



11 (internal quotation marks omitted). The interpretation of legislation—in this case the Illinois Motor Fuel Tax Law—presents questions of law resolvable through summary judgment. *See Barnett v. Zion Park District*, 171 Ill. 2d 378, 384–85 (1996).

The existence of factual questions that are unrelated to the essential elements of the cause of action does not preclude a court from granting summary judgment. *Staley Continental, Inc. v. Venterra Sales & Management Co*, 228 Ill. App. 3d 174 (1st Dist. 1992). If no genuine issue of material fact exists, the trial court must grant judgement as a matter of law. *First State Insurance Co. v. Montgomery Ward & Co.*, 267 Ill. App. 3d 851 (1st Dist. 1994). “An issue of fact is not material, even if disputed, unless it has legal and probative force as to the controlling issue.” *First of America Bank, Rockford, NA., v. Netsch*, 166 Ill. 2d 165 (1995); *see also Pietruszynski v. McClier Corporation, Architects & Engineers*, 338 Ill. App. 3d 58 (1st Dist. 2003).

The central issue presented by Waste Management’s Petition is whether compressed natural gas (“CNG”) is a taxable fuel under the Motor Fuel Tax Law (“MFTL”). 35 ILCS 505/1 *et seq.* With respect to that issue, upon considering Waste Management’s Petition, the Department’s Answer, and the parties’ joint Stipulation of Facts, there is no outstanding dispute about any of the material facts in this case.

Should the central issue here be decided in favor of Waste Management, there is also no remaining genuine issue of material fact regarding (i) whether the Department’s actions with respect to taxing compressed natural gas under the MFTL amount to an unconstitutional usurpation of legislative authority in violation of the Illinois Constitution of 1970; and (ii) whether the Department’s policy of subjecting compressed natural gas to the MFTL violated the rulemaking provisions of the Illinois Administrative Procedure Act. *See* 5 ILCS 100/Art. 5.

## II. FACTS

The following material facts are not disputed by the parties, as illustrated by the attached Stipulation of Facts, attached hereto as **Exhibit 1** (referred to herein as the “Stipulation”).

Waste Management utilizes motor vehicles (“vehicles”) while performing its services. Stipulation ¶ 4. Some Waste Management vehicles use diesel fuel. Stipulation ¶ 6. Other Waste Management vehicles operate using compressed natural gas (“CNG”). Stipulation ¶ 7. Waste Management purchases natural gas from a local gas supplier which is delivered to Waste Management via pipeline. Stipulation ¶ 8. During the Periods at Issue, Waste Management operated natural gas compression and fueling stations at two locations in Illinois, at which its CNG vehicles are refueled. Stipulation ¶ 9. These stations contain bulk fuel tanks for storage of CNG.<sup>2</sup> *Id.*

Waste Management delivers CNG directly into the fuel supply tanks of motor vehicles. Stipulation ¶ 11. Waste Management uses compressors to compress the natural gas from its “natural state” of 14.7 pounds per square inch (“psi”), which is the atmospheric pressure at sea level, to 3,600 psi for storage as CNG, at approximately less than 1% of the volume it had at atmospheric pressure. Stipulation ¶ 12. CNG flows from storage through a dispenser into high-pressure cylinders located on the vehicle. Stipulation ¶ 12. When the vehicle accelerates, CNG leaves the on-board storage cylinder, passes through a line to the engine compartment where it flows through a regulator which reduces the pressure from as high as 3,600 psi down to atmospheric pressure, and into a gas mixer or fuel injectors where it is mixed with air and enters an engine’s combustion chambers. *Id.*

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<sup>2</sup> During the Periods at Issue, Waste Management also operated a retail station at which non-Waste Management vehicles that use CNG may purchase CNG to refuel their vehicles. Stipulation ¶ 10. No sales from that facility are at issue here.

The United States Department of Energy (“DOE”) has reported that CNG “is produced by compressing natural gas to less than 1% of its volume at standard atmospheric pressure. To provide adequate driving range, CNG is stored onboard a vehicle in a compressed gaseous state within cylinders at a pressure of 3,000 to 3,600 pounds per square inch.” Stipulation ¶ 19. The parties agree that natural gas exists in a gaseous state at 14.7 psi (atmospheric pressure at sea level). Stipulation ¶ 22. The parties further agree that CNG used by Waste Management is compressed to a pressure of 3,600 psi. Stipulation ¶ 12.

