

**ILLINOIS INDEPENDENT
TAX TRIBUNAL**

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

DEPARTMENT’S ANSWER TO PETITION

Respondent, the Illinois Department of Revenue (the “Department”), by and through its attorney, Lisa Madigan, Illinois Attorney General, and for its Answer to Petition (“Petition”), hereby states as follows:

Jurisdiction and Venue

1. This timely petition involves two Notices of Tax Liability (NTLs), each in a face amount in excess of \$15,000.00 in tax, penalty and interest proposed for assessment under a tax law identified in Section 1-45 of the Tax Tribunal Act; therefore, the Tax Tribunal has jurisdiction over this petition.

ANSWER: The Department admits the allegations contained in paragraph 1.

2. Marathon accepts the Tax Tribunal’s designation of its office in Cook County to conduct the hearing in this matter.

ANSWER: Paragraph 2 is not an allegation of material fact but a statement of Petitioner’s belief or position and as such does not require an answer pursuant to Tribunal Rule 86 Ill.Adm.Code §5000.310(b).

Facts Common to all Counts

The Parties

3. MPC is a limited partnership maintaining its principal offices at 539 South Main Street, Findlay, Ohio, 45840-3229.

ANSWER: The Department admits the allegations contained in paragraph 3

4. MPC is engaged in the wholesale distribution of petroleum products to Marathon-branded retail service stations, and was so engaged in Illinois during the taxable periods at issue in this petition.

ANSWER: The Department admits the allegations contained in paragraph 4

5. The Illinois Department of Revenue is an executive agency authorized, among other functions, to administer and enforce the provisions of the Illinois Retailers' Occupation Tax Act, and the Illinois Use Tax Act. 20 ILCS 2505/2505-25; 20 ILCS 2505/2505-90.

ANSWER: The Department admits the existence, force and effect, at all relevant times of the statutory provision set forth or referred to in paragraph 5 and state such provision speaks for itself.

The Retailers' Occupation Tax Act and the Use Tax Act

6. The Retailers' Occupation Tax Act (the "ROT") imposes a tax on persons engaged in the occupation of selling tangible personal property at retail in Illinois. 35 ILCS 120/1 *et seq.*

ANSWER: The Department admits the existence, force and effect, at all relevant times of the statutory provision set forth or referred to in paragraph 6 and state such provision speaks for itself.

7. The Use Tax Act (the "UT") imposes a tax on a purchaser of tangible personal property for use or consumption, and not for resale, from a retailer. 35 ILCS 105/1 *et. Seq.*

ANSWER: The Department admits the existence, force and effect, at all relevant times of the statutory provision set forth or referred to in paragraph 7 and state such provision speaks for itself.

8. The ROT is imposed on the gross receipts from a taxable retail sale.

ANSWER: Paragraph 8 is not an allegation of material fact but a legal conclusion and as such does not require an answer pursuant to Tribunal Rule 86 Ill.Adm.Code §5000.310(b).

9. The UT is imposed on the purchase price of a taxable retail purchase.

ANSWER: Paragraph 9 is not an allegation of material fact but a legal conclusion and as such does not require an answer pursuant to Tribunal Rule 86 Ill.Adm.Code §5000.310(b).

10. The ROT and the UT provide specific tax exemptions, including among them an exemption for certain special-purpose entities:

Personal property sold to [or "purchased by"] a governmental body, to a corporation, society, association, foundation, or institution organized and operated exclusively for charitable, religious, or educational purposes, or to a not-for-profit corporation, society, association, foundation, institution, or organization that has no compensated officers or employees and that is organized and operated primarily for the recreation of persons 55 years of age or older. A limited liability company may qualify for the exemption under this paragraph only if the limited liability company is organized and operated exclusively for educational purposes. On and after July 1, 1987, however, no entity otherwise eligible for this exemption shall make tax-free purchases unless it has an active identification number issued by the Department.

