OHIO BOARD OF TAX APPEALS

CONDUENT STATE & LOCAL SOLUTIONS, INC., (et al.), Appellant(s), vs. PATRICIA HARRIS, TAX COMMISSIONER OF OHIO, (et al.), Appellee(s).	)	CASE NO(S). 2021-374 (USE TAX) DECISION AND ORDER

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Entered Friday, April 25, 2025

Ms. Clements, Ms. Allison, and Mr. Seitz concur.

Conduent State & Local Solutions, Inc. f/k/a ACS State & Local Solutions, Inc. ("Conduent") appeals a final determination of the Tax Commissioner, which denied Conduent's application for a sales and use tax refund for the period January 1, 2002, through June 30, 2008. Because Conduent did not present new evidence to this Board, we decide the case on the notice of appeal, the statutory transcript, and the briefs. For the following reasons, we affirm.

BACKGROUND AND PROCEDURAL HISTORY

According to Conduent's brief, its appeal involves tax paid on four categories of purchases. First, Conduent argues it is entitled to a refund of tax paid on the purchase of utility poles used for the City of Cleveland's red light camera program. The bulk of Conduent's brief is focused on that issue. Second, Conduent states it is entitled to a refund of tax paid for furniture purchased from "Workplace Solutions because the purchases are installations to real property." Next, Conduent argues it is entitled to a refund of tax paid on purchases of printing equipment and software from Pitney Bowes used directly in producing printed matter. Finally, Conduent argues it is entitled to a refund of tax paid on other miscellaneous purchases for items resold to a political subdivision. Conduent argues it is entitled to a refund of penalties paid for all of the purchases mentioned above.

FACTS

The Utility Pole Issue

During the refund period, Conduent was "in the business of providing technology services and business process outsourcing solutions to state and local governments," including those in Ohio. S.T. at 1. In December 2004, the City issued a request for proposals ("RFP") for "a full service, turnkey program for red-light traffic signal photo enforcement and associated services." On January 18, 2005, Conduent submitted its proposal in response to the RFP. The City accepted Conduent's proposal and signed the "Agreement between The City of Cleveland and ACS State & Local Solutions, Inc.," revised September 7, 2005 ("the Main Agreement"). In pertinent part, the Main Agreement incorporated by reference: (1) the RFP, (2) Conduent's proposal in response to the RFP, (3) certain documents that Conduent presented to the Cleveland City Council, and (4) the "License and Service Agreement By and Between ACS State & Local Solutions, Inc. and The City of Cleveland, Ohio," revised on September 7, 2005 ("license agreement"). S.T. at 943. Despite the incorporation of other documents, Section 3 of the Main Agreement states that "In the event of

any variance between the provisions of this [Main] Agreement and the provisions of any other document comprising this Contract, the provisions of this [Main] Agreement shall govern." S.T. at 943, 951. As discussed below, the Agreement allowed Conduent to subcontract some of its work to Cook Paving & Construction Co., Inc. ("Cook"). As a subcontractor, Cook provided certain goods and services and was paid for those goods and services directly by Conduent. In the contract between the City and Conduent, the City acknowledged that Conduent "will utilize Cook as a subcontractor in the performance of this Agreement." S.T. at 947.

The RFP also explains the services and goods to be provided. In its RFP, the City sought proposals from prospective vendors for a comprehensive package of traffic enforcement services running the gamut from installing traffic violation detection equipment to adjudicating the violations captured by that equipment.

> The City . . . requests proposals for a full-service, turnkey program for red-light traffic signal photo enforcement and associated services. The City . . . seeks a combined red-light camera system and all necessary support services (such as violation validation, camera system site selection support, customer service, technical support, expert witness testimony, noticing, violations processing, Bureau of Motor Vehicle (BMV) interface, payment processing support, collections, reporting, field maintenance and repair services, adjudication support, training, and public information.).

S.T. at 954.

The implementation of the program was to occur in two phases. In Phase 1, consisting of the first 90 days, the selected vendor was to install 15 red-light cameras (with 5 of the 15 within the first 60 days), 6 "Speed on Green [speeding] sites," 3 "Mobile Speed Units," and 3 "Fixed Speed Cameras." Phase 2, called the "12 Month Plan," called for installing 30 red-light cameras, 6 Speed on Green sites, 6 Mobile Speed Units, and 6 Fixed Speed Cameras. The initial fine for a

red-light infraction was $100, with additional penalties for late payment. Fines for speeding started at $100 for violations of zero to 24 miles per hour over the speed limit, with the fines increasing to $200 for violators speeding 25 miles per hour or higher over the speed limit. Fines for speeding in a school or work zone, regardless of the speed, were $200, with late penalties to increase the fines. S.T. at 966.

Again, the most significant portion of Conduent's refund claim relates to purchases it made from Cook, on which Conduent did not initially pay tax. Those purchases were made pursuant to Conduent's Agreement with the City. As outlined in the final determination, Conduent

> entered into a contract with the City of Cleveland to provide equipment and services as part of a red-light enforcement program, which remotely monitors intersections for traffic violations . . . [Conduent] contends that as part of the contract, the City agreed to allow the claimant to subcontract with Cook Paving & Construction Co., Inc. to install utility poles. [Conduent] contends that purchases from Cook are exempt as materials and services incorporated into real property under a construction contract with a political subdivision . . .

S.T. at 2. Conduent made numerous purchases from Cook related to the Agreement, including equipment and installation at several locations. S.T. at 22-24, 75, 96.

The Commissioner agreed with the Department's earlier determination that Conduent's refund application should be denied. The Commissioner summed up Conduent's claims:

> [Conduent] contends that purchases from Cook are exempt as materials and services incorporated into real property under a construction contract with a political subdivision because the City of Cleveland is an Ohio political subdivision and [Conduent] entered into a subcontract with Cook to install utility poles on the City's land as part of its [Conduent's] contract with the City.

S.T. at 2. The Department found that the poles and installation did not qualify for an exemption

from the tax and were "business fixtures as infrastructure needed to support the operation of the purpose of the contract – services for red light camera enforcement and administration, which exclusively benefited the business undertaken by Conduent, rather than the realty." S.T. at 2.

In support of that determination, the Commissioner found that the program "generated significant revenue for both the City and [Conduent], that the Program was "an enterprise conducted by [Conduent] for income," and that Conduent was the "party that primarily benefits from the utility pole purchase and installation as a necessary component in fulfilling its service contract for red-light camera enforcement with the City of Cleveland." S.T. at 4.

The Workplace Solutions Issue

Conduent paid tax on purchases of "workstations, credenza, and bookcases" for purposes of fulfilling a contract with the Ohio Department of Job and Family Services ("ODJFS"). It claims it permanently attached the furniture to the buildings; therefore, the items were incorporated into real property. Conduent Br. at 17-18. In the alternative, Conduent argues the furniture was resold to ODJFS. The Commissioner rejected the argument for lack of evidence. Specifically, the Commissioner found that Conduent failed to supply contracts, photographs, or other evidence showing the items were affixed to real property and benefited the real property. The Commissioner also found that Conduent failed to present evidence that it resold the furniture to ODJFS.

The Purchase of Equipment and Software

Next, Conduent claims it is entitled to a refund of tax paid on software and equipment from Pitney Bowes used in producing printed matter for sale. Conduent claims it utilized the software and equipment to print and mail child support checks for ODJFS. The Commissioner found the software was pre-written as reflected on the invoices and, therefore, subject to tax. The

Commissioner also found the true object of the ODJFS contract was the administration of the child support system, not for the checks. The Commissioner also rejected the argument that Conduent resold the software and equipment to ODJFS, citing a lack of evidence.

