COURT OF APPEALS
DECISION
DATED AND FILED

October 4, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2216 **Cir. Ct. No. 2005CV3996**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

VISU-SEWER CLEAN & SEAL, INC.,

PETITIONER-APPELLANT,

V.

WISCONSIN DEPARTMENT OF REVENUE,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: ANGELA B. BARTELL, Judge. *Affirmed.*

Before Higginbotham, P.J., Dykman and Vergeront, JJ.

¶1 PER CURIAM. Visu-Sewer Clean & Seal, Inc., appeals from a circuit court order affirming a decision of the Tax Appeals Commission. The issues relate to sales and use taxes, the exemptions for raw materials, machinery

and equipment, and whether the company's work is properly considered real property construction activity. We affirm.

¶2 This case concerns a Department of Revenue assessment of sales and use taxes against Visu-Sewer. Visu-Sewer is in the business of installing liners in sewer pipes. The department assessed Visu-Sewer with sales and use taxes on its purchases of raw materials, machinery, equipment, and other items that it uses to perform this work. Visu-Sewer claims that these taxes should not be assessed because certain exemptions apply, specifically the one for raw materials found in WIS. STAT. § 77.54(2) (2005-06)[1] and the one for machines, equipment, and other items found in § 77.54(6)(a). The commission and circuit court affirmed the assessment. They concluded that Visu-Sewer's work is properly characterized as real property construction and, therefore, by operation of WIS. STAT. § 77.51(2), these exemptions do not apply.

¶3 Visu-Sewer argues that the commission erred by first considering whether the company's activities are real estate construction, without first considering whether its activities meet the definition of "manufacturing" provided in WIS. STAT. § 77.54(6m). Meeting that definition is a necessary precursor to receiving the exemption in § 77.54(6) for purchases of machines and equipment. The commission's position appears to be that this determination is irrelevant because real estate construction contractors are subject to the tax, even if their activities might also constitute "manufacturing" under § 77.549(6m).

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶4 This is an issue of statutory interpretation in an area where we conclude the commission is entitled to great weight deference. *See* ***Harnischfeger Corp. v. LIRC***, 196 Wis. 2d 650, 660-61, 539 N.W.2d 98 (1995). Under that standard, the agency's interpretation must merely be reasonable for it to be sustained. ***Id.*** at 661.

¶5 The main flaw in Visu-Sewer's argument is that it is sparse and vague as to how the analysis should proceed if we were to agree that its activities met the definition of "manufacturing." The commission relied on statutes and the administrative code to conclude that any such determination was irrelevant because it would be trumped by the company's status as a real estate contractor performing real estate construction activities.

¶6 Specifically, the commission relied on WIS. STAT. § 77.51(2), which provides that contractors "are the consumers of tangible personal property used by them in real property construction activities and the sales and use tax applies to the sale of tangible personal property to them." The term "real property construction contractor" is defined in WIS. ADMIN. CODE § Tax 11.68(3) as generally meaning "persons who perform real property construction activities." Section 77.51(2) defines "real property construction activities" as:

> activities that occur at a site where tangible personal property that is applied or adapted to the use or purpose to which real property is devoted is affixed to that real property, if the intent of the person who affixes that property is to make a permanent accession to the real property.

Finally, WIS. ADMIN. CODE § Tax 11.39(4) provides that "nonmanufacturers" include:

> (a) Contractors, when engaged in real property construction activities and installing or repairing tangible personal property" [and]
>
> (n) Persons engaged in:
>
> ….
>
> 9. Real property construction activities.

¶7 Based on these definitions, the commission concluded that, if Visu-Sewer meets the definition of "contractor" and was engaged in "real estate construction activities," then the law provides that Visu-Sewer is not a manufacturer, and therefore cannot claim the tax exemption for machines and equipment, regardless of whether Visu-Sewer's activities might also satisfy the definition of "manufacturing" provided in WIS. STAT. § 77.54(6m), which would allow Visu-Sewer to claim that exemption.

¶8 Visu-Sewer's opening brief does not argue that this interpretation was unreasonable. In its reply brief, Visu-Sewer argues that this interpretation was rejected in a certain circuit court decision. While we could properly disregard this argument because it was not raised until the reply brief, *see* ***Swartwout v. Bilsie***, 100 Wis. 2d 342, 346 n.2, 302 N.W.2d 508 (Ct. App. 1981), we also reject it on the merits.

¶9 In ***DOR v. Wissota Sand and Gravel Co***, Wis. Tax Rep. (CCH) ¶400-810, p. 33,201 (Dane Co. Cir. Ct. Jan. 27, 2005), the department argued that certain machinery was not exempt because it was used in activities that were properly described as mining. Mining, like real estate construction activities, is an activity expressly defined as "nonmanufacturing" in WIS. ADMIN. CODE § Tax 11.39(4). The court's discussion of that issue stated in part: "The statutes and administrative code provide the definition of manufacturing to be applied here.

Whether an activity may be seen as mining does not mean that it cannot also be manufacturing, and the statute clearly does not make the two activities mutually exclusive." ***Wissota Sand***, ¶400-810 at p. 33,204.

¶10 There is no indication in ***Wissota Sand*** that the court was aware of the rule expressly providing that mining is not manufacturing. There is no attempt by the court to reconcile its conclusion with that provision. Even if more than one interpretation of that rule is possible, it is at least reasonable to conclude that the effect of the rule is to make both mining and real estate construction activities mutually exclusive from manufacturing. There is no analysis in this circuit court opinion, beyond its conclusion, to convince us that the commission's interpretation in the present case is unreasonable.

