





# COMMONWEALTH of VIRGINIA

## *Department of Taxation*

July 6, 2021

Jonathan L. Caulder, Esq.  
Hunton Andrews Kurth LLP  
Riverfront Plaza, East Tower  
951 East Byrd Street  
Richmond, Virginia 23219-4074

Re: Appeal of Final Local Determination  
Taxpayer: Sea World Parks and Entertainment, LLC  
Locality: County of York  
Business Tangible Personal Property Tax

Dear Mr. Caulder:

This final state determination is issued upon the application for correction filed by you on behalf of Sea World Parks and Entertainment, LLC (the "Taxpayer"), with the Department of Taxation. The Taxpayer appeals the denial of a refund of business tangible personal property (BTTP) taxes paid by the Taxpayer to the County of York (the "County") for the 2016 through 2019 tax years.

The BTTP tax is imposed and administered by local officials. *Virginia Code* § 58.1-3983.1 D 1 authorizes the Department to issue determinations on taxpayer appeals of BTTP assessments. On appeal, a local tax assessment is deemed *prima facie* correct, *i.e.*, the local assessment will stand unless the taxpayer proves that it is incorrect.

The following determination is based on the facts presented to the Department summarized below. The *Code of Virginia* sections and public document cited are available on-line in the Laws, Rules and Decisions section of the Department's web site, located at [www.tax.virginia.gov](http://www.tax.virginia.gov).

### FACTS

The Taxpayer operated a water park in the County. The Taxpayer submitted a refund request to the County for BTTP tax paid for the 2016 through 2019 tax years, arguing that certain items of property that had been the subject of previous BTTP tax assessments were in fact fixtures to realty and not subject to the BTTP tax.

The County denied the refund request, and the Taxpayer filed an appeal with the County. The County concluded that the property at issue constituted the taxable tangible personal property of a business and upheld the denial of the refund. The Taxpayer filed an appeal with the Department, contending that all of the contested items of property were fixtures to realty.

## ANALYSIS

### Legal Standard

Real property and all tangible personal property except the rolling stock of public service corporations and that which is declared intangible under the provisions of *Va. Code* § 58.1-1100 *et seq.*, is reserved for local taxation by Article X, § 4 of the *Constitution of Virginia*.

The method of taxation of real property is provided under *Virginia Code* § 58.1-3200 *et seq.*, whereas the taxation of tangible personal property is provided under *Virginia Code* § 58.1-3500 *et seq.* On those occasions when an item of tangible personal property is determined to be a fixture, it is treated as real property for purposes of local taxation. Fixtures are presumed to be annexed to the realty in some form.

In *Danville Holding Corp. v. Clement*, 178 Va. 223, 232, 16 S.E.2d 345, 349 (1941), the Virginia Supreme Court (the "Court") set forth three general rules to be used in determining whether an article of tangible personal property is a fixture, and thus considered a part of the real estate for purposes of taxation, or remains personal property subject to taxation as BTPP. The three tests are: (1) the annexation of the chattel (property) to the realty, actual or constructive; (2) its adaptation to the use or purpose to which that part of the realty to which it is connected is appropriated; and (3) the intention of the parties, *i.e.*, the intention of the owner of the chattel to make it a permanent addition to the freehold.

In order for the rules to apply, it is presumed that the property is annexed to the realty in some form. In its decision, the Court noted that the "intention of the party making the annexation is the paramount and controlling consideration." *Id.*

### **Annexation**

Annexation of chattel must be actual or constructive. In *Danville Holding*, the Court concluded "the method or extent of the annexation carries little weight, except insofar as they relate to the nature of the article, the use to which it is applied and other attending circumstances as indicating the intention of the party making the annexation." *Id.* In other words, so long as chattel is attached to a building to carry

out the purpose for which such building was erected and to increase its value for occupation or use, such chattel may become part of the realty even if it may be removed without injury to itself or the building.

### **Adaptation**

If attached property is essential to the purposes for which the building (or realty) is used or occupied, it would generally be considered a fixture even if its annexation to such building is such that it may be severed without injury to either the chattel or the building.

### **Intention**

The Court has emphasized the intention of the party making the annexation is the chief test to be considered in determining whether the chattel has been converted into a fixture. Although the intention does not need to be expressed in words, it should be able to be inferred from the nature of the property annexed, the purpose for which it was annexed, the relationship of the party making the annexation, and the structure and mode of annexation.

Under this test, an owner of real property usually places permanent improvements upon such property in order to enhance its usefulness and market value. Thus, when an owner of realty annexes chattels to such realty, a doubt as to his intention to annex them permanently will in most cases be resolved in favor of such intent. See *Danville Holding* at 232 and 233.