The Miscellaneous Purchases

Conduent's brief also notes tax paid on purchases using an electronic benefit transfer system, point-of-sale identification systems, and related equipment from Mustang Systems. Further, Conduent argues it was improperly charged tax on an interactive voice response system. The Commissioner again rejected the argument, finding Conduent failed to provide evidence that tax was erroneously paid. For example, the Commissioner criticized Conduent for not providing a contract or detailed invoices.

LAW AND ANALYSIS

Standard of Review

On appeal, a taxpayer challenging a determination of the Commissioner must prove that the findings were incorrect because "the tax commissioner's findings are presumed valid subject to rebuttal." *Accel, Inc. v. Testa*, 2017-Ohio-8798, ¶ 14. Consequently, it is incumbent upon a taxpayer challenging a determination of the commissioner to rebut the presumption and to establish a clear right to the requested relief. *Belgrade Gardens v. Kosydar*, 38 Ohio St.2d 135 (1974); *Midwest Transfer Co. v. Porterfield*, 13 Ohio St.2d 138 (1968). In this regard, the taxpayer is assigned the burden of showing in what manner and to what extent the commissioner's determination is in error. *Kern v. Tracy*, 72 Ohio St.3d 347, 349 (1995); *Federated Dept. Stores, Inc. v. Lindley*, 5 Ohio St. 3d 213 (1983).

Ohio's sales and use taxes work in tandem. Under R.C. 5739.02, an excise ("sales") tax is levied upon all retail sales made in Ohio. Under R.C. 5741.02, a corresponding tax ("use tax") is imposed on any tangible personal property's storage, use, or consumption in this state. The

interconnected nature of the sales and use taxes is made manifest in R.C. 5741.02(C)(2), which "excepts from the use tax the acquisition of 'tangible personal property or services, the acquisition of which, if made in Ohio, would be a sale not subject' to the sales tax." *Funtime, Inc. v. Wilkins*, 2004-Ohio-6890, ¶ 10. Under R.C. 5739.02(C), "it is presumed that all sales made in this state are subject to the [sales] tax until the contrary is established." Similarly, as to the use tax, under R.C. 5741.02(G), "it shall be presumed that any use, storage, or other consumption of tangible personal property in this state is subject to the tax until the contrary is established." When reviewing exemptions, our role is "to provide a fair reading of what the legislature enacted: one that is based on the plain language of the enactment and not slanted toward one side or the other." *Stingray Pressure Pumping LLC v. Harris*, 2023-Ohio-2598, ¶ 22.

The Parties' Arguments Generally

Under Ohio law, "a construction contract pursuant to which tangible personal property is or is to be incorporated into a structure or improvement on and becoming a part of real property is not a sale of such tangible personal property. The construction contractor is the consumer of such tangible personal property . . . ." R.C. 5739.01(B)(5). Conduent asserts that "the only issue is whether the utility poles are real property." Conduent Br. at 5. The Commissioner claims that "the red-light camera poles were not incorporated into real property," because they are "business fixtures" and, accordingly, that Conduent is not entitled to a refund. TC Br. at 2.

Conduent asserts several theories, some in the alternative, as to why its purchases from Cook were exempt from the tax and why it is entitled to a refund. Conduent's first claim is that its purchases from Cook are exempt because, under Ohio law, the poles are "structures or fixtures . . . installed under a construction contract with the City," and, therefore, are real property not subject to the tax. Conduent Br. at 3. Conduent's second claim, in the alternative, is that "[e]ven if the poles are not structures, they are nontaxable fixtures that benefit the realty, not any particular business conducted there." Conduent Br. at 8. As such, under this claim, it argues that the poles

are fixtures (realty) and not "business fixtures" and are, therefore, not subject to tax. Finally, Conduent argues that even if the poles are business fixtures, they are purchases for resale and, under Ohio law, are not subject to sales or use tax.

What Constitutes Real Property

The court has described a two-step analysis to determine whether an item constitutes real property: "first, determine whether the item meets the requirements of one of the definitions of real property set forth in R.C. 5701.02. If the item does not, then it is personal property. If the item fits a definition of real property in R.C. 5701.02, it is real property unless it is 'otherwise specified' in R.C. 5701.03. If an item is 'otherwise specified' under R.C. 5701.03, it is personal property." *Funtime, Inc. v. Wilkins*, 2004-Ohio-6890, ¶ 33. If an item is expressly defined as a business fixture in R.C. 5701.03, such as a storage bin or tank, the first step is not necessarily required. *Metamora Elevator Co. v. Fulton Cty. Bd. of Revision*, 2015-Ohio-2807. Although we may avoid an inquiry as to whether an item meets the definition of real property in R.C. 5701.02 if it is "otherwise specified" in R.C. 5701.03, such an analysis is worthwhile in the present case in order to address all of the arguments presented. Under its first theory, Conduent claims that "the installation services [purchased from Cook] are exempt from tax as purchases of materials and supplies incorporated into real property under a construction contract with a political subdivision." Conduent Br. at 3-4. Under Adm.Code 5703-9-14(A), a "construction contract" is defined as "any agreement, written or oral, pursuant to which tangible personal property is or is to be transferred and incorporated into real property . . . so as to become a part thereof without regard to whether it is new construction or an addition to or alteration of an existing building or structure."

Conduent claims that "the utility poles were transferred to and incorporated into real property owned by the City." Conduent Br. at 4-5. It supports that claim by asserting that the poles were installed at intersections identified by the City, at a time chosen by the City, pursuant to instructions from City officials, and that "neither Cook nor Conduent were even permitted to

access the utility poles, without the City's permission." In addition, Conduent argues that "the Commissioner . . . recognized that the utility poles became permanently affixed to the land in their Final Determination." Conduent Br. at 5. The Revised Code uses several defined terms, the understanding of which is critical in determining whether Conduent's claims have merit. In particular, R.C. 5701.02(A) defines "real property" and, in applicable part, reads as follows:

> "Real property," . . . include[s] land itself . . . and, *unless otherwise specified in this section or section 5701.03* of the Revised Code, all buildings, structures, improvements, and fixtures of whatever kind on the land, and all rights and privileges belonging or appertaining thereto. (Emphasis added.)

That definition, in turn, uses several words – "buildings," "structures," "improvements," and "fixtures" – which are further defined in the Revised Code. A "building" is defined, in applicable part, as:

> a permanent fabrication or construction, attached or affixed to land, consisting of foundations, walls, columns, girders, beams, floors, and a roof, or some combination of these elemental parts, that is intended as a habitation or shelter for people or animals or a shelter for tangible personal property, and that has structural integrity independent of the tangible personal property . . . .

R.C. 5701.02(B)(1). A "structure" is defined, in pertinent part, as "a permanent fabrication or construction, other than a building, that is attached or affixed to land, and that increases or enhances utilization or enjoyment of the land." R.C. 5701.02(E). An "improvement" means, "with respect to a building or structure, a permanent addition, enlargement, or alteration that, had it been constructed at the same time as the building or structure, would have been considered a part of the building or structure." R.C. 5701.02(D). And finally, a "fixture" is defined 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 realty and not the business, if any, conducted by the occupant on the premises." R.C. 5701.02(C).

Thus, under R.C. 5701.02(A), *unless otherwise specified* by R.C. 5701.03, all "buildings," "structures," "improvements," and "fixtures" are real property and, if the installed poles and attached equipment or unit, fall within one or more of those definitions, they are not subject to the tax. Conduent argues that the Units are "structures," but even if they're not, it claims that they are "fixtures." Conduent Br. at 5.

