No. SC94109

IN THE SUPREME COURT OF MISSOURI

FRED WEBER, INC.,
Respondent,

v.

DIRECTOR OF REVENUE,
Appellant.

On Petition for Review from the Missouri Administrative Hearing Commission

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RESPONDENT'S BRIEF

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[1] Throughout the brief, Respondent uses an underscore in place of periods in citations to Internet sources to avoid hyperlinks in the brief.

Statement of Facts

Fred Weber, Inc. ("Respondent" or "Weber") petitioned the Administrative Hearing Commission ("Commission") regarding the Director of Revenue's ("Director") denial of a sales tax refund on sales tax Weber paid for the sale of rock aggregate and hot mix asphalt to asphalt paving contractors. (Legal File (LF) 1). The Director appeals from the Commission's Decision (LF 15 – 31) finding Weber was entitled to the requested refund.

Weber is a Missouri corporation operating manufacturing facilities, quarries, and asphalt plants. (LF 16).[2] Weber sold $2,634,362.37 worth of rock aggregate and hot mix asphalt to paving contractors to make new streets, parking lots, and residential driveways for the paving contractors' customers. (LF 16 – 17; Transcript (Tr.) 17 – 18, 39). These asphalt products were created

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[2] The Commission's "[f]actual determinations will be upheld if supported by substantial evidence based on review of the whole record." *Union Elec. Co. v. Director of Revenue*, 425 S.W.3d 118, 121 (Mo. banc 2014). The Director does not challenge the Commission's factual determinations, so Weber recites the facts largely from the Decision.

by a series of acts performed on the raw materials in the following order:

1. The dirt is graded to form a dirt substrate. (LF 16).
2. Rock aggregate is placed on the dirt substrate. (LF 16).
3. The rock aggregate is leveled, graded and compacted by heavy machinery to ensure the rock aggregate has the density specified in the site design. (LF 16).
4. Hot mix asphalt is poured on the rock aggregate. (LF 16).
5. The hot mix asphalt is leveled, graded and compacted by heavy machinery before the hot mix asphalt cools to 175 degrees. (LF 16).

In November of 2011, Weber requested a refund of $139,654.62 in sales taxes for the paving contractors. (Ex. B.). Weber's refund claim was based on § 144.054.2 because the paving contractors were using the rock aggregate and hot mix asphalt (materials) in the manufacturing, producing, compounding or producing of a product (asphalt pavement). (Ex. B). The Director denied the refund request. (Ex. B). Weber filed a complaint with the Commission for the denial of the refund. (LF 1). After a hearing, the

Commission concluded Weber was entitled to the refund because it found the paving contractors were using the rock aggregate and hot mix asphalt (materials) in manufacturing, processing, compounding and producing a product (asphalt pavement). (LF 18 – 31). This appeal followed.

Standard of Review

This Court must uphold a decision of the Commission when it is "authorized by law and supported by competent and substantial evidence upon the record as a whole unless it is clearly contrary to the reasonable expectations of the General Assembly." *AAA Laundry & Linen Supply Co. v. Dir. of Revenue*, 425 S.W.3d 126, 128 (Mo. banc 2014). This Court reviews the Commission's interpretation of revenue statutes *de novo*. *Union Elec. Co. v. Dir. of Revenue*, 425 S.W.3d 118, 121 (Mo. banc 2014).

Argument

Section 144.054.2 provides sales and use tax exemptions for "materials used or consumed in the manufacturing, processing, compounding, mining, or producing of any product. . . ." For this exemption to apply here, three requirements exist:

1. Rock aggregate and hot mix asphalt must be "materials."
2. Rock aggregate and hot mix asphalt must be used or consumed in manufacturing, processing, compounding, mining, or producing.
3. Finished asphalt pavement must be a product.

See E & B Granite, Inc. v. Dir. of Revenue, 331 S.W.3d 314, 316-18 (Mo. banc 2011) (discussing requirements 1 and 3).

