

**ILLINOIS INDEPENDENT TAX TRIBUNAL
CHICAGO, ILLINOIS**

MARATHON PETROLEUM)	
COMPANY LP,)	
Petitioner,)	
)	No. 14 TT 88
)	Chief Judge James M. Conway
ILLINOIS DEPARTMENT)	
OF REVENUE,)	
Respondent.)	

**ILLINOIS DEPARTMENT OF REVENUE’S
MOTION TO QUASH TAKING OF DEPOSITION**

Now comes the State of Illinois, Department of Revenue (“Department”), by and through its attorney, LISA MADIGAN, Illinois Attorney General, and moves this Tribunal to quash Petitioner’s Deposition request filed on December 7, 2015 and states as follows:

Background

In July 2011, the Department began a sales tax audit of Petitioner, Marathon Petroleum Company (“Marathon”). The audit covered the periods January 1, 2009 through June 30, 2011. During that time and as relevant to this matter, Marathon did two things, one, it sold gasoline as a retailer to large bulk fleets who were end users, and two, it sold gasoline for resale as a wholesaler or distributor to its Marathon branded gas station dealers throughout the State. While affiliated with Marathon through some type of licensing or franchise agreement, the Marathon dealers were not owned or operated by Marathon but instead were independent dealers, i.e., typical of any franchise arrangement.

Under Illinois law, Marathon’s sales for resale of gasoline to its franchisee dealers, like all sales for resale, were not taxable. See 35 ILCS 120/1 (definition of “sale at retail”).

Marathon’s sales to its bulk user customers were taxable since the bulk users were not gasoline

dealers but end users. *Id.* Illinois, like most states with a sales tax, provides an exemption from sales tax for all sales to charities and other exempt entities like governmental bodies, etc. 35 ILCS 120/2-5(11). However, the exemption is conditioned on the entity having a valid tax exempt identification number with the Department. *Id.* When such charities or other government bodies make most retail purchases, retailers will not charge tax if the tax exempt customer produces a valid exemption certificate at the point of sale. *Id.* 86 Ill. Adm. Code § 130.2007; 86 Ill. Adm. Code 130.2005(d)(1), (d)(2). If the retailer is shown an exemption certificate, it will not, or at least should not, collect any sales tax. 86 Ill. Adm. Code § 130.2007.

However, whenever such sales tax exempt entity purchases gasoline from a dealer at the pump, there is no way or method to back out sales tax from the purchase price and so the entity will end up paying the tax, at least where it pays in cash. For credit card sales, which are the focus of the dispute here, the issue is a little more complicated because of all the parties involved. To that end, the Department announced in a 1998 General Information Letter or GIL how the issue should be handled. See ST 98-0304-GIL, available on the Department's website:

Under Illinois law, there is a method by which the government can purchase motor fuel without paying the motor fuel tax. The tax would be collected at the pump because it is included within the price of the gasoline. The retailer would then submit the credit receipt to the bank who would reimburse the retailer for the gas less the amount of tax. The bank would also bill the government for only the amount of gas and not include any tax. The retailer would then give the credit card receipts to the distributor who would then report the sale as an exempt sale to the government. No motor fuel tax is actually paid under this scenario.

If Retailers' Occupation Tax and Use Tax is paid, a claim for credit would have to be filed by the taxpayer. Enclosed is a copy of [86 Ill. Adm. Code 130.1501](#), which describes the procedures used to obtain a credit for sales tax that is erroneously paid. Please note that only persons who have actually paid tax to the Department can file a claim for credit. Since retailers usually pay the tax to the Department, usually only retailers can file a claim for credit.

ST 98-0304-GIL, 1998 WL 854815 (Ill. Dept. Rev.) This general information letter was issued in response to a ruling request, apparently from a law or accounting/consulting firm on behalf of their unidentified client. As the letter indicates, the Department stated that credit card issuer was supposed to only reimburse the gasoline retailer/dealer for the gasoline, net of tax. Then the credit card issuer/bank would bill the tax exempt government entity/customer for the price of the gas, net of tax. Finally, the fuel distributor, after receiving the receipts from the gasoline retailer/dealer, submits the receipts to the State, showing the sale as exempt. *Id.* But as the second paragraph discusses, if tax is paid, then only the entity actually paying the tax can claim the refund. See also 86 Ill.Adm.Code § 130.1501.

Despite this ruling having been issued and publicly available, Marathon apparently chose to recoup the overpayment of tax by the Marathon dealers tax exempt customers in a completely different manner. Perhaps in an attempt to alleviate or minimize the record keeping requirements for Marathon dealers, Marathon reimbursed the dealers for the entire amount of exempt sales. The dealers then in turn remitted that amount (which included tax on sales to tax exempt customers) to the Department. Finally, and in an attempt recover the overpaid sales tax, Marathon offset the overpayment against its sales tax liability incurred on its retail gasoline sales to its bulk or end users. There is no dispute that Marathon's sales to its bulk or end users were unrelated to its gasoline sales for resale to the Marathon dealers. As indicated above, Marathon had two types of transactions, at least for purposes of this matter, i.e., sales for resale to its dealers and sales at retail to bulk users. The Department denied Marathon's attempt to offset the sales tax due on retail sales to its end user/bulk sale customers with or against the sales tax it paid its dealers on their exempt sales at the pump to governmental and other exempt customers.

