SC94109

IN THE SUPREME COURT OF MISSOURI

FRED WEBER, INC.,

Respondent,

v.

DIRECTOR OF REVENUE,

Appellant.

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

REPLY BRIEF OF APPELLANT

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SUMMARY OF THE ARGUMENT

Building a road or a parking lot is not the "manufacturing" of a "product" under § 144.054, RSMo,[1/] because it is neither manufacturing nor a product. If it were, then every construction project would result in the manufacturing of a product, and all materials purchased for the construction (along with many other items) would be entirely tax free. Indeed, the entire construction industry could potentially operate free from any sales or use tax. But that is not what the law provides, and it is certainly not consistent with the strict construction that must be applied to tax exemptions. *Aquila Foreign Qualifications Corp. v. Dir. of Revenue*, 362 S.W.3d 1, 4 (Mo. banc 2012).

Had the General Assembly intended to include the construction of real property improvements within § 144.054 it could have easily done so. In fact, surrounding statutory provisions that were in place when § 144.054 was enacted and have been amended since make specific references to "constructing" and "construction projects." In § 144.062, for example, the General Assembly repeatedly uses these words or terms: "constructing,"

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

"contractor," "construction," and "construction of the project." Yet, Fred Weber, Inc. calls this all a red herring since building a road is not really construction. Resp't Br., p. 19.

According to Weber, the Paving Contractors in this case only "*operate* within the construction industry," and do not actually do construction. Resp't Br., p. 19 (emphasis added). The Paving Contractors, however, 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).

This Court in *Blevins Asphalt Constr. Co. v. Dir. of Revenue*, 938 S.W.2d 899 (Mo. banc 1997) also 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 of § 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 Commission should be reversed.

ARGUMENT

In its brief, Weber makes no mention of the strict construction that this Court applies to sales and use tax exemptions, including exemptions under § 144.054. *See, e.g., Aquila Foreign Qualifications Corp. v. Dir. of Revenue*, 362 S.W.3d 1, 3 (Mo. banc 2012). And that failure is repeatedly evident in its analysis. Indeed, according to Weber, "new streets, parking lots, and residential driveways" are apparently not only "products," but building them is simultaneously "manufacturing, processing, compounding, and producing a product." Resp't Br., pp. 1 & 6. Neither the law nor the caselaw (nor common sense for that matter) support such broad constructions.

I. Roads and Parking Lots are Built as Real Property Improvements, Not Manufactured, Processed, Compounded, and Produced as Products.

In order to qualify for a tax exemption under § 144.054, the burden is on "the taxpayer claiming the exemption to show that it fits the statutory language exactly." *Cook Tractor Co. 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"). Here, Weber cannot even decide what statutory language fits exactly – and so it concludes that

building roads and parking lots broadly fits manufacturing, processing, compounding, and producing.

The centerpiece of Weber's analysis is a United States Supreme Court decision from 1910 – *Friday v. Hall & Kaul Co.*, 216 U.S. 449 (1910) – dealing with the bankruptcy act at the time. Weber quotes extensively from *Friday* (Resp't Br., pp. 14-16), but leaves out some significant language. In fact, the entire case is premised upon the following proposition: Congress' intention concerning the bankruptcy act "should be regarded by giving to doubtful words and terms a liberal rather than a narrow meaning." *Id.* at 454. Thus, according to the Supreme Court the words and terms " 'manufacture' and 'manufacturing' " are doubtful as to their meaning, but should – according to congressional intent – be given a liberal construction. *Id.* It is exactly the opposite in this case.

Section 144.054 requires strict construction, and the building of roads and parking lots does not fit exactly the common understanding of "manufacturing, processing, compounding, mining, or producing of any product." § 144.054.2. In fact, courts from around the country have concluded that building asphalt roads is not manufacturing. *See, e.g., Bert Smith Road Machinery Co. v. Okla. Tax Comm'n*, 563 P.2d 641, 643 (Okla. 1977) ("The equipment was used primarily in the building of roads and not in the

manufacturing of property subject to taxation."); *Commonwealth of Pa. v. Interstate Amiesite Corp.*, 194 A.2d 191, 193 (Pa. 1963) ("The production of asphalt constitutes manufacturing. By the same token, the construction or paving of roadways is not in this category.") (internal citations omitted).