There is no dispute the ingredients used to make asphalt pavement are "materials." *See E & B Granite*, 331 S.W.3d at 318 (citing *Blevins v. Dir. of Revenue,* 938 S.W.2d 899, 901 (Mo. banc 1997)); Appellant's Brief, pp. 3, 11, 12 (characterizing what was purchased by the paving contractors as "materials"). However, the Director argues requirements 2 and 3 are not met because: (i) "construction of a road or parking lot is not the 'manufacturing, processing, compounding, mining or producing' of a 'product'" and (ii) the asphalt pavement "is not the type of output ordinarily associated with manufacturing." *See* Appellant's Brief, pp. 12, 28. None of the Director's arguments have merit because the paving contractors were using the rock aggregate and hot mix asphalt (materials) in manufacturing, processing, compounding and producing a product (asphalt pavement).

I. The Commission correctly concluded Weber qualified for a tax exemption under § 144.054.2, because the paving contractors were engaged in "manufacturing, processing, compounding, mining, or producing."

In finding Weber qualified for a tax exemption under §144.054, the Commission correctly interpreted the terms of the statute in order to conclude the paving contractors manufacture, process, compound, or produce.

"When construing sales and use tax exemptions, the Court strives to 'give effect to the General Assembly's intent, using the plain and ordinary meaning of the words.'" *AAA Laundry & Linen Supply Co.*, 425 S.W.3d at 128 (quoting *Branson Properties USA,* *L.P. v. Director of Revenue*, 110 S.W.3d 824, 825–26 (Mo. banc 2003)). This Court will look beyond the plain meaning of the statute only when the language is ambiguous. *Akins v. Director of Revenue*, 303 S.W.3d 563, 565 (Mo. banc 2010). The Court "does not write on a blank slate in each and every tax case," but relies on *stare decisis* to guide its interpretation. *Id.*

Although this Court has never determined whether paving contractors manufacture, process, compound, or produce as those terms are used in §144.054, it has examined the meaning of those terms and interpreted them to apply to industrial activities transforming an input into an output with a separate and distinct use, identity, or value. *See Aquila Foreign Qualifications Corporation v. Director of Revenue*, 362 S.W.3d 1, 5 (Mo. banc 2012) (noting the industrial connotations of the terms in § 144.054); *see also West Lake Quarry & Material Co. v. Schaffner*, 451 S.W.2d 140, 141-43 (Mo. 1970) (holding grinding, crushing, and sorting rock into various sizes for commercial use is manufacturing and noting the "asphalt and concrete operations … are conceded to be manufacturing[.]");*Heidelberg Central, Inc. v. Director of Dept. of Revenue*, 476

S.W.2d 502, 506 (Mo. 1972) and *Ovid Bell Press, Inc. v. Director of Revenue,* 45 S.W.3d 880, 884 (Mo. banc 2001) (commercial printing is manufacturing); *Wilson & Co., Inc. v. Department of Revenue,* 531 S.W.2d 752, 754-55 (Mo. 1976) and *Sipco, Inc. v. Director of Revenue,* 875 S.W.2d 539, 541-42 (Mo. banc 1994) (slaughtering livestock to create marketable food is manufacturing); *State ex rel. Union Electric Co. v. Goldberg,* 578 S.W.2d 921, 924 (Mo. banc 1979) ("thickening, filtering, mixing, shaping and firing of the iron ore" is processing); *Jackson Excavating,* 646 S.W.2d at 51 (treating and purifying water is manufacturing); *Galamet, Inc. v. Director of Revenue,* 915 S.W.2d 331, 333-34 (Mo. banc 1996) (converting old automobiles/appliances into steel shreds for commercial use is manufacturing); *Concord Pub. House, Inc. v. Director of Revenue,* 916 S.W.2d 186, 190 (Mo. banc 1996) (manipulating and affixing words onto a page to create a newspaper is manufacturing).[3]

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[3] Most of these examples are cases applying § 144.030.2. This Court has found the analysis of "manufacturing" and "processing" under § 144.030.2 are relevant in analyzing those same terms in § 144.054.2. *AAA Laundry & Linen Supply Co. v. Director of Revenue*, 425 S.W.3d 126, 130 n. 4 (Mo. banc 2014).

