
IN THE SUPREME COURT OF MISSOURI

IBM CORPORATION,
Respondent/Cross-Appellant,

v.

DIRECTOR OF REVENUE,
Appellant/Cross-Respondent.

On Petition for Review from the Administrative Hearing Commission

Hon. Sreenivasa Rao Dandamudi, Commissioner

BRIEF OF RESPONDENT/CROSS-APPELLANT IBM CORPORATION

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TABLE OF CONTENTS

JURISDICTIONAL STATEMENT	1
STATEMENT OF FACTS	2
A. IBM and MasterCard	2
B. MasterCard’s Core Manufactured Products: Transaction Authorization, Clearing, and Settlement	4
C. Transaction Authorization.....	4
D. Clearing.....	6
E. Settlement.....	8
F. Additional Products Manufactured and Sold by MasterCard.....	9
ARGUMENT	11
The Commission Correctly Held That MasterCard’s Purchases Were Exempt Under § 144.054.2, R.S.Mo., Because MasterCard Manufactures A Valuable Product, In That It Organizes And Manipulates The Data To Produce A Different Product.	11
Standard of Review	11
Introduction.....	12
A. This Court Has Consistently Held That Manipulation Of Data To Produce A New Product Is “Manufacturing.”	13

B. Basic Principles Of Statutory Construction Support This Court’s Holdings On The Manufacturing Of Intangible Products.....	17
C. The Director’s Arguments Do Not Apply To The Intangible Products At Issue.	20
D. If The Court Finds That MasterCard’s Organization And Manipulation Of Data Is Not Manufacturing, That Decision Should Apply Only Prospectively.	23
CONCLUSION	24
CERTIFICATE OF COMPLIANCE	25
CERTIFICATE OF SERVICE	25

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Ben Hur Steel Worx, Inc. v. Director of Revenue,</i> 452 S.W.3d 624 (Mo. banc 2015).....	20
<i>Bridge Data Co. v. Director of Revenue,</i> 794 S.W.2d 204 (Mo. banc 1990).....	<i>passim</i>
<i>Brinker Missouri, Inc. v. Director of Revenue,</i> 319 S.W.3d 433 (Mo. banc 2010).....	12, 20
<i>Concord Publishing House v. Director of Revenue,</i> 916 S.W.2d 186 (Mo. banc 1996).....	<i>passim</i>
<i>Cook Tractor Co. v. Director of Revenue,</i> 187 S.W.3d 870 (Mo. banc 2006).....	19
<i>DST Systems, Inc. v. Director of Revenue,</i> 43 S.W.3d 799 (Mo. banc 2001).....	14, 15, 16, 17
<i>E&B Granite, Inc. v. Director of Revenue,</i> 331 S.W.3d 314 (Mo. banc 2011).....	19
<i>Emerson Elec. Co. v. Director of Revenue,</i> 204 S.W.3d 642 (Mo banc 2006).....	15
<i>State ex rel. Goldberg v. Barber & Sons Tobacco, Inc.,</i> 649 S.W.2d 859 (Mo. banc 1983).....	21
<i>GTE Automotive Electric v. Director of Revenue,</i> 780 S.W.2d 49 (Mo. banc 1989).....	16

<i>Int’l Bus. Machines Corp. v. Director of Revenue,</i>	
958 S.W.2d 554 (Mo. banc 1997).....	13, 14, 16, 17
<i>Mack Motor Truck Corp. v. Wolfe,</i>	
303 S.W.2d 697 (Mo. App. 1957)	19
<i>Marx v. General Revenue Corp.,</i>	
133 S.Ct. 1166 (2013)	22
<i>Michael Jaudes Fitness Edge, Inc. v. Director of Revenue,</i>	
248 S.W.3d 606 (Mo. banc 2008).....	11
<i>State ex rel. Sayad v. Zych,</i>	
642 S.W.2d 907 (Mo. banc 1982).....	19
<i>Southwestern Bell Telephone Co. v. Director of Revenue,</i>	
78 S.W.3d 763 (Mo. banc 2002).....	<i>passim</i>
<i>Southwestern Bell Telephone Co. v. Director of Revenue,</i>	
182 S.W.3d 226 (Mo. banc 2005).....	<i>passim</i>
<i>State v. Bouser,</i>	
17 S.W.3d 130 (Mo. App. 1999)	19
<i>Westwood Country Club v. Director of Revenue,</i>	
6 S.W.3d 885 (Mo. banc 1999).....	21
Statutes and Rules	
§ 143.903, R.S.Mo.....	23
§ 144.030.2, R.S.Mo.....	<i>passim</i>
§ 144.030.2(2), R.S.Mo.	12, 13, 16, 19

