

SC93915

IN THE SUPREME COURT OF MISSOURI

**FENIX CONSTRUCTION COMPANY OF ST. LOUIS,
FIVE STAR READY-MIX CONCRETE COMPANY,
and HORSTMAYER ENTERPRISES,**

Appellants,

vs.

DIRECTOR OF REVENUE,

Respondent.

**Appeal from the Missouri Administrative Hearing Commission
The Honorable Sreenivasa Rao Dandamudi, Commissioner**

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
STATEMENT OF FACTS	1
SUMMARY OF THE ARGUMENT	10
ARGUMENT	12
I. The General Assembly Did Not Intend for Construction Projects or Construction Facilities, Such as the Building of Tilt-up Concrete Walls, to be Exempt as “Manufacturing, Processing, Compounding, Mining, or Producing of Any Products” Under § 144.054.2 – Responding to Appellants’ Points I & II.....	13
A. The Plain Language of § 144.054 Makes No Reference to Construction or Construction Materials.....	14
B. Surrounding Statutory Provisions Confirm That § 144.054 Does Not Include Construction or Construction Materials.	16
C. Fenix Construction Never Treated Its Tilt-up Construction Projects as Manufacturing, Processing, or Producing a Product.	19
II. The General Assembly Did Not Expand the Types of Activities Exempted Under the Manufacturing Exemption in § 144.054.2,	

Only the Items That Are Exempt. – Responding to Appellants’
Points I & II..... 21

A. Applying § 144.054.2 to Activities Other than
Manufacturing is Contrary to the Express Intent of the
General Assembly..... 23

B. Building Construction is not the Type of Industrial
Activity Ordinarily Associated with Manufacturing. 25

C. The Decision in *E & B Granite* is Inapplicable..... 29

CONCLUSION..... 32

CERTIFICATE OF SERVICE AND COMPLIANCE 33

TABLE OF AUTHORITIES

CASES

<i>AAA Laundry & Linen Supply Co. v. Dir. of Revenue,</i>	
425 S.W.3d 126 (Mo. banc 2014)	21
<i>Akins v. Dir. of Revenue,</i>	
303 S.W.3d 563 (Mo. banc 2010)	14
<i>Aquila Foreign Qualifications Corp. v. Dir. of Revenue,</i>	
362 S.W.3d 1 (Mo. banc 2012)	<i>passim</i>
<i>Blevins Asphalt Construction Co. v. Dir. of Revenue,</i>	
938 S.W.2d 899 (Mo. banc 1997)	31
<i>Branson Properties USA, L.P. v. Dir. of Revenue,</i>	
110 S.W.3d 824 (Mo. banc 2003)	12
<i>Bratton Corp. v. Dir. of Revenue,</i>	
783 S.W.2d 891 (Mo. banc 1990)	12
<i>Brinker Mo., Inc. v. Dir. of Revenue,</i>	
319 S.W.3d 433 (Mo. banc 2010)	10, 11, 14, 24
<i>City of St. Louis v. Smith,</i>	
114 S.W.2d 1017 (Mo. 1937)	13, 25
<i>Cook Tractor Co., Inc. v. Dir. of Revenue,</i>	
187 S.W.3d 870 (Mo. banc 2006)	12, 22, 24

E & B Granite, Inc. v. Dir. of Revenue,
331 S.W.3d 314 (Mo. banc 2011) 23, 29, 30, 31

International Business Machines Corp. v. Dir. of Revenue,
958 S.W.2d 554 (Mo. banc 1997) 26

Mid-Am. Dairymen, Inc. v. Dir. of Revenue,
924 S.W.2d 280 (Mo. banc 1996) 8, 26

Overland Steel, Inc. v. Dir. of Revenue,
647 S.W.2d 535 (Mo. banc 1983) 13

Southwestern Bell Telephone Co. v. Dir. of Revenue,
182 S.W.3d 226 (Mo. banc 2005) 19

State ex rel. White Family P’ship v. Roldan,
271 S.W.3d 569 (Mo. banc 2008) 14

Union Elec. Co. v. Dir. of Revenue,
425 S.W.3d 118 (Mo. banc 2014)*passim*

STATUTES

§ 144.030.....*passim*

§ 144.054.....*passim*

§ 144.062.....*passim*

OTHER AUTHORITIES

http://en.wikipedia.org/wiki/Square_peg_in_a_round_hole..... 10

Rule 84.04(f) 1

STATEMENT OF FACTS

The Director of Revenue supplements the appellants' statement of facts, pursuant to Rule 84.04(f), for the Court's use and consideration.

A. Fenix Construction is a Construction Contractor.

Fenix Construction Company of St. Louis, which engages in the activities that are the subject of this appeal, is a construction contractor offering its customers a complete package of concrete construction services, including foundations, flatwork, and tilt-up construction services. (Respondent's Hearing Exhibit A (Respnd't Ex. A), pp. 1-2, 4, 34, and 89; Apr. 29, 2013 Transcript, page 28: lines 6-16 ("Tr. 28:6-16")). To this end, it maintains various business licenses, including contractor and general business licenses. Fenix Construction does not, however, have any license as a manufacturer. (Joint Hearing Exhibit 1 (Joint Ex.), ¶ 18 & Respnd't Exhibit M).

