

IN THE
ILLINOIS INDEPENDENT TAX TRIBUNAL
COOK COUNTY, ILLINOIS

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

**REPLY TO DEPARTMENT'S RESPONSE
TO PETITIONERS MOTION TO COMPEL**

The Department's response, like its objections to discovery, argues either a motion to dismiss it never filed or a motion for summary judgment not yet ripe to file, rather than deal with the discovery relevant to Marathon Petroleum Corporation's ("MPC") claim.¹ MPC's Petition is about the State policy against "unjust enrichment" which should have stayed the Department's hand from assessing MPC. Like the proverbial ostrich that sticks its head in the sand, the words "unjust" and "enrichment" are nowhere found in the Department's response to MPC' s motion to compel.

Yet, the unjust enrichment is not denied, as the Department concedes that there was "an overpayment" of tax to the Department but it argues that

¹¹ Illinois S. Ct. Rule 201(b) provides that the scope of discovery extends to "full disclosure regarding any matter relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking disclosure or of any other party", and that extends to discovery information that may lead to relevant information.

"Marathon overpaid its dealer's tax liability." *IDOR Resp. p. 4*, emphasis in original. That concession cements the auditor's express statement in his notes that MPC had "borne the burden" of the tax on exempt sales of its dealers. Consequently, contrary to the Department's mischaracterization of MPC's Petition as that for a refund that only the dealer-taxpayer making the overpayment to it can file a claim for (*IDOR Resp. p. 6*), and that is otherwise barred by the voluntary payment doctrine (*id.*), it is evident that MPC is simply trying to avoid bearing the dealer's tax burden *twice* rather than seeking a refund of the overpayment it already made.

The Department quite correctly points out that Civil Administrative Code Section 2505-275, allowing for offsets of any tax overpayment against any tax liability, uses the word "may" not "shall" and is therefore not mandatory. *IDOR Resp. p. 7*. However, MPC's main argument is that the Department *shall not* violate the State policy against unjust enrichment – *i.e.*, once the auditor determined that MPC had borne the burden of the tax overpaid to the IDOR by MPC dealers, the IDOR *should not* have issued an assessment to double that overpayment. Having done that, however, MPC has offered that Civil Administrative Code Section 2505-275 does not bar the Department from making an offset to MPC's assessed liability of the amount of the Department-acknowledged overpayment for which MPC bore the burden. 20 ILCS 2505/275.

The Department reads into Section 2505-275 a definition of "overpayment" that is restricted to a single taxpayer, when in fact Section 2505-275 contains no such limitation. The Department does so by tying the implementation of that provision to the taxpayer confidentiality provisions of the Retailers' Occupation Tax Act ("ROTA"). *IDOR Resp. p. 5*. It took no violation of the confidentiality provisions for the Department auditor to conclude that MPC had borne the burden of the tax on exempt sales by its dealers and to quantify and verify the amount of that burden. Likewise, MPC has not asked for any third-party information to be disclosed in its Petition or in its discovery. Rather, MPC is asking: (i) for a Department-acknowledged and quantified overpayment of tax, the burden of which it concedes was borne by MPC, to offset the liability the Department proposes to assess; or (ii) for the Department to withdraw the assessment and render irrelevant the interpretation and application of Section 2505/275.

MPC has at no point asked for a refund, but the Department states that: "By creating its own methodology [to] recoup the overpaid tax, Marathon was not following the refund provisions of the ROTA or the Department's