35 ILCS 120/2-5(11); bracketed text from 35 ILCS 105/3-5(4).

ANSWER: The Department admits the existence, force and effect, at all relevant times of the statutory provision set forth or referred to in paragraph 10 and state such provision speaks for itself.

11. Under Sections 2-5(11) of the ROT and 3-5(4) of the UT, a qualifying exempt purchaser is allowed to make a purchase of tangible personal property for use or consumption from a retailer without tendering payment for the use tax.

ANSWER: The Department admits the existence, force and effect, at all relevant times of the statutory provision set forth or referred to in paragraph 11 and state such provision speaks for itself.

The Controversy

12. Since at least 1992, the Department was aware of difficulties experienced by retailers of gasoline in giving effect to sales, use and motor fuel tax

exemptions for exempt purchasers where taxes, including those paid by distributors and passed on to gas stations and including the Use tax due from retail purchasers on the final retail purchase, were embedded in the pump retail price for fuel.

ANSWER: Although paragraph 12 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 12.

13. As recently as 2009, in response to exempt purchasers asking the Department to approve or devise alternate ways of giving effect to the exemption where the tax costs were embedded in the purchase price, the Department offered no solution but stated the problem thusly: "The use of fleet cards can sometimes complicate transactions for the exempt purchase of motor fuel, since tax is included in the pump price. This is especially so if the card issuer is not also the seller of the motor fuel." ST-09-0095-GIL, 07/08/2009.

ANSWER: The Department admits the existence, force and effect, at all relevant times of the document set forth or referred to in paragraph 13 and state such document speaks for itself.

14. The lack of guidance from the Department to facilitate these transactions so that exempt purchasers would not have to pay the tax on their purchases left Marathon-branded service stations in Illinois with the choice to deny the exemption to qualified exempt purchasers, such as police and fire departments and charitable organizations, and to collect the tax that the General Assembly intended such purchasers not pay, or to refund the tax on such purchases to such purchasers and file individual claims for refund with the Department on a monthly or periodic basis.

ANSWER: Although paragraph 14 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 14.

15. To assist its Marathon-branded independent dealers in Illinois to give effect to the intent of the General Assembly, MPC developed a system that, unlike the Department's guidance, assured that exempt purchasers did not first have to bear the burden of the tax that the General Assembly intended for them not to bear.

ANSWER: The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 15 and therefore neither admits or denies the allegations.

The MPC Exempt Purchase Program During the Audit Periods

16. Marathon devised a method of processing exempt purchases that required agreements and exchanges of sales information with certain credit card companies so that Marathon itself paid the tax to its dealers on behalf of the exempt purchasers, and so that the credit card lenders could bill their exempt customers their purchase amounts net of (or minus) embedded use tax and honor their customers' charges with Marathon-branded dealers by remitting the purchase price net of embedded use tax.

ANSWER: The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 16 and therefore neither admits or denies the allegations

17. An example of how the MPC Exempt Purchase Program worked is as follows (see, demonstrative Exhibit A):

- i. An exempt purchaser, for example a police patrolman or a fire-engine company, purchased \$50 worth of gasoline and tendered a fleet credit card to the Marathon-branded dealer.
- ii. The Marathon dealer would transmit the daily credit card sales receipts to Heartland Payment Systems ("Heartland"), a third-party payment processing company.
- iii. Heartland would transmit the transaction data to Marathon and to various fleet card issuers.
- iv. The fleet card issuers would, based on the data received from Heartland, pay to MPC the amounts due on fuel sales to their cardholders by Marathon-branded dealers, less a service fee by the issuer, net of taxes on exempt purchaser charges, and including taxes on purchasers by non-exempt purchasers.
- v. MPC then paid the Marathon-branded dealers the full retail value of the fuel and the associated taxes (less a service fee) for all purchases, i.e., including paying tax on retail sales to exempt purchasers.
- vi. The fleet card issuers would bill their retail customers, using the data obtained from Heartland, for the value of their fuel purchases, but it would not issue a bill for sales/use tax to its exempt purchasers.

