SC91010

IN THE SUPREME COURT
OF MISSOURI

E & B GRANITE, INC.,
Respondent,

v.

DIRECTOR OF REVENUE,
Appellant.

Appeal from the Missouri Administrative Hearing Commission
The Honorable Karen A. Winn, Commissioner

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

This matter involves the construction of Missouri Revised Statute Section 144.054, a revenue law of the State of Missouri. Therefore, this Court has exclusive jurisdiction over this matter pursuant to Article V, Section 3 of the Missouri Constitution.

STATEMENT OF FACTS

The relatively few facts in this matter are largely contained in a Joint Stipulation of Facts filed by the parties on November 18, 2009. Record ("R.") 44-55. In short, E & B Granite, Inc. ("E & B") is and has at all relevant times been a construction contractor specializing in the manufacture, fabrication, and installation of granite countertops and other granite products. R. 44-45. E & B also sells granite products as a retailer, and this combination of purchasing materials and supplies for both consumption as a contractor and resale as a retailer makes E & B a "dual operator" under Missouri law. R. 44-45.

While the Director would have the Court believe that the manufacturing process for granite products requires E & B to simply "cut" and "polish" pieces of granite (App. Brief, p. 18), this could not be further from the truth. E & B begins its manufacturing process with pieces of raw granite, and utilizes complex machinery, precise calculations and computerization to create granite countertops and other granite products such as windowsills, fireplace hearths and fireplace and bathtub surrounds. R. 44-55. An explanation and photos of this process and the machinery used can be found in the joint stipulation between the parties. R. 44-55.

E & B is not only a manufacturer of these granite products, but it also installs them onto customers' real property. R. 44. In so doing, E & B and its customer expressly agree in writing that title to and ownership of the countertop or other granite product(s) pass to the owner only upon permanent and complete

installation of the product(s) on to the customer's real property. R. 45.

As a manufacturer of granite products, E & B claims an exemption under Section 144.054 from sales and use tax on its purchases of raw materials used in the manufacturing process. R. 45. As such, E & B paid, under protest, state sales and use tax and local use tax on the purchase price of raw granite slabs used in the manufacture and fabrication of granite countertops and other granite products which were eventually installed on and attached to customers' real property. R. 45-46. The Director of Revenue ("the Director") disallowed E & B's payments under protest, and E & B filed a Complaint with the Administrative Hearing Commission claiming that the purchases of granite slabs were exempt from state sales and use tax and local use tax as materials used or consumed in the manufacturing of any product, pursuant to Section 144.054.2. R. 1-8; 45-47.

While the Director denied E & B's claim, the Administrative Hearing Commission found in E & B's favor. R. 56-65. The Director now appeals.

POINTS RELIED ON

I. The Administrative Hearing Commission Did Not Err in Awarding Sales and Use Tax Refunds to E & B Granite, Inc. Because a Granite Countertop is a Product Under § 144.054.2 In That It Is Tangible Personal Property that is Eventually Affixed to Real Estate

International Business Machines Corp. v. Director of Revenue, 958 S.W.2d 554 (Mo. 1997)

Blevins Asphalt Construction Company v. Director of Revenue, 938 S.W.2d 899 (Mo. banc 1997)

LaSalle Iron Works v. Director of Revenue, No. 07-0493 RS (Mo. AHC, December 31, 2008)

II. The Administrative Hearing Commission Did Not Err in Awarding Sales and Use Tax Refunds to E & B Granite, Inc. Because the Tax Exemption in § 144.054.2 Applies to Raw Materials in that a Raw Granite Slab Used in the Manufacture of a Granite Countertop is Within the Meaning of "Materials Used or Consumed in the Manufacturing" of "Any Product."

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

Southwestern Bell Yellow Pages, Inc. v. Director of Revenue, 94 S.W.3d 388 (Mo. 2002)

Kilbane v. Director of Revenue, 544 S.W.2d 9 (Mo. banc 1976)

Blevins Asphalt Construction Company v. Director of Revenue, No. 94-002095RV (April 26, 1996)

SUMMARY OF THE ARGUMENT

There are three themes in the Director of Revenue's Appellant's Brief. The first theme is the Director's search, far and wide, for interpretations of common words like "product," "materials" and "use," that may not fit Respondent E & B's operations exactly. In conducting this search, the Director looks past the "plain language of the statute" and employs canons of contract interpretation and secondary or tertiary dictionary definitions that are completely unnecessary.

