

Newcome Corporation, dba)	CASE NO. 97-M-320
Newcome Electronic Systems,)	
)	(SALES AND USE TAX)
Appellant,)	
)	DECISION AND ORDER
vs.)	
)	
Roger W. Tracy, Tax)	
Commissioner of Ohio,)	
)	
Appellee.)	

APPEARANCES:

For the Appellant	-	James J. Chester Roderick H. Willcox Chester, Willcox and Saxbe 17 South High Street Suite 900 Columbus, Ohio 43215
For the Appellee	-	Betty D. Montgomery Attorney General of Ohio By: Phyllis J. Shambaugh Assistant Attorney General State Office Tower-16th Floor 30 East Broad Street Columbus, Ohio 43266-0410

Entered December 11, 1998

Mr. Johnson, Ms. Jackson and Mr. Manoranjan concur.

This cause and matter comes to be considered by the Board of Tax Appeals upon a Notice of Appeal filed herein on March 28, 1997. Appellant appeals from a final determination of the Tax Commissioner, appellee herein, wherein that official affirmed an assessment (after conditionally modifying penalties imposed) resulting from an audit of appellant's sales and purchases for the period of July 1, 1991 through March 31, 1995.

The matter is considered by the Board of Tax Appeals upon the Notice of Appeal, the Statutory Transcript certified to

this Board by the Commissioner, the record of the evidentiary hearing, and the argument by counsel. At hearing, Newcome presented the testimony of Mr. Michael D. Stemen, vice-president of Newcome, who testified regarding the installation of computer cabling. Newcome also presented the testimony of Brian Coughlin, the vice president and operations manager of Calvert Wire and Cable Corporation, Newcome's cable supplier. Mr. Coughlin discussed the general industry of data communications contractors, the state of the industry, and the ability to utilize an existing cabling system.

The Tax Commissioner presented the testimony of Mr. David Boeder, a 27 year employee of the Department of Taxation, currently Assistant Administrator for Audit Activities. Mr. Boeder testified generally as to department policy regarding the installation of computer cabling.

The following is evident from the record. Appellant, Newcome Corp., dba Newcome Electronic Systems, ("Newcome") is engaged in the business of designing and installing network cabling and electronics for computer systems. At issue in this appeal is the taxability of cabling which interconnects computers and peripheral equipment to form what is commonly known as a "network." Newcome installs cabling which transmits various types of electromagnetic signals in a variety of environments, such as business offices, manufacturing locations, and educational institutions.

Newcome's installation of computer cabling, whether in new or existing construction, is specific to the customer's needs. The main determinant appears to be the speed by which the cable allows transmission. Other variables, such as the use of the computer network, the type of data or objects to be transmitted, and the type of programs intended to be run across the network, may affect the type of cable to be installed. Testimony at hearing disclosed that an "industry standard" cable installation exists. However, the rapid change in computer equipment, the needs of the network, and placement of cable in certain areas within a business operation, causes each installation to be unique.

As is obvious to even the most casual observer, computer equipment is evolving at a rapid pace. Processing speeds have increased virtually exponentially within a short period of time. As the speed by which processing increases, so does the need for cabling which allows for faster data transmission. A particular type of cable's useful life is dependent upon its ability to communicate with the computers and other components currently running on the network, as well as its ability to transmit data at the speed necessary to satisfy the network's users.

While the use of computer networks is increasing, existing cabling is rarely used when systems are upgraded or newly installed. Because of the different manufacturers of computer hardware and peripherals, myriad of programming configurations, and rapid change in the industry, it is not likely that the in-place

cabling will be compatible with an existing network being moved or sophisticated enough for a new installation. When new networks are deployed, or in the case of the transfer of an existing network, new cabling is installed and the existing cable is either removed or abandoned in place.

