TR 94/D26 - Income tax: depreciation of fixtures

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Draft Taxation Ruling
Income tax: depreciation of fixtures

other Rulings on this topic

IT 175; IT 209; IT 2519

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What this Ruling is about

1. This Ruling considers the ownership of fixtures for depreciation purposes.

Ruling

2. Where an item is affixed to land so that it becomes a fixture, at common law it becomes part of the land and is legally owned by the owner of the land. Only the legal owner of the land will be entitled to claim depreciation on assets affixed to the land, unless one of the exceptions contained in this Ruling applies.

3. Specific legislation may apply to confer legal ownership on another entity. For example, subsection 28(2) of the *Landlord and Tenant Act* 1958 (Victoria) confers legal ownership of a fixture attached by a tenant of land at its own cost and expense on the tenant, unless there is a provision to the contrary in the lease. Hire purchase or consumer credit legislation, or legislation dealing with such things as power lines, gas mains or water pipes, might also confer legal ownership on a particular entity.

4. Section 54AA may deem a taxpayer to be the owner of an asset for depreciation purposes if the taxpayer is the lessee of land under a Crown lease. For these purposes a Crown lease extends to an easement or other rights over land granted by an eligible government body. The provision may not apply if a financing arrangement is involved.

5. Where an item has been affixed by a tenant of land, the item is still legally owned by the owner of the land, but the tenant will have a common law right to remove the fixture provided that:

- it has been affixed for the purpose of trade, manufacture, ornament or for domestic convenience and utility,
- it is capable of being severed from the land without irreparable injury to it, and
- the lease does not provide to the contrary.

Such items are commonly referred to as "tenant's fixtures".

6. Where a tenant has the physical possession and use of a tenant's fixture, and a financing arrangement is not involved, it is accepted that the rights of the tenant, when taken together with the physical possession of the asset by the tenant, will generally be sufficient to warrant the acceptance of the tenant as the owner of the asset for depreciation purposes. The same position will apply if the lease provides the tenant with a contractual right to remove the asset, the asset can be easily removed without damage, the tenant has the physical possession of the asset and a financing arrangement is not involved.

7. Similarly, if a tenant has under the terms of a lease a specific right to compensation for the value of fixtures annexed by the tenant, being more than a nominal amount, the tenant has physical possession of the asset, it can be easily removed without damage and a financing arrangement is not involved, the tenant may be treated as the owner of the asset for depreciation purposes. The compensation, when received, would be "consideration receivable" in terms of section 59.

8. The position outlined in paragraphs 6 and 7 does not extend to buildings or items that form part of the original building.

9. In deciding whether a particular item is a fixture, the basic tests to be applied are:

- If something is attached to the land by more than its own weight, it will *prima facie* be considered to be a fixture.
- If the item is to be attached to the land for a permanent or substantial time, it will generally be a fixture.
- If something cannot be easily removed from the land without damage, there is a strong presumption that it is a fixture.
- An item can still be considered to be a fixture even if it is being leased, it is being purchased under a hire purchase agreement, it is easily removed or if the relevant contracts state that the item is not a fixture and/or that it belongs to someone other than the owner of the land.
- An item can still be a fixture even if it only fixed to the land by reason of its own weight.

Date of effect

10. This Ruling applies to years commencing both before and after its date of issue. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

Explanations

11. Under section 54, depreciation is allowed to the owner of plant and articles.

12. The technical position of the ownership of fixtures for depreciation purposes has been recognised by the courts in *Case W18* 89 ATC 223; *AAT Case 4883* 20 ATR 3278 and *Case F75* 74 ATC 439; (1974) 19 CTBR(NS) *Case 91*.

13. In *Case W18, AAT Case 4883* plumbing fixtures and fittings were sold to a financier and leased back by the owner of the premises. An agreement stated that the equipment was owned by the financier. Nevertheless P.M. Roach held that the disputed equipment was not owned by the financier. To quote from paragraph 6:

> "What occasioned the diffidence previously referred to is the difficulty in accepting that ownership of the disputed equipment, which was an integral part of the structures in which and to which it was fitted, could be with anyone other than the owner of the structure - at least while so affixed. ... Hence, I express doubts as to whether there ever was a "sale of goods" or a "lease" whereby financier first became owner of, and later delivered possession to trader of, the disputed equipment in accordance with their agreement that it should be so."

14. In (1959) 8 CTBR (NS) *Case 108*, the taxpayer company sought to depreciate a parking area which consisted of a "tarmac" surface over a layer of decomposed granite on a clay bed. Although ownership was not an issue in that case, it was held that the car park was no more than an integral part of the taxpayer's land, and was not "plant" under section 54.

What is a fixture?

