrubs grown on the nursery and replanting them on customers’ land as part of landscaping or improvement contracts. The court held that, while trees and shrubs form part of the land and are generally realty, when they were severed from the nursery land to be replanted on customers’ land they became tangible personal property subject to the Illinois Retailers’ Occupation Tax (ROT), which imposes a tax on persons engaged in selling tangible personal property at retail. The court’s holding was based not only on the theory that the trees and shrubs were “grown for the express purpose of sale and severance from the soil” but also on the language of the statute imposing the tax which, at the time of the court’s decision, stated that “the stock of nurseries, growing or otherwise, in the hands of nurserymen, shall be listed and assessed as merchandise” and thus subject to the ROT.

The statutory language at issue in *Swain Nelson* has, however, since been removed from the ROT Act.<sup>14</sup> In fact, the Department’s current regulations lead to the opposite result with regard to landscape contractors’ receipts from labor and tangible personal property “incorporated into real estate as an integral part thereof” when furnished and installed pursuant to a landscape contract.<sup>15</sup> Under the Department of Revenue’s regulations, when a landscape contractor sells and installs

trees, shrubs, seedlings, sod, grass seed, and other similar plants, the contractor is *not* subject to ROT on receipts from those sales and installations.<sup>16</sup> The same is true for any fertilizer, mulch, and soil incorporated into the ground in the process of planting the plants.<sup>17</sup> The regulations, however, distinguish plants sold in pots that the landscape contractor does not plant into the ground.<sup>18</sup> These types of plants are subject to ROT as tangible personal property.<sup>19</sup>

Perhaps the biggest area of confusion in terms of distinguishing between tangible personal property and real property in the sales/use context arises when tangible personal property is incorporated into real estate. It is generally understood that, when incorporated into real estate, building materials lose their identity as tangible personal property and become a “fixture.” Yet some items that might *seem* to retain their identity as tangible personal property upon installation can effectively become real property depending on the particular facts and circumstances of the transaction.

For example, in *Bradley Supply Co. v. Ames*,<sup>20</sup> the Illinois Supreme Court addressed the issue of whether a supplier was liable for ROT on sales of plumbing and heating supplies to contractors who had entered into agreements with building

owners to furnish and install the equipment into the buildings. On the one hand, the court acknowledged that the materials furnished by the contractor became fixtures upon attachment to the realty and at that point they lost their identity as tangible personal property. On the other hand, based on an analysis of the legislative intent of the taxing statute in place at the time, the court found that because the fixtures were not used or consumed by the contractors, the transfer from the suppliers to the contractors were sales for resale and were therefore not subject to ROT.

Notably, the *Bradley Supply* holding demonstrates the court’s opinion at the time that plumbing and heating supplies sold by a supplier to a contractor retain their character as tangible personal property even after those supplies are resold by the contractor to the building owner. Under this approach, the taxable retail sale of the plumbing and heating supplies is between the contractor and building owner and not the supplier and contractor. Today, however, a construction contractor’s sale and installation of plumbing and heating fixtures is *not* subject to ROT and instead, the contractor is liable for use tax as the end user or consumer of the tangible personal property being incorporated into real estate.<sup>21</sup>



This current approach is demonstrated in *Craftmaster, Inc. v. Dep't of Revenue*,<sup>22</sup> in which the Illinois Appellate Court (Fourth District) explained that the Department's regulations treat sales of building materials to construction contractors as taxable retail sales and consider the subsequent transfer of those materials to customers to be a non-taxable transfer of real property. Similarly, in *Lyon & Sons Lumber and Manufacturing Co. v. Dep't of Revenue*,<sup>23</sup> the Illinois Supreme Court noted that, "[i]t is obvious that building materials, after they have been used in the construction of a house, constitute real estate rather than personal property, and that they are not transferred to the homeowner in any form as tangible personal property." As a result, the Court explained, the sale of the materials by the supplier "is not for resale in any form as tangible personal property."