§ 144.030.2(5), R.S.Mo.	12, 13, 16, 19
§ 144.030.2(6), R.S.Mo.	12, 13, 16
§ 144.054.2, R.S.Mo.	11, 12, 21, 22
§ 144.054.3, R.S.Mo.	21, 22
§ 144.054.4, R.S.Mo.	21
§ 144.810, R.S.Mo.	20
§ 621.193, R.S.Mo.	11
Rule 84.04(f)	2

Other Authorities

The American Heritage Dictionary, 2nd College Edition (1991).....	18
Black’s Law Dictionary (10th Ed. 2014).....	21
Webster’s Third New International Dictionary (1993)	17

JURISDICTIONAL STATEMENT

Respondent/Cross-Appellant IBM Corporation (“IBM”) agrees the Court has jurisdiction over this appeal.¹

¹ IBM is not pursuing its cross-appeal before this Court.

STATEMENT OF FACTS

MasterCard organizes, manipulates, and processes data to produce a completely new product of value to its clients. This constitutes “manufacturing” as a matter of law. The Director’s brief inaccurately describes MasterCard’s operations and clashes with the uncontested evidence — including the parties’ stipulated evidence — and the Administrative Hearing Commission’s (“Commission”) findings of fact. Accordingly, pursuant to Rule 84.04(f), IBM submits its own Statement of Facts.

A. IBM and MasterCard

IBM is a New York based company. J.Ex. 8 ¶ 4.² IBM sells, among other things, computer equipment to customers around the world. MasterCard processes credit and debit transactions for cards carrying its brand at facilities in O’Fallon and Kansas City, Missouri. J.Ex. 8 ¶ 6. MasterCard also guarantees settlement between its customers and provides other payment-related products. *Id.* MasterCard uses the equipment purchased from IBM to produce these products. *Id.*

² References to the hearing transcript are as “Tr. __,” and references to the attached hearing exhibits, which were jointly admitted, are as “J.Ex. __.” References to the Legal File are as “L.F.,” and references to the parties’ Joint Proposed Hearing Order with stipulated facts — adopted by the Commission’s Order of November 26, 2013 — that is included in the Supplemental Legal File, are as “S.L.F. __.”

MasterCard's customers are generally financial institutions and other entities that include both cardholders' banks and merchants' banks. Cardholders' banks are known as "issuers," and merchants' banks are known as "acquirers." S.L.F. 1, ¶ C2. Each year, MasterCard authorizes, clears, and settles trillions of dollars in cardholder transactions among thousands of customer banks. J.Ex. 8 ¶ 16. These transactions occur in over 160 currencies. *Id.*

During the refund period, IBM sold computer hardware to MasterCard. This equipment included such items as servers, storage systems, and work stations for use at MasterCard's global technology and operations headquarters in O'Fallon and Kansas City. J.Ex. 1; J.Ex. 2; J.Ex. 8 ¶ 5.

MasterCard uses IBM's computer hardware to manufacture hundreds of products that it sells to its customers and cardholders. As MasterCard engineers Prashant Kondapaneni and Vernon Hoffman explained in their testimony, MasterCard's internal development teams use IBM's hardware to create the proprietary code and instructions that allow MasterCard to produce the products its customers desire. Tr. 73, 76, 81-84, 91, 96-97, 99-100.

The uncontested evidence established that MasterCard uses IBM's equipment to (i) organize and analyze the raw data from millions of credit and debit transactions as "inputs," (ii) "manipulate" the data, and (iii) using the data it has stored, analyzed, and manipulated to generate "outputs" that MasterCard sells to its customers as "products." Tr. 73, 83-84, 91.

**B. MasterCard's Core Manufactured Products: Transaction
Authorization, Clearing, and Settlement**

MasterCard produces and sells to its customers three core products using the equipment purchased from IBM — transaction authorization, clearing, and settlement. J.Ex. 8 ¶ 9. These core products are described below.

C. Transaction Authorization

To authorize a credit or debit card transaction, MasterCard electronically verifies the identity of the cardholder, the authenticity of the card, and the availability of funding. The authorization process begins when a cardholder presents a card to a merchant and the merchant's bank (the acquirer) asks MasterCard to identify the cardholder's bank (the issuer).

MasterCard's authorization system then analyzes and validates the card's security features. If the system confirms that the transaction is qualified for authorization and "makes sense," MasterCard sends the information to the issuer to approve (or decline) the transaction. After the transaction is approved or declined, the acquirer is electronically notified. The acquirer then conveys an approval to the merchant who completes the transaction, and the cardholder receives a receipt. S.L.F. 2-3, ¶¶ C3-6; J.Ex. 4, Part 1 at 2-1; J.Ex. 8 ¶¶ 10-11; Tr. 44.

