

**IN THE SUPREME COURT OF MISSOURI**

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**No. SC94209**

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**BEN HUR STEEL WORX, LLC,**

**Appellant,**

**v.**

**DIRECTOR OF REVENUE,**

**Respondent.**

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**Appeal from the Administrative Hearing Commission  
State of Missouri  
Sreenivasa Rao Dandamudi, Commissioner**

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**BRIEF OF APPELLANT BEN HUR STEEL WORX, LLC**

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## **JURISDICTIONAL STATEMENT**

This case involves construction of Section 144.054 RSMo Supp. 2013, a revenue statute of the state. More specifically, it requires construction of the term “product” as used in subsection 2 of section 144.054. Exclusive jurisdiction is in this Court pursuant to Article IV, section 3, Missouri Constitution.

## STATEMENT OF FACTS

Appellant, Ben Hur Steel Worx, LLC (Ben Hur), is a Missouri limited liability corporation in good standing at all times relevant herein. (Ex. E) Respondent is the Director of Revenue for the state of Missouri, charged with the enforcement and collection of the Missouri sales and use tax pursuant to Chapter 144, RSMo.

Ben Hur is in the business of manufacturing, processing or producing structural steel building components. (Tr. 10:23-11:2) Ben Hur maintains a manufacturing plant on Weber Road, Lemay, Missouri. (Tr. 10:2-7; Ex. 4) Ben Hur purchases material from steel mills or warehouses, and such steel is received at the plant and stored in an outside staging area until needed. (Tr. 11:11-11:20)

Ben Hur commonly manufactures or produces structural steel products known as columns, beams, purlins, girts, trusses, frames, embeds, and lintels. (Tr. 10:23-11:9) To manufacture and produce the structural steel components, Ben Hur performs one or more of the following operations: cutting, drilling, coping, grinding, welding, cambering, blasting, painting, or galvanizing. (Tr. 12:3-12:11). In addition, Ben Hur may attach bolts, clips, angles, erection hardware, plates and other strengthening materials. (Tr. 12:9-12:11)

Ben Hur operates a plate machine which will cut shapes to order from steel plate up to four inches thick. (Tr. 14:10-14:16). Ben Hur has an “angle line” consisting of machinery and equipment that will cut raw angle iron up to 60 feet long into various lengths. It also punches holes into the angle iron on both horizontal and vertical planes. (Tr. 14:1-14:8). Ben Hur employs a “drill and saw line” consisting of machinery and

equipment used to cut and drill steel beams on all planes. (Tr. 13:9-24). Ben Hur has sixteen work stations for welding, grinding, and fit-up in the attachment of additional components (e.g., plates, angles, clips, bolts, and erection hardware). (Tr. 14:18-15:17). Additional operations are performed at the work stations, including cambering, cleaning and painting the steel, when needed. (Tr. 14:17-15:17; Ex. 4, App. 11-15).

The market for structural steel in the construction trade, whether sold as tangible personal property or installed on customers' premises, is for customized products. (Tr. 15:17-16:4; 33:4-33:21) The market price is established by bid or request for proposals at the request of the potential customer. (Tr. 15:17-16:4).

Ben Hur sold and delivered the products it manufactured or produced to its customers either as tangible personal property (Tr. 20:13-21) or, for some projects, erected or installed the product on the customers' premises. (Tr. 20:22-21:4). During the refund period Ben Hur purchased, under a resale exemption certificate, raw steel and other materials for products resold as tangible personal property. (Tr. 20:13-21). Ben Hur collected and remitted sales tax on the sales of its products when sold as tangible personal property. (Tr. 16:15-22). Ben Hur did not request a refund of any sales tax collected and remitted on its sale of structural building products that it manufactured or produced and sold as tangible personal property and these transactions are not the subject of Petitioner's refund claim. (Tr. 16:15-17:14; 20:13-21).

