**SC94209**

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**IN THE SUPREME COURT OF MISSOURI**

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**BEN HUR STEEL WORX, LLC,**

**Appellant,**

**vs.**

**DIRECTOR OF REVENUE,**

**Respondent.**

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

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# BRIEF OF RESPONDENT

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## STATEMENT OF FACTS

Ben Hur Steel Worx, LLC (Ben Hur), a wholly owned subsidiary of Ben Hur Construction Company (Respondent's Appdx. A2, n.2), is a construction subcontractor that provides "labor, materials, and equipment necessary to furnish and install structural steel beams, plates, angles, and other components in the process of construction of large scale commercial buildings and structures." (Respondent's Appdx. A2); (Tr. 15, 38). Ben Hur does not manufacture the steel beams but purchases the steel beams from a steel mill or a steel warehouse. (Tr. 11). Ben Hur then installs the steel beam infrastructure as part of the overall construction project.

Ben Hur's construction projects are for two different types of entities: taxable entities and exempt entities. If the construction project is for a taxable entity, Ben Hur pays taxes on the materials it purchases to build the steel beam infrastructure. (Respondent's Appdx. A3). If, however, the construction project is for an exempt entity, such as a qualified educational institution or healthcare organization, Ben Hur does not pay sales or use taxes on the purchased materials. (Respondent's Appdx. A3); (Tr. 16 (There are "a lot of occasions" when Ben Hur will be constructing a building for "a

hospital or a government organization that is tax exempt.")). These construction projects are exempt under § 144.062.[1/] (Tr. 19-20).

For purposes of this case, Ben Hur was a party to construction contracts as a subcontractor, and employed all of the necessary labor, materials, and equipment in order to deliver and install the steel beam infrastructure for building projects involving taxable entities. (Respondent's Appdx. A4). There are no exempt entities in this case.

The contracts under which Ben Hur uses structural steel beams is for constructing a building, not for the manufacturing of a product. (Tr. 37; Ex. B; Ex. C; Ex. D). For example, the contracts provide as follows:

> [Ben Hur] shall do and provide all things necessary for the proper performance, installation, construction and completion . . . . (Exhibit C)
>
> [Ben Hur] shall procure and furnish all materials, labor, supervision, equipment, facilities, supplies, licenses, and permits necessary to perform all work set forth below in the construction of . . . (Ex. D)

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[1/] All references to the Missouri Revised Statutes are to the 2014 Cumulative Supplement unless otherwise specified.

The contracts do not refer to the construction project or the building of the steel beam infrastructure as the manufacturing of a product, but instead as the constructing of a building or facility. (*See, e.g.,* Exs. B, C, and D).

In order to complete its construction contracts, Ben Hur receives specifications from its customer concerning the structural steel beams it will use. (Tr. 12, 33). Ben Hur purchases steel beams that fit the client's specifications if possible, (Tr. 11, 32), but it may cut the steel beams to length, drill holes, bevel edges and attach clips or pieces of plate. (Tr. 12, 33). Ben Hur retains ownership of the steel beams until the building is constructed. (Tr. 20-23). Because the structural steel beams are specific to each customer, Ben Hur will scrap the steel beams if the project is canceled. (Tr. 18).

Citing *E & B Granite, Inc. v. Dir. of Revenue*, 331 S.W.3d 314 (Mo. banc 2011), Ben Hur sought a refund of sales and use taxes paid on "steel beams, plates, angles, bolts, etc. used to fabricate structural steel for installation in building construction" for construction projects involving taxable entities. (Exs. 1-3). The Director of Revenue denied the refund claim and the Administrative Hearing Commission agreed that "Ben Hur is not entitled to the refund" under § 144.054. (Respondent's Appdx. A1 & A10).

## SUMMARY OF THE ARGUMENT

Just as the construction companies did in *Fenix Construction Co.*, SC93915 and *Fred Weber, Inc.*, SC94109, Ben Hur attempts to expand the tax exemption for manufacturing in § 144.054 in an effort to include its business in this case – construction of steel beam infrastructures for large scale commercial building projects. Expanding § 144.054 to include construction, however, would be contrary to the plain language of the statute and surrounding statutory provisions, to say nothing of the absurd and unreasonable result that would occur.

