

OHIO BOARD OF TAX APPEALS

NATIONWIDE MUTUAL
INSURANCE COMPANY, (et. al.),

Appellant(s),

vs.

JEFFREY A. MCCLAIN, TAX
COMMISSIONER OF OHIO, (et.
al.),

Appellee(s).

CASE NO(S). 2018-313, 2018-315,
2018-316, 2018-317, 2018-318

(SALES TAX)

DECISION AND ORDER

APPEARANCES:

For the Appellant(s)

- NATIONWIDE MUTUAL INSURANCE COMPANY
Represented by:
ADAM L. GARN
ZAINO HALL & FARRIN LLC
41 SOUTH HIGH STREET, SUITE 3600
COLUMBUS, OH 43215

For the Appellee(s)

- JEFFREY A. MCCLAIN, TAX COMMISSIONER OF OHIO
Represented by:
CHRISTINE T. MESIROW
ASSISTANT ATTORNEY GENERAL
OFFICE OF OHIO ATTORNEY GENERAL
30 EAST BROAD STREET, 25TH FLOOR
COLUMBUS, OH 43215

Entered Tuesday, October 22, 2019

Mr. Harbarger, Ms. Clements, and Mr. Caswell concur.

The appellant taxpayer, Nationwide Mutual Insurance Company (“Nationwide”), appeals several final determinations of the Tax Commissioner, in which he denied Nationwide’s application for refund of sales tax. This matter is now considered upon the notices of appeal, the transcripts certified by the Tax Commissioner, joint stipulations of fact, and the parties’ written argument.

At issue in the present appeal is whether Nationwide illegally or erroneously paid sales tax on the installation of communication cabling for Voice over Internet Protocol (“VoIP”) and internet. During a rehabilitation of its headquarters in Columbus, Nationwide engaged

contractors to install the communication lines, which are standard CAT-5 or CAT-6 cabling and 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 applied for a refund of the sales tax paid during the period from July 1, 2010 through December 31, 2012 related to the communication cabling and its installation, claiming that the installation constituted improvements to real property. After the commissioner denied its refund claim, Nationwide requested a hearing and presented additional evidence. The commissioner then issued final determinations affirming the denial of the claimed refund, indicating that the cabling constitutes a business fixture, citing to this board's decision in *Newcome Corp. v. Tracy* (Dec. 11, 1998), BTA No. 97-M-320, unreported.

Nationwide appealed to this board asserting that because it is incorporated into the real property, the cabling and installation thereof is not a "retail sale," but rather a construction contract not subject to sales tax. As such, Nationwide contends, the commissioner erroneously denied its refund claim. The commissioner argues that Nationwide's refund claims "fall squarely within" this board's decision in *Newcome*, which found that the same kind of cabling at issue is a business fixture because it benefits the business conducted in the building and not the building itself.

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*, 152 Ohio St.3d 262, 2017-Ohio-8798, ¶14. The findings of the Tax Commissioner are presumptively valid. *Alcan Aluminum Corp. v. Limbach*, 42 Ohio St.3d 121 (1989). 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. *Federated Dept. Stores, Inc. v. Lindley*, 5 Ohio St.3d 213 (1983).

In general, excise taxes are imposed upon all retail sales made in Ohio (sales tax), in addition to any storage, use, or consumption in this state of any tangible personal property (use tax), unless the transaction is specifically exempted. R.C. 5739.02; 5741.02. When an item of tangible personal property is incorporated into real property pursuant to a construction contract, the contractor is considered the consumer of the personal property and is responsible for the payment of the sales (or use) tax. R.C. 5739.01(B)(5). Real property generally includes the land along with all buildings, structures, improvements, and fixtures on the land. R.C. 5701.02(A). Excluded from this definition, however, are "business fixtures," which are defined by R.C. 5701.03(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' does not include fixtures that are 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

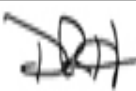


water for fire control, electrical and communication lines, and other fixtures that primarily benefit the realty and not the business conducted by the occupant on the premises.”

In *Newman*, this board concluded that communications cabling was a business fixture because it primarily benefited the business occupant and was not a communication line common to buildings. We commented that at that time (1998), “[a]s is obvious to even the most casual observer, computer equipment is evolving at a rapid pace.” *Id.* at 3. We also noted that despite the existence of “industry standard” cable installation, due to this rapid change in computer equipment and increasing use of computer networks, at that time existing cabling was rarely used when systems were upgraded or installed. Thus, we concluded that the cabling at issue was “designed to meet the technical requirements of the individual business consumer,” “would not be found in every building, nor would it be available to or even usable by other building occupants.” *Id.* at 19. As such, the board found that the cabling in that case was not common to buildings and fell within the definition of business fixture. Following this decision, the commissioner issued an Information Release to announce a change in the application of sales and use tax to the sale and installation of computer cabling based on the *Newcome* decision, indicating that it would now consider the sale and installation of such cabling to be a sale subject to the sales tax. Ohio Dept. of Taxation Information Release ST 1999-01 (Mar. 1999), “Sale and Installation of Computer Cabling.”

In this case, we find that the cabling at issue does not constitute a “business fixture” but rather is incorporated into the real property. 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. *** The communication lines were not designed to meet the requirements of the specific business Nationwide conducts in the buildings. They could be installed in any office building for VoIP and internet communications and are as common to commercial property as telephone lines and coaxial cables were in the past.” Thus, it is clear that the cabling at issue (and all industry standard communication cabling) is a communication line that is incorporated into real property, as opposed to a specialized network designed to meet technical requirements of an individual business consumer. As such, we agree with Nationwide that its installation constitutes a construction contract under R.C. 5739.01(B)(5) and not a retail sale subject to sales tax. Furthermore, the Information Release that applies *Newcome* to the sale and installation of all computer cabling is incorrect given the ubiquitous presence of industry-standard cabling in commercial buildings. This is not to say that a specialized network of computer cabling would never be considered a business fixture, but those are not the facts in this case.

Based upon the foregoing, we find that Nationwide has met its burden of proof to demonstrate that its refund claim regarding the sales tax paid for its purchase of communications cabling and installation thereof was improperly denied. Accordingly, we reverse the commissioner’s final determinations.

BOARD OF TAX APPEALS		
RESULT OF VOTE	YES	NO
Mr. Harbarger		
Ms. Clements		
Mr. Caswell		

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