For foundation construction, Fenix Construction "begin[s] with the layout of the building, followed by excavation of dirt, furnishing and installation of rebar, and pouring of grade beams and/or footings." (Respnd't Ex. A, p. 34). For buildings that involve foundation walls, Fenix Construction will "form, pour, and strip anywhere from a two-foot knee wall to a thirty-foot foundation wall." (Respnd't Ex. A, p. 34). Flatwork construction, in turn, includes interior and exterior flatwork. (Respnd't Ex. A, p. 89). Examples of

exterior flatwork that Fenix Construction can handle are sidewalks, approaches, curbs, and concrete parking lots. (Respnd't Ex. A, p. 89).

Tilt-up construction is used for various types of buildings, including warehouses, churches, office buildings, schools, and retail buildings. (Respnd't Ex. A, p. 4). According to Fenix Construction, it is a viable construction option for these buildings because it “combines reasonable cost with low maintenance, durability, speed of construction, fire resistance, security, and minimal capital investment.” (Respnd't Ex. A, pp. 2 & 4).

B. Tilt-up Construction is Construction.

“Tilt-up construction is a technique for casting concrete elements in a horizontal position at the jobsite and tilting them to their final position in the structure[.]” (Petitioners’ Hearing Exhibit 1 (Pet. Ex. 1), p. 551.1R-2). It has a long history in the United States beginning as early as 1906. (Pet. Ex. 1, pp. 551.1R-2, 551.1R-3). “Tilt-up construction was first used for large, plain, simple structures—most notably warehouses or distribution centers.” (Pet. Ex. 1, p. 551.1R-3). “This is still the dominant building-type in tilt-up construction.” (Pet. Ex. 1, p. 551.1R-3).

“Familiarity with tilt-up by designers and the use of innovative finishes have made tilt-up acceptable for use in other types of buildings, including office buildings and retail structures.” (Pet. Ex. 1, p. 551.1R-3). “Correctional facilities, schools, multistory office buildings, low-temperature storage

buildings, industrial and manufacturing projects, recreational facilities, churches, and housing also use tilt-up construction.” (Pet. Ex. 1, p. 551.1R-3).

Tilt-up construction is similar to other concrete construction in that it does not require a different crew of construction workers, is conducted using the same skills and trades as other concrete construction work, and does not result in any higher profit margins than other concrete construction work. (Tr. 61:19-25, 62:1-6). Fenix Construction uses some of the same machinery in providing tilt-up construction services that it uses in providing foundation and flat work construction services. (Respnd’t Ex. A, *compare* pp. 5 and 14 (tilt-up) with 43, 49, 54 (foundations), and pp. 9, 19-21 (tilt-up) with 39, 50, 64, 68, 84 (foundations) and 94, 110, 116, 122, 123, 126 (flatwork), and pp. 18 (tilt-up) with 108, 112, 114, 115 (flatwork)). Fenix Construction also uses similar materials, namely concrete and reinforcing steel, in providing tilt-up construction services as it uses in providing foundation and flatwork construction services. (Respnd’t Ex.t A, pp. 4-130).

Fenix Construction repeatedly referred to tilt-up construction as just another type of “construction:”

- “Due to the rapid popularity of the tilt-up industry, Fenix has operated across the US constructing warehouses, offices, churches, retail shops, and schools” (Respnd’t Ex. A, p. 1);

- “Tilt-up combines reasonable cost with low maintenance, durability, speed of construction, fire resistance, security and minimal capital investment” (Respnd’t Ex. A, p. 2);
- “Our 18 years of experience and expertise in this area of construction is unmatched when comparing us to others” (Respnd’t Ex. A, p. 4);
- “Tilt-up concrete panels can be constructed using numerous methods” (Respnd’t Ex. A, 4);

C. Building Tilt-up Concrete Walls.

After winning a concrete construction bid, Fenix Construction has meetings with the general contractor to start working out the schedule for the project. (Tr. 31:14-20, 33:8-15). Fenix Construction will also contact its engineer to begin working out the engineering requirements for the walls. (Tr. 31:14-25, 32:1). The engineer will use the building’s architectural drawings to develop the specific tilt-up drawings to be followed in the project. (Tr. 31:21-25, 32:1-2, 64:25, 65:1-9). Fenix Construction will also order the rebar, embeds, and other items that will be needed for the construction project. (Tr. 32:2-4).

After the preliminary matters are taken care of, Fenix Construction will begin building the walls at the construction site because the wall panels

cannot practically or economically be made in another location then moved to the construction site, given their size and weight. (Tr. 34:1-23). The wall panels are cast on either the building's floor slab (called, "slab on grade"), or a separate slab outside of the building that is poured for this purpose. (Tr. 35:3-23). The majority of tilt-up construction projects use slab on grade to pour the walls. (Pet. Ex. 1, p. 551.1R-11).