The second theme in the Director's brief is the constant clinging to a line of cases which interpret Section 144.030, a statute that E & B does not seek an exemption under. This line of cases turns on crucial language included in that section which qualifies the word "product," and that qualifying language is nowhere to be found in Section 144.054, the statute under which E & B *does* seek an exemption.

The third and final theme of the Director's brief is that if E & B is allowed to enjoy this exemption, there will be disastrous consequences. The Director points to the fact that because of the way E & B does business (as a manufacturer who affixes its products to real property); an exemption under Section 144.054 would result in a situation where no sales tax is paid on the granite slabs either by E & B on its purchases, or by E & B's customers. While the Director finds this to its disadvantage and asserts that everything in the stream of commerce needs to be taxed at least once, she neglects to mention that the legislature excuses on a regular basis certain goods and services from tax. The Director further neglects to

mention that E & B does not operate tax-free: its purchases of materials are subject to local sales tax, the profits E & B generates from its manufactured products are subject to income tax, and E & B's employees involved in the manned manufacturing process are of course subject to payroll and withholding taxes.

Also regarding this "sky is falling" theme, the Director surmises that under E & B's analysis, a carpenter "could argue that the cutting and installation of lumber to build a house would be exempt from taxes." E & B agrees that a carpenter "could argue" that, 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 E & B, meanwhile, applies the plain language of the statute and presents an interpretation which requires no reference to a dictionary definition and which is entirely in tune with each and every one of Appellant's cases, even despite their misapplication to the case at bar.

ARGUMENT

Introduction

This case involves the interpretation of a sales and use tax statute. "[T]he 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). "Where the language of the statute is clear and unambiguous, there is no room for construction." *Jones v. Director of Revenue*, 832 S.W.2d 516, 517 (Mo. 1992). If construction is necessary, "[t]he construction . . . is not to be hyper-technical, but instead to be reasonable and logical and to give meaning to the statutes." *LaSalle Iron Works v. Director of Revenue*, No. 07-0493 RS (Mo. AHC, December 31, 2008) (quoting *Gash v. Lafayette County*, 245 S.W.3d 229, 232 (Mo. banc 2008).

While it is generally held that statutes providing a tax exemption should be construed strictly against the party claiming the exemption, this principle "should not be applied to force a conclusion that the legislature intended something other than what is expressed in the plain meaning of the statute." *State ex rel. Union Elec. Co. v. Goldberg*, 578 S.W.2d 921, 923 (Mo. 1979) (citing *American Bridge Co. v. Smith*, 179 S.W.2d 12, 16 (Mo. 1944)).

I. The Administrative Hearing Commission Did Not Err in Awarding Sales and Use Tax Refunds to E & B Granite, Inc. Because a Granite Countertop is a Product Under § 144.054.2 In That it is Tangible Personal Property that is Eventually Affixed to Real Estate

The Director claims that the granite countertops and other granite products that E & B manufactures using granite slabs are not "products." As an initial matter, E & B must first point out that in the Joint Stipulation of Facts entered into between E & B and the Director at the Administrative Hearing Commission level, the products that E & B manufactures are referred to as "products" no fewer than 13 times. R. 44-47 (i.e., "E & B specializes in the manufacture and installation of granite countertops and other granite **products**," and "[a]t all relevant times, E & B manufactured its own **products** and was operating its business as a contractor and as a retailer." (emphasis added)).

The Director now seeks to have her stipulations either forgotten or rendered completely meaningless. She instead points to the Webster's Dictionary definition of product, the first listed definition being "something produced by physical labor or intellectual effort; the result of work or thought." App. Brief., p. 16. Granite countertops clearly fit this definition, and accordingly, the Director quickly changes course and looks to case law for the answer she seeks.