When issuers are unable to authorize transactions themselves, MasterCard "stands in" for the issuer and directly authorizes (or declines) credit and debit transactions that meet the issuer's pre-defined criteria. S.L.F. 2, ¶ C11; J.Ex. 4 at 2-3; J.Ex. 11 at 13-14,

46-50. Once MasterCard authorizes the transactions, the authorization is binding on the issuer and cannot be reversed. *Id.*

MasterCard's systems authorize more than 40 million credit and debit transactions every day. J.Ex. 8 ¶ 13; J.Ex. 3. On average, transactions take less than three seconds to authorize. S.L.F. 2, ¶ C6; J.Ex. 3. Authorization is automated, performed in response to MasterCard's coding instructions, and produced with the equipment that IBM sold to MasterCard. S.L.F. 2, ¶ C6; J.Ex. 11 at 25, 28; Tr. 81-84, 97, 100.

The Director suggests MasterCard's role in authorization is "merely to communicate information electronically between different parties, and thereby facilitate a smooth path for the message to flow from the merchant to the cardholder bank and back again." App. Br. 9. The Director cites no evidence for this proposition because the undisputed facts, including facts the Director stipulated at trial, clearly refute it.³

While MasterCard does transmit information, it does so only after the authorization software has electronically verified the integrity of the card, the identity of the cardholder, and the availability of funding for the transaction — in a nutshell, after

³ The Director refers to an excerpt from Michael Rethorn's deposition in which Mr. Rethorn confirmed that MasterCard does not alter transaction data during authorization **after** an issuer approves a transaction and communicates its decision to MasterCard. The Director ignores the vital data organization and analysis that MasterCard performs **before** the transaction is approved, along with MasterCard's continued data organization and manipulation during clearing and settlement.

MasterCard has verified that the transaction “makes sense.” MasterCard thus analyzes a proposed transaction by processing data and produces a new product: a “yes” or “no” answer depending on the data relative to the issuer’s criteria.

In other cases, the evidence showed and the Commission found, MasterCard “stands in” for the customer and directly determines whether to authorize or decline transactions according to the customer’s defined parameters. Once MasterCard authorizes the transaction, it is binding and irreversible. The Director’s suggestion that authorization consists merely of “communicating information” is thus inaccurate and misleading.

D. Clearing

When clearing a customer’s account, MasterCard’s systems produce an account reconciliation and settlement position. J.Ex. 8 ¶ 14(c). To do so, MasterCard’s systems analyze the raw data for millions of transactions in dozens of currencies for each of its issuer and acquirer customers. *Id.*; S.L.F. 2, ¶ C9. The account reconciliation and settlement positions that MasterCard computes provide its customers with some of the most important information they need to run their businesses — whether the customers owe money to, or are owed money by, the counter-parties to each credit card transaction.

In addition to the stipulated evidence and the undisputed documentary evidence, Michael Rethorn, MasterCard’s Group Head of Service Definition for MasterCard Technologies, explained the clearing process at trial and through his uncontested affidavit. As Mr. Rethorn explained and the documents confirmed, clearing begins when merchants’ operating terminals close and they send their daily transactions to the

acquirers. The acquirers then send the transaction information to MasterCard. S.L.F. 2, ¶¶ C7–8; J.Ex. 8 ¶ 14(a); J.Ex. 5 at 1-1, 1-2. MasterCard processes the information in a computerized “mixing bowl,” validates the information, and approves sending the sorted information to the issuer. J.Ex. 8 ¶ 14(a). The issuer uses the clearing data organized and validated by MasterCard to post transactions to the cardholder’s account and generate the cardholder’s statement. J.Ex. 8 ¶ 14(b).

MasterCard’s systems produce a settlement amount for each transaction and then separate and total them by issuers and acquirers. MasterCard adds up each bank’s amount to determine how much is paid to each bank from all the transactions for that period. S.L.F. 2, ¶ C9. Each reconciliation may, depending on the specific issuer and acquirer, involve the analysis of thousands of separate transactions. J.Ex. 8 ¶ 14(c).

MasterCard uses mainframes purchased from IBM to run six complete clearing cycles per day, six days per week, processing “millions and millions of records every cycle.” *Id.* The clearing cycles are then fed for settlement into other computers that IBM sold to MasterCard. *Id.*; *see also* J.Ex. 5, Part 1 at 1-4.

The Director suggests that MasterCard is merely a passive conduit during clearing. App. Br. 9 (“Again, MasterCard’s part is to communicate information”). But that is not what the record evidence shows, what the Commission found, or, indeed, what the Director stipulated to before the hearing. The uncontested facts are that, during clearing, MasterCard analyzes millions of separate transactions, organizes the data for those transactions for each of its issuer and acquirer customers, reconciles each bank’s account, and then produces a comprehensive daily reconciliation that tells each customer whether

it owes, or is owed, money. Thus, in processing the data, once again MasterCard produces an entirely new end product that is different from the input data.