Here, the paving contractors took an input – the rock aggregate and hot mix asphalt – and produced an output – asphalt parking lots, roads, and driveways. Applying both the plain meaning of its terms and this Court's prior interpretations of the statute, the Commission correctly concluded that the paving contractors manufacture, process, compound, mine, or produce asphalt pavement.

A. *Processing*

Section 144.054.1(1) defines "processing" as:

> 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[.]

To "transform" is defined as "a: to change completely or essentially in composition or structure ... b: to change the outward form or appearance of[.]" Webster's Third New Int'l Dictionary Unabridged 2427 (1986)); *see also E & B Granite*, 331 S.W.3d at 318 (the plain meaning of the words may be derived from a dictionary).

In *Aquila*, this Court determined although the statute defines the term "processing," the definition itself is ambiguous. *Aquila*, 362 S.W.3d at 3. This Court then interpreted the terms in the statute to find that "processing" requires an industrial connotation. *Id.* at 5.

Applying this Court's construction of "processing" to the facts at hand, the Commission correctly found the paving contractors processed asphalt because they performed a series of acts upon materials to transform or change them. When the materials arrived at the contract site, "they were in dump trucks, could be spread, and had no form or structure." (LF 22). The contractors used rollers, graders, and other machinery to pour, level, grade, and compact the rock aggregate and hot mix asphalt. (LF 21). After the paving contractors used their machinery, skill and labor, the materials were changed into a smooth asphalt surface that could not be moved or altered except by breaking it into pieces that can later be sold and used as an aggregate base. (LF 22; Tr. 45). The structure of the materials and their outward form or appearance "was changed from loose rock and oil to a solid surface." *Id.* The paving contractors processed the hot mix asphalt and rock aggregate. Missouri courts have held similar acts on raw materials constitute "processing." *See, e.g.*, *Goldberg*, 578 S.W.2d at 924 ("[T]hickening, filtering, mixing, shaping and firing of the iron ore" is processing.).

The Director contends construing "processing" in such a manner gives the exemption statute unintended breadth, citing to *Aquila*. In *Aquila*, this Court held preparation of food in a convenience store was not "processing" because the industrial connotation of this term with the other terms listed in § 144.054.2 suggests "the legislature did not intend 'processing' to include food preparation for retail consumption." 362 S.W.3d at 5. Unlike *Aquila,* however, the activity here deals with an industrial process that fits the definition of "processing" provided by § 144.054.1(1).

The paving contractors processed as that term is used in § 144.054.2 and the tax exemption applies. This Court need not examine whether the other terms listed with "processing" apply to determine the sales here were exempt, but the other terms also support the Commission's finding that the exemption applies.

B. *Compounding*

The meaning of "compounding" can be derived from its dictionary definition: "to put together (as elements, ingredients or parts) to form a whole[.]" Webster's Third New Int'l Dictionary Unabridged 466 (1986). Although compounding and processing have partially overlapping meanings, *Goldberg*, 578 S.W.2d at 924, it is "presumed that the legislature did not insert idle verbiage or superfluous language in a statute." *801 Skinker Blvd. Corp. v. Director of Revenue*, 395 S.W.3d 1, 5 (Mo. banc 2013). "[E]very word, clause, sentence, and provision of a statute must have effect." *Id.*

Here, there is evidence in the record the paving contractors put together or combined rock aggregate and hot mix asphalt to form roads, driveways and parking lots. (Tr. 15). The paving contractors compounded as that term is used in § 144.054.2 and the tax exemption applies.