In turn, R.C. 5701.03, which is referenced in R.C. 5701.02's definition of real property ("unless otherwise specified in . . . section 5701.03 . . . ") defines a "business fixture." Under Section B of R.C. 5701.03(B), a "business fixture" is defined in applicable part 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.

That definition goes on to cite examples of business fixtures and reads, in applicable part:

> "Business fixture" includes, but is not limited to, machinery, equipment, signs . . . broadcasting, transportation, transmission, and distribution systems, whether above or below ground. "Business fixture" also means those portions of buildings, structures, and improvements that are specially designed, constructed, and used for the business conducted in the building, structure, or improvement, including, but not limited to, foundations and supports for machinery and equipment. "Business fixture" does not include fixtures that . . . primarily benefit the realty and not the business conducted by the occupant on the premises.

Id. "Personal property," as distinguished from real property, is defined in applicable part by R.C. 5701.03(A):

> "Personal property" includes every tangible thing that is the subject of ownership, whether animate or inanimate, *including a business fixture*, and that does not constitute real property as defined in section 5701.02 of the Revised Code. (Emphasis added.)

Under that definition, a business fixture is personal property, and accordingly, if the units are business fixtures, they are subject to the tax.

Conduent's argument is multi-layered and includes a number of arguments in the alternative. In its first argument, Conduent claims it is entitled to a refund because the poles are "structures or fixtures and are installed under a construction contract with the City, a political subdivision of Ohio." It cites R.C. 5739.01(B)(5) and Adm. Code 5703-9-14(D)(1)(a)-(b) in support of that claim. Conduent Br. at 3-4.

In applicable part, R.C. 5739.01(B)(5) reads that

> a construction contract pursuant to which tangible personal property is or is to be incorporated into a structure or improvement on and becoming a part of real property is not a sale of such tangible personal property. The construction contractor is the consumer of such tangible personal property . . . .

Adm. Code 5703-9-14(A) amplifies R.C. 5739.01:

> A "construction contract" is any agreement . . . pursuant to which tangible personal property is or is to be *transferred and incorporated* into real property, as defined in section 5701.02 of the Revised Code, so as to become a part thereof without regard to whether it is new construction or an addition to or alteration of an existing building or structure. (Emphasis added.)

Subsection (D)(1) of that same rule commences by stating, in applicable part, that:

> A construction contractor who purchases materials or taxable services for incorporation into real property is the consumer of those materials or services and

> shall pay sales or use tax on their purchase price . . . . The construction contractor is the consumer, even if a subcontractor provides the actual labor to incorporate those materials into the real property.

But that same subsection contains an exemption from the tax that is applicable to construction contractors under certain specified circumstances:

> Nevertheless, a construction contractor may purchase exempt from tax those materials or services that will be incorporated:
>
> . . .
>
> (b) Into real property that is owned, or will be accepted for ownership at the time of completion, by the United States government or its agencies, the state of Ohio, or an Ohio political subdivision . . . .

Conduent claims that "under Ohio law, the purchase of the utility poles is nontaxable if the utility poles were transferred to and incorporated into real property owned by the City, an Ohio political subdivision, pursuant to a construction contract." Conduent Br. at 4-5. Further, it argues that "[t]he utility poles installed by Cook are real property because they are structures . . . ," and, as such, are not subject to the Tax. Conduent Br. at 5. In the alternative, Conduent argues that even if the poles are not "structures," they are real property "fixtures" under R.C. 5701.02(C) and, therefore, also not subject to the tax.

The Poles are Business Fixtures

To qualify as a business fixture under R.C. 5701.03(B), the personal property attached or affixed to the land, etc., must "*primarily benefit the business conducted by the occupant on the premises, and not the realty*." (Emphasis added.) An item cannot be both a fixture and a business fixture. "It is apparent that the General Assembly has expressed its intent that fixtures are real property and that business fixtures are personal property." *Metamora*, at ¶ 23. In short, a fixture primarily benefits the realty, and a business fixture primarily benefits the business.

In the final determination, the Commissioner rejected Conduent's argument that the poles were fixtures, determining instead that they were "business fixtures." A review of the law, as it relates to business fixtures, supports that the poles and the Units to which they are incorporated are business fixtures. The definition of a business fixture in R.C. 5701.03(B) contains two key elements. Under the first element, an item of tangible personal property must be "permanently attached or affixed to the land." That element does not appear to be in dispute between the parties.

Under the second element, a business fixture "*primarily benefits* the *business* conducted by the *occupant* on the premises and not the realty." (Emphasis added.) Those three italicized words/phrases ("primarily benefits," "business," and "occupant") comprise the sub-elements of the second element. Unfortunately, those words are used in R.C. 5701.03(B) without further statutory definition. Accordingly, in order to determine if the poles are business fixtures, we must first understand the meaning of those words in the context of "business fixture," as used in R.C. 5701.03(B). Below, we first address the meaning of "business," followed by the meaning of "occupant," followed by the meaning of "primarily benefit."

The meaning of "business"

In its brief, Conduent argues that the poles are not business fixtures "because the City is not operating a 'business.'" Conduent Br. at 11. Consequently, it argues that the poles cannot be "business fixtures" under R.C. 5701.03(B). In support of that position, it cites R.C. 5701.08(E), which states that the word "'Business' includes all enterprises, except agriculture, conducted for gain, profit, or income and extends to personal service occupations." Conduent argues that because the City is not operating a business, the poles cannot primarily benefit a business. Further, Conduent argues that "the Cleveland City Counsel [sic] confirmed that the red-light program was not installed for commercial 'gain, profit, or income'" within the meaning of R.C. 5701.08(E). Conduent Br. at 11. Conversely, the Commissioner argues that it is *Conduent*, and not the City, conducting business on the premises. She argues that the program "is an enterprise conducted for

gain by Conduent as a commercial enterprise." TC Br. at 6. We concur with the Commissioner's view and find that Conduent is conducting "business" as defined in R.C. 5701.08(E) on the premises.

The meaning of "occupant"

Having correctly recited in its brief the meaning of the word "business" as used in R.C. 5701.08(E), Conduent contends that "[i]n other words, in order for a fixture to qualify as a business fixture, the *land owner* must be engaged in a commercial enterprise." (Emphasis added.) Conduent's Brief, at 11. Conduent cites no authority for its assertion that under R.C. 5701.03(B) 's definition of "business fixture," the "the land owner" must be engaged in "commercial enterprise," and its use of the phrase "land owner" departs from that statute's definition of "business fixture." Although Conduent uses the term "commercial enterprise" and not "business," as quoted above, the word "business" has "been defined as '[a] commercial enterprise carried on for profit.'" *Stauffer v. Smith*, 2015-Ohio-4240, ¶ 26, (11th Dist.); *City of Cleveland v. Heckathorne*, 2016-Ohio-8059, ¶ 5 (8th Dist.).

Contrary to Conduent's claim that the "land owner" must operate the business, the definition of "business fixture" in R.C. 5701.03(B) does *not* require that the "land owner" conduct the business on the premises. Rather, it requires that "the occupant" conduct the business on the premises. Just as lessees occupy a property they do not own, a business can also occupy land they do not own under a license or some other arrangement. Accordingly, we find no support in the law for Conduent's assertion that "in order for a fixture to qualify as a business fixture, the *land owner* must be engaged in a commercial enterprise." (Emphasis added.) Conduent Br. at 11.