Ben Hur accrued and remitted state and local sales or use tax on its purchases of raw steel plate, beams, angle, paint and other materials that it used to manufacture or produce steel building products that were erected by Ben Hur, or a subcontractor acting

on behalf of Ben Hur, into real property improvements on its customers' realty. (Tr. 22:18-23:2; Exs. 1, 2 and 3).

Ben Hur timely filed applications for refunds with the Director for sales or use tax accrued and remitted on purchases of materials that it manufactured or produced into structural steel building products that were erected by Ben Hur or by a subcontractor into real property improvements. Ben Hur claimed exemption pursuant to Section 144.054.2, RSMo. (Exs. 1, 2 and 3). The "refund period" is March 1, 2008 through February 28, 2011. (Ex. 1-3).

On April 27, 2011, Ben Hur timely filed its claim for refund of sales tax it paid from March 1 through June 30, 2008, and use tax for the period January 1, 2008, through June 30, 2008, in the total amount of \$150,415.38. (Ex. 1). The Director assigned number 068044 to this claim. (Ex. 1). On August 15, 2011, Ben Hur timely filed its claim for refund of sales tax it paid from July 1, 2008, through December 31, 2008, and for use tax from July 1, 2008, through December 31, 2008, in the total amount of \$7,815.94. (Ex. 2). The Director assigned number 069075 to this claim. (Ex. 2). On January 3, 2012, Ben Hur timely filed its claim for refund of sales tax it paid from January 1, 2009 through February 28, 2011, and use tax from January 1, 2009 through December 31, 2010, in the total amount of \$40,753.01. (Ex. 3). The Director assigned number 070208 to this claim. (Ex. 3). The amounts claimed accurately reflect the sales tax paid on the purchases for the respective periods. (Tr. 8:12-10:1).

The Director denied each application for refund on January 23, 2012, explaining only “denied because claim does not qualify for exemption under Section 144.054.2.” (Exs. 1, 2 and 3).

Ben Hur timely filed its petition (L.F. 1) for review with the Administrative Hearing Commission on March 19, 2012. The Commission issued its Amended Decision on May 14, 2014, denying the refunds. (App. 1-10). Ben Hur timely filed this appeal on May 23, 2014.

**POINTS RELIED ON**

**I.**

**THE ADMINISTRATIVE HEARING COMMISSION ERRED IN HOLDING THAT BEN HUR'S OUTPUT WAS NOT A PRODUCT BECAUSE THE STRUCTURAL STEEL THAT BEN HUR MANUFACTURES IS AN OUTPUT WITH A MARKET VALUE IN THAT (A) THE STRUCTURAL STEEL OUTPUT IS SIGNIFICANTLY DIFFERENT FROM THE MATERIALS PURCHASED, WITH DIFFERENT USES; AND, (B) THOSE PRODUCTS HAVE A MARKET VALUE, WHETHER INSTALLED BY BEN HUR OR SOLD SEPARATELY AS TANGIBLE PERSONAL PROPERTY.**

Section 144.054, RSMo

*E & B Granite v. Director of Revenue*, 331 S.W.3d 314 (Mo. banc 2011)

*Branson Properties USA, LP v. Director of Revenue*, 110 S.W.3d 824

(Mo. banc 2003)

*Mid-American Dairymen, Inc. v. Director of Revenue*, 924 S.W.2d 280

(Mo. banc 1996)

## II.

THE ADMINISTRATIVE HEARING COMMISSION ERRED IN APPLYING THE RATIONALE OF *BLEVINS ASPHALT CONSTRUCTION COMPANY v. DIRECTOR OF REVENUE*, 938 S.W.2d 899 (MO. BANC 1997) BECAUSE *BLEVINS* IS INAPPOSITE TO THIS CASE IN THAT *BLEVINS* CONSTRUED SECTION 144.030.2(2), RSMO, WHICH REQUIRES THAT THE PRODUCT BE SOLD, SUBJECT TO SALES TAX, WHEREAS THE EXEMPTION PROVIDED BY SECTION 144.054.2, RSMO, DOES NOT, AND IS THEREFORE DIFFERENT AND BROADER THAN THE EXEMPTION AT ISSUE IN *BLEVINS*.