C. *Producing*

The meaning of "producing" can also be attained by its dictionary definition. "Producing" is defined as to "make or manufacture from components or raw materials." *See* www_google_com/#q=definition+producing. Synonyms include manufacture, make, construct, build, fabricate, put together, assemble, turn out, and create. *Id.*

Here, there is evidence in the record the paving contractors took different materials and combined them to produce a new product. (Tr. 20). The paving contractors made roads, driveways and parking lots from two primary components (rock aggregate and hot mix asphalt). The paving contractors produced as that term is used in § 144.054.2 and the tax exemption applies.

D. *Manufacturing*

"'Manufacturing' has no technical meaning. It is not limited by the means used in making, nor by the kind of product produced." *Friday v. Hall & Kaul Co*, 216 U.S. 449, 454 (1910). "Manufacturing has been described both as a process that takes something practically unsuitable for any common use and changes it so as to adopt it to such common use and as the production of raw materials into products for sale which have an intrinsic and merchantable value." *Southwestern Bell,* 78 S.W.3d at 767 (internal quotes, citations and brackets omitted). It has also been described as "a transformation of a raw material by the use of machinery, labor and skill into a product for sale which has an intrinsic and merchantable value in a form suitable for new uses." *Jackson Excavating*, 646 S.W.2d at 51. The legislature enacted § 144.054.2 knowing this Court's construction of "manufacturing." *AAA Laundry*, 425 S.W.3d at 130 n. 4.

Making asphalt pavement products takes materials practically unsuitable for any common use (rock aggregate and hot mix asphalt) and changes them to adopt those materials into a common use. The paving contractors create roads fit for driving, driveways fit for parking and athletic tracks fit for running. The paving contractors are also transforming raw materials (rock aggregate and hot mix asphalt) by machinery, labor and skill into a product suitable for new uses. The process "makes more than a superficial change in the original substance; it causes a substantial transformation in quality and adaptability and creates an end product quite different from the original." *Jackson Excavating,* 646 S.W.2d at 51.

The Director strains to liken this case to food preparation in a restaurant. Although in "lay terminology, one does not speak of a restaurant as manufacturing or producing food or drink," the same cannot be said for making roads, driveways and parking lots. As the United States Supreme Court said over 100 years ago when discussing similar products:

Concrete is an artificial stone. It is a product resulting from a combination of sand or gravel or broken bits of limestone, with water and cement; a combination which requires ordinarily the use of both skill and machinery. It is not denied that if concrete in a shape adapted to use and in finished form is supplied to others for the making of a house, bridge, pier, arch, or abutment, that the corporation making such blocks or shapes would be, in the most narrow sense, one engaged in manufacture. But it is urged that this corporation made these blocks or shapes at the place where used; and that, as finished, they became a part of a principal structure and affixed to the realty; and that therefore they were not engaged in manufacturing, which, say counsel, is a business confined to those who make articles which may be 'transported and sold at some other place than that where made.'

The production of concrete arches or piers or abutments is the result of successive steps. The combination of raw material-the sand, the limestone, the cement, and the water-produced a product which undoubtedly was 'manufactured.' This concrete had then to be given shape. That required the manufacture of moulds, which remain in place until hardening occurs. If the concrete is reinforced, as is the case where great strength is required, then the adjustment of the bars of steel within the moulds was another step. Do all of these steps,

> each a step in 'manufacturing,' cease to be 'manufacturing' because the moulds into which the concrete is poured, when in a fluid state, are upon the spot where the finished product is to remain? That the operation of making and shaping the concrete is done at the place used seems rather a matter of convenience, due to the quick hardening in moulds and difficulties of transportation. But, as we may take notice, the operation which, in the end, is to produce an arch or abutment or pier or house, is not necessarily a single operation, but one of successive repetitions of the process. The business is not identical with that of a mere builder or constructor who puts together the brick or stone or wood or iron, as finished by another. If the builder made his brick, shaped his timbers, and joined them all together, he would plainly be a manufacturer as well as a builder….

Friday, 216 U.S. at 454-55.

