
SC91784

IN THE SUPREME COURT OF MISSOURI

AQUILA FOREIGN QUALIFICATIONS CORPORATION,

Respondent,

v.

DIRECTOR OF REVENUE,

Appellant.

**From the Administrative Hearing Commission
The Honorable Karen A. Winn, Commissioner**

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	3
STATEMENT OF FACTS	6
SUMMARY OF THE ARGUMENT	11
ARGUMENT	13
The Commission Correctly Held that Casey’s is Entitled to a	
Partial Sales Tax Exemption on its Purchases of Electricity	
Because Casey’s Activities Fall Within the Plain Meaning of	
§ 144.054.2.	
CONCLUSION.....	29
CERTIFICATE OF SERVICE AND COMPLIANCE	30

TABLE OF AUTHORITIES

CASES

Al-Tom Investment v. Dir. of Revenue,

774 S.W.2d 131 (Mo. banc 1989)..... 17

Arizona Department of Revenue v. Blue Line Distributing, Inc.,

43 P.3d 214 (Az. Ct. App. 2002) 24

Brinker Mo. Inc. v. Dir. of Revenue,

319 S.W.3d 433 (Mo. banc 2010)..... 12, 21, 22, 23

Burger King, Inc. v. State Tax Commission,

416 N.E.2d 1024 (N.Y. App. 1980)..... 24

Concord Publishing House, Inc. v. Dir. of Revenue,

916 S.W.2d 186 (Mo banc 1996)..... 15, 17

E & B Granite v. Dir. of Revenue,

331 SW.3d 314 (Mo. banc 2011).....*passim*

Golden Skillet Corporation v. Commonwealth of Virginia,

199 S.E.2d 511 (Va. 1973) 25

Gross v. Merchants-Produce Bank,

390 S.W.2d 591 (Mo. Ct. App. 1965) 23

HED, Inc. v. Powers,

352 S.E.2d 265 (N.C. Ct. App. 1987)..... 25

<i>Indianapolis Fruit Co. v. Department of State Revenue,</i>	
691 N.E.2d 1379 (Ind. Tax Ct. 1998)	26
<i>KFC of Ohio, Inc. d/b/a Kentucky Fried Chicken v. Kosydar,</i>	
Ohio Bd. Of Tax Appeals, No. A-408, Oct. 1, 1973	24, 26
<i>Kilbane v. Dir. of Dep't of Revenue,</i>	
544 S.W.2d 9 (Mo. banc 1976).....	14, 23
<i>Lynn v. Dir. of Revenue,</i>	
689 S.W.2d 45 (Mo. banc 1985).....	28
<i>Marriott Family Restaurants, Inc. v. Tax Appeals Tribunal,</i>	
570 N.Y.S.2d 741 (N.Y. Sup. Ct., App. Div. 1991)	25
<i>McDonald's Corp. v. Ok. Tax Comm'n,</i>	
563 P.2d 635 (Ok. 1977).....	24
<i>Southwestern Bell Tel.Co. v. Dir. of Revenue,</i>	
182 S.W.3d 226 (Mo. banc 2005).....	16, 17
<i>Six Flags Theme Parks, Inc. v. Dir. of Revenue,</i>	
179 S.W.3d 266 (Mo. banc 2005).....	23
<i>Staley v. Mo. Dir. of Revenue,</i>	
623 S.W.2d 246 (Mo. banc 1981).....	20, 23
<i>York Steak House Systems, Inc. v. Commissioner of Revenue,</i>	
472 N.E.2d 230 (Mass. 1984)	25

STATUTES

§ 144.030.2(2).....	22
§ 144.030.2(4).....	21, 22, 25
§ 144.030.2(5).....	21
§ 144.054.1(1).....	17, 18, 19
§ 144.054.2	14, 15, 16,
	17, 18, 20,
	22, 23, 27

OTHER AUTHORITIES

12 CSR 10-110.261(4)(K)	18
12 CSR 10-110.261(4)(O)	18
12 CSR 10-110-601(2)(A).....	20
New Webster Encyclopedia Dictionary of the English Language.....	20

STATEMENT OF FACTS

This case involves a claim for a partial refund of sales tax paid on electricity used in the processing or production of products by Aquila's customer, Casey's General Stores ("Casey's"). Casey's creates products for sale to its customers. Most of the products are created in a section of its retail stores, separated from the retail area. Most of the products produced by Casey's involve multiple ingredients and component items. The production of these products also require multiple steps to process and create the items.