15. *Halsbury's Laws of England*, Volume 27, paragraph 143 (Fourth edition) says:

> "Whether a chattel has been affixed to the premises so as to become a fixture is a question of fact which principally depends first on the mode and extent of the annexation, and especially on whether the chattel can easily be removed without injury to itself or to the premises; and secondly on the object and purpose of the annexation, that is whether it was for the permanent and substantial improvement of the premises or merely for a temporary purpose or for the more complete enjoyment and use of the chattel as a chattel."

16. The frequently quoted judgment of Jordan CJ. in the case of *Australian Provincial Assurance Co. Ltd. v. Coroneo* (1938), 38 S.R.(N.S.W.) 700 said at page 712:

> "A fixture is a thing once a chattel which has become in law land through having been fixed to land. The question whether a chattel has become a fixture depends upon whether it has been fixed to land, and if so for what purpose. If a chattel is actually fixed to land to any extent, by any means other than its own weight, then *prima facie* it is a fixture; and the burden of proof is upon anyone who asserts that it is not; if it is not otherwise fixed but is kept in position by its own weight, then *prima facie* it is not a fixture; and the burden of proof is on anyone who asserts that it is: *Holland v. Hodgson*. The test of whether a chattel, which has been to some extent fixed to land, is a fixture is whether it has been fixed with the intention that it shall remain in position permanently or for an indefinite or substantial period ..., or whether it has been fixed with the intent that it shall remain in position only for some temporary purpose .... In the former case, it is a fixture, whether it has been fixed for the better enjoyment of the land or building, or fixed merely to steady the thing itself for the better use or enjoyment of the thing fixed .... If it is proved to have been fixed merely for a temporary purpose it is not a fixture .... The intention of the person fixing it must be gathered from the purpose for which and the time during which user in the fixed position is contemplated .... If a thing has been securely fixed, and in particular if it has been so fixed that it cannot be detached without substantial injury to the thing itself or to that to which it is attached, this supplies strong but not necessarily conclusive evidence that a permanent fixing was intended".

17. There would appear to be a shift in the importance of the degree of annexation and the object of annexation. To quote Kearney J in *Palumberi v. Palumberi* (1986) NSW ConvR 55-287, as quoted in *Eon Metals NL v. Commissioner of State Taxation (WA)* 91 ATC 4841; (1991-92) 22 ATR 601, at page 4846, 606:

> "It would seem from the perusal of these and other authorities in the field that there has been a perceptible decline in the comparative importance of the degree or mode of annexation, with a tendency to greater emphasis being placed upon the purpose or object of annexation, or putting it another way, the intention with which the item is placed upon land."

See also *Hamp v. Bygrave* (1983) 266 Estates Gazette 720 at 724 cited by Kevin Gray at page 13 of *Elements of Land Law*, 1993, Second Edition.

18. An item will *prima facie* be a fixture even if the degree of attachment is very slight. To quote Bradbrook, MacCallum and Moore *Australian Real Property Law* 1991 at page 519:

> "This presumption applies even if the degree of attachment is very slight. The greater the degree of attachment, the stronger the presumption appears to be."

19. An item can still be a fixture even if it is only affixed to the land by its own weight - Mahoney JA in *NH Dunn Pty Ltd v. LM Ericsson Pty Ltd* (1979) (2) BPR 9241.

Objective intention

20. "The test to be applied is objective. The purpose for which the item was taken on to the property must be deduced from what is "patent for all to see", and not from the actual intention of the parties: *Hobson v. Gorringe* [1897] 1 Ch. 182".

See *The Law of Real Property* by R.A. Woodman, vol.1, 1980, page 17.

To continue the quote from page 193 of *Hobson v. Gorringe*:

> "Now, in *Holland v. Hodgson*, Lord Blackburn, when dealing with the "circumstances to shew intention," was contemplating and referring to circumstances which shewed the degree of annexation and the object of annexation which were patent for all to see, and not to the circumstances of a chance agreement that might or might not exist between an owner of a chattel and a hirer thereof. This is made clear by the examples that Lord Blackburn alludes to shew his meaning. He takes as instances (a) blocks of stone placed in position as a dry stone wall or stacked in a builder's yard; (b) a ship's anchor affixed to the soil, whether to hold a ship riding thereto or to hold a suspension bridge. In each of these instances it will be seen that the circumstance to shew intention is the degree and object of the annexation which is in itself apparent, and thus manifested the intention."

21. In *Eon Metals,* Ipp J said at page 4846:

> "As regards intention, while subjective intention may be relevant, it is objective intention that is of paramount significance. As Mahoney JA pointed out in *NH Dunn Pty Ltd v. LM Erissson Pty Ltd* (at 9244-9245) the ultimate fact to be proved is the objective intention that ought to be imputed or presumed from the circumstances of the case."

Permanent or temporary

22. An intention to ultimately remove the plant will not necessarily mean that it is not a fixture. For example in *Commissioner of Stamps (W.A.) v. L.Whiteman Ltd* (1940) 64 C.L.R. 407, in a brick making business, machinery was bolted to concrete bases and enclosed in sheds. It was intended at some future time when the clay was exhausted on the land to shift it to another site. The High Court held that in view of the degree and object of the annexation, the machinery became part of the land.