The installation process was not discussed in detail at hearing. However, an earlier case before this Board where cabling was at issue described the installation of voice and data communication wiring as follows:

"The contractors installed the wiring through the ceiling and clamped the wire to the ceiling supports by brackets in buildings that contained air return ceilings. *** The wire was directed to a point where the wall met the ceiling and then was threaded through conduit bolted to wall studs. *** The contractors cut the wire to specific lengths and terminated the wire in jacks mounted in the wall. *** The wire is terminated at the opposite end at wall units referred to as main distribution frames. *** The main distribution frames were attached to the wall by bolts. ***

"The wire installation was slightly different in cell system buildings. In these buildings the wire was installed through trays cut or formed in concrete floors. *** The wire is cut to length and terminated at jacks affixed to the floor. *** In cell system buildings the wire is also terminated at the opposite end at wall mounted main distribution frames. *** ." (Record citations omitted) Community Mutual Insurance Company v. Tracy (Mar. 4, 1994), B.T.A. No. 91-J-418, unreported.

Appellant's reply brief includes a similar description:

"Most of Newcome's network computer cabling that it installs for a customer is actually

just above a 'drop' ceiling." (Appellant's Reply Brief, p. 2)

Testimony at hearing also described cabling as "generally run to specific points where computers will be located within the building, and they will be collected in a central point, or several central points within that building at what we'll define as a wiring closet." (H.R. p. 17)

It was Newcome's general practice to charge sales tax upon both the material and installation costs of a cabling system to all customers who did not present exemption certificates or direct pay permits. Upon audit, the Commissioner's agent concluded that Newcome was not the seller of tangible personal property, but instead a construction contractor, incorporating tangible personal property into real property, and, as such, the consumer of such property, liable for an excise tax upon the purchase of the property eventually installed. The agent then identified those jobs for which no tax was charged upon installation, such as jobs where the purchaser provided a direct pay permit or an exemption certificate¹ (S.T. p. 20), calculated the costs of the personal property used on those jobs, and assessed tax accordingly. That conclusion was affirmed by the Commissioner upon review. Newcome challenges the Commissioner's finding that it should have paid an

¹While Newcome did not pay an excise tax on any of its purchases of tangible personal property used in the cabling installations, apparently the Commissioner's agent did not assess the purchases of material when sales tax was charged on the installation, collected and remitted to the state. Newcome was informed that if a refund claim was filed on such sales, the eventual refund would be reduced by the tax due on material costs. (S.T. p. 4)

excise tax upon the purchase of cabling material eventually installed by the company.

R.C. 5739.01 provides:

"(B) 'Sale' and 'selling' include all of the following transactions for a consideration ***:

"(1) All transactions by which title or possession, or both, of tangible personal property, is or is to be transferred ***;

"(5) *** Except as provided in section 5739.03 of the Revised Code, 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 property. The construction contractor is the consumer of such tangible personal property ***."

Excluded from the definition of "sale" are the purchases of those items of tangible personal property incorporated into real property pursuant to a construction contract. Instead, R.C. 5739.01(B)(5) identifies the construction contractor as the consumer of such tangible personal property for purposes of the collection of sales (and, correspondingly, use tax²) when items are or are to be incorporated into real property.

The above quoted statute succinctly captures the positions of both parties. Newcome relies upon R.C. 5739.01(B)(1),

²R.C. 5741.02(B)(2) imposes tax upon the acquisition of sales and services only if such acquisition would be considered a taxable "sale" under R.C. 5739.01 through R.C. 5739.31. Therefore, our discussion will consider the sales tax statutes.

which includes within the definition of sale, all transfers of personal property. Newcome asserts that the cabling is personal property, for which the vendor is required to collect sales tax when sold. See R.C. 5739.02, 5739.03.

The Commissioner, on the other hand, relies upon R.C. 5739.01(B)(5). The Commissioner asserts that Newcome is not the seller of personal property, but a construction contractor, incorporating personal property into real property, and, as such, the consumer of the personalty so incorporated. Under the Commissioner's position, Newcome erred when it charged sales tax to its customers on the installation of cabling; instead Newcome should have paid sales or use tax upon its purchases.

The resolution of this appeal depends upon the application of the terms "real property" and "personal property" to sales and/or use tax statutes. If after installation the cabling is found to be personalty, then Newcome was correct when it charged its customers sales tax. However, if the cabling is found to be personalty incorporated into real property, then the Commissioner is correct and Newcome should pay a sales or use tax upon its purchases.

