SC94109

IN THE SUPREME COURT OF MISSOURI

FRED WEBER, INC.,

Respondent,

vs.

DIRECTOR OF REVENUE,

Appellant.

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

BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

The issues before the Court in this matter involve the construction of § 144.054.2, RSMo (2013 Cum. Supp.),[1/] a revenue law of the State of Missouri. Therefore, this Court has exclusive jurisdiction over this matter pursuant to Article V, § 3 of the Missouri Constitution.

[1/] All references to the Missouri Revised Statutes are to the 2013 Cumulative Supplement unless otherwise specified.

STATEMENT OF FACTS

Fred Weber, Inc. (Weber), a manufacturer and miner, sells asphalt and rock aggregate to contractors who use it to construct roads and parking lots. (Ex. B). In this case, Weber sold asphalt and rock aggregate to Byrne & Jones Enterprises, Inc. and Leritz Contracting, Inc. ("Paving Contractors"), for their construction of roads and parking lots. (Ex. B). The Paving Contractors paid sales tax on their purchases from Weber. (Ex. B). And it is this sales tax – paid by the Paving Contractors – for which Weber now seeks to obtain a refund.

A. The Construction of Roads and Parking Lots.

The Administrative Hearing Commission (Commission) described the "Construction of an Asphalt Pavement" as follows:

> The *construction* crew levels and grades the dirt, ensures that it is stable, and assures that the drainage is adequate.
>
> The *construction* crew then places a rock aggregate base on top of the dirt substrate.
>
> The *construction* crew levels, grades, and compacts the rock aggregate using heavy machinery including ten-ton steel rollers and graders.

> The *construction* crew then pours the hot mix asphalt.
>
> The *construction* crew levels, grades, and compacts the hot mix asphalt using heavy machinery including rollers and graders.

(LF 16, ¶¶ 1-6, App. A2) (emphasis added).

The hot asphalt sold by Weber is already mixed when it arrives at the construction site. (Tr. 37-38). It is delivered at a temperature of at least 300 degrees. (Tr. 37). The Paving Contractors do nothing to maintain the temperature of the asphalt. (Tr. 19 & 37). They do not "modify, heat, or alter the rock aggregate or the hot mix asphalt except by pouring, grading, leveling, and compacting it." (LF 17, ¶13, App. A3). Instead, they must work quickly in order to pave the surface before the asphalt cools and hardens. (Tr. 37, 66-67).

B. The Refund Claims "Manufacturing, Producing, or Processing" of Roads and Parking Lots.

In November of 2011, Weber sought a refund on behalf of the Paving Contractors in the amount of $139,654.62. (Ex. B). This represents the state sales tax on $2,634,362.37 in materials the Paving Contractors purchased "for construction of new streets, parking lots, and resurfacing." (LF 17, ¶15, App. A3). Weber claimed that the Paving Contractors were "manufacturing,

producing or processing" a product under § 144.054; namely, "asphalt real property improvements." (Ex. B).

At the hearing, the director of asphalt operations for one of the Paving Contractors testified about the construction process for asphalt roads and parking lots. Despite efforts by Weber's counsel to suggest manufacturing, the director of asphalt operations repeatedly referred to the process as one of construction or building:

> . . . the owner of the property that's paying for the construction." (Tr. 15:22-23).
>
> Most typically the owner will hire an independent testing company that will monitor that construction process . . . . (Tr. 18:16-17).
>
> So this is one section of the new parking lot that we are building. (Tr. 25:3-4).

The witness also referred to the construction as "installing" a road or parking lot, not manufacturing. (Tr. 30:19-20; 32:9-14).

The director of asphalt operations also confirmed the obvious – that a road or parking lot cannot be moved after it has been paved and cannot be placed anywhere else. (Tr. 43). The asphalt can certainly be scraped up and the materials reused, but it cannot be simply picked up and moved as some sort of fungible product. (Tr. 64).