Regardless of whether the wall is made on the floor slab or a separate slab outside the building, Fenix Construction tries to pour each wall panel in as close proximity as possible to its ultimate location within the building structure to minimize the distance the wall panel will have to be moved and the size of the crane necessary to move it. (Tr. 35:24-25, 36:1-16). After determining whether the wall panels will be made on grade or on a separate slab, a panel layout is developed. (Tr. 38:13-25, 39:1-3). Panel layout is one of the most important planning items prior to actual construction because the construction schedule can be optimized if the tilt-up panels are poured in the same order as they are to be erected and as close as possible to their final position in the building. (Pet. Ex. 1, pp. 551.1R-6, 551.1R-7).

One of the next steps is forming, which refers to the use of wood to build a form of the wall panel into which concrete will be poured. (Tr. 40:13-21, 41:12-21; Pet. Ex. 1, pp. 551.1R-12, 551.1R-13; Respnd't Ex. A, pp. 7-9, 22). After forming, any unique aesthetic architectural features of the

building, such as thin brick used to give the appearance of a masonry wall, are put in the form. (Tr. 46:5-25, 47:1-17, 48:1-15; Respnd't Ex. A, pp. 25-26, 28).

After the placing of architectural features, if any, reinforcing steel rebar is placed in the form. (Tr. 41:24-25; Respnd't Ex. A, pp 7-8, 12, 16-17, 22). The amount of reinforcing steel depends upon the size of the building and the specifications for the strength of the walls required by the owner or general contractor. (Tr. 42:2-25, 43:1-10). A variety of embeds are also placed in the form as well. (Tr. 44:11-25, 45:1-24). Embeds can be of various types, including embeds that connect to the bracing that holds up the tilt-up wall panel until the structural steel is attached to the building, or embeds that provide lifting loops to be used with the crane that lifts the wall panel into place. (Tr.: 44:11-25, 45:1-24).

Next, the concrete is poured into the forms. (Tr. 50:7-16; Respnd't Ex. A, pp. 19-21). Pumping is generally used to pour the concrete in the forms. (Pet. Ex. 1, p. 551.1R-21; Tr. 50:15-21). After filling the forms with concrete, the wall is finished to a hard trowel finish using machines driven by Fenix Construction's employees that are placed on top of the backs of wall panels. (Tr. 51:6-25, 52:1-4; Respnd't Ex. A, p. 18). Once the forms are removed and the cement is cured, the wall panels are prepared for erection. (Pet. Ex. 1, pp. 551.1R-23, 551.1R-24; Tr. 53:22-25, 54:1-20; Respnd't Ex. A, p. 15).

Every wall panel made by Fenix Construction is custom constructed for the specific job and in accordance with the detailed specifications of the customer for that specific panel on that specific job. (Tr. 64:18-24). Due to the fact that each wall panel is designed for a particular building, it cannot be sold to any other person and has only value to the specific customer who hired Fenix Construction to build it. (Tr. 66:5-22, 67:3-5).

D. Taxpayers Seek Refunds for Construction Materials.

On July 28, 2011, Horstmeyer Enterprises, Inc. d/b/a Tulley Equipment Company filed a state sales tax refund claim with the Director of Revenue (Director) asserting it had erroneously collected and remitted state sales tax on its sales of reinforcing steel to Fenix Construction. (Joint Ex. ¶ 5 & Respnd't Ex. A). Shortly thereafter, Five Star Ready Mix Concrete Company filed a state sales tax refund claim with the Director asserting it had erroneously collected and remitted state sales tax on its sales of concrete to Fenix Construction. (Joint Ex. ¶ 6 & Respnd't Ex. B). Finally, Fenix Construction itself filed a Sales Tax Protest Payment Affidavit with the Director stating that it was paying under protest state sales tax on its purchases of: (a) reinforcing steel and chairs; (b) concrete; and (c) embeds. (Joint Ex. ¶¶ 7-16 & Ex. C-L). The Director denied the claims of Horstmeyer, Five Star, and Fenix Construction (taxpayers). (Joint Ex. ¶¶ 5-16).

The taxpayers appealed to the Administrative Hearing Commission

(Commission). The Commission considered the evidence and arguments and identified two critical issues: “1. Whether tilt-up wall panels are products under § 144.054.2”^{1/} and “(2) Whether the construction of tilt-up wall panels constitutes manufacturing, processing, or producing under § 144.054.2.” (Respondent’s Appendix (Respnd’t App.) A13). As to the first issue, the Commission concluded that “[w]hile these panels have an output that is useful for the individual for whom they were constructed, ‘it is incumbent on the taxpayer[s] to prove the existence of a market[.]’ ” (Respnd’t App. A14 (quoting *Mid-Am. Dairymen, Inc. v. Dir. of Revenue*, 924 S.W.2d 280, 283 (Mo. banc 1996))).

On this point the founder of Fenix Construction testified to, and the Commission relied on, the following evidence:

Q: Now, given that each wall panel is designed for a particular building, you can’t sell that wall panel to any other person, could you?