The classification of "real property" and "personal property" have been the subject of legislative action during the audit period. During that part of the audit period prior to July 20, 1992, R.C. 5701.02 defined real property, in pertinent part, as follows:

"As used in Title LVII [57] of the Revised Code, 'real property' and 'land' include land

itself *** and, unless otherwise specified, all buildings, structures, improvements, and fixtures of whatever kind on the land, and all rights and privileges belonging or appertaining thereto."

R.C. 5701.03 defined "personal property," in pertinent part, as follows:

"As used in Title LVII [57] of the Revised Code, 'personal property' includes every tangible thing which is the subject of ownership *** and not forming part of a parcel of real property, as defined in section 5701.02 of the Revised Code ***."

The seminal case distinguishing between real property and personal property was Teaff v. Hewitt (1853), 1 Ohio St. 511. That case dealt with the effect of foreclosure proceedings upon certain property used in a manufacturing facility. The mortgagee argued that the manufacturing equipment was properly considered a part of the land, to the exclusion of separate lienholders who held liens upon the equipment alone. The Court set forth the method to determine whether certain property remained personalty even if attached to land and held that the test applied to personal property used in a trade or business. The Court held that fixtures must meet the following criteria: Annexation to realty, appropriation to the use or purpose of the realty, and intention by the party making annexation to make the item a permanent accession to the freehold. It was the third element which the Court believed caused manufacturing equipment to retain its character as personalty. The Court held that in the area of business or trade fixtures, prior case law and common custom reflected an intention

by business owners to remove business equipment. Therefore, the Court held, there was a presumption that trade or business equipment was not intended to be annexed to the real property.

In 1931, Article XII, Section 2 of the Ohio Constitution was amended to remove the uniformity requirement applicable to the taxation of personal property. Continental Can Co. v. Donahue, Tax Commr. (1966), 5 Ohio St.2d 224. Because real and personal property had previously been taxed at uniform rates, the classification of personal property as personalty or realty had little effect. After the constitutional change, however, the General Assembly adopted a classified property tax law, assessing manufacturing equipment at a rate different from that of real property. Section 5386 and 5388 General Code, now R.C. 5711.16 and R.C. 5711.22. Thus, the distinction between real property and business property became important to business owners who argued that auditors were overvaluing their real property by including within such valuations items now properly taxed as personal property.

The Court, in Zangerle v. Standard Oil Co. (1945), 144 Ohio St. 506, Standard Oil Co. v. Zangerle (1945), 144 Ohio St. 523, and Zangerle v. Republic Steel Corp. (1945), 144 Ohio St. 529, agreed. Relying upon Teaff v. Hewitt, the Court concluded that business property retained its character as such even if affixed to land, if such property benefitted the business carried on to a greater degree than the land upon which the business was situated.

The Court also, in Zangerle v. Republic Steel Corp., id., relied upon the definition of real property as provided by G.C. 5322, the precursor to R.C. 5701.02. That section included within the definition of real property "not only land itself but also unless otherwise specified all buildings, structures, improvements, and fixtures of whatever kind thereon[.]" 144 Ohio St. at 538, emphasis in original. The Court held that when business machinery was included in the newly enacted personal property listing statute, G.C. 5388 (now R.C. 5711.22), the General Assembly "otherwise specified" the equipment. By being "otherwise specified," the business equipment escaped classification as real property.

The Court again considered the classification of personal property in Reed v. Bd. of Revision (1949), 152 Ohio St. 207. Here, the owners of cottages located on state-owned canal lands at Buckeye Lake sought to have their cottages classified as personal property. The Court again relied upon its "otherwise specified" holding of Zangerle. The Court concluded that the cottages were not "otherwise specified" from classification as "real property" by any other statutory provision. Therefore, the Court reasoned, the cottages were properly classified and taxed as realty.

As to the argument that the cottages were, in actuality, personalty, the Court explicitly recognized that the General Assembly was constitutionally permitted to include items of personal property within the definition of real property for

purposes of classification for taxation. Paragraph 3 of the syllabus provided:

"Even if a structure or building located on land is personal property, such structure or building will, for purposes of taxation, be included within the definition of 'real property' as that term is defined in Section 5322, General Code, unless the General Assembly has otherwise specified."

This explicit recognition that personal property may be lawfully classified as realty despite the fact that it had not lost its character as personalty set the stage for later tax cases.