23. In *Eon Metals*, Ipp J rejected the argument that mining equipment placed on mining land, "with the intention that they should be removed or destroyed when the mining was concluded, should necessarily, for that reason alone, be treated as chattels." Even though the expected life of the mine in that case was only four years and it was a condition of the mining tenements that on completion of the operations all buildings and structures were to be removed from the site or demolished and buried, many of the items in dispute in that case were held to be fixtures. In ascertaining whether particular equipment was a fixture or a chattel, Ipp J. took into account the likelihood of removal given the nature of the equipment and the economics of the situation.

24. In *Stephen v. Bell* (1934) 37 W.A.L.R. 52, Dwyer J held that a building on a mining lease was not intended to be permanently affixed to the soil, and could be removed and reerected, and should therefore be regarded as a chattel.

25. Further examples were given in *Holland v. Hodgson* [1861-73] All ER Rep 237 at page 244, where Blackburn J said:

> "The words "merely for a temporary purpose" must be understood as applying to such a case as we have supposed, of the anchor dropped for the temporary purpose of mooring the ship, or the instance ... of the carpet tacked to the floor for the purpose of keeping it stretched whilst it was there used, and not to a case such as that of a tenant who, for example, affixes a shop counter for the purpose (in one sense temporary) of more

effectually enjoying the shop whilst he continues to sell his wares there."

26. On the other hand, it is possible that items attached to the land for a permanent purpose will not be fixtures, as for example in *Anthony v. Commonwealth of Australia* (1973) 47 A.L.J.R. 83. In that case Walsh J. "held that a telephone line and a power line did not become fixtures, having regard to the object of placing them on the land, but that the degree and object of the annexation of two pipelines and their supports was such that they became and remained part of the land." (Woodman p.15) Walsh J. noted that the poles could be easily removed, and that the siting of the poles on that particular piece of land was not essential to the object in hand, which was not concerned with adding to the enjoyment of that parcel of land.

Temporary purpose and for the better use of land or chattel

27. An asset may not become a fixture if it is attached merely for a temporary purpose or the more complete enjoyment and use of the asset as a chattel, rather than for the permanent and substantial improvement of the dwelling or freehold.

28. Although the better enjoyment of the chattel test is not an independent or conclusive test, it is a factor to be taken into account. In *Kay's Leasing Corporation Pty Ltd v. CSR Provident Fund Nomineees Pty Ltd* [1962] VR 429, Adam J. specifically rejected the idea that the better use as a chattel test was an independent test (see page 433). *Coroneo* indicated that the enjoyment of the chattel test is irrelevant if the item is to be attached for a permanent or substantial time. On the other hand, in *Anthony v. Commonwealth* of Australia the fact that the telephone poles and power lines were not for the benefit of the land, even though they were to be attached permanently, was seen to be an important but not conclusive factor.

29. The better use distinction is illustrated by the following cases and textbook extracts.

30. In *Adams v. Medhurst & Sons Pty Ltd* (1929) 24 Tas.L.R. 48 a hot water service was installed on the premises. Crisp J. held that the object of the installation was not for its more convenient use as a chattel, but for rendering more convenient the occupancy of the house, and so the service was a fixture. Note that this was so even though the service was on hire purchase to the tenant.

31. In the case of *Reynolds v. Ashley & Sons* (1904) AC 406, it was held that machines on hire-purchase, which were bolted to concrete beds in the floor of a factory and which could have been easily removed, were fixtures. Lord Lindley stated on page 472:

> "The purpose for which the machines were obtained and fixed seems to me unmistakable: it was to complete and use the building as a factory."

32. And in *Re Starline Furniture Pty Ltd (In liq.)* (1982) 6 A.C.L.R. 312, it was held that the machinery and equipment were primarily installed and affixed for the better use and enjoyment of the land as a furniture factory, and thus formed part of the mortgaged property.

33. Hargreaves and Helmore gives further examples in *An Introduction to the Principles of Land Law (New South Wales)*, 1963, at page 77:

> "Generally speaking, annexation will not affect the character of a chattel if the chattel is not intended to further the purposes for which the building is used; whereas, if in fact an article forms part of the main fabric, it will be realty even though not permanently fastened down. Thus, an engine fastened to the floor of a factory solely for the purpose of steadying it is none the less part of the factory, and therefore realty; tapestry nailed on the wall of a dwelling-house in order that it might be displayed does not become realty but remains a chattel; a sulphuric acid vat resting by its own weight is part of the fabric of the chemical factory and is therefore realty; and on like considerations a shed resting on land by its own weight has been held to be a fixture."

34. On this basis, machinery and equipment which form part of the functioning apparatus of a factory or refinery could be fixtures as long as they are fixed to the premises to some extent, even if only by reason of their weight.