E. Settlement

MasterCard's third core product, settlement, enables the actual exchange of funds among MasterCard's bank customers and ensures that the appropriate parties are paid in an appropriate amount. The settlement positions that are produced during clearing are fed into MasterCard's Settlement Account Management system. S.L.F. 2, ¶ C10; J.Ex. 6 at 1-6, 1-7; Tr. 96-97. MasterCard then sends a computerized message to the bank to alert it to its settlement position. The message tells the bank whether it will have to pay funds or will receive funds during settlement. If the bank owes money, the bank pays the money to MasterCard. If the bank is due money, MasterCard pays the money to the bank. MasterCard then generates and sends a message to the bank that the funds transfer is complete. S.L.F. 2, ¶ C10; J.Ex. 6 at 1-6, 1-7.

The Director downplays the complexity and importance of MasterCard's settlement product, declaring without elaboration or record citation that "[o]nce again, MasterCard's part is to communicate information and facilitate transactions." App. Br. 10. But credit card transactions do not and cannot settle themselves. An exchange of money occurs only after MasterCard determines that a funds transfer is appropriate, where the money should come from, where it should go, and, based on that analysis, generates the electronic instructions that cause the transfers to occur. S.L.F. 2, ¶ C10; J.Ex. 6 at 1-6, 1-7. So once again, MasterCard generates a new and valuable end product from the input data.

F. Additional Products Manufactured and Sold by MasterCard

MasterCard uses its data warehousing capabilities to create new products on an ongoing basis. The data warehouse, which is electronic information stored in IBM's equipment, contains all of the transactions that MasterCard processes across the globe. The data warehouse contains more information than the Library of Congress, Tr. 82, and it allows MasterCard to access and organize all of the data collected in transaction authorization, clearing, and settlement to generate new products for its customers.

As Mr. Kondapaneni explained, the equipment IBM sold to MasterCard takes an "input" from MasterCard's proprietary code and instructions, "manipulate[s] the data," and then generates an "output" that MasterCard sells as a product. Tr. 83-84. MasterCard sells at least 50 such products to its customers from its warehoused transaction data. Tr. 82. For example, based on the data that it warehouses, organizes, analyzes, and manipulates, MasterCard is able to monitor how much gasoline is purchased during a given time period and, based on that information, produces a forecast about where the economy is headed. MasterCard sells this product to clients such as banks and securities exchanges. J.Ex. 8 ¶ 17; Tr. 78. Using warehoused transaction data, MasterCard also produces and sells trend reports of sales for items such as airline tickets, apparel, electronics and appliances, groceries, hardware, hotels and lodging, jewelry, and restaurants. Tr. 88-89; J.Ex. 4, Part 3 at 10-2, 10-3, 10-8, 10-9.

MasterCard also uses its data warehouse to produce and sell its "fraud scoring" product to its issuer customers. During authorization, MasterCard analyzes warehoused transactions to determine whether fraud is likely being committed. MasterCard produces

a fraud “score” for the transaction by electronically comparing a particular transaction to millions of other fraudulent and non-fraudulent transactions and determining how likely the transaction is to be fraudulent. S.L.F. 3, ¶ C13; J.Ex. 8 ¶ 20. The more transactions MasterCard analyzes, the more accurate the fraud score becomes. *Id.* MasterCard then provides the score to the issuing bank, which uses the score as it decides whether to authorize the transaction. *Id.*

MasterCard’s “InControl” product is another example. InControl allows cardholders to set spending limits on specific credit cards or credit card accounts. S.L.F. 3, ¶ C12. Using InControl, cardholders are able to control how, when, and where their cards are authorized for use. *Id.* For example, parents who provide a credit card to their children may use InControl to prevent the card from being used in bars and/or after curfew hours. When the card is presented for authorization, MasterCard electronically analyzes the time, location, and amount of the transaction. J.Ex. 5, Part 1 at 6-1, 6-2; J.Ex. 8 ¶ 19. If the transaction does not fall within the parameters established by the cardholder through the InControl system, the transaction is automatically declined. *Id.*

ARGUMENT

The Commission Correctly Held That MasterCard's Purchases Were Exempt Under § 144.054.2, R.S.Mo., Because MasterCard Manufactures A Valuable Product, In That It Organizes And Manipulates The Data To Produce A Different Product.

Standard of Review

The Director's brief is not entirely clear about whether she is challenging the Commission's factual findings or its legal conclusions. Much of the Director's brief argues that MasterCard merely communicates information to its clients and cardholders rather than generating a new and different product. App. Br. 8-11; 31; 40-43. Because the Commission found that MasterCard's data organization, manipulation, and processing produced new products (*see* App. Appx. A25, L.F. 37), the Director's assertion is an attack on the Commission's factual findings.

