

**STATE OF WISCONSIN
TAX APPEALS COMMISSION**

VISU-SEWER CLEAN & SEAL, INC. (P),

DOCKET NO. 02-S-442(P)

Petitioner,

vs.

RULING AND ORDER

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

The respondent, Wisconsin Department of Revenue, filed a motion to supplement the record on September 23, 2004, requesting that a private letter ruling, dated June 15, 1995, be admitted into evidence. The petitioner, Visu-Sewer Clean & Seal, Inc., filed an objection to this motion on September 29, 2004. The Commission held a telephonic hearing on November 30, 2004 at which the parties presented oral arguments on the motion.

For the reasons stated below, the Department's request to supplement the record is denied.

The Department seeks to introduce into evidence a 1995 letter from Vicki Gibbons, a staff specialist at the Department, in response to an inquiry from a taxpayer. The letter advised that gutter machines used to produce seamless gutters at a job site are not exempt from Wisconsin sales or use tax because the fabrication of the gutters does not meet the definition of manufacturing provided in Wis. Stat. § 77.54(6m). The letter listed various reasons for the Department's determination that creation of the seamless gutters was real property construction and not manufacturing, including that the fabrication occurred at the site where the gutters were affixed to the real estate and

that the gutters were unique for the structure to which they were affixed and were only useful for that particular structure.

The Department requests that the record be supplemented with this private letter ruling to refute the testimony of petitioner's expert witness, Jack DeYoung, who was an employee at the Department from 1962-2000 and, beginning in 1974, was the Assistant Administrator of the Income, Sales and Excise Tax Division. In this capacity, he was director of private letter rulings, and his responsibilities included directing technical services staff who responded to taxpayers' questions.

On the first day of a three-day trial, during direct examination by counsel for petitioner, Mr. DeYoung testified that the manufacturing of seamless gutters at a customer's location was considered manufacturing by the Department, even though the person who manufactured them would later install them into a house or building. Mr. DeYoung's assertion was made in the context of providing a series of examples of manufacturing processes that take place in more than one location.

Counsel for the Department asserts that Mr. DeYoung's testimony regarding the Department's position was in error and that the private letter ruling from Ms. Gibbons, which was issued during the audit period in this case, refutes his testimony. She further asserts that she could not anticipate that Mr. DeYoung would provide this example at trial, that the issue did not come up during discovery, that over 1,000 private letter rulings are issued by the Department each year, and that she could not be expected to know about this particular ruling at the time of trial.

Counsel for the Department also contends that it was not until she received and reviewed the transcript in July 2004, eight months after the November

2003 trial, that she realized that Mr. DeYoung's testimony was in error. She filed her motion to supplement the record in September 2004, prior to briefing in this case. Counsel asserts that it would be a manifest injustice not to allow the Department to correct Mr. DeYoung's erroneous statement regarding the Department's position.

The Department cites no authority for the proposition that a party should be allowed to supplement the record ten months after each party has rested its case after trial. The Department's reference to Wis. Stat. § 802.01(2) is unhelpful, as that statute only addresses the process for bringing motions generally, not the ability to refute a witness' testimony through extrinsic evidence ten months after trial. The fact that the request to supplement was made just months after counsel received and reviewed the transcript and prior to briefing is of little consequence, as the proper time to have attempted to refute Mr. DeYoung's testimony was during trial. The testimony occurred on the first day of a three-day hearing, during petitioner's case-in-chief. The Department could have cross-examined Mr. DeYoung on this point at trial or attempted to impeach him during the Department's case-in-chief, through the testimony of Ms. Gibbons and/or through the letter ruling. The Department could have also sought to recall Mr. DeYoung after looking into whether his statement was accurate.

Petitioner alleges that Mr. DeYoung still maintains that his testimony on this point was accurate. The Commission cannot simply accept as evidence a document which appears to contradict his testimony without providing petitioner an opportunity to refute that new evidence, either through the testimony of Mr. DeYoung or through examination of Ms. Gibbons. While the Department offers such measures as a solution to any perceived unfairness, the Commission, parties, and witnesses have an interest in

the finality of trials. Moreover, to re-open the testimony this late in the game, when the evidence sought to be admitted could have been introduced at trial, would open the door to future litigants who discover that they missed a point or opportunity at trial.

Finally, re-opening the case for additional testimony is unwarranted under the circumstances here, where the testimony the Department wishes to refute was just one of many examples provided by Mr. DeYoung in support of his assertion that manufacturing processes may occur in more than one location.

IT IS ORDERED

1. The Department's motion to supplement the record is denied.
2. **No later than January 31, 2005**, petitioner shall file its brief; respondent shall file its brief within 75 days of the filing of petitioner's brief; and petitioner shall file its reply brief within 30 days of the filing of respondent's brief.

Dated at Madison, Wisconsin, this 30th day of December, 2004.

WISCONSIN TAX APPEALS COMMISSION

Jennifer E. Nashold, Commissioner