35. Peter Butt in *Land Law*, 1988, Second Edition, states at pages 18-19:

> "Looms, attached to the stone floor of a mill by means of nails driven through holes in the feet of the looms into wooden beams and plugs in the floor, have been held to be fixtures, notwithstanding that they were easily removable and were attached in this manner solely for the purpose of keeping them steady in use, because the ultimate intention was to enhance the value and usefulness of the mill to which they were affixed. Again, engineering machines each weighing up to 3 or 4 tons, resting by their own weight on concrete foundations specially poured to accommodate them have been held to be fixtures, because they were "subservient to the business carried on" on the land. On the other hand, substantial printing presses, each weighing about 45 tons, secured by nuts and bolts to a concrete foundation so as to keep them steady when in operation, have

been held not to be fixtures, because the intention governing their affixing was the more efficient use of them as presses."

36. The same test can be applied to equipment which is for the better use of an office building. To quote R.C. Nicholls from a contribution entitled "Problems in project finance - fixtures, force majeure, frustration and fundamental breach", contained in *The Law of Public Company Finance*, edited by Austin and Vann, 1986, Chapter 20 at page 548:

> "In *Belgrave Nominees* the air conditioning plants "when fitted, form part of an essential part of the building as necessary for their use and occupancy as modern office premises". The air conditioning equipment in *Pan Australian* "was attached in the way it was not for the better enjoyment of the equipment, but for the better enjoyment of the convention centre. The nature of the equipment when installed was essentially a part of the convention centre."

Removable

37. An item will not be a chattel solely because it is removable. To quote from *The Law of Real Property*, vol.1, 1980, by Woodman at page 15:

> "The secureness with which a particular chattel is affixed to the land does not necessarily answer the question whether it is or is not a fixture."

And to quote Kevin Gray in *Elements of Land,* 1993 (Second Edition) at page 13:

> "Even if an object is attached to the realty only slightly and can be fairly easily removed, its character is prima facie that of a fixture. Fixtures can thus include anything attached to 'land' by bolts, screws or nails. Somewhat to the surprise of the lay person, even such objects as a bathroom cabinet, overhead heater or extractor fan, if attached to a wall, become prima facie part of the 'land'."

38. According to paragraph 145 of *Halsbury's*:

> "Although the immediate object of fastening an article, such as a loom, may only be to steady it and make it more convenient for use, the article will be deemed to be a fixture if it is intended that it is to remain on the premises for the remainder of the term as a means of more effectually enjoying the use of the premises. If there is such an intention, the article will be treated as permanently attached to the premises even though it is capable of being moved from one part of the premises and

> fastened in another. Hence articles and machinery necessary for the use of land as agricultural land, or of premises as a factory, and attached to it in the manner already described, may be fixtures notwithstanding that they could be removed without substantial damage to the land or premises."

39. *Eon Metals*, discussed above, indicates that an item can still be a fixture even if the item must be removed from the land.

Reservation of title clauses

40. It has been argued that an item cannot become a fixture, but will remain a chattel, if the relevant agreement provides that the item is not a fixture and specifies that a party other than the owner of the land will be the owner of the item. This argument is not accepted.

41. To quote Mahoney J. in *Dunn* at 9244:

> "Where both the owner of the chattel and the owner of the realty have agreed, that agreement may no doubt create rights which will affect the status of the chattel as between them. But the matter is not concluded simply by such an agreement. The status of the chattel may be relevant qua the rights of others, e g., mortgagees: see, eg, *Reynolds v Ashby & Son* [1904] AC 466 at 473.
>
> The actual or subjective intention of the parties and, *a fortiori*, of one of them, is, no doubt, not conclusive as to the status of the chattel. But I do not think that the intention of the owner is irrelevant."

42. Cases dealing with hire purchase and lease agreements which held that an item can still become a fixture even if there is a reservation of title clause include *Pan Australian Credits (SA) Pty Ltd v. Kolim Pty Ltd* (1981) 27 S.A.S.R. 353 and *Kay's Leasing*.

43. In *Pan Australian Credits* (PAC) the owner of land had mortgaged the land to PAC. Kolim installed two air conditioning units in a conference centre on the land under a 5 year equipment lease. The owner of the land defaulted in payment on the mortgage and the PAC began a process of selling the land. Kolims removed the air conditioning units. PAC sought a declaration that Kolims had wrongfully converted the units. Matheson J held that the units were fixtures despite the lease agreement and ordered that they be reinstalled in the building. He made much of the point that in *Kay's Leasing* the machinery was held to be a fixture despite the short term nature of the hire, and an agreement which acknowledged that the property belonged to Kay's and that Kay's could, upon default, take away the equipment.

44. *Kay's Leasing* involved an action between a mortgagee and a hirer, with the hiring company seeking an injunction to prevent the mortgagee selling the assets. The owner of the land had attached assets which were acquired under a lease with an option to purchase. The court clearly stated that the assets were fixtures with legal title vested in the owner of the land.