The products produced by Casey's use or consume a number of raw materials and component parts. The following is a partial list of the products and the raw materials and component parts used in each product:

- Ice – Filtered water, plastic bags and bag ties
- Breakfast pizza, sold by the whole pie or by the slice - Pizza dough flour, water, egg, bacon bits, sausage, canned nacho cheddar cheese sauce, nonstick cooking spray, shredded mozzarella cheese and shredded cheddar cheese, packaging consisting of cardboard box packaging (whole pie) or cardstock slice holder
- Breakfast sandwiches – croissants, biscuits, egg, sausage patty, bacon rounds, ham, cheese, packaging consisting of a plastic clamshell container
- Biscuits & Gravy – biscuit and white sausage gravy, packaging consisting of a plastic clamshell container

- Cookies – cookie dough, chocolate chips, caramel, pecan, packaging consisting of a cellophane wrap (large cookies), or a cup and lid (for mini-cookies)
- Donuts - water, donut flour, cooking oil, icing, sprinkles, chopped nuts, grated coconut. Donuts sold in a dozen or ½ dozen volume may be placed in a box; donuts sold individually may be packaged in plastic bags.
- Pizza with various toppings, sold by the whole pie or slice – pizza dough flour, nonstick cooking spray, water, seasoned pizza sauce, onion, green peppers, black olives, mushrooms, refried beans, lettuce, tomato, Canadian bacon, beef, sausage, pepperoni, ham, shredded mozzarella cheese, shredded cheddar cheese, packaging consisting of cardboard box packaging (whole pie) or cardstock slice holder
- Chicken Tenders Sandwich – breaded chicken pieces, bun, lettuce, tomato, onion, pickles, packaging consisting of plastic clamshell box
- Breaded Pork Sandwich - breaded pork patty, bun, cooking oil, lettuce, tomato, onion, pickles, packaging consisting of plastic clamshell box

- Breaded Chicken Sandwich - breaded chicken breast, bun, cooking oil, lettuce, tomato, onion, pickles, packaging consisting of plastic clamshell box
- Sausage Sandwich - sausage, hoagie bun, shredded mozzarella cheese, lettuce, tomato, onion, pickles, packaging consisting of plastic clamshell box
- Mini Pizza Bites – rectangular shaped dough with pizza sauce, meat and cheese inside, packaging consisting of a plastic clamshell container
- Sub Sandwich – sliced deli meats, sliced cheese, hoagie roll, lettuce, tomato, pickles and onion, packaging consisting of clear cellophane wrap
- BBQ Beef Sandwich – chopped beef, hoagie roll, cheese, lettuce, tomato, pickles, onion, packaging consisting of plastic clamshell box

(LF 44-47; Appdx. A4-A16).

Most of the equipment used in the production of Casey's products is kept and operated in a separate section of each store. (LF 85-86, 106-108, 234). Each item set forth above is processed and produced using specific equipment operated in a production setting. For example, the items set forth above require use of the following equipment. Please note that most of the items involve the use of multiple pieces of equipment to process and produce.

- Ice that is sold in 7 lb. bags - Manitowic Ice Maker machine, ice scoop
- Breakfast pizza, sold by the whole pie or by the slice – Lincoln Oven, Univex Mixer, Acme Dough Roller or Somerset Dough Roller Machine, Hatco Pizza Warmer, scale, Beverage Air Refrigerated Prep Table, pizza pan, “spoodle”, “Meat Measuring Cup”, mixing bowl, “Cheese Measuring Cup”, pizza paddle, spatula double handled pizza knife.
- Breakfast sandwiches - Lincoln Oven; Hatco Sandwich Warmer, knife
- Biscuits & Gravy - Lincoln Oven; Server Brand Gravy Warmer, ladle, knife
- Cookies - Lincoln Oven, donut tray, spatula
- Donuts - Belshaw Donut Fryer, Univex Mixer, scale, thermometer, water pitcher, metal mixing bowl, hand timer, donut tray, spatula, Food Quality Monitor test kit, cooling rack
- Pizza with various toppings, sold by the whole pie or slice - Lincoln Oven, Univex Mixer, Acme Dough Roller, Somerset Dough Roller, Hatco Pizza Warmer, scale, donut tray, Beverage Air Refrigerated Prep Table, pizza pan, spoodle, “Meat Measuring Cup”, mixing