The Commission concluded that the construction of an asphalt road or parking lot is "processing," "manufacturing," "compounding," and "producing" of a "product." (LF 16-18, ¶¶6-17, App. A2-4). According to the Commission, "[t]he fact that asphalt pavement cannot be moved, that it is permanently affixed to real property," or that it is "valuable only to the owner or first user" "does not make it any less of an output with market value." (LF 31, App. A17).

POINTS RELIED ON

I. The Commission Erred in Refunding Sales Tax, In That Construction Does Not Qualify for a Tax Exemption Under § 144.054.2, Because Construction of a Road or Parking Lot is Not the "Manufacturing, Processing, Compounding, Mining, or Producing" of a "Product."

Akins v. Dir. of Revenue, 303 S.W.3d 563 (Mo. banc 2010)

Aquila Foreign Qualifications Corp. v. Dir. of Revenue, 362 S.W.3d 1 (Mo. banc 2012)

Blevins Asphalt Constr. Co. v. Dir. of Revenue, 938 S.W.2d 899 (Mo. banc 1997)

§§ 144.030, 144.054, 144.062, 144.455

II. The Commission Erred in Refunding Sales Tax, In That Construction Does Not Qualify for a Tax Exemption Under § 144.054.2, Because § 144.054.2 Merely Expanded the Materials Subject to Exemption, Not the Type of Manufacturing Activities.

Aquila Foreign Qualifications Corp. v. Dir. of Revenue, 362 S.W.3d 1 (Mo. banc 2012)

Brinker Mo., Inc. v. Dir. of Revenue, 319 S.W.3d 433 (Mo. banc 2010)

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

SUMMARY OF THE ARGUMENT

A contractor who builds a road, a house, or a building is not "manufacturing" a "product" under § 144.054. The General Assembly did not intend such a result.

Because tax exemptions are to be strictly construed against the taxpayer, the language of an exemption is as important for what it includes as for what it does not include. *See Aquila Foreign Qualifications Corp. v. Dir. of Revenue*, 362 S.W.3d 1, 4 (Mo. banc 2012) (noting the omission of terms related to retail food preparation). Here, the General Assembly exempted manufacturing activities in § 144.054 by using terms such as "manufacturing," "processing," "producing," and "compounding," as well as "production facility." Notably absent is any reference to "contractor," "construction," "construction materials," "building," or "project."

The omission of construction terms from § 144.054 is significant, and cannot be swallowed up by expansive definitions of the manufacturing terms. This is so, not only because such an approach runs contrary to the long-established principles for interpreting tax exemptions, but because the General Assembly has demonstrated that it can, and does, use these very construction terms. Indeed, in the very same chapter – and in tax exemptions no less – the General Assembly used terms such as "construction," "constructing," "building," "contractor," and "project." §§ 144.030; 144.062.

The General Assembly even went so far as to apply the term "construction" (not manufacturing, processing, producing, or compounding) to roads, as is its common usage. § 144.455.

Had the General Assembly intended to include construction in § 144.054, it certainly knew how to do that. Or vice versa, had the General Assembly believed that manufacturing included the construction of a road, it certainly would have used terms such as manufacturing, processing, producing, or compounding in describing the construction of roads in the very same chapter. But it did not, and the construction of roads is not exempt from state taxes under § 144.054.

This case once again points to a fundamental misunderstanding of § 144.054 by certain enterprising taxpayers. While this provision is unquestionably "in addition" to other exemptions, it is not so because it expands the manufacturing activities subject to exemption, but instead because it expands the types of materials (*e.g.*, water, coal, etc.) that are subject to the manufacturing exemptions. After all, the terms "manufacturing, processing, compounding, mining, or producing" of a "product" are already used in, and were taken from, § 144.030. Section 144.054 should be interpreted according; not as a broad expansion of what it means to be a manufacturer of a product, but as the expansion of items exempt if used in the manufacturing of a product.

For these reasons, the Director of Revenue requests that this Court reverse the Administrative Hearing Commission.