Just as in *Friday*, it cannot be denied if the paving contractors could make the asphalt pavement products in a finished form to be installed as roads, driveways or parking lots, that the paving contractors would be manufacturing. That the operation of making and shaping the asphalt pavement is done at the place used is a matter of necessity, due to the quick hardening in asphalt once it cools and impossibility of transporting roads, parking lots or driveways. (Tr. 43:21 – 25). Paving contractors are not mere builders or constructors who put together products finished by another; rather, the paving contractors compact, level, grade, and shape the rock aggregate and hot mix asphalt to make roads, driveways and parking lots. To suggest the paving contractors are not engaged in "manufacturing" "processing" "compounding" or "producing" would give the term too narrow a construction. The Commission correctly determined the paving contractors manufactured as that term is used in § 144.054.2 and the tax exemption applies.

Despite the Commission's finding the paving contractors manufacture, process, compound, and produce asphalt pavement, the Director argues the paving contractors are engaged in "construction," and § 144.054 does not apply to construction because it makes no reference to "'contractor,' 'construction,' 'construction materials,' 'building' or 'project.'" *See* Appellant's Brief, pp. 12-14. In so arguing, the Director ignores this Court's decision in *E & B Granite*, where it found that E & B was entitled to the tax exemption under § 144.054 despite being a "construction contractor." *See*

E & B Granite, 331 S.W.3d at 318; Respondent's Brief of E & B Granite at 4, *E & B Granite*, 331 S.W.3d 314 (No. SC91010) ("E & B Granite, Inc. . . . is and has at all relevant times been a construction contractor . . . ."). The Director also attempts to divert this Court's attention to the absence of words in the statute to avoid addressing the terms of the statute itself, citing to *Brinker Mo., Inc. v. Dir. of Revenue*, 319 S.W.3d 433 (Mo. banc 2010).

In *Brinker*, the appellant sought a tax exemption for the stoves, refrigerators, dispensers and other items it used to prepare food and beverages for its customers. *Id.* at 437. In rejecting Brinker's claim, this Court found the legislature did not include the words "restaurant" or "preparation" or "furnishing" or "serving" in the statute, nor did it intend 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.* at 438.

The Director now argues the absence of terms in §144.054 regarding "construction" indicates the legislature's intent not to exempt such activities from taxation.[4] The Director's argument relies on the flawed premise that the paving contractors engaged in "construction." The Director's argument is a red herring. Regardless of whether the paving contractors operate within the construction industry, the question under § 144.054.2 is whether the asphalt paving contractors manufacture, process, compound, mine, or produce as those terms are used in the statute and applied by this Court. They do.

The Director also asks this Court to look to surrounding statutory provisions referring to "construction" or "building." Again, the Director's argument relies on the assumption the paving contractors are engaged in "construction" rather than analyzing their work under the terms of § 144.054. This Court may look beyond the plain language of the statute and resort to extrinsic aids such as the principle that statutes should be read *in pari materia* only

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[4] The Director's argument directly contradicts its own Letter Ruling No. 6784, in which the Director agreed that an asphalt contractor's purchase of materials used to create asphalt that the contractor then installed was exempt from taxation under Section 144.054.2.

if the statute is ambiguous. *Jefferson ex rel. Jefferson v. Missouri Baptist Med. Ctr.*, ED99895, 2014 WL 4067216 (Mo. App. Aug. 19, 2014) (citing *Turner v. Sch. Dist. of Clayton*, 318 S.W.3d 660, 668–69 (Mo. banc 2010)) ("[T]there is no need to refer to other . . . statutes where a statute's own language is clear."). Here, the terms of the statute are unambiguous as demonstrated by their dictionary definitions and by this Court's interpretation. The presence of terms related to "construction" outside of § 144.054 is irrelevant.

The Commission correctly concluded the paving contractors manufacture, process, compound, mine, or produce asphalt as those terms are used in § 144.054. There is competent and substantial evidence in the record to support the Commission's determination that the tax exemption applies. The Commission's decision should be upheld.