bowl, “Cheese Measuring Cup”, pizza paddle, spatula, double handled pizza knife

- Chicken Tenders Sandwich - Wells Tenderloin Fryer, Hatco Sandwich Warmer, knife
- Breaded Pork Sandwich - Wells Tenderloin Fryer, Hatco Sandwich Warmer, knife
- Breaded Chicken Sandwich - Wells Tenderloin Fryer, Hatco Sandwich Warmer, knife
- Sausage Sandwich - Lincoln Oven, Hatco Sandwich Warmer, knife
- Mini Pizza Bites - Lincoln Oven, Hatco Sandwich Warmer
- Sub Sandwich – Beverage Air Refrigerated Prep Table, knife, True Brand Submarine Sandwich Cooler
- BBQ Beef Sandwich – Lincoln Oven, Beverage Air Prep Table, knife

(LF 47-50; Appdx. A4–A16).

Finally, each of the products produced by Casey’s not only involve multiple ingredients and multiple pieces of production equipment, each requires a multi-step production process. Most of the items cannot be produced by simply “heating up” frozen materials. Instead, as the Commission found, these items require Casey’s employees to engage in detailed and specific activities to process the raw materials and produce a final product. (LF 51-63; App. A4-A16). Many of the production steps are set forth in minute

detail and require faithful adherence to a process necessary to produce a product to be sold. *Id.*

SUMMARY OF ARGUMENT

This Court in *E & B Granite v. Dir. of Revenue*, 331 SW.3d 314, 317 (Mo. banc 2011), established that in § 144.054 the “legislature intended to provide additional exemptions that are not allowed by section 144.030.” Nevertheless, without citing *E & B Granite*, the Director takes the position that the partial exemptions allowed under § 144.054 are limited by the restrictions set forth in § 144.030, as interpreted by this Court in *Brinker Mo. Inc. v. Dir. of Revenue*, 319 S.W.3d 433 (Mo. banc 2010). Thus, the Director argues that retail establishments are not manufacturing “plants”, even though that word is specifically omitted from § 144.054. The Director’s argument fails to give effect to the intent of the legislature to establish additional exemptions than those allowed in § 144.030. Under the Director’s arguments, presumably Casey’s production activities would be entitled to the exemption if the activities took place in a separate building, designated as a “plant” or production facility. However, § 144.054 does not limit the type of business entity that qualifies for the exemption.

Further, the Director does not dispute that Casey’s produces products using multiple items of raw materials and component parts. The Director also does not dispute that, for many products, Casey’s uses a multi-step procedure and utilizes different types of commercial production equipment. Instead, the Director argues that the processing and production of food products does not qualify for any of the exemptions set forth in § 144.054.

The Commission correctly found that § 144.054 was clearly designed to be another exemption and not just an extension of existing exemptions. The statute exempts chemicals, energy, and materials in addition to machinery and equipment. The statute omits the word “plant” and includes the broader term “production facility.” The exemptions apply to the production of “any product,” and not the more narrow definition of product in § 144.030.

The Commission correctly gave effect to the legislature intent to provide additional exemptions. The Director’s position ignores the plain language of § 144.054. The Director’s position can prevail only if words not chosen by the legislature and restrictions not included are judicially inserted into the statute.

ARGUMENT

The Commission correctly Held that Casey’s is entitled to a Partial Sales Tax Exemption on its Purchases of Electricity Because Casey’s Activities Fall Within the Plain Meaning of § 144.054.2.

