

SC91784

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**IN THE SUPREME COURT OF MISSOURI**

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**AQUILA FOREIGN QUALIFICATIONS CORPORATION,**

**Respondent (Petitioner below),**

**vs.**

**DIRECTOR OF REVENUE,**

**Appellant (Respondent below).**

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

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**REPLY BRIEF OF APPELLANT**

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## SUMMARY OF THE ARGUMENT

A common ploy for businesses seeking an exemption from taxes is to wordsmith their activities in an attempt to come within the language of the exemption – in this case “processing” under § 144.054.2<sup>1/</sup>. Thus, according to Aquila, Casey’s no longer makes or cooks food at its convenience stores; instead, “[e]ach item . . . is processed and produced using specific equipment operated in a production setting.” Respondent’s Brief at 6. If this exaggerated effort to wordsmith were not enough, Aquila submits the following supposed description of Casey’s activities – “each of the products produced . . . involve . . . multiple pieces of production equipment [and] a multi-step production process.” *Id.* at 8.

This type of manufactured application of a statutory exemption is contrary to a fundamental rule of statutory interpretation, that exemptions are strictly or narrowly construed. *Cook Tractor Co., Inc. v. Dir. of Revenue*, 187 S.W.3d 870, 872 (Mo. banc 2006). It is obvious that a statute is not being strictly or narrowly construed when the party seeking to interpret the statute has to contort their language or the description of their activities in order to try to fall within the language of the statute. *Id.* (holding that the party must “show that it fits the statutory language exactly”).

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<sup>1/</sup> All statutory references are to RSMo Cum. Supp. 2011 unless noted otherwise.

The strict or narrow construction of the statutory exemption at issue is that it applies to industrial-type “manufacturing, processing, compounding, mining, or producing,” not to making or cooking meals at a restaurant or convenience store such as Casey’s. This is consistent with the plain language of the statute, the statutory structure, and this Court’s interpretation of virtually identical language in *Brinker Mo., Inc. v. Dir. of Revenue*, 319 S.W.3d 433 (Mo. banc 2010). Indeed, if Aquila’s “broad and expansive” interpretation is adopted, it will entirely undo this Court’s decision in *Brinker*. And the fact that § 144.054 is expressly “in addition to all other exemptions” does not change this result or the proper interpretation in any way.

## ARGUMENT

In order to avoid the application of this Court's common-sense interpretation in *Brinker Mo., Inc. v. Dir. of Revenue*, 319 S.W.3d 433 (Mo. banc 2010), Aquila argues that the legislature used "broad and expansive terms" to allow exemptions beyond the "traditional forms of 'manufacturing.'" Respondent's Brief at 19. The legislature, however, did not use any broader or more expansive terms than this Court considered in *Brinker*, and the result should be the same.

### **I. The Tax Exemptions in § 144.054 are to be Strictly Construed, Not Broadly Construed to Cover Any Restaurant or Convenience Store.**

Aquila has apparently forgotten that tax exemptions are to be "strictly construed" and that the taxpayer must "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). Indeed, not once does Aquila attempt to explain how its interpretation of § 144.054 constitutes a strict construction, nor does it even reference or cite this essential rule of statutory interpretation. Instead, Aquila seeks to make the terms "broad and expansive." Respondent's Brief at 19.

It is no wonder that Aquila has chosen to ignore the strict construction rule, because Aquila's interpretation would dramatically expand manufacturing tax exemptions to include convenience stores, restaurants, snack bar in theaters, and really any business that could be viewed as "processing" a product in the

most generic sense. This is not what the legislature intended when it used the language “manufacturing, processing, compounding, mining, or producing a product” to describe the industrial-type activities subject to tax exemptions under § 144.054.2. See *Akins v. Dir. of Revenue*, 303 S.W.3d 563, 565 (Mo. banc 2010) (finding that “the primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute”).

**A. The Strict Construction of “Processing” is Not Merely Mixing Flour or Adding Toppings to a Pizza, But Processing Products on an Industrial-Type Scale Consistent with a “Production Facility.”**

Just as the restaurants did in *Brinker*, Casey’s, through Aquila, is trying to turn making pizzas, making sandwiches, or heating up food items into a “multi-step production process” involving “multiple pieces of production equipment.” Respondent’s Brief at 8. This type of falsely exaggerated language utilized by Aquila makes it sound like Casey’s activities are comparable to mining coal by the boxcar load, when in fact, Aquila’s interpretation of “processing” could as easily apply to an eight-year-old mixing lemon juice with water and ice for a corner lemonade stand.

There must be more to the term “processing” in § 144.054 than the most generic version advanced by Aquila, or really anything can be “processing.” As set forth in the Director’s opening brief, we begin to understand the intent of the legislature when it used the term “processing” by the language of the definition

and the use of “production facility” to define the place at which “processing” takes place. § 144.054.1(1). No one thinks of a restaurant, much less a convenience store, kitchen, or a theater snack bar as a “production facility.” This is especially true if the terms are to be strictly construed, as they must, by operation of controlling rules of statutory interpretation. This strict construction is also consistent with the definitions used by the dictionary, which suggest large-scale industrial-type processing. Aquila even concedes that there are “traditional forms of ‘manufacturing.’” And this Court has equated “production facility” with the term “plant” in § 144.030. *Brinker*, 319 S.W.3d at 438 (“These definitions have in common that they treat restaurants as furnishing food and beverages to the public at retail, not as plants or production facilities that manufacture, mine, fabricate or produce food or drink.”). Respondent’s Brief at 19. See Webster’s Third New International Dictionary 1808 (1993).