Natural gas is not a liquid at 14.7 psi at sea level. Stipulation ¶ 22. When the gas is compressed by Waste Management, stored as CNG by Waste Management, and used in combustion by Waste Management, it always remains in a gaseous form. Stipulation ¶ 22. By contrast, to be converted to a liquid state natural gas has to be cooled to approximately negative 260 degrees Fahrenheit, and to transport LNG it must be maintained at a pressure of less than 4 psi. Stipulation ¶ 24. Being subjected to pressures 900 times greater than LNG when compressed, and not being cooled to a negative 260 degrees Fahrenheit, at no point does the natural gas purchased by Waste Management convert to a liquid form. Stipulation ¶ 22. The parties, therefore, agree that CNG is not the same as LNG. Stipulation ¶ 25.

### III. ARGUMENT

#### *A. Compressed Natural Gas is Not a Taxable “Fuel”*

The MFTL limits its own application by specifying at its outset that “[f]or the purposes of this Act the terms set out in the Sections following this Section and preceding Section 2 have the meanings ascribed to them in those Sections.” *See* 35 ILCS 505/1. Since first enacted in 1929, the MFTL has imposed a tax on “all *motor fuel* used in motor vehicles operating on the public highways . . . of this State.” 35 ILCS 505/2(a) (emphasis added). The purpose of the MFTL is

“to impose a tax upon the privilege of operating each motor vehicle as defined in this Act upon the public highways and the waters of this State, such tax to be based upon the consumption of *motor fuel* in such motor vehicle . . . .” 35 ILCS 505/17 (emphasis added).

The General Assembly stated that the term “‘Motor Fuel’ *means* all volatile and inflammable *liquids* produced, blended or compounded for the purposes of, or which are suitable and practicable for, operating motor vehicles.” 35 ILCS 505/1.1 (emphasis added). Adding, that “[a]mong other things, ‘Motor Fuel’ includes ‘Special Fuel’ as defined in Section 1.14 of this Act.” *Id.* The General Assembly provided that “‘Special Fuel’ *means* all volatile and inflammable *liquids* capable of being used in the generation of power in an internal combustion engine *except that it does not include . . . combustible gases* as defined in Section 5, example (b), of this Act. . . .” 35 ILCS 505/1.13 (emphasis added). The term “combustible gases” referred to in Section 1.13’s definition of “Special Fuel” to exclude such gases, is defined, in a section dealing with reporting, as “all combustible gases which exist in a gaseous state at 60 degrees Fahrenheit and at 14.7 pounds per square inch absolute including, but not limited to, liquefied petroleum gases used for highway purposes.” 35 ILCS 505/5. The MFTL also includes specific definitions of “dyed diesel fuel,” “kerosene-type jet fuel” and “1-K Kerosene,” respectively. 35 ILCS 505/1.13a; 35 ILCS 505/1.13b; 35 ILCS 505/1.25. Lastly, for the broad term “fuel” in the MFTL the General Assembly said that “‘Fuel’ means all *liquids* defined as ‘Motor Fuel’ in Section 1.1 of this Act and aviation fuels and kerosene, but excluding liquefied petroleum gases.” 35 ILCS 505/1.19 (emphasis added). Thus, under the MFTL taxable fuel is always a liquid.

CNG is not a liquid. Stipulation, ¶ 25. That has been stipulated by the parties. Further, there is no colloquial or ordinarily understood definition of “liquid” that encompasses CNG,

which exists in a gaseous state under normal atmospheric conditions. *See Exelon Corp. v. Dep't of Revenue*, 234 Ill. 2d 266, 275 (2009) (“words in a statute are to be given their ordinary and popularly understood meaning.”). Because CNG is not a liquid, it cannot be considered a “motor fuel,” “special fuel” or “fuel” taxable under the MFTL.