The title of § 144.054 is instructive – “additional sales tax exemptions for various industries and political subdivisions.” By enacting a separate statutory section, the legislature clearly intended to add “additional” sales tax exemptions to those already set forth in other sections of Chapter 144. When enacting new statutes on similar subjects, it is ordinarily the intent of the legislature to effect some change in existing law. *Kilbane v. Dir. of Dep’t of Revenue*, 544 S.W.2d 9, 11 (Mo. banc 1976). It must be assumed that the legislature did not intend to perform a useless act. *E & B Granite, Inc. v. Dir. of Revenue*, 331 S.W.3d 314, 317 (Mo. banc 2011).

Section 144.054.2 provides in relevant part:

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

(Emphasis added). Section 144.054 was enacted in 2007. L. 2007 S. B. 30. The items exempted by § 144.054.2 are not exempt from all taxes. The exemption is a “partial”

exemption, exempting these items from state sales tax, state and local use taxes, but not local sales taxes. There is only one reported case construing § 144.054 – *E & B Granite*. Interestingly, the Director’s brief fails to cite this case.

E & B Granite stands for the proposition that § 144.054 was written broadly to grant more exemptions than those previously allowed. The issue was whether the taxpayer’s purchase of raw granite slabs used to make granite countertops were products under § 144.054.2 and exempt from sales and use tax. 331 S.W.3d at 315. This Court recognized § 144.054.2 was “broader” than § 144.030.2. *Id.* at 317. This Court acknowledged that the legislature intended to provide “additional exemptions that are not allowed by §144.030.” *Id.* To remove all doubt on this issue, the legislature was explicit – “the provisions of this subsection shall be in addition to any state and local sales tax exemption provided in section 144.030.” § 144.054.2.

Casey’s Business Falls Within The Plain Meaning of § 144.054

The Director argues that Casey’s is a convenience store and retail establishment and, therefore, cannot be a manufacturer under § 144.054. While this issue was not addressed in *E & B Granite*, it appears the Director and the Court assumed that a retail business qualified for the additional exemptions set forth in § 144.054. *E & B Granite* was a business that retailed its own product; it manufactured, processed and produced granite countertops and other granite products for sale to its retail customers. 331 S.W.3d at 315. Moreover, this Court has allowed the narrower production exemptions under § 144.030 for taxpayers who retailed their own products. *See, e.g., Concord Publishing*

House, Inc. v. Dir. of Revenue, 916 S.W.2d 186 (Mo banc 1996) (exemption allowed to newspaper that retailed its product); *Southwestern Bell Tel. Co. v. Dir. of Revenue*, 182 S.W.3d 226 (Mo. banc 2005) (retail phone company entitled to production exemptions for its products – taxable telecommunication services).

Further, § 144.054.2 contains no limitation on the type of business entity entitled to the exemptions. The statute uses words other than manufacturing, including “processing, compounding, mining or producing.” Unlike § 144.030, the statute does not use the word “plants” or any other language limiting the exemptions to non-retail establishments.

The Director cites the business license applications filed by Casey’s and the real estate zoning classifications of the facilities at issue to support her position that Casey’s does not qualify for the partial exemption. App. Br. at 6-7. Section 144.054.2, however, does not require that the taxpayer be a certain type of business or that the taxpayer obtain a certain type of local business license to qualify for the partial exemption. Nor does § 144.054.2 require that the processing activity be performed in a certain type of location to qualify for the partial exemption. All of the Director’s arguments are red herrings intended to guide this Court away from the fact that Casey’s performs production procedures that meet the definition of “processing” as set forth by the legislature in § 144.05.1 (1).

The Director’s position that retail businesses are not entitled to the partial exemption under § 144.054.2 is not supported by the plain language of the statute. E & B Granite is clearly a business that retails its products – granite countertops. *E & B*

Granite, 331 S.W.3d at 316. In fact, the Director agreed that countertops sold at retail were entitled to exemptions under § 144.054.2. *Id.* at 315 n. 1. The Director’s agreement in *E & B Granite* is consistent with this Court’s opinions allowing similar production exemptions to business entities that retailed their products. *Concord Publishing House*, 916 S.W.2d at 196 (taxpayer producer sold its newspapers at retail); *Southwestern Bell*, 182 S.W.3d at 237 (phone company entitled to production exemptions—retailing telephone services); *see also Al-Tom Investment v. Dir. of Revenue*, 774 S.W.2d 131, 134, (Mo. banc 1989) (component part production exemption allowed to a KFC restaurant that retailed its product).