As these cases and the following section of this article demonstrate, items of tangible personal property incorporated into real estate generally lose their identity as tangible personal property for sales/use tax purposes. In this regard, the Illinois General Assembly has specifically addressed a particular type of construction contract. Under the ROT Act, construction contracts for the improvement of real estate consisting of "engineering, installation, and

maintenance of voice, data, video, security, and all telecommunications systems" do not constitute engaging in a business of selling tangible personal property if they are sold at "one specified contract price."<sup>24</sup> The Illinois Independent Tax Tribunal addressed the scope of this provision in *Nokia Siemens Networks US LLC v. Illinois Department of Revenue*.<sup>25</sup> In this case, Nokia sold certain telecommunications equipment and software to T-Mobile USA but did not collect tax because T-Mobile provided a resale certificate to Nokia. The Department nevertheless assessed use tax against Nokia, which the Tax Tribunal upheld on the grounds that Nokia was a "construction contractor" and the equipment was sold at one contract price. Interestingly, Nokia argued that it was not subject to use tax – and should instead be allowed to accept a resale certificate from T-Mobile – because the equipment it sold could be removed from the cell towers where they were housed. Thus, according to Nokia, it sold tangible personal property and it should therefore be allowed to accept a resale certificate from its customer T-Mobile. While this argument certainly makes sense in theory, the Tax Tribunal noted that the General Assembly carved out a specific provision for this type of equipment. Under this provision, a construction contractor that sells telecommunications equipment sold at one contract price is subject to use tax and cannot

accept a resale certificate even if the equipment otherwise arguably retains its character as tangible property. This is because the General Assembly has made the legislative determination that such contractors should be considered the end-users of the equipment.

### ROT Regulations

In light of the confusion that can arise in determining whether an item is tangible personal or real property, and the tax consequences flowing from that determination, the Illinois Department of Revenue has issued extensive regulations to provide guidance in this area. The Department's ROT regulations provide guidelines for identifying situations in which construction contractors are or are not liable for ROT. These rules are premised on the distinction between tangible personal property and real property.

Generally, construction contractors are subject to ROT on sales of tangible personal property for use or consumption that the contractors do not install.<sup>26</sup> If the items sold by the contractor are not installed, then by definition, they retain their character as tangible personal property and are subject to ROT. By contrast, construction contractors are not subject to ROT on receipts from labor and tangible personal property "incorporated into a structure as an integral part

thereof" when furnished and installed pursuant to a construction contract.<sup>27</sup> Instead, the construction contractor, who is considered to be the end user of such items, is subject to use tax on the cost price of those items.<sup>28</sup> After such items have been incorporated into real estate by a construction contractor, they lose their identity as tangible personal property and effectively become real property. As real property, these items are not subject to ROT when sold.

While the ROT regulations provide that the question of whether an item of tangible personal property ultimately transforms into real property depends on whether the item is "incorporated" into real estate, the term "incorporated" is not defined in the ROT regulations. The regulations do, however, provide some specific examples of items of tangible personal property sold by construction contractors that are not treated as retail sales subject to ROT, which can assist in determining when seemingly similar items will be treated differently. For example, curtains and drapes sold by construction contractors with or without installation are subject to ROT,<sup>29</sup> while sales and installations of Venetian blinds and window shades sold and installed pursuant to a construction contract are *not* subject to ROT, but instead are subject to use tax because those items are deemed incorporated into the real estate.<sup>30</sup>



Similarly, a construction contractor's sale, with or without installation, of certain floor coverings, such as area rugs and floor coverings attached using two-sided tape, are subject to ROT.<sup>31</sup> However, floor coverings that the construction contractor, pursuant to a construction contract, cements or otherwise permanently affixes to the building structure by way of tacks, staples, or tacking strips are considered to be incorporated into the real estate and are therefore subject to use tax instead of ROT.<sup>32</sup>

In addition, pursuant to the ROT regulations, the sale of certain appliances are subject to ROT regardless of whether the construction contractor installs such items.<sup>33</sup> These items, which are deemed by the regulations to retain their identity as tangible personal property even upon installation, include: stoves, refrigerators, washing machines, portable ventilating units, and other similar "portable" equipment.<sup>34</sup> Under the ROT regulations, these items retain their character as tangible personal – even after installation – because they are "portable" and therefore never become part of the building's electrical, plumbing or other system. A June 2015 Department of Revenue Compliance Alert provides further guidance on this subject, explaining that sales of such appliances do not fall outside the scope of the ROT and become construction contracts

"simply because the seller and purchaser agree that the seller will install the item by plugging the item into an electrical outlet or connecting the item to the gas or water supply."<sup>35</sup> According to the Department, such an installation process does not rise to the permanent affixation required to consider the items incorporated into the real estate. However, items such as stoves and refrigerators that are built into the structure and are not free-standing, could be considered permanently affixed or incorporated into real estate.<sup>36</sup>