- vii. The Marathon-branded dealers would file their monthly ST-1 sales tax return remitting payment for all taxable sales reported therein, including the sales tax on sales to tax exempt customers for whom MPC paid the sales/use tax based on the information received from Heartland and the fleet card issuers.

ANSWER: The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 17 and therefore neither admits or denies the allegations.

18. MPC assured that all exempt purchasers directly received the benefit of the exemption intended for them by the General Assembly and granted by the Department, *i.e.*, the benefit of not bearing the burden of the tax, by paying the taxes out of its own pocket. Having so assured, MPC applied as a credit against its own ST-1 sales tax liability the amount of tax it paid on exempt sales during that reporting period.

ANSWER: The Department denies the allegations contained in paragraph 18.

19. MPC did not own the Illinois Marathon-branded independent dealer stations to which it made payments of tax on exempt sales.

ANSWER: The Department admits the allegations contained in paragraph 19.

20. The system MPC devised is substantially similar to one which the Department had approved in instances where the card issuer was an entity related to a seller of motor fuel, as in ST-01-0094-GIL, 06/07/2001.

ANSWER: The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 20 and therefore neither admits or denies the allegations.

The Department's Audit

21. The Department's audit staff and management received access to MPC's books and records supporting the tax exempt transactions by MPC dealers, as reported to Heartland and reimbursed by MPC, to allow the Department to confirm that MPC paid the tax due on sales by Marathon-branded dealers to exempt purchasers.

ANSWER: The Department denies the allegations contained in paragraph 21.

22. The Department also had the registration number of, and tax return and audit information from and regarding, every Illinois Marathon-branded dealer to which MPC made payments of tax on sales to exempt purchasers.

ANSWER: Paragraph 22 is not an allegation of material fact but a statement of Petitioner's belief and as such does not require an answer pursuant to Tribunal Rule 86 Ill.Adm.Code §5000.310(b).

23. On information and belief, the Department's records confirm with respect to each Marathon-branded dealer for any given tax period within the scope of the audit, that such dealer remitted ROT to the Department for that given tax period in an amount that exceeded the amount the dealer received from MPC in respect of sales to exempt purchasers for that tax period.

ANSWER: Paragraph 23 is not an allegation of material fact but a statement of Petitioner's belief and as such does not require an answer pursuant to Tribunal Rule 86 Ill.Adm.Code §5000.310(b).

24. Despite having received tax payments from Marathon-branded dealers in excess of the amounts paid by MPC to such Illinois dealers in respect of sales to exempt purchasers during the period from January 1, 2009 through June 30, 2009, the Department issued a Notice of Tax Liability, dated March 26, 2014, to MPC assessing tax, penalty and interest liability in respect of such payments to Marathon-branded dealers for which MPC took a credit on its ST-1 sales tax returns. See, Exhibit B.

ANSWER: The Department admits the existence, force and effect, at all relevant times of the document attached to the Petition as Exhibit B and state such document speaks for itself. The Department further states that the remaining allegations in Paragraph 24 are not allegations of material fact but statements of Petitioner's belief and as such do not require an answer pursuant to Tribunal Rule 86 Ill.Adm.Code §5000.310(b).

25. Despite having received tax payments from Marathon-branded dealers in excess of the amounts paid to such dealers by MPC in respect of sales to exempt purchasers during the period from July 1, 2009 through June 30, 2011, the Department issued a Notice of Tax Liability, dated March 26, 2014, to MPC assessing tax, penalty and interest liability in respect of such payments to Marathon-branded dealers for which MPC took a credit on its ST-1 sales tax returns. See, Exhibit C.

ANSWER: The Department admits the existence, force and effect, at all relevant times of the document attached to the Petition as Exhibit C and state such document speaks for itself. The Department further states that the remaining

allegations in Paragraph 25 are not allegations of material fact but statements of Petitioner's belief and as such do not require an answer pursuant to Tribunal Rule 86 Ill.Adm.Code §5000.310(b).