Section 144.054, RSMo

*E & B Granite v. Director of Revenue*, 331 S.W.3d 314 (Mo. banc 2011)

## ARGUMENT

### POINT I

**THE ADMINISTRATIVE HEARING COMMISSION ERRED IN HOLDING THAT BEN HUR'S OUTPUT WAS NOT A PRODUCT BECAUSE THE STRUCTURAL STEEL THAT BEN HUR MANUFACTURES IS AN OUTPUT WITH A MARKET VALUE IN THAT (A) THE STRUCTURAL STEEL OUTPUT IS SIGNIFICANTLY DIFFERENT FROM THE MATERIALS PURCHASED, WITH DIFFERENT USES; AND, (B) THOSE PRODUCTS HAVE A MARKET VALUE, WHETHER INSTALLED BY BEN HUR OR SOLD SEPARATELY AS TANGIBLE PERSONAL PROPERTY.**

### STANDARD OF REVIEW

The Court on review of a decision of the Administrative Hearing Commission will affirm if the decision is authorized by law; supported by competent and substantial evidence based upon the whole record; did not violate mandatory procedural safeguards; and, is not contrary to the reasonable expectations of the legislature. Section 621.193, RSMo. The Court reviews the Commission's interpretation of the revenue statutes *de novo*. Factual determinations will be upheld if supported by substantial evidence on the whole record. *Bunker Missouri, Inc. v. Director of Revenue*, 319 S.W.3d 433, 435 (Mo. banc 2010); *Union Electric Co. v. Director of Revenue*, 425 S.W.3d 118, 121 (Mo. banc 2014).

## ARGUMENT

The taxpayer bears the burden to establish that it is entitled to an exemption from sales tax. *Mid-American Dairymen, Inc. v. Director of Revenue*, 924 S.W.2d 280, 282 (Mo. banc 1996). In this case, Ben Hur is required to prove that its purchases of raw steel are “materials used in the manufacturing, processing, compounding, mining or producing of any product.” The record before the Administrative Hearing Commission clearly does just that.

In its decision the Commission found that the fabricated structural steel that Ben Hur produced were not products pursuant to §144.054.2 by adding glosses to the statutory language that are unwarranted by either the language itself or the case law construing it.

Section 144.054 states in pertinent part:

1. “Processing”, any mode of treatment, act, or series of acts performed upon materials to transform or reduce them to a different state or thing, including treatment necessary to maintain or preserve such processing by the producer at the production facility.
2. In addition to all other exemptions granted under this chapter, there is hereby specifically exempted from the provisions of sections 144.010 to 144.525 and 144.600 to 144.761, and from the computation of the tax levied, assessed, or payable under sections 144.010 to 144.525 and 144.600 to 144.761, electrical

energy and gas, whether natural, artificial, or propane, water, coal, and energy sources, chemicals, machinery, equipment, and materials used or consumed in the manufacturing, processing, compounding, mining, or producing of any product, or used or consumed in the processing of recovered materials, or used in research and development related to manufacturing, processing, compounding, mining, or producing any product...

For purposes of Section 144.054.2, a product is “output with a market value, it can be either tangible personal property or a service.” *E & B Granite v. Director of Revenue*, 331 S.W.3d 314, 16 (Mo. banc 2011), citing *International Business Machines Corporation v. Director of Revenue*, 958 S.W.2d 554, 557 (Mo. banc 1998).