The General Assembly did not intend a tax exemption for "manufacturing, processing, compounding, mining, or producing of any product" to include construction activities. § 144.054.2. Indeed, all the evidence is to the contrary. Most people, of course, do not reasonably think of the construction of a house or a building as the manufacturing of a product. Neither did the General Assembly. When the General Assembly needed to refer to construction activities they did so clearly and repeatedly. The General Assembly even made the distinction between manufacturing and construction in the very same chapter (Chapter 144) and section (§ 144.030.2).

In § 144.062 (a provision that was amended in the same legislative session that § 144.054 was adopted), the General Assembly specifically

exempted "materials for the purpose of constructing, repairing or remodeling facilities." The General Assembly certainly could have included the same types of activities in § 144.054 – constructing, repairing, and remodeling – but it did not. That obvious omission is dispositive. *Aquila Foreign Qualifications Corp. v. Dir. of Revenue*, 362 S.W.3d 1, 4 (Mo. banc 2012).

In yet another tax exemption, the General Assembly once again specifically exempted "fabricating tangible personal property which is used in fulfilling a contract for the purpose of constructing, repairing or remodeling facilities." § 144.030.2(37). This language is used in the very same subsection that exempts "manufacturing, processing, compounding, mining, producing or fabricating," § 144.030.2(2), demonstrating without question that the General Assembly considers manufacturing and construction to be different. As a result, Ben Hur cannot show that its construction activities "fit[] the statutory language exactly." *Cook Tractor Co., Inc. v. Dir. of Revenue*, 187 S.W.3d 870, 872 (Mo. banc 2006).

If Ben Hur, as a construction contractor, were permitted to claim an exemption under § 144.054 for its construction activities, then every construction contractor in Missouri would likewise be permitted to claim the exemption. As a result, all "electrical energy and gas, whether natural, artificial, or propane, water, coal, and energy sources, chemicals, machinery,

equipment, and materials" would be entirely tax exempt. The impact on sales and use tax revenue in Missouri would be significant, to say the least.

The Administrative Hearing Commission correctly concluded that Ben Hur is not entitled to a tax exemption for its construction activities in this case, and that decisions should be 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, Ben Hur is subject to sales or use tax on its purchases of construction materials, energy sources, machinery, and equipment 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 support the claim that constructing a building fits exactly the tax exemption for "manufacturing, processing, compounding, mining, or producing of any product" under § 144.054.2.

## I. The Construction of a Building Does Not Qualify for a Tax Exemption Under § 144.054.2, Because it is Not the "Manufacturing, Processing, Compounding, Mining, or Producing" of a "Product" – Responding to Appellant's Points I & II.

It is undisputed that Ben Hur is a construction contractor purchasing materials, energy, machinery, and equipment to build buildings. The Commission agreed. Nevertheless, Ben Hur argues that it qualifies for the exemption under § 144.054.2 because it cuts, grinds, or paints steel beams (or makes similar modifications to the beams) in order to fulfill construction contracts and build buildings. This argument, however, ignores the General Assembly's language in describing when purchases of construction materials are exempt from taxes, language that is not used in § 144.054.

"No portion of a statute is read in isolation, but rather is read in context to the entire statute, harmonizing all provisions." *Utility Serv. Co., Inc. v. Dep't of Labor and Indus. Relations*, 331 S.W.3d 654, 658 (Mo. banc

2011). Indeed, "[a]scertaining and implementing the policy of the General Assembly requires the court to harmonize all provisions of the statute." *20th & Main Redevelopment Partnership v. Kelley,* 774 S.W.2d 139, 141 (Mo. banc 1989). The General Assembly specifically provided an exemption for building and construction materials in § 144.062, which is an exemption that Ben Hur regularly uses; but an exemption under § 144.062 was not sought in this case because it does not apply. Instead, Ben Hur seeks to stretch the manufacturing exemption in § 144.054 to apply to construction. Such an interpretation would render the language of § 144.062 and § 144.030.2(37) effectively meaningless, a result that this Court has never approved. *See Edwards v. Gerstein*, 237 S.W.3d 580, 581 (Mo. banc 2007) ("When interpreting statutes, courts do not presume that the legislature has enacted a meaningless provision.").

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

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, processing, compounding, mining, or producing– but it is especially notable for the words and terms it does not use – construction and building.

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). "Essential 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. One would think that if the General Assembly had intended to include such a broad range of activities as construction, the General Assembly would have used the appropriate words or terms, particularly when the words and terms are so obvious and are used by the General Assembly in other provisions in the same chapter. And 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.

### B. Applying § 144.054 to Construction or Building Projects Would Render the Language of § 144.062 and § 144.030.2(37) Effectively Meaningless.