While there appears to be no dispute that the City is the owner of the land on which the poles were installed, that begs the question as to who is the "occupant" of the land and whether the poles primarily benefit the business or the realty. Conduent argues that "the Commissioner's assertion [that the poles are taxable business fixtures] cannot stand because the City is not

operating a 'business' and therefore, the poles cannot be primarily benefiting a business." Conduent Br. at 11. Its argument that (1) "the *land owner* must be engaged in commercial enterprise [a business]," for the fixture to qualify as a business fixture, and (2) that the City cannot be a commercial enterprise because it is a political subdivision, of necessity incorporates the presumption that the City, and not Conduent, is the occupant of the premises. (Emphasis added.) Conduent Br. at 11.

On the contrary, the Commissioner argues that *Conduent* is the entity conducting business on the premises as its occupant and that, subject to meeting the other requirements of R.C. 5701.03(B), the poles may be considered business fixtures subject to tax. In the final determination, the Commissioner states that:

> Regardless of whether the red-light enforcement program is an enterprise conducted for gain by the City, the red-light enforcement program is an enterprise conducted for gain by the claimant [Conduent]. [Conduent] misidentifies the party engaged in "business" as defined in R.C. 5701.08. The evidence provided by [Conduent] demonstrates that red-light enforcement programs are an enterprise conducted by [Conduent] for income.

S.T. at 4. Unfortunately, neither the courts nor this Board has previously defined the meaning of the word "occupant" in the context of R.C. 5701.03(B), and we must turn to the general rules of statutory interpretation to discern its meaning in that statute to determine whether Conduent is the occupant of the premises.

Under R.C. 1.42, "Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly." We note the term has different meanings in other statutory contexts.

In the context of storage facilities, for example, "occupant" means "a person that rents

storage space at a self-service storage facility pursuant to a rental agreement that the person enters into with the owner." R.C. 5322.01(C). In other contexts, an economic relationship is analyzed. *State v. Sneed*, 78 Ohio Misc. 2d 5, 8 (Cleveland Muni. Ct. 1996). Black's Law Dictionary defines "occupancy" simply as the person in possession and having possessory rights. *Black's Law Dictionary* (6th Ed. 1990) at 1078; *Sneed* at 8. In *Pep Boys v. Testa*, BTA No. 2015-706, 2016 Ohio Tax LEXIS 694 (April 4, 2016), we stated that "the determination of whether an item constitutes a "business fixture" so often turns upon the specific facts relating to its use and installation." That same fact-specific inquiry is also necessary here. It requires that we determine whether, under the facts of our case, Conduent was an "occupant," as that word is used in the definition of "business fixture" in R.C. 5701.03(B).

Conduent is the occupant of the premises.

In the final determination, the Commissioner stated, "During the hearing, [Conduent] verified the nature of its business as contracting exclusively with governments to provide services, such as red-light camera enforcement." Further, "[Conduent] is the party at issue engaged in the commercial enterprise of providing red-light camera enforcement services." S.T. at 4. Among other things, Conduent's active and continuing presence on the Premises makes clear that it was the "occupant" of those premises within the meaning of R.C. 5701.03(B) and that it was conducting business on the premises. A review of the evidence, particularly the agreements between Conduent and the City, makes this clear.

Conduent and the City entered into the Main Agreement, which incorporated by reference several documents, including, among others, Attachment 4 to the Main Agreement, which was the license agreement. Section 4 of the Main Agreement is entitled Scope of Services and requires, in applicable part, that Conduent "provide the specific services described in its Proposal [in response to the City's RFP] as modified by Attachment 4 [the License Agreement] . . . ." S.T. at 943. The license agreement, in turn, shows that Conduent is to have continuing access to and use of the land

on which the poles and equipment are placed. Both the Main Agreement and the license agreement require that Conduent install, service, and maintain the cameras and related equipment on the premises and largely run the operations necessary to issue and enforce the traffic tickets generated by the program.

The RFP, the Main Agreement, and the license agreement make clear that starting with the selection of sites for the units, to the construction and installation of the units, to the maintenance of the units, to the enforcement of the traffic tickets issued via the units, and to the adjudication and collection of the fines resulting from those violations, Conduent is to have day-to-day control of the actual operation of the program. At the program's inception, the RFP stated that the selected vendor was to have a primary role in selecting the locations for the equipment. Further, "the City will rely on the selected vendor to provide critical site analysis and information to assist in the final selection of all enforced approaches." S.T. at 955.

After the sites were chosen, the RFP required that the selected vendor "provide and install all necessary equipment," which, the RFP said, included "poles, camera boxes, sensors, related wiring, and any supplementary equipment to operate the Red-light Camera Enforcement System." S.T. at 955. In connection with the construction and installation of the units, for example, under Section 2.1 of the license agreement, Conduent was required to "consult with and perform certain support services for the City . . . such as site selection evaluation support, the installation of automated cameras, maintenance and servicing of equipment . . ." to name just a few requirements. S.T. at 978. In particular, it is required to "conduct a site construction evaluation and collect appropriate data, photographs, all other necessary data . . . ," all of which would require access to and continuing use of the premises. S.T. at 979 The license agreement further requires that Conduent "prepare engineering drawings and measurements for each site where a fixed camera is to be installed" and is responsible for "traffic maintenance during camera installations." S.T. at 980. After construction is completed, Conduent is required to "take all loop

measurements and have these dimensions documented on as-built, engineered drawings . . . ," actions which actions could only be taken by Conduent at the Premises. Because the RFP was incorporated by reference into the Main Agreement, the RFP's terms apply to Conduent's contractual obligations. S.T. at 942.

Once the program was initiated, Conduent had continuing maintenance and servicing obligations at the Premises. The RFP requires that "All maintenance of vendor-supplied equipment shall be the responsibility of the vendor," with Conduent being required to guarantee repairs within seventy-two hours of being notified by the City. Further, under the RFP, Conduent must show its capability to "Provide daily maintenance and support operations including camera relocation, preventative maintenance, and calibration." S.T. at 956.

In attempting to show Conduent's purportedly limited control over the Premises, Conduent argues that "neither Cook nor Conduent were even permitted to access the utility poles, without permission from the City." Conduent Br. at 5. First, it is clear from the subcontract between Cook and Conduent that, other than completing the installation of the poles by a date certain, there were no restrictions or limitations by the City as to when Cook could access the Premises to perform its tasks. This is significant because the City was aware that Conduent was going to use Cook as a subcontractor. S.T. at 947. Under its subcontract with Conduent, "[Cook] shall commence performance of this Subcontract on or before March 27, 2006 and render services in accordance with the schedule dates set forth in Exhibit C . . . ," which calls for completion by April 10, 2006. S.T. at 78. A second subcontract with Cook calls for commencement on or before March 20, 2006, and completion by April 4, 2006. S.T. at 84-99. Neither subcontract appears to limit Cook's access. While both subcontracts state that Cook's work shall be performed in such a manner as to cause a minimum of interference with the City's operations, those sections impose no access restrictions by the City.

Further, it is clear from the RFP, as well as the Main Agreement and license agreement,

that Conduent was not required to contact the City's Director of Public Safety *each and every time* over the proposed five-year term of the program that it (Conduent) wished to access any of the numerous sites on which Program equipment was located. The Main Agreement states that "CONTRACTOR (sic) personnel shall service all camera units. All servicing and maintenance will be performed according to a schedule approved by the Director of Public Safety." S.T. at 981. Given the RFP's requirement that the selected vendor show its ability to be on the premises for daily maintenance and support operations, including location, maintenance, and calibration. The RFP and the agreements as a whole make clear that the City's schedule preapproval was not meant to limit access but rather to ensure a *minimum amount* of regularly scheduled maintenance.

