

OHIO BOARD OF TAX APPEALS

Funtime, Inc.,)
)
 Appellant,) CASE NO. 2001-A-342
)
 vs.) (USE TAX)
)
 Thomas M. Zaino, Tax Commissioner)
 Of Ohio,) DECISION AND ORDER
)
) Affirmed on Appeal Dec. 22, 2004 Ohio Supreme Court
)
 Appellee. Ohio St.3d , 2004-Ohio-6890

APPEARANCES:

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Entered: March 7, 2003

Mr. Johnson, and Ms. Jackson, concur; Ms .Margulies dissents.

This cause and matter came on to be considered by the Board of Tax Appeals upon a notice of appeal filed by the appellant, Funtime, Inc., from a final determination of the Tax Commissioner. The Tax Commissioner allowed in part and denied in part appellant's objections to the use tax assessment against it relating to its purchases for the period from January 1, 1995 through December 31, 1997.

The matter was submitted upon the notice of appeal, the statutory transcript certified by the Tax Commissioner, the hearing record, and the briefs of counsel.

In reviewing appellant's appeal, we recognize the presumption that the findings of the Tax Commissioner are valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121. It is therefore incumbent upon a taxpayer challenging a finding of the Tax Commissioner to rebut the presumption and establish a right to the relief requested. *Belgrade Gardens v. Kosydar* (1974), 38 Ohio St.2d 135; *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St.2d 138. Moreover, the taxpayer is assigned the burden of showing in what manner and to what extent the Tax Commissioner's determination is in error. *Kern v. Tracy* (1995), 72 Ohio St.3d 347; *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213. Where competent and probative evidence is not presented by the appellant to show that the Tax Commissioner's findings are incorrect, then the Board of Tax Appeals must affirm the Tax Commissioner's findings. *Kern v. Tracy*, supra; *Kroger Co. v. Limbach* (1990), 53 Ohio St.3d 245; *Alcan Aluminum Corp. v. Limbach*; *Alcan*, supra.

Initially, we note appellant's contentions, as set forth in the notice of appeal:

1. The Tax Commissioner erroneously assessed tax on costs associated with the Company's Grizzly Run, Hook's Lagoon, Mind Eraser and Skyscraper since such property was constructed under construction contracts pertaining to real property and thereby exempt from tax under R.C. 5739.01(B)(5).

2. The Tax Commissioner erroneously assessed tax on costs pertaining to the design and development of the Company's Mind Eraser and Hook's Lagoon. These transactions involve the provision of professional/personal services exempt from tax under R.C. 5739.01(B)(5).

3. The Tax Commissioner erroneously assessed tax on the costs pertaining to the inspection and maintenance of the Company's Skyscraper since such property constitutes real property.

4. It imposes tax on costs associated with the Company's Grizzly Run, Hook's Lagoon, Mind Eraser, and Skyscraper which are not subject to tax pursuant to R.C. 5739.01(E) and 5739.02(B).

5. It is not based on evidence and is contrary to law.

During the audit period in question, appellant, ("Funtime"), operated an "amusement park with approximately sixty rides and attractions, refreshment stands, gift shops, picnic grounds, and a water recreation complex" formerly known as "Geauga Lake." (S.T., p. 1) In its presentation to this board and its brief, Funtime essentially argues three propositions of law, specifically: 1) "Grizzly Run is real property, and the purchases from Hi Tech Pools and Strait Bilt therefore are not subject to tax." 2) "The Mind Eraser is a structure. Consequently, the purchases from Industrial First are not subject to tax." 3) "An elevator is an integral part of a building, and therefore contracts to maintain it are not subject to tax." (Appellant's Brief, p. i) Based upon the foregoing description of the issues, the board will address each proposition separately.