The General Assembly passed § 144.054 in 2007, expanding the manufacturing exemptions in § 144.030. *See E & B Granite, Inc.*, 331 S.W.3d at 317. That very same year, the General Assembly amended another important tax exemption in Chapter 144 – § 144.062 ("Construction materials, exemption allowed, when"). Section 144.062 was originally passed in 1988, and was subsequently amended in 1994, 1998, and 2007. The fact that it was amended in the very same session in which § 144.054 was passed demonstrates that the General Assembly knew how to distinguish between construction and manufacturing in exemptions and did not intend to undermine § 144.062 by the passage of § 144.054.

Section 144.062 provides as follows:

> 1. With respect to exempt sales at retail of tangible personal property **and materials for the purpose of constructing, repairing or remodeling facilities** for:
>
> (1) A county, other political subdivision or instrumentality thereof exempt from taxation under

subdivision (10) of section 39 of article III of the Constitution of Missouri; or

(2) An organization sales to which are exempt from taxation under the provisions of subdivision (19) of subsection 2 of section 144.030; or

(3) Any institution of higher education supported by public funds or any private not-for-profit institution of higher education, exempt from taxation under subdivision (20) of subsection 2 of section 144.030; or

(4) Any private not-for-profit elementary or secondary school exempt from taxation under subdivision (22) of subsection 2 of section 144.030; or

(5) Any authority exempt from taxation under subdivision (39) of subsection 2 of section 144.030; or

(6) After June 30, 2007, the department of transportation or the state highways and transportation commission;

hereinafter collectively referred to as exempt entities, such exemptions shall be allowed for such purchases if the purchases are related to the entities' exempt functions and activities. In addition, the sales shall

not be rendered nonexempt nor shall any material supplier or contractor be obligated to pay, collect or remit sales tax with respect to such purchases made by or on behalf of an exempt entity due to such purchases being billed to or paid for by a contractor or the exempt entity contracting with any entity to render any services in relation to such purchases, including but not limited to selection of materials, ordering, pickup, delivery, approval on delivery, taking of delivery, transportation, storage, assumption of risk of loss to materials or providing warranties on materials as specified by contract, use of materials or other purchases **for construction of the building or other facility, providing labor, management services, administrative services, design or technical services or advice to the exempt entity**, whether or not the contractor or other entity exercises dominion or control in any other manner over the materials in conjunction with services or labor provided to the exempt entity.

> 2. When any exempt entity contracts for the purpose of **constructing, repairing or remodeling facilities, and purchases of tangible personal property and materials to be incorporated into or consumed in the construction of the project are to be made on a tax-exempt basis**, such entity shall furnish to the contractor an exemption certificate authorizing such purchases for the construction, repair or remodeling project. . . . .

§ 144.062 (emphasis added). Section 144.062, therefore, specifically provides an exemption for building materials incorporated into or consumed in the construction of buildings and other facilities – but only with respect to certain exempt entities.

The interpretation ascribed to § 144.054 by Ben Hur would strip § 144.062 of meaning, as any construction project could thereby qualify as the manufacturing of a product. It is impossible to conceive of a building project that would not meet the supposed definition of manufacturing. Even cutting and hammering boards together with nails would constitute an "output that has a separate and distinct use, identity, or value, and thus is a product of manufacturing, or producing." Appellant's Br. P. 11. Though Ben Hur does this work with steel beams, it is essentially identical to what carpenters do to

build a house – the carpenters cut, drill, and connect wood to construct (or "frame") the house.

In addition to § 144.062, the General Assembly's intent to not include construction in the meaning of manufacturing is confirmed by still more surrounding statutory provisions; namely, § 144.030.2(37):

> 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. *See also* § 144.455 (relating to sales and use tax for "constructing, widening, reconstructing, maintaining, resurfacing and repairing" highways, roads and streets). And like § 144.062, the General Assembly limited the "construction exemption" to certain entities of which Ben Hur does not qualify in this case.

If the General Assembly considered construction or building to be manufacturing, processing, or producing of a product, it would not have used different words or terms to describe exempt activities in the very same chapter – chapter 144, much less the very same section – § 144.030.2. *Compare* § 144.030.2(2) ("manufacturing, processing, compounding, mining, producing or fabricating") *with* § 144.030.2(37) ("constructing, repairing or remodeling").