Crucially, the Department’s challenge in this case is to specify for the Tax Tribunal where in these foregoing MFTL definitions the General Assembly has introduced any ambiguity. “A court's analysis begins with the language of the statute, which is the best indication of legislative intent. Where the statutory language is clear and unambiguous, the court must give it effect without resort to other tools of interpretation.” *Exelon Corp.*, 234 Ill. 2d at 274–75 (internal citations omitted). If the terms of the definitions are not susceptible to more than one construction then there is no ambiguity. A statute is ambiguous if it is capable of two reasonable and conflicting interpretations. *Tri-State Coach Lines, Inc. v. Metropolitan Pier Exposition Authority*, 315 Ill. App. 3d 179, 190 (2000). Absent such ambiguity, there is no legal basis to search elsewhere for guidance to the meaning of the terms in the statute. “[W]hen the language of a statute is clear, it must be applied as written without resort to aids or tools of interpretation.” *Deluna v. Barciaga*, 223 Ill. 2d 49, 59 (2006).

To find a new or additional definition of what is a taxable “motor fuel” by reference to another section of the MFTL having a purpose other than the definition of terms, or among reporting requirements, whether in statute, regulations or forms, is to render Section 1.1, Section 1.13 and Section 1.19 of the MFTL meaningless. In each of those sections the General Assembly stated that the term there defined “*means*” what the General Assembly there provided as a definition. To find an additional and expansive meaning of these terms by, *e.g.*, saying that a liquid includes a gas, or that a liquid need not be liquid, is to change the unambiguous meaning

the General Assembly expressly provided. A court should avoid an interpretation of a statute that would render any portion of it meaningless or void *McNamee v. Federated Equipment & Supply Co.*, 181 Ill. 2d 415, 422 (1998), or absurd. *McMahan v. Industrial Comm'n*, 183 Ill. 2d 499, 513-14 (1998).

The statutory interpretation maxim, *inclusio unius est exclusio alterius* (“inclusion of one is the exclusion of the other”), a well-established principle in Illinois courts, lends further support to Waste Management’s assertion that there is no ambiguity which would require the Tax Tribunal to tread beyond the definitional provisions of the MFTL. *See, e.g., Rochelle Disposal Serv., Inc. v. Ill. Pollution Control Bd.*, 266 Ill. App. 3d 192, 201 (2d Dist. 1994) (using the *inclusio* maxim to find that the Environmental Protection Act, by explicitly permitting mitigation of a fine under one subsection, did not allow such mitigation under another subsection which had no such explicit permission ); *Costello v. Lee County Special Ed. Ass’n*, 252 Ill. App. 3d 547 (2d Dist. 1993) (applying *inclusio* to the interpretation of tenure rights under the School Code). Here, the definition of “special fuel” specifically mentions gasoline and diesel fuel, and specifically excludes combustible gases. 35 ILCS 505/1.13. The definition of “fuel” is “all liquids defined as ‘Motor Fuel’ in Section 1.1 of this Act” in addition to specifically including aviation fuels and kerosene, and explicitly excluding liquefied petroleum gases. 35 ILCS 505/1.19.

The MFTL nowhere mentions “natural gas,” “compressed natural gas,” or “CNG.” Given the numerous different types of fuel specifically singled-out in the MFTL, the General Assembly could also have singled out CNG as motor fuel to be taxed. It did not do so. Under

the maxim of *inclusio unius est exclusio alterius* the inclusion of references to certain types of fuel in the definition of taxable fuels acts as an exclusion of CNG.<sup>3</sup>

Here, the parties have stipulated facts that are objectively verifiable and subject to judicial notice which foreclose considering CNG to ever be a “liquid” and which therefore also foreclose considering CNG as a “motor fuel” or “special fuel” under the statutory definitions in the MFTL. There is simply no ambiguity in the General Assembly’s choice to make being a “liquid” the distinctive characteristic of a taxable fuel under the MFTL. If the Department fails to identify an ambiguity, there is no need for the Tax Tribunal to delve beyond the definitional terms of the MFTL. Thus, the remainder of this memorandum is addressed to the existence of that as yet identified and improbable ambiguity.