### Application to Facts

#### **Rides Structures and Ride Equipment**

The Taxpayer explains that the category of ride structures includes structural towers, stairs, fiberglass waterslides, pools and conveyors and that the category of ride equipment includes filtration systems, pump systems, tanks and electrical components necessary for the operation of the rides.

In Public Document (P.D.) 96-121 (6/7/1996), the Taxpayer owned and operated theme parks throughout the United States, including one in Virginia. Citing the three-part test from *Danville Holding*, the Department concluded that the theme park rides were fixtures to realty. The Department observed that the rides were annexed to concrete supports embedded in the earth, the rides were essential to the purpose for which the land was used (i.e., a theme park) and that the rides had been in place for a number of years and enhanced the usefulness of the property.

In the Department's opinion, this case is not distinguishable from the facts of P.D. 96-121 as to the ride structures and ride equipment. These items of property were annexed to the realty in such a way that they would be difficult and costly to remove, and they were essential to the purpose for which the land was used (i.e., a theme park). While it is unclear exactly how long these items of property had been in place, the Department finds no reason to rebut the presumption that the Taxpayer intended to permanently improve the realty to which the ride structures and ride equipment were annexed. See P.D. 96-121.

In P.D. 99-200 (7/23/1999), the Department opined that while local taxes have their own characteristics, separate and distinct from the sales and use tax, occasionally, these provisions are quite similar for purposes of the application of the law. The Department has consistently used the same factors included in *Danville Holding* to evaluate whether property is real or tangible for retail sales and use tax purposes. Thus, fixture evaluations conducted under the *Danville Holding* standard should be consistent even if cases ultimately involve different tax types. Even so, the Department has found that the outcome of a fixture case depends on the particular facts and circumstances. See P.D. 14-53 (4/22/2014). In this case, however, the Department finds the treatment of the theme park rides under the sales and use tax to be persuasive.

### **Theming Equipment**

The Taxpayer also disputes the taxation of certain "theming" equipment such as attraction signs, large decoration items, giant umbrellas and water features for rides. Although these items were affixed to the realty, they were more for decorative purposes than being strictly essential to the purpose of using the land as a theme park. As to the element of intent, reference must be made to all the facts and circumstances in order to be able to infer what the Taxpayer's intent was with respect to these items of property. The Taxpayer points out that these items of property were affixed to the realty in order to convey a particular theme that was present throughout the park. The conveyance of a unified theme, especially in the context of an amusement park, suggests a more permanent intention as to the annexation of the items. Although it would not be impossible, a change of theme would likely require a significant investment in time and resources to undertake and would require not only the removal of old physical theme elements and installation of new elements, but also changes in, for example, how the park is marketed.

### **Lockers**

Similar to the theming equipment, the lockers were affixed to the realty but not strictly essential to the purpose of using the land as a theme park. Nevertheless,

customers to theme parks generally expect such storage space to be available if they require it, and not having suitable storage space would likely put such businesses at a competitive disadvantage. In addition, in a water park, such storage space was likely more necessary because customers would generally be unable to carry belongings with them while enjoying the park's attractions. These circumstances tend to indicate that the Taxpayer intended for the lockers to be permanent additions to the realty.

### County's Arguments

In its final determination, the County made certain arguments that the Department wishes to address specifically. In the section addressing the annexation of the property, the County stated that other jurisdictions with similar theme parks and attractions were treating rides and ride equipment as BTPP. The County also stated that it had consulted an employee of the Taxpayer who worked at an office in another state and who confirmed that all rides in the Taxpayer's parks were classified as tangible personal property. Finally, in the same section, the County reasoned that because the rides were essential to the operation of the park and because they were the reason the park was able to generate revenue, they should be classified as BTPP.

None of these considerations, however, are relevant to the element of annexation. With the longstanding precedent of P.D. 96-121 treating amusement park rides as fixtures to realty, the Department finds it surprising that other jurisdictions continue to classify them as BTPP. In addition, an employee's opinion about the classification of such property is not a relevant consideration. Further, as the County itself stated and as the Department observed in P.D. 96-121, rides are essential for the purpose for which the real property of a theme park is used. Contrary to being a consideration as to the annexation factor, this fact goes to the adaptation element and tends to indicate the rides are fixtures.

With respect to adaptation, the County observed that some of the pumps and generators were maintained inside of buildings. The County reasoned that because this equipment did not maintain the operation of the building or increase its value, it should be considered BTPP. This argument, however, ignores the fact that realty includes the land itself and the buildings constructed on it. The fact that such equipment, otherwise affixed to realty, may be housed in a building does not mean that it cannot be considered a fixture as to the underlying land.

As for intent, the County makes a number of observations and arguments. First, the County points out that it has always classified the rides and equipment as BTPP and that the Taxpayer did not contest a prior final determination of the County that concluded as such. Past local practice, however, has no bearing on the

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application of the legal standard at issue, nor is the failure to pursue a previous appeal an admission as to the classification of disputed property.