The Director insists on reading into the statute an “entity” or “industrial plant” requirement. App. Br. at 21-26. However, the primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute. The Director’s position that retail establishments are excluded from the statute is not supported by the plain language of the statute.

Under the statute, the activity is what causes the exemption, not where the activity is performed. The statute does not specify where the processing must take place and sets forth no required situs for the activity to be exempt. This statute does not limit the locations or type of business that qualifies for the partial exemption.

The only limitation in the statute, for example, is that for any post-processing treatment to qualify for the partial exemption, such post-processing treatment must be performed at the same facility as the original processing activity. Section 144.054.1(1)

defines processing to include “treatment necessary to maintain or preserve such processing by the producer at the production facility.” For example, electricity used to preserve a product (say ice or ice cream) qualifies for the exemption if it is used to keep the product frozen at the site where the product is processed or produced. However, if the product is transferred to a different facility, such as a warehouse away from where the processing took place, it does not qualify for the exemption. As such, neither the definition of “processing” in § 144.054.1(1), nor the exemption itself set forth in § 144.054.2, require the manufacturing, production or processing activity be performed in a specific setting, or deny the exemption to such activities performed at facilities that also retail.

The Director has previously recognized that exemptions are available for retail establishments. The Director allows the § 144.054 exemption to apply to a hobby shop’s production of frames (12 CSR 10-110.261(4)(K)), a retail bakery’s production of baked goods (example (0) of the same regulation), a retail drug store’s production of photographs using automated photo lab equipment (Letter Ruling 4779), and a meat processor’s production of meat into edible products or marketable products to be sold to the public (Letter Ruling 5500).

Casey’s Production Activities Are Within The Plain Meaning of § 144.054.

The Director attempts to minimize the activities that take place when Casey’s employees transform materials into finished products. The Director implies that Casey’s is “simply heating up frozen foods.” App. Br. at 17. The Commission, however, made

extensive findings of fact regarding the processes and activities that take place at Casey's.

The Director does not challenge these findings of fact.

Section 144.054.1(1) specifically defines "processing" as:

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.

For example, many of the items processed by Casey's involve multiple steps and materials. Pizzas are prepared by mixing pizza flour into a Univex mixer with the appropriate amount of water to form the pizza dough. The dough is then separated to a specific weight, using a dough scale. The weighed dough is then rolled and placed into the Acme Dough Roller Machine or the Somerset Dough Roller Machine and goes through four or five cycles to flatten the dough. The flattened dough is then placed into the Beverage Air Preparation Table where it is hand-rolled with a Dockit Roller. The flattened dough is placed in a pizza pan, previously sprayed with a non-stick cooking spray. The top of the dough is covered with nacho cheese sauce and various toppings are applied. The pizza is then cooked in a Lincoln oven, then taken off the conveyer and placed on the finishing table to be sliced or boxed. Individual slices are then placed into a Hatco FSDT-2 pizza warmer. Thus, the processing of pizza involves several steps utilizing several different types of equipment. (Appdx. A5, A9-10).

There are many other products produced at Casey's that involve similar multi-step activities, such as the production of cookies, cake donuts and ice. (LF 51-63). The Commission's findings of fact sets forth the activities, materials and equipment needed to process the materials into finished products. (Appdx. A4-A16).

The Director implies that "processing" is just a subset of "manufacturing" and, therefore, Casey's activities do not fall within the provisions of the statute. The Director's argument, however, ignores fundamental rules of statutory construction. The legislature chose to use additional terms, such as, "processing, compounding, mining, [and] producing . . ." Section 144.054.2. "[E]very word, clause, sentence, and section" of a statute must be given some meaning. *Staley v. Mo. Dir. of Revenue*, 623 S.W.2d 246, 250 (Mo. banc 1981).