With the law concerning the classification of real versus personal property for purposes of real property taxation well settled, see Bobb Bros. v. Bd. of Revision (1976), 45 Ohio St.2d 81, the Court's focus was directed to the levy of sales and use taxes. In Pittsburgh-Des Moines Steel Co. v. Lindley (1982), 1 Ohio St.3d 15, the Tax Commissioner had assessed an out-of-state corporation in the business of constructing steel storage tanks. The corporation had constructed seven such tanks for businesses in Ohio. The Board of Tax Appeals overturned the resulting use tax assessment on the costs of the materials used to construct the tanks, concluding that the constructed tanks were not tangible personal property, but real property. The Court, after reviewing the case law relating to the distinction between personalty and realty for ad valorem tax purposes, affirmed:

"The commissioner asserts the board erred in concluding that the completed tanks constitute 'structures' on and becoming a part of real property and suggests we reevaluate

the decision of the board in light of our previous decisions in Zangerle v. Standard Oil Co. (1945), 144 Ohio St. 506 *** , and Standard Oil Co. v. Zangerle (1945), 144 Ohio St. 523 *** . Conversely, appellee urges that our decision in Bobb Bros. v. Bd. of Revision (1976), 45 Ohio St.2d 81 *** , is dispositive of the issue raised in this appeal.

"After an examination and review of the record in this cause, this court agrees with appellee that Bobb Bros., supra, governs the issue raised. Therein, we reviewed a decision of the board concluding that concrete and metal grain storage silos should be classified as real property for purposes of taxation. We stated, at pages 81-82:

"The property in question is personalty, as defined by this court in Zangerle v. Standard Oil Co. (1945), 144 Ohio St. 506 *** ; Standard Oil Co. v. Zangerle (1945), 144 Ohio St. 523 *** ; and Zangerle v. Republic Steel (1945), 144 Ohio St. 529 *** . That property, however, may be treated as realty for purposes of taxation. Reed v. Bd. of Revision (1949), 152 Ohio St. 207 *** ; Shutter Bug v. Kosydar (1974), 40 Ohio St. 2d 99 *** . In Shutter Bug, we held:

"Even if a structure or building located on land is personal property, such structure or building will, for purposes of taxation, be included within the definition of 'real property' as that term is defined in R.C. 5701.01, unless the General Assembly has otherwise specified." (Parallel citations omitted)

The Court's holding in Shutter Bug, originally relating to the distinction between real and personal property for purposes of ad valorem taxation, now became the focus of its review for all appeals relating to excise tax. In Rotek, Inc. v. Limbach (1990), 50 Ohio St.3d 81, the Court remanded an appeal from a manufacturer who had contracted for the expansion of its manufacturing

facilities. The Board had considered the individual items assessed upon a standard of whether such property was devoted to the land or the business thereon (the Teaff and Zangerle standard). The Court rejected that standard, instead holding that the appropriate standard for review was "whether the property in question was incorporated into a structure, thus becoming real property." 50 Ohio St.3d at 83.

In Thomas Steel Strip Corp. v. Limbach (1991), 61 Ohio St.3d 340, an appeal like Rotek in which the Commissioner had assessed certain improvements to a manufacturing plant, such as foundations and floor plates to hold manufacturing equipment, the Court was even more emphatic:

"R.C. 5701.02 states:

'As used in Title LVII of the Revised Code, "real property" and "land" include land itself *** and, unless otherwise specified, all buildings, structures, improvements, and fixtures of whatever kind on the land, and all rights and privileges belonging or appertaining thereto.'

