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SC97582

IN THE SUPREME COURT OF MISSOURI

INTERVENTIONAL CENTER FOR PAIN MANAGEMENT,

Appellant,

v.

DIRECTOR OF REVENUE,

Respondent.

Appeal from the Administrative Hearing Commission of Missouri
The Honorable Renee T. Slusher, Commissioner

RESPONDENT'S BRIEF

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INTRODUCTION

This case is about who qualifies as a manufacturer under the sales tax law and compensating use tax law. The question presented is whether a medical provider who buys drug delivery devices to use in its pain treatment services can avail itself of the use tax exemption for industrial manufacturers' purchase of raw materials to compound into a saleable product.

The Interventional Center for Pain Management is a Missouri business offering medical services for pain management, including the service of injecting patients with pain-relieving prescription drugs. To provide these nontaxable services, the pain management center bought needles, cannulas, filters, catheters, syringes, and trays from outside Missouri and used them to treat patients—but it did not pay any sales or use tax when it bought the items. After an audit, the state Director of Revenue assessed the center for the use tax due on these and many other out-of-state purchases for on which the center did not pay any tax. The center conceded tax liability for most items, but claimed that its purchase of drug delivery devices should be tax-exempt under Section 144.054.2, RSMo.

The center must pay use tax on these pain treatment devices because the tax exemption in Section 144.054.2, RSMo for materials used in compounding and manufacturing products does not apply to these pain treatment service items. The needles, syringes, and other pain treatment items were not tax-

exempt raw materials from which a product for sale is made. Nor are the center's services part of an industrial drug compounding operation. And, even if they were, the center did not show that it used each drug delivery device to compound medication—as opposed to using some items for other procedures.

The center is a service provider, not a manufacturer. Much like how a restaurant owner uses silverware, dishes, and ingredients not to manufacture or compound meals but to provide food service for patrons enjoying a meal, the center does not manufacture or mix drugs at a factory to create a product to sell. Instead, the center uses needles, syringes, and related supplies to perform a nontaxable medical service—to inject prescription drugs into patients. These purchases therefore are subject to use tax.

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STATEMENT OF THE CASE

I. Factual background

The center treats patients in pain. It is a Missouri business offering medical services for pain management, including the medical service of injecting patients with pain-relieving prescription drugs. LF p. 59, App. A2. It is a medical office and it employs an interventional pain physician to advise its patients and administer injections. *Id.*; Tr. 9, 37, 41.

To provide its pain treatment services, the center bought hundreds of thousands of dollars of needles, cannulas, filters, catheters, syringes, and trays tax-free from outside Missouri and used them to treat patients. LF p. 59-65, App. A2–A8; Tr. 10, 64.

After an audit, the state Director of Revenue discovered these and many other purchases on which the center failed to pay sales or use tax. LF p. 59–65, App. A2–A8; Tr. 9–16. For at least five years, the center had never filed a use tax return or paid use tax on any of its nearly $800,000 of assorted out-of-state purchases. LF p. 59–60, App. A2–A3; Tr. 16.

The director then assessed the center for use tax on these purchases. LF p. 60, App. A3. The director found that the center made $791,567.28 in out-of-state purchases for which it paid no tax, including $263,028.62 in drug delivery devices like needles and syringes. *Id.* Applying use tax rates, that varied between seven and eight percent depending on the year, the director assessed

a total tax liability of $69,331.44 on the center, including additions to tax for initial nonpayment. *Id.* The audit and assessments reflected a five-year period of tax liability from January 2008 to December 2012, and it rested on a thorough review of all the center's business records. LF p. 59–60, App. A2–A3; Tr. 11.

In response, the center conceded liability for most of the assessments, but contested use tax liability for items used to inject patients with prescription drugs. LF p. 58, App. A1. It claimed that under section 144.054.2, RSMo, the devices are exempt from use tax as "materials" that the center used in a compounding operation. *Id.*

These pain treatment service items included many types of needles, cannulas, filters, catheters, syringes, and trays used to inject patients. LF p. 66, App. A9; Tr. 55. They fall into these categories

- *Accu-Tip kits*. Accu-Tip needles are non-corregatal needles used to prevent latex from getting into a syringe. The kits included these needles and many compatible filters, syringes, and catheters to prepare and administer medication. LF p. 61, App. A4; Tr. 42–43.
- *Cannulas*. Cannulas are thin tubes to insert and position within a patient to administer medicine. They are used "'to create a microwave inside the human body when it's combined with an electrical current and with a localized anesthetic . . . a specific combination technique that is

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used to turn off nerves, to improve patients' mobility, to allow them to stand up more straight or to improve their . . . back functions.'" LF p. 62–63, App. A5–A6 (quoting Tr. at 48).

- *Hustead needle kits*. Hustead needles are used to inject medicine into the spine's cervical epidural space. A Hustead needle has a soft tip that will not cut the spinal cord and a curved needle to direct the flow of medication. LF p. 63, App. A6. It "'uses the medications that we pharmaceutically get purchased, plus the air from the room, to create a loss of resistance [and] to get into the right space.'" Tr. at 52.
- *Non-specialized or general-purpose needle trays*. These trays include different sized needles, syringes, and filter systems, sometimes with a loss-of-resistance system. LF p. 64, App. A7. The needle trays can administer medicine for about 17 types of procedures. *Id.*; Tr. 50.
- *Other non-specialized trays*. These trays lack needles but hold filters and syringes that the center usually uses for hip joint injections. LF p. 64, App. A7; Tr. 53.
- *Luer-Lok syringes with betadine*. Luer-Lok syringes have special valves to attach a second syringe and to mix different solutions within the syringe. LF p. 65, App. A8; Tr. 54–55.

The center generally uses all these drug delivery devices to administer medicine to a patient seeking pain treatment. LF p. 66, App. A9; Tr. 55.

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The center's doctor generally used these devices to inject prescription drugs that the center buys and that the doctor mixes in the devices as needed. *Id.* When the center mixes drugs for treatment, the doctor uses a syringe to take a reagent drug from a multi-dose bottle and then "adds other syringes together to make the compound drug, 'which is kept in a sterile environment and then directly injected . . . into the patient.'" LF p. 66, App. A9 (quoting Tr. 45). The center compounds the drugs in a sterile procedure room that has ventilators and UV-lighted hoods. LF p. 66, App. A9. After injecting the patient, the center disposes of each item after a single use. *Id.*

According to the center's physician, the center "generally" mixes more than one drug per injection, typically using three or four drugs per injection. *Id.*; Tr. 47. Compounding the drugs makes them "into something that's useable for the patient [b]ecause you can't just directly inject the purchased drug." LF p. 66, App. A9 (quoting Tr. 44–45). Each joint location requires a different mixture, although the mixture is the same for all patients needing an injection for that particular joint problem or disease. LF p. 67, App. A10; Tr. 45–46.

II. Procedural history

The center appealed the director's assessments on these pain treatment items to the Administrative Hearing Commission, which then reviewed the assessments. LF p. 67, App. A10 (citing Section 621.050.1, RSMo); LF 1–55.