Appellant Director points to *International Business Machines Corp. v. Director of Revenue*, 958 S.W.2d 554 (Mo. 1997) for the proposition that a

product can be "either tangible personal property or a service." *Id*. at 557.[1] E & B has no problem with this statement; granite countertops and other granite products are clearly tangible personal property prior to affixation. That the countertop is eventually affixed to real estate does not change the fact that what was originally manufactured was tangible personal property. Similarly, manufactured ceiling fans or shower heads are affixed to real estate after they are purchased by consumers, but prior to affixation they are certainly tangible personal property. Put another way, after E & B manufactures a granite countertop, but before the countertop is installed and affixed to a customer's real property, *what is it* if its not tangible personal property?

The Director also points to *Blevins Asphalt Construction Company v. Director of Revenue*, 938 S.W.2d 899 (Mo. banc 1997), a case that was decided a decade before Section 144.054 was enacted. *Blevins* involved a claim for exemption under Section 144.030.2 by an asphalt company that manufactured and

[1] The Director alleges that in defining a "product," the Commissioner neglected an "important qualification" mentioned in *International Business Machines*, that a product can be either tangible personal property or services. App. Brief, p. 17. The Commissioner was actually quite clear, however, in stating that "[s]uch output [with a market value] may include services as well as tangible personal property." R. 63. Having noted this, the Administrative Hearing Commission found a granite countertop to be a product. R. 64.

installed asphalt on to customers' real property and also sold asphalt to customers at retail. *Id*. This Court stated that "[t]he issue is whether Blevins manufactures 'new personal property . . . intended to be sold ultimately for final use or consumption.'"[2] *Id*. at 901 (citing Mo. Rev. Stat. § 144.054) (ellipsis in original). Further, because the asphalt was installed onto real property and not resold, it could not be "'new personal property . . . intended to be sold ultimately for final use or consumption' within the meaning of the sales tax law." *Id*.[3]

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[2] The Administrative Hearing Commission's decision in that case, which the Missouri Supreme Court affirmed, was based upon the same logic: "We find that Blevins has not carried its burden of proof to show that anyone **resold** the materials." *Blevins Asphalt Construction Company, v. Director of Revenue*, No. 94-002095RV (April 26, 1996) (emphasis added). Further, the Commissioner twice emphasized, using bold letters, the words "to be sold" in the phrase "which new personal property is intended to be sold ultimately for final use or consumption." *Id*.

[3] The Director's liberal (at best) use of ellipses must be noted. In the discussion regarding *Blevins* on page 17, for instance, the Director quotes this Court as follows: "If title had passed before the asphalt was installed on real property, [it] would have created new personal property . . . . However, because title passed after the asphalt was installed, [it] created an improvement to real property which *cannot be 'new personal property . . . .'*" The Director left out the language in

The disallowance in *Blevins* regarding the exemption under Section 144.030.2 turned solely upon the limited exemption language in that section.

Whereas Section 144.030.2 requires that the manufacturing process result in a product or a component of personal property "which is intended to be sold ultimately for final use or consumption," Section 144.054.2 provides a broader exemption for "materials used or consumed in the manufacturing, processing, compounding, mining, or producing of **any product**." Mo. Rev. Stat. § 144.030.2; Mo. Rev. Stat § 144.054.2 (emphasis added). There is no qualifying language after the word "product," as in Section 144.030. *Id*.

The limited exemption of section 144.030.2, and what demonstrates its broadening in section 144.054.2, is illustrated in *International Business Machines*:

> Section 144.030.2(5), however, does not exempt sales of machinery and equipment used directly to manufacture *any* product. That statute does not end with the word 'product.' Rather, section 144.030.2(5) exempts sales of machinery and equipment used directly to manufacture a product 'which is intended to be sold ultimately for final use or consumption.'

958 S.W.2d 554, 557 (Mo. 1997) (emphasis in original). This qualifying language

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Section 144.030, "intended to be sold ultimately for final use or consumption," upon which both the Supreme Court and the Administrative Hearing Commission made clear that they relied, and upon which is conspicuously absent in Section 144.054.

"requires a 'sale' of the new tangible personal property, within the meaning of the sales tax law." *Ovid Bell Press, Inc. v. Director of Revenue*, 45 S.W.3d 880, 885 (Mo. 2001).