GRIZZLY RUN

In 1996, Funtime added an amusement ride to its park called Grizzly Run. “Grizzly Run simulates a white water raft experience that you might experience if you were to go to the Grand Canyon or a gorge, anything in West Virginia, in this area. It simulates the experience of traveling down a river and having water splashed on you and going through canyons and just * * * seeing different parts of an experience.” (R., p. 22) In completing work on the Grizzly Run attraction, Funtime employed both Hi Tech Pools (“Hi Tech”) and Strait Bilt. Hi Tech was “primarily responsible for the construction of all of the concrete work that went into the Grizzly Run attraction.” (R., p. 25) Hi Tech built the walls and floor of the attraction, i.e., the structure through which the boat travels. Strait Bilt “was a contractor brought in to give some of the aesthetic look to the ride, to give it the look and feel of a white water experience. They would take concrete and form it to look like boulders and canyon walls * * * .” (R., p. 37) A station house or queue house was also constructed and included in the assessment, where the guests line up to load and unload from the ride itself. It is Funtime’s contention that the Grizzly Run attraction constitutes real property, specifically, a structure, pursuant to R.C. 5701.02, and, as such, the purchases from Hi Tech and Strait Bilt are not subject to tax. Further, Funtime contends that the station house constitutes real property, specifically a building, pursuant to R.C. 5701.02 (B).

During the period at issue, R.C. 5701.02 defined “real property” as follows:

- (A) ‘Real property,’ ‘realty,’ and ‘land’ include land itself, * * * 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.

(B) 'Building' means 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, if any, it is designed to shelter * * * .

(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.

(D) '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.

(E) 'Structure' means 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. 'Structure' includes, but is not limited to, bridges, trestles, dams, storage silos for agricultural products, fences, and walls.

On the other hand, the Tax Commissioner contends that the Grizzly Run constitutes personal property and is a business fixture, pursuant to the provisions of R.C. 5701.03. Specifically, personal property is defined by such statute:

(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’ 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. * * *

Prior to the adoption of the current statutory definition of real and personal property¹, a line of judicial authority classified a fixture as real or personal predicated upon the traditional criterion of actual annexation to the realty, appropriation to the use of the realty and its permanent accession to the realty. The decisive test of appropriation was whether the fixture was devoted primarily to the business conducted on the premises, or the use of the land upon which the business was conducted. See, e.g., *Teaff v. Hewitt* (1851), 1 Ohio St. 511; *Zangerle v. Standard Oil Co.* (1945), 144 Ohio St. 506; *Zangerle v. Republic Steel Corp.* (1945), 144 Ohio St. 529.

In more recent years, however, the Supreme Court departed from these earlier pronouncements. In *Rotek, Inc. v. Limbach* (1990), 50 Ohio St.3d 81, the court expressly rejected, as improper, the test found in the *Teaff* and *Zangerle* line of cases. Finally, in *Thomas Steel Strip Corp. v. Limbach* (1991), 61 Ohio St.3d 340, the court

¹¹ R.C. 5701.02 previously read;

(A) “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, previously read:

reiterated its rejection of the *Zangerle* line of cases and set forth its test for determining whether property is real or personal property for purposes of taxation:

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, 517 N.E. 2d 899. We have drawn away from earlier rulings that asked whether the improvement primarily benefited the land or business on the land. For example, in *Rotek, Inc. v. Limbach* (1990), 50 Ohio St.3d 81, 552 N.E. 2d 640, 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." *Id.* at 341.

Most notably, in one of the last cases in the line, *Kings Entertainment Co. v. Limbach* (1992), 63 Ohio St.3d 369, the issue concerned construction of various amusement park rides: structural steel, concrete piers supporting roller coasters, concrete bottoms and sides for a water ride, and concrete queue pads in waiting areas. The Supreme Court rejected the commissioner's claim that these were fixtures related to the business under *Zangerle*, and found the property constituted "structures" and "improvements" to the land, thus real property under then R.C. 5701.02. Relying on *King Entertainment* and *Thomas Steel Strip*, we reversed the commissioner and held that a giant waterslide similar to Grizzly Run was real property, applying then R.C. 5701.02, for tax years, 1986, 1987, and 1988. *Erievue Amusement Park, Inc., v. Tracy* (Sept. 17, 1993) BTA No. 1991-P-1028, unreported.

