

# FUN WITH FIXTURES!

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DISTINGUISHING REAL & PERSONAL PROPERTY

NATIONAL CONFERENCE OF STATE TAX JUDGES

SEPTEMBER 22, 2023

# PANEL

- Panelists:
  - Lucky DeFries, Morris Laing Law Firm
  - Kathy Spletter, Stancil & Co.
- Moderator: Matt Boch, Arkansas Tax Appeals Commission

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## AGENDA

*Understanding the legal distinction between real and personal property*

*Review of property tax disputes on real versus personal property*

*Review of sales and use tax disputes on real versus personal property*



# DEFINITION OF REAL PROPERTY

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- Land and anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land.
- Real property can be either corporeal (soil and buildings) or incorporeal (easements).
- Also termed realty; real estate. Cf. personal property (1).

Black's Law Dictionary (11<sup>th</sup> ed. 2019)



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# DEFINITION OF PERSONAL PROPERTY

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- Any movable or intangible thing that is subject to ownership and not classified as real property.
- Also termed personalty; personal estate; movable estate; (in plural) things personal. Cf. real property.

Black's Law Dictionary (11<sup>th</sup> ed. 2019)  
(definition 1)



# COMMON SENSE EXPLANATION OF THE DIFFERENCE...

Real estate — or, to use the more formal term, real property — means primarily land, and everything which is naturally a part of the land, or is more or less permanently added to it. Trees, mineral deposits, gas and oil wells are all classed as real property so long as they remain a part of the land, but if the trees are cut down or the minerals extracted they cease to be real property and become personalty. Buildings and improvements of all kinds, which are permanent additions to the land upon which they stand, are a part of the real estate.”

*William J. Grange, Real Estate: A Practical Guide to Ownership, Transfer, Mortgaging, and Leasing of Real Property 3 (1937) (quoted in Black's Law Dictionary definition of “real property”).*



# HISTORICAL EXPLANATION OF THE DIFFERENCE...

“Historically, the line between real and personal property stems from the types of assets administered on death respectively, in the king's and in the church's courts. The king's courts, concerned with the preservation of the feudal structure, dealt with fees simple, fees tail and life estates. Estates for years, gradually evolving out of contracts made by feudally unimportant persons, clearly became interests in land but never fully attained the historical dignity of being ‘real property.’ The early economic unimportance of money, goods and things other than land permitted the church courts to take over the handling of all such assets on the death of the owner. When the development of trade and of capitalism caused assets of these types to assume great, and sometimes paramount, importance we found ourselves with the two important categories of property, namely ‘real’ and ‘personal’ property, each with its set of rules evolved from a different matrix. The pressure of modern society has been strongly for assimilation and the resultant elimination of this line, but this movement is far from complete attainment of its goal.”

I Richard R. Powell, Powell on Real Property § 5.04, at 5-7 to 5-8 (Patrick J. Rohan ed., rev. ed. 1998). (quoted in Black's Law Dictionary definition of “real property”).

# REAL PROPERTY VERSUS PERSONAL PROPERTY

- *Real property*
  - *Titled and recorded*
  - *Transferred by deed*
  - *Part of a parcel of real property until severed*
- *Personal property*
  - *Generally not titled and recorded*
  - *Transferred by bill of sale*
  - *Retains separate identity as an item of property*





# GENERAL TAX CHARACTERISTICS OF REAL AND PERSONAL PROPERTY

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## *Real Property*

*Subject to property tax*

*Sale or transfer not subject to sales tax (may be separate transfer tax)*

*Differing income tax treatment in some instances (depreciation, REIT eligibility, etc.)*



## *Tangible Personal Property*

*May or may not be subject to property tax, depending on jurisdiction*

*Sale or transfer subject to sales tax*

*Differing income tax treatment in some instances (depreciation, REIT eligibility, etc.)*

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## COMMON LAW THREE-FACTOR TEST

**Annexation:** What is the physical means and degree of attachment?

**Adaptation:** Does the property serve the real estate?

**Intention:** What is the objective intent of the parties?

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How is the item under consideration physically annexed to the real property?