***B. The Department must try to convince this Tribunal that the plain meaning of the word “liquid” is ambiguous and does not mean what every person knows it means.***

*1. The Department’s reporting requirements*

Not only does the Department have to convince this Tribunal that the MFTL is ambiguous, but the Department then has to convince this Tribunal that (i) Waste Management is a distributor of motor fuel, which it is not and (ii) that reporting requirements should substitute for the MFTL as binding taxing authority.

Section 5 of the MFTL provides that distributors of motor fuel must file a monthly return detailing the number of invoiced gallons of motor fuel distributed for that month. 35 ILCS 505/5. A “distributor” is defined as

a person who either (i) produces, refines, blends, compounds or manufactures motor fuel in this State, or (ii) transports motor fuel into this State, or (iii) exports

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<sup>3</sup> See, e.g. *United Airlines, Inc. v. Dep’t of Rev.*, 367 Ill. App. 3d. 42 (1<sup>st</sup> Dist. 2006), where kerosene-type jet fuel which is admittedly “motor fuel” under the MFTL was nevertheless held not to be a taxable motor fuel when used by an aircraft, since the MFTL applies to the use of motor fuel by a “motor vehicle,” a term which by omission excludes aircraft. Regardless of whether Waste Management’s fleet vehicles are “motor vehicles” for purposes of the MFTL, the CNG used to fuel such vehicles is excluded from in the class of fuels taxed by the MFTL.

motor fuel out of this State, or (iv) engages in the distribution of motor fuel primarily by tank car or tank truck, or both, and who operates an Illinois bulk plant where he or she has active bulk storage capacity of not less than 30,000 gallons for gasoline as defined in item (A) of Section 5 of this Law.

35 ILCS 505/1.2. Waste Management purchases CNG from a local gas supplier that is delivered to it via pipeline, stores it in the state, and then dispenses it as needed to its fleet vehicles.

Stipulation ¶¶ 8, 22. With respect to CNG, Waste Management does not produce, refine, blend, compound, manufacture, transport, or export motor fuel in Illinois, and therefore categories (i) – (iii) are inapplicable. Waste Management does not fall under the last category (iv) of distributor either, because that category is limited to distributors of gasoline, and is therefore inapplicable to CNG users and sellers. Waste Management is not a distributor under the MFTL, and therefore it is not subject to the reporting requirements under Section 5. Moreover, given the stipulated fact that CNG remains gaseous at all stages of compression, storage and use (Stipulation ¶ 22), reporting requirements are not a substitute for, nor a supplement to, the unambiguously liquid-centric definitions of motor fuel in the MFTL.

The Department may argue that Section 5 provides an impetus for taxing CNG. Section 5 states that the motor fuel subject to the reporting requirements, as specified in Section 5 only, includes in relevant part, “all combustible gases which exist in a gaseous state at 60 degrees Fahrenheit and at 14.7 pounds per square inch absolute including, but not limited to, liquefied petroleum gases used for highway purposes.” 35 ILCS 505/5.<sup>4</sup> The term “gallon” is defined in a different section as “in addition to its ordinary meaning, its equivalent in a capacity of measurement of substance in a gaseous state.” 35 ILCS 505/1.8. Under these two definitions,

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<sup>4</sup> Liquefied petroleum gases are defined as “any material having a vapor pressure not exceeding that allowed for commercial propane composed predominantly of the following hydrocarbons, either by themselves or as mixtures: Propane, Propylene, Butane (normal butane or iso-butane) and Butylene (including isomers).” 35 ILCS 505/5. CNG does not match this description and therefore would not be considered a liquefied petroleum gas.

the Department may insinuate that CNG would be a motor fuel subject to reporting an equivalent measure of gallons distributed per month.

The Department may argue that requiring an information return is tantamount to levying a tax, because the only reason to have such returns and to define “gallon” as encompassing the gaseous equivalent is to subject gases, such as CNG, to the motor fuel tax. However, the legislature “does not alter the fundamental details of a regulatory scheme in ancillary provisions—it does not, one might say, hide elephants in mouseholes” *People ex rel. Ryan v. Agpro, Inc.*, 214 Ill. 2d 222, 228 (2005) (quoting *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 468 (2001)). When the meaning of a statute is plain “inferences based on language found in scattered ancillary provisions of the Act are insufficient to change the outcome.” *Id.* at 228. To look in the reporting provisions of the MFTL in the hopes of finding CNG taxable under the MFTL requires one to believe that the General Assembly not only hid “an elephant in a mousehole,” but also that it had a reason for doing so when it could instead have provided or amended a definition in the definitional sections of the MFTL as it has done for decades.

