

IN THE SUPREME COURT OF MISSOURI

No. SC94209

BEN HUR STEEL WORX, LLC,

Appellant,

v.

DIRECTOR OF REVENUE,

Respondent.

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

REPLY BRIEF OF APPELLANT BEN HUR STEEL WORX, LLC

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TABLE OF CONTENTS

Table of Authorities ii

Summary of the Argument..... 1

Argument.....4

Conclusion15

Certificate of Service and Compliance16

TABLE OF AUTHORITIES

Affiliated Medical Transport v. State Tax Commission, 755 S.W.2d 646
 (Mo. App. E.D. 1988).....7

Batek v. Curators of the University of Missouri, 920 S.W.2d 895
 (Mo. banc 1996).....11

Brinker Missouri, Inc. v. Director of Revenue, 319 S.W.3d 433, n.4
 (Mo. banc 2010).....14

E & B Granite, Inc. v. Dir. of Revenue, 331 S.W.3d 314
 (Mo. banc 2011).....3, 7, 8, 9, 13

Fenix Construction Company, SC 93915, Slip Opinion,
 November 25, 20141, 8, 9, 10

Fred Weber, Inc. SC 941091, 8, 9

Hess v. Chase Manhattan Bank, USA, N.A., 220 S.W.3d 758
 (Mo. banc 2007).....13

Kuzuf v. Gebhardt, 606 S.W.2d 446 (Mo. 1990).....1

State ex rel Koster v. Cowin, 390 S.W.3d 239 (Mo. App. W.D. 2013).....11

United Cerebral Palsy Assoc. of Greater Kansas City v. Ross, 789 S.W.2d 798
 (Mo. banc 1990).....7

Utilicorp United, Inc. v. Director of Revenue, 75 S.W.3d 725, n.5
 (Mo. banc 2002).....14

Winston v. Reorg. School District R-2, Lawrence County, 636 S.W.2d 324

(Mo. banc 1982).....11

Black’s Law Dictionary, Eighth Edition, Thomson West, p. 14611

Logic For Lawyers, Aldisert; Clark Boardman Callaghan, 11-21

Logic for Lawyers, Aldisert; Clark Boardman Callaghan, op. at, 11-18.....10

Mo. Const., Art. I, Section 13.....13

Section 136.300, RSMo 200014

Section 136.300, RSMo3, 7, 11, 14

Section 144.030, RSMo2, 7, 8

Section 144.054, RSMo 2, 3, 5, 6, 7, 8, 9, 11, 15

Section 144.055, RSMo2

Section 144.062, RSMo7, 8

SUMMARY OF THE ARGUMENT

The Director’s brief in this case is nothing more than a series of strawmen.¹ First, the Director attempts to shift the Court’s attention to Ben Hur’s post-production activity on construction sites. This misstates Ben Hur’s exemption claim, which is based upon manufacturing, processing and producing building materials at its plant facility. Further, the “output with market value,”—the materials for which Ben Hur seeks exemption—is not an improvement or structure on real property, but the structural steel building materials manufactured and shipped from its plant.

A second misdirection is the Director’s suggestion on page 4 of his brief that Ben Hur’s position is like the recently argued cases involving Fenix Construction Company and Fred Weber, Inc.; Ben Hur is not like either. First, some of Ben Hur’s product is sold as tangible personal property at retail, sales for which Ben

¹ *Logic For Lawyers*, Aldisert; Clark Boardman Callaghan, 11-2 (“It [*ignoratio elenchi*] also arises in what is sometimes called “the fallacy of the strawman—erecting a strawman posed as an opponent’s argument and then proceeding to demolish it.”); *Black’s Law Dictionary*, Eighth Edition, Thomson West, p. 1461 (a tenuous and exaggerated counter argument that an advocate puts forward for the sole purpose of disproving it.) See, e.g., *Kuzuf v. Gebhardt*, 606 S.W.2d 446, 453 (Mo. 1990).

Hur charges, collects and remits sales tax to the Director. Secondly, the manufacturing, processing or producing of Ben Hur's product is completed at its own facility, not at a construction site.