A: No.

Q: And there is no market of people going – somebody doesn’t drive to your site and look at

^{1/} All statutory references are to the 2013 Cumulative Supplement of the Revised Statutes of Missouri, unless otherwise noted.

[the] left corner of that building and say that's amazing. I'll offer you double what the contractor is paying you for that panel?

A: That's never happened.

Q: And it really is unlikely to happen, isn't it, because that panel is designed for that particular building, isn't it?

A: Yes.

(Tr. at 66). The Commission, therefore, concluded that there is no "discrete market for tilt-up wall panels," and as such Fenix Construction's "tilt-up wall panels are not products." (Respnd't App. A15). As the taxpayers failed to establish any product under § 144.054.2, the Commission did not need to analyze whether tilt-up construction constitutes manufacturing, processing, or producing under § 144.054.2.

SUMMARY OF THE ARGUMENT

First, it was restaurants – *Brinker Mo., Inc. v. Dir. of Revenue*, 319 S.W.3d 433 (Mo. banc 2010).

Next convenience stores – *Aquila Foreign Qualifications Corp. v. Dir. of Revenue*, 362 S.W.3d 1 (Mo. banc 2012).

And then grocery stores – *Union Elec. Co. v. Dir. of Revenue*, 425 S.W.3d 118 (Mo. banc 2014).

Now, apparently, it is construction companies – *Fenix Constr. Co. of St. Louis v. Dir. of Revenue*, SC93915; *Fred Weber, Inc. v. Dir. of Revenue*, SC94109; *Ben Hur Steel Worx, LLC v. Dir. of Revenue*, SC94209.

In each of these cases, the taxpayers have sought to expand Missouri’s tax exemptions in order to fit their own square peg into a round hole. See http://en.wikipedia.org/wiki/Square_peg_in_a_round_hole (last visited July 2, 2014) (describing the idiomatic expression). The square peg in this case is construction activities, which the taxpayers are seeking to force into a manufacturing exemption in § 144.054.2. It does not fit, and should not be forced into statutory language that must be strictly construed.

The plain language of § 144.054.2 is entirely void of construction words or terms, such as “contractor,” “construction,” “construction materials,” “building,” or “project.” The absence of such construction words or terms in the statute is significant, because “[h]ad the legislature intended to exempt

those activities from taxation, it would have included those terms in the statute.” *Aquila*, 362 S.W.3d at 4, citing *Brinker Mo., Inc.*, 319 S.W.3d at 438.

What is more, the General Assembly uses these construction words or terms in other statutory provisions, including in tax exemptions. For example, § 144.030.2(37) exempts materials purchased by a “contractor” when used for “constructing, repairing or remodeling facilities.” The provisions of § 144.062 are even more comprehensive, including provisions such as the following:

- Exempts materials for “*constructing, repairing or remodeling facilities*” § 144.062.1;
- Provides “*contractor*” requirements for exempt materials in the “*construction of the building or other facility*” § 144.062.1(6);

Unquestionably, the General Assembly knows how to use and distinguish between construction and manufacturing. It chose not to use words or terms exempting construction activities in § 144.054.2, which is exactly what Fenix Construction does when building tilt-up concrete walls. In their own words, tilt-up construction is simply an “area of construction.” (Respnd’t Ex. A, p. 4). And as such, the claims in this case should be denied and the Administrative Hearing Commission affirmed.

ARGUMENT

Section 144.054 is not just any revenue law; instead, it is a sales and use tax exemption subject to strict construction:

Tax exemptions are strictly construed against the taxpayer. An exemption is allowed only upon clear and unequivocal proof, and doubts are resolved against the party claiming it. Exemptions are interpreted to give effect to the General Assembly's intent, using the plain and ordinary meaning of the words.

Branson Properties USA, L.P. v. Dir. of Revenue, 110 S.W.3d 824, 825-26 (Mo. banc 2003) (internal citations omitted); see *Aquila Foreign Qualifications Corp. v. Dir. of Revenue*, 362 S.W.3d 1, 3 (Mo. banc 2012). As such, "it is the burden of the taxpayer claiming the exemption to show that it fits the statutory language exactly." *Cook Tractor Co., Inc. v. Dir. of Revenue*, 187 S.W.3d 870, 872 (Mo. banc 2006); *Union Elec. Co. v. Dir. of Revenue*, 425 S.W.3d 118, 125 (Mo. banc 2014) (requiring "clear and unequivocal proof").

As a construction contractor, Fenix Construction is subject to sales or use tax on its purchases of construction materials unless a specific exemption applies to exempt its purchases. See *Bratton Corp. v. Dir. of Revenue*, 783 S.W.2d 891, 892 (Mo. banc 1990); *Overland Steel, Inc. v. Dir. of Revenue*, 647

S.W.2d 535, 538 (Mo. banc 1983); *City of St. Louis v. Smith*, 114 S.W.2d 1017, 1020 (Mo. 1937). Here, neither the law nor the evidence supports the taxpayers' claim that building large concrete walls for a construction project fits exactly the tax exemption for "manufacturing, processing, compounding, mining, or producing of any product" under § 144.054.2.