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

Subsequent to the decisions in this line of cases, ending with *Thomas Steel Strip* and *Kings Entertainment*, the General Assembly amended R.C. 5701.02 and 5701.03, supra, to revise the definition of real and personal property for tax purposes. See 144 Ohio Laws, 1528, S.B. No. 272, eff. 7-20-92. It would appear that the General Assembly, by such amendment, essentially codified the earlier decisions of the Supreme Court in the *Teaff* and *Zangerle* line of cases. It is these amended provisions which we must now consider and apply in this appeal. In this enactment, the General Assembly added specific statutory definitions of buildings, improvements, structures, and fixtures as they relate to both real and personal property. Each term now has specific identifying elements. R.C. 5701.02 limits the definition of real property, “unless otherwise specified in R.C. 5701.03,” and R.C. 5701.03 limits the definition of personal property, “ * * * that does not constitute real property as defined in section 5701.02 * * * .”

We are required to read these two sections in *pari materia*, and harmonize the provisions to reach the result intended by the General Assembly, which was to revise these definitions and create a specific classification of personal property, designated as a business fixture. “Where a statute defines terms used therein, which are applicable to the subject matter affected by the legislation, such definition controls in the application of the statute.” *Terteling Bros., Inc., v. Glander* (1949), 151 Ohio St. 236, paragraph one of the syllabus. The General Assembly has created terms of art which we must recognize and apply in the determination of this matter. We find no ambiguity, and must apply these provisions without further construction. The

board, as the fact finder, must inquire into the specific characteristics of the property in question to determine whether it falls within the scope of the statutory definition of real or personal property for taxation purposes, that is, whether the property primarily benefits the realty or the business conducted by any occupant on the premises. See *Newcome Corp. v. Tracy* (Dec. 11, 1998), BTA No. 1997-M-320, unreported; *F.P.&E. Inc. Currently Centurion Industries, Inc. v. Tracy* (Mar. 18, 1999), BTA No. 1996-M-806, unreported.

The definition of “fixture” in R.C. 5701.02(C) means an item either affixed to the land or to a building that primarily benefits the realty and not the business conducted on the premises. The definition of structure in R.C. 5701.02(E) has three requirements: (1) that the property be attached or affixed to the land; (2) that the attachment be a permanent fabrication or construction, other than a building; and (3) that the property increase or enhance the utilization or enjoyment of the land. A fixture, to be classified as real property, must be affixed to the land or a building, structure, or improvement “that primarily benefits the realty and not the business * * *.” In both definitions, a fixture or structure to be classified as realty must benefit the land, or enhances its utilization or enjoyment, which are distinctions similar to those expressed by the Supreme Court in both the *Teaff* and *Zangerle* cases, *supra*. The General Assembly has adopted a new classification of business fixture in R.C. 5701.03 which also has its origin in these cases, and the practice of the Tax Commissioner before *Rotek*. A business fixture is now an inclusive term which is defined as both an item of personal property which is permanently affixed to the land

or an item of personal property attached to a building, structure or improvement that primarily benefits the business conducted on the land. The term also includes those portions of a building, structure or improvement designed, constructed or used for the conduct of business.

In the instant matter, Grizzly Run, the white water raft ride, is primarily a metal-reinforced concrete structure consisting of two walls and a floor within which the water is contained and through which the boats travel. (R., p. 25-26) The ride sits directly on the land and in some portions must be supported by metal pilings. (R., p. 29-30) Appellant offered the testimony of Herbert Gedeon, director of finance for Funtime, Inc., who indicated that “the concrete cannot be disassembled without destroying it.” (R., p. 34) Based upon this description, we find that the Grizzly Run amusement ride is permanently attached to the land. The ride cannot be dismantled and moved to another location without destroying it, a signpost of permanency.