Third, the Director suggests at page 27 of his brief that Ben Hur's structural steel products do not have a market value because they are later incorporated into a structure, and thus not readily removable from the specific site for resale. Again, the Director attempts to shift the relevant activity from Ben Hur's manufacturing facility to a post-production construction site.

Fourth, at page 21 of his brief, the Director suggests that a position posited by the Director, not based on Ben Hur's claim, would result in exemption of millions of dollars of material purchases by one J.E. Dunn. There is no evidence in the record whatsoever about the activities of J.E. Dunn, nor any findings of fact thereon by the Administrative Hearing Commission (AHC). Further, it appears to be focused on construction site activity, not the activity of manufacturing and producing structural steel at a manufacturing facility. Finally, it suggests that the Director in the first instance, and this Court on review, consider the fiscal impact of the General Assembly's tax policy, a concept long rejected by this Court.

Fifth, the Director repeatedly ignores a principal difference between the exemptions granted by Sections 144.030(2), (13), (37); 144.055 and 144.062, and the exemption at issue in this case under Section 144.054.2. The exemptions in the

former sections are all conditioned on the disposition of products, whether by sale for resale or sale for use in activities of exempt entities. As this Court noted in *E & B Granite, Inc. v. Dir. of Revenue*, 331 S.W.3d 314, 317 (Mo. banc 2011), the exemption pursuant to Section 144.054.2, RSMo, attaches without regard to a post-production sale upon completion of the production process.

Finally, the Director ignores the import of Section 136.300, RSMo as amended by Senate Bill 829, passed over the Governor's veto and effective October 10, 2014. The General Assembly amended that section specifically to extend its provisions to exemption cases such as the one at bar, and removing the net worth of the taxpayer as an issue to application of the section. Thus, "with respect to any issue relevant to ascertaining the tax liability of a taxpayer all laws of the state imposing a tax shall be strictly construed against the taxing authority in favor of the taxpayer" is now the law to be applied by this Court.

This Court should reject the fallacious arguments of the Director and reverse the AHC's erroneous construction and application of Section 144.054.2, RSMo, to the facts of this case.

ARGUMENT

Introduction

Ben Hur Steelworx, LLC (hereinafter “Ben Hur”) is in the business of manufacturing structural steel building materials. (L.F. 15, FOF 2; L.F. 16, FOF 5).

The market for structural steel building materials, whether delivered to the customer or installed on customers’ premises is for customized products. (Tr. 15:17–16:4). In all sales, the product is delivered from Ben Hur’s plant to the buyer. The market price is established by bid or request for proposals from many sellers at the request of the potential buyers. (Tr. 15:17–16:4). If the buyer later cancels the order, Ben Hur may buy the product back, or it may be sold as scrap. (Tr. 18:10–18:16).

Ben Hur sells some of its products as tangible personal property, and Ben Hur charges, collects and remits sales tax on such sales. (L.F. 16, FOF 9). Ben Hur has claimed, and the Director has not denied, sales tax exemption on its purchase of materials for these transactions. These transactions are not at issue on this case.

Ben Hur sells some of its products for use in projects for exempt entities. (L.F. 16, FOF 6). Ben Hur has claimed, and the Director has not denied, sales tax exemption on its material purchases for these transactions. These transactions are not at issue here.

Ben Hur sells some of its product installed. (L.F. 15, FOF 2). Ben Hur sought exemption, pursuant to section 144.054.2 RSMo, on its purchases of materials for these sales. The Director denied the claim, and the Administrative Hearing Commission denied the claimed exemption, as well. (L.F. 23).

Ben Hur's claim is that its manufacturing, processing and producing structural steel building materials at its manufacturing plant meets the conditions specified in 144.054.2, RSMo, to qualify for sales tax exemption on its purchases of materials.

The Director's brief to this Court, like its arguments below, does not address, much less controvert, any element of Ben Hur's claim. Rather, the Director argues about the post-production use of building materials², and on Ben Hur's post-production installation activities. Neither is a material or relevant factor under the plain language of 144.054.2, RSMo.