E & B does not seek exemption under Section 144.030.2, but instead looks to the more recently enacted Section 144.054.2. This section, in what appears to be a direct response by the legislature to the quoted passage above from *International Business Machines*, applies to the manufacture, processing, or production of "any product." Mo. Rev. Stat § 144.054.2. There is no requirement that the manufacturer intend to sell the product ultimately for final use or consumption, and in fact, there is no qualifying language whatsoever under § 144.054.2. *Id*. Finally, section 144.054.2 expressly states that the exemptions therein are "in addition to all other exemptions granted under [chapter 144]," and specifically, are "in addition to any state and local sales tax exemption provided in section 144.030." *Id*. This statutory language clearly demonstrates the legislative intent to expand the exemption for manufacturing products in Missouri.[4]

[4] While the plain language of Section 144.054 clearly demonstrates the legislative intent to expand exemptions for manufacturers, official and publicly available representations by the Department of Revenue ("the Department") provide useful confirmation. In a PowerPoint presentation created by the Department and titled "2007 Senate Bill 30 Exemptions," the Department states that "Governor Blunt identified the expansion of manufacturing as a priority." www.motaxpayers.com/

LaSalle, supra, is also illustrative of the importance of the differences between Section 144.030.2 and Section 144.054.2. *See LaSalle Iron Works v. Director of Revenue*, No. 07-0493 RS (Mo. AHC, December 31, 2008). Pursuant to section 144.030.2, LaSalle claimed exemptions on its purchases of steel which it used to make building components that it installed into customers' real property. *Id*. Like E & B, LaSalle did not pass title until it had completed installation under its contract. *Id*. Citing *Blevins*, the Administrative Hearing Commission held that the Section 144.030 exemption did not apply because "[s]teel that LaSalle uses to make building components that LaSalle installs into the real property *does not result in a product intended to be sold ultimately for final use or consumption*." *Id*. (emphasis added). Once again, this is referring to the narrower exemption language of Section 144.030.2 which is absent in Section 144.054.2 and, through its absence, expands the manufacturing exemption to "any product" whatsoever.

The Department of Revenue's letter rulings also prove helpful in the case at bar. In Letter Ruling 4535, Applicant was a business that fabricated granite countertops, took them to the customer's location and installed them, and passed title to the customer only after installation. L.R. 4535. Addressing what appear to

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DOR 2007 Senate Bill 30 Exemptions Presentation.pps. The Department quoted Governor Blunt as follows: "[m]anufacturing is a vital part of our diverse economy, and this legislation will help level the playing field for Missouri manufacturers." *Id*.

be identical questions of law and the same factual situation as the case at bar, the Department of Revenue ruled that Applicant's purchases of manufacturing equipment and slabs of granite were exempt from state sales and use tax and local use tax under section 144.054. *Id*. The Department acknowledged that Section 144.030.2 would not be helpful to Applicant because that statute is only applicable "if the products that are manufactured are ultimately sold at retail." *Id*. However, ruling that applicant's purchases of equipment and material were exempt under Section 144.054, the Department stated as follows:

> For purchases occurring on or after August 28, 2007, Section 144.054 provides an exemption for materials that are 'used or consumed' in the manufacturing process. There is no requirement that the manufacturer produce a product that is ultimately sold at retail for this exemption to apply.

Id.

Although the Department has recognized Section 144.054.2 as creating an exemption in cases with similar facts to the case at bar, it has curiously issued conflicting decisions as well. In Letter Ruling 4757, the Department held that a company who fabricated and installed granite and marble countertops was not exempt under 144.054.2. L.R. 4757. In yet another ruling, the Department held that when a manufacturer of cabinets installed the cabinets into real property, section 144.054.2 did not create an exemption. L.R. 5225.

The Department did not explain how Letter Rulings 4757 and 5225 in any way apply or coincide with the language of Section 144.054.2, or why they

sharply diverge from previous letter rulings. What *is* evident is that Letter Ruling 5225 applies *Blevins*, a case which addressed only Section 144.030.2 and which was decided a decade before Section 144.054.2 was enacted. Both rulings also apply the requirement of Section 144.030.2 that the materials or manufactured goods be "intended to be sold for final use or consumption," even though this language is omitted from Section 144.054.2.