ARGUMENT

Section 144.054 is not just any revenue law; instead, it is a sales and use tax exemption subject to strict construction:

> Tax exemptions are strictly construed against the taxpayer. An exemption is allowed only upon clear and unequivocal proof, and doubts are resolved against the party claiming it. Exemptions are interpreted to give effect to the General Assembly's intent, using the plain and ordinary meaning of the words.

Branson Properties USA, L.P. v. Dir. of Revenue, 110 S.W.3d 824, 825-26 (Mo. banc 2003) (internal citations omitted); *see Aquila Foreign Qualifications Corp. v. Dir. of Revenue*, 362 S.W.3d 1, 3 (Mo. banc 2012). As such, "it is the burden of the taxpayer claiming the exemption to show that it fits the statutory language exactly." *Cook Tractor Co., Inc. v. Dir. of Revenue*, 187 S.W.3d 870, 872 (Mo. banc 2006); *Union Elec. Co. v. Dir. of Revenue*, 425 S.W.3d 118, 125 (Mo. banc 2014) (requiring "clear and unequivocal proof").

As construction contractors, the Paving Contractors in this case are subject to sales or use tax on their purchases of construction materials unless a specific exemption applies to exempt their purchases. *See Bratton Corp. v. Dir. of Revenue*, 783 S.W.2d 891, 892 (Mo. banc 1990); *Overland Steel, Inc. v.*

Dir. of Revenue, 647 S.W.2d 535, 538 (Mo. banc 1983); *City of St. Louis v. Smith*, 114 S.W.2d 1017, 1020 (Mo. 1937). Here, neither the law nor the evidence support the claim that building roads and parking lots fit exactly the tax exemption for "manufacturing, processing, compounding, mining, or producing of any product" under § 144.054.2.

I. The Commission Erred in Refunding Sales Tax, In That Construction Does Not Qualify for a Tax Exemption Under § 144.054.2, Because Construction of a Road or Parking Lot is Not the "Manufacturing, Processing, Compounding, Mining, or Producing" of a "Product."

From the record before the Commission, it cannot be disputed that the Paving Contractors in this case are construction contractors purchasing materials for use in building roads and parking lots – classic construction projects, not manufacturing. In fact, the director of asphalt operations for one of the Paving Contractors correctly called this type of work construction. And even the Commission cannot help but repeatedly refer to the work as construction. Nevertheless, Weber asserts that the Paving Contractors qualify for the exemption under § 144.054.2 because building roads and parking lots results in an "output with market value" in the most generic sense. This argument, however, ignores the General Assembly's use of

specific language in describing when purchases of construction materials are exempt from taxes, language that is not used in § 144.054.

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

As with any statutory provision, "the primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute." *Akins v. Dir. of Revenue*, 303 S.W.3d 563, 565 (Mo. banc 2010) (citing *State ex rel. White Family P'ship v. Roldan*, 271 S.W.3d 569, 572 (Mo. banc 2008)). The plain language of § 144.054.2 is reflective of the legislature's intent not only for the words and terms it uses – manufacturing words and terms – but it is especially notable for the words and terms it does not use – construction words and terms.

The absence of words or terms in a statute is compelling as to the intent of the legislature, especially when the language is to be strictly construed. *See Brinker Mo., Inc. v. Dir. of Revenue*, 319 S.W.3d 433, 438 (Mo. banc 2010). Indeed, "[e]ssential to *Brinker*'s holding was the lack of the terms 'restaurant,' 'preparation,' 'furnishing,' or 'serving' in section 144.030.2." *Aquila*, 362 S.W.3d at 4, citing *Brinker Mo., Inc.*, 319 S.W.3d at 438. "Had the legislature intended to exempt those activities from taxation, it would have included those terms in the statute." *Id.* It is the same in this case.