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After a hearing, the commission found the above facts and determined the center's tax liability. LF p. 67–69, App. A10–A12; Tr. 1–78. First, the court resolved a conceded error in the assessments for some prescription drugs that everyone agreed fell under another tax exemption, Section 144.030.2(19), RSMo, and which is not on appeal. LF p. 69–70, App. A12–A13. Second, the commission next held that no statute of limitations barred the assessments, a determination also not on appeal. LF p. 77–78, App. A20–A21. Third, the commission held that the center must pay tax on the remaining items. LF p. 70–77, App. A13–A20.

The commission held that the center's pain treatment service items do not fall under the use tax exemption in Section 144.054.2 for materials used or consumed in compounding a product. *Id.*

Section 144.054.2 exempts from use tax materials used in manufacturing or compounding a product

> 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[.]

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LF p. 70, App. A13 (citing Section 144.054.2, RSMo).

The center had argued before the commission that its needles, syringes, and other drug delivery devices are materials used or consumed in the compounding of any product because they are "tools or instruments [that] qualify as apparatus" that the center used "to produce a new compounded pharmaceutical product." LF p. 70, App. A13.

But the commission held that the center did not prove that these pain treatment service items fall under this "manufacturing" or "compounding" exemption. It rested its decision on three independent grounds.

First, the commission held that the drug delivery devices are not "materials" within the statute's meaning. They may be an apparatus in a loose sense of the word, but under a strict and narrow construction of the statute, the term "materials" means raw ingredients, not these items or apparatuses. LF p. 76, App. A19. The commission explained that this Court has held that the "raw products from which something is made" fall under the definition of materials, but it has never held that apparatuses fall within the definition of materials. LF p. 71–73, App. A14–A16 (citing *E & B Granite, Inc. v. Dir. of Revenue*, 331 S.W.3d 314, 318 (Mo. 2011). And the commission recognized that the center's pain treatment devices "are clearly not raw products from which compounded medications are made," so it reasoned that the devices could only

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be a “material” if the term encompasses not only a raw ingredient used to make something but also an apparatus necessary to make it. LF p. 72, App. A15.

The commission also looked to the exemption’s context in the use tax statutes to see if the term “materials” meant both raw ingredients and apparatuses. LF p. 71–72, App. A14–A15. This Court gives terms in Section 144.054 the same meaning as terms in the other use tax exemption statute, § 144.030. LF p. 72, App. A15 (citing *E & B Granite*, 331 S.W.3d at 317). To give the term “materials” the same meaning as other use tax exemptions, the commission thus looked to how this Court has understood the term “materials” under § 144.030. This statute uses the terms “machinery,” “materials,” “parts,” and “supplies,” and in the past this Court has held that these terms must have their own different meanings. *Id*. Under this statute, this Court has held that an apparatus, which a party had proposed to be “defined as any compound instrument or appliance designed for a specific mechanical or chemical action or operation,” more closely resembles what ordinary people think of as machinery than what the statute called materials. *Id*. (citing *Alberici Contractors, Inc. v. Dir. of Revenue*, 452 S.W.3d 632, 637–38 (Mo. 2015)). An apparatus like a crane or welder, for example, thus falls within the definition of “machinery,” not of “materials.” *Id*.

The commission then extended this contextual approach to discern the dividing line between the terms “supplies” and “materials,” because, whatever

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the legislature means by supplies, it is by implication, omitted from § 144.054.2. The demarcation between supplies and materials mattered because even though both Section 144.054.2 and Section 144.030.2(2) exempted materials and machinery in various contexts, Section 144.054.2 omitted supplies. Plus, the legislature had enacted Section 144.054.2 after Section 144.030.2(2)— "indicating that the legislature did not choose to include supplies in § 144.054." LF p. 73, App. A16. The commission then referred to a dictionary, which defines supplies broader than materials, defining supplies to mean items including provisions, clothing, arms, or raw material available for use. *Id.*

The question for the commission, as it understood this precedent, was thus whether the center's pain treatment items more closely resembled "machinery" (such as a mechanical apparatus), "supplies" (which could mean raw materials, arms, clothing, or other necessary provisions), or "materials" (by implication, only raw ingredients). *Id.* But no one contended that the needles, syringes, and other pain injection service items were a type of apparatus that fell under the term "machinery."

And so, under a strict and narrow construction of the statute, the commission concluded that the center's drug delivery devices "more closely related to the term 'supplies,'" which are not exempt under Section 144.054.2, rather than exempt materials. LF p. 73, 76, App. A16, A19. This holding

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squared with this Court's precedents, which had never expanded the term "materials" in Section 144.054.2 beyond the "raw products from which something is made." LF p. 73, App. A16 (citing *Alberici*, 452 S.W.3d at 637).

Second, and as an alternate ground for its decision, the commission held that even if the center mixes drugs for use in its services, the center's compounding operation "does not rise to the level of a large-scale industrial activity, as required" to fall under the exemption for "materials" used in compounding a product. LF p. 76, App. A19.

Because no court has defined the term "compounding" under either exemption statute, the commission looked to 12 CSR 10-110.621(2)(A), A47, which defines compounding for purposes of exempting energy sources as "[p]roducing a product by combining two (2) or more ingredients or parts." LF p. 74, App. A17. Under this basic definition, the center's general "compounding practice falls within the definition of producing a product by combining two or more ingredients." *Id.* The center "combined two or more ingredients in a sterile environment by following a set formula or recipe to create a unique medication that was used to treat patients with particular types of pain or conditions." *Id.*

The commission also thought that the center's compounded drugs could be a "product" because it viewed them as an "output with market value." *Id.* (quoting *Fenix Constr. Co. of St. Louis v. Dir. of Revenue*, 449 S.W.3d 778,780

(Mo. 2014)). Under Sections 144.054.2 and 144.030.2(2), "a product can either be a 'tangible personal property or a service.'" *Id.* (quoting *Int'l Bus. Machs. Corp. v. Dir. of Revenue*, 958 S.W. 2d 554, 557 (Mo. 1997); *E & B Granite*, 331 S.W.2d at 317.) The commission held that the center's compounded drugs have a common formula per joint location, a formula that can be used by any patient needing an injection at that joint, and so the commission concluded that the drugs are thus marketable to "various medical patients suffering from similar conditions." LF p. 74–75, App. A17–A18. "While patients might not know to ask for a particular type of compounded drug, they do seek out such a product based upon the advice of a physician." LF p. 75, App. A18.

But the commission made clear that, under this Court's precedent, these broad understandings of the terms "compounding" and "product" did not entitle the center to an exemption, unless the terms used together in their statutory context encompassed the center's operations. LF p. 75–76, App. A18–A19.