The Director does not disagree that manufactured granite countertops and other granite products are "output[s] with market value," the definition of a product. *International Business Machines*, at 557.[5] She instead claims that because these granite products are eventually affixed to real estate, E & B does not manufacture tangible personal property, as allegedly required in *International Business Machines*. This is a ludicrous proposition: E & B manufactures granite products just as a manufacturer of ceiling fans manufactures ceiling fans, or a manufacturer of shower heads manufactures shower heads, which are very clearly

[5] It should be noted that the Administrative Hearing Commission did not "reverse" the "long-standing law establishing what constitutes a 'product.'" App. Brief., p. 18. The Director analyzes the word "product" in conjunction with the qualifying language in Section 144.030, just as the courts in the *Blevins* cases and in every other Section 144.030 case have done. The Commissioner did not reverse these cases, but correctly analyzed the new, broader exemption language contained in Section 144.054, which refers to "any product," with no qualifying language.

tangible personal property. It is only upon the affixation to real estate that certain aspects of these products are changed from tangible personal property to real property. Even after affixation, however, such products retain many qualities, such as warranties and service guarantees, which are uncommon to items that can be classified purely as real property.

II. The Administrative Hearing Commission Did Not Err in Awarding Sales and Use Tax Refunds to E & B Granite, Inc. Because the Tax Exemption in § 144.054.2 Applies to Raw Materials in that a Raw Granite Slab Used in the Manufacture of a Granite Countertop is Within the Meaning of "Materials Used or Consumed in the Manufacturing" of "Any Product."

A. The Plain Language of § 144.054.2 Does Not Specify that the Materials Used or Consumed in the Manufacturing Process Be "Similar" to Electrical Energy, Gas, Propane or Water and Applies to the Raw Materials Used in the Manufacturing Process

Appellant states in one of its headings that "The Plain Language of § 144.054.2 Limits the Tax Exemption to Electrical Energy, Gas, Propane, Water and *Similar* 'Materials' 'Used or Consumed' in the Manufacturing Process and Does Not Apply to the Raw Product That is Being Manufactured." Appellant's Brief, p. 19 (emphasis added). "Similar," it should be noted, is a word that does not appear in the statute. Mo. Rev. Stat. § 144.054.2.

1. "Materials" Include the Raw Materials Used or Consumed in the Manufacturing Process[6]

"Absent a statutory definition, 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). "Where the language of the statute is clear and unambiguous, there is no room for construction." *Jones v. Director of Revenue*, 832 S.W.2d 516, 517 (Mo. 1992).

The word "materials" is not ambiguous. A slab of granite is a material, and the joint stipulation between the parties states as much in the caption to the photos on page 5: "Granite slabs (raw **material**) are purchased by E & B Granite." R. 48 (emphasis added).

This is one of the few areas of Appellant's brief where *Blevins* is not cited, but it actually warrants some attention here. Blevins, a manufacturer and installer of asphalt, claimed an exemption on its purchases of "ingredients for hot mix asphalt, including the base rock, and for chip and seal." *Blevins Asphalt Construction Company, v. Director of Revenue*, No. 94-002095RV (April 26,

[6] Throughout her brief, Appellant refers to a granite slab as a "raw product." E & B can only find limited case law which uses this phrase, and can find no evidence that "raw product" is a term of art. Instead, it appears that the Director uses this terminology because the obvious description of raw granite slabs, "raw materials," contradicts the Director's argument in this section.

1996). The Administrative Hearing Commission repeatedly acknowledged that these ingredients were "materials," and this Court stated that "the Director does not dispute that the items at issue are *materials* used in manufacturing or that they are component parts or ingredients." *Id*.; 938 S.W.2d 899, 901 (emphasis added).

Thus in the case most cited by Appellant, *Blevins*, the raw materials (base rock and other ingredients) which were manufactured into asphalt were considered "materials" under the sales and use tax statute. However, the Director claims that the raw materials in the case at bar ("raw products") which are manufactured into granite countertops and other products should not be considered "materials." Appellant espouses the need to look at the "context of the entire statute in which [a word] appears," yet apparently claims that the uncomplicated term "materials" has a completely different meaning in Section 144.030 than it does in Section 144.054. App. Brief, p. 25.