Conduent's on-premises responsibilities required that its personnel service all camera units and "provide maintenance and repair of the camera Units and Housings, [capitalized in original] including the obligation to replace the Units and Housings if the Units or Housings cannot be repaired." S.T. at 981. In addition, Conduent was required to "provide and maintain a routine maintenance/repair/service log for Red-light and Fixed Speed Camera Systems." S.T. at 981.

Conduent's obligations to install, service, and maintain the poles and equipment were only part of its obligations to the City. Under the License Agreement, the Units were an integral and critical component of the other portion of Conduent's obligations: the issuance and enforcement of camera-related traffic tickets and the collection of revenues from those traffic tickets issued by Conduent's Units. For example, Conduent was required to review all images captured by its cameras to determine if there were traffic infractions. S.T. at 982. Based on its review of the images produced by its cameras, Conduent was required to seek information from the Ohio Bureau of Motor Vehicles ("BMV") for in-state vehicles and to pursue registered owner information for out-of-state violators and to prepare an electronic record for review by the City's Division of Police The License Agreement required that Conduent send out follow-up notices to the traffic violator if the violator did not respond to the initial notice of violation and to coordinate

efforts at enforcement with the City's Parking Violations Bureau. S.T. at 982. Section 1.10 of the license agreement requires that Conduent "provide all image equipment it needs to support the Photo Safety Program, including processing and/or adjudication equipment." All of the above requirements were based upon the photographic images and data gathered by Conduent's on-premises units, requiring that it have access and control to install, repair, maintain, and update its poles and equipment. While the license agreement states generally that the City is responsible for the "management, control, and oversight of the Photo Safety Program," the duties and obligations imposed upon Conduent by that agreement make clear that the program could not be initiated, maintained, or operated without Conduent's continuing access to, and active and continued presence at the premises.

Conduent, at a minimum, had management, subjection, and direction of the premises. Conduent had detailed, numerous, and continuing on-site duties set forth in the contract documents, continuing access to the premises required for Conduent to properly service and maintain those premises, and the necessary technical and other expertise and discretion required by Conduent in performing those duties. The facts support that Conduent, not the City, exercised actual and continuing control. Conduent had control over "what goes on on-premises."

Conduent is Conducting Business on the Premises

We turn next to the question of whether Conduent was conducting "business" on the premises, as that word is used in the definition of business fixture in R.C. 5701.03(B). To a certain extent, there is an overlap of evidence, which shows that Conduent was both the occupant of the premises and conducting business thereon. It could not conduct business on the premises without being its occupant.

As discussed above, under R.C. 5701.08(E), the word business "includes all enterprises . . . conducted for gain, profit, or income and extends to personal service occupations." A review of the evidence makes clear that, as its occupant, Conduent was conducting business on the premises.

> In asserting that it is not conducting business on the Premises, Conduent stated that: Conduent is not in the business of enforcing red-lights for its own benefit; rather, Conduent "performs professional services and work in support of the City's Automated Traffic Enforcement Program." S.T. 977. It is the City's public safety program that benefits from the utility poles holding the red light cameras, *not Conduent's business*.

(Emphasis added.) Reply at 8. That assertion is illogical. For example, a criminal defense attorney does not mount a defense for an accused for the attorney's own benefit; the attorney is not accused of a crime. But no one would deny that in so doing, the attorney is operating her "business" and that the attorney profits and benefits by using the law as a tool to make money.

Conduent's above assertion turns a blind eye to the substantial evidence in the record showing that red-light enforcement is, in fact, Conduent's business and has been so for over seventy-five years. In materials it provided to the City in response to the RFP, Conduent stated as follows:

> [Conduent] is a nearly $4 billion, US-based, Fortune 500 Corporation with 40,000 employees worldwide – we are the most financially stable vendor in the industry. . . On behalf of our photo enforcement customers, [Conduent] has:
>
> - Installed more than 750 traffic enforcement systems.
> - Proceeded with more than four million automated traffic enforcement violations.
> - Responded to more than 250,000 customer service calls.
> - Prepared more than 50,000 evidence packages.
> - Scheduled more than 75,000 hearings.
> - Processed more than one million payments.

S.T. at 961. Further, it said that since 2002, it has been selected to provide its services in

numerous cities across the United States and Canada.

In light of this and the other facts discussed herein, Conduent's argument that "it is the City's public safety program that benefits from the utility poles holding the red light cameras, *not Conduent's business*" is simply not credible. Conduent's business benefits from the program as it has in other large cities. Two things can be true at once, and while the City benefits from the program, there is no question that Conduent is conducting business on the premises and that its business benefits from that conduct**.**

In addition to the foregoing, a review of the RFP and the agreements signed pursuant to the RFP makes clear that Conduent is conducting business on the Premises. The City's RFP required that the selected vendor provide "a full service, *turnkey program* for red-light traffic signal photo enforcement and associated services." (Emphasis added.) S.T. at 954. Although the RFP called for a turnkey program, the day-to-day operational duties of the program were *not* turned over to the City once the sites were constructed. Instead, the agreements show that after it completed construction of the sites, Conduent had the contractual responsibility for the actual operations of the program and received a continuing income stream for those operational services.

The evidence shows that Conduent "marketed its services to the City of Cleveland for the purpose of revenue generation for both [Conduent] and the City." S.T. at 4. In particular, Conduent presented information to the City in a document entitled "City of Cleveland Automated Traffic Enforcement Program, Vendor Pricing Breakdown . . . " S.T. at 970, where Conduent estimated how much it would be paid for its services. The record includes information on payments to Conduent, including monthly fees for the maintenance of the red-light, mobile, fixed speed, and speed on green equipment. Depending on the type of equipment, those monthly fees ranged from $313 to $1,486. In addition, Conduent estimated the number of tickets per day that the program would generate, for which it was to receive $7.95 per traffic ticket as a "ticket processing cost." S.T. at 970.

Conduent also prepared estimates of the funds to be generated by the program and estimated how much the City would be paying Conduent for each type of traffic device. For example, it estimated that the "Red-light Projected Roll Up" from 2005 through 2009 would generate "Annual Vendor Fees" to Conduent of $5,882,400, which averaged more than one million dollars per year for that device alone. For that same period, it estimated that the "Speed on Green Projected Roll Up" would produce annual fees to Conduent of $2,226,000, that the "Fixed Speed Projected Roll Up" would produce annual fees to Conduent of $3,319,971, and that the "Mobile Projected Roll Up" would produce annual fees to Conduent of $5,566,340. Thus, for that period, Conduent projected that it would be paid $16,994,711 in total or an average of $3,398,942 per year. S.T. at 973.

Unfortunately, Conduent submitted no evidence of the amount it actually received, so we have no way to measure these estimates against actual payments to revenue. S.T. at 3. Regardless of its actual receipts, the evidence supports that, according to its own estimates, Conduent expected to receive multi-millions of dollars from its operation and maintenance of the program. Using R.C. 5701.08(E)'s definition of business to include "all enterprises . . . conducted for gain, profit, or income . . . ," there can be no doubt that Conduent, as the occupant of the Premises, was an enterprise conducted for profit, gain or income. As such, we find that it was operating a "business" on the Premises as the word "business" is used in R.C. 5701.03(B)'s definition of "business fixtures."

The poles primarily benefit the business on the premises and not the realty.

The evidence shows that the poles primarily benefited the business conducted by Conduent as the occupant of the premises and not the realty. Conduent is a for-profit business, and at the hearing before the Commissioner, it "verified the nature of its business as contracting exclusively with governments to provide services, such as red-light camera enforcement." S.T. at 4. Conduent argues that the program "was intended to benefit public safety" and not for "gain, profit or

income," citing in support of the Cleveland City Council's resolution enacting the red-light program. Conduent Br. at 11; S.T. at 785.