This matters because this Court has held that the exemption in context does not mean *any* manufacturing, compounding, or processing task in which materials are consumed, but only *industrial* manufacturing, compounding, or processing operations. *Id.* (citing *Fred Weber, Inc. v. Dir. of Revenue*, 452 S.W.3d 628 (Mo. 2015)). Applying the exemption outside industrial activities would run "'clearly contrary to the General Assembly's expectations.'" LF p. 76, App. A19 (quoting *Fred Weber, Inc.*, 452 S.W.3d at 630–31). For this reason,

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"paving companies that bought rock base and asphalt were not engaged in 'manufacturing,' 'compounding,' or 'producing' as defined in § 144.054.2" when the companies mixed the base and asphalt to construct roads and parking lots. LF p. 75, App. A18 (citing *Fred Weber, Inc.*, 452 S.W.3d at 630). So, too, the retail preparation, mixing, and service of food at a restaurant is not "industrial-type" processing, manufacturing, or compounding of a product. *Id.*

Under this precedent, the Commission then concluded that the center's compounding activity, "from the evidence before us, does not rise to the level of a large-scale industrial activity, as required by § 144.054.2." LF p. 76, App. A19. This holding mirrored a letter ruling from the director that the exemption did apply to the purchase of sterile syringes, needles, sterile tubing sets, and filter bags by a compounding operation that mixed drugs and then always sold them on as anticipatory products to hospitals and surgical centers to use. LF p. 75, App. A18 (citing Director's Letter Ruling 7873 (Sept. 26, 2017)); A41–44. This operation did not mix drugs only as needed for services. *Id.*

Third, as another alternate holding, the commission held that even if the center's mixing of drugs fell under the exemption, the center did not "establish that all of the disputed items were used by the center to compound medication, as opposed to other medical procedures it may have performed." LF p. 77, App. A20. And, despite its burden to provide clear and unequivocal proof of the exemption's application, the center's testimony was vague on this point and

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without “any supporting evidence in the record that all, or what percentage of, the disputed items were used to compound medication.” *Id.*

Finally, because the center did not intend to avoid paying its taxes but had instead mistakenly relied on an accountant who had not advised it to pay use tax, the commission held that the lack of any willful neglect meant that the center would not be liable for additions to the tax due. LF p. 78, App. A21.

The center now petitions this court for review.

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STANDARD OF REVIEW

This Court reviews de novo the Administrative Hearing Commission's interpretation of revenue laws and it upholds the Administrative Hearing Commission's decision if it is "authorized by law and supported by competent and substantial evidence upon the whole record." *Six Flags Theme Parks, Inc. v. Dir. of Revenue*, 179 S.W.3d 266, 268 (Mo. 2005); § 621.193, RSMo.

The primary rule of construing statutes "is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words in their plain and ordinary meaning." *Nelson v. Crane*, 187 S.W.3d 868, 869–870 (Mo. 2006). This Court also gives no deference to the Commission's resolution of the proper interpretation of state law. *AAA Laundry & Linen Supply Co. v. Dir. of Revenue*, 425 S.W.3d 126, 128 (Mo. 2014).

At the same time, this Court strictly construes tax exemptions against the taxpayer. *TracFone Wireless, Inc. v. Dir. of Revenue*, 514 S.W.3d 18, 21–22 (Mo. 2017). To claim an exemption, a taxpayer must prove an exemption applies by "clear and unequivocal proof," and "all doubts are resolved against the taxpayer." *Id.* No court may ever presume "an abandonment of the sovereign right to exercise the vital power of taxation." *Miss. River Fuel Corp. v. Smith*, 164 S.W.2d 370, 377 (1942) (citation omitted).

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SUMMARY OF ARGUMENT

The center must pay use tax on its purchases of pain treatment service items. For four reasons, Section 144.054.2's exemption for materials used in "manufacturing" or "compounding" a medical product does not apply.

First, the needles, cannulas, filters, catheters, syringes, and trays that the center bought and used to provide medical services are not tax-exempt raw materials from which something is made.

Second, the center uses these items to provide a nontaxable medical service; it does not use these items to "manufacture," "process," "compound," "mine," or "produce" a product for sale. Much like how a restaurant uses silverware, dishes, and food to provide food service to patrons, the center mixes drugs in drug delivery devices to provide a medical service to a patient.

Third, the center's services are not an industrial operation like a factory that consumes or uses an item to produce a product for sale.

Fourth, even were the exemption to apply, the center did not show by clear and unequivocal proof that the center used all its drug delivery devices to compound medication, as opposed to using them for other medical purposes, and the center has not appealed this part of the commission's decision.

These pain treatment service items therefore are subject to use tax. This Court should thus affirm the commission's decision upholding the director's assessments.

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ARGUMENT

Everyone who buys products out of state must pay use tax on their purchases, subject to narrow exceptions. Section 144.610.1, RSMo, imposes a tax "for the privilege of storing, using or consuming within this state any article of tangible personal property." And, under Sections 144.030.2 and 144.054.2, the exceptions to this tax are narrow and limited.

Under the use tax statutes, Missouri taxes medical items differently as they are developed, sold, and put into service, depending on where they are in their life cycle. The law's purpose is to tax the sale of completed products sold from out of state but taken and used in the state. *Blevins Asphalt Const. Co. v. Dir. of Revenue*, 938 S.W.2d 899, 901 (Mo. 1997). Because it seeks to tax the sale or use of products, it does not tax the purchase of raw materials for manufacturing into a product, nor does it tax the receipt of medical services. §§ 144.010.1(13), 144.018.1 RSMo.

Consider the beginning of the product's life cycle—a tax exemption in Section 144.054.2, RSMo applies to the purchase or use of raw materials from which the product is made—like when a manufacturer makes something at a factory as part of industrial operations. Under Section 144.054.2, RSMo, an exemption from tax applies to "machinery, equipment, and materials used or consumed in the manufacturing, processing, compounding, mining, or producing of any product[.]" This and other manufacturing exemptions exist to

encourage the economic development of the state. *Bridge Data Co. v. Dir. of Revenue*, 794 S.W.2d 204, 206 (Mo. 1990), abrogated on other grounds by *Int'l Bus. Machs. Corp.*, 958 S.W.2d 554. Thus, the raw materials that go into the product, as well as the machinery and equipment on which the product is made, are exempt from use tax. For this reason, as the director has said in a letter ruling, no tax is due when a medical factory buys the raw materials to mix drugs to sell as compounded medications to medical providers and consumers. LF p. 75, App. A18 (citing Director's Letter Ruling 7873 (Sept. 26, 2017)); A41–44.

So, too, the end of an item's life cycle, when the product is used by a medical provider to perform a medical service, the service is excluded from use or sales tax. A tax exemption applies to medical services of all kinds, including services that involve medical items used as part of treating patients. Under Section 144.010.1(13), RSMo, "purchases of tangible personal property made by duly licensed physicians, dentists, optometrists and veterinarians and used in the practice of their professions shall be deemed to be purchases for use or consumption and not for resale[.]" And, under Section 144.018.1, RSMo, "[t]he purchase of tangible personal property by a taxpayer shall not be deemed to be for resale if such property is used or consumed by the taxpayer in providing a service on which tax is not imposed by subsection 1 of section 144.020[.]" These laws provide that, even if a doctor uses gloves or bandages for one patient, the

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patient buys the service, not the doctor's gloves or bandages. And so the patient need not pay use or sales tax on this item—the entire service is nontaxable.

But no tax exemption applies when a medical product is sold for use during the middle of this life cycle. "In sales and use tax, the taxable event is the passage of title or ownership." *Blevins Asphalt Const. Co.*, 938 S.W.2d at 901. Sales and use tax thus apply when a medical provider or a consumer buys completed products at retail or wholesale, such as when a patient buys bandages at a drugstore or a doctor buys sterile gloves from a medical supply company. No tax applies to raw materials that the factory bought to make the product, and patients need not pay use tax on medical services that use the product to treat them, but medical providers and consumers must pay use tax on medical products when they buy them.