Furthermore, there may be valid policy reasons for requiring an information return for non-taxable transactions. The General Assembly may have an interest in tracking the amount of CNG and other natural gas used in vehicles for environmental policy reasons, or to gauge the volume of usage should it decide to impose a tax on CNG in the future (this would help with revenue estimates). Whatever the reason the General Assembly imposed a reporting requirement on CNG distributors, that decision is perfectly compatible with CNG remaining not taxable under the MFTL.

In summary, Waste Management is not a distributor under the MFTL because it does not fit any of the enumerated categories. Moreover, the distributor reporting requirements do not

cause CNG to be taxable even if they require distributors to report CNG usage, because such a fundamental change to the taxing scheme (subjecting non-liquid fuel to tax) would not be buried in ancillary provisions of the MFTL, see *Agpro, Inc.*, 214 Ill. 2d at 228, and such requirements may have policy rationales besides tax imposition.

2. *Illinois' Membership in the International Fuel Tax Agreement does not make CNG a Taxable Motor Fuel*

The Department may argue that Illinois' membership in the International Fuel Tax Agreement ("IFTA") makes CNG taxable by reference to IFTA rules. This argument is flawed because the very terms of the IFTA ensure "[r]etention of each jurisdiction's sovereign authority to determine tax rates, exemptions and exercise other substantive tax authority." IFTA, Art. I, R. 130.100.010. Hence, in joining the IFTA, the Illinois General Assembly did not lose its legislative sovereignty over the MFTL. The legislative sovereignty retained by the General Assembly cannot be delegated to the Department. Illinois' membership in the IFTA provides certain benefits to the state and to taxpayers, but the choice of whether CNG is taxable rests entirely with the Illinois General Assembly. Therefore, Illinois' membership in the IFTA does not validate the Department's unconstitutional imposition of tax upon CNG.

Moreover, the IFTA is only applicable to taxpayers engaged in interstate transportation. If advanced at all, such an argument would only support taxability of CNG with regard to interstate use, and not with regard to intrastate consumption of CNG by motor vehicles. The ridiculousness of the result advocates against the success of advancing such an interpretation. There is no definition of a taxable fuel under the MFTL that is dependent on whether use occurs both within and without Illinois.

### 3. Tax Statutes Must Be Construed Against the Government

According to the Illinois Supreme Court “the rule that tax statutes are to be strictly construed against the government and in favor of the taxpayer is so well settled as to require no citation of authority.” *People ex rel. Ramey v. Gulf, Mobile & O. R. Co.*, 15 Ill. 2d 126, 129 (1958). This bedrock principle of Illinois law—that tax statutes should be interpreted in favor of the taxpayer—has been repeatedly upheld by Illinois courts throughout the years. *See, e.g., Quad Cities Open, Inc. v. Silvis*, 208 Ill.2d 498, 508 (2004) (“taxing laws are to be strictly construed and they are not to be extended beyond the clear import of the language used. If there is any doubt in their application they will be construed most strongly against the government and in favor of the taxpayer.”) (internal quotations omitted); *Nw. Airlines, Inc. v. Dep’t of Rev.*, 295 Ill. App. 3d 889, 892 (1st Dist. 1998) (“Where there is doubt, tax statutes will be construed most strongly against the government and in favor of the taxpayer.”).

Here, the MFTL unambiguously fails to levy a tax on CNG. But even if this Tribunal finds that some ambiguity exists, that ambiguity must be resolved in favor of the taxpayer. This is doubly true where the taxpayer’s interpretation is reasonable, as it is here. CNG is not a liquid, and only liquids are contained in the definition of “motor fuel,” which is the touchstone for taxation in the MFTL. So even if, *arguendo*, the reporting requirements of Section 5 and Illinois membership in IFTA add some uncertainty to this case, any doubt “will be construed most strongly against the government and in favor of the taxpayer.” *Nw. Airlines*, 295 Ill. App. 3d at 892. When viewed in this light, Waste Management must prevail on Count I of its Petition as a matter of law.