The meaning of these words and terms could not have been stated more succinctly than in *State Tax Comm'n v. Baltimore Asphalt Block & Tile Co.*, 26 A.2d 371, 374 (Md. Ct. App. 1942) – "Would not the average mind think of constructing a street, not of manufacturing a street?" This common sense conclusion is also borne out by this Court's decision in *Blevins Asphalt Constr. Co. v. Dir. of Revenue*, 938 S.W.2d 899 (Mo. banc 1997). At no point did this Court refer to the building of asphalt roads as "manufacturing, processing, compounding, mining, producing or fabricating." Instead, it was described as the installation of a real property improvement.

Moreover, as the Director pointed out in its opening brief, the Missouri General Assembly made no reference in § 144.054 to words or terms such as "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. And the omissions were not merely accidental, nor made under the assumption that the manufacturing exceptions included construction activities.

The meaningful omission of construction or building words or terms in § 144.054 is confirmed by the surrounding statutory provisions that refer to these words or terms. In § 144.030.2(37), for example, the General Assembly refers to "contractor" and "constructing." Likewise, in § 144.062 – which is titled, in part, by the revisor of statutes as "construction materials, exemption allowed" – the General Assembly uses these words or terms: "constructing," "contractor," "construction," and "construction of the project." And § 144.062 was amended the very same year that § 144.054 was enacted.

Section 144.455, which has also been amended since § 144.054 was enacted, 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, compounding, or producing, surely it would have used those terms in § 144.455. *See Baldwin v. Dir. of Revenue*, 38 S.W.3d 401, 405 (Mo. banc 2001) ("Statutory provisions

relating to the same subject matter are considered *in pari materia* and are to be construed together."). But it did not.

What is Weber's response to this overwhelming evidence of the General Assembly's intent to treat construction and building differently than manufacturing, processing, compounding, and producing? It claims that "[t]he presence of terms related to 'construction' outside of § 144.054 is irrelevant." Resp't Br., p. 20. Weber further argues that because the words or terms are supposedly so clear, it can ignore the obvious intent of the legislature. Not so.

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). Accordingly, the refund claim must fail, and the Commission should be reversed.

II. Roads and Parking Lots are Not "Products."

Straining reason further, Weber claims that roads and parking lots are "products" under § 144.054 simply because they are an output with a "market value when first sold to the original owner." Resp't Br., p. 23. Weber reaches this conclusion despite acknowledging – as it must – that roads and parking lots are real property improvements. Under Weber's interpretation of "product," however, there is no limit to what can be a product. Indeed, everything would be a product under its analysis. If that were the case then all construction and construction materials would be exempt. As we have seen, this is not consistent with the General Assembly's intent.

Asphalt paving contractors are not hired to manufacture a product, but instead to build roads and parking lots. Recognizing its flawed logic and limitless consequences, Weber claims that *E & B Granite v. Dir. of Revenue*, 331 S.W.3d 314 (Mo. banc 2011) is its salvation. That is not the case. *E & B Granite* was limited to whether attaching a product to real property changed the nature of the product such that it was no longer exempt. Here, Weber

certainly manufactured a product – asphalt.[2/] But the manufacture of asphalt is not at issue in this case. Instead, the Paving Contractors purchased the product Weber manufactured and built a road, just as a carpenter would purchase a piece of wood and build a wall. The road, like a wall in a home or building, is not a "product." Otherwise, every construction project – whether a road, a house, or a building – would result in a product and all would be tax free. The tax consequences would truly be staggering and would give § 144.054.2 an "unintended breadth." *Aquila*, 362 S.W.3d at 5; *Union Elec.*, 425 S.W.3d at 123.

Had the legislature really intended such a dramatic result, it would have used clearer language to do so. *See Aquila*, 362 S.W.3d at 4 ("Had the legislature intended to exempt those activities from taxation, it would have included those terms in the statute."); *see also Brinker Missouri, Inc. v. Dir. of Revenue*, 319 S.W.3d 433, 438 (Mo. banc 2010).

[2/] In support of their argument, Weber cites to a private letter ruling – LR 6784. Not only is a private letter ruling not controlling, but LR 6784 is not even helpful to the taxpayers in this case. The private letter ruling concludes that the sale of asphalt to paving contractors is subject to sales tax, as it is in this case.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Director's opening brief, 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 30th day of October, 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 2,131 words.

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