The issue here is whether, when a medical provider provides pain treatment injections, the medical provider may claim not only the service provider tax exemption for providing its medical services, but also the manufacturing and compounding exemption for its purchase of drug delivery devices like needles and syringes. The center alleges that because it generally uses these medical items to combine drugs that it injects into a patient, its purchase of these drug delivery devices is tax-exempt. Aplt Br. 21–25. It claims that it uses these drug delivery devices to make products for sale—like when

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a drug compounding factory buys raw ingredients to compound into a prepared drug for later sale and distribution to hospitals.

But, for three reasons, this manufacturing exemption does not apply to the center's purchases. First, finished products like needles and syringes are not raw materials from which something is made. Second, these drug delivery devices do not become a new product for sale once drugs are mixed into them; they are instead used to provide a nontaxable medical service. Third, the center's individual mixing of drugs for each patient is not an industrial compounding operation that yields products for any potential retail or wholesale. And fourth, even if the exemption did encompass this type of operation, the center did not show by clear and unequivocal proof that it used all its pain treatment devices to compound medication, as opposed to using them in single-drug medical procedures—and the center has not appealed this part of the commission's ruling.

This Court should thus affirm the Administrative Hearing Commission's decision holding that this tax exemption does not apply to the center's purchases.

I. The center's pain treatment devices are not tax-exempt raw materials from which something is made.

The center must pay use tax on its purchase of drug delivery devices. The center claims that, because it generally uses these products to combine drugs

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to inject into a patient, its items fall under the manufacturing and compounding exemption. Aplt Br. 21-25. But the commission was right to hold that these pain treatment items are not materials within the statute's meaning.

The exception for "materials" used in "manufacturing" or "compounding" operations, Section 144.054.2, RSMo, does not provide a tax exemption to the center because the center uses its needles, cannulas, filters, catheters, syringes, and trays at most as an apparatus to provide medical services, not as a raw ingredient to make a product to be sold.

Section 144.054.2 provides an exemption from tax for "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[.]" Section 144.054.2, RSMo. No one has ever argued (or even suggested) that the center's drug delivery devices are energy, chemicals, machinery, or equipment used in manufacturing or compounding. And so, to fall under the manufacturing and compounding use tax exemption, the center asks this Court to hold that these items are "materials" that the center compounds as it treats its patients.

But, under the definitions and precedents of this Court, these pain treatment service items are not exempt because they are not the raw materials

from which something is made. This Court "interprets statutes in a way that is not hyper-technical but, instead, is reasonable and logical and gives meaning to the statute." *Fred Weber, Inc.*, 452 S.W.3d at 630. Under Missouri's sales and use tax exemptions, the term "materials" means the raw materials from which a product is made, not an apparatus used to make a product, like equipment or machinery. In *E & B Granite, Inc.*, 331 S.W.3d at 318, this Court defined "material" as "the raw product from which something is made." "A material is a component part or ingredient if any part of it is intended to and does remain an essential or necessary element of new personal property." *Ovid Bell Press, Inc. v. Dir. of Revenue*, 45 S.W.3d 880, 884–85 (Mo. 2001). And items are exempt only if they are "used directly" in manufacturing under § 144.030. *Sw. Bell Tel. Co. v. Dir. of Revenue*, 182 S.W.3d 226, 229 (Mo. 2005) ("*Bell II*").

And this is how this Court has used in the term in many cases. Granite countertops that the business manufactured and sold to consumers upon installation were a "product" within the meaning of the exemption, and a raw granite slab used to make a countertop was a "material" under the statute. *E & B Granite, Inc.*, 331 S.W.3d at 317. But materials bought to manufacture asphalt installed by the taxpayer did not qualify for the exemption because paving is manufacturing. *Blevins Asphalt Const. Co.*, 938 S.W.2d at 901. And materials used to construct tilt-up concrete walls at a construction site are not a manufactured product. *Fenix Constr. Co.*, 449 S.W.3d at 779. On the other

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hand, printing paper is a component part or ingredient of the manufacture of photographs, and thus subject to the exemption, but the same is not true for pens used incidentally in the process but that did not become part of the new property. *Ovid Bell Press*, 45 S.W.3d 880 at 885.

Under this definition, the commission correctly recognized that the center's pain treatment devices are "not raw products from which compounded medications are made." LF p. 72, App. A15. So, it held that the devices could only qualify as a "material" if the term also encompassed the apparatus necessary to make the product. LF p. 72–73, App. A15-16.

The center argues that this Court should use a secondary, alternate definition of "materials" in which the term encompasses an apparatus. Aplt. Br. 21. But this is not how the court has defined the term in the past, nor should it expand the definition in this way now. And it was the definition rejected by this Court in *E & B Granite*, when it held that, rather than define "materials" as apparatuses, it was appropriate to define the term as the raw ingredients used. *E & B Granite, Inc.*, 331 S.W.3d at 318.

This Court has never before expanded the definition of "materials" to include apparatuses. When this Court defined the term "materials" in *E & B Granite*, it drew on the definition in Webster's Third New International Dictionary, which defined the term materials as

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la(l): the basis matter from which the whole or the greater part of something physical is made (2) finished stuff of which something physical is made.

1b(l): the whole or notable part of the elements or constituents or substance of something physical.

2a: apparatus necessary for doing or making something.

But the Court ignored the alternate, secondary part of the definition, and rejected the argument that it was the right definition, holding instead that the appropriate definition of "materials" is "the raw product from which something is made[.]" *Id*. This makes sense because other categories in the statute, such as "machinery" or "equipment," capture much of what the term apparatus would cover. And, since then, this Court has never held that apparatuses fall within the definition of "materials." LF p. 71, 73, App. A14, A16 (citing *E & B Granite, Inc.*, 331 S.W.3d at 318.

To examine whether the term "materials" encompasses apparatuses, the commission considered the term's statutory context. LF p. 71–73, App. A14–16. This Court gives terms in Section 144.054 the same meaning as the other use tax exemption statute, Section 144.030. LF p. 72, App. A15 (citing *E & B Granite*, 331 S.W.3d at 317).

The center argues that terms in Section 144.054 should be given a broader meaning than in Section 144.030. Aplt. Br. 13. But even if Section

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144.054 created exemptions beyond what Section 144.030 allowed, and applied the terms to new industries and situations, this Court understands individual terms in similar tax statutes to be defined the same way.

And this harmonization of terms in the use tax exemption statutes reflects this Court's usual method of reading statutes. "If terms within a tax statute are defined by the legislature, this Court must give effect to the legislature's definition." *Jones v. Dir. of Revenue*, 832 S.W.2d 516, 517 (Mo. 1992). But if the statute does not define a term, the court looks to textual context, including related clauses and other "'statutes involving similar or related subject matter when such statutes shed light upon the meaning of the statute being construed.'" *President Casino, Inc. v. Dir. of Revenue*, 219 S.W.3d 235, 240 (Mo. 2007) (quotations omitted).

To give the term "materials" the same meaning across the use tax statutes, this Court looks to what the term materials means under Section 144.030. Section 144.030 juxtaposes the terms "machinery," "materials," "parts," and "supplies." To avoid having the statute be redundant, this Court has held that each term must have its own different meaning. With this in mind, and given that the party had proposed defining an apparatus "as any compound instrument or appliance designed for a specific mechanical or chemical action or operation," this Court has held that an apparatus like a crane or welder more closely resembles what ordinary people think of as

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machinery than what the statute called "materials." LF p. 72, App. A15 (citing *Alberici Contractors, Inc.*, 452 S.W.3d at 637–38).