"We have recently and consistently interpreted this definition of real property and land to mean that any property attached to land is real property for tax purposes, unless otherwise specified. Green Circle Growers, Inc. v. Lorain Cty. Bd. of Revision (1988), 35 Ohio St.3d 38 *** . We have drawn away from earlier ruling that asked whether the improvement primarily benefited the land or the business on the land. For example, in Rotek, Inc. v. Limbach (1990), 50 Ohio St.3d 81 *** , we reversed a BTA decision concerning very similar items, because the BTA based its decision on whether the property was primarily devoted to the business conducted on the land. We conclude that R.C. 5701.02 does not require

the fact-finder to make this distinction."
(Emphasis added, parallel citations omitted)

After Thomas Steel Strip, the test for whether an item was personalty or realty, at least for purposes of sales and use taxation, was one of attachment -- if items of personalty were attached to land itself, or a building or structure upon land, then the item was realty. The three-prong test set forth in Teaff v. Hewitt, and its modification set forth in the Zangerle line of cases -- that trade or business equipment attached to land should be taxed depending upon the benefit to the business or to the land -- clearly had no legal significance. Subsequent case law recognizes this position. If the party assessed was the entity owning or leasing the real property, then an assessment of sales and use tax was not proper. Kings Entertainment Co. v. Limbach (1992), 63 Ohio St.3d 369; Universal Oil Co. v. Limbach (1992), 63 Ohio St.3d 476; Buehler Food Markets, Inc. v. Tracy (July 11, 1997), B.T.A. No. 96-T-643, unreported.

If the party to be assessed was the entity completing the construction project as the construction contractor, then assessment of sales or use tax upon the costs of the purchased items used in the project was proper. Guardian Technology v. Tracy (Sept. 30, 1994), B.T.A. No. 91-N-1765, unreported; VanDemark v. Tracy (May 19, 1995), B.T.A. No. 94-M-506, unreported.

Under the applicable statutes and case law, we consider the assessments on the purchases of cabling made during the period prior to the legislative changes in R.C. 5701.02 and R.C. 5701.03 (eff. July 20, 1992). A review of earlier appeals before this

Board indicates that similar property has been classified as personalty incorporated into realty. Community Mutual Insurance Co. v. Tracy (Mar. 4, 1994), B.T.A. No. 91-J-418, unreported, affirmed in part and reversed in part on other grounds (1995) 73 Ohio St.3d 371; see, also Data Processing Sciences Corp. v. Kosydar (Oct. 9, 1974), B.T.A. No. C-107, unreported wherein this Board held that the installation of cable outlets were properly classified as tangible personal property incorporated into real property pursuant to a construction contract. Finding no factual distinction between the cabling as described in the present appeal and the cabling as described in Community Mutual Insurance Co., this Board concludes that our earlier holdings require a finding that the cabling purchases considered in this appeal are of tangible personal property which upon installation became a part of realty. Therefore, such purchases should be taxed as such. See Mercury Machine Co. v. Limbach (1994), 94 Ohio App.3d 116. Thus, the Commissioner was correct when he concluded that the personal property installed by Newcome was used in completing a construction project incorporating personalty into realty

³Newcome directs this Board's attention to a number of personal property classification appeals wherein this Board, relying upon the Teaff and Zangerle line of cases, concluded that certain property was, for ad valorem tax purposes, properly classified as personalty rather than realty. Chillicothe Cablevision, Inc. v. Limbach (June 5, 1987), Ross Cty. App. No. 1341, unreported; Blade Communications, Inc. v. Limbach (Mar. 20, 1992), B.T.A. No. 87-E-1405, unreported; Court Cablevision, Inc. v. Limbach (July 28, 1989), B.T.A. No. 86-G-57, unreported; Communication Properties Inc. v. Lindley (Aug. 15, 1978), B.T.A. No. 77-C-60, unreported. As we indicated in Blade Communications, while having no application to excise tax appeals prior to 1992, this Board believed that the Teaff and Zangerle line of cases remained viable

Having concluded that Newcome was properly assessed under the prior statute, we must now consider the effect of the legislative changes to R.C. 5701.02 and R.C. 5701.03. Effective July 20, 1992, the General Assembly modified the definitions of "real property" and "personal property" contained in those statutes. R.C. 5701.02 as amended provides, in pertinent part:

"As used in Title LVII (57) of the Revised Code:

"(A) 'Real property,' 'realty,' and 'land' include land itself, *** all growing crops, ***, plants and shrubs, with all things contained therein, and, unless otherwise specified in 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."

The statute as amended provides a statutory definition for the term "fixture":

"(C) 'Fixture' means 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. 5701.03 as amended defines "personal property" and adds a statutory definition of "business fixture":

"As used in Title LVII (57) of the Revised Code:

precedent for ad valorem tax classification purposes during that period.