In *F.P.&E.*, supra, we determined that gas station canopies, under the statute as amended, qualified as business fixtures, although under the prior version of the statute we had determined the canopies were real property. In addressing this apparent inconsistency, we stated that “it appears to this Board that, under the new statute, the definition [of] ‘business fixture’ includes items which were otherwise considered structures.” *Id.* at 18, f.n.4. We held:

(N)o longer is property presumed to be realty because it meets the definition of structure. Now, inquiry must be made into whether the personalty benefits the land or the business thereon. Further, the inquiry now appears weighted more heavily towards finding property to be personalty, regardless of the permanence of attachment to

realty. R.C. 5703.03(B) specifically requires that an item that qualifies as a business fixture by virtue of its primary benefit to the business be taxed as personalty even if [sic] is permanently attached or affixed to land.

In order to determine whether personalty is so devoted to the land that it must be taxed as realty, in *F.P.&E.* we returned to the Supreme Court's pronouncement in *Zangerle* supra, where the court delineated a test for such questions. Specifically, to be considered realty, the personalty must "have such relationship to the land or improvements already constructed thereon as to be necessary or beneficial to its enjoyments, independent of the business presently carried on." *Id.* at 515. The court relied upon the "intention upon the part of the annexer to make the chattel annexed a permanent accession to the freehold." *Id.* at 518. The court provided the following indices upon which to determine intent:

The intention of the annexer must be determined from the nature of the article affixed; the relation and situation of the party making the annexation; the structure and mode of annexation; the purpose or use for which the annexation has been made, taking into consideration whether it was made with a view of permanence or with a view of serving a special purpose or business; the economic advantage, if any, of treating the annexed property as real or personal; the relationship between the parties interested in the land and chattel and the resulting equities arising from such relationship; and contracts or agreements between those having ownership of or equitable interests in the chattel, tending constructively to annex such chattel to or to sever it from real estate.

Intention to render a chattel a fixture is not the mere determination to annex the chattel to the realty, but the determination to devote the chattel to the use and service of the land or structure already a part of the land, in such manner as to enhance the serviceability of the

whole as a permanent unit of property to whatsoever use it may be devoted.

In applying the *Zangerle* test we asked, “Would a canopy exist on the property if a service station were not present? Is there an economic advantage to treating the canopy as real or personal property? Does the canopy have intrinsic value separate from the realty? If the owner of the realty is unrelated to the owner of the business, which party believes it to be the owner of the canopy?” *F.P.&E.*, p. 18.

Here, the board finds that the evidence establishes that while Grizzly Run might be deemed a “structure”, it does not increase or enhance the utilization of the land. Would the Grizzly Run exist on the property if an amusement park were not present? Is there an economic advantage to treating the Grizzly Run as personal or real property? Does the Grizzly Run have intrinsic value separate from the realty? If the owner of the realty is unrelated to the owner of the business, which party believes it to be the owner of the Grizzly Run? Considering these questions and the very specific changes made to the statutory definitions which we must apply in making our determination, we conclude that the Grizzly Run ride constitutes a business fixture. Further, as we consider the statutory examples of what constitutes a “structure,” i.e., a bridge, trestle, dam, silo, fence, or wall, we note that all of the examples are items which support or aid in the use of the land on which they are located. The use of the natural land is improved or assisted by a “structure” situated thereon. Grizzly Run does not increase or enhance the utilization of the land on which it is located; on the contrary, it benefits the business conducted on the land, not the land itself. Grizzly Run was not constructed by Funtime in its amusement park so that its patrons would

enjoy the land; it was constructed so that patrons would enjoy the experience of riding Grizzly Run. Funtime stipulates that “the Grizzly Run, Mind Eraser and Skyscraper primarily benefit Funtime’s business,” and as such, are not “fixtures” classified as real property” (Appellant’s Reply Brief, p. 9, f.n. 8) We agree with the appellee’s characterization of the ride as being “designed, constructed and used for the specific business that Funtime conducts, an amusement park operation.” (Appellee’s Brief, p. 8) Further, the rides “are the equipment which constitutes the business conducted by Funtime. * * * The rides would be of no benefit to the land if the particular business conducted on the land was terminated. The rides are unique to the conduct of the amusement park business and would be of no benefit to any other use of the land.” (Appellee’s Brief, p. 9)

With regard to the station house, we find that while it has some of the attributes of a building, it was only intended to provide temporary shelter from the elements for patrons waiting in line to ride on Grizzly Run. Based upon the evidence, we do not find the station house, which provides shade/protection with a canvas roof, a “permanent” fabrication or construction contemplated in the definition of real property in the statute.