**A. Ben Hur’s structural steel output is a product**

In *Branson Properties USA, L.P. v. Director of Revenue*, 110 S.W.3d 824, 826 (Mo. banc 2003) the Court noted a long line of sales tax exemption cases holding that manufacturing, mining, fabricating, and producing all transform an input into an output with a separate and distinct use, identity, or value, citing *Southwestern Bell Telephone Co. v. Director of Revenue*, 78 S.W.3d 763, 767-68 (Mo. banc 2002); *Galamet v. Director of Revenue*, 915 S.W.2d 331, 333 (Mo. banc 1996); *House of Lloyd v. Director of Revenue*, 824 S.W.2d 917, 919 (Mo. banc 1992); *L & R Egg Co. v. Director of Revenue*, 796 S.W.2d 624, 626 (Mo. banc 1990); and *Jackson Excavating Co. v. Administrative Hearing Com’n*, 646 S.W.2d 48, 51 (Mo. 1983).

The *Branson* Court listed, at 110 S.W.3d at 826, activities that are not transformations that qualify as manufacturing or producing:

*State ex rel. AMF Inc. v. Spradling*, 518 S.W.2d 58, 61-62 (Mo. 1974)

(Retreading or capping tires);

*Unitog Rental Services v. Director of Revenue*, 779 S.W.2d 568, 570-71

(Mo. banc 1989) (Cleaning and repairing uniforms);

*L & R Egg Co. v. Director of Revenue*, 796 S.W.2d 626-27 (Mo. banc

1990) (Cleaning and inspecting eggs);

*House of Lloyd*, 824 S.W.2d at 919 (Repackaging products); and

*Utilicorp United*, 75 S.W.3d 725, 729 (Mo. banc 2001) (Transmitting or distributing electricity).

The *Branson* Court then lists, *Id.*, output that has a separate and distinct use, identity, or value, and thus is a product of manufacturing, or producing:

*West Lake Quarry & Material Co. v. Schaffner*, 451 S.W.2d 140, 143 (Mo. 1970) (Grinding, crushing and sorting rock for commercial use);

*Heidelberg Central, Inc. v. Director of Dept. of Revenue*, 476 S.W.2d 502, 506 (Mo. 1972) (Commercial printing);

*Wilson & Co., Inc. v. Department of Revenue*, 531 S.W.2d 752, 754-55 (Mo. 1976) (Slaughtering livestock to create marketable food);

*Jackson Excavating*, 646 S.W.2d at 51 (Treating and purifying water);

*Galamet*, 915 S.W.2d at 333-34 (Converting old automobiles/appliances into steel shreds for commercial use); and

*Concord Pub. House, Inc. v. Director of Revenue*, 916 S.W.2d 186, 190 (Mo. banc 1996) (Manipulating and affixing words onto a page to create a newspaper).

Section 144.054.1(1) itself defines “processing”, consistent with the long history of case law set out above, as “any mode of treatment, act or series of acts performed on materials to transform or reduce them to a different state or thing.” Reading such words together with the words manufacturing, processing, compounding, and producing in § 144.054.2 conjures up images of manufacturing facilities producing various items. Ben Hur’s actions at its plant transform the raw steel beams and other material into finished structural steel members, a distinctly new and different state from the raw materials, and fit for a different use. (Tr. 12:3 to 15:5; Ex A, frames 6-27; App. 19-29; Ex 4; App. 11-15.) Ben Hur’s activities produce the type of end result ordinarily associated with manufacturing. (Ex. A, frames 6-22; App. 19-27). The finished structural steel is a product for purposes of §144.054.2.

**B. Ben Hur’s products have a market value**

The Commission held that for output to constitute a product under §144.054.2 there must be: “a market in which fabricated steel pieces are regularly bought and sold at retail” (LF 20-21; App. 7-8); a sale “at retail to its general contractor or to the property owner when it was under a construction contract” (LF 21; App. 8); and, “that a portion of the taxpayer’s output was sold at retail and therefore exempt” (LF 21; App. 8). No such restrictions are required or authorized by Section 144.054.2.