To the extent the Director is challenging the Commission's factual findings, the Court's review is quite deferential. The Court must view the evidence "in a light most favorable to the [Commission's] decision, together with all reasonable inferences that support it." *Michael Jaudes Fitness Edge, Inc. v. Director of Revenue*, 248 S.W.3d 606, 608 (Mo. banc 2008) (*citing Kanakuk-Kanakomo Kamps, Inc. v. Director of Revenue*, 8 S.W.3d 94, 95 (Mo. banc 1999)). The Court must affirm factual findings if competent and substantial evidence, based upon the whole record, supports the Commission's decision. § 621.193, R.S.Mo.

The Director also argues that MasterCard’s operations do not constitute “manufacturing” under § 144.054.2, R.S.Mo. App. Br. 21. To the extent the Director’s argument turns on the meaning of the statute, the Court reviews the issue *de novo*. *Brinker Missouri, Inc. v. Director of Revenue*, 319 S.W.3d 433, 436 (Mo. banc 2010). In determining the meaning of the word “manufacturing” in tax exemption statutes, this Court has interpreted the term “liberally.” *Concord Publishing House v. Director of Revenue*, 916 S.W.2d 186, 191 n.5 (Mo. banc 1996).

Introduction

In construing § 144.030.2(2), its other subsections, and § 144.054.2, this Court has consistently distinguished between tangible products such as steel and intangible products such as those at issue here. In the latter context, the Court has consistently — usually unanimously — held that organization and manipulation of computer data to produce a different product qualifies as “manufacturing.”

Section 144.054.2 provides, in pertinent part:

In addition to all other exemptions granted under this chapter, there is hereby exempted [from taxation] electrical energy and gas, whether natural, artificial or propane, water coal and energy sources, chemical, machinery, equipment, and materials used or consumed in the *manufacturing*, processing, compounding, mining, or producing of *any product*

(Emphases added). The emphasized parts of the statute are identical to § 144.030.2(2), and similar to § 144.030.2(5) and (6), all of which use the word “manufacturing.”

Basic principles of statutory construction support this Court's holdings. MasterCard's organization and manipulation of the data to produce a different product fits the dictionary definitions set forth in Judge Stith's dissent in *Southwestern Bell Tel. Co.* 182 S.W.3d 226, 238 (Mo. banc 2005) (Stith, J., dissenting). The legislature clearly intended § 144.054.2 to broaden the exemptions granted by § 144.030.2(2), (5) and (6). Most importantly, when it enacted § 144.054.2, the legislature is presumed to have known of the Court's construction of the identical language and hence to have adopted it.

The Director's principal argument is that "manufacturing" applies only to "industrial activities," which the Director apparently equates to smokestack factory operations that produce tangible personal property. In the context of tangible products, this argument may make sense. But it simply cannot apply to intangible products such as those at issue here.

A. This Court Has Consistently Held That Manipulation Of Data To Produce A New Product Is "Manufacturing."

The Court first addressed the issue in the context of computerized data in *Bridge Data Co. v. Director of Revenue*, 794 S.W.2d 204 (Mo. banc 1990), *abrogated on other grounds*, *Int'l Bus. Machines Corp. v. Director of Revenue*, 958 S.W.2d 554, 559 (Mo. banc 1997) ("*IBM*"). Bridge gathered financial data; analyzed it; and sent the end product to its customers. Bridge claimed that it owed no use tax on the hardware it used because it was "manufacturing" a product under § 144.030(4) and (5) (now codified at § 144.030(5) and (6)). Noting that the statute "contains no explicit requirement that the

product be ‘tangible,’” and that “what comes out of the system is clearly different from what went into it,” the Court sustained *Bridge*’s position. 794 S.W.2d at 206.

Bridge clearly supports the Commission’s holding. The Director argues to the contrary, that *IBM* “abrogated” *Bridge* and criticized its rationale. App. Br. 34. The only part of *Bridge* that *IBM* abrogated was its holding that the product need not be sold to qualify for the exemption. 958 S.W.2d at 558. In agreement with *Bridge*, *IBM* squarely holds that “organizing information through computer technology is ‘manufacturing.’” *Id.* at 557.

The Court has subsequently followed *Bridge* on the issue currently before the Court: whether the exemption applies to “equipment used to collect, process and transmit financial data.” *Southwestern Bell Tel. Co. v. Director of Revenue*, 78 S.W.3d 763, 766 (Mo. banc 2002) (“*Bell I*”). *Bell I* reaffirmed *IBM*’s express holding that ““organizing information through computer technology is ‘manufacturing.’” 78 S.W.3d at 768 (quoting *IBM*, 958 S.W.2d at 557).