As the commission held, extending this contextual approach here explains the meaning of the term "materials" in Section 144.054.2 because it clarifies the term by distinguishing it from the term "supplies." Section 144.054.2 omitted "supplies" from its exemptions even though Section 144.054.2 and Section 144.030.2(2) both give exemptions for "materials" and "machinery." And the legislature had enacted Section 144.054.2 after Section 144.030.2(2)— "indicating that the legislature did not choose to include 'supplies' in § 144.054." LF p. 73, App. A16.So, whatever the legislature meant by "supplies," it by implication omitted that category from Section 144.054.2, and by extension, from the term "materials."

The best way to reconcile the terms "supplies" and "materials" is thus, as the commission held, to understand "supplies" to be a broader category than "materials." A dictionary definition of supplies makes it broader than materials—supplies means items including provisions, clothing, arms, or raw material available for use. LF p. 73, App. A16. And this Court has already held that "materials" means, at a minimum, the raw ingredients from which something is made, and confining the term to that meaning reconciles these terms with the broader term "supplies". *Id.* (citing *Alberici*, 452 S.W.3d at 637).

This holding would also conform to its understanding that items are exempt only if they are "used directly" in manufacturing. *Bell II*, 182 S.W.3d at 229.

When understood this way, this case presents a simple category choice – whether the center's pain treatment items more closely resemble: "machinery" (such as a mechanical apparatus), "supplies" (which could mean raw materials, clothing, arms, or other necessary provisions), or "materials" (by implication, only raw ingredients). LF p. 71–13, App. A14–16. Given that no one contends that the needles and other items were a type of apparatus that fell under the term "machinery," or any other term in the statute, the question is whether they are "supplies" or "raw materials."

Because this Court has to construe this tax exemption strictly and narrowly, the best reading is, as the commission held, that the center's drug delivery devices are more like "supplies" than "materials." LF p. 73, 76, App. A16, A19. The center's drug delivery devices are used to inject patients as part of medical services, and they are not a raw ingredient from which something else is made, so they are not "materials" exempt from use tax.

In response, the center argues that because the term "raw materials" also is present under a different part of Section 144.030, the term "materials" in Section 144.054 must be given a broader meaning. Aplt. Br. 22–24. But this ignores the rule of strict construction and the earlier precedent of this Court

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interpreting the term "materials" narrowly. Nor does it harmonize the other terms as the commission did.

The center then asserts that if the materials can be used or consumed, then the term can include more than just raw ingredients. Aplt. Br. 22. But this language merely captures how materials are treated in the manufacturing process, not which items the term "materials" includes.

But even if this Court were to adopt a secondary definition that included apparatuses, these items still would not be "apparatuses." The Court defined apparatus as machinery: "any compound instrument or appliance designed for a specific mechanical or chemical action or operation: MACHINERY, MECHANISM." LF p. 72, App. A15 (citing *E & B Granite*, 331 S.W.3d at 317). The contested items do not have any mechanical or chemical character and do not constitute any type of machinery; they are a simple delivery system, not an instrument or an appliance. *See infra* Pt. III.

But the best reading of the statute is that, even if the service item may be an apparatus in a loose sense of the word, under a strict and narrow construction of the statute, the term "materials" means raw ingredients, not these items. LF p. 76, App. A19.

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II. The center does not use its pain treatment devices to compound a product for sale but to perform medical services.

Another reason why Section 144.054.2, RSMo does not provide a use tax exemption to the center is because the center sells a medical service of injecting patients with pain medication; it does not sell a "product," marketable for retail or wholesale purchasers. The center thus may not take the manufacturing exemption for material used to make a product.

Section 144.054.2 exempts from tax for "materials used or consumed in the manufacturing, processing, compounding, mining, or producing of any product[.]" In *Fenix Construction Company*, 449 S.W.3d at 780, this Court held that the term "product" means "an output with market value." And the "fact that the price of a product is set primarily by competing buyers and sellers necessarily implies that a good or service qualifies as a product only if it can be marketed to various buyers." *Id.*

To prove that a particular good or service constitutes a "product," the taxpayer does not have to market the product, but it is incumbent on the taxpayer to prove the existence of a market, whether or not the product is actually marketed by the taxpayer. *Id.* (citing *Mid-Am. Dairymen, Inc. v. Dir. of Revenue*, 924 S.W.2d 280,283 (Mo. 1996)).

Thus, this "element requires a 'sale' of the new tangible personal property, within the meaning of the sales tax law." *Ovid Bell Press, Inc.*, 45

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S.W.3d at 885. "A sale is (1) a transfer of (2) the title or ownership of tangible personal property (3) for consideration (4) for the purchaser's use or consumption and not for resale in any form." *Id.* Somewhere, *these* products must be "produced and sold to the ultimate consumer by the use of equipment involved in this exemption request." *DST Sys., Inc. v. Dir. of Revenue*, 43 S.W.3d 799, 803 (Mo. 2001).

But these pain treatment service items do not become component parts of any new product for sale; the center just uses them to deliver its pain medication services. They retain their character as delivery items throughout the center's use, and are disposed of afterwards.

And these pain treatment service items in which the center blends the necessary drugs before injecting the patient are anything but marketable or sold in themselves. No one buys these items in a market; patients buy the service of pain treatment. The patient has no choice in what drugs are used because the center makes that determination for them. Much like *Fenix*, the center is marketing services for individual patients, not making or otherwise manufacturing an output with a market value that can be sold to various buyers. *Fenix Constr. Co.*, 449 S.W.3d at 781.

While the center claims that its pain treatment service items are marketable, it is conflating the lack of a market for its prepared drugs with its ongoing market for medical services. The center's services are marketable

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because the center competes with other medical service providers for patients who need pain injections. But the drugs that the center mixes up and injects as part of its services are not independently sold or marketable outside its services.

And, at the point of compounding, there is no service component added yet because the doctor has not advised or injected the patient, so the compounded output is not yet a service. The item thus must stand or fall on its own, apart from services, as a saleable product.

The center's pain treatment drugs are also not "products" under the exemption for another reason—they are not marketable at the point of manufacture or otherwise outside the delivery of pain treatment services. The center instead uses these items for the nontaxable medical service of delivering drugs into a patient's system. The center provides services, and any use of a product is incidental to those services, which is why it its medical services are nontaxable under Section 144.010.1(13), RSMo. And Section 144.018.1, RSMo, provides "[t]he purchase of tangible personal property by a taxpayer shall not be deemed to be for resale if such property is used or consumed by the taxpayer in providing a service on which tax is not imposed by subsection 1 of section 144.020." But if the product of medical services is nontaxable, then there is no point during the manufacture of the needles, syringes, and other drug delivery devices when they are used and taxed. And so, this exemption applies "to

machinery and equipment that generate sales of tangible personal property or *taxable* services." *Int'l Bus. Machs. Corp.*, 958 S.W.2d at 557–58. The center's services here are nontaxable. And, because a purpose of the statute is promoting manufacturing in Missouri by exempting manufacturers from taxes on the materials that they bought, "'this was done, presumably, in view of the fact that sales taxes would be paid on *all* of their finished products when sold.'" *Id.* at 558(quoting *Heidelberg Cent. Inc., v. Dir. of Dep't. of Revenue*, 476 S.W.2d 502, 506 (Mo.1972)).

