

Personal v Real Property: A Modern Perspective.

When it comes to home systems and appliances, it's not personal.

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We all hear that arcane and rather silly message as we depart an airplane. "Please look around *for all your personal belongings* and take them with you." I always wondered, "Are there impersonal belongings? Are there "public belongings?" Is *belongings* even a word? (It is.) What if you have something in your possession but it does not "belong" to you? Is it still a belonging? What makes it "personal?"

And what about your belongings at home? What is "real estate" and what is "personal property?" These are questions only comedians and tax lawyers contemplate late at night. The test for what is personal property, what is a fixture (an arcane legal term¹ that no longer has useful meaning) and what is real property is more confusing now than asking a politician the difference between a lie and "a short circuit."

Merriam-Webster says *real estate* is property consisting of buildings and land.² That seems too simple and begs what parts of a building are included. The nation's tax and real estate laws currently present a 50-state fruit-salad buffet of circular definitions and ambiguous criteria. It's time to end this confusion. It's time to examine the law, common sense, logic and reality of modern life.

Let us begin with established common sense and consensus. No one questions whether furniture, drapes and carpeting are personal or real property. Furniture is personal property; it leaves when the home seller leaves. Carpeting and drapery, by contrast, are extensions of the house (real estate), as hands are extensions of arms. In other words, property and property improvements cease to be "personal" when they are installed or affixed in such a way that they are no longer moved or readily moveable. Central heating, water heaters and light fixtures are the internal organs of a house and provide its useful functions.

The term "real estate" applies to the house and all its body parts. This includes kitchen appliances and anything else that is wired, screwed, nailed, connected, vented or plumbed into the house structure. The line between personal property and real estate is not merely linguistic. The distinction directly affects sales taxes paid by consumers and collected by states. State, local and federal governments do not *sales tax* real estate. Governments impose a variety of taxes on real estate, but sales tax is not one of them. Sales taxes are imposed on goods, services, sometimes labor and other transactions. They most certainly apply to ***tangible personal property*** (hereafter

¹ Black's Law Dictionary defines a fixture as "A **fixture** is a personal chattel substantially affixed to the land, but which may afterwards be lawfully removed therefrom by the party affixing." For present purposes, the law of "chattels" is ancient and we consider irrelevant to any modern discussion.

² See: <http://www.merriam-webster.com/dictionary/real%20estate>. Helpful. If it is part of a building (and assumedly *normally* sold with a building) **it is** real property.

“TPP”). Specifically, sales tax is imposed on the **transfer** – or sale – of tangible personal property.

Now let us examine in more detail the menagerie of state laws and regulatory interpretations that have merged the legal lines between personal property and real estate.

As indicated, there is a defining moment at which property ceases to be tangible or transferrable. That is the moment at which it is affixed or incorporated into the permanent structure of the house. Hence forward, it is no longer personal or normally transferrable property. It is now part of the permanent real estate and, thus, no longer subject to sales tax.

The law of fixtures³ (another arcane concept only lawyers study in law school) provides a convenient label, but glosses over the transformation of property from personal to real. The law of fixtures relies upon removability. The fact a good can be removed from realty and revert back to personalty is irrelevant. Many states reject a common sense delineation between personal and real property in favor of complex and arcane language that leads to confusion and confrontation. A few examples:

- A: Texas Tax Code Sec. 1.04. DEFINITIONS. (4) "Personal property" means property that is not real property." *This is hardly helpful or instructive but is common in most states.*
- B: The California Bureau of Real Estate says that real property is land and anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land. See: <http://www.dre.ca.gov/files/pdf/refbook/ref27.pdf> [The first part of this is instructive as it has an “affixation” element, but the latter would exclude the whole house as an entire house can clearly be severed and moved without injury to the land itself.]
- C: A Pennsylvania statute liberally defines TPP as “[corporeal] goods, wares, merchandise, steam and natural and manufactured and bottled gas for non-residential use, electricity for non-residential use, prepaid telecommunications, premium cable or premium video programming service, spirituous or vinous liquor and malt or brewed beverages and soft drinks, interstate telecommunications service originating or terminating in the Commonwealth and charged to a service address in this Commonwealth, intrastate telecommunications[.]” (72 Pa. Stat. Ann. § 7201(m)).
- D: Iowa law lists kitchen cabinets, dishwashers, sinks (including faucets), fans, garbage disposals and incinerators as items that routinely become realty and do not remain TPP. (Iowa Admin. Code r. 701-19.10 (2016)).