It is E & B's position that the word "materials" is "clear and unambiguous," but should the Court disagree and deem construction necessary, E & B believes the maxim "ejusdem generis" to be inapplicable. This rule of construction generally applies when there is a "catch-all" phrase following a list of specific terms. *Alumax Foils, Inc. v. City of St. Louis*, 959 S.W.2d 836 (Mo. App. E.D. 1997) ("Where the specific terms or phrases identify a class, the particular words restrict the meaning of the general, catchall phrase . . ."). The word "materials" is not a catch-all; it carries independent significance, which is demonstrated by the legislature's omission of the word "similar" or the word "other" before it. Mo.

Rev. Stat § 144.054.2.

Further, the ejusdem generis maxim has no application where the particular words describe variant and differing things or concepts. *Jackes-Evans Mfg. Co. v. Christen*, 848 S.W.2d 553, 555 (Mo. App. E.D. 1993). The word "materials" carries an entirely different meaning than "electrical energy," "coal," "chemicals," "machinery" or "equipment," and in fact, these words all "describe variant and differing things or concepts." *Id*.

Appellant attempts to classify the words preceding "materials" as consistent with a secondary definition of "material:" an "apparatus necessary for doing or making something." App. Brief, 21-22. Thus, the Director claims, the word "materials" in Section 144.054 must follow and also be limited to apparatuses necessary for doing or making something. However, this theory requires the Director to take the untenable position that "electrical energy," "gas," and "water" can each be classified as "apparatuses." What is instead clear from the language in Section 144.054 is that the legislature intended to exempt everything "used or consumed" in the manufacturing process; from the fuel used to operate machinery and equipment, to the machinery and equipment itself, to the materials which used in the manufacturing process.

2. The Definitions of "Used" and "Consumed" Support the Position that the Term "Materials" Includes the Raw Materials Used or Consumed in the Manufacturing Process

The Director argues that raw granite slabs are not "used or consumed" in E & B's manufacturing process. The joint stipulation filed by E & B and the Director must once again be noted, wherein it is stipulated no fewer than five times that E & B "used" the granite slabs in its manufacturing process. R. 45-47 (i.e. "E & B also paid state and local use tax under protest on the purchase price of granite slabs **used** in the manufacture of granite countertops and other granite products . . ." (emphasis added)).

In the oft-cited (by Appellant) *Blevins* case, wherein an asphalt company claimed an exemption for materials (base rock) that went into or became asphalt, this Court stated that "the Director does not dispute that the items at issue are materials **used** in manufacturing . . . ." 938 S.W.2d at 901; *Blevins,* No. 94-002095RV (emphasis added). E & B claims an exemption for materials (raw granite slabs) that go into or become granite countertops or other granite products, thus the Director now disputes an issue that was a foregone conclusion in *Blevins.*

Blevins was not alone in finding that raw materials which are manufactured are "used" under sales and use tax law. In *Southwestern Bell Yellow Pages, Inc. v. Director of Revenue,* 94 S.W.3d 388 (Mo. 2002), this Court found that raw paper that was purchased and manufactured into yellow page telephone directories was

"used" under sales and use tax. *Id*. Similarly, in *Ovid Bell Press, Inc. v. Director of Revenue*, 45 S.W.3d 880 (Mo. 2001), this Court found that copy paper was "used" in the manufacture of printed photos under sales and use tax. *Id*. at 885.

There is simply no reasonable explanation why the word "used," or, from the previous section, "materials," should be interpreted differently in *Blevins* and Section 144.030, on the one hand, and in Section 144.054 on the other; yet the Director asserts that these words should be given entirely different meanings under Section 144.054. Conversely, the Director *does* seek to use the *Blevins* approach to the word "product," only she does not wish to acknowledge that the Administrative Hearing Commission's and this Court's analyses in that case focused not on the word "product," but on the qualifying language in Section 144.030 that followed "product"—"which is intended to be sold ultimately for final use or consumption." *Blevins*, No. 94-002095RV; 938 S.W.2d 899, 901.