COUNT I

The Department's Assessment Impermissibly Contravenes The State Policy Against Unjust Enrichment

26. MPC incorporates and realleges by this reference paragraphs 1 through 25 of this Complaint as though fully set forth herein.

ANSWER: The Department repeats and incorporates its answers to paragraphs 1-25 as if fully set forth herein.

27. It is the policy of the State of Illinois, recognized by the Illinois Supreme Court and reflected in the provisions of its tax laws, including the ROTA and the UTA, to prevent, avoid, and remedy unjust enrichment in the administration and enforcement of the tax laws of the State, and generally. For example:

- a. Section 2-40 of the ROTA is designed to prevent unjust enrichment on the part of retailers by the collection of tax in excess of that allowed. 35 ILCS 120/2-40; *John Nottoli Inc. v. Illinois Department of Revenue*, 272 Ill. App. 3d 822 (1995).
- b. The same terms appearing in an earlier version of Section 2 of the ROTA, evidence the legislative purpose to prevent unjust enrichment of the seller. *Acme Brick & Supply Company v. Department of Revenue*, 133 Ill. App. 3d 757 (1985); *Adams v. Jewel*, 63 Ill. 2d 336 (1976).
- c. The ROTA refund provisions, in order to prevent unjust enrichment, do not allow a retailers' claim to be paid unless the retailer proves that it bore the burden of the tax or, if it shifted the burden to the purchaser, that it has refunded the tax to the purchaser. 35 ILCS 120/6; 86 Ill. Admin. Code § 130.1501(a)(2).
- d. The Department has guarded against unjust enrichment even where the statute, like the Illinois Income Tax Act, is silent in that regard. *See, e.g., Department of Revenue v. Taxpayer*, 96-IT-38, stating that "to allow TAXPAYER A and TAXPAYER B to utilize those NOLs [net operating losses] now would unjustly enrich the taxpayers" and thereafter denying the taxpayers claims for refund.

ANSWER: Paragraph 27 is not an allegation of material fact but rather a recitation of many legal statements, principles and conclusions and as such does not require an answer pursuant to Tribunal Rule 86 Ill. Adm. Code §5000.310(b).

28. In issuing NTLs as aforesaid against MPC, the Department arbitrarily and erroneously concluded that MPC created a liability due to the State when MPC credited on its ST-1 returns the amounts it paid to Marathon-branded dealers in respect of sales to exempt purchasers.

ANSWER: Although paragraph 28 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 28.

29. In issuing NTLs as aforesaid against MPC, the Department has failed to avoid the unjust enrichment of the State that results from assessing and collecting from MPC amounts which MPC paid to Marathon-branded dealers in respect of their sales to exempt purchasers, and which were already received by the Department from Marathon-branded dealers.

ANSWER: Although paragraph 29 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 29.

30. The State Treasury received, and the Department has not refunded, the amount of tax paid by Marathon-branded dealers in Illinois for the MPC audit periods that is at least equivalent to the amounts paid to the Marathon-branded dealers by MPC in respect of exempt purchasers' purchases during the audit periods.

ANSWER: The Department denies the allegations contained in paragraph 30

31. The State will be unjustly enriched when it collects from MPC the liability assessed in the amount of the credit MPC took on its ST-1 returns for the payments MPC made to Marathon-branded Illinois dealers in respect of their sales to exempt purchasers.

ANSWER: Although paragraph 31 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 31.

32. The Courts agree that "a tax is overpaid when a taxpayer pays more than is owed, for whatever reason or no reason at all." *United States v. Dalm*, 494 U.S. 596, 609 n. 6 (1990), quoted approvingly in *Alvarez v. Pappas*, 229 Ill.2d 217, 225

(2008). MPC is overpaid for the audit periods to the extent of the taxes received by the Department from a Marathon-branded dealer in any month of the audit period which were in excess of the amount paid by MPC to such Marathon-branded dealer for the same period in respect to its sales of fuel to exempt purchasers.