Aquila chooses to ignore these principles and definitions, and instead simply mischaracterizes the analysis. For example, Aquila argues that the “Director implies that ‘processing’ is just a subset of ‘manufacturing.’” Respondent’s Brief at 18. In fact, it was this Court in *Hudson Foods, Inc. v. Dir. of Revenue*, 924 S.W.2d 277 (Mo. banc 1996) and *Mid-America Dairymen, Inc. v. Dir. of Revenue*, 924 S.W.2d 280 (Mo. banc 1996) that in reviewing the same language under § 144.030.2(12) that is now before the Court under § 144.054.1 held “there is little to no difference between the terms ‘processing’ and

‘manufacturing.’” *Hudson Foods*, 924 S.W.2d at 278 n.1. In short, “the meaning of the term ‘processing’ is ordinarily ‘included within the meaning of the more general and inclusive term “manufacturing.””” *Mid-America Dairymen*, 924 S.W.2d at 283 (quoting *State ex rel. Union Elec. Co. v. Goldberg*, 578 S.W.2d 921, 924 (Mo. banc 1979)).

The definition of “processing,” as ordinarily included within the meaning of the term “manufacturing,” was well established when the legislature adopted the same definition of “processing” in § 144.054.1. Even the Commission in this case, contrary to its ultimate conclusion, considered § 144.054 a manufacturing exemption. See Appdx. A22 (“All of these statutes provide, in one form or another, favored tax treatment for those who manufacture products in this state.”). Aquila can provide no meaningful response to these arguments, and chooses instead to ignore the required strict construction of the statutory language.

**B. The Terms Surrounding “Processing” Further Confirm the Proper Application of § 144.054 to Industrial-Type “Processing.”**

Not only is the plain language, as strictly construed, clear in its application to “processing” at a “production facility,” but the surrounding statutory terms make the proper interpretation of the language all the more evident. See *Utility Serv. Co., Inc. v. Dep’t of Labor and Indus. Relations*, 331 S.W.3d 654, 658 (Mo. banc 2011) (noting that “[n]o portion of a statute is read in

isolation, but rather is read in context to the entire statute, harmonizing all provisions”). The term “processing” is used among several other terms in a single sentence of the statute. Those terms are classic industrial-type terms – what Aquila calls “traditional forms of manufacturing”: “manufacturing, processing, compounding, mining, or producing.” Because they are linked together to each other in a list, they are – under the maxim *ejusdem generis* – “of the same kind” and interpreted consistently with each other. *Standard Operations, Inc. v. Montague*, 758 S.W.2d 442, 444 (Mo. banc 1988) (applying the maxim “*ejusdem generis*”).

To suggest that the term “processing” under § 144.054 can mean a corner lemonade stand, making a sandwich at a convenience store, or popping popcorn in a theater would be to undermine all of the other adjacent terms which suggest a large-scale industrial-type operation. Indeed, in their brief, Aquila takes that very leap – arguing that Casey’s meets the definition of “compounding.” Respondent’s Brief at 19. Just as digging holes for a sprinkler system is not mining, and making food at a restaurant is not manufacturing, the making or heating up of food at a convenience store is not “processing” under § 144.054, consistent with the statutory structure and strict construction of the terms.

Interestingly, Aquila begins its argument by turning to the title of § 144.054, claiming that it is instructive or supportive of its position. Of course, the title of a statute is of no persuasive value as to the meaning of the statute. See *Independence-Nat. Educ. Ass’n v. Independence Sch. Dist.*, 223 S.W.3d 131,

138 (Mo. banc 2007) (“The title of a statute is an editorial decision by the revisor of statutes rather than a legislative enactment and may not be considered in construing the statute.”), citing *State ex rel. Agard v. Riederer*, 448 S.W.2d 577, 581 (Mo. banc 1969). Furthermore, the title actually undermines Aquila’s position – it uses the term “industries,” which is consistent with a reading of the statute suggesting a large-scale industrial application of the language.

**C. The Statutory Treatment of Restaurants and “Other Places” Serving Meals Also Supports the Proper Interpretation of “Processing” as Not Applying to Casey’s Preparation of Food.**

In addition to the terms immediately surrounding “processing” in § 144.054, the very structure of Chapter 144 supports the Director’s interpretation. Indeed, Aquila makes no attempt to address the fact that the legislature specifically provided for sales taxes for a “restaurant,” “eating house,” or “other place” in which “meals or drinks are regularly served to the public.” § 144.020.1(6). This perfectly describes Casey’s. Yet, there is no corresponding exemption for these places, nor any mention of them in § 144.054.