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Would removing the item cause a reduction in the fair market value of the realty?

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Would the item, once removed require a significant amount of time or cost to restore the realty to its original condition?

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**KANSAS  
PERSONAL  
PROPERTY  
GUIDE:  
ANNEXATION**



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Adaptation to the use of the realty to which it is attached.

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In the adaptability test, the focus is on whether the property at issue serves the real estate or a production process.

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For example, a boiler that heat a building is considered real property, but a boiler that is used in the manufacturing process is considered personal property.

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## KANSAS PERSONAL PROPERTY GUIDE: ADAPTATION

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Intent of the party making the annexation based on the nature of the item affixed

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The relation and situation of the party making the annexation;

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The structure and mode of annexation;

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The purpose or use for which the annexation was made.

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## KANSAS PERSONAL PROPERTY GUIDE: ADAPTATION

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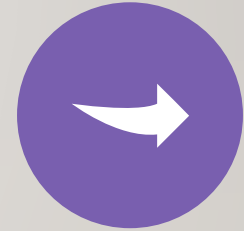
**EXAMPLES OF  
REAL-PERSONAL  
PROPERTY  
DISPUTES**



**CELLULAR  
TOWERS**



**REFINERIES**



**WIND  
TURBINES**



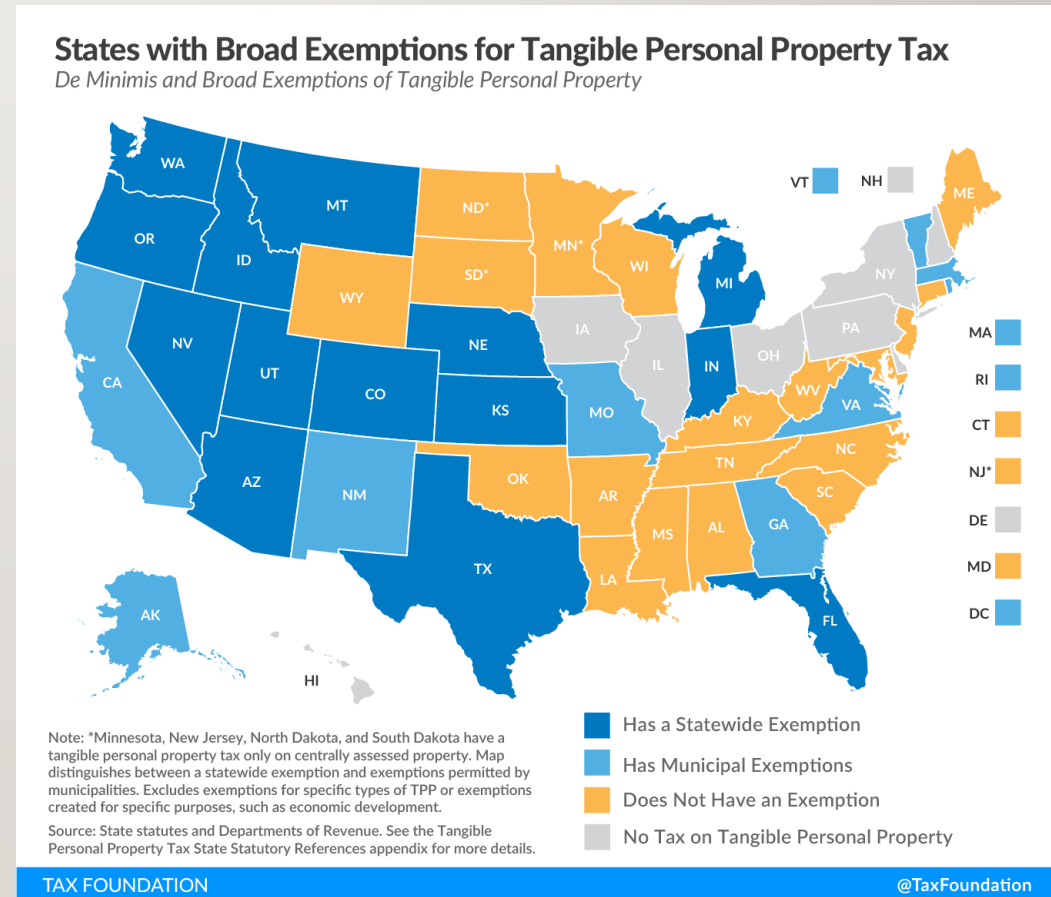
# APPRAISAL IMPLICATIONS

- Differentiation between real and personal property becomes relevant when personal property is taxed differently.
- Also relevant to the method of appraisal even when real and personal property are taxed the same.
  - Viewed as an assembled unit
  - Valued based on the value of the components – Is the value added by assembling into a process operation taxable?



# PROPERTY TAX: NONTAXABILITY OF PERSONAL PROPERTY

- 7 states exempt all TPP
- Another 5 states exempt most TPP except for certain industries that are centrally assessed
- Many other states provide exemptions for certain TPP or have exempted TPP acquired after the effective date of the legislation. (e.g. Kansas – July 1, 2006)