A. The Post-Production Disposition of Ben Hur's Products is not Material to the Exemption granted by Section 144.054.2, RSMo (In reply to the Director's Points I and II.)

Ben Hur's exemption claim is based upon manufacturing, processing and producing structural steel building materials at its plant facility. Further, the

² Unsurprisingly, structural steel building materials are used in the construction industry.

“output with market value,”—the materials for which Ben Hur seeks exemption—is not an improvement or structure on real property, but the structural steel building materials manufactured in, and shipped from, its plant. (L.F. 16, FOF 5, 7). The exemption attaches when production is complete; section 144.054.2, RSMo, does not condition the exemption on subsequent disposition of the product.

Section 144.054.2, RSMo, states:

2. In addition to all other exemptions granted under this chapter, there is hereby specifically exempted from the provisions of sections 144.010 to 144.525 and 144.600 to 144.761, and from the computation of the tax levied, assessed, or payable under sections 144.010 to 144.525 and 144.600 to 144.761, electrical energy and gas, whether natural, artificial, or propane, water, coal, and energy sources, chemicals, machinery, equipment, and materials used or consumed in the manufacturing, processing, compounding, mining, or producing of any product, or used or consumed in the processing of recovered materials, or used in research and development related to manufacturing, processing, compounding, mining, or producing any product

...

The Director does not point out any language in the statute that suggests that the exemption is conditioned on any activity after the product is complete because there is none. Historically, Missouri courts have strictly, but reasonably, construed exemption statutes. *United Cerebral Palsy Assoc. of Greater Kansas City v. Ross*, 789 S.W.2d 798, 799 (Mo. banc 1990); *Affiliated Medical Transport v. State Tax Commission*, 755 S.W.2d 646, 649 (Mo. App. E.D. 1988).³ Regardless of the construction standard, this Court should not impose post-production requirements not actually contained in the statutory language.

Indeed, the Director repeatedly ignores a principal difference between the exemptions he cites in Sections 144.030(2), (13), (37) and 144.062, RSMo, as these are all conditioned upon the disposition of the product. The exemption at issue in this case under Section 144.054.2, RSMo, is not. As this Court noted in *E & B Granite, Inc. v. Dir. of Revenue*, 331 S.W.3d 314, 317 (Mo. banc 2011), the exemption pursuant to Section 144.054.2, RSMo, attaches upon completion of the production process, without requiring a post-production sale.

In contrast, Section 144.030.2(2), RSMo, requires a post-production taxable sale for the exemption to apply. (Materials...which...become a component part of the new personal property...intended to be sold at retail.) The exemption provided

³ Since the passage of the amendments to Section 136.300, RSMo, this strict construction is no longer the law in Missouri. *See, infra*, pages 10-13.

by Section 144.030.2(37), RSMo, obtains only if “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... (b) An exempt entity located outside the state...” Section 144.062.1, RSMo, provides an exemption for purchases for enumerated exempt entities “if the purchases are related to the entities’ exempt function.” These exemptions are conditioned on the use of the materials or property whose purchase is exempted. The absence of such restrictions in Section 144.054.2, RSMo, prompts a different analysis, one focused on the production of the product, and not its later use.

The Director compounds confusion by suggesting (Brief, p. 4) that Ben Hur’s case is like the recently argued cases involving *Fenix Construction Company*, SC 93915 and *Fred Weber, Inc.* SC 94109; Ben Hur is not like either. First, some of Ben Hur’s product is sold as tangible personal property at retail, sales for which Ben Hur charges, collects and remits sales tax to the Director (L.F. 16, FOF 9); neither is true of either Fenix or the paving subcontractors purchasing from Fred Weber. Second, the manufacturing, processing or producing of Ben Hur’s product is completed at its own facility (L.F. 16, FOF 7), not at a construction site as with both Fenix and Fred Weber.