It is presumed that “the legislature had knowledge of the law, the surrounding circumstances and the purpose and object to be accomplished.” *Pfefer v. Bd. of Police Comm’rs*, 654 S.W.2d 124, 127 (Mo. App. W.D. 1983). The legislature’s specific reference to taxes on restaurants or “other places” where meals or drinks are served to the public with no corresponding exemption is

plain evidence of the legislative intent that “processing” was not intended to cover simply the preparation of food at a restaurant or convenience store. Indeed, if Aquila’s version of “processing” is correct then § 144.054 entirely undermines § 144.020 without any evidence of such intent. It also allows a restaurant to claim the electrical exemption under 144.030.2(12), as the term “processing” under § 144.054 was taken from that statute. It would also undue the department’s promulgated regulations. *See* 12 CSR 10-110.601(6)(A); 12 CSR 10-110.621(5)(A).

The very fact that meals and drinks regularly served to the public are singled out for taxation, but not an exemption, indicates that the legislature intended for the preparation of food at a “restaurant,” “eating house,” or “other place” to be considered for all sales and use taxation purposes. It would defeat this purpose to allow a convenience store such as Casey’s to take advantage of a manufacturing exemption by interpreting the definition of “processing” beyond recognition when the legislature knew exactly how to tax (or exempt) the preparation of food at a restaurant or convenience store.

## **II. The Exemptions in § 144.054 are in Addition to, Not Entirely Different From, All Other Exemptions.**

Aquila appears fixated on one primary point in its brief – that the exemptions in § 144.054 are “in addition” to other exemptions. On this basis Aquila attempts to distinguish this Court’s decision in *Brinker* and extend what are industrial-type manufacturing exemptions to restaurants and convenience

stores such as Casey's.<sup>2/</sup> These efforts fail, however, because the additional exemptions in § 144.054 are not different in the type of industrial-type manufacturing to which they apply, but are instead in addition to the items used or consumed by these industries.

For example, “water” used or consumed “in the manufacturing, processing, compounding, mining or producing of any product” is now exempt under § 144.054.2. This is a new exemption in Chapter 144 – for water – not an entirely different exemption unrelated to industrial-type manufacturing. Similarly, § 144.030.2(12) currently provides an exemption for “[e]lectrical energy used in . . . manufacture, processing, compounding, mining or producing of a product,” but the exemption is limited to electrical energy costs that exceed “ten percent of the total cost of production.” To expand this exemption, § 144.054 now exempts all electrical energy “used or consumed in the manufacturing, processing, compounding, mining, or producing of any product,”

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<sup>2/</sup> Aquila also argues that the distinction is supposedly retail/non-retail and cites *E & B Granite, Inc. v. Dir. of Revenue*, 331 S.W.3d 314 (Mo. banc 2011). The issue in this case, however, is not about retail/non-retail, but instead about manufacturing exemptions, and *E & B Granite* does not apply because it dealt with what constitutes a “product” and “material.” Moreover, E & B Granite, Inc. was an industrial-type manufacturer because it used “raw granite slabs . . . to manufacture granite countertops.” *Id.* at 315.

with no limitation based on the total cost of production. The change is not to the nature of the manufacturing covered, but to the items that are used or consumed by the manufacturing process.<sup>3/</sup>

The fact that § 144.054 provides additional exemptions does not mean that the term “processing,” or for that matter “manufacturing, processing, compounding, mining or producing,” has an entirely different meaning than the meaning in § 144.030, as found by this Court in *Brinker*, or that it should not be strictly construed. Yet, under Aquila’s broad interpretation of § 144.054, these terms would take on an entirely different meaning – one that is “broad and expansive” – in complete disregard of the common-sense (and strict) interpretation in *Brinker*.

In *Brinker*, this Court faced a similar claim in which Chili’s and other restaurants sought an exemption for machinery and equipment, claiming that their preparation of food constituted “manufacturing,” “mining,” “fabricating” or

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<sup>3/</sup> Another example of this is the exemptions for machinery and equipment. Section 144.030 already provides a manufacturing exemption for machinery and equipment, but only for “replacement” machinery and equipment or when “solely required for the installation . . . to establish new or to expand existing” manufacturing. Section 144.054 also exempts machinery and equipment, but there is no limitation on the types of machinery and equipment. Both exemptions are fundamentally manufacturing exemptions.

“producing.” *Brinker*, 319 S.W.3d 436-37. The Court rejected the claim, concluding that “restaurants prepare rather than manufacture meals.” *Id.* at 436. The exemptions in § 144.054 change nothing in this regard. Restaurants and convenience stores are not “manufacturing, processing, compounding, mining, or producing” under § 144.054 any more than they are under § 144.030. And to hold otherwise would entirely undo the decision in *Brinker* because restaurants such as Chili’s would just re-wordsmith their activities to fit the language of § 144.054 and then obtain exemptions for their machinery and equipment.

### CONCLUSION

For the foregoing reasons, as well as those set forth in the Director’s initial Appellant’s Brief, the Administrative Hearing Commission’s decision should be reversed.

Respectfully submitted,

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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 December 9, 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 the brief contains 2,972 words.

/s/ Jeremiah J. Morgan  
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