Other examples that became part of the real property upon being incorporated into real estate and are therefore not subject to ROT include: screen and storm doors and windows, weather stripping, insulation material, awnings, cabinets that are built into the structure, brick, lumber, sheet metal, and roofing materials.<sup>37</sup> With regard to cabinets, the Illinois Appellate Court of Illinois (Third District) in *Spurgeon v. Dep't of Revenue*,<sup>38</sup> applied the ROT regulations and held that a taxpayer who was engaged in the business of designing and selling kitchens was liable for ROT on sales of cabinets to building owners *without* installation because such sales were retail sales of tangible personal property rather than construction contracts.

Other items that the ROT regulations treat as real property upon incorporation into the real estate pursuant to a construction contract include plumbing, heating, ventilation, and commercial refrigeration systems and parts thereof.<sup>39</sup> Qualified parts of plumbing systems include: bathtubs, toilets, sinks, faucets, water pumps, water heaters, water softeners, and water pipes; qualified parts of heating systems include: furnaces, stokers, boilers, and heating pipes.<sup>40</sup> The June 2015 Department of Revenue Compliance Alert notes that “if a contractor enters into an agreement with a person to remodel a kitchen and furnish and install cabinets and a dishwasher as part of the construction contract, the contractor pays use tax to his supplier.”<sup>41</sup>

Finally, the regulations also provide that when a construction contractor contracts for the improvement of real estate that involves “engineering, installation, and maintenance of voice, data, video, security, and all telecommunication systems” the contractor is not subject to ROT on those items if the contractor sells them at one specified contract price *regardless of whether they are incorporated into real estate*.<sup>42</sup> Instead, the construction contractors incur use tax on such sales.<sup>43</sup>

It is also worth noting that, while construction and landscape contractors incorporating items of tangible personal property into real estate are generally subject to use tax, the contractors may pass along the tax burden to their customers by including the tax as a charge for “reimbursement” on their invoices.<sup>44</sup> In other words, chances are good that the customer will bear the economic burden of the tax imposed, whether it’s use tax on the contractor’s cost, or ROT on the sales price.

### Conclusion

While distinguishing between tangible personal property and real property is necessary in several contexts, it is not always a simple determination to make, particularly from a tax perspective. Although the tax consequences of transfers of building materials and fixtures can differ depending on the type of materials or fixtures being transferred, generally once the materials or fixtures are incorporated or installed into a building, they lose their identity as tangible personal property and become real property. However, as discussed, this general rule brings with it several nuances that warrant a meticulous analysis of the facts of each particular situation before making a determination of how certain items will be treated for tax purposes.