The center relies on many cases which hold that the sale of a service can be the sale of a product. For example, this Court has long held that "[b]asic telephone service and the various vertical services involved herein are intangible products that are manufactured." *Sw. Bell Tel. Co. v. Dir. of Revenue*, 78 S.W.3d 763, 768 (Mo. 2002) ("*Bell I*"). But that does not matter if the final sale of the service is nontaxable.

In sum, the center did not prove a clear and unequivocal market for these compounded devices apart from any services. Patients do not buy this drug on their own. The center, on its own, decides what drugs to use depending on the unique needs of a specific patient, and it injects the patients in its location while billing for a nontaxable medical service. The patient does not even buy the filled devices for home use. Tr. 64–65, 67. Nor did the center provide any evidence that these drug mixtures are marketed or hypothetically marketable

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to other medical providers. The commission thus erred when it held that the center's compounded drugs are a product under Section 144.054.2 because they are an "output with market value" hypothetically marketable to buyers with similar conditions when advised by their doctors. LF p. 74–75, App. A17–A18 (quoting *Fenix Constr. Co.*, 449 S.W.3d at 780).

Simply put, even if the drugs were marketable to many patients, the drug delivery devices were apparatuses or supplies, not the final product. Once loaded the devices were not marketable because they expired quickly and were never contemplated to be sold. Instead, the center immediately used them in providing a medical service. But "[b]y the use of the term "sold" in section 144.030.2(5), the General Assembly intended that exemption to apply to machinery and equipment that generate sales of tangible personal property or *taxable* services." *Int'l Bus. Machs. Corp.*, 958 S.W.2d at 557–58. The center's services here are nontaxable.

In contrast, a drug compounding pharmacy or other industrial operation that simply mixed and distributed drugs to sell to other medical providers would be creating products for sale. This is why the director issued a letter ruling that the exemption applies to the purchase of sterile syringes, needles, sterile tubing sets, and various filter bags by a licensed drug distributor that mixed drugs and sold them on to hospitals and surgical centers for use on

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patients. LF p. 75, App. A18 (citing Director's Letter Ruling 7873 (Sept. 26, 2017)); A41–44.

The center argues that this approach unfairly exempts manufacturers who sell compounded drugs to many customers versus manufacturers who sell compounded drugs to few. Aplt. Br. 20. It asserts that "[u]nder the Commission's interpretation, if two medical companies both engage in identical compounding activity, yet one has three stores and the other has 300, the company that compounds medication across 300 stores falls under the use tax exemption while the smaller company does not." *Id.*

But this mistakes the matter. Industrial manufacturers who sell compounded drugs differ from doctors who mix drugs in providing injections. An industrial-type of manufacturer who sells finished products to actual purchasers is a different category and treated alike as industrial operators.

The center also argues that this ruling, despite being specific to one taxpayer and in effect for only three years, still should extend to their operations, even if it is not an industrial operation. Aplt. Br. 13, 18–20; 12 CSR 10-1.020(7)(A),(B); *see also* § 536.21.10, RSMo. And it seeks deference for this ruling and for regulations that it claims support their position. Aplt. Br. 23, 25.

But this argument is incorrect for three reasons. First, this Court gives no deference to the Commission's resolution of the proper interpretation of

state law. *AAA Laundry*, 425 S.W.3d at 128. Second, regulation addresses this situation in a doctor's office. *See infra* Pt. II. And third, the director's letter never said that any compounding operation, no matter how small or non-industrial, falls under the meaning of this term. Opining in that way would have conflicted with many of this Court's precedents that an industrial operation is usually understood to be a large-scale operation. The letter's silence on this point should not be taken as a fatal concession, but as silence.

Just as in *Union Electric*, when a taxpayer claims that a revenue regulation foreclosed the director's position, this Court reviews the issue de novo, and, just as in that case, the silence of a regulation or a letter ruling on an issue does not bind this Court or the commission. *Union Elec. Co. v. Dir. of Revenue*, 425 S.W.3d 118, 125 (Mo. 2014).

Finally, the commission argues that "like sandpaper, soap, tape, and crop cards, the syringes and needles used by" the center are single-use materials used in a manufacturing process. Aplt. Br. 23–24. But items used up in washing or processing a finished product differ from an apparatus on which a product is made. Nor does the exemption apply beyond industrial operations, and the examples in the regulations cited by the center each concern industrial production, not the in-office provision of nontaxable medical services. 12 CSR 10-110.201(3)(A); App 45; *id.* at (3)(B); 12 CSR 10-111.011(4)(B); App 48.

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III. The center does not use its pain treatment devices to compound drug products in an industrial operation.

Section 144.054.2, RSMo also does not provide a use tax exemption to the center for a third reason—the center does not compound drugs in these drug delivery devices on an industrial scale.

Neither the statute nor this Court has defined "compounding" as it is used in section 144.054.2. The commission thus first looked to 12 CSR 10-110.621(2)(A), A47, which defines "compounding" for energy sources as "[p]roducing a product by combining two (2) or more ingredients or parts." LF p. 74, App. A17. Under this broad definition, it thought that the center's general "compounding practice falls within the definition of producing a product by combining two or more ingredients." *Id.* On appeal, the center urges this Court to adopt this broad definition, and overlook or overrule decisions in which this Court has explained why the statute in context concerns the narrower category of industrial operations. Aplt Br. 18, 20.

The center's broad, surface approach to defining statutory terms elides the statutory context, as the commission later explained. Under the other use tax statute, this Court has held that "compounding" has an "industrial connotation." *Aquila Foreign Qualifications Corp. v. Dir. of Revenue*, 362 S.W.3d 1, 5 (Mo. 2012). Even if terms like "compounding" and "producing" can have broad or narrow meanings, the terms can only mean what the statute

uses them in context to mean—especially when tax exemptions must be given narrow meanings. LF p. 75, App. A18.

Here, in textual context, the statute does not encompass any broad or loose definitions, but instead uses the terms narrowly to describe an industrial context. *Id.* The exemption for raw materials does not mean any conceivable situation in which someone may be said to manufacture, compound, or process something; it means *industrial* manufacturing, compounding, and processing. *Id.*; *e.g.*, *AAA Laundry*, 425 S.W.3d at 130-31. Otherwise the terms could mean almost anything. "Compounding" does not mean any time someone mixes drugs; "compounding" means industrial mixing of drugs.

As this Court held in *Fred Weber, Inc.,* 452 S.W.3d 628, Section 144.054.2 applies only to industrial processes. LF p. 75, App. A18. In that case, this Court gave the terms their plain and ordinary meaning, and held that "paving companies that bought rock base and asphalt were not engaged in 'manufacturing,' 'compounding,' or 'producing'" when the companies mixed the items to construct roads and parking lots. *Id.* (citing *Fred Weber, Inc.*, 452 S.W.3d at 630). Terms must carry a plain and ordinary meaning, and applying the manufacturing exemption to a paving construction company runs "'clearly contrary to the General Assembly's expectations for tax exemption under § 144.054.2,'" especially under the narrow construction it must give to a tax exemption. LF p. 76, App. A19 (quoting *Fred Weber, Inc.*, 452 S.W.3d at 630–

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31). This Court noted that "the General Assembly is aware of the vocabulary concerning construction and maintenance of highways, roads, and streets in Missouri." *Fred Weber, Inc.*, 452 S.W.3d at 631. "Had the General Assembly intended for the construction activities performed in this case to be exempt from sales and use tax, it would have used this terminology." *Id.* Asphalt companies do not sell a pavement product when they install it, just as "[c]ontractors who buy materials to construct a real estate improvement use and consume those materials and are subject to sales tax on their purchases." *Blevins Asphalt Const. Co.*, 938 S.W.2d at 901. And steel companies do not manufacture anything when they use steel materials to fulfill construction contracts. *Ben Hur Steel Worx, LLC v. Dir. of Revenue*, 452 S.W.3d 624, 627 (Mo. 2015).