In *Mid-America Dairymen, Inc. v. Dir. of Revenue*, 924 S.W.3d 280, 283 (Mo. banc 1996), the Court explained for purposes of § 144.030.2(13):

Implicit in the use of the term “product” is an output with a market value because the economic purpose of manufacturing or processing a product is to market the product. That is not to say, however, that the taxpayer must actually market the product in order to qualify for the exemption. It is sufficient if the product, although marketable, is used instead by the same manufacturer or processor as an ingredient or base for yet another product. In this regard, we emphasize that it is incumbent on the taxpayer to prove the existence of a market, whether or not the product is actually marketed by the taxpayer. (Emphasis added.)

Neither § 144.054 nor *E & B* limits or restricts how markets operate nor how market value is determined by buyers and sellers. The record in this case establishes beyond question that Ben Hur’s output has a market value. (Tr. 19:24 to 21:4; Ex. C, ¶ 3.1, App. 36).

**1. Requirement for a “market in which fabricated steel pieces are regularly bought and sold at retail”**

The Commission held (LF 20; App. 7) that the statute requires there to be “a market in which fabricated steel pieces are regularly bought and sold at retail.” The Commission cites no authority for this proposition, and Appellant has found none.

Rather, the testimony established that the market for structural steel products is established by a bid process. (Tr. 15:17 to 16:4; 17:15 to 18:20). Ben Hur’s contracts at

issue here require Ben Hur to furnish and install personal property. “Subcontractor shall furnish and pay for all item [sic] specified in any project rider, or the contract documents and any other items necessary for the work....” (Exhibit C, ¶ 2.5; App. 36). “Subcontractor shall furnish and install all inserts and anchors required for the proper securing, support and erection of the work, and shall perform all layout work and provide all scaffolding required to perform the work under this subcontract.” (Exhibit C, ¶ 6.2; App. 39). The provisions of paragraph 8.3, Compensation Upon Termination, clearly state the parties’ rights and obligations, including payment, for the materials provided by Ben Hur. (Ex. C, ¶ 8.3; App. 42). Likewise, provisions of paragraph 10.2, Changes in the Work, clearly reflect that Ben Hur is providing materials for value under the contract. (Ex. C, ¶ 10.2; App. 44).

Neither the language of Section 144.054 nor *E & B Granite* requires a market in which fabricated steel pieces are regularly bought and sold at retail as necessary to establish that Ben Hur’s output has a market value, and is therefore a product for purposes of 144.054.2.

**2. Requirement that Ben Hur “modified steel beams and then sold them, at retail, to its general contractor or to the property owner when it was under a construction contract.”**

In denying the exemption, the Commission ruled that it found no evidence that Ben Hur “modified steel beams and then sold them, at retail, to its general contractor or to the property owner when it was under a construction contract.” (LF 21; App. 8).

Again, the Commission provides no authority, statutory or case law, that requires such a showing for purposes of securing the exemption provided by 144.054.2.

Indeed, this Court held to the contrary in *E & B Granite v. Director of Revenue*, 331 S.W.3d 314, 317 (Mo. banc 2011), that no sale at retail of a product was necessary to qualify for the exemption. There the Court held “In short, section 144.054.2 is broader than 144.030.2(2) and is not restricted by the phrases “personal property ... sold ultimately for final consumption” and “tangible personal property.” ” There is no need for the evidence the Commission required, because the condition the Commission sought to impose is not authorized by the statute.

### **3. Requirement that Ben Hur sell similar property at retail**

The Commission held (LF 21; App. 8) that “there was no substantial evidence presented that Ben Hur ever sold a single beam in an ordinary retail transaction. Thus, there is no basis on which the Commission may conclude that anything produced by Ben Hur fits the definition of “product” as an “output with a market value”.” As noted in paragraph 1 above, a retail sale is not necessary to establish that there is a market value for output to qualify for the exemption under 144.054.2.

In any event, the record establishes beyond a doubt that Ben Hur sells some of its structural steel output in retail sales. (Tr. 20:13-21). Furthermore, the Commission specifically found that in some instances Ben Hur prepares such components for other contractors and collects sales tax from those contractors when the components are sold. (L.F. 11, FOF 9; App. 3, FOF 9; Tr. 20:13-21). The commission’s decision is inconsistent with its own findings and with the uncontroverted evidence.