***C. The Department Cannot Make Rules that are Inconsistent with Underlying Statutes***

The MFTL provides that “[t]he Department of Revenue is authorized to make such reasonable rules and regulations relating to the administration and enforcement of the provisions of this Act, as may be deemed expedient.” 35 ILCS 505/14.

In 2014, the Department amended its MFTL regulations, for the stated purpose that “Motor Fuel Tax is calculated on a per gallon basis. The need for this rulemaking arises because CNG is not sold on a per gallon basis; instead, it is sold at an established price per cubic foot or pound.” 38 Ill. Reg. 18586-7 (Sep. 5, 2014). In order to accomplish this, the regulations were amended to read “Gallon means, in addition to its ordinary meaning, its equivalent in a capacity of measurement of substance in a gaseous state.” 86 Ill. Admin. Code § 500.100. They were further amended in relevant part to state:

Compressed natural gas is subject to tax at the rate established in subsection (a)(1). However, because compressed natural gas cannot be measured in gallons, it must be converted to gallons using a conversion factor. For purposes of calculating tax under the Motor Fuel Tax Law, a gallon of compressed natural gas means a quantity of compressed natural gas equal to 126.67 cubic feet of natural gas at 60 degrees Fahrenheit and one atmosphere of pressure. In the alternative, it means a quantity of compressed natural gas that weighs 5.66 pounds.

86 Ill. Admin. Code § 500.200(c). The regulations were also amended to include the following language: “For carriers registered under the IFTA that consume compressed natural gas and other fuels that cannot be measured in gallons, the fuels must be converted to gallons using the conversion factor used by the jurisdiction in which the fuel was consumed. See Section 500.200(c) for the conversion factor used for compressed natural gas.” 86 Ill. Admin. Code § 500.335(f).

By amending the Regulations and going beyond volumetric conversion to state that CNG “is subject to tax” when the General Assembly has not said so, the Department improperly usurped legislative power.

*1. The Department Violated Core Administrative Law Principles by Promulgating a Regulation that is Contrary to the Statute*

Agency interpretations of statutes cannot go “beyond the meaning the statute can bear.” *See Tulcem v. Chicor Title Ins. Co.*, 2015 IL App (1st) 140808, ¶ 42 (internal citations omitted). “Rules that conflict with the statutory language under which they were adopted are invalid.” *Ill. Dep’t of Rev. v. Ill. Civil Serv. Comm’n*, 357 Ill. App. 3d 352, 367 (1st Dist. 2005). This is due to the “core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate.” *Utility Air Regulatory Group v. E.P.A.*, 134 S. Ct. 2427, 2446 (2014). “No matter how it is framed, the question a court faces when confronted with an agency’s interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority.*” *City of Arlington, Tex. v. F.C.C.*, 133 S. Ct. 1863, 1868 (2013) (emphasis in the original).

Here, the Department believes that CNG should be subject to motor fuel tax. However, in line with basic administrative law principles, the MFTL specifically limits the Department of Revenue’s power to administering and enforcing the statutes as written. *See* 35 ILCS 505/14. To hold otherwise and to thus allow CNG to be taxed because the Department said so undermines the rule of law by allowing the exercise of legislative powers by the executive branch, violating core administrative law principles.

2. *The Department Violated the Illinois Constitution of 1970 by Promulgating a Regulation that is Contrary to the Statute*

Article IX, Section 1 of the Illinois Constitution of 1970 (“Illinois Constitution”) states that the “General Assembly has the exclusive power to raise revenue by law except as limited or otherwise provided in this Constitution. The power of taxation shall not be surrendered, suspended, or contracted away.” Article II, Section 1 of the Illinois Constitution states the “legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another.”