Section 144.054 provides in relevant part:

> 1. As used in this section, the following terms mean:
>
> (1) "Processing", any mode of treatment, act, or series of acts performed upon materials to transform or reduce them to a different state or thing, including treatment necessary to maintain or preserve such processing by the producer at the production facility[.]
>
> * * *
>
> 2. In addition to all other exemptions granted under this chapter, there is hereby specifically exempted . . . electrical energy and gas, whether natural, artificial, or propane, water, coal, and energy sources, chemicals, machinery, equipment, and materials used or consumed in the manufacturing, processing, compounding, mining, or producing of any product[.]

Notably absent from these provisions, and from § 144.054 in its entirety, is any reference to "contractor," "construction," "construction materials," "building," or "project." These are significant omissions,

particularly considering the strict construction that must be applied to the exemptions in § 144.054. Even if the absence of such words or terms merely raised a doubt as to the applicability of § 144.054.2, the exemption should be denied.

B. Surrounding Statutory Provisions Confirm That § 144.054 Does Not Include Construction or Road Building.

The absence of words or terms such as "contractor," "construction," "construction materials," "building," or "project" in § 144.054 is not only significant on its own, but the General Assembly's intent is confirmed by the surrounding statutory provisions that repeatedly refer to these words or terms. For example, in § 144.030.2(37), the General Assembly provided that:

> Materials shall be exempt from all state and local sales and use taxes when purchased by a *contractor* for the purpose of fabricating tangible personal property which is used in fulfilling *a contract for the purpose of constructing, repairing or remodeling facilities* for the following:
>
> (a) An exempt entity located in this state, if the entity is one of those entities able to issue project

exemption certificates in accordance with the provisions of section 144.062; or

(b) An exempt entity located outside the state if the exempt entity is authorized to issue an exemption certificate to *contractors* in accordance with the provisions of that state's law and the applicable provisions of this section[.]

(Emphasis added). The General Assembly certainly knows how to use, and distinguish between, construction terms and other activities.

Likewise, § 144.062 – which is titled, in part, by the revisor of statutes as "construction materials, exemption allowed" – repeatedly uses these words or terms:

- Exempts materials for "*constructing, repairing or remodeling facilities*" § 144.062.1;
- Applies construction exemption to "the department of transportation or the state highways and transportation commission" § 144.062.1(6);
- Provides "*contractor*" requirements for exempt materials in the "*construction of the building or other facility*" § 144.062.1(6);

- Requires an exemption certificate for materials used in "*constructing, repairing or remodeling facilities*," referencing "*construction, repair or remodeling project*" and materials "*to be incorporated into or consumed in the construction of the project*" § 144.062.2;
- Requires the "*contractor*" to furnish an exemption certificate to "*subcontractors*" and any "*contractor purchasing materials*" to be "*incorporated into or consumed in the construction of that project*," while excluding "*construction machinery, equipment or tools used in constructing, repairing or remodeling facilities*" § 144.062.3;
- Mandates a "*contractor's*" treatment of exempt materials that are "*not incorporated into or consumed in the construction of the project*" as well as an audit on materials "*incorporated into or consumed in the construction of the project*" § 144.062.4-.5;
- Imposes tax liability under some circumstances where materials are "*incorporated into or*

> *consumed in the construction of its project*" as well as circumstances where materials are "*incorporated into or consumed in the construction of a project, or part of a project*" § 144.062.6.

(Emphasis added).

Even more compelling is the language of § 144.455, which specifically identifies the building of roads as "construction" for tax purposes, not manufacturing:

> The tax imposed . . . [is] to be used by this state to defray in whole or in part the cost of *constructing, widening, reconstructing, maintaining, resurfacing and repairing the public highways, roads and streets of this state* . . . .

(Emphasis added). If the General Assembly considered the construction or building of roads to be manufacturing, processing, or producing, it would have certainly included those terms in § 144.455. It did not.