I. The General Assembly Did Not Intend for Construction Projects or Construction Facilities, Such as the Building of Tilt-up Concrete Walls, to be Exempt as "Manufacturing, Processing, Compounding, Mining, or Producing of Any Products" Under § 144.054.2 – Responding to Appellants' Points I & II.

From the record before the Commission, it cannot be disputed that Fenix Construction is a construction contractor purchasing materials for use in building construction projects or facilities. In fact, Fenix Construction repeatedly refers to itself as a construction contractor and describes the building of tilt-up concrete walls as construction. Nevertheless, the taxpayers in this case assert that Fenix Construction qualifies for the exemption under § 144.054.2 because the technique of tilt-up construction supposedly constitutes the manufacturing, processing, or producing of a product. This argument, however, ignores the General Assembly's use of specific language

in describing when purchases of construction materials are exempt from taxes – language that is not used in § 144.054.

A. The Plain Language of § 144.054 Makes No Reference to Construction or Construction Materials.

As with any statutory provision, “the primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute.” *Akins v. Dir. of Revenue*, 303 S.W.3d 563, 565 (Mo. banc 2010) (citing *State ex rel. White Family P’ship v. Roldan*, 271 S.W.3d 569, 572 (Mo. banc 2008)). The plain language of § 144.054.2 is reflective of the legislature’s intent not only for the words and terms it uses – manufacturing words and terms – but it is especially notable for the words and terms it does not use – construction words and terms.

The absence of words or terms in a statute is compelling as to the intent of the legislature, especially when the language is to be strictly construed. *See Brinker Mo., Inc. v. Dir. of Revenue*, 319 S.W.3d 433, 438 (Mo. banc 2010). Indeed, “[e]ssential to *Brinker’s* holding was the lack of the terms ‘restaurant,’ ‘preparation,’ ‘furnishing,’ or ‘serving’ in section 144.030.2.” *Aquila*, 362 S.W.3d at 4, citing *Brinker Mo., Inc.*, 319 S.W.3d at 438. “Had the legislature intended to exempt those activities from taxation, it would have included those terms in the statute.” *Id.* It is the same in this case.

Section 144.054 provides in relevant part:

1. As used in this section, the following terms mean:

(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 . . . 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[.]

Notably absent from these provisions, and from § 144.054 in its entirety, is any reference to “contractor,” “construction,” “construction materials,” “building,” or “project.” These are significant omissions,

particularly considering the strict construction that must be applied to the exemptions in § 144.054. Even if the absence of such words or terms merely raised a doubt as to the applicability of § 144.054.2, the exemption should be denied. But that is not all.

B. Surrounding Statutory Provisions Confirm That § 144.054 Does Not Include Construction or Construction Materials.

The absence of words or terms such as “contractor,” “construction,” “construction materials,” “building,” or “project” in § 144.054 is not only significant on its own, but the General Assembly’s intent is confirmed by the surrounding statutory provisions that repeatedly refer to these words or terms. For example, in § 144.030.2(37), the General Assembly provided that:

Materials shall be exempt from all state and local sales and use taxes when purchased by a *contractor* for the purpose of fabricating tangible personal property which is used in fulfilling *a contract for the purpose of constructing, repairing or remodeling facilities* for the following:

- (a) An exempt entity located in this state, if the entity is one of those entities able to issue project

exemption certificates in accordance with the provisions of section 144.062; or

(b) An exempt entity located outside the state if the exempt entity is authorized to issue an exemption certificate to *contractors* in accordance with the provisions of that state’s law and the applicable provisions of this section[.]

(Emphasis added). The General Assembly certainly knows how to use, and distinguish between, construction terms and other activities.

Likewise, § 144.062 – which is titled, in part, by the revisor of statutes as “construction materials, exemption allowed” – repeatedly uses these words or terms:

- Exempts materials for “*constructing, repairing or remodeling facilities*” § 144.062.1;
- Provides “*contractor*” requirements for exempt materials in the “*construction of the building or other facility*” § 144.062.1(6);
- Requires an exemption certificate for materials used in “*constructing, repairing or remodeling facilities,*” referencing “*construction, repair or remodeling project*” and materials “*to be*

incorporated into or consumed in the construction of the project” § 144.062.2;

- Requires the “*contractor*” to furnish an exemption certificate to “*subcontractors*” and any “*contractor purchasing materials*” to be “*incorporated into or consumed in the construction of that project,*” while excluding “*construction machinery, equipment or tools used in constructing, repairing or remodeling facilities*” § 144.062.3;
- Mandates a “*contractor’s*” treatment of exempt materials that are “*not incorporated into or consumed in the construction of the project*” as well as an audit on materials “*incorporated into or consumed in the construction of the project*” § 144.062.4-.5;
- Imposes tax liability under some circumstances where materials are “*incorporated into or consumed in the construction of its project*” as well as circumstances where materials are “*incorporated into or consumed in the construction of a project, or part of a project*” § 144.062.6.