The application of Section 144.054.2, RSMo, in this case is to facts far closer to those of *E & B Granite, supra*, than to *Fenix* or *Fred Weber*. E & B

Granite manufactured raw granite slabs into countertops. E & B sold some without installation and some with installation. *E & B Granite*, 331 S.W.3d at 315. Here, Ben Hur manufactures structural steel building materials. Ben Hur sells some without installation, and some with installation. (L.F. 15, FOF 2; L.F. 16, FOF 9). The fact patterns are identical for purposes of Section 144.054.2, RSMo. This Court should apply its *E & B Granite* analysis to this case, without regard to the pending *Fenix* and *Fred Weber* cases, which raise different issues based on different facts.

The Director suggests (Brief, p. 27) that Ben Hur's structural steel products do not have a market value because they are later incorporated into a structure, and not thereafter readily removable from the specific site for resale. Here, again, the Director fails to address the relevant time and activity, which is completion of the product at Ben Hur's manufacturing facility before the product is shipped to the buyer. The Director also conflates "market value" with "market". Section 144.054.2, RSMo, does not require that a product be sold in a retail sale at Walmart or Lowes to establish market value. The market value of Ben Hur's products is demonstrated in its contracts, in which buyers agree to pay for them. (Pet. Appendix, A 36, ¶ 2.5, 3.1).

This Court, in *Fenix*, SC93915, summarized why the tilt-up concrete walls are not a product:

“The walls are constructed on site, can be used only for that particular building, and have not demonstrated actual or potential market value to any buyer other than the building owner.”

Slip Op., November 25, 2014, at 5. However, in this matter the opposite is the case: 1) The steel beams are constructed in a factory in Lemay and put on a truck to the construction site for installation (Tr. 10:2-7; Ex. 4); 2) Steel beams can be used for other purposes with modification; and 3) The evidence shows other potential buyers for the beams including Ben Hur repurchasing for use or even using for scrap iron (Tr. 18:10-18:16).

Fenix supports Ben Hur’s claim or, at the least, does not conflict with Ben Hur’s claim.

B. The Director’s argument *ad terrorem*⁴ is unsupported in the record; the General Assembly, not the Director or this Court, sets tax policy.

The Director suggests (Brief p. 21) that a decision based on facts hypothesized by the Director, not based on Ben Hur’s claim, would result in exemption of millions of dollars of material purchases by one J.E. Dunn. There is no evidence in the record whatsoever about the activities of J.E. Dunn, the taxable status of its purchases and sales, nor any findings of fact thereon by the

⁴ An appeal to fear of exaggerated consequences in the event an adversary’s argument prevails. *Logic for Lawyers*, op. at, 11-18.

Administrative Hearing Commission (AHC). Further, it focuses on construction site activity, not the activity of manufacturing and producing structural steel at a manufacturing facility. This Court should reject the Director's proposal.

In making this fallacious argument, the Director further suggests that he, and this Court on review, consider the fiscal impact and wisdom of the General Assembly's tax policy in administering and construing tax statutes, a concept long rejected by this Court. It is not this Court's province to question the wisdom, social desirability or economic policy underlying a statute as these are matters for the legislature's determination. *Batek v. Curators of the University of Missouri*, 920 S.W.2d 895, 899 (Mo. banc 1996); *Winston v. Reorg. School District R-2, Lawrence County*, 636 S.W.2d 324, 327 (Mo. banc 1982); *State ex rel Koster v. Cowin*, 390 S.W.3d 239, 245 (Mo. App. W.D. 2013). This Court should reject the Director's unsubstantiated invitation to speculate on the economic impact and wisdom of the exemption.

C. In construing the language of section 144.054.2, RSMo, this Court should apply the provisions of the newly-amended Section 136.300, RSMo.

Finally, the Director ignores the import of Section 136.300, RSMo as amended by Senate Bill 829, passed over the Governor's veto and effective October 10, 2014. (App. A1). The General Assembly declared that strict

construction of revenue laws against the taxing authority is now to apply in exemption cases.