ENDNOTES

- <sup>1</sup> The author gratefully acknowledges the assistance of Elise Anderson, a law clerk with his firm who assisted in the research and drafting of this article.
- <sup>2</sup> For example, the state use tax rate is 6.25% and – except for Chicago – there is no local use tax on non-titled property. By contrast, the ROT rate, which can include various local “sales” taxes, can be as high as 10.25% (Chicago).
- <sup>3</sup> *In re Cty. Collector*, 2011 IL App (3d) 100181, ¶ 16, 952 N.E.2d 57, 61.
- <sup>4</sup> *Thomas M. Madden & Co. v. Dep’t of Revenue*, 272 Ill. App. 3d 212, 216, 651 N.E.2d 218, 221 (1995).
- <sup>5</sup> *A & A Mkt., Inc. v. Pekin Ins. Co.*, 306 Ill. App. 3d 485, 488, 713 N.E.2d 1199, 1202 (1999).
- <sup>6</sup> 333 Ill. App. 3d 480, 775 N.E.2d 669 (2002).
- <sup>7</sup> 401 Ill. App. 3d 884, 931 N.E.2d 285 (2010).
- <sup>8</sup> 219 Ill. App. 3d 550, 579 N.E.2d 1082 (1991)
- <sup>9</sup> 306 Ill. App. 3d 485, 713 N.E.2d 1199 (1999).
- <sup>10</sup> 256 Ill. 553, 556, 100 N.E. 205, 206 (1912).
- <sup>11</sup> 272 Ill. App. 3d 212, 651 N.E.2d 218 (1995).
- <sup>12</sup> 35 ILCS 105/3-5.
- <sup>13</sup> 365 Ill. 401, 6 N.E.2d 632 (1937).
- <sup>14</sup> 35 ILCS 120/2.
- <sup>15</sup> Ill. Admin. Code tit. 86, § 130.1940(c)(2).
- <sup>16</sup> Ill. Admin. Code tit. 86, § 130.1940(c)(2).
- <sup>17</sup> Ill. Admin. Code tit. 86, § 130.1940(c)(2).
- <sup>18</sup> Ill. Admin. Code tit. 86, § 130.1940(c)(2).
- <sup>19</sup> Ill. Admin. Code tit. 86, § 130.1940(c)(2).
- <sup>20</sup> 359 Ill. 162, 194 N.E. 272 (1934).
- <sup>21</sup> Ill. Admin. Code tit. 86, § 130.1940(b)(1).
- <sup>22</sup> 269 Ill. App. 3d 934, 647 N.E.2d 607 (1995).
- <sup>23</sup> 23 Ill.2d 180, 177 N.E.2d 316 (1961)
- <sup>24</sup> 35 ILCS 120/1.
- <sup>25</sup> Illinois Independent Tax Tribunal, 14 TT 10 (decided December 22, 2015).
- <sup>26</sup> Ill. Admin. Code tit. 86, § 130.1940(b)(1).
- <sup>27</sup> Ill. Admin. Code tit. 86, § 130.1940(c).
- <sup>28</sup> Ill. Admin. Code tit. 86, § 130.1940(c).
- <sup>29</sup> Ill. Admin. Code tit. 86, § 130.1940(b)(2).
- <sup>30</sup> Ill. Admin. Code tit. 86, § 130.1940(c)(1).
- <sup>31</sup> Ill. Admin. Code tit. 86, § 130.1940(b)(2); *see also generally* Ill. Admin. Code tit. 86, § 130.2101.
- <sup>32</sup> Ill. Admin. Code tit. 86, § 130.1940(c)(1); *see also generally* Ill. Admin. Code tit. 86, § 130.2101.
- <sup>33</sup> Ill. Admin. Code tit. 86, § 130.1940(b)(2).
- <sup>34</sup> Ill. Admin. Code tit. 86, § 130.1940(b)(2).
- <sup>35</sup> Ill. Dept. of Revenue, Compliance Alert (June 2015), <http://www.revenue.state.il.us/Publications/ComplianceAlerts/CA-2015-14.pdf>.  
The Illinois Department of Revenue allegedly issued the June 2015 Compliance Alert in response to information provided to the state by a family-owned appliance business claiming that some of its competitors had been improperly treating sales of certain appliances as construction contracts. The business owners later initiated a *qui tam* action under the Illinois False Claims Act against several competitors. *See People ex rel. Lindblom v. Sears Brands, LLC*, 2018 IL App (1st) 171468. The Illinois Appellate Court held that the Department of Revenue’s initiation of an audit of one of the competitors (Best Buy) did not bar a *qui tam* complaint. Neither the trial court nor the Appellate Court has addressed the allegations that the defendants erroneously treated retail appliance sales as construction contracts.
- <sup>36</sup> Ill. Dep’t of Revenue, Gen. Info. Letter ST 10-0066-GIL (Aug. 10, 2010), <http://www.revenue.state.il.us/LegalInformation/LetterRulings/st/2010/ST-10-0066.pdf>.
- <sup>37</sup> Ill. Admin. Code tit. 86, § 130.1940(c)(1).
- <sup>38</sup> 52 Ill. App. 3d 29, 6 Ill. Dec. 450, 362 N.E.2d 1370 (1977).
- <sup>39</sup> Ill. Admin. Code tit. 86, § 130.1940(c)(1).
- <sup>40</sup> Ill. Admin. Code tit. 86, § 130.1940(c)(1).
- <sup>41</sup> Illinois Department of Revenue, Compliance Alert (June 2015), <http://www.revenue.state.il.us/Publications/ComplianceAlerts/CA-2015-14.pdf>.
- <sup>42</sup> Ill. Admin. Code tit. 86, § 130.1940(c)(3).
- <sup>43</sup> Ill. Admin. Code tit. 86, § 130.1940(c)(3).
- <sup>44</sup> Ill. Dep’t of Revenue, Gen. Info. Letter ST 10-0066-GIL (Aug. 10, 2010), <http://www.revenue.state.il.us/LegalInformation/LetterRulings/st/2010/ST-10-0066.pdf>.

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