(Emphasis added).

Sections 144.030.2(37) and 144.062 demonstrate that the General Assembly routinely uses words or terms such as “construction,” “constructing,” “building,” “contractor,” and “project.” More importantly, these provisions demonstrate that the General Assembly uses such words or terms in relation to exempt purchases of construction materials. No such words or terms, however, appear in § 144.054.2. And their absence is dispositive, *see Aquila*, 362 S.W.3d at 5, particularly given that “[e]xemptions from taxation are to be strictly construed against the taxpayer, and any doubt is resolved in favor of application of the tax.” *Southwestern Bell Telephone Co. v. Dir. of Revenue*, 182 S.W.3d 226, 228 (Mo. banc 2005).

C. Fenix Construction Never Treated Its Tilt-up Construction Projects as Manufacturing, Processing, or Producing a Product.

In addition to the plain language of the statute, as well as the surrounding statutory provisions, Fenix Construction itself never treated or referred to its tilt-up construction projects as manufacturing, processing, or producing of a product. In their brief, taxpayers acknowledge that “tilt-up wall panels ultimately become part of the construction process” and that they are a “construction subcontractor.” Appellants’ Brief, p. 22.

Consistent with common sense, and the ordinary use of these construction related words and terms, Fenix Construction characterized its tilt-up construction as follows:

- “Due to the rapid popularity of the tilt-up industry, Fenix has operated across the US *constructing* warehouses, offices, churches, retail shops, and schools” (Respnd’t Ex. A, p. 1);
- “Tilt-up combines reasonable cost with low maintenance, durability, speed of *construction*, fire resistance, security and minimal capital investment” (Respnd’t Ex. A, p. 2);
- “Our 18 years of experience and expertise in this *area of construction* is unmatched when comparing us to others” (Respnd’t Ex. A, p. 4);
- “Tilt-up concrete panels can be *constructed* using numerous methods” (Respnd’t Ex. A, p. 4);

(Emphasis added).

Instead of establishing by clear and unequivocal proof that its tilt-up construction fits exactly the statutory language, even Fenix Construction must acknowledge that what it does is construction, which is not covered or

even mentioned in § 144.054.2. Accordingly, the taxpayers' claims must fail, and the Commission should be affirmed.

II. The General Assembly Did Not Expand the Types of Activities Exempted Under the Manufacturing Exemption in § 144.054.2, Only the Items That Are Exempt. – Responding to Appellants' Points I & II.

Explicit in the taxpayers' argument is the suggestion that the General Assembly's combining of the litany of "manufacturing, processing, compounding, mining, or producing" with § 144.054's definition of "processing" supposedly demonstrates its intent that § 144.054.2 apply to an entirely different – and much broader – category of activities than the manufacturing exemptions in § 144.030.2. In fact, taxpayers claim in their brief that the exemption in § 144.054.2 is not only "broad," but that it includes "almost any activity which results in something being made." Appellants' Brief, p. 19. Not so.

Presumably, the taxpayers' use of the term "almost" is a tacit acknowledgement of this Court's recent decisions addressing § 144.054.2 – *Union Elec. Co. v. Dir. of Revenue*, 425 S.W.3d 118 (Mo. banc 2014); *AAA Laundry & Linen Supply Co. v. Dir. of Revenue*, 425 S.W.3d 126 (Mo. banc 2014); and *Aquila*, 362 S.W.3d at 2 – none of which held that the exemption includes almost any activity which results in something being made. Indeed,

this Court specifically rejected a similar notion in *Aquila*, and recognized that “[t]o so interpret section 144.054.2 would give it unintended breadth.” *Aquila*, 362 S.W.3d at 5 *quoted in Union Electric*, 425 S.W.3d at 123.

The General Assembly’s use of the words “manufacturing, processing, compounding, mining, or producing” with the statutory definition of “processing” must be understood as an effort to circumscribe the activities exempted by § 144.054.2. This is especially true given that the words and definition enacted by the General Assembly in § 144.054.2 already had substantial legislative and judicial meaning attached to them from their use in the other manufacturing exemptions. *See Cook Tractor*, 187 S.W.3d at 873. Rather than expanding the range of activities exempt as manufacturing, § 144.054.2 was designed to expand the number of items exempt (e.g., electrical energy) for those engaged in manufacturing a product.^{2/}

Examining the language of § 144.054.2 and that of § 144.030.2 establishes that the General Assembly did not intend for § 144.054.2 to apply to non-manufacturing activities like building construction. Otherwise, as set

^{2/} This is not to say that § 144.054 only concerns manufacturing. In other parts of subsections 2-4 of § 144.054, exemptions are expressly provided for activities other than manufacturing (e.g., television or radio broadcasting). These activities are not at issue here.

forth above, the General Assembly would have included construction-type terms. Instead, § 144.054, in relevant part, provides an exemption only for “manufacturing, processing, compounding, mining, or producing.” This language is drawn directly from § 144.030.2(13), and the same type of activities are exempt under § 144.030.2.^{3/} See *E & B Granite, Inc. v. Dir. of Revenue*, 331 S.W.3d 314, 317 (Mo. banc 2011) (noting that both §§ 144.054.2 and 144.030.2(2) “relate to sales and use tax exemptions for manufacturers”).