45. The subservience of the contract to property law principles was recognised in an article in CCH's *Australian Federal Tax Reporter* by J.H.Momsen LLM of Minter Ellison. The article, titled "Tenant's fixtures - depreciation and CGT consequences" appears at 987-008 of volume 11. To quote from page 883,043 and pages 883,046-7:

> "The cases have held that an agreement that a chattel is not to become a fixture does not prevent it from becoming a fixture. This is so even if the tenant has a right to remove the fixture. ...
>
> ... there is a thin shifting line between the law of contract and other branches of the law (such as property). It is not suggested that the law has reached or will necessarily reach the position where either:
>
> (a) the law of property will be supplanted entirely in relation to some leases; or
>
> (b) the exception to the Basic Rule [that a fixture becomes part of the realty] will be developed to such an extent that a landlord and a tenant can agree that a chattel is not to become a fixture and so prevent any shifting in title from the tenant to the landlord."

46. In addition to *Case W18* and *Case 91* discussed above, the case of *Emanuel (Rundle Mall) Pty Ltd v. Commissioner of Stamps (S.A.)* 86 ATC 4394, although a stamp duty case, decided that a contractual term would not prevent the ownership of fixtures moving with the land. Myer sold its land to Emanuel (Rundle Mall), but the contract excluded specific items and said that they were to remain the property of Myer. A long lease of the items was then taken by Myer. It was not disputed that the items were fixtures. To quote from Bollen J. at page 4398:

> "As between vendor and purchaser here the stated exclusion of the fixtures from the passing of property may well be relevant and effective for some purposes. It would certainly be relevant if the appellant sought to remove the fixtures on the ground that they were its property by virtue of their annexure to its building. But we are not concerned with those matters. We are concerned with the assessment of stamp duty, nothing else.
>
> ... They pass by virtue of their nature no matter what the parties have said."

Bollen J quoted from White J in the lower court, whose opinion was upheld:

> "Fixtures in situ and intended to remain in situ are intrinsically part of the land and have no separate legal existence or entity apart from the land. It is true that fixtures can by agreement be excluded from sale and removed; but if they are not severed by the time when the conveyance operates, they are still part of the soil and pass with the conveyance of the land."

47. In *Mills v. Stokman* (1966) 116 CLR 61, in which slate discarded from old quarrying operations was purportedly sold, the Full High Court held that the slate was part of the land, the agreement to sell the slate was ineffective and that the agreement only created a right to take the slate.

48. The cases of *Shell Co. of Australia Ltd v. Bailey and Drysdale* [1980] WAR 233 and *Simmons v. Midford* [1969] 2 Ch 415 have also been put forward to support the argument that the contract can override the law of fixtures. It is not accepted that either of these two cases indicates, when taken together with the other more relevant cases, that an item can be prevented from becoming a fixture by a contractual reservation of title clause.

49. In the *Simmons* case, a transfer of land included a right to lay drains under an adjoining roadway strip. Owners of both pieces of land changed. The owner of the roadway strip was prevented from interfering with the drains, as on the basis of the circumstances and the language used in the document it was held that the drains had not formed part of the freehold. There was no reservation of title clause. As there was a grant of a right to lay and maintain drains, the transfer document implied that the grantee should be able to remove pipes to fix them or improve them. This would not have been possible if the pipes belonged to the grantor. Accordingly it was decided that the pipe did not become part of the freehold. It was not a mere contract which prevented title passing, but the actual deed granting title to the property.

50. In the *Shell* case, the action was between a tenant and a later sub-tenant. The owner of land allowed their tenant, Shell, to remove tenant's fixtures. Shell installed four underground tanks. Shell ceased to be a tenant, and the subsequent tenant subleased the premises to another party (B). Shell leased the tanks to the subsequent tenants. Shell sought a declaration that B should allow Shell to remove the tanks. Everyone had signed documents accepting that Shell owned the tanks. The court held that where a former tenant, who has an enforceable right as against the landlord to enter and remove tenant's fixtures, enters into a similar agreement with an incoming tenant and sub-tenant, that right is enforceable as against the incoming sub-

tenant. Neither party sought to argue that the tanks were not fixtures. The rights of Shell emanated not from the recognition of ownership by the owner of the land, but from the contractual agreement of B to allow Shell to remove the tanks. The court did not talk in terms of legal or equitable interests, but mainly in terms of a defence to an action for trespass.

Should an equitable interest be sufficient?

51. It has been argued that where a taxpayer has a right to remove fixtures, a right which has been stated to be a "species of equitable interest" in the asset, that interest should be sufficient to warrant the acceptance of the taxpayer as the owner of the asset for depreciation purposes.

52. The use of a non-technical concept of ownership was outlined in Taxation Ruling IT 2398 which deals with depreciation of co-owned property. It said that:

> "It has been the practice of this office to give to the term "owned" in subsec. 54(1) its ordinary non-technical meaning."