Sections 144.030.2(37), 144.062, and 144.455 all demonstrate that the General Assembly routinely uses words or terms such as "construction," "constructing," "building," "contractor," and "project." More importantly, these provisions demonstrate that the General Assembly uses such words or terms in relation to exempt purchases of construction materials and the

building of roads. No such words or terms, however, appear in § 144.054.2. And their absence is dispositive, *see Aquila*, 362 S.W.3d at 5, particularly given that "[e]xemptions from taxation are to be strictly construed against the taxpayer, and any doubt is resolved in favor of application of the tax," *Southwestern Bell Tel. Co. v. Dir. of Revenue*, 182 S.W.3d 226, 228 (Mo. banc 2005).

C. The Paving Contractors Never Treated Their Construction of Roads or Parking Lots as Manufacturing, Processing, or Producing a Product.

In addition to the plain language of the statute, as well as the surrounding statutory provisions, the Paving Contractors in this case never treated or referred to their construction of roads as manufacturing, processing, or producing of a product.

Consistent with common sense, and the ordinary use of these construction related words and terms, Paving Contractors characterized their construction of roads as just that, construction or building:

> . . . the owner of the property that's paying for the construction." (Tr. 15:22-23).
>
> Most typically the owner will hire an independent testing company that will monitor that construction process . . . . (Tr. 18:16-17).

So this is one section of the new parking lot that we are building. (Tr. 25:3-4).

Instead of establishing by clear and unequivocal proof that construction of roads and parking lots fits exactly the statutory language, even the taxpayers must acknowledge that what they do is construction, which is not covered or even mentioned in § 144.054.2. Indeed, this Court in *Blevins Asphalt Constr. Co. v. Dir. of Revenue*, 938 S.W.2d 899 (Mo. banc 1997) repeatedly distinguished between manufacturing of asphalt on the one hand and construction of a road on the other for purposes of the manufacturing exemptions. *Compare id.* at 901 ("Contractors who buy materials to construct a real estate improvement use and consume those materials and are subject to sales tax on their purchases.") *with id.* at 900 ("Blevins 'sold some of its asphalt, which it manufactured . . . .'").

The plain language § 144.054, the surrounding statutory provisions, and even the taxpayers, do not treat construction of roads or parking lots as "manufacturing, processing, compounding, mining, or producing" of a "product." Accordingly, the refund claim must fail, and the Commission should be reversed.

II. The Commission Erred in Refunding Sales Tax, In That Construction Does Not Qualify for a Tax Exemption Under § 144.054.2, Because § 144.054.2 Merely Expanded the Materials Subject to Exemption, Not the Type of Manufacturing Activities.

Implicit in the arguments of Weber and the decision of the Commission is the suggestion that the General Assembly's combining of the litany of "manufacturing, processing, compounding, mining, or producing" with § 144.054's definition of "processing" supposedly demonstrates its intent that § 144.054.2 apply to an entirely different – and much broader – category of activities than the manufacturing exemptions in § 144.030.2, including construction activities. This is not the case. Instead, § 144.054.2 expands the materials subject to exemption, not the type of activities.

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

In support of its broad interpretation of § 144.054.2, the Commission turned to footnote 10 in *Aquila Foreign Qualifications Corp.*, 362 S.W.3d at 5, and concluded that although this Court had always held that "'processing' is ordinarily included within the meaning of the more general and inclusive term 'manufacturing,'" that "processing" and "manufacturing" now have

"different definitions" under § 144.054. (LF 24, App. A10). But this is not what the Court held in *Aquila*. To be sure, the Court found that judicial definitions "do not control the statutory definition" under § 144.054.2. Nevertheless, the Court concluded that judicial definitions "provide insight into the legislative intent of section 144.054.2." *Id.* n. 10 (citing *Cook Tractor Co., Inc. v. Dir. of Revenue,* 187 S.W.3d 870, 873 (Mo. banc 2006) for the proposition that "[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").