A. Applying § 144.054.2 to Activities Other than Manufacturing is Contrary to the Express Intent of the General Assembly.

The similarity of the language in § 144.054.2 with that of § 144.030.2(13) and the other manufacturing exemptions of § 144.030.2 led this Court to reject an argument similar in reasoning to the one advanced by the taxpayers here. In *Aquila*, it was argued that the term “processing,” for purposes of § 144.054.2, expanded the range of exempt activities to include

^{3/} It would be more plausible to assert that the General Assembly intended fewer types of activities to be exempted by § 144.054.2 than are exempted by subdivisions (2), (5), (6), and (14) of § 144.030.2 because these latter subdivisions include the term “fabricating,” which was left out of § 144.054.2.

food preparation at retail convenience stores. *See Aquila*, 362 S.W.3d at 3. The Court rejected this argument.

In determining the General Assembly's intent in § 144.054.2, the Court was guided by its prior decision in *Brinker*, in which the Court held that food preparation in a retail restaurant was not manufacturing for purposes of § 144.030.2(4) and (5). *Id.* at 4. To reach this decision, the Court pointed out that “no portion of a statute is read in isolation, but rather is read in context to the entire statute, harmonizing all provisions.” *Id.* The Court also applied the statutory maxim of *noscitur a sociis*, – that a word is known by the company it keeps – to establish that all of the words used in § 144.054.2 have industrial connotations. *Id.* at 5.

Importantly, the Court relied upon its prior case law interpreting § 144.030.2(13) that had found little or no practical difference in meaning between the terms manufacturing and processing because “ [w]hen the legislature enacts a statute referring to terms that have had other judicial or legislative meaning attached to them, the legislature is presumed to have acted with knowledge of that judicial or legislative action.’ ” *Id.* at 5, fn. 10 (*quoting Cook Tractor*, 187 S.W.3d at 873).

Finally, the Court concluded that if the General Assembly had intended to exempt new activities in § 144.054.2, other than those previously exempted by § 144.030.2(13), it should have used more appropriate words to express its

intent. *Id.* Given the General Assembly’s use of the words or terms “construction,” “constructing,” “building,” “contractor,” and “project” in other statutory provisions, and their absence in § 144.054.2, the only conclusion consistent with *Aquila* that can be reached with regard to their absence in § 144.054.2 is that the General Assembly did not intend to expand the activities exempt under § 144.054.2 to include construction activities.

B. Building Construction is not the Type of Industrial Activity Ordinarily Associated with Manufacturing.

As previously discussed, §§ 144.030.2(37) and 144.062 demonstrate that the General Assembly, consistent with common usage, distinguishes between manufacturing and construction. Similarly, early in the history of Missouri’s Sales and Use Tax Law, this Court identified construction services as a distinct category of activity. *See, e.g., City of St. Louis*, 114 S.W.2d at 1020. These distinctions in the law reflect the common understanding that manufacturing and construction are different.

Fenix Construction is a concrete contractor engaged in building construction at construction sites. (Respnd’t App. A9-A12). Building construction at a construction site is no more associated with industrial manufacturing than is food preparation in a restaurant. The reference to “processing by the producer at the production facility” in § 144.054.1’s definition of “processing” further demonstrates that the General Assembly

did not intend for the exemption to apply to construction activities. 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 by means of mass production rather than skilled tradesmen laboring to construct a building at a construction site.

Similarly, Fenix Construction's activities do not produce the type of end result ordinarily associated with manufacturing. Fenix Construction builds the walls of a building using tilt-up construction techniques at the construction site. (Respnd't App. A9-A12). The walls built by Fenix Construction cannot be used for any other building and could not be practically moved to any other location even were they usable. *Id.* The only value they have is to the person who contracted with Fenix Construction to build them. (Respnd't App. A12). This is different than the product required by § 144.054.2, which the Court has defined as "an output with a market value[.]" *International Business Machines Corp. v. Dir. of Revenue*, 958 S.W.2d 554, 557 (Mo. banc 1997).

In *Mid-America Dairymen*, 924 S.W.2d at 283, the Court explained what a product was 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.

Fenix Construction is hired as a contractor to perform certain construction services that are necessary to construct a building. The end result is not a marketable product. The walls constructed by Fenix Construction cannot be marketed as they are immovable, made specifically for only one customer, and are not valuable to any other person. An unmarketable product with no intrinsic market value is not the type of output ordinarily associated with manufacturing.^{4/}

^{4/} In their brief the taxpayers suggest that the Commission's decision in *Fred Weber v. Dir. of Revenue*, No. 12-0252 (March 13, 2014) is "confusing." Appellants' Brief, p. 8. The Director agrees that the decision is incorrect and

This is to not to say there is not a market at play in relation to Fenix Construction's activities. The bid service market in which Fenix Construction operates is the market for the specialized knowledge and skilled labor necessary to construct the walls of a building from construction materials. These construction services are valuable to the general contractor hiring Fenix Construction, but their exercise does not result in a product that has any intrinsic market value. The consideration paid to Fenix Construction is based upon the value of the construction services it renders rather than the value of the built walls on the market. This is not the "manufacture, processing, compounding, mining or producing of a product" contemplated in § 144.054.2.