53. A similar practical approach allows a hire purchaser to be treated as the owner, even though they have no legal interest in the property. Two Board cases have accepted the Commissioner's practice of allowing depreciation to the hirer in possession of the property.

54. In *Case G22* (1956) 7 T.B.R.D. 134 the Board accepted that payments other than interest, insurance and stamp duty would be capital. Although it was not in dispute, the majority accepted that the hirer was entitled to claim depreciation. A. Fletcher recognised that the vehicle remained the exclusive property of the financier until the right to purchase was exercised. Yet he continued:

> "It is common knowledge - and I suppose, commonsense - that when people enter into a hire-purchase agreement they enter into it not only for the purpose of hiring, but also for the purpose of purchasing by what are, in effect deferred payments.
> ... The commonsense view of the transactions is that they were purchasing the vehicles by deferred payments plus interest. The Commissioner's allowance of depreciation to the partnership in respect of these vehicles accords with this commonsense view as well as with recognised accounting practice." (pp.134-135)

H. Antcliff relied on section 2 of the Hire Purchase Agreements Act (Qld) which grants a right in equity to the hirer based on payments made by the hirer and on the hirer's possession of the vehicle.

55. Similarly in (1967) 14 CTBR (NS) *Case 26* Mr N Dempsey said:

> "The fact that the vehicle is under hire-purchase and that perhaps legally is not owned by the taxpayer is not raised and I do not consider this technicality important and prefer the normal practical approach of treating taxpayer as the owner."

56. The case of *In re Samuel Allen & Sons Limited* [1907] 1 Ch 575 held that a hire purchase company had an equitable interest in items which it had hired out which had become fixtures. In *Kay's Leasing* the court recognised that the contract gave the hirer an "equitable interest" in the goods, but noted that the equitable interest would not stand against a prior registered mortgage or a third party without notice, but could stand against an equitable mortgagee or the other contracting party. To quote Adam J at p. 436:

> "Where chattels are hired on terms that they may be repossessed by the owner on the hirer's default in payment of hire, it is clearly established that the owner does not lose all interest in the chattels merely by reason of the hirer attaching them to land so as to make them fixtures. In law, no doubt, fixtures become part of the freehold while they remain annexed thereto and the legal title to them belongs to him who owns the freehold. But the contractual right, which the owner has against the hirer, to repossess on default confers on him a species of equitable interest which entitles him, as against the hirer, to enter upon the premises and sever and remove the chattels which have become fixtures. As against the hirer and those claiming through him in circumstances which have not destroyed this equitable interest, this right to enter and repossess remains. ... in *Hobson v. Gorringe* ... the court said: " ... In my opinion the engine became a fixture - ... subject to this right of Hobson's which was given him by contract. ... The right ... imposed no legal obligation on any grantee from King of the land. Neither could the right be enforced in equity against any purchaser of the land without notice of the right"".

See also Woodman at page 22 , Sykes *The Law of Securities* (4th ed.) at page 761 and Gray at page 18, footnote 15 on the limitations of an equitable interest.

57. The Macquarie Dictionary defines "own" as "belonging to". Among the meanings of "own" in The Concise Oxford Dictionary are "Have as property, possess". In the situation of co-ownership and the hire purchase cases discussed above, the user has physical possession of the asset, as well as contractual rights over the asset.

58. Where a fixture is involved, it is appropriate that where a taxpayer has the physical possession and use of the asset, as well as legal ownership of the asset, that taxpayer should be treated as the owner of the asset for depreciation purposes in preference to a taxpayer having only an equitable interest in the asset. Where a tenant has the physical possession and use of a tenant's fixture, plus a common law or contractual right to remove the asset, the asset can be easily removed without damage, and a financing arrangement is not involved, it is accepted that the rights of the tenant, when taken together with the physical possession of the asset by the tenant, will generally be sufficient to warrant the acceptance of the tenant as the owner of the asset for depreciation purposes.

Hire-purchase and lease agreements

59. At common law an item will not be considered to be a chattel or to have been attached for a temporary purpose merely because it was the subject of a hire-purchase or lease agreement.

60. *Hobson v. Gorringe* [1897] 1 Ch 182 specifically dealt with this argument in relation to hire-purchase agreements. To quote the judgment of the Court of Appeal, delivered by A.L. Smith LJ at pages 191-193:

> "But it was argued that the terms of the hiring and purchase agreement caused this engine to remain a chattel, notwithstanding its annexation to the soil, for it was said that the intention of the parties who placed it where it was must be considered ...
>
> It is said on behalf of the plaintiff that the hire and purchase agreement shews an intention on Mr Hobson's part, as also on King's part, that the gas engine should remain a chattel until King had paid the stipulated instalments, which he never did. ...
>
> It seems to us that the true view of the hiring and purchase agreement, coupled with the annexation of the engine to the soil which took place in this case, is that the engine became a fixture, ie part of the soil, when it was annexed to the soil by screws and bolts, subject as between Hobson and King to this, that Hobson had the right by contract to unfix it and take possession of it if King failed to pay him the stipulated monthly instalments.
>
> ...It is said that the intention that the gas engine was not to become a fixture might be got out of the hire and purchase agreement, and, if so, it never became a fixture ... In *Holland v. Hodgson*, Lord Blackburn, when dealing with the "circumstances to shew intention", was contemplating and referring to circumstances which shewed the degree of

> annexation and the object of such annexation which were patent for all to see, and not to the circumstances of a chance agreement that might or might not exist between an owner of a chattel and a hirer thereof."