On the basis of its new reading of § 144.054, the Commission concluded that building roads and parking lots is "processing," as well as "manufacturing," as well as "compounding," as well as "producing." (LF 20-23, App. A6-9). In effect, almost any activity where something is made would qualify under its broad and generic definitions. Such a conclusion, however, belies recent decisions addressing § 144.054.2 – *Union Elec. Co. v. Dir. of Revenue*, 425 S.W.3d 118 (Mo. banc 2014); *AAA Laundry & Linen Supply Co. v. Dir. of Revenue*, 425 S.W.3d 126 (Mo. banc 2014); and *Aquila Foreign Qualifications Corp.*, 362 S.W.3d at 2. In none of those cases did the court hold that the exemption includes almost any activity that results in something of value being made. Indeed, this Court specifically rejected a

similar notion in *Aquila*, and recognized that "[t]o so interpret section 144.054.2 would give it unintended breadth." *Aquila*, 362 S.W.3d at 5 *quoted in Union Electric Co.*, 425 S.W.3d at 123.

The General Assembly's use of the words "manufacturing, processing, compounding, mining, or producing" with the statutory definition of "processing" must be understood as an effort to circumscribe the activities exempted by § 144.054.2. This is especially true given that the words and definition enacted by the General Assembly in § 144.054.2 already had substantial legislative and judicial meaning attached to them from their use in the other manufacturing exemptions. *See Cook Tractor Co., Inc. v. Dir. of Revenue*, 187 S.W.3d 870, 873 (Mo. banc 2006). Rather than expanding the range of activities exempt as manufacturing, § 144.054.2 was designed to expand the number of items exempt (*e.g.*, electrical energy) for those engaged in manufacturing a product.[2/]

Examining the language of § 144.054.2 and that of § 144.030.2 establishes that the General Assembly did not intend for § 144.054.2 to apply

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[2/] This is not to say that § 144.054 only concerns manufacturing. In other parts of subsections 2-4 of § 144.054, exemptions are expressly provided for activities other than manufacturing (*e.g.*, television or radio broadcasting). These activities are not at issue here.

to non-manufacturing activities like building construction. Otherwise, as set forth above, the General Assembly would have included construction-type terms. Instead, § 144.054, in relevant part, provides an exemption only for "manufacturing, processing, compounding, mining, or producing." This language is unquestionably drawn directly from § 144.030.2(13), and the same type of activities are exempt under § 144.030.2.[3/] *See E & B Granite*, 331 S.W.3d at 317 (noting that both § 144.054.2 and § 144.030.2(2) "relate to sales and use tax exemptions for manufacturers").

The similarity of the language in § 144.054.2 with that of § 144.030.2(13) and the other manufacturing exemptions of § 144.030.2 led this Court to reject an argument similar in reasoning to the one advanced here. In *Aquila*, it was argued that the term "processing," for purposes of § 144.054.2, expanded the range of exempt activities to include food preparation at retail convenience stores. *See Aquila*, 362 S.W.3d at 3. The Court rejected this argument.

[3/] It would be more plausible to assert that the General Assembly intended fewer types of activities to be exempted by § 144.054.2 than are exempted by subdivisions (2), (5), (6), and (14) of § 144.030.2 because these latter subdivisions include the term "fabricating," which was left out of § 144.054.2.

In determining the General Assembly's intent in § 144.054.2, the Court was guided by its prior decision in *Brinker Mo., Inc. v. Dir. of Revenue*, 319 S.W.3d 433 (Mo. banc 2010), in which the Court held that food preparation in a retail restaurant was not manufacturing for purposes of § 144.030.2(4) and (5). *Id.* at 4. To reach this decision, the Court pointed out that "no portion of a statute is read in isolation, but rather is read in context to the entire statute, harmonizing all provisions." *Id.* The Court also applied the statutory maxim of *noscitur a sociis*, – that a word is known by the company it keeps – to establish that all of the words used in § 144.054.2 have industrial connotations. *Id.* at 5.

Importantly, the Court relied upon its prior case law interpreting § 144.030.2(13) that had found little or no practical difference in meaning between the terms manufacturing and processing because " '[w]hen the legislature enacts a statute referring to terms that have had other judicial or legislative meaning attached to them, the legislature is presumed to have acted with knowledge of that judicial or legislative action.' " *Id.* at 5, fn. 10 (*quoting Cook Tractor*, 187 S.W.3d at 873).