Appellant Director of Revenue has stipulated repeatedly that E & B "used" granite slabs in manufacture of granite countertops and other granite products. This agreement, which the Director apparently wishes to abandon, is supported by common sense and case law, and should be upheld.

B. The Statutory Structure Supports the Interpretation that "Materials" Under § 144.054.2 Include the Raw Materials Used or Consumed in the Manufacturing Process

The Director once again argues that "materials" under Section 144.054 do not include the raw materials that make up the manufactured product. Her first

point in this section is that because the legislature did not expressly state that "materials" include those that become an ingredient or component part of new personal property, the legislature could not have intended for raw materials to be exempted.[7] App. Brief, p. 26 ("to broadly extend the interpretation of the additional exemption in § 144.054 to include language that the legislature could have included is improper.").

Section 144.054.2 is a broad exemption; it exempts virtually anything that can be used or consumed during the manufacturing process, including energy sources and fuel, machinery, and materials. Mo. Rev. Stat. § 144.054. The specificity of Section 144.030 is what makes it such a limited exemption, and that Section 144.054 does not include that specific limiting language should only be interpreted as the intentional broadening of the exemption for manufacturers in Missouri.

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[7] Regarding the intentions of the legislature, Section 144.054 was enacted in 2007. Mo. Rev. Stat. § 144.054. This case originated by way of E & B's complaints to the Administrative Hearing Commission in July of 2009, and the Director issued its conflicting letter rulings regarding the statute in 2008. It seems that if the legislature felt that this statute needed to be amended to clearly limit the exemption, it could have done so by now, and in fact, this statute was amended in August of 2009 and no changes were made to the language that E & B seeks exemption under. *Id*.

Appellant's case law for this argument is, once again, the *Blevins* line of cases. App. Brief, p. 26-27. *Blevins* is the most recent case listed in the Director's string citation at pages 26-27, and that case was decided ten years before Section 144.054 was enacted. In the Director's analysis of *Blevins* in this section, she once again misstates the focus of the Administrative Hearing Commission's and this Court's decisions: "[Blevins] purchases were not exempt because title to the asphalt passed only after the asphalt was installed onto real property." App. Brief, p. 27-28. This is partly true; however, the passage of title after installation was only important because it demonstrated that Blevins was not manufacturing a product that was "intended to be sold ultimately for final use or consumption." *Blevins*, 938 S.W.2d at 901. This is the language that limits the exemption in Section 144.030, and which is not included in Section 144.054.

The Director finally points to her own regulation, 12 CSR 10-112.010, as evidence of the limitations of the exemption in Section 144.054. First, it must be noted that this regulation begins as follows: "PURPOSE: this rule interprets sections 144.010, 144.020, 144.030 and 144.062, RSMo as they relate to taxation of sales and purchases by contractors." 12 CSR 10-112.010. Section 144.054, under which E & B seeks an exemption, is conspicuously absent in the PURPOSE for this rule. Section 144.030 is, however, listed, and it thus further appears that Appellant is clinging to the limiting language in that statute.

Further, as the Commissioner pointed out in her decision in this case, it is presumed that the legislature intends to change the law when it enacts a statute,

and regulations to the contrary are overruled. *Kilbane v. Director of Revenue*, 544 S.W.2d 9, 11 (Mo. banc 1976); *Bridge Data Co. v. Director of Revenue*, 794 S.W.2d 204, 207 (Mo. banc 1990).

C. The Potential Consequences of the AHC's Decision Do Not Include Any Absurdities

Appellant claims that "[t]he consequences of the AHC's decision, if permitted to stand, would be disastrous." App. Brief., p 13. She points to the fact that, if the exemption were allowed, E & B would not pay taxes on its purchases of raw materials. *Id*. at 32-33. Also, because title to the products E & B manufactures does not pass to its customers until completion of the installation on to the customer's real property, there is no taxable sale of personal property. *Id*. This would, according to the Director, lead to a situation where there was no tax at all on the raw materials. *Id*. at 33.