ANSWER: The Department admits the existence, force and effect, at all relevant times of the case law set forth or referred to in paragraph 32 and state such case law speaks for itself.

33. An exempt purchaser cannot file and succeed on a claim for refund of the tax paid by MPC to a Marathon-branded dealer in respect of the exempt purchases because: (i) the exempt purchasers were not billed for tax amounts by the fleet card issuers; and (ii) the Department does not allow claims for refund to be filed directly by purchasers who paid use tax on their purchases to a retailer required to remit ROT on the gross receipts from the sale. See, 86 Ill. Admin. Code § 130.1501.

ANSWER: The Department admits the existence, force and effect, at all relevant times of the regulatory provision set forth or referred to in paragraph 33 and state such provision speaks for itself.

34. A Marathon-branded dealer cannot file and succeed on a claim for refund of tax paid on exempt purchases because the dealer cannot support its claim with E-numbers corresponding to the exempt purchasers for which they received payment from MPC for the tax on exempt purchases.

ANSWER: Paragraph 34 is not a material allegation of fact but a legal conclusion and/or statement of Petitioner's belief or position and as such does not require an answer pursuant to Tribunal Rule 86 Ill. Adm. Code §5000.310(b).

35. A Marathon-branded dealer that could obtain the E-numbers necessary to file a claim for refund of taxes paid on exempt purchases would not succeed unless, to prevent unjust enrichment, it also established to the Department's satisfaction that the tax was refunded by the dealer to the exempt purchaser.

ANSWER: Paragraph 35 is not a material allegation of fact but a legal conclusion and/or statement of Petitioner's belief or position and as such does not require an answer pursuant to Tribunal Rule 86 Ill. Adm. Code §5000.310(b).

36. If a Marathon-branded dealer could establish the E-numbers necessary and prove that it refunded the tax on exempt purchases to the exempt purchaser, the Department would offset any refund by any deficiency due and

owing to the Department or that would be discovered to be due and owing in an audit of the period for which the refund is claimed.

ANSWER: Paragraph 36 is not a material allegation of fact but a legal conclusion and/or statement of Petitioner's belief or position and as such does not require an answer pursuant to Tribunal Rule 86 Ill.Adm.Code §5000.310(b).

37. The Department does not face a refund of taxes paid by Marathon-branded dealers in respect of sales to exempt purchasers, therefore, avoiding unjust enrichment by cancelling the assessments issued against MPC does not subject the Department to a risk that it will experience an actual deficiency in amounts due the State for the audit periods.

ANSWER: Paragraph 37 is not a material allegation of fact but a legal conclusion and/or statement of Petitioner's belief or position and as such does not require an answer pursuant to Tribunal Rule 86 Ill.Adm.Code §5000.310(b).

WHEREFORE, the Department prays:

- A) That Judgment be entered against the Petitioner and in favor of the Department on Count I in this matter;
- B) That the Department's Notices of Tax Liability be determined to be correct.
- C) That this Tribunal grant such other additional relief it deems just and proper

COUNT II

Recoupment

37. MPC incorporates and realleges by this reference paragraphs 1 through 25 of this Complaint as though fully set forth herein.

ANSWER: The Department repeats and incorporates its answers to paragraphs 1-25 as if fully set forth herein.

38. The Illinois courts recognize that claims "in the nature of setoff, recoupment, cross claim or otherwise . . . may be pleaded as a cross claim in any cause of action, and when so pleaded shall be called a counterclaim." See, 735 ILCS 5/2-608(b).

ANSWER: The Department admits the existence, force and effect, at all relevant times of the case law and statute set forth or referred to in paragraph 38 and state such case law and statute speak for themselves.

39. MPC has a claim for 'recoupment' against the Department in each tax period within the audit periods to the extent that the amount of the credits claimed on MPC's ST-1 returns which the Department disallowed and has assessed is less than the amount paid to the Department by Marathon-branded dealers for each such period and MPC paid the Marathon-branded dealer an amount in respect of sales to exempt purchasers for each such period.