Similarly, a restaurant's processing or preparations that go into cooking and service of food are not industrial-type activities of "processing," "manufacturing," or "compounding" materials. A restaurant uses silverware, dishes, and food to provide food service to patrons; the center mixes drugs in drug delivery devices to provide a medical service to a patient. Neither "processes," "compounds," or "manufactures" anything in the sense of the terms in the exemption.

This court has thus refused a use tax exemption for a food-service restaurant that buys kitchen equipment of non-disposable tableware, cutlery,

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chairs, tables, and similar items for use by its customers. *Brinker Mo., Inc. v. Dir. of Revenue*, 319 S.W.3d 433, 434 (Mo. 2010). This type of business "prepares and serves food rather than manufactures a product." *Id.*

Mere mixing or processing of food service components into something else is not manufacturing under the statute. In *Brinker*, this Court rejected the "theory [] that when it cooks and serves food, it in effect is making a product; therefore, its restaurants qualify for these 'production exemptions.'" *Id.* at 436. And this Court also upheld the commission's ruling that "these exemptions apply only to manufacturers and not to retail sale restaurants, which merely engage in preparation of food to be served to restaurant diners." *Id.*

This Court thus held that an exemption did not apply in *Brinker* to restaurants like Chili's Grill & Bar, Romano's Macaroni Grill, On the Border and Maggiano's Little Italy. *Id.* These restaurants use food service items for

- "cutting, cooking, mixing or blending ingredients such as for salsa";
- "baking, frying or otherwise cooking raw foods";
- "keeping its salsa and other food and drink ingredients chilled or warm during their preparation to prevent spoilage or to hold them until there was a need to assemble or mix them into the final food item"; and

- “generally presenting food and drinks to customers in an attractive way in individual servings.”

Id. at 435.

Critical to this decision is this Court’s textual approach of strict construction. This Court rejects any broad, basic, non-contextual understanding of the term manufacture or prepare, outside an industrial context. *Id.* at 437. In that case, the restaurants’ owner Brinker had argued “that this interpretation of the exemption is too narrow and that the words ‘manufacture’ and ‘produce’ should be read broadly to include preparing and cooking food.” *Id.* And Brinker argued “as though all that is required to avail itself of the exemption is simply to refer to preparing food as producing it and cooking food as manufacturing or transforming it.” *Id.* But this Court held that “Brinker’s argument ignores the fact that it is seeking to take advantage of an *exemption*.” *Id.* The exemption requires clear and unequivocal proof, with all doubts resolved against the party claiming it. *Id.* And, under the rule of strict construction, this Court must “give the language used in the statute a narrow construction, not the exceedingly broad and peculiar meaning argued for by Brinker.” *Id.*

This Court thus reaffirmed its usual, textual approach of adopting “the common sense understanding of the words used in the statute,” subject to strict construction. *Id.* “Absent a statutory definition, the primary rule of statutory

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interpretation is to give effect to legislative intent as reflected in the plain language of the statute." *Id.* at 437-48 (quoting *Akins v. Dir. of Revenue*, 303 S.W.3d 563, 565 (Mo. 2010)). "In lay terminology, one does not speak of a restaurant as manufacturing or producing food or drink; instead, restaurants prepare, cook and serve food and drink to their customers." *Id.* at 438. And the "legislature did not include the words 'restaurant' or 'preparation' or 'furnishing' or 'serving' in § 144.030.2, nor did it elsewhere indicate that it intended the words 'manufacturing,' 'mining,' 'fabricating' or 'producing' to be used in a broad sense to include preparation and cooking of food for service in a restaurant." *Id.*

In the same vein, under Section 144.054, this Court has also held that a convenience store is not exempt from sales and use tax for the electricity it purchases for its food preparation operations. *Aquila Foreign Qualifications Corp.*, 362 S.W.3d at 2. Under Section 144.054.21, the "processing" of products does not include retail food preparation. *Id.* As a result, in *Aquila*, this Court held that Casey's General Store, which used electricity to heat or reheat food, as well as to mix pizza dough and to mix and cut donuts, does not use an exempt energy source for the "processing" of foods. *Id.* at 2–3. In that case, Casey's had argued "that all of its food preparation operations fall within the statutory definition of 'processing,'" which would "exempt from sales and use taxation virtually all electricity used to power activities that modify consumer

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products in any way." *Id.* at 3 n.6. Rejecting that limitless understanding of the term, this Court instead agreed with the director "that the definition of 'processing' includes only industrial-type processing operations and not the mere preparation of food." *Id.*

Finding *Brinker*'s holding under Sections 144.030 instructive, this Court held that its "interpretation of "processing" is guided by the statutory maxim of *noscitur a sociis*—a word is known by the company it keeps." *Id.* at 5. "It is 'often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth in statutory construction.'" *Id.* (quoting *Pollard v. Bd. of Police Comm'rs*, 665 S.W.2d 333, 341 n. 13 (Mo. 1984)). Just as in the other statute, the exemption applies to various industrial activities. "Section 144.054.2 lists 'processing' along with 'manufacturing,' 'compounding,' 'mining,' and "producing.'" *Id.* "The industrial connotations of those terms in Section 144.054.2 indicate that the legislature did not intend 'processing' to include food preparation for retail consumption." *Id.*

Any other interpretation of Section 144.054.2 thus "would give it unintended breadth." *Id.* "If the legislature intended 'processing' to encompass retail food sales by restaurants or convenience stores, it could have used terms such as 'preparing,' 'furnishing,' or 'serving.'" *Id.* (citing *Brinker*, 319 S.W.3d at 438). "But instead it chose industrial-type terms, such as 'manufacturing,' 'processing,' 'compounding,' 'mining,' or 'producing.'" *Id.*

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For the same reason, the term processing, under Section 144.054.2, does not include in-store preparation of cooked goods for retail sale at a grocery store. *Union Elec. Co.*, 425 S.W.3d at 120. In *Union Electric*, a Schnuck's grocery store sought an exemption for energy used for making "baked goods such as cookies, doughnuts, sheet cakes, bagels, breads, stollens, Danish rolls and pies." *Id.* These fully or partially formed and frozen baked goods are thawed, proofed to make dough rise, or put into ovens and fryers for cooking. *Id.* at 121. But again, this Court held that the section's exempt activities of "manufacturing," "compounding," and "processing" "are what can best be described as large-scale industrial activities, not on-site cooking or preparing of food for retail sale." *Id.* at 124. "One does not speak of a grocery store bakery department as 'processing' baked goods any more than one speaks of it as manufacturing, compounding or producing such goods." *Id.* "The term 'processing' does not encompass the on-site thawing, proofing, cooking, frying or other preparation of frozen or partially prepared dough for sale as consumable baked goods in retail markets." *Id.*

And, once again, this Court again rejected any "expansive" reading of the law "to include the retail bakery department of a grocery store that uses equipment to do the final preparation and cooking of the baked goods it sells." *Id.* at 125. None of the director's regulations had suggested that the exemption applies to retail or grocery store operations, as opposed to processing of raw

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ingredients at industrial bakery operations. *Id*. And, of course, "an expansive reading of that term is barred by the fact that this case involves an exemption from tax." *Id*.