“As a matter of general principle, the constitutional rule is that power granted to the legislature cannot be delegated.” *Chicagoland Chamber of Commerce v. Pappas*, 378 Ill. App. 3d 334, 348 (1st Dist. 2007) (citing *People ex rel. Bernat v. Bicek*, 405 Ill. 510 (1950)). Because of this nondelegation rule, “[a]n act which vests any person or authority with arbitrary discretion to determine what the law shall be in a particular situation is invalid.” *Rogers v. Desiderio*, 274 Ill. App. 3d 446, 449 (3d Dist. 1995). For example, the Supreme Court had to consider whether the Domestic Relations Act that gave the Circuit Courts of Cook County the ability to determine whether to create a “Divorce Division” of the court to handle marital law issues was unconstitutional. *See Bicek*, 405 Ill. at 517–18. The Court held that the General Assembly, by delegating a legislative power—the ability to determine whether a divorce court will be formed—to the judicial branch of government, was a violation of the separation of power enshrined in the Illinois Constitution.<sup>5</sup> *Id.* at 518–19. Only the General Assembly can decide what the law will be.

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<sup>5</sup> This case antedates the Constitution of 1970, but is still routinely cited for its separation of powers analysis. *See, e.g., Chicagoland Chamber of Commerce v. Pappas*, 378 Ill. App. 3d 334, 348 (1st Dist. 2007) (citing extensively to *Bicek*).

As documented above in extensive detail, the MFTL only imposes tax on fuels that are in liquid form. *See supra* Section III.A; 35 ILCS 505/1.1; 35 ILCS 505/1.13; 35 ILCS 505/1.19. Levying motor fuel tax on CNG would therefore require an act of the General Assembly to expand the scope of the MFTL. It did not do so. The General Assembly also did not delegate to the Department the authority to expand the scope of the MFTL, consistent with Art. II, § 1 and Art. IX, § 1 of the Illinois Constitution. *See* 35 ILCS 505/14 (limiting the Department’s power to administering and executing the law as written).<sup>6</sup>

However, the Department’s attempts to tax CNG, whether by form or regulation so providing, or by denial of claims by Waste Management, amounts to an argument that the General Assembly did in fact delegate authority to the Department to determine that non-liquid fuels are subject to tax. Such a delegation would violate Art. IX, Section 1 of the Illinois Constitution because the Department would be exercising the power of taxation by creating a new class of taxable motor fuel, and that power of taxation may not be surrendered, suspended, or contracted away. The executive branch, via the Department, is forbidden by Article II, Section 1 of the Illinois Constitution from exercising the power of taxation, which belongs to the General Assembly.

***D. The Department’s Informal Policy that Subjected Waste Management’s CNG to Tax Violates the Illinois Administrative Procedures Act***

The Illinois Administrative Procedure Act (“APA”) applies to the MFTL:

The Illinois Administrative Procedure Act is hereby expressly adopted and shall apply to all administrative rules and procedures of the Department of Revenue under this Act, except that (1) paragraph (b) of Section 5-10 of the Illinois Administrative Procedure Act<sup>2</sup> does not apply to final orders, decisions and opinions of the Department, (2) subparagraph (a)<sup>2</sup> of Section 5-10 of the Illinois Administrative Procedure Act does not apply to forms established by the Department for use under this Act, and (3) the provisions

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<sup>6</sup> Given Art. IX, Section 1 of the Illinois Constitution, it is questionable as to whether the General Assembly could vest the Department with such authority, but suffice it to say for this case, such a delegation was never attempted.

of Section 10-45 of the Illinois Administrative Procedure Act regarding proposals for decision are excluded and not applicable to the Department under this Act to the extent Section 10-45 applies to hearings not otherwise subject to the Illinois Independent Tax Tribunal Act of 2012.

35 ILCS 505/18. The exceptions listed in the above-quoted statute relate to the non-release of confidential information (5 ILCS 100/5-10(b)), excuses form-making from having to comply with certain formality procedures ((5 ILCS 100/5-10(a)(2)), and administrative “proposals of decision” not relevant to the current case (5 ILCS 100/10-45). Thus, for the purposes of our case, the APA applies to relevant actions of the Department taken with respect to Waste Management.