"(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. ***

"(B) 'Business fixture' means 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. 'Business fixture' includes, but is not limited to, machinery, equipment, signs, storage bins and tanks, whether above or below ground, and 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 improvements, including, but not limited to, foundations and supports for machinery and equipment. 'Business fixture' does not include fixtures common to buildings, including, but not limited to, heating, ventilation, and air conditioning systems primarily used to control the environment for people or animals, tanks, towers, and lines for potable water or water for fire control, electrical and communication lines, and other fixtures that primarily benefit the realty and not the business conducted by the occupant on the premises."

Thus, after July 20, 1992, a different standard exists when considering the classification of fixtures as real or personal property. Now, inquiry must be made into whether a fixture primarily benefits the realty or the business conducted by any occupant on the premises.

At this point, Newcome urges this Board to review the early case law and conclude that the cabling it installs meets the definition of a business fixture. However, because the General

Assembly has provided a definition for the term "business fixture," we find that the statutory definition controls the ultimate finding in this appeal. State ex rel. Meyers v. Baldwin (1953), 94 Ohio App. 381.

The parties differ on the effect of the specific statutory definition of business fixture set forth in R.C. 5701.03(B). Newcome relies upon that portion of the statute which affirmatively describes 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." Newcome suggests that the definition of "business fixture" codifies the Teaff v. Hewitt line of cases, supra, which require inquiry into both the attachment of the item and the intention of the annexer.

The Commissioner, on the other hand, emphasizes a parenthetical phrase within the statute which describes an exclusion to the definition of a "business fixture." After excluding from the definition of a "business fixture" those items which are "common to buildings," R.C. 5739.03(B) lists certain generic building components. The listing identifies such components as heating systems and also includes the term "communication lines." The Commissioner maintains that by including "communication lines" in the list of items which are "common to buildings," the General Assembly has preempted any claim

that cabling which allows components on a data network to operate in concert is a "business fixture."

We find the Commissioner's focus too narrow. Our reading of R.C. 5701.03(B) leads us to the conclusion that the General Assembly intended to include within the classification of personal property considered fixtures certain business fixtures which would have otherwise been classified as real property under the line of cases beginning with Reed, and including Rotek and Thomas Strip Steel, supra. It is our conclusion that fixtures which are properly included within the ambit of real property are limited to those which are common to and primarily benefit a building. While the General Assembly has provided a list of fixtures generally considered "common to buildings," the fact that communication lines are included does not limit our inquiry to only whether a computer cable is a communication line. Telephone lines and certain coaxial cables clearly fall within the definition of personalty "common to buildings." However, the overwhelming evidence before this Board persuades us that computer cabling installed by Newcome is designed to meet the technical requirements of the individual business consumer. Such computer cabling would not be found in every building, nor would it be available to or even usable by other building occupants. It is the conclusion of the Board that the computer network cabling under consideration is within the statutory definition of business fixture and is not "common to buildings," which would require its classification as real property.

The proper focus of the Commissioner's inquiry should have been on whether the particular fixture primarily benefits the business occupant. We therefore conclude that the Commissioner erred when he held that the network computer cabling in question is "common to buildings" because it meets the definition of a communication line. The parenthetical listing provided by the General Assembly which describe components "common to buildings" is merely illustrative and is not intended to preclude the proper classification of what is otherwise a business fixture.

Therefore, we must find that the Commissioner erred when he concluded that, after July 20, 1992, the network computer cabling, once installed, should be classified as real property. This Board finds that, based upon the definition set forth in R.C. 5701.03(B), the network computer cabling retained its character as a business fixture and should be classified as personal property. Therefore, the sale and installation of the network computer cabling constitutes a sale of tangible personal property by a vendor and shall be taxed to the consumer as such, pursuant to the provisions of R.C. 5739.02.

Based upon the record, the applicable statutes and the case law, the Board of Tax Appeals finds and determines that the final determination of the Commissioner is correct for those periods prior to the amendment of R.C. 5701.03, effective July 20, 1992, and in error for those periods thereafter.

Therefore, it is ordered that the final determination is affirmed in part and reversed in part, consistent with this Decision and Order.