So too here. The term "compounding" refers to industrially creating new mixed drug products for sale, not to any incidental mixing of drugs on-site at a doctor's office as part of servicing patients' pain. The legislature did not include doctors' offices in the exemption. And lay people understand their doctors to provide them with pain treatment services, not to compound or manufacture drugs for sale to them—an understanding confirmed by the statutes making the center's services nontaxable, rather than the taxable sale of goods. *See supra* Pt. II. Any common sense meaning of the terms supports this holding, but even if doubt existed, the rule of strict construction derived from the state's sovereign taxing power requires this Court to adopt the narrow meaning. *Miss. River Fuel Corp.*, 164 S.W.2d at 377.

In response, the center asks this Court to adopt a broad understanding of "compounding," which reverts only to the broadest possible dictionary understanding of the term, out of context and away from precedent. Aplt. Br. 20. But this conflicts with all the reasons explained in these cases about why statutory context matters, especially under a statute subject to strict construction.

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Under this precedent, the commission was thus right to hold that even if the center mixes drugs for use in its services, the center's compounding operation "does not rise to the level of a large-scale industrial activity, as required by § 144.054.2." LF p. 76, App. A19. The center's operations do not resemble the large-scale industrial manufacturing or compounding activities that the legislature exempted from use tax in Section 144.054.2. *Union Elec. Co.*, 425 S.W.3d at 124. The center is a doctor's office; it is not an industrial compounding plant. The center's mixing of various prescription drugs takes place in a room near where it treats patients. The center prepares the mixtures as needed for individual patients, not on an industrial or a large scale factory. And the center uses its purchases in the delivery of the drugs, and it disposes of those purchases upon use.

The best term for this type of tangible personal property thus is, as the commission held, "supplies." Although there is no definition of supplies, this term means items used or consumed in manufacturing that do not constitute raw product made into something else then sold to a consumer. 12 CSR 10-111.010, A45; *supra* Pt. I. And, although "supplies" are an exempt category for certain circumstances under Sections 144.030.2(5) & (6), they are not exempt materials under Section 144.054.2.

In response, the center argues that this line of precedent was abrogated in 2018 when the legislature amended Section 144.0054 to reinstate the

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decisions in *DST Systems, Inc.*, 43 S.W.3d 799, *Bell I*, 78 S.W.3d 763, and *Bell II*, 182 S.W.3d 226. Aplt. Br. 14. But the statute's text did not change, nor did the legislature add new definitions of the terms "compounding" or "materials," nor did the legislature's cited cases concern the industrial nature of the exempt activities.

All that the amendment did was to reinstate earlier cases that held that "manufacturing" includes, contrary to a recent decision overruling past decisions, the manufacture of telecommunications products, like telephone services and the electronic transfer of voices or data. *IBM Corp. v. Dir. of Revenue*, 491 S.W.3d 535, 541 (Mo. 2016). This change does not concern any of the longstanding decisions about the industrial production nature of the statute, let alone decisions about other industries. The center argues that the amendment's reasoning is inconsistent with these cases, but the statute did not abrogate *Fred Weber*, *Brinker*, *Ben-Hur*, *Aquila*, or any other cases disconnected from telecommunications. With no clear legislative abrogation of this other part of the statute, this Court should be reluctant to discard stare decisis and abandon its textually grounded precedents.

What is more, this amendment in 2018 makes clear that it clarifies the statute, and that it does not change the statute, but even if it did, the new amendment does not apply retroactively as a matter of substance to tax years governed by previous laws. *Beatty v. State Tax Comm'n*, 912 S.W.2d 492, 496

(Mo. 1995). This Court has clearly stated that a statute may only be applied retrospectively "when the statute expressly states that it should be." *Wellner v. Dir. of Revenue*, 16 S.W.3d 352, 354 (Mo. 2000).

IV. The center did not provide clear and unequivocal proof that it used every pain treatment device to compound drugs.

In any event, even if Section 144.054.2 did encompass this type of compounding service, the center did not show by clear and unequivocal proof that it used all its pain treatment devices to compound medication. The center had to prove each item was used in a way that fell under the exemption.

> If an item is not necessary to production, it cannot be exempt. If it is not close physically or causally to the end product, it cannot be exempt. If it does not operate with admittedly exempt items in an integrated and synchronized system, it cannot be exempt.

Bell II, 182 S.W.3d at 234.

Here, the center could have used some items in other medical procedures, such as single-drug injections, and so the commission could not find that every device was used for "compounding." The center could have used some items in single-drug injections or for non-drug purposes, or not used in a way that made them retained as a component part of the final new product. Tr. 28–31. And the center testified only that all injections were with

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prescription drugs, and that "some of them" or "many of these" or "a number of these" injections involved drugs that had to be mixed. Tr. 44, 47, 56.

The commission thus held that the "evidence does not clearly establish that all of the disputed items were used by the center to compound medication, as opposed to other medical procedures it may have performed." LF p. 77, App. A20. It found the center's testimony on this point vague and without "any supporting evidence in the record that all, or what percentage of, the disputed items were used to compound medication." *Id.*

All the commission could find by clear and unequivocal proof was that the center "generally" mixes more than one drug per injection, typically using three or four drugs per injection. LF p. 66, 77, App. A9, A20; Tr. 47. But a general practice is not a universal practice, nor does it establish what portion of the devices the center used to compound drugs.

And the center has not appealed this part of the commission's decision, and so any objection to this disposition alternate ground for the commission's decision is waived. Any argument not included in the briefs "shall not be considered." *Newsome v. Kan. City, Mo. Sch. Dist.*, 520 S.W.3d 769, 777, n.8 (Mo. 2017) (citing Rule 84.13(a)). By rule, any non-jurisdictional allegation of error, "not briefed or not properly briefed shall not be considered in any civil appeal and allegations of error not presented to or expressly decided by the

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trial court shall not be considered in any civil appeal from a jury tried case." Rule 84.13(a).

The only exception is for plain error, which this is not, because this question does not concern substantial rights or questions of justice and the commission's decision that there is insufficient evidence to show the exemption applied to all items, or to exactly which of the hundreds of items, was correct. Sometimes, when a Court rules on a new question of the construction of the revenue statutes, "it is appropriate to remand the case to the commission to review the evidence to ascertain that the items that are the subject of the exemption claim met the statutory criteria of section 144.030.2(5)." *DST Sys., Inc.*, 43 S.W.3d at 804. But this only applies if the issue could not have been fairly raised below, and here it was the center's theory of the case the whole time.

This point alone is thus an ample basis to affirm the commission.

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CONCLUSION

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 on June 5, 2019, I electronically filed the above with the Clerk of the Court by using the Case.net system. I certify that all participants in the case are registered users and that service will go through the system.

The undersigned certifies that the above brief complies with the limitation in Rule 84.06(b), and that the brief contains 12,017 words.

/s/ Julie Marie Blake
JULIE MARIE BLAKE