We have no reason to question that at least *part* of the City's motivation in enacting the red-light program was public safety. But, as mentioned above, two things can be true at once, and the evidence shows that the City's motivations were mixed at best and not purely related to public safety. As such, we concur with the Commissioner's statement in Final Determination that "[t]he cameras may be a safety measure; however, [Conduent] misrepresents the fact that the cameras are merely a safety measure and not revenue raising." S.T. at 4. While the City's motives may have been mixed, Conduent's were not. It is not a charity or a not-for-profit organization. Like all for-profit businesses, Conduent is in business to make a profit. For sure, *standing alone*, its for-profit status does not show that the business Conduent conducted on the Premises "primarily benefit[ed] the business . . . and not the realty."

While we find Conduent's use of the property is dispositive, the record does not support Conduent's position that the program was not revenue-generating for all involved. The Commissioner noted in the final determination that revenue was an important factor for both the City and Conduent. A review of the agreements makes clear that revenue generation was essential at the program's inception, during operation, and at its conclusion. The Main Agreement is replete with references to the revenue to be generated by the program and allows the City to limit or stop its payments to Conduent if Program revenues from traffic tickets do not generate sufficient funds to support the program. It further allows *Conduent*, under certain specified circumstances, to end the program.

Conduent also cites our decision in *Nationwide Mut. Ins. v. McClain*, BTA Nos. 2018-313, 2018-315, 2018-316, 2018-317, 2018-318, 2019 Ohio Tax LEXIS 2413 (Oct. 12, 2019) in support of its claim that the poles are fixtures. In *Nationwide*, the Commissioner denied the taxpayer's application for a refund of sales tax, and on appeal, we found that the office cabling in question

was not a business fixture but rather a construction contract under R.C. 5739.01(B)(5) (and therefore not personal property). *Nationwide* at *5. In particular, we found that the taxpayer engaged contractors to install "standard CAT-5 or CAT-6 cabling common to office buildings and other commercial buildings. The cabling was installed underneath the floors, above the ceilings, and in the walls, affixed to the building in the same way as are telephone lines and electric lines." *Nationwide* at *2. Like the taxpayer in *Nationwide*, Conduent argued that the poles here benefited the realty and not the business. Conduent's Brief, at 10 – 11.

We find that *Nationwide* does not apply to the facts of our case. First, our decision in *Nationwide* was premised on a specific fact pattern. In addition, in *Nationwide*, the parties stipulated that if "Nationwide were to abandon the buildings in which the cabling was installed, 'any business relocating into those buildings could be able to use the communication lines for its VoIP and internet communications . . . '" *Nationwide* at *4 - 5. Here, there is no stipulation by the Commissioner, similarly indicating a common purpose for the poles by any subsequent user.

Further, a review of the Scope of Work in Conduent's subcontract with Cook highlights the distinction between the facts in our case and those in *Nationwide*. Under the subcontract, in addition to requiring Cook to install the poles, it was also required to install wiring and equipment that appear to be specific to camera enforcement units. As stated in the Scope of Work,

> Subcontractor shall install three-three-conductor number fourteen cables (14/3C) one for red and yellow phases . . . routed from the controller *to each RLC* [Red-light Camera]. Subcontractor shall install 3 wire #14 . . . for *auxiliary camera power, auxiliary flash power and triggering* . . . Subcontractor shall supply and install a ground rod and a number ten solid wire . . . *for the camera bond system* at the base of each RLC pole. (Emphasis added.)

S.T. at 80, 81, 82, and 101.

Thus, Conduent's subcontract with Cook made clear that, unlike the "the standard . . .

cabling . . . common to office buildings and other commercial buildings" that was at issue in *Nationwide*, at * 2, the equipment and cabling here was designed and intended to be specific to camera enforcement equipment. Although Conduent argues the opposite, the evidence supports that the wiring here (quoting from its brief) was, in fact, "*a specialized network designed to meet technical requirements of an individual business consumer.*" Conduent's Brief, at 10. Accordingly, these significant factual differences distinguish *Nationwide* from the instant case and make it inapplicable here.

In *Funtime*, 2004-Ohio-6890, ¶ 37, the Supreme Court examined the elements of a fixture. It stated that "[t]he second requisite of the test of a fixture [real property] is that the annexed chattel must have such relationship to the land or improvements already constructed thereon as to be necessary or beneficial to its enjoyment, independent of the business presently carried on." Further, in that decision, it quoted from its earlier decision in *Zangerle v. Standard Oil Co.,* 144 Ohio St. 506 (1945), paragraph four of the syllabus, where it stated that "[t]he decisive test of appropriation is whether the chattel under consideration in any case is devoted primarily to the business conducted on the premises, or whether it is devoted primarily to the use of the land upon which the business is conducted." *Funtime* at ¶ 38.

The undisputed facts discussed above make clear that the Units (poles and equipment) located on the Premises primarily benefited the business and not the realty. Among other things, the program's recurring contractual emphasis on revenue generation supports the finding that the tangible personal property used in the program primarily benefited the for-profit business conducted by Conduent on the Premises. Accordingly, the poles are business fixtures and constitute personal property.

The poles are not "structures."

As discussed above, examining whether the poles fit the definition of real property in R.C. 5701.02 is unnecessary because they are "otherwise specified" in R.C. 5701.03. Yet, such analysis

is helpful in this case. R.C. 5701.02(E) provides that a structure is "a permanent fabrication or construction, other than a building, that is attached or affixed to land, and that increases or enhances utilization or enjoyment of the land." R.C. 5701.02(E). Under that section, a structure "includes, but is not limited to, bridges, trestles, dams, storage silos for agricultural products, fences, and walls." Thus, to prove that the poles are structures, Conduent must first prove that they are permanent fabrications or construction other than a building. The definition of structure in R.C. 5701.02(E) is dependent upon whether the item is a permanent "fabrication or construction" and, accordingly, must determine whether the poles are "fabrications or construction" within the meaning of the statute.

Conduent's claim that the poles are structures is based largely on a 2001 opinion of the Tax Commissioner. Tax Commr. Opinion, Opinion No. 21-0001 (Nov. 9, 2021). It should be noted that opinions of the Commissioner are not final determinations, and "[a]n opinion of the commissioner binds the commissioner only with respect to the taxpayer for whom the opinion was prepared." R.C. 5703.53(H); R.C. 5703.53(J). The cited opinion was not prepared for Conduent in connection with this case, but nonetheless, its reasoning may be persuasive in our determination.

Under that opinion, the Commissioner said that the terms "building," "improvement," and "structure" as used in R.C. 5701.02 "are never considered tangible personal property, even before the component parts are attached to land." The opinion states:

> These items [buildings, improvements, and structures] are described as "fabrications or constructions" to stress the fact that they are *formed upon the land itself, and not tangible personal property that is merely attached to the land*. These items are usually composed of bricks, mortar, beams, cement, boards, etc. Buildings, improvements, and structures are constructed upon the realty in which they are situated and have no existence until they are constructed on site. (Emphasis added.)

Tax Commr. Opinion No. 21-0001, at *2 (Nov. 9, 2021).