As an initial matter, E & B's purchases of raw granite slabs are not untaxed; its retail sales of granite are subject to state and local sales tax, and its purchases of granite which are used or consumed in the manufacturing process are still subject to local sales tax, even with the exemption in Section 144.054. It should also be mentioned that the manufacturing process is heavily manned and E & B is of course subject to payroll and withholding taxes.

This aside, the Director's brief is devoid of any case law stating that items cannot move throughout the stream of commerce without being taxed. She only cites cases pertaining to the resale exemption, stating that the purpose of the sales

and use tax laws is to tax property only once in the stream of commerce. *E.g.*, *Westwood Country Club v. Director of Revenue*, 6 S.W.3d 885 (Mo. banc 1999).[8] The case at bar does not involve a resale because E & B installs the countertops it manufactures. Once again, the Director misses the fundamental difference between the exemptions in Section 144.030 and Section 144.054: Section 144.030 requires that the manufacturer intend to sell its product at retail, and Section 144.054 does not.

Not only does case law not prohibit an absence of taxation on certain items, the legislature in Sections 144.030, 144.037, 144.038 and 144.062 specifically exempts certain items from any taxation. The legislature's long list of items exempt from any tax demonstrates that Missouri law does not require that each and every item in the stream of commerce be taxed at least once.

The exclusion due to the eventual affixation of the manufactured product

[8] Perhaps the primary case that the Director relies upon for the proposition that there must be tax at least once in the stream of commerce, *ICC Management, Inc. v. Dir. of Revenue*, 290 S.W.3d 699 (Mo. banc 2009), is also a resale exemption case and has in fact recently been abrogated by statute. Section 144.018.4 states as follows: "The provisions of this section are intended to reject and abrogate earlier case law interpretations of the state's sales and use tax law with regard to sales for resale as extended in . . . *ICC Management, Inc. v. Dir. of Revenue,* 290 S.W.3d 699 (Mo. banc 2009).

into real property, while brought up ad nauseam by the Director, is completely irrelevant to E & B's claim for an exemption under Section 144.054. They are simply two very different aspects of the law, which happen to both apply to certain contractors. This is not "an absurd or illogical result" as required for a court to look beyond the plain meaning of a statute. *Akins v. Dir. of Revenue*, 303 S.W.3d 563, 565 (Mo. banc 2010) (citing *Spradlin v. City of Fulton*, 982 S.W.2d 255, 258 (Mo. banc 1998)).

Regarding the allegedly "disastrous" consequences of this situation, the Director seems to make two separate and conflicting arguments: (1) if the exemption under Section 144.054 were allowed, E & B would receive a special benefit not enjoyed by other taxpayers, and (2) if the exemption under Section 144.054 were allowed, the floodgates would be opened as carpenters' purchases of lumber used to build a house would all be exempt. App. Brief, pp. 31-34. Neither argument succeeds.

Although the "special benefit" language is from *ICC Management*, and as previously mentioned that case has been specifically abrogated by statute, that language would nonetheless be inapplicable to the situation at hand. E & B is very simply a vertically integrated company: they manufacture items either for sale at retail or for installation onto real property, and if for installation onto real property, E & B performs the installation. An exemption on purchases of materials is not a special benefit to E & B, as any company can and other companies do operate this way (Blevins appears to be one of these companies,

although it requested an exemption about a decade early).

E & B's interpretation of the exemption in Section 144.054 is also not even remotely close to being applicable to home builders, as alluded to in the footnote on page 34 of the Director's brief. The exemption, as it applies to E & B, exempts materials used or consumed in the "manufacture" of "products." Mo. Rev. Stat. § 144.054. A home builder is not a manufacturer of a product as contemplated by Section 144.054.

CONCLUSION

For the foregoing reasons, the Administrative Hearing Commission's decision should be affirmed.

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RULE 84.06(C) CERTIFICATION

Undersigned counsel certifies that this brief includes the information required by Rule 55.03, complies with the limitations contained in Rule 84.06(b), and contains 8,100 words.

CERTIFICATE OF SERVICE

Undersigned counsel for Respondent hereby certifies that on November 12, 2010, two true and correct copies of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

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APPENDIX

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