¶11 Visu-Sewer next argues that, even if the commission was correct that the dispositive question is whether the company was performing real estate construction activities, the commission erred in its application of the statutes and rules to the undisputed facts relevant to that issue.

¶12 The application of a statute to undisputed facts presents a question of law. We are not bound by an administrative agency's legal conclusions, though we generally accord one of three levels of deference to an agency's legal conclusions: great weight, due weight, or *de novo* review. ***G & G Trucking, Inc. v. DOR***, 2003 WI App 228, ¶11, 267 Wis. 2d 847, 672 N.W.2d 80. The commission argues that its application of the sales and use tax statutes to the facts is entitled to great weight deference, while Visu-Sewer argues that *de novo* review is proper. However, Visu-Sewer's arguments are unconvincing as to this issue, and we will apply great weight deference.

¶13 Under WIS. STAT. § 77.51(2), real estate construction activities are those:

> that occur at a site where tangible personal property that is applied or adapted to the use or purpose to which real property is devoted is affixed to that real property, if the intent of the person who affixes that property is to make a permanent accession to the real property.

That test is repeated in WIS. ADMIN. CODE § Tax 11.68(1), which further includes a note stating that the definition of real property construction activities was revised to:

> [p]rovide by statute those criteria that were used by the Supreme Court in the case of *Dept. of Revenue vs. A.O. Smith Harvestore Products. Inc*. (72 Wis. 2d 60. (1976)), for purposes of determining whether tangible personal property becomes real property. The meaning of each of the criteria is explained in the Supreme Court's decision.

¶14 In their arguments on appeal, it is clear that the parties have different views of what we should consider to be the "real estate" to which Visu-Sewer's liners are affixed. The commission's view is that the sewer pipe itself is the real estate. It asserts that this conclusion flows from rule language that could be read as classifying installed sewer pipes as "improvements to land."[2] In contrast, Visu-

[2] This language appears in Wis. Admin. Code § Tax 11.68(6)(f), which provides:

> A construction contractor is the consumer of personal property, such as building materials, which is incorporated into or becomes a part of real property, and sales of this personal property to a contractor are subject to the tax. Personal property which becomes a part of real property includes the following:
>
> ….
>
> (f) Improvements to land, including retaining walls, roads, walks, bridges, fencing, railway switch tracks, ponds, dams, ditches, wells, underground irrigation systems except systems sold to and for use by farmers, drainage, storm and

(continued)

Sewer appears to regard the relevant real estate as being the land on the surface above the sewer pipe. However, Visu-Sewer does not make any direct argument against the commission's reliance on the rule, which the commission also relied on in its administrative decision. Therefore, in applying the ***Harvestore***[3] test, we will consider the sewer pipe itself to be the relevant real estate.

¶15 The first element of the test is whether the sewer liners were physically annexed to the sewer pipes. Visu-Sewer argues that its liners do not meet this test because they are not glued or bolted inside the pipes, but are instead "mechanically locked" into place by the liner molding itself to variations on the inside surface of the pipe. The commission concluded that the liners are physically annexed to the pipe because the process of heating the liner to conform to the crevices and grooves inside the pipe resulted in them being "physically attached in a very secure manner." In addition, the commission noted that the liners could be removed only by destroying them, which would likely also destroy the host pipe. The commission's decision was reasonable.

¶16 The second element is whether the liners were adapted to the purpose to which the realty is devoted. Visu-Sewer admits that there is "no doubt"

> sanitary sewers, and water supply lines for drinking water, sanitary purposes and fire protection.

We note that there appears to be a linguistic glitch in this provision. Contrary to the way the introductory paragraph is phrased, sub. (6)(f) is *not* a list of "personal property which becomes real property." Instead, sub. (6)(f) is actually a list of real property that was constructed from items that were once personal property such as concrete blocks, beams, fenceposts, lengths of pipe, and so on. One example of an amendment that would correct the problem is for sub. (6)(f) to begin with the phrase "personal property that is used to construct improvements to land such as" the various items as currently listed.

[3] ***DOR v. A.O. Smith Harvestore Prods., Inc.***, 72 Wis. 2d 60, 67-68, 240 N.W.2d 357 (1976).

that the pipes and liners assist with the movement of water and sewage, but asserts that the record contains no other evidence on the purpose and other uses of the realty. Here, Visu-Sewer appears to be referring to the land above the pipes, which we have already concluded is not our focus. The commission reasonably concluded that the liners are adapted to the purpose of the sewer pipes.

¶17 The third element is the intent of the person doing the annexing to make the annexation permanent. This intention is "not the actual subjective intent of the landowner making the annexation, but an objective and presumed intention … to be ascertained in the light of the nature of the article, the degree of annexation, and the appropriateness of the article to the use to which the realty is put." ***Harvestore***, 72 Wis. 2d at 69. Visu-Sewer argues that because its liners have a life expectancy shorter than some sewer pipes, and can be removed, the commission erred by concluding that the installation was intended to be permanent. And, again, Visu-Sewer makes an irrelevant argument about the intent of the landowner regarding the property above the sewer. Based on all the facts and circumstances, the commission's decision was reasonable.

¶18 Visu-Sewer next argues that we should remand for the commission to consult with the commissioner who conducted the hearing, but retired before the commission reached its decision. It argues that it was a violation of Visu-Sewer's due process rights for the commission to find facts without consulting that commissioner. We reject this argument because resolution of the case does not depend on any disputed fact. The case was resolved at the commission, and is resolved in this opinion, entirely on undisputed facts, statutory interpretation, and application of law to undisputed facts.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.