Contrary to the Director's brief (App. Br. at 18 n. 2), Casey's did note before the Commission that the statute includes the word "compounding," albeit without a statutory definition.¹ The Director, however, provides a definition of "compounding" as used in § 144.054 – "[p]roducing a product by combining two (2) or more ingredients or parts." 12 CSR 10-110.601(2)(A). This is consistent with the common meaning of the word. The New Webster Encyclopedia Dictionary of the English Language (p. 171) defines "compound" as "to mix up or mingle together; to form by mingling two or more ingredients or elements into one."

¹ Petitioner's Supplemental Brief filed October 4, 2010. Both parties' supplemental briefs filed after the *Brinker* decision were inadvertently omitted from the Legal File.

Many of Casey's production activities meet the meaning of "processing" as defined in § 144.051.1(1). Other activity falls within the Director's definition of "compounding." And virtually all the production activity is within the common meaning of the word "producing." The legislature clearly intended that the exemptions apply to more than just "manufacturing". The legislature used broad and expansive terms that allow the exemptions to apply to production activities in addition to the traditional forms of "manufacturing."

Brinker does not apply

The Director relies primarily on *Brinker Missouri, Inc. v. Dir. of Revenue*, 319 S.W.3d 433 (Mo. banc 2002). The Commission, however, found that *Brinker* did not apply because *Brinker* addressed different statutory sections and the exemptions set forth in § 144.054 were intended to be broader. In *Brinker*, the taxpayer sought exemptions under two different statutory sections -- §§ 144.030.2(4) and (5). Brinker owned and operated 23 restaurants in Missouri and each restaurant prepared and served food and drink to the public. Brinker sought exemptions for the kitchen equipment used to make food and prepare it for serving to customers. 319 S.W.3d at 436.

In denying the exception, the Court first analyzed § 144.030.2(5) and emphasized that the statutory language included the word "plants". *Id.* at 436. The Court also considered the exemption under § 144.030.2(4). The Court stated subsection (4) should be construed in conjunction with subsection (5). The Court's denial of the exemption was based on a view that Brinker's restaurants were not manufacturing "plants." *Id.* at 437.

Critical to the Court’s analysis was the lack of definitions contained in § 144.030. The word “plants” was not defined and the Court relied on a dictionary definition of the word. 319 S.W.3d at 436 n.3. Because of a lack of a statutory definition, the Court further held that a restaurant does not manufacture or produce food or drink; instead, restaurants prepare, cook and serve food and drink to their customers. *Id.* at 438.

Brinker specifically addressed the production exemptions in §§ 144.030.2(4) and (5). 319 S.W.2d at 435. Neither subsection uses the terms “processing” or “compounding.” Both subsections include the word “plants” and subsection (5) uses the phrase “manufacturing, mining or fabricating plants.”

Thus, in *Brinker*, the Court concluded that the taxpayer’s activities did not constitute “manufacturing” only because the legislature did not expressly define the term in the exemption statute and the provisions of the statute included the word “plants.” In § 144.054, however, the legislature eliminated the word “plants” and provided a separate definition for “processing.” Because this Court has held that § 144.054 is broader than § 144.030, the Director cannot rely on *Brinker* to bootstrap a narrow definition of “manufacturing” or insert the word “plants” into the statute to override the legislature’s express language.

There are other differences between § 144.030 and § 144.054 that make *Brinker* inapposite. Section 144.054.2 applies to the processing of “any product.” Section 144.030, however, limits exemptions to “new personal property [. . .] intended to be sold ultimately for final use or consumption.” That phrase is found in §§ 144.030.2(2), (4) and

(5). Casey's produces products that are sold without service.. These products include, but are not limited to, ice, donuts and cookies packaged and sold at retail. In *E & B Granite*, this Court emphasized that "section 144.054.2 broadly applies to 'any product.'" 331 S.W.3d at 317. Casey's creates these products using established procedures to transform raw materials and other items to a different state or thing – tangible personal property with a market value. The procedures used to transform these raw materials typically involve a series of acts and multiple ingredients and materials.