Similarly, in *DST Systems, Inc. v. Director of Revenue*, 43 S.W.3d 799 (Mo. banc 2001), the taxpayer performed accounting and transfer agent functions for approximately 3,000 mutual funds with some 50 million mutual fund accounts. The taxpayer purchased mainframe computers to “gather, store, and organize all the information about shareholders,” and used that information to generate reports. 43 S.W.3d at 803. This Court “reiterated that organizing information through computer technology is manufacturing.” *Id.* at 802 (internal punctuation omitted). *Accord, Concord Publishing*, 916 S.W.2d at 191 (organizing information through computer technology is

manufacturing because the “final product is clearly different from what is put into the system”).⁴

The latest case in which the Court addressed the issue is *Southwestern Bell Telephone Co. v. Director of Revenue*, 182 S.W.3d 226 (Mo. banc 2005) (“*Bell II*”). Bell’s telephone system converted the human voice into electrical impulses that traveled to the destination and then converted it back to audible voices. *Bell II* confirmed that “both basic telephone services and various vertical services are intangible products that are manufactured.” 182 S.W.3d at 234.

These cases are directly on point. In each stage of its basic service — authorizing, clearing, and settling transactions — MasterCard’s computers organize, manipulate, and process data to produce a different product from the inputs. In authorization, MasterCard systems determine whether a transaction qualifies for approval or must be rejected. In

⁴ The Director’s suggestion that the exemption only applied in *Concord Publishing* and *DST* because the computers were part of producing tangible products, App. Br. 35-36, is incorrect. Both cases plainly held that “organizing information through computer technology” was, standing alone, “manufacturing.” *DST*, 43 S.W.3d at 802; *Concord Publishing*, 916 S.W.2d at 191. See also *Bell II*, 78 S.W.3d at 768 (“Basic telephone service and the various vertical services involved herein are intangible products that are manufactured”); *Emerson Elec. Co. v. Director of Revenue*, 204 S.W.3d 642, 647 (Mo. banc 2006) (holding in both *Concord Publishing* and *DST*, “the information itself was the ultimate product”).

clearance, MasterCard systems determine which banks owe money to each other and how much. In settlement, MasterCard systems effect the actual transfer of funds between its acquirer and issuer clients. In its ancillary services, MasterCard also manipulates data to produce a different, and valuable, end product from the input data. MasterCard performs all of these activities tens of millions of times a day. That is “manufacturing” as a matter of law.

The only case suggesting a contrary result was *GTE Automotive Electric v. Director of Revenue*, 780 S.W.2d 49 (Mo. banc 1989), a 4-3 opinion by this Court. *IBM* overruled *GTE*, see 958 S.W.2d at 557, and no other case since has even suggested that intangibles cannot be “products” within the meaning of the manufacturing exemption statutes.⁵

Bridge Data, *DST*, *Concord Publishing*, *IBM*, and *Bell I* and *Bell II* were decided under § 144.030.2(2), (5), or (6) rather than § 144.054.2. Nevertheless, the language in § 144.054.2 is essentially identical to the language in § 144.030.2(2) and was surely copied from it. Moreover, as explained in more detail in Point B, the exemption in § 144.054.2 is broader than the exemptions in § 144.030.2.

⁵ In *IBM*, the taxpayer received financial data and manipulated the data to produce balance, control and exception reports, super sheets, ad hoc reports and statements, account conformation statements, etc., and delivered the output to customers by both physical and electronic means. 958 S.W.2d at 557. The Court held that this was “manufacturing.” *Id.*

Like the taxpayers in *Bridge Data*, *DST*, *Concord Publishing*, *IBM*, and *Bell I* and *Bell II*, MasterCard uses computer equipment purchased from IBM in “manufacturing” because MasterCard uses the equipment to gather, organize, analyze, manipulate, and synthesize a vast store of electronic data to provide products for which its customers pay and receive value.

B. Basic Principles Of Statutory Construction Support This Court’s Holdings On The Manufacturing Of Intangible Products.

The Director cites Judge Stith’s dissent in *Bell II*, which relied on dictionary definitions of the word “manufacturing.” 182 S.W.3d at 238; App. Br. 26. In fact, Judge Stith’s dissent does not support the Director’s position because MasterCard’s processes satisfy those definitions.

The first, second, and third definitions of the word “manufacturing” were taken from the 1993 version of *Webster’s Third New International Dictionary* at page 1378. 182 S.W.3d at 238.