In its brief, Conduent argues that under the Commissioner's opinion, "a utility pole . . . is a structure because, similar to a fence, it does not have the character as a utility pole until it is installed as part of the real estate . . . before it is installed, a utility pole is not a utility pole-it is an assembly of a cylindrical piece of metal and concrete." Conduent Br. at 6. We disagree with that interpretation. At the outset, as the party bearing the burden of proof, Conduent was required, and failed, to provide any evidence that the utility poles were "*formed* upon the land itself." (Emphasis added.) *Id*. The utility poles are cylindrical pieces of metal, cast and pre-formed before they arrive at the site, and are merely attached to the land thereafter. On the other hand, buildings are typically not built at a remote location and then moved to their final, permanent location. Generally, a true building, structure, or improvement that is "formed upon the land, itself" is created on the land on which it is permanently located *and is not transported from location "A," where it is built, to location "B,"* the land on which it is permanently located.

Unlike a building, structure, or improvement composed of bricks, mortar, and other construction materials, the metal pole is not created upon the Premises, having taken its shape and form offsite and not on the Premises itself. On the other hand, the bricks and mortar of a building, structure, or improvement come together and take on their physical shape and configuration when they are formed on the land. That is not the case with a pre-cast metal pole. It was a cylindrical metal tube before it arrived on the site, and it remains a cylindrical metal tube after it is attached to the ground. It is created and formed off-site and exists in that form before its arrival.

Conduent cites *Polaris Amphitheater Concerts, Inc. v. Del. Cty. Bd. of Revision*, BTA No. 2004-V-1294, 2007 Ohio Tax LEXIS 209 (Jan. 26, 2007) *rev'd on other grounds* 2008-Ohio-2454 (2008), in support of its argument that the poles are structures. *Polaris* offers no support to Conduent's argument. In that case, concerning an amphitheater facility, we found that:

The amphitheater *stage, loading docks, attached wings, concession facilities,*

> *merchandising facilities, restroom facilities, storage facilities, video production facilities, administrative offices, VIP lounges, outdoor lounges, storage facilities, maintenance facilities, cafeteria, hospitality facility, first aid and public safety facilities, paved parking lots and walkways, and the like* all constitute buildings, improvements, and/or structures as defined by R.C. 5701.02, as they all are of "permanent fabrication or construction," affixed to the land, intended as "habitation for people, animals or a shelter for tangible personal property" and furthermore "increase the utilization or enjoyment of the land."

(Emphasis added.) *Polaris* at *9-10. The facilities described in the italicized language above are distinctly different from the poles in this case. The buildings, structures, and other facilities in *Polaris* were built, constructed, and fabricated on the site of their permanent locations. There was no evidence in *Polaris* that the above-described facilities were fabricated and constructed off-site and then delivered and thereafter affixed to the land on which they were permanently located. Accordingly, we find that *Polaris* is inapposite to our case and that the poles are tangible personal property. Accordingly, we reject Conduent's assertion that the poles are "structures" as defined in R.C. 5701.02(E).

The poles are not "fixtures."

Conduent argues in the alternative that even if the poles are not structures, they are non-taxable "fixtures," a form of real property "that benefit[s] the realty, not any particular business conducted thereon." Conduent Br. at 8. By contrast, under R.C. 5701.03(B), if the poles are "business fixtures," then they primarily benefit the business conducted on the property and are considered personal property subject to the tax.

Conduent argues that our decision in *Palace Hotels, LLC v. Testa*, BTA No. 2016-1300, 2018 Ohio Tax LEXIS 474 (March 5, 2018), supports its position. We find this argument not well taken. In its brief, Conduent states that in *Palace Hotels*, "this Board opined that *once it is*

determined that an item meets the definition of real property in R.C. 5701.02(A), no further inquiry is needed." (Emphasis added.) Reply at 5. Accordingly, Conduent says we need not further explore whether the units are business fixtures. *Id*. But Conduent's argument assumes in the first instance that we have already determined that the units were realty. The definition of "fixture" requires that the item of personal property, in addition to being permanently attached or affixed to the land, must "primarily benefit the realty." In purported support of its position that the poles primarily benefit the realty, Conduent claims that these poles "can be used in a variety of ways" and therefore benefit the realty, a necessary element under the definition of fixture. The evidence in the record does not support that claim. Conduent Br. at 9-10.

Throughout its brief, Conduent refers to the poles on which the cameras and related equipment are installed as "utility poles," with that phrase appearing approximately eighty times in the body of its brief. Conduent's use of "utility" modifies the word "poles" and indicates multiple uses. Indeed, as an adjective, "utility" is defined as "capable of serving as a substitute in various roles or positions." https://www.merriam-webster.com/dictionary/utility. But there is no evidence in the record that shows multiple uses for the poles, nor is there any support for Conduent's use of the adjective "utility" to describe the poles.

Despite Conduent's characterization of the poles as "utility" poles, the phrase "utility poles" is neither used nor defined in the Main Agreement, the license agreement, nor the portions of the RFP that are contained in the record. Indeed, Conduent does not even use the phrase "utility poles" in its subcontract with Cook. Instead, in the scope of work sections of its subcontract with Cook, Conduent is more specific, describing the poles that Cook is required to install not as "utility poles" but rather as "type 1-A *camera* pole[s]." (Emphasis added.) S.T. at 80, 81, 82, and 101.

Indeed, the evidence submitted by Conduent to the Commissioner undercuts its argument that these are "utility" poles. Conduent provided an article to the Commissioner that the

Commissioner considered in its final determination regarding the red-light cameras. S.T. at 3, fn. 1. That article, which was based on a local televised news story, included both video and still photographs of the poles and the red-light cameras placed on those poles. Olivia Fecteau, *Traffic cameras remain in some Northeast Ohio villages, as court battle plays out*, available at https://www.news5cleveland.com/news/local-news/oh-cuyahoga/traffic-cameras-remain-in-some-northeast-ohio-villages-as-court-battle-plays-out. While the article does not indicate if those poles were the same ones used by Conduent, they show a metal pole with an attached metal box-like enclosure containing speed-related equipment. Unfortunately, although it bears the burden of proof, Conduent did not submit a picture of its "utility poles" as part of its evidence before this Board.

Despite Conduent's description of its poles as "utility poles," the article Conduent submitted to the Commissioner photographically shows that red-light camera poles are substantially different from standard telephone or streetlight poles, which are also depicted in a photograph in that same article. Indeed, the photo shows that the camera poles are substantially shorter and thinner than standard streetlight/telephone utility poles.

Further, the RFP clarifies that the red-light camera system it was seeking "is defined as inclusive of all equipment and personnel required to completing the operation of Red-light Camera Enforcement of red-light violations . . . ." Under the RFP the hardware that the selected vendor was required to install was to include "at a minimum, all computer interfaces, software, cameras, flash strobes, violation detection loops, wiring, and any necessary appurtenances to support a fully functional Red-light Camera Enforcement System." S.T. at 954. That is substantially different from the plain vanilla "utility pole" language used by Conduent in its brief to describe the items being installed on the Premises.

These were *camera* poles, and Conduent explicitly said so in its subcontract with Cook. But more than that, even within the camera pole category, Conduent required the installation of a

specific type of camera pole: Type 1-A. Conduent's mischaracterization of these as "utility" poles doesn't make it so, nor does its repetitive use of that term throughout its brief. While a better argument can be made that, as a general matter, utility poles might benefit the realty because of their potentially varied use, a *camera* pole does not benefit the realty. It benefits the business that is profiting from the use of the camera.

Conduent's mischaracterization of the poles as "utility poles" is significant because one of the elements of a business fixture is that it primarily benefits the business and not the realty. Conduent's argument that the poles benefit the realty might be better supported if the evidence showed – which it does not – that the poles have multiple uses because then they are more likely to be considered as benefiting the realty as opposed to a particular business conducted on the Premises.