II. The Commission correctly concluded Weber qualified for a tax exemption under § 144.054.2 because the paving contractors manufactured, processed, compounded, or produced a "product."

The Director's second point on appeal addresses essentially the same argument as the Director's first point on appeal. Point I asserts "construction" is not manufacturing, processing, compounding or producing under § 144.054.2, while Point II asserts "construction" does not qualify for tax exemption under § 144.054.2. Buried in the body of Point II, however, is an argument that asphalt pavement is not a product. *See* Appellant's Brief, p. 28. "[I]ssues not presented in the points to be argued in an appellate brief are abandoned and will not be considered by a reviewing court." *Boyer v. Grandview Manor Care Ctr., Inc.*, 793 S.W.2d 346, 347 (Mo. banc 1990); *see also State v. Fuente,* 871 S.W.2d 438, 443 (Mo. banc 1994) ("This Court's review is limited to matters raised in the points relied on."). Weber will address the Director's argument in an abundance of caution.

The Director contends roads, driveways and parking lots are not "products" under § 144.054.2 by citing to cases defining the meaning of "product" in § 144.030.2. These same arguments were made and rejected in *E & B Granite*. There, this Court held "section 144.054.2 is broader than 144.030.2(2) and is not restricted by the phrases 'personal property ... sold ultimately for final consumption' and 'tangible personal property.'" *E & B Granite*, 331, S.W.3d at 317. "Section 144.054.2 applies to products, whether or not they are eventually affixed to real property." *Id.*

The asphalt pavement is an output resulting from the culmination of manufacturing, processing, compounding and producing. There is also a competitive market for installed asphalt pavement products. (Tr. 41 – 43, 55, 58 – 62; Ex. GG). Weber sold $2,634,362.37 in raw materials to the paving contractors to make new streets, parking lots and driveways. These costs were included in the price paid by the ultimate owners of the asphalt pavement. (LF 30).

The Director tries to escape this conclusion by arguing roads, parking lots and driveways are not products because they are customer-specific, cannot be moved to any other location and only have value to the original owner. The countertops in *E & B Granite* were also customer specific because all of them were "custom-made to fit the very specific and precise dimensions of the customer. No two tops are manufactured to the same specifications and dimensions." *E & B Granite, Inc. v. Dir. of Revenue*, No. 09-0842 RS, ¶ 10 (AHC June 2, 2010). There, the "Director agree[d] that the countertops [we]re 'output[s] with a market value.'" *E & B Granite*, 331 S.W.3d at 316.

The countertops had market value when sold to the original owner and increased the value of the real property to which they were affixed (i.e., they had market value when the real property was resold). The same is true for asphalt driveways and parking lots. They have market value when first sold to the original owner and increase the value of the real property (i.e., a commercial building with a gravel parking lot would sell for less than the same commercial building with an asphalt parking lot). There was also substantial evidence installed asphalt pavement products were bought, sold, and had subsequent uses in the market. (Tr. 42

– 45). The Commission correctly concluded asphalt pavement is a product under § 144.054.2.

Conclusion

The Commission correctly construed § 144.054.2 to exempt the purchase of rock aggregate and hot mix asphalt used in the manufacturing, processing, compounding and producing of roads, driveways and parking lots. Substantial competent evidence exists in the record to support the Commission's determination the paving contractors produced a product. Weber respectfully requests this Court affirm the Commission's Decision.

Respectfully submitted,

/s/ Jesse B. Rochman

Certificate of Compliance

1. This brief complies with the limitations in Rule 84.06(b) because it contains 4,252 words. This word count does not exclude the parts of the brief subject to exemption under the rules.

2. This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in at least 13-point font.

3. Under Local Court Rule No. 1 for this Court, this brief was electronically filed. The document was scanned for viruses and is virus-free.

/s/ Jesse B. Rochman

Certificate of Service

I certify that on October 15, 2014, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system to the attorneys of record.

/s/ Jesse B. Rochman