The first definition is “to make (as raw material) into a product suitable for use.” The data manipulation at the heart of MasterCard’s operations makes the raw material, or customer provided data, “suitable for use” by its issuing banks and its cardholders. *Id.*

The second definition is “to make from raw materials by hand or by machinery....” Clearly, the information, or raw data, provided by MasterCard’s customers has to be organized, analyzed, and manipulated by the IBM computers (machinery) in order to produce reports or products that are suitable for use by MasterCard’s customers. *Id.*

Judge Stith's third definition is "to produce according to an organized plan and with division of labor." MasterCard's data output is certainly produced "according to an organized plan" and the division of labor is the programming that makes it possible.

Judge Stith's fourth, fifth and sixth definitions are taken from the 1991 version (2nd College Edition) of The American Heritage Dictionary at page 764. 182 S.W.3d at 238.

The fourth definition of manufacturing is to "make or process (a raw material) into a finished product, esp. with the use of industrial machines." *Id.* The fifth definition is "(t)o make or process (a product), esp. with the use of industrial machines." *Id.* Finally, the sixth and final definition of manufacturing is "(t)o create, produce, or turn out in a mechanical manner." *Id.*

MasterCard plainly "makes a product" and, because the product is intangible, the computers must necessarily qualify as industrial machines. The raw material (customer transaction data) is clearly processed through the use of very expensive, highly industrial computers (hardware that is operated by software or industrial machines) that analyze, manipulate, and organize millions of transactions on a daily basis into credit and debit card processing services, risk management tools, forecasts, and reports (finished products) that have a value separate and apart from the raw data that Mastercard inputs into the computers to produce such products. There is no requirement in any of these six definitions that either the raw materials used or the product produced by the manufacturing process must be "tangible," and accordingly, the Director's arguments are both inaccurate and misleading.

Contrary to the Director's argument, *see* App. Br. 20-21, the language of § 144.054.2 is actually quite broad. Sections 144.030.2(2) and (5) require that the final product be resold; § 144.054.2 does not. Thus, § 144.054.2 is "broader than § 144.030.2(2)." *E&B Granite, Inc. v. Director of Revenue*, 331 S.W.3d 314, 317 (Mo. banc 2011).

Section 144.054.2 is "[i]n addition to all other exemptions granted under this chapter." And it applies to equipment used in manufacturing "any product." The word "any" is "all-comprehensive, and is equivalent to every." *State ex rel. Sayad v. Zych*, 642 S.W.2d 907, 911 (Mo. banc 1982). *Accord*, *State v. Bouser*, 17 S.W.3d 130, 139 (Mo. App. 1999) ("any" means "every"). As this Court held in *E&B Granite*, § 144.054.2 "broadly applies to 'any product.'" 331 S.W.3d at 317.

When the legislature enacted § 144.054.2 in 2007, this Court had repeatedly construed § 144.030.2 to hold that manipulation of data by a computer constitutes "manufacturing," at least in the context of intangible products. "Appellate courts presume the legislature is aware of appellate interpretations of existing statutes." *E&B Granite*, 331 S.W.3d at 317. Thus, "[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." *Cook Tractor Co. v. Director of Revenue*, 187 S.W.3d 870, 873 (Mo. banc 2006). *Accord*, *Mack Motor Truck Corp. v. Wolfe*, 303 S.W.2d 697, 701 (Mo. App. 1957).

If the legislature did not intend § 144.054.2 to apply to the products of computerized data organization and manipulation, therefore, it would not have copied the

word “manufacture” from § 144.030.2, which this Court had repeatedly held did include such activities. Or it would have included an express exclusion for data organization and manipulation. It did neither.

Finally, while not applicable to this case, the recent enactment of § 144.810 proves the legislature is far more open to tax exemptions for computers than the Director pretends. The new statute provides a 100% exemption for computers purchased for a new or expanded data storage or processing center, with no requirement that the taxpayer demonstrate that the computers are used for manufacturing products.

For all of these reasons, this Court’s consistent interpretation of the word “manufacture” to include intangible products generated from the organization and manipulation of computerized data comports with recognized canons of statutory construction.

C. The Director’s Arguments Do Not Apply To The Intangible Products At Issue.

The Director’s principal argument is that the Court should apply recent holdings involving tangible products to the intangible products MasterCard provides. App. Br. 23-24; 33; 37-38. According to the Director, the term “manufacturing” connotes “industrial” type operations, a concept that the Director does not define but apparently equates with old-fashioned smokestack industries that produce tangible, rather than intangible products. As the Director notes, neither food preparation nor construction qualify. *E.g.*, *Brinker Missouri, Inc. v. Director of Revenue*, 319 S.W.3d 433 (Mo. banc 2010); *Ben Hur Steel Worx, Inc. v. Director of Revenue*, 452 S.W.3d 624 (Mo. banc 2015).