ANSWER: Although paragraph 39 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 39.

40. The overpayment of tax on exempt purchases by Marathon-branded dealers arises out of the same transactions and operative facts as the assessment the Department issued against MPC for crediting on its ST-1 returns the amounts paid by MPC to Marathon-branded dealers in respect of sales to exempt purchasers.

ANSWER: Although paragraph 40 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 40.

41. On information and belief, without regard to whether claims for refund could have been successfully prosecuted, the statutes of limitation for certain Marathon-branded dealers to file claims for refund of taxes paid in respect to sales to exempt purchasers has expired.

ANSWER: Paragraph 41 is not an allegation of material fact but a statement of Petitioner's belief or position and as such does not require an answer pursuant to Tribunal Rule 86 Ill.Adm.Code §5000.310(b).

42. There is no tax period for which any exempt purchaser could have filed a claim for refund of taxes paid on exempt purchasers, even if the tax had been paid directly to the Marathon-branded dealers by the purchasers and not by MPC.

ANSWER: Paragraph 42 is not an allegation of material fact but a statement of Petitioner's belief or position and as such does not require an answer pursuant to Tribunal Rule 86 Ill.Adm.Code §5000.310(b).

43. The General Assembly gave the Department the power to implement recoupment, providing in Section 2505-275 of the Civil Administrative Code, in part, that:

(20 ILCS 2505/2505-275) (was 20 ILCS 2505/39e)
Sec. 2505-275. Tax overpayments. In the case of overpayment of any tax liability arising from an Act administered by the Department, the Department may credit the amount of the overpayment and any interest thereon against any final tax liability arising under that or any other Act administered by the Department. . . .

ANSWER: The Department admits the existence, force and effect, at all relevant times of the statutory provision set forth or referred to in paragraph 43 and state such provision speaks for itself.

44. Section 2505-275 of the Civil Administrative Code does not prohibit crediting the overpayment of taxes on sales to exempt purchasers by Marathon-branded dealers against the liability it has assessed against MPC in respect of the amounts MPC paid on the same sales to exempt purchasers.

ANSWER: The Department admits the existence, force and effect, at all relevant times of the statutory provision set forth or referred to in paragraph 44 and state such provision speaks for itself.

WHEREFORE, the Department prays:

- A) That Judgment be entered against the Petitioner and in favor of the Department on Count II in this matter;
- B) That the Department's Notices of Tax Liability be determined to be correct;
- C) That this Tribunal grant such other additional relief it deems just and proper.

LISA MADIGAN
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Respectfully Submitted,

LISA MADIGAN
Illinois Attorney General



By _____
Michael Coveny,
Assistant Attorney General

STATE OF ILLINOIS)
) SS
 COUNTY OF SANGAMON)

AFFIDAVIT AS TO LACK OF SUFFICIENT KNOWLEDGE

I, ALLAN SCHELL, being first duly sworn, deposes and says that I am an employee of the Illinois Department of Revenue, that I have read the foregoing Department's Answer to Petitioner's Petition to the Illinois Independent Tax Tribunal, that I am well acquainted with its contents, and under penalties as provided by law pursuant to 735 ILCS 5/1-109 of the Illinois Code of Civil Procedure, I certify that I lack the required personal knowledge to either admit or deny paragraphs 15-17 pursuant to 735 ILCS 5/2-610(b) and Tribunal Rule 5000.310(b)(3). I hereby certify that the statements set forth in this affidavit are true and correct to the best of my knowledge, information and belief.



 Allan Schell
 Revenue Auditor III
 Illinois Department of Revenue

Date: 8-8-14

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 Answer to Petitioner's Petition upon:

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

By email to mwynne@reedsmith.com and abeckerink@reedsmith.com on August 11, 2014.



Michael Coveny,
Assistant Attorney General