The goal of a statutory construction is to give effect to the legislature's intent. *Six Flags Theme Parks, Inc. v. Dir. of Revenue*, 179 S.W.3d 266, 268 (Mo. banc 2005); *see also, Staley*, 623 S.W.2d at 250 ("all provisions of a statute must be harmonized and every word, clause, sentence, and section thereof must be given some meaning"); *Kilbane*, 544 S.W.2d at 11 (legislative changes should not be construed as to have accomplished nothing and to have been useless); *Gross v. Merchants-Produce Bank*, 390 S.W.2d 591, 597 (Mo. Ct. App 1965) ("legislatures are not presumed to have intended a useless act").

Brinker did not address the additional exemptions set forth by the legislature in § 144.054.2. The use of multiple terms and the broad definition of "processing" included in the statute clearly indicate the legislature intended to include activities in addition to the traditional form of manufacturing.

Cases From Other States

The Director's citation to other states and their unique statutory schemes is not persuasive. For instance, in *McDonald's Corp. v. Ok. Tax Comm 'n*, 563 P.2d 635 (Ok. 1977), the Oklahoma court denied the exemption because the restaurant did not meet two requirements of that exemption statute not found in Missouri's statute: (1) that the establishment must be "primarily engaged in manufacturing" and; (2) that the establishment must be "generally recognized as [a 'manufacturing plant.]" Neither was held to be the case for the McDonald's restaurant because the court viewed McDonald's as primarily a retailer rather than manufacturer and because the restaurant would not be generally recognized as a manufacturing plant.

In rejecting the taxpayer's claim, the Oklahoma court distinguished *KFC of Ohio, Inc., d/b/a Kentucky Fried Chicken v. Kosydar*, Ohio Bd. Of Tax Appeals, No. A-408, Oct. 1, 1973, Ohio Tax Reports, p. 11, 313 sections 200-682 (granting the manufacturing exemption for fryers and other equipment), because the Ohio exemption statute, like Missouri's, did not include the above two conditions. What this analysis shows is that courts, like the one in Ohio, who have construed statutes similar to Missouri's, actually find in favor of taxpayers.

Arizona Department of Revenue, v. Blue Line Distributing, Inc., 43 P.3d 214 (Az. Ct. App. 2002), is inapposite for the reason that Arizona's exemption statute, like Oklahoma's, requires a general recognition that the operation is deemed a "manufacturing and processing operation." *Burger King, Inc. v. State Tax Commission*, 416 N.E.2d 1024

(N.Y. App. 1980) and *Marriott Family Restaurants, Inc. v. Tax Appeals Tribunal*, 570 N.Y.S.2d 741 (N.Y. Sup. Ct., App. Div. 1991), are also inapposite. In both cases, the courts rejected the taxpayers' manufacturing equipment exemption claims because they applied only to the production of "tangible personal property," something that the courts determined restaurant food was not. Missouri's definition of manufactured product in section 144.010.1(14) includes both tangible personal property or taxable services, so it does not matter whether Casey's product is deemed tangible personal property (even though clearly it is).

Golden Skillet Corporation v. Commonwealth of Virginia, 199 S.E.2d 511, 514 (Va. 1973), is inapposite because the exemption statute at issue used the word "industrial," thus requiring manufacturing to occur in an "industrial" setting: "[w]hen so interpreted and read, [the exemption statute] is intended ... to provide exemption ... only in the industrial sense." Sections 144.054, 144.030.2(4) and (5) have no such limitation. For the same reason, *HED, Inc. v. Powers*, 352 S.E.2d 265 (N.C. Ct. App. 1987), is inapposite since the manufacturing exemption applied to a "manufacturing industry or plant."

Finally, *York Steak House Systems, Inc. v. Commissioner of Revenue*, 472 N.E.2d 230 (Mass. 1984), is inapposite. There, the question was whether a property tax exemption for a "manufacturing corporation" applied. That is not the issue herein. Casey's need not be deemed a "manufacturing corporation" to be manufacturing, processing or producing a product (either tangible product or a service) in Missouri.