Finally, the Court concluded that if the General Assembly had intended to exempt new activities in § 144.054.2, other than those previously exempted by § 144.030.2(13), it should have used more appropriate words to express its intent. *Id.* Given the General Assembly's use of the words or terms

"construction," "constructing," "building," "contractor," and "project" in other statutory provisions, including in relation to the construction of roads, the only conclusion consistent with *Aquila* that can be reached with regard to their absence in § 144.054.2 is that the General Assembly did not intend to expand the activities exempt under § 144.054.2 to include construction activities.

B. Construction of Roads and Parking Lots is not the Type of Industrial Activity Ordinarily Associated with Manufacturing.

As previously discussed, §§ 144.030.2(37), 144.062, and 144.455 demonstrate that the General Assembly, consistent with common usage, distinguishes between manufacturing and construction. Similarly, early in the history of Missouri's Sales and Use Tax Law, this Court identified construction services as a distinct category of activity. *See, e.g., City of St. Louis v. Smith*, 114 S.W.2d at 1020. These distinctions in the law reflect the common understanding that manufacturing and construction are different.

The Paving Contractors in this case are asphalt contractors engaged in road and parking lot construction at construction sites. Road and parking lot construction at a construction site is no more associated with industrial manufacturing than is food preparation in a restaurant. The reference to "processing by the producer at the production facility" in § 144.054.1's

definition of "processing" further demonstrates that the General Assembly did not intend for the exemption to apply to construction activities. Reading such words together with the words manufacturing, processing, compounding, and producing in § 144.054.2 conjures up images of manufacturing facilities producing various items by means of mass production rather than skilled tradesmen laboring to construct a road or parking lot.

Similarly, the construction activities in this case do not produce the type of end result ordinarily associated with manufacturing. The roads and parking lots cannot be used for any other location and could not be moved to any other location even were they usable. The only value they have is to the person who contracted to build them. This is different than the product required by § 144.054.2, which the Court has defined as "an output with a market value[.]" *International Business Machines Corp. v. Dir. of Revenue*, 958 S.W.2d 554, 557 (Mo. banc 1997).

In *Mid-America Dairymen, Inc. v. Dir. of Revenue*, 924 S.W.2d 280, 283 (Mo. banc 1996), the Court explained what a product was for purposes of § 144.030.2(13):

> Implicit in the use of the term "product" is an output with a market value because the economic purpose of manufacturing or processing a product is to market

> the product. That is not to say, however, that the taxpayer must actually market the product in order to qualify for the exemption. It is sufficient if the product, although marketable, is used instead by the same manufacturer or processor as an ingredient or base for yet another product. In this regard, we emphasize that it is incumbent on the taxpayer to prove the existence of a market, whether or not the product is actually marketed by the taxpayer.

The Paving Contractors are hired to perform certain construction services that are necessary to construct a road or parking lot. The end result is not a marketable product. The roads and parking lots cannot be marketed as they are immovable, made specifically for only one customer, and are not valuable to any other person. An unmarketable product with no intrinsic market value is not the type of output ordinarily associated with manufacturing.

This is not to say there is not a market at play in relation to these activities. The market in which the Paving Contractors operate is the market for the specialized knowledge and skilled labor necessary to construct roads and parking lots. These construction services are valuable to the general contractor hiring the Paving Contractors, but their exercise does not result in

a product that has any intrinsic market value. The consideration paid to the Paving Contractors is based upon the value of the construction services it renders rather than the value of the built roads or parking lots on the open market. This is not the "manufacture, processing, compounding, mining or producing of a product" contemplated in § 144.054.2.