Thus, we find that the Grizzly Run amusement ride is a business fixture and constitutes personal property, as defined by R.C. 5701.03. We therefore concur with the Tax Commissioner's determination regarding such item’s taxability.

MIND ERASER

The board must also determine whether another amusement ride, the Mind Eraser, a.k.a. the Boomerang, a roller coaster, constitutes real property or a business fixture, pursuant to the current statutory definitions. The coaster was manufactured and designed by one company, Vekoma, but another company, Industrial First, actually constructed the ride at the amusement park, under Vekoma's supervision. The Mind Eraser "is attached with concrete footers that are embedded into the land," and cannot be disassembled to be taken to another location. (R., p. 48)

A station house or queue house, where the guests line up to load and unload from the ride itself, was also constructed and Funtime also argues it constitutes a "building," for real property tax purposes, as it was intended as a shelter for people. (R., p. 49)

Both the station house and the coaster itself were found by the Tax Commissioner to constitute business fixtures. Based upon the statutory definitions and our earlier discussion in regard to the Grizzly Run attraction, this board agrees with the Tax Commissioner that the Mind Eraser and associated station house also constitute business fixtures, which primarily benefit the business conducted on the land, not the land itself. Like the Grizzly Run ride, the Mind Eraser coaster does not increase or enhance the utilization of the land. Neither the coaster nor the associated station house would have any use independent of the amusement park business. As the commissioner points out, Funtime basically acknowledged this proposition when it stated in its brief that the Mind Eraser "has no economic value except as a structure at this park." (Appellant's Brief, p. 11)

Thus, based upon the foregoing, we find that the Mind Eraser amusement ride and station house are business fixtures and constitute personal property, as defined by R.C. 5701.03, and we therefore concur with the Tax Commissioner's determination regarding such items' taxability.

SKYSCRAPER

Finally, Funtime contends that repairs and maintenance to an elevator in the Skyscraper ride should not be taxable as they are necessary to ensure the safety of the patrons housed in the ride itself (R., p. 53) and since the repairs are made subject to service contracts pertaining to real property, the charges are therefore not taxable. The Skyscraper is described by Funtime as “a revolving building * * *. It travels up in the air and rotates 360 degrees, giving our guests the opportunity to view the surrounding area.” (R., p. 51) Funtime argues that the Skyscraper is a structure, or in the alternative, a building, i.e., real property.

Just as we determined with regard to the other amusement rides under consideration, Grizzly Run and the Mind Eraser, the Skyscraper does not increase or enhance the utilization of the land. Further, the Skyscraper does not qualify as a “building” under the real property definitions as it was neither constructed to shelter people or tangible personal property, but instead, was constructed to be a ride experience at an amusement park. It is a business fixture that primarily benefits the business conducted by Funtime on the land. It would have no value or use independent of the amusement park business of which it is a part. As such, any

repairs made to such personal property are taxable, pursuant to R.C. 5739.01(B)(3)(a) and 5741.02(B), the former of which provides:

(B) ‘Sale’ and ‘selling’ include all of the following transactions for a consideration in any manner, whether absolutely or conditionally, whether for a price or rental, in money or by exchange, and by any means whatsoever:

(3) All transactions by which:

“(a) An item of tangible personal property is or is to be repaired, except property, the purchase of which would be exempt from the tax imposed by section 5739.02 of the Revised Code.

CONCLUSION

Accordingly, the Board of Tax Appeals finds that the Tax Commissioner’s findings were reasonable and lawful. It is therefore ordered that the final determination of the Tax Commissioner must be and hereby is affirmed.

Ms. Margulies dissenting.

I respectfully dissent from the majority opinion in this case. I would hold for the taxpayer and reverse the findings of the Tax Commissioner based upon the statutory interpretation of R.C. 5701.02 and 5701.03.