Yet another authority says: “Real property generally includes the land itself, **and all things permanently attached**, such as buildings, structures and improvements.”⁴ The discerning legal mind leads us to this **attachment concept**. In fact, nothing is permanent in the modern world. “Permanency” depends on the tools you have, strength of body or equipment and expertise. The nature of the property cannot

³ Black’s Law Dictionary states “A fixture is a personal chattel substantially affixed to the land, but which may afterwards be lawfully removed therefrom by the party affixing it.”

⁴ See *Lincoln Institute of Land Policy*, <https://www.lincolninst.edu/subcenters/significant-features-property-tax/CustomReport.aspx?id=273>

depend on the nature or skill of one owning it. The key must be that when TPP is affixed in *any* meaningful way, is it intended to become part of the useful function of a normal house?

Consider this instructive tax rule:

..... **Tangible personal property** [is property] that becomes a part of any building or other structure, project, development, or other permanent improvement on or to such real property **including tangible personal property** that, after installation, becomes real property by virtue of being embedded in or permanently affixed to the land or structure constituting realty and which property after installation is necessary to the intended usefulness of the building⁵

If the states were to adopt a simpler, more logical demarcation between real estate and personal property, they might find that clarity about “tangible personal property” is also within reach. Tangible means it can be felt or touched. This distinguishes a chair from a checking account, a credenza from a capital gain or patent. For Latin aficionados, intangible property is *incorporeal*.

States impose a sales tax when personal property, *tangible of course*, **is sold or transferred from one person to another**. Beating the tax collector by selling for free or trade is another concept also beyond our instant concern. However, **there is no sales tax to own, use or simply possess**, tangible personal property. This is because there is **no “transfer” of ownership or no “sales”** involved. Beyond the scope of this article are ad valorem taxes (based on value of the property) on TPP.⁶

The paradox here is that TPP cannot be both personal property and real property at the same time. In the case of a residential house, almost everything started as tangible personal property (two by fours, nails, water heater, dishwasher, pipe, electric cabinet, wire, faucet, sink, stove, air conditioner, etc.) *that at some point*, after sale or transfer and after being installed or incorporated into a house, it became so integral to the usefulness of the house, it became part of the house. It no longer retains any nature of a mobile good routinely moved, handled or sold outside of a real estate transaction.

At first glance, pinpointing the distinctions between personal and real property may resemble the difficulty of pinpointing when a caterpillar becomes a butterfly. That the transformation was neither witnessed or understood does not change the fact that it occurred. You know when you see it. A caterpillar is attached to the ground. A butterfly soars through the air. Call it a caterpillar all you wish but the butterfly’s worm days are over. When a dishwasher is installed in your home it becomes part of the realty and not sales taxable. Same goes for a washer/dryer, which can neither wash

⁵ Texas Administrative Code Rule 3.291 (a) (7)

⁶ SEE: Errecart, Gerrish & Drinkard *States Moving Away From Taxes on Tangible Personal Property* (Oct. 4, 2012) TaxFoundation.org

nor dry until attachment occurs. It requires water service, a drain line, and an external air duct vent.

Case law or legal tests before the advent of the modern residential home are senseless. Here are the modern essential tests of when TPP becomes reality. No test is exclusive, but affixation is certainly the strongest. The sum and weight of all tests must fit into the final determination.

Affixation:

Affixation is the primary test and must be applied consistently. It cannot depend upon your level of sophistication, age or muscular attributes. The affixed or installed items in a home which become integral to the usefulness and function of a home are make up a surprisingly finite list. There is no question or reasonable suggestion that the following items in a home, once mobile and tangible and transferred in a sale (prior to house construction or later as a replacement in a retail store or professional installer transaction), are any longer personal property once affixed and placed into a home as realty.