The concept of old-fashioned, smokestack industries is wholly at odds with the intangible nature of the products MasterCard provides. Several of the exemptions in §§ 144.054.3 and 144.054.4 are limited to “tangible personal property,” but § 144.054.2’s reference to “any product” contains no such limitation. Accordingly, to read such a limitation into § 144.054.2 would violate the rule of statutory construction *expressio unius est exclusio alterius*, meaning the express mention of one thing in one subsection of a statute implies the exclusion of it in another subsection. See *Westwood Country Club v. Director of Revenue*, 6 S.W.3d 885, 887 (Mo. banc 1999); *State ex rel. Goldberg v. Barber & Sons Tobacco, Inc.*, 649 S.W.2d 859, 861 (Mo. banc 1983). Simply put, if the legislature wanted to limit the exemptions contained in § 144.054.2 to “tangible personal property” like it did in §§ 144.054.3 and 144.054.4, it could have done so.

From *Bridge* forward, this Court has consistently and unanimously held that § 144.030.2 applies to intangible products. 794 S.W.2d at 206; *Concord*, 916 S.W.2d at 191; *Bell I*, 78 S.W.3d at 768. In that context, § 144.054.2’s use of the word “manufacture” cannot logically be limited to heavy industry, and statutory construction principles prohibit such a limitation.

Moreover, assuming that the word does imply industry, an “industry” is not limited to a steel mill or an auto assembly plant. *Black’s Law Dictionary* (10th Ed. 2014) at p. 895 defines “industry” to mean “[s]ystematic labor for some useful purpose.” So the focus is properly on whether the system produces a product; if so, it is a manufacturing system. The Director does not dispute that MasterCard’s computer systems produce a product different from the input and it does so millions of times daily.

The Director also argues that § 144.054.2 does not reference financial institutions by name, but does reference them in other taxation statutes. App. Br. 24-25; 28-30. Section 144.054.2 does not reference steel mills or auto assembly plants by name either. Instead, it uses the generic and all-inclusive phrase “any product.” The Director cannot dispute that MasterCard produces a product, and this is fatal to her argument.

The Director next argues that the exemption for radio and television in § 144.054.3 would be redundant if § 144.054.2 applies to mere communications. App. Br. 27-28. This argument overlooks the legislature’s decision that § 144.054.2 was “in addition to” any other exemptions.

Moreover, the “canon against surplusage is not an absolute rule,” and “[r]edundancies across statutes are not unusual.” *Marx v. General Revenue Corp.*, 133 S.Ct. 1166, 1177 (2013). Much of § 144.054.2 is duplicative of subsections of § 144.030.2. That does not detract from the plain meaning of either.

The Director’s argument that law firms could qualify for a tax exemption because they communicate with their clients, App. Br. 31, rests on the Director’s failure to distinguish between communicating information and processing it into an entirely new product. Lawyers do the former; MasterCard does the latter. Moreover, a lawyer’s work “product” is a small-scale one-of-a-kind transaction tailored to the needs of a particular client, in contrast to the massive and organized production of MasterCard. There is nothing absurd about the Commission’s conclusion.

The Director substantially exaggerates the effect that the Commission’s ruling will have on tax collection. App. Br. 32. The *Dell* and *Sun* cases both involve the sale of

computer equipment to MasterCard, and the amount at issue in each case is smaller than the amount at issue here. Any taxes inadvertently or erroneously collected on exempt items should never have been collected.

The Director's final argument is that the legislature intended § 144.054.2 to expand the number of items exempted rather than the range of activities exempted. App. Br. 40-41. That argument is irrelevant, because the Commission's decision does not expand the range of exempted activities. When the legislature enacted § 144.054.2, it did so armed with nearly 20 years of rulings from this Court that "manufacturing" as used in § 144.030.2 includes using computers to organize and manipulate data to generate new products. Applying the new statute to MasterCard's purchases does not in any way expand the range of activities exempted from taxation.

D. If The Court Finds That MasterCard's Organization And Manipulation Of Data Is Not Manufacturing, That Decision Should Apply Only Prospectively.

Finally, should the Court find that the electronic organization and manipulation of data to produce new outputs is not manufacturing, this holding should only apply prospectively. Such a holding would be at odds with a quarter-century of precedent and would produce an unexpected result that a reasonable person would not have anticipated based on any prior law, previous policy, or regulation of the department of revenue. *See* § 143.903, R.S.Mo.

CONCLUSION

For these reasons, IBM respectfully submits that the Court should affirm the decision of the Administrative Hearing Commission.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the limitations in Rule 84.06(b), and it contains 5,453 words, excluding the parts of the brief exempted; and has been prepared in proportionally spaced typeface using Microsoft Word in 13 point Times New Roman font.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 9, 2015, the foregoing was filed electronically with the Clerk of Court to be served by operation of the court's electronic filing system upon the following:

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