As explained above, courts that have construed exemption statutes more like Missouri's have concluded that the exemption applies. For instance, in *KFC of Ohio, Inc., d/b/a Kentucky Fried Chicken v. Kosydar*, *supra*, the Ohio Board of Tax Appeals allowed the manufacturing exemption for a restaurant's chicken fryers and other equipment. There, the exemption applied to purchases of property used "directly in the production of tangible personal property for sale by manufacturing, processing, refining or mining[.]" The definition of "manufacturing" or "processing" was statutorily defined as:

The transformation or conversion of material or things into a different state or form from that in which they originally existed and ... includes the adjuncts used during and in, and necessary to carry on and continue, production to complete a product at the same location after such transformation or converting has commenced.

And, in *Indianapolis Fruit Co. v. Department of State Revenue*, 691 N.E.2d 1379, 1384 (Ind. Tax Ct. 1998), the Indiana Tax Court determined that equipment used to ripen bananas qualified for the exemption for "manufacturing machinery, tools and equipment used to produce 'other tangible personal property.'" There, the taxpayer used equipment and gas to chemically ripen bananas. The court granted the exemption because the process transformed the bananas from an unmarketable to a marketable state that was of a substantially different "form, composition or character[.]" That taxpayer's processes caused a much smaller change in the value of the food product than Casey's herein. These

statutory schemes more closely mirror Missouri's than those schemes of the states whose decisions the Director cites.

In summary, either decisions from other states are irrelevant because the courts addressed entirely different exemption schemes or those state's decisions, such as the ones from Ohio and Indiana, support Casey's construction of Missouri law. In addition, the tax schemes in Alabama and Texas show that Missouri is not alone in its farsighted approach to encouraging production of products in our state. Ultimately, the Commission determined that Missouri exemptions must be decided on Missouri law as "each state has its own statutory exemptions, none of which is identical to the one at issue here." (Appdx. A30).

The Commission's Decision Will Not Lead to Absurd or Illogical Results

The Director argues that the Commission's ruling on § 144.054.2 would lead to thousands of additional claims for exemption and absurd or illogical results. The Director made the absurd and illogical argument in *E&B Granite* and continues to make this "Chicken Little"—the-sky-is-falling argument to the Court in her appeal. This Court rejected the Director's argument emphasizing that "[i]f the legislature creates a tax exempt situation for a business, this Court must enforce it." *E & B Granite*, 331 S.W.3d at 318. The Director's policy arguments are better directed to the legislature. The Court's role is to apply the plain language of the statute. As the Commission noted, the "wisdom of any such exemption is for the legislature . . . to decide." (Appdx. A32). The

Court must give effect to legislature intent and apply the law as written. *Lynn v. Dir. of Revenue*, 689 S.W.2d 45, 49 (Mo. banc 1985).

Moreover, there is no evidence in the record that the Commission's interpretation of § 144.054 would have a negative effect on tax revenues. The reduction of a business's tax liability on business inputs encourages additional production that could just as easily result in a net increase in jobs and tax revenues, including sales tax on retail sales of the products produced, individual income tax from job creation and corporate income taxes. The legislature may have intended to allow additional exemptions to encourage more manufacturing, processing and production.

Other states also allow their production and processing exemptions to apply to qualifying activities conducted in retail settings. In fact, Casey's qualifies for sales tax exemptions on the electricity it purchases for production activities at retail convenience stores in Kansas and Iowa. (LF 144-145). The Iowa and Kansas legislatures allowing of a similar production exemption at retail locations does not appear to have destroyed their tax base, contrary to the Director's prediction for Missouri.

A more reasonable explanation is that the legislature intended to level the playing field and provide Missouri businesses similar exemptions to better compete with neighboring states. The point is whether the partial exemptions set forth § 144.054.2 are advisable is a question for the legislature.

CONCLUSION

For the foregoing reasons, the Administrative Hearing Commission's decision should be affirmed.

/S/ Bruce Farmer

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was filed electronically via Missouri CaseNet, and served, on November 25, 2011 to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that he brief contained 5611 words.

/s/Bruce Farmer
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