As indicated above, the two types of transactions Marathon engaged in are completely unrelated. Marathon's bulk sales have nothing to do with the reimbursements at issue to its dealers. When Marathon sold fuel to Marathon dealers, it was acting in its capacity as fuel distributor, making gasoline sales for resale to Marathon branded dealers. But when it sold fuel in bulk, it was acting in the capacity of a retailer making sales to end users.

What it attempted to do here was offset the overpaid sales tax it previously paid to its dealers against unrelated sales tax due on retail sales to its bulk end user/customers. After conducting an audit of Marathon's sales tax returns it filed in its capacity as a retailer selling to bulk users, the Department issued the two Notices of Tax Liability ("NTL's") protested by Marathon and at issue in this proceeding.

Marathon's Previous Interrogatories to the Department

After the Department filed its answer to the Petition, Marathon served it with written interrogatories in September of 2014 and the Department responded to those interrogatories in February of 2015. See Exhibit A for a copy of the Department's Response. Interrogatory numbers four through nine concerned the Department's administration and/or interpretation of a certain provision from the Civil Administrative Code of Illinois known as the Department of Revenue Law. The specific provision at issue is titled "Tax Overpayments." 20 ILCS 2505/2505-275.

This provision gives the Department general power to move or apply a taxpayer's overpayment in one type of tax administered by the Department, like income tax, to another tax also administered by the Department such as sales tax. 20 ILCS 2505-275. The provision also allows the Department to offset any state tax overpayment of a taxpayer against any federal income tax liability of that taxpayer. *Id.* The second provision is not at issue here.

Department's Response to Interrogatories

The Department provided the following response to Interrogatories four through nine:

OBJECTION: The Defendants object to this interrogatory as outside the scope of discovery in that it seeks information irrelevant to the issue in this matter, i.e., whether a retailer can offset its sales tax liability on retail sales with purported credits from its voluntary overpayments of another retailer's sales tax liability on unrelated transactions. Further, the request will not lead to any relevant evidence because Petitioner has not demonstrated that it has overpaid any of its own tax liability, as opposed to the liability of a third party taxpayer, so the cited statutory provision is not implicated.

RESPONSE: For the reasons stated in the objection above, the Department declines to answer.

The Department's primary basis for the Department's response was the text of the provision itself. Specifically, it is clear the provision allows or permits, but does not require, the Department to credit an overpayment of one type of tax to another or different type of tax, provided the other type of tax is also administered by the Department. 20 ILCS 2505/2505-275. For example, the Department would be free to credit an income tax overpayment to the same taxpayer's sales tax liability since both taxes, income and sales, are administered by the Department. But the Department could not credit an overpayment of sales tax to a taxpayer's state unemployment tax or franchise tax liability because neither of those taxes is administered by the Department.

But the provision does not allow or permit, much less require, the Department to credit one taxpayer's overpayment to another taxpayer, which is what Marathon wants here. The Department promulgated an income tax regulation reflecting the statute's requirement that only the taxpayer who made the overpayment can request its application to another tax (but not to a different taxpayer):

The Department shall credit the amount of any overpayment, including interest allowed on the overpayment, against any liability for tax imposed under the IITA or any other Act administered by the Department on the person who made the overpayment, and it shall refund the balance to that person.

86 Ill. Adm. Code § 100.9400(a) (emphasis added).

Each Marathon dealer is a separate taxpayer with its' own filing and reporting requirements. Marathon overpaid its dealers taxes, not its own. While Marathon does not dispute this, it argues that Section 25050-275 can be read to require the Department to apply the dealers' overpayment to Marathon's unrelated sales tax liability. This provision can never and will never apply to this situation. It was designed to allow or permit (but not require, since it used the permissible "may" vs mandatory "shall") the Department to apply a tax overpayment from one tax act to another. And even then, only when the liability offset is "final." Marathon's interpretation, while apparently based on an equitable principle, simply stretches this provision too far. Since this provision was never and will never apply to a situation like this, the information Marathon is seeking in its deposition request will never be relevant, nor will it ever lead to relevant evidence.

Marathon's Motion to Compel

On April 2, 2015, Marathon filed a Motion to Compel the Department to answer, among other items, interrogatories four through eight, which were relative to the Department's interpretation of and actions regarding the tax overpayment provision of the Department of Revenue Law in the Civil Administrative Code of Illinois at issue here, 20 ILCS 2505/2505-275. The Motion was briefed by both parties and this Tribunal, after hearing the arguments of both parties, on June 24, 2015, entered an order denying Marathon's Motion to Compel. While the order did not explain the reasons for the denial, the Department's main argument in support of its

discovery response was that the question was not relevant to this matter where a taxpayer was attempting to force the Department to apply one taxpayer's overpayment to a different taxpayer.