A “rule” for purposes of the APA is “each agency statement of general applicability that implements, applies, interprets, or prescribes law or policy.” 5 ILCS 100/1-70. Agency rules are not “valid or effective against any person or party, nor may it be invoked by the agency for any purposes, until it has been made available for public inspection and filed with the Secretary of State as required by [the APA].” 5 ILCS 100/5-10. If an agency does not “follow the proper procedure for adoption of a rule, the rule is invalid.” *Senn Park Nursing Ctr. v. Miller*, 104 Ill. 2d 169, 181 (1984).

These rules are illustrated by the *Riverboat* case, where a corporation sought a license to host riverboat gambling in Illinois from the Illinois Gaming Board. *See Riverboat Dev. Corp. v. Ill. Gaming Bd.*, 268 Ill. App. 3d 257 (1st. Dist. 1994). There, the Gaming Board voted to propose certain rules, after which the Chairman stated “the fact that the Board’s rules had not gone through the formal rulemaking process does not preclude the Board from operating under them.” *Id.* at 258. After the rules were proposed, the corporation sought its license, and it was found “not preliminarily suitable for licensing,” a conclusion that could only be reached under the informal (proposed) rules just mentioned. *Id.*

The corporation in *Riverboat* challenged the Board's conclusion, arguing that the Board's rules did not satisfy the requirements set forth in APA Section 5-10, thereby voiding the Board's decision. *Id.* at 259–62. The Riverboat Gambling Act specifically provided that all administrative rules should be promulgated by the APA's procedures. *Id.* at 259. Further, the Act only provided for decisions of "eligible" or "denied"; there was not provision for a "not preliminarily suitable" decision by the Board. *Id.* at 259–62. The court held in favor of the corporation, reasoning that the statute did not provide for a decision of "not preliminarily suitable for licensing" and that the Board's rule was not properly promulgated by following APA procedures, because it ran afoul of Section 5-10. The Board's decision was therefore voided.

In denying Waste Management's refund claims, the Department stated "YOU HAVE BEEN INFORMED THAT CNG USED FOR HIGHWAY PURPOSES IS TAXABLE AND HAS ALWAYS BEEN TAXABLE." (admitted by the Department at Answer, ¶ 50). This is a statement of general applicability by the Department, which it has applied to Waste Management, making it a "rule" under the APA. For rules to be valid and effective under the APA, they must be made available for public inspection and filed with the Secretary of State. *See* 5 ILCS 100/5-10. Here, the Department never followed the APA procedures by filing the rule with the Secretary of State and putting the public on notice of the new rule. Administrative agency rules are invalid when they are not adopted by the required procedure. *See Senn Park Nursing Ctr.*, 104 Ill. 2d at 181. Therefore, the Department's informal rule that CNG is taxable under the MFTL is invalid as applied to Waste Management.

The present case is similar to the *Riverboat* case. There, an administrative agency applied an informal rule that was not properly adopted via APA procedures, just like here where the Department applied its own informal rule that CNG was taxable to Waste Management

without following Section 5-10 of the APA. In *Riverboat*, the statute at issue, the Riverboat Gambling Act, explicitly stated that the APA applied to its provisions, just like the MFTL which has a similar statement. And like the statute in *Riverboat* that did not provide for a “preliminarily denied” assessment despite the Gaming Board’s protests to the contrary, the MFTL does not allow the taxation of CNG, *contra* the Department’s protestations. Just as the Gaming Board’s application of an improperly promulgated rule was deemed invalid in *Riverboat*, so should the Tribunal find that the Department’s informal and improperly promulgated rule assessing tax on CNG under the MFTL be deemed invalid as applied to Waste Management.

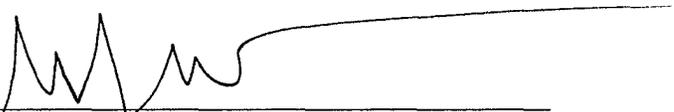
## VII. CONCLUSION

For the foregoing reasons, Petitioner Waste Management of Illinois, Inc. prays that the Illinois Tax Tribunal grant its motion for summary judgment on Counts I, II, and III of its Petition.

Respectfully submitted,

**WASTE MANAGEMENT OF ILLINOIS, INC.**

By:



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# **EXHIBIT 1**