What is more, the omission of the term "fabricating" from the list of activities exempt under § 144.054 further undermines Ben Hur's claims. In truth, the best (or rather closest) description for what Ben Hur does is actually in § 144.030.2(37) – "fabricating tangible personal property which is used in fulfilling a contract for the purpose of constructing, repairing or remodeling facilities." *See Cook Tractor Co.*, 187 S.W.3d at 872 (requiring that a taxpayer "fit[] the statutory language exactly"). Of course, Ben Hur cannot satisfy this exemption here (though they routinely seek the

construction exemption for exempt entities on other projects). But what this language demonstrates is that when the General Assembly passed § 144.054 it knew how to address the activities for which Ben Hur now seeks an exemption. Yet, the General Assembly omitted the term "fabricating" from the list of exempt activities in § 144.054, in addition to making no reference to the constructing, repairing, or remodeling of buildings or facilities.

Sections 144.062, 144.030.2(37), and even 144.455 all demonstrate that the General Assembly routinely uses words or terms such as "construction," "constructing," "building," "contractor," "facilities," and "project." More importantly, these provisions further 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 Tel. Co. v. Dir. of Revenue*, 182 S.W.3d 226, 228 (Mo. banc 2005).

### C. Ben Hur Never Treated Its Construction Projects in This Case as Manufacturing, Processing, or Producing a Product.

In addition to the plain language of the statute, as well as the surrounding statutory provisions, Ben Hur never treated or referred to their construction projects in this case as manufacturing, processing, or producing of a product. They were, after all, constructing large scale industrial buildings, or the steel beam infrastructure for such projects. Indeed, Ben Hur has routinely sought and obtained an exemption for their "construction" activities under § 144.062 for the very same type of work or activities for which they now seek exemption under § 144.054.

Consistent with common sense, and the ordinary use of these construction related words and terms, Ben Hur characterized their construction of buildings as just that:

> [Ben Hur] shall do and provide all things necessary for the proper performance, installation, construction and completion . . . . (Exhibit C)
>
> [Ben Hur] shall procure and furnish all materials, labor, supervision, equipment, facilities, supplies, licenses, and permits necessary to perform all work set forth below in the construction of . . . (Ex. D)

Instead of establishing by clear and unequivocal proof that the construction of a building fits exactly the statutory language, even Ben Hur must acknowledge that what they do is construction, which is not covered or even mentioned in § 144.054.2. As a construction contractor, Ben Hur is the final user and consumer of the materials and supplies it consumes in fulfilling its contracts and is responsible for paying or accruing tax on these materials and supplies. 12 CSR 10-112.010(1). In *Bratton Corp. v. Dir. of Revenue*, 783 S.W.2d 891, 892 (Mo. banc 1990), the Court held: "Materials purchased by a construction contractor and used in meeting his contractual obligation to improve real property are used or consumed by the contractor—not resold, making the transaction subject to sales tax." *Id.* citing *Overland Steel, Inc. v. Dir. of Revenue*, 647 S.W.2d 535, 538 (Mo. banc 1983).

The plain language of § 144.054, the surrounding statutory provisions, and even the taxpayers, do not treat the construction of a building as "manufacturing, processing, compounding, mining, or producing" of a "product." To do so would not only improperly expand § 144.054, but it would render meaningless other provisions of the law that the General Assembly gave no indication should be undermined. Accordingly, the refund claim must fail, and the Commission should be affirmed.

### D. The Consequences of Turning § 144.054 Into a Construction Exemption Would Produce Unreasonable and Absurd Results.

In addition to the plain language of the statute and the surrounding statutory provisions, it is likewise essential that the "[c]onstruction of statutes should avoid unreasonable or absurd results." *Reichert v. Bd. of Educ. of City of St. Louis,* 217 S.W.3d 301, 305 (Mo. banc 2007).

Here, applying the manufacturing exemption in § 144.054 to construction activities would produce significant tax consequences for the State of Missouri. Every construction company, large and small, would be able to seek an exemption for all "electrical energy and gas, whether natural, artificial, or propane, water, coal, and energy sources, chemicals, machinery, equipment, and materials used or consumed" in construction. § 144.054.2. Thus, a construction company like JE Dunn, which purchases millions upon millions of dollars in materials, to say nothing of their use or consumption of energy, water, machinery, and equipment, would do so entirely tax free. And JE Dunn would only be the tip of the iceberg.