It must also be pointed out that the taxpayers' argument rests upon the artificial isolation of the particular construction task performed by Fenix Construction from the tasks of the other contractors working on the project. This approach makes no sense given that any significant construction project

has sought review in this Court. The taxpayers also reference several letter rulings. Of course, letter rulings are not binding even on the Director of Revenue. More importantly, none of the letter rulings address tilt-up wall construction, and the very nature of the items addressed in the letters is distinct from this case.

involves numerous contractors working in conjunction to make a real property improvement. Moreover, separating out each contractor's activities in isolation from the real property improvement being constructed would lead to absurd results. The construction contracts for some contractors would become taxable as a retail sale while others might not. Any interpretation of § 144.054.2 should avoid such an unreasonable or absurd result. *Aquila*, 362 S.W.2d at 4.

C. The Decision in *E & B Granite* is Inapplicable.

Disagreeing with the above analysis, taxpayers assert that *E & B Granite*, requires the finding of a product in this case because it does not matter that Fenix Construction is building a wall to serve only the needs of a particular customer. The taxpayers are again ignoring *Aquila*, which came after *E & B Granite*. In *Aquila*, there was no dispute that the end result of Casey's food preparation activities were items sold at retail to the general public. Nevertheless, the Court concluded that the activities did not qualify for the exemption because food preparation in a convenience store was not the manufacturing of a product. The nature of Fenix Construction's activities matter because the activities must constitute the manufacturing of a product to be exempt.

Taxpayers' reliance upon *E & B Granite* ignores what is truly at issue in this case – whether Fenix Construction is manufacturing a product. In *E &*

B Granite the parties entered into a stipulation before the Commission that narrowed both the factual and legal issues. It was stipulated that E & B manufactured granite countertops and other granite products in a manufacturing facility. (*E & B Granite, Inc. v. Dir. of Revenue*, SC 91010, Joint Stipulation ¶ 4, p. 44-45 of record on appeal, *available on CaseNet*); *see also E & B Granite*, 331 S.W.3d at 315 (“E & B buys raw granite slabs and uses them to manufacture granite countertops and other granite products.”).

Further, it was stipulated that after the manufacturing was complete, E & B installed and attached some of the countertops to customers’ real property while others were sold to customers at retail. *Id.* The Director agreed that E & B’s purchases of granite were exempt under § 144.054.2 when used by E & B to manufacture countertops and other granite products. However, the Director asserted that this granite became subject to tax when E & B installed the fixture on customers’ real property rather than selling them at retail. (*E & B Granite, Inc. v. Dir. of Revenue*, SC 91010, Joint Stipulation ¶ 10, p. 46-47 of record on appeal, *available on CaseNet*).

Unlike in this case, the Director was not contesting whether E & B was a manufacturer or whether it had manufactured a product in some production facility. The Director’s argument was merely that the granite countertop became subject to tax when E & B used it for its own purposes in making a real property improvement rather than selling it at retail. In other

words, E & B's countertops ceased being a product for purposes of the exemption under § 144.054.2 when used to make a real property improvement.

In making this argument, the Director was relying upon the Court's historic treatment of dual operators in the case of *Blevins Asphalt Construction Co. v. Dir. of Revenue*, 938 S.W.2d 899 (Mo. banc 1997). The Court, however, rejected the Director's contention concluding that: "Section 144.054.2 applies to products, whether or not they are eventually affixed to real property. Although E & B's granite countertops are eventually installed, they are 'products' under Section 144.054.2." *E & B Granite*, 331 S.W.3d at 317.

Even the taxpayer in *E & B Granite* recognized in their brief that the issue we are concerned with here was not at issue in that case:

E & B agrees that a carpenter "could argue" that [the cutting and installing of lumber to build a house qualified the carpenter for the exemption], but finds little reason to believe that the carpenter would be deemed a "manufacturer" and that the house he builds would be deemed a "product" under Section 144.054.

Respondent's Brief, pg. 8 in *E & B Granite, Inc. v. Director of Revenue*, Case No. SC 91010 (available at <https://www.courts.mo.gov/casenet/cases/searchDockets.do>) (parenthetical added for context). To conclude otherwise would permit virtually any construction contractor to claim a manufacturing exemption and would give § 144.054.2 an "unintended breadth." *Aquila*, 362 S.W.3d at 5; *Union Elec.*, 425 S.W.3d at 123.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was served electronically via Missouri CaseNet e-filing system on the 2nd day of July, 2014, 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 the brief contains 6,574 words.

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