I would reverse the commissioner’s assessment of use tax against Funtime, Inc. based upon a determination that the Grizzly Run, the Mind Eraser, and the Skyscraper are “structures” as defined in R.C. 5701.02(E). Thus, they fall within the definition of real property found in R.C. 5701.02(A) and are accordingly not subject to use tax. It is my interpretation that the analysis of the taxability of the property at issue must begin with a determination as to whether or not the property falls within

the definition of real property found in R.C. 5701.02. Once the conclusion is reached that property falls within the definition of “structure” contained in that statute, no further analysis under R.C. 5701.03 is relevant or required. The property is real property that is not subject to use tax.

I believe that the majority opinion misinterprets the legislative changes to R.C. 5701.02 and 5701.03 that were enacted in 1992. Prior to 1992, R.C. 5701.02 and 5701.03 contained language similar to that which is relied upon by the majority to allegedly signal a major change in the law regarding the primacy of the definition of “real property” contained in R.C. 5701.02 as compared to the definition of “personal property” contained in R.C. 5701.03.

Prior to the 1992 amendments, R.C. 5701.02 provided:

(A) “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. (Emphasis added.)

R.C. 5701.03 provided:

As used in Title LVII [57] of the Revised Code, “personal property” includes every tangible thing which is the subject of ownership *** *not forming part of a parcel of real property, as defined in R.C. 5701.02 of the Revised Code* ***. (Emphasis added.)

Thus, there were references already contained in both statutes that were very similar to the amendments that were adopted in 1992. The 1992 amendments did add language defining the major terms in the two code sections, but the language changes made to both sections did not extensively alter the interpretation of those

sections, as the majority contends. The amendments to R.C. 5701.02 did add a definition of the term “fixture” which essentially excluded fixtures that were used in business from the definition of real property. In R.C. 5701.03, there occurred the corresponding addition of a definition of the term “business fixture,” to encompass fixtures that primarily benefited a business as personal property.

However, there was nothing in those 1992 language changes that affected the analysis that needs to take place to determine taxability in matters such as the instant case. The initial inquiry remains a determination of whether or not the subject property is real property. Once property is deemed a “structure” under R.C. 5701.02, the business use of the property becomes irrelevant, and as real property, the structure is not taxable.

I do not agree with the majority’s interpretation of the meaning of the 1992 amendments. The codification of the test set forth in *Zangerle v. Standard Oil Co.* (1945), 144 Ohio St. 506, occurred, but only as that test applies to the classification of “fixtures.” The legislative change that added the definition of a business fixture to the definition of taxable personal property did nothing to change existing law both then and now: the initial inquiry must be whether or not the property in question meets the definition of “real property.” If the property does meet the definition of a building, structure, or improvement, the property is real property and thus is not taxable. If the property is not a building, structure, or improvement, but is instead a fixture, the relevant inquiry then becomes whether or not such property

primarily benefits the land or a business, under the language of R.C. 5701.02 and 5701.03.

The majority relies upon its prior decision in *F.P. & E. Inc. Currently Centurion Industries, Inc. v. Tracy* (Mar. 18, 1999), BTA No. 1996-M-806, unreported, for the proposition that:

We interpret these changes as requiring this board, as fact finder, to inquire into the specific characteristics of the property in question to determine whether it falls within the scope of the statutory definition of real property for taxation purposes, *that is, whether the property primarily benefits the realty or the business conducted by any occupant on the premises.* (Emphasis added.)

The board correctly states the test in the unemphasized portion of the quotation above; however, in the emphasized language, the board goes on to completely change the meaning of the test, in my opinion, incorrectly. The first analysis is whether or not the property meets the definition of real property. In instances in which the property is deemed to be a structure, no consideration of a benefit primarily to the land or to the business is appropriate.

In applying the definitions contained in R.C. 5701.02 to the property in the instant matter, I conclude that the Grizzly Run, the Mind Eraser, and the Skyscraper are structures as that term is defined in the statute, and thus they are not taxable.

Based upon the foregoing analysis, I would find for the taxpayer, Funtime, Inc., and reverse the Tax Commissioner's final determination.

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