

**Florida Department of Revenue  
Tax Information Publication**

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**Definition of "Real Property" for Sales and Use Tax  
Clarified by 2002 Legislature**

A person who sells tangible personal property is required to collect and remit sales and use tax on the full sales price charged to the customer, including charges for installation labor. Contractors making real property improvements are not selling tangible personal property and are the consumers and final users of the materials that are incorporated into the project. Contractors shall pay tax on the cost of those materials (direct materials and the cost price of materials fabricated for their own use), and should not collect tax from customers.

In order to properly pay tax on the cost of materials or collect tax on the contract price from the customer, a contractor must determine whether a job involves selling tangible personal property or performing real property work. Prior to July 1, 1998, the only guidance for taxpayers and the Department of Revenue in making the determination was in court decisions dealing with the respective rights of landlords, tenants, lenders, vendors, developers, and tradesmen. Those decisions often turned on facts that are not relevant to deciding tax issues. Cases were often resolved based on facts that are not available to the contractor who has to decide whether to pay tax on costs or to collect tax from the customer.

As of July 1, 1998, Section 212.06(14), Florida Statutes (F.S.), was added to the statutes to provide definitions to assist contractors in deciding whether a job should be taxed as a sale of tangible personal property or as the performance of a real property contract. "Real property" is land, improvements to land, and fixtures. "Fixtures" are "items that are an accessory to a building, other structure, or land and that do not lose their identity as accessories when installed but that do become

permanently attached to realty." Although the determination of whether an item is a fixture requires review of all the facts and circumstances, a prerequisite is that it must be attached to the real property in some manner indicating that it has become part of the real property and will remain in place indefinitely. The statute specifically excluded certain types of property from classification as a real property fixture, even if the items were permanently attached and would otherwise qualify as a fixture.

### **Trade Fixtures**

Under Section 212.06(14), F.S., prior to the retroactive amendment approved this year, "trade fixtures" would always be tangible personal property, even if permanently attached. The term "trade fixtures," was not defined by the statute. In general terms, trade fixtures are items that are attached to real property to further a particular business conducted at that location. Examples of trade fixtures would be built-in specialty shelving for a particular product, signs identifying the business at a location, or large refrigerated display cases at a grocery store. The court cases that discussed trade fixtures dealt with fixtures added by commercial tenants. If the tenant retained title under the lease, the fixture would be a trade fixture that remained tangible personal property because it did not belong to the lessor who owned the land and building. If the lease provided that fixtures added by the tenant became the property of the lessor, the court would find that the item was a real property fixture. This "unity of title" analysis was specifically rejected in the definition of "fixture" in Section 212.06(14), F.S.

The automatic classification of "trade fixtures" as tangible personal property under Section 212.06(14), F.S., had unintended results and caused difficulties for contractors. Grocery store refrigeration units and walk-in coolers that were bolted or otherwise attached and required structural wiring and plumbing had been treated as real property. Large commercial signs that were embedded in concrete foundations had been treated as real property. As trade fixtures, those items would be tangible personal property under Section 212.06(14), F.S., regardless of

how they were attached, how much damage their removal would cause, and the buyer's intent that they remain in place indefinitely. Their classification as trade fixtures resulted in adding installation labor charges to the taxable base amount.

The 2002 Legislature deleted "trade fixtures" as a class of items that would be treated as tangible personal property regardless of permanent attachment. The effect is that trade fixtures will be classified either as real property or as tangible personal property depending upon review of all the facts and circumstances, including method of attachment, damage upon removal, intent of the buyer, treatment for other tax and accounting purposes, treatment under real property law, contract provisions, and any other factors relevant to the determination.

### **Machinery and Equipment**

As enacted in 1998, Section 212.06(14), F.S., excluded "machinery or equipment" from real property treatment. The term was intended to mean only industrial/commercial machinery and equipment, such as factory production line machines or wholesale distribution center conveyor systems. It was not intended to include items such as water heaters that are part of a building's plumbing system or compressors or exchangers that are part of a central air conditioning system. The 2002 Legislature provided clarification by amending Section 212.06(14), F.S., so that only "industrial machinery or equipment" is excluded from the definition of "fixture." The amendment specifies that the term "industrial" is not limited to manufacturing processes.

### **Effective Date**

The definitional changes to Section 212.06(14), F.S., are remedial and have retroactive effect to July 1, 1998, when the statute took effect. Therefore, no assessments will be made against taxpayers for treating a trade fixture as real property since July 1, 1998, if that treatment would be correct under the amended Section 212.06(14), F.S. The 2002 legislation also provides that any taxpayers who treated items as tangible personal property as required under the original Section 212.06(14), F.S., are protected against assessments based on the

remedial revisions to the definitions. In addition, no refunds will be made of taxes collected under the original statute based on a claim that the taxes would not have been collected under the revised definitions.

### **Examples of the Operation of the Effective Date Provisions**

A sign contractor specializes in large exterior signs that identify business locations. The signs are welded and bolted to steel poles, which are embedded in concrete foundations. They are lighted and directly wired. Based on the methods of attachment alone, the signs would be classified as real property. Under Section 212.06(14), F.S., as originally enacted in 1998, the signs would have been trade fixtures classified as tangible personal property.

1. After July 1, 1998, the contractor treated the signs as real property because they were permanently attached. The contractor always paid tax on the cost of materials and collected no tax from the customers. No assessment will be made because the repeal of the special rule for trade fixtures is retroactive to July 1, 1998.

2. Beginning July 1, 1998, the contractor treated the signs as tangible personal property because they were trade fixtures under Section 212.06(14), F.S. The contractor purchased materials using a resale certificate. The contractor charged and collected tax on the full price, including separately stated installation charges, to commercial customers. The contractor accepted a consumer's certificate of exemption instead of collecting tax on a sign installed at a private nonprofit hospital. No assessment will be made for tax on the materials used for the hospital sign, even though the contractor would be liable for tax under the retroactive revision to the statute. The contractor's commercial customers are not entitled to refunds of the taxes collected from them.

References: Section 212.06(14), Florida Statutes; Committee Substitute for Senate Bill 426; Chapter 2002-218, Laws of Florida

## **FOR MORE INFORMATION**

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