The amended section states:

136.100.1. With respect to any issue relevant to ascertaining the tax liability of a taxpayer all laws of the state imposing a tax shall be strictly construed against the taxing authority in favor of the taxpayer.

The director of revenue shall have the burden of proof with respect to any factual issue relevant to ascertaining the liability of a taxpayer only if:

(1) The taxpayer has produced evidence that establishes that there is a reasonable dispute with respect to the issue; and

(2) The taxpayer has adequate records of its transactions and provides the department of revenue reasonable access to these records.

2. This section shall not apply to any issue with respect to the applicability of any tax credit.

The General Assembly amended this section specifically to extend its provisions to exemption cases such as the one at bar, and to remove the taxpayer's net worth as a condition to application of the section. Because Ben Hur's net worth is not now an issue and the section now applies in exemption cases, "with

respect to any issue relevant to ascertaining the tax liability of a taxpayer all laws of the state imposing a tax shall be strictly construed against the taxing authority in favor of the taxpayer” is now the law to be applied by this Court.

Because this Court reviews agency decisions on matters of law *de novo*, *E & B Granite, supra*, 331 S.W.3d at 316 (“This court reviews the AHC’s interpretation of revenue laws *de novo*.”), it will not be applying the amended statute retroactively. In any event, precedent establishes that application of the amended statute by this Court does not run afoul of the constitutional prohibition against laws retrospective in their operation.⁵

This Court discussed the application of new statutory language in *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758 (Mo. banc 2007). There the Court said, at page 769:

Procedural and remedial statutes “not affecting substantive rights, may be applied retrospectively, without violating the constitutional ban on retrospective laws. *Mendelsohn v. State Board of Registration for the Healing Arts*, 3 S.W.3d 783, 786 (Mo. banc 1999).

“Procedural law prescribes a method of enforcing rights or obtaining

⁵ That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted. Mo. Const., Art. I, Section 13.

redress for their invasion; substantive law creates, defines and regulates rights.” [Citation omitted]... and absent legislative intent to the contrary, “[w]hen a statute is...remedial in one part while penal in another, it should be considered a remedial statute when enforcement of the remedy is sought” and applied retrospectively, but considered “penal when enforcement of a penalty is sought” and applied prospectively. *City of St. Louis v. Carpenter*, 341 S.W.2d 786, 788 (Mo. 1961).”.

The provisions of Section 136.300, RSMo, are remedial only. Thus, even under the strictures of Article I, Section 13, this Court should apply the standards of the amended section in its deliberations in this case.

Prior to amendment, Section 136.300.1, RSMo 2000, codified the proposition that taxing statutes are to be strictly construed against the tax gatherer. Subsection 2 excepted application of the section in exemption cases.⁶ (App. A2). However, in enacting the current statute the General Assembly has included exemption cases within the ambit of the statute on and after October 10, 2014.

⁶ This Court has noted that the basis for strictly construing sales tax exemptions against taxpayers is grounded in Section 136.300, RSMo 2000. *See, e.g., Utilicorp United, Inc. v. Director of Revenue*, 75 S.W.3d 725, n.5 (Mo. banc 2002); *Brinker Missouri, Inc. v. Director of Revenue*, 319 S.W.3d 433, n.4 (Mo. banc 2010).

Consistent with these principles, this Court should reject the Director's proposed addition of conditions subsequent to Section 144.054.2, RSMo.

CONCLUSION

This Court should reject the fallacious arguments of the Director and reverse the AHC's erroneous construction and application of Section 144.054.2, RSMo, to the facts of this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned counsel certifies that on this 25th day of November, 2014, a true and correct copy of the above brief and Appendix were served on the following by eService of the eFiling System and a Microsoft[®] Office Word 2010 version was e-mailed to:

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

- (1) contains the information required by Rule 55.03;
- (2) complies with the limitations in Rule 84.06(b) and contains 3,378 words, determined using the word count program in Microsoft[®] Office Word 2010; and
- (3) the Microsoft[®] Office Word 2010 version e-mailed to the parties has been scanned for viruses and is virus-free.

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