Had the General Assembly intended such a dramatic result it certainly would have said so. The General Assembly specifically limited construction exemptions as provided in § 144.062 and § 144.030.2(37). And to broadly

apply the manufacturing exemption in § 144.054 – despite strict construction – would produce an unreasonable and absurd result.

## II. Section 144.054.2 Merely Expanded the Exempt Items, Not the Type of Manufacturing Activities – Responding to Appellant's Points I & II.

Implicit in the arguments of Ben Hur is the suggestion that the language of § 144.054 supposedly demonstrates an intent to apply the exemption to an entirely different – and much broader – category of activities than the manufacturing exemptions in § 144.030.2, including construction activities. This is not the case. Instead, § 144.054.2 expands the items subject to exemption, not the type of activities.

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

According to Ben Hur, its building and construction activities satisfy an expanded § 144.054. In effect, almost any activity where something is made would qualify under its broad and generic definition. Such a conclusion, however, belies recent decisions addressing § 144.054.2. *See, e.g., 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); *Aquila Foreign Qualifications Corp.*, 362 S.W.3d at 2. In none of these cases did this

Court hold that the exemption in § 144.054 includes almost any activity that results in something of value 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 Co.*, 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 Co., Inc. v. Dir. of Revenue*, 187 S.W.3d 870, 873 (Mo. banc 2006). 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/]

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[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.

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 constructing a building. Otherwise, as set 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 unquestionably drawn directly from § 144.030.2, and the same type of activities are exempt.[3/] *See E & B Granite*, 331 S.W.3d at 317 (noting that both § 144.054.2 and § 144.030.2(2) "relate to sales and use tax exemptions for manufacturers").

The similarity of the language in § 144.054.2 with that of § 144.030.2, and the other manufacturing exemptions, led this Court to reject an argument similar in reasoning to the one advanced here. In *Aquila*, it was argued that the term "processing," for purposes of § 144.054.2, expanded the

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[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 not included in § 144.054.2.

range of exempt activities to include 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 Mo., Inc. v. Dir. of Revenue*, 319 S.W.3d 433 (Mo. banc 2010), 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, including in relation to the construction of buildings and facilities, 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. Construction of a Building is not the Type of Industrial Activity Ordinarily Associated with Manufacturing a Product.

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 v. Smith*, 114 S.W.2d at 1020. These distinctions in the law reflect the common understanding that manufacturing and construction are different.

Ben Hur is a construction contractor that builds buildings. Buildings, and the materials used to build them, are no more associated with industrial manufacturing than is food preparation in a restaurant. Similarly, the

construction activities in this case do not produce the type of end result ordinarily associated with manufacturing. The buildings (or the steel beam infrastructure) cannot be used for any other location. The only value they have is to the person who contracted to have them built. 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, Inc. v. Dir. of Revenue*, 924 S.W.2d 280, 283 (Mo. banc 1996), 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.

Ben Hur was hired to perform certain construction services that are necessary to construct a building. The end result is not a marketable product. In fact, Ben Hur is not merely preparing individual steel beams, but instead a steel beam framework for a building. The steel beams and resulting building cannot be marketed as they are made specifically for the construction project 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.

This is not to say there is not a market at play in relation to these activities. The market in which Ben Hur operates is the market for the specialized knowledge and skilled labor necessary to construct buildings with steel beams. These construction services are valuable to the general contractor hiring Ben Hur, but their exercise does not result in a product that has any intrinsic market value. The consideration paid to Ben Hur is based upon the value of the construction services it renders rather than the value of the finished steel beam or building on the open market. This is not the "manufacture, processing, compounding, mining or producing of a product" contemplated in § 144.054.2.

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

In further support of its analysis, Ben Hur relies on *E & B Granite*. Such reliance is misplaced. First, it ignores *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 the construction activities in this case matter because the activities must constitute the manufacturing of a product to be exempt.

Second, reliance upon *E & B Granite* ignores what is truly at issue in this case – whether Ben Hur is manufacturing a product when it is constructing a building. 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*, SC91010, 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*, SC91010, Joint Stipulation ¶ 10, p. 46-47 of record on appeal, *available on* CaseNet). Steel construction beams are hardly fixtures. They are prepared and joined together in order to build the structural steel framework for a building.

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. It had. 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 attached to real property as a fixture.

In making this argument, the Director was relying upon the Court's historic treatment of dual operators in the case of *Blevins Asphalt Constr. 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 – construction – 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. SC91010 (*available on* CaseNet). 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 10th day of November, 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 6,526 words.

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