Finally, Conduent cites *Funtime, Inc. v. Wilkins*, 2003-Ohio-6890, Conduent's Brief, at 9, in support of its position that the poles were fixtures. In *Funtime*, the Court stated that items are fixtures if "they would be beneficial, if not necessary, to the use of the land . . . regardless of the nature of the business which might be located on such land." *Funtime* at ¶ 37. In affirming this Board's decision that the items in question were not fixtures, the Court focused on the factual record and found no evidentiary support for the claimant's assertion that the items were fixtures.

> The *evidence* presented to the BTA showed that the rides in question were installed to attract customers to the amusement park business . . . *There was no evidence* that the rides would be of any benefit to a buyer of the land who engaged in a different business. (Emphasis added).

Funtime at ¶ 41. The Court made clear in *Funtime* that standing alone merely because the disputed item is affixed to the land is not by itself a sufficient basis on which to find that it is a fixture within the meaning of R.C. 5701.02(B).

Because there is no evidentiary support for Conduent's assertion that the poles "can be

used in a variety of ways" and, therefore, purportedly benefit the realty, and because, as discussed in greater detail below, we do not find that the poles primarily benefited the realty, we find that Conduent's arguments based on *Palace Hotels*, 2018 Ohio Tax LEXIS 474, and *Funtime* are misplaced.

The Poles Were Not Resold to a Political Subdivision

Conduent asserts that "[t]here is no dispute that the utility poles were transferred to and incorporated into real property owned by the City," and that, accordingly, they are not subject to the tax as a construction contract. Conduent's Brief, at 5. Contrary to that assertion, it is clear that the poles were *not* transferred to the City. Indeed, the License Agreement states explicitly that "[a]ll equipment provided by CONTRACTOR (sic) will remain the property of CONTRACTOR unless fully purchased by CITY as provided by this Agreement in Exhibit 1." S.T. 979 – 980. Exhibit 1 was not provided in the record by Conduent, and there is no evidence of such a transfer. Further evidencing that the poles were not transferred to the City, Section 10.B of the Main Agreement states that under the circumstances specified therein relating to revenue shortfall, Conduent "upon two weeks' written notice to the City of its intent to do so, shall at its own expense have the right to remove and retain as its own property the cameras and equipment installed pursuant to the terms of this Agreement." S.T. 945. Thus, contrary to Conduent's assertion, the poles were not transferred to the City and, accordingly, that the "construction contract" provision of the Revised Code cited above is inapplicable.

In an attempt to bolster its argument that the poles were transferred to the City, Conduent cites *Karvo Paving Co. v. Testa*, 2019-Ohio-3974 (9th Dist.) ("*Karvo*"). We find *Karvo* to be inapplicable to our case. In *Karvo*, the taxpayer was a road construction company that did work for the Ohio Department of Transportation (ODOT) and was required to install traffic maintenance equipment during construction, including concrete barrier walls, temporary traffic lights, signs, and message boards. After the taxpayer was audited, the Commissioner assessed a use tax on the

traffic maintenance equipment that the taxpayer provided while performing ODOT contracts. The taxpayer petitioned for a reassessment, which the Commissioner denied. Thereafter, the taxpayer appealed to this Board, which determined that the taxpayer "did not have to pay use tax on the traffic maintenance equipment it installed while performing ODOT contracts because it was effectively leasing the equipment to ODOT during the construction projects." *Karvo* at ¶¶ 2 – 4.

We find that *Karvo* does not apply to our facts. In particular, the Court's decision in *Karvo* was fact-specific, and in upholding this Board's decision, the Court stated that "The Board found that under *the specific facts of this case*, (Emphasis added.) ODOT obtained possession of the traffic maintenance equipment." *Karvo* at ¶ 21. Further, it stated that this Board's determination "is limited to the particular facts of this case." *Id*. There were facts in *Karvo* that distinguish it from the instant case. For example, unlike here, in *Karvo*, once the taxpayer delivered the equipment to the work site and installed it, the taxpayer did not interact with the equipment until the project was complete. *Karvo* at ¶ 14. Further, in *Karvo*, we found that the equipment was "effectively leased" to ODOT under the specific facts of that case. As discussed in greater detail below, that is not the case here, where the evidence shows Conduent's continuing obligation to maintain and interact with the poles and related equipment during the term of the program.

Conduent is not Entitled to a Refund of Tax Paid Related to Workplace Solutions

We agree with the Commissioner that Conduent has failed to substantiate its claim that it erroneously paid tax on the furniture. Conduent's brief relies on five pages in the statutory transcript. Conduent Br. at 20 (citing S.T. at 192-196). Those documents do not establish if the furniture was incorporated into real property. The invoices suggest the furniture will be "installed" and "rebuil[t]" but do not suggest that they are incorporated into real property. Further, they do not establish that the items were resold to ODJFS. Indeed, Conduent's brief states, within citation to the record, that the "furniture was installed at the location designated for performing the services contracted for by ODJFS . . . ." So, it appears that the furniture was used by Conduent or other

contractors, not resold ODJFS. We, therefore, find that Conduent failed to carry its burden on this claim.

Conduent is not Entitled to a Refund of Tax Paid on the Purchase of Equipment and Software

Conduent argues that it is entitled to a refund of tax paid on software and equipment from Pitney Bowes used in producing printed matter for sale. Conduent acknowledges that prewritten computer software is generally taxable as tangible personal property. It claims that, in this case, it is not taxable because it is consumed in the production and preparation of printed material, falling into the exemption in R.C. 5739.02(B)(42)(f). As we consider the true object of these purchases, we agree with the Commissioner that the true object of the ODJFS contract was the administration of the child support system and not simply the printing of checks. Conduent did not present sufficient evidence to support the contrary. Thus, we agree that the transactions were taxable.

Conduent is not Entitled to a Refund of Tax Paid on Miscellaneous Purchases

Conduent contends that it is owed a refund for tax paid on purchases for other miscellaneous items. These items include using an electronic benefit transfer system, point-of-sale identification systems, related equipment from Mustang Systems, and an interactive voice response system. Conduent maintains that for each of these purchases, the product or service was transferred to the government entity that contracts with Conduent in the same form in which it was purchased. Again, we agree with the Commissioner that Conduent failed to provide evidence that the tax was erroneously paid. Because Conduent's claims are unsupported by evidence, we find it failed to carry its burden on this claim.

Conduent is not Entitled to Penalty Remission

The Supreme Court has held that "[b]y stating that a penalty 'may be added,' the statute confers discretionary authority on the tax commissioner to impose a penalty in conjunction with an assessment." *J.M. Smucker, L.L.C. v. Levin*, 2007-Ohio-2073, ¶ 14-15. Because the decision to

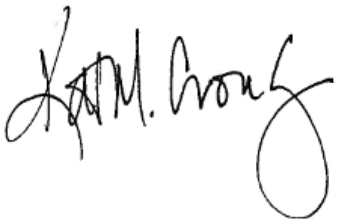
impose a penalty is within the Commissioner's discretion, we may reverse the imposition of a penalty only if we find an abuse of discretion. *Karr v. McClain*, 2022-Ohio-449, ¶ 7-8. An abuse of discretion in the tax-penalty context is an act showing an "arbitrary or unconscionable attitude" on the part of the Commissioner. *Renacci v. Testa*, 2016-Ohio-3394, ¶ 32. Upon review of the record, we conclude there is no evidence that the Commissioner abused her discretion by refusing to abate the penalty.

CONCLUSION

For these reasons, we affirm the Commissioner's final determination.

BOARD OF TAX APPEALS		
RESULT OF VOTE	YES	NO
Ms. Clements		
Ms. Allison		
Mr. Seitz		

I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.



Kathleen M. Crowley, Board Secretary