Marathon's Notice of Deposition

On December 7, 2015 Marathon sent the Department its Notice of Deposition, requesting the Department to:

Please identify a representative or representatives from the program area, bureau, division, office or other organizational unit within the Department of Revenue responsible for executing actions of the Department pursuant to 20 ILCS 2505/2505-275 and that has information regarding the ability of the Department to credit overpayments.

Marathon Notice of Deposition dated December 7, 2015. In short, Marathon is seeking the same information it sought in interrogatories four through eight, which information this Tribunal already determined to be irrelevant.

Scope of Discovery

In Illinois, the scope of discovery extends to all matters "relevant to the subject matter involved in the pending action . . ." Ill. S. Ct. R. 201(b)(1) (eff. Jan. 1, 2013). Relevant information has been defined broadly to include either "that which is admissible at trial" or "that which leads to admissible evidence." *Manns v. Briell*, 349 Ill.App.3d 358, 361, 811 N.E.2d 349 (4th Dist. 2004). But the right to discovery is not absolute. Rather, it is limited to "disclosure of matters that will be relevant to the case at hand in order to protect against abuses and unfairness, and a court should deny a discovery request where there is insufficient evidence that the requested discovery is relevant or will lead to such evidence." *Youle v. Ryan*, 349 Ill.App.3d 377, 380-81, 811 N.E.2d 1281 (4th Dist. 2004).

Under Illinois Rules of Evidence, "relevant evidence" is defined as:

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the

determination of the action more probable or less probable than it would be without the evidence.

Illinois Rules of Evidence 401 (eff. January 1, 2011). The trial court has broad discretion to restrict discovery where probative value is lacking. *People ex rel. State Dental Society v. Norris*, 79 Ill.App.3d 890, 900, 398 N.E.2d 1163 (1st Dist. 1979).

Section 2505/2505-275 Is Not Relevant to this Matter

Marathon's argument that this provision authorizes the Department to credit one taxpayer's overpayment against another unrelated taxpayer's liability is not supported by logic or legal authority. As mentioned above, the Department's income tax regulation interpreting the provision (which applies to all taxes administered by the Department) has been acquiesced in by the Legislature. See *Hawthorne Race Course, Inc., v. Illinois Racing Board*, 2013 IL App (1st) ¶¶ 35-36 (citing *People ex rel. Birkett v. City of Chicago*, 202 Ill.2d 36, 46, 779 N.E.2d 875 (2002)(reasonable construction of statute is considered to have been acquiesced in by the Legislature if it has not amended underlying Act at issue to change or alter agency's regulation.) When the Legislature wants to allow or permit a taxpayer to assign a tax credit to another unrelated taxpayer, it will do so explicitly. See 35 ILCS 120/6 (. . . "the credit memorandum may be assigned and set over by the lawful holder thereof, subject to reasonable rules of the Department, to any other person who is subject to this Act, the Use Tax Act, the Service Occupation Tax Act, the Service Use Tax Act . . . "); 86 Ill.Adm.Code § 130.1505(a) ("Assignment of Credit Memoranda by Holders Thereof").

Because Marathon was legally precluded from claiming an overpayment actually made by third party taxpayers (the Marathon dealers), regardless of the source of such overpayments, Section 2505/2505-275 did not and would not ever come into play. The Department's position is supported by the language of the law itself, logic, legislative acquiescence in the aforementioned

income tax regulation, and general principles of statutory construction, i.e., Section 6 of the Retailers' Occupation Tax Act. Consequently, this provision has no relevance whatsoever to this matter. No amount of discovery can change that. Simply put, the provision does not apply to someone attempting to use another person's overpayment on its own returns. Therefore, Marathon's deposition request, which seeks to depose someone from the Department "... responsible for executing actions of the Department pursuant to 20 ILCS 2505/2505-275. ..." is not relevant nor will it ever lead to relevant evidence. Consequently, the Notice of Deposition should be quashed. The fact that this Tribunal already denied Marathon's Motion to Compel the Department to answer questions regarding Section 2505/2505-275 is all the more reason for it to quash Marathon's attempt to depose someone from the Department concerning the same statute, which statute has no relevance to this matter.

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Respectfully Submitted,

LISA MADIGAN
Illinois Attorney General



By _____
Michael Coveny,
Assistant Attorney General

CERTIFICATE OF SERVICE

I, Michael Coveny, an attorney for the Illinois Department of Revenue, state that I served a copy of the attached Department's Motion to Quash the Taking of a Deposition upon:

Michael J. Wynne / Adam Beckerink
Reed Smith LLP
10 South Wacker Drive
Chicago, IL 60606

By email attachment to mwynne@reedsmith.com and abeckerink@reedsmith.com on January 15, 2016.



Michael Coveny,
Assistant Attorney General