Next, the County seems to argue that because the rides could be improved and more rides could be added to the park to generate additional income, they should be classified as BTPP. The question whether an item of property generates income is not determinative of a taxpayer's intent to make it a fixture. The County also cites to a third party publication in which appraisers are quoted as saying major theme park assets such as rides should be assessed as tangible personal property. The practices of industry appraisers has no bearing on the application of the legal standard.

Finally, the County cites the case *Funtime, Inc. v. Wikins*, 105 Ohio St. 3d 74 (2004) for its position that amusement park rides should be considered BTPP. The Department's review of this court case indicates the court concluded that the rides in question were "business fixtures" as defined by Ohio statute. See 105 Ohio St. 3d. at 81-82. Ohio R.C. 5701.03(B) defined a business fixture as "an item of tangible personal property that has become permanently attached or affixed to the land or to a building, structure, or improvement, and that primarily benefits the business conducted by the occupant on the premises and not the realty." Under Ohio law, therefore, amusement park rides were in fact considered fixtures in the general sense because they are permanently attached or affixed to the land. Virginia law, however, does not distinguish between business fixtures and fixtures generally. If an item of property is a fixture, it is not subject to the BTPP tax.

#### **DETERMINATION**

For the reasons stated herein, I find that the ride structures, ride equipment, theming equipment and lockers were fixtures to the realty. As such, the case will be returned to the County to issue a refund consistent with this determination.

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If you have any questions regarding this determination, you may contact Timothy R. Mucha in the Office of Tax Policy, Appeals and Rulings, at (804) 371-6755.

Sincerely,



Craig M. Burns  
Tax Commissioner

AR/3671.M

C: The Honorable Ann H. Thomas  
Commissioner of the Revenue  
County of York



**REQUEST FOR TAX REFUND**

Name of taxpayer(s) or business entity: Mailing Address:		Busch Entertainment Corp. Property Tax Service Co. P. O. Box 543185 Dallas, TX 75354	Acct #: 120011974 Preparer Initials: lmk
Reason for Request: (attach additional information)		Appeal and agreement regarding the real estate improvement value.	
<b>Tax Type</b>	<b>Description of Property</b>	<b>Amount of Tax to be Refunded</b>	
<b>Tax Year</b>		<b>Tax:</b>	<b>\$</b>
<b>Ticket #</b>		<b>Penalty:</b>	
Real Estate	Resub. of Whittakers Mill Tract Parcel 2	<b>Interest:</b>	
2022	113a-0846-4200	<b>TOTAL:</b>	100,230.00
3030-0001			
INTEREST PAID BY COUNTY			1503.45
<b>TOTAL REFUND DUE (TAX REFUND &amp; INTEREST PAID BY COUNTY)</b>			<b>101,733.45</b>

**REFUND AUTHORIZATION**

**Commissioner of the Revenue**

I have reviewed the above request for a tax refund, and concur that the taxpayer is entitled to the refund.

Brandy Palazzone, CDC  
Commissioner of the Revenue

7-21-22  
Date

**Treasurer**

I hereby verify that the aforementioned taxpayer(s) have made payment of tax for which a refund has been requested. Such payment; and any amount owed the County by the taxpayer(s) which should be deducted from any refund made to the taxpayer, are in the following amounts:

Cordie D.K.  
Treasurer

7-22-2022  
Date

**County Attorney**

Pursuant to the provisions of Section 21-7.3, York County Code, I hereby consent to a tax refund to the taxpayer in the amount authorized by the Commissioner of the Revenue, less any amount owed the County by the taxpayer(s).

\_\_\_\_\_  
County Attorney

\_\_\_\_\_  
Date

**RETURN ORIGINAL FORM TO THE COMMISSIONER OF THE REVENUE**

Appeal



COPY

2022 ASSESSMENT RECORD CHANGE

TO: Commissioner of the Revenue Office
FROM: Real Estate Assessment Office
DATE: 7/20/2022
PID: 4345
ACCOUNT: 120011974
GPIN: I13a-0846-4200
OWNER OF RECORD: BUSCH ENTERTAINMENT CORP
PROPERTY ADDRESS: 176 WATER COUNTRY PKWY ,

RECEIVED

JUL 20 2022

COMMISSIONER OF THE REVENUE
YORK COUNTY

THIS IS A NOTICE OF A CHANGE AND/OR CORRECTION IN THE ASSESSMENT RECORD

Table with 2 columns: CHANGE FROM and CHANGE TO. Rows include LAND VALUE, BLDG VALUE, OB/XF VALUE, and TOTAL VALUE. Includes handwritten corrections and remarks.

\*\*\*Proposed Estimated Value for 2022/2023\*\*\* Changes per agreement with Water Country.

Appraiser: MK/tam

Assessor: MK 7-20-22

Effective Date: 01/01/2022