- HVAC system (including indoor unit and outside compressor)
- Whole house fans (attic fans)
- Ductwork
- Electric system
- Electric fixtures and ceiling fans
- Plumbing system
- Plumbing fixtures
- Water heater
- Garbage disposer
- "Built in "or under cabinet trash compactor, dishwashers and microwaves
- Cooktops and Stoves
- Ovens and ranges
- Garage door openers
- Central vacs
- Water softeners
- Septic tanks
- Well pumps
- Pools and pumps
- Doorbells and Intercoms
- Clothes Washer/Clothes Dryer

The commonality is that all these items are wired, plumbed, screwed, glued, hard vented or trimmed into a specific place in a house and are not normally intended to be removed until they wear out. This is true regardless of your age or relative training or sophistication to move or change them out. They may or may not last as long as cement, sheet rock or shingles, but they are no less affixed as to become part of the realty.

The few notable goods or property otherwise that *may* retain their nature as personalty, certainly tangible and capable of non-sophisticated, easy mobility or transfer may *be*:

- Non-built in, “free standing” refrigerator
(unless hard plumbed for water service or drain)
- Counter top microwave
- Mobile dishwashers on wheels
- Free standing trash compactor on wheels
- Televisions, game systems, radios and computers.

For these items we must consider other tests.

Normally transferred with realty:

It is a waste of time and effort not to simply acknowledge that counter top microwaves remain personalty throughout their useful (and non-useful) lives. Equally, a portable dishwasher on wheels or portable trash compactor by their nature were most often chosen *for the very purpose of moving them*, or taking them with you, unless they were simply acquired for space savings lacking sufficient space to permanently install. Keep in mind, even a portable dishwasher on wheels must be plumbed and have a drain attached unless designed to temporarily use a sink. [One might also note the relative rarity of both of the latter and the lack of sense to base any broad public tax policy on the meager existence of an obscure appliance.]

In the case of refrigerators not hard wired in, trimmed in or plumbed in, certainly the case exists that these might remain personal goods. But not always. Until the late 1980's, refrigerators were rarely included in home sales and often were taken when people sold their house and moved. They were almost part of the family until the 1980's. This quickly faded away in the 21st century. Most new homes come with a refrigerator already installed and few home sellers find it economic or desirable to take their refrigerator with them. This can depend upon the home value or socio economic demographic yet, but largely these appliances *remain part of the realty*. The same is increasingly the case for clothes washer and clothes dryers. Clothes washers and dryers easily meet the *affixation* test, even if they yet fail the *normally transferred* test.

We can accept without argument that many televisions, game systems, radios and computers remain cherished personal possessions, are rarely permanently intended to be permanently affixed. Despite that many flat screen televisions and their attendant cabling and mounting support a strong affixation argument, these items are generally saved outside real estate transactions, quite mobile and often taken with home sellers. This nature is rapidly changing as we often see large flat screens sold with realty as they are too dangerous to move, too expensive to ship or just technologically obsolete to bother with that they remain as part of a residential home upon sale. Some are more permanently affixed and require much more sophistication to move than a built in dishwasher. Many today (this author included) would consider a cable/internet driven flat screen more useful, integral and indispensable to the usefulness of a home than a dishwasher or even hot water.

No longer treated as personal property:

This test is simple and closely related to the affixation test and all items listed there. One may purchase a dishwasher as a personal good, but it is never treated as personal property once installed in a home. Certainly the case for hot water heaters and garage door openers. Despite the case of an occasional antique light fixture or family heirloom ceiling fan, these lead to a highly subjective consideration rather than one for law, commerce or tax policy.

Integral to form function and usefulness of a residential house:

There are simply no items above that fail this test. The only variation is your economic status and perhaps demographic or age of home that dictates whether some of these items are normally found in a house. If they are in the house, they seem all at least to fully meet the Texas rule cited above. Think: What feature is more indispensable in a house to daily function? A garbage disposer or an internet connected flat screen?

Conclusion. After a tangible good or piece of property has been affixed or installed into a house; will normally be transferred on a future sale of the house; is no longer treated as a personal good; and is integral to the function and usefulness of a house—it should be taxed as real property. The fact that an appliance, system or piece of property can be removed from the real estate is of no merit or consequence. Everything can be removed from a house at some point.

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