# NONTAXABILITY OF PERSONAL PROPERTY: KANSAS EXPERIENCE

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- Prior to July 1, 2006, real property and TPP property taxed but with different valuation methods – few disputes
- Exemption as of July 1, 2006 for newly acquired commercial and industrial machinery and equipment (CIME) on property transported into the state after July 1, 2006.





# NONTAXABILITY OF PERSONAL PROPERTY: KANSAS EXPERIENCE

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New issues  
confronting counties  
and taxpayers and  
practical implications

Immediate litigation

Amendment to K.S.A.  
79-261 in 2016 and  
special statute for  
cement plant

Importance of PVD  
Guide, in particular  
after 2016 legislative  
changes

Decision tree created  
and discussion with  
PVD

Current state of  
litigation and existing  
case law

# KANSAS: TOTAL PETROLEUM

*In re Equalization Appeals of Total Petroleum, Inc.*, 28 Kan. App. 2d 295, 16 P.3d 981 (2000).

- Is equipment remaining at a closed refinery realty or personalty?
- Classic 3-factor analysis
  - Annexation: Property was originally annexed and not easily removed
  - Adaptation: Property was customized for land and could not be removed without contamination
  - Intent: Test is at the time of annexation, not when the refinery closed

# KANSAS: COFFEYVILLE RESOURCES NITROGEN FERTILIZERS

*In re Equalization Appeal of Coffeyville Resources Nitrogen Fertilizers*, No. 117,045, 2018 WL 4655648 (Kan.App. 2018) (unpublished)

- At what level do you analyze items of property?
- 3-factor analysis by Kansas Board of Tax Appeals sustained:
  - Annexation: Property only bolted on foundations and easily removable
  - Adaptation: Nothing unique about land or assets; boiler in a building test
  - Intent: Contemporaneous documentation and also the annexation and adaptation factors





# KANSAS: DODGE CITY COOPERATIVE EXCHANGE

*Dodge City Cooperative Exchange the Board of County  
Commissioner of Gray County, Kansas, 62 Kan.App. 2d 391,  
516 P.3d 615 (2020)*

- Taxability of equipment bolted onto grain storage bins
- On which party is the burden of proof?
- District court 3-factor test in favor of personal property affirmed

# PROPERTY TAX: DIFFERENT ASSESSMENT METHODS

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- Windmills in Connecticut:
  - Development costs includable in valuation of real property but not personal property (in CT)
  - Turbines themselves treated as real property under Connecticut case law. Cannot qualify as electric fixtures.
  - Accessory equipment treated as personal property under electric company fixtures statute.
  - *Wind Colebrook South, LLC v. Town of Colebrook*, 344 Conn. 150 (2022)