61. This position was confirmed in the more recent cases of *Pan Australian Credits* and *Kay's Leasing* which were discussed above, in relation to both hire-purchase agreements and lease agreements. In *Pan Australian Credits* air conditioning units were leased for only 5 years, yet they were still held to be fixtures.

62. In contrast, in the case of *Austral Otis Elevator & Engineering Co. Ltd v. Andrew Kerr & Co. Ltd* (1890) 16 V.L.R. 744, the existence of a hire purchase agreement, combined with the fact that the machinery was easily disconnected from the brickwork, even though a flimsy roof would need to be removed to take the machinery out, led to the conclusion that the intention of the parties indicated that the machinery had not become part of the freehold.

Specific legislation granting ownership

63. A tenant may be granted ownership of items attached at its own cost and expense by section 28 of the Victorian *Landlord and Tenant Act* 1958, section 26 of the Tasmanian *Landlord and Tenant Act* 1935 or sections 153-157 of the Queensland *Property Law Act* 1974.

64. Subsection 28(2) of the Victorian Act provides that:

> "If any tenant holding lands by virtue of any lease or agreement ... at his own cost and expense erects any building either detached or otherwise or erects or puts in any building fence engine machinery or fixtures for any purpose whatever (which are not erected or put in pursuance of some obligation in that behalf) then, unless there is a provision to the contrary in the lease or agreement constituting the tenancy, all such buildings fences engines machinery or fixtures shall be the property of the tenant and shall be removable by him during his tenancy".

The Tasmanian and Queensland provisions are slightly different, with the Queensland legislation restricted to items affixed to agricultural holdings.

65. Hire purchase legislation sometimes provides that chattels will not become fixtures whilst they are the subject matter of a hire-purchase agreement. However, many hire purchase acts have been repealed and replaced by consumer credit legislation. Such legislation may pass property in goods to the consumer, but it does not generally apply to goods used in a business, where the hirer is a body corporate, or to goods costing more than a reasonably low limit (normally

$20,000 as in Victoria but $40,000 in Queensland) which are not farm equipment or commercial vehicles.

66. Consumer credit provisions are contained in:

Commonwealth	Trade Practices Act 1974, ss.66-74
Victoria	Credit Act 1984
	Chattel Securities Act 1981 and 1987
NSW	Credit Act 1984
Qld	Consumer Transactions Act 1972
	Credit Act 1987
WA	Credit Act 1984
SA	Consumer Credit Act 1972
ACT	Credit Ordinance 1985

Crown leases

67. Section 54AA will deem a taxpayer to be the owner of property for depreciation purposes if the taxpayer is a lessee of land under a Crown lease, the property is affixed to the land, and the taxpayer is not, apart from that section, the owner of the property. Crown lease is defined to include easements granted by an eligible government body or any other rights over land granted by an eligible government body. The provision does not apply if "it would be concluded that a purpose of the scheme was to provide finance to enable a person other than the taxpayer or the lessor to become the end-user of the property for the whole, or a substantial part of, the effective life of the property".

Tenant's fixtures

68. The common law will grant a tenant a right to remove fixtures attached by the tenant in certain circumstances. To quote *Halsbury's* (paras 147, 148, 149 and 150):

> "The rule has, however, been relaxed to some extent as between landlord and tenant, and, even where an article has been attached to the demised premises by the tenant so as to become a fixture, if it has been affixed for the purposes of trade or ornament the tenant is entitled, in the absence of agreement to the contrary, to sever the article from the premises and to remove it.
>
> A tenant may remove fixtures if they have been affixed for the purposes of trade or manufacture, so long as the lease does not

> provide to the contrary, and so long as they are capable of being severed from the land without irreparable injury to it. This relaxation of the ordinary rule as to the irremovability of fixtures was made in order to encourage industry, but the relaxation has not been extended to agricultural fixtures, and such fixtures may only be removed in circumstances where there is a statutory right to do so.
>
> Articles which form an essential part of a house at the time of its construction may not be removed, and it is doubtful whether such articles may properly be called fixtures of any description.
> ...
>
> So long as a chattel can be removed without doing irreparable damage to the demised premises, neither the method nor the degree of annexation, nor the quantum of damage that would be done either to the chattel itself or to the demised premises by the removal, have any bearing upon the tenant's right to remove it, except insofar as they indicate the intention with which the tenant affixed the chattel to the premises. Where trade fixtures have to be taken to pieces in the removal, in general it is essential that they are capable of being put together in the same form in some other place. Buildings of a permanent nature are not removable, but a temporary corrugated iron shed used for trade is removable."

69. Even though an item may be a tenant's fixture, and the tenant may have a common law right to remove the item, it is still owned by the owner of the land during the term of the lease - *Bain v. Brand* (1876) 1 App. Cas. 762, *Halsbury's* para 142, article by Peter Butt '"Fixtures" and "chattels" - Mutually exclusive terms?' (1981) 55 A.L.J. 756.

70. Nevertheless, where

- a tenant has either a common law or contractual right to remove a fixture attached by the tenant, or under the terms of the lease a specific right to compensation for the value of fixtures annexed by the tenant, being more than a nominal amount;
- the tenant has the physical possession and use of the asset;
- where there is a contractual right to remove the asset, the asset can be easily removed without damage; and
- a financing arrangement is not involved;

it is accepted that the rights of the tenant, when taken together with the physical possession of the asset by the tenant, will generally be

sufficient to warrant the acceptance of the tenant as the owner of the asset for depreciation purposes.

71. Taxation Ruling IT 175, which dealt with the depreciation of improvements and fixtures on leasehold property, is withdrawn and replaced by this Ruling.

Buildings and parts of buildings

72. Buildings will generally be part of the land, unless they are placed in position for a temporary purpose, for example, buildings on construction sites or on limited life mining leases. They cannot be tenant's fixtures. Parts of the original building will also be part of the land and cannot be tenant's fixtures.

73. For example, in *Mitchell v. McNeil* (1909) 11 W.A.L.R. 153 a house built on site while clearing the land was held to be a chattel. In contrast, in *Wellsmore v. Ratford* (1973) 23 F.L.R. 295, an exhibition house erected at a building materials exhibition centre for 12 months, was held to be a fixture. The fibreglass house was fixed to steel spikes driven into the ground.

74. Taxation Ruling IT 209, which dealt with the deductibility of lease payments on farm sheds, considered that the sheds were part of the land.

75. Lewis and Cassidy's *Tenancy Law of New South Wales*, 1966, Book 1 states at page 262:

> "Fixtures are defined as "things which, not being portion of the building itself, have been, after its construction, brought on to the premises and affixed thereto". [Citing *Boswell v. Crucible Steel Co. of America* [1925] 1 K.B. 119] ...
>
> It will be seen that there is excluded from this definition things which form part of the original building itself."

And later at page 265:

> "It can never be said that such a substantial structure as a building is a "trade and tenants' fixture"." [Citing *Weller v. Everitt* (1900) 25 V.L.R. 683.]

Case precedents

76. To quote Peter Butt at page 22:

> "In determining whether an item is a fixture or remains a chattel, each case must be determined according to its own particular circumstances. It cannot be assumed that, because in one case a

> particular item annexed in a particular manner has been held to be a fixture (or chattel), in another case the same item annexed in the same manner will be characterised in the same way. For example, depending on the circumstances, a house may be either a fixture or a chattel, as may tapestries, garden furniture, theatre chairs, and so on."

There is a large amount of case law in this area. In certain circumstances particular items of plant have been held not to be fixtures, that is, to continue to be chattels. If a directly comparable and uncontradicted precedent would indicate that a particular item should be treated as a chattel rather than a fixture in particular circumstances, that precedent may be followed.

Examples

Financing arrangements

77. The arrangement outlined in Taxation Ruling IT 2519 is an example of a financing arrangement where it was not accepted that it was appropriate to allow a tenant to claim depreciation on a tenant's fixture. In that case the entities seeking to claim depreciation on the relevant equipment (A) were effectively making available a loan towards the cost of construction of the plant. The charges payable to A were calculated to cover any loan repayments and hire purchase payments to be made by A and to provide a predetermined and guaranteed annual return. The predetermined net rate of return in substance constituted interest payments to the financiers. A did not operate the plant. Although A had a contractual right to remove the plant at the end of the arrangement, as the entities within A had the right to require an entity associated with the operator to purchase their interests, and as A was to dissolve at the end of the arrangement, it was considered that A would not, in a physical or practical sense, be in a position to remove the various items of plant.

78. Another example of a financing arrangement where, even if a building were not involved, it would not be accepted that the tenant should be treated as the owner of the asset for depreciation purposes is as follows. A building was constructed on land owned by an associate of an "exempt public body". A site lease (the head lease) was granted to a nominee company owned by the financiers to the project which then undertook construction of the building. On completion of the building an underlease was entered into with an entity associated with the site lessor. The nominee company, as site lessee, derives rental income and is also to receive a large 'compensatory' payment at the expiry of the site lease. All payments flowing to the financiers (via the

nominee) are predetermined and are guaranteed by the exempt public body.

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