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

In further support of its analysis, the Commission relies on *E & B Granite*. Such reliance is misplaced. First, it ignores *Aquila*, which came after *E & B Granite*. In *Aquila*, there was no dispute that the end result of Casey's food preparation activities were items sold at retail to the general public. Nevertheless, the Court concluded that the activities did not qualify for the exemption because food preparation in a convenience store was not the manufacturing of a product. The nature of the construction activities in this case matter because the activities must constitute the manufacturing of a product to be exempt.

Second, reliance upon *E & B Granite* ignores what is truly at issue in this case – whether Paving Contractors are manufacturing a product. In *E & B Granite* the parties entered into a stipulation before the Commission that narrowed both the factual and legal issues. It was stipulated that E & B manufactured granite countertops and other granite products in a manufacturing facility. (*E & B Granite, Inc. v. Dir. of Revenue*, SC 91010,

Joint Stipulation ¶ 4, p. 44-45 of record on appeal, *available on* CaseNet); *see also E & B Granite*, 331 S.W.3d at 315 ("E & B buys raw granite slabs and uses them to manufacture granite countertops and other granite products.").

Further, it was stipulated that after the manufacturing was complete, E & B installed and attached some of the countertops to customers' real property while others were sold to customers at retail. *Id.* The Director agreed that E & B's purchases of granite were exempt under § 144.054.2 when used by E & B to manufacture countertops and other granite products. However, the Director asserted that this granite became subject to tax when E & B installed the fixture on customers' real property rather than selling them at retail. (*E & B Granite, Inc. v. Dir. of Revenue*, SC 91010, Joint Stipulation ¶ 10, p. 46-47 of record on appeal, *available on* CaseNet).

Unlike in this case, the Director was not contesting whether E & B was a manufacturer or whether it had manufactured a product in some production facility. It had. The Director's argument was merely that the granite countertop became subject to tax when E & B used it for its own purposes in making a real property improvement rather than selling it at retail. In other words, E & B's countertops ceased being a product for purposes of the exemption under § 144.054.2 when used to make a real property improvement.

In making this argument, the Director was relying upon the Court's

historic treatment of dual operators in the case of *Blevins Asphalt Constr. Co. v. Dir. of Revenue*, 938 S.W.2d 899 (Mo. banc 1997). The Court, however, rejected the Director's contention concluding that: "Section 144.054.2 applies to products, whether or not they are eventually affixed to real property. Although E & B's granite countertops are eventually installed, they are 'products' under Section 144.054.2." *E & B Granite*, 331 S.W.3d at 317.

Even the taxpayer in *E & B Granite* recognized in their brief that the issue we are concerned with here – construction – was not at issue in that case:

> E & B agrees that a carpenter "could argue" that [the cutting and installing of lumber to build a house qualified the carpenter for the exemption], but finds little reason to believe that the carpenter would be deemed a "manufacturer" and that the house he builds would be deemed a "product" under Section 144.054.

Respondent's Brief, pg. 8 in *E & B Granite, Inc. v. Director of Revenue*, Case No. SC 91010 (available at courts.mo.gov/casenet/cases/searchDockets.do) (parenthetical added for context). To conclude otherwise would permit virtually any construction contractor to claim a manufacturing

exemption and would give § 144.054.2 an "unintended breadth." *Aquila*, 362 S.W.3d at 5; *Union Elec.*, 425 S.W.3d at 123.

Finally, the circumstances in this case are distinct from *E & B Granite* because the Paving Contractors did not manufacture the asphalt. That was done by Weber. The asphalt was already manufactured when it was delivered to the Paving Contractors. They merely used it to construct roads and parking lots. Unlike *E & B Granite*, where the same entity both manufactured and installed the product, the Paving Contractors here are unrelated to Weber and merely install the product as a real property improvement. Unrelated entities cannot be vertically integrated when it comes to the manufacturing exemption. And an improvement to real property is not a product for purpose of the manufacturing exemptions. *Blevins*, 938 S.W.2d at 901.

CONCLUSION

For the foregoing reasons, the decision of the Administrative Hearing Commission should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was served electronically via Missouri CaseNet e-filing system on the 15th day of August, 2014, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 6,089 words.

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