For the reasons set forth above, this Court should reverse the decision of the Commission below, hold that Ben Hur's fabricated structural steel are "products" as used in §144.054.2, RSMo, and that Ben Hur is entitled to the exemption from sales and use tax on the materials it bought to fabricate those products pursuant to that section.

## POINT II

THE ADMINISTRATIVE HEARING COMMISSION ERRED IN APPLYING THE RATIONALE OF *BLEVINS ASPHALT CONSTRUCTION COMPANY v. DIRECTOR OF REVENUE*, 938 S.W.2d 899 (MO. BANC 1997) BECAUSE *BLEVINS* IS INAPPOSITE TO THIS CASE IN THAT *BLEVINS* CONSTRUED SECTION 144.030.2(2), RSMO, WHICH REQUIRES THAT THE PRODUCT BE SOLD, SUBJECT TO SALES TAX, WHEREAS THE EXEMPTION PROVIDED BY SECTION 144.054.2, RSMO, DOES NOT, AND IS THEREFORE DIFFERENT AND BROADER THAN THE EXEMPTION AT ISSUE IN *BLEVINS*.

### STANDARD OF REVIEW

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## ARGUMENT

Section 144.054.2, RSMo, begins:

“In addition to all other exemptions granted under this chapter, there is hereby specifically exempted....”

The Commission’s Decision in this case (LF 21-25; App. 8-10) places great reliance on the reasoning of this Court’s opinion in *Blevins v. Director of Revenue*, 938 S.W.2d 899 (Mo. banc 1997). In so doing, the Decision overlooks or misinterprets material matters of law. In *Blevins*, this Court was construing Section 144.030. It could not have construed Section 144.054, as that statute was not enacted until 2007, ten years after *Blevins*.

This Court considered and distinguished *Blevins* in construing Section 144.054.2, RSMo, in *E & B Granite, Inc. v. Director of Revenue*, 331 S.W.3d 314 (Mo. banc 2011). First, this Court noted that Section 144.030.2(2), the statute in question in *Blevins*, applies to “personal property...sold ultimately for final consumption,” but noted that Section 144.054.2, the statute in question in *E & B Granite* and in the current matter, “broadly applies to ‘any product’”.

Second, the *E & B Granite* Court noted that Section 144.030.2(2) uses the phrase “new tangible personal property” while the legislature did not include any reference to “tangible personal property” in Section 144.054.2, RSMo. This Court concluded “[T]he legislature intended to provide additional exemptions that are not allowed by Section 144.030.” *Id.* at 317. Reliance on *Blevins* as authority for a qualifying product under Section 144.054.2, RSMo, is not appropriate after *E & B Granite*.

The Commission's reliance on *Blevins* to support its denial of Ben Hur's refund is not consistent with the statutes or this Court's precedent, and this Court should reverse the Commission's decision.

**CONCLUSION**

For the reasons stated above, this Court should hold that the Commission's decision under review misconstrues the law and is unsupported by the evidence. It should reverse the decision and hold that Ben Hur is entitled to the exemption provided by §144.054.2 for its purchases of materials.

Respectfully submitted,

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**CERTIFICATE OF SERVICE AND COMPLIANCE**

The undersigned counsel certifies that on this 10<sup>th</sup> day of September, 2014, a true and correct copy of the above brief was served on the following by eService of the eFiling System and a Microsoft<sup>®</sup> Office Word 2010 version was e-mailed to:

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The undersigned counsel further certifies that pursuant to Rule 84.06(c), this brief:

- (1) contains the information required by Rule 55.03;
- (2) complies with the limitations in Rule 84.06(b) and contains 3,998 words, determined using the word count program in Microsoft<sup>®</sup> Office Word 2010; and
- (3) the Microsoft<sup>®</sup> Office Word 2010 version e-mailed to the parties has been scanned for viruses and is virus-free.

/s/ Thomas R. Schwarz, Jr.