# PROPERTY TAX: DIFFERENT ASSESSMENT METHODS

- Nebraska values realty differently from personalty
  - Real property valued with traditional three approaches
  - Personal property valued using statutory depreciation schedules to determine net book value
- How should irrigation pumps be taxed?
  - Impact of statutory trade fixture definition
  - *Vandenberg v. Butler County Bd. of Equalization*, 281 Neb. 437 (2011)



# PROPERTY TAX: EXEMPTION QUALIFICATION

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Can a hay baler in Oregon qualify for a farm equipment exemption?

- Issue: Exemption applies only to tangible personal property, not real property.
- Summary judgment denied on question of real vs. personal property treatment
  - Rejected strained interpretations of definitions (“erected upon”, “affixed to land”),
  - Bolting of machinery to realty not dispositive
  - Intent must be determined by objective facts
  - Property must be “designed to be moved in the ordinary course of business” under relevant law
- *Farmer’s Direct, Inc. v. Dept. of Revenue*, Or.T.C. 5328 (Feb. 3, 2021) (decided on other grounds Sept. 3, 2023).



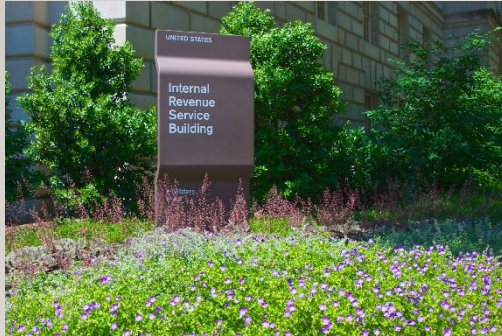
# PROPERTY TAX: CONSTITUTIONAL STANDARDS

- State constitutions may specify taxation of different property classifications
- How much leeway can a state or locality affect the classification?
- *Kaheawa Wind Power, LLC v. County of Maui*, 146 Hawai'i 76 (2020)
  - Taxation of wind turbines as real property?
  - Hawai'i Constitution had been amended to delegate power to tax real property to the counties, but not the power to tax personal property.
  - Maui County defines real property to include wind turbines and related equipment.



# SALES TAX: VENDOR OR CONTRACTOR? CUSTOM SIGN OPINION LETTERS

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- Fla. Dep't of Revenue Tech. Asst. Adv. 20A-020 (Dec. 4: 2020)
  - Signs themselves remain TPP
  - “Mixed contract” rule allows treatment of entire transaction as sale of TPP, even foundations
- Ga. Dep't of Revenue LR SUT-2019-05 (Jul. 16, 2019)
  - Freestanding signs are TPP,
  - Unclear about affixed signs—look to intent based on degree of affixation



# SALES TAX: EXEMPTION OR EXCLUSION QUALIFICATION

- Ark. Tax App. Cmm'n 23-TAC-01158 (Sept. 7, 2023)
  - Installation of machinery generally subject to sales tax
  - Rule provides exclusion for installation in new or substantially modified buildings or other improvements
  - Does a special-purpose industrial building qualify for exclusion?



# SALES TAXABILITY OF LEASING CELL TOWERS

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- Chicago Lease Transaction Tax – see Informational Bulletin: Lease Tax on Cell Towers
  - *40% safe harbor*
  - *“Because the lease or rental of space on cell towers generally involves not only the lease of personal property but also the lease of real property, and possibly the sale of a service” ...*

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Recurring, structural issue of  
state tax systems

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Fact-intensive determinations  
required for borderline cases

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Evolution of laws and cases over  
last 100+ years yields diverging  
results—or even tax types

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CONCLUDING  
THOUGHTS ON  
REAL OR  
PERSONAL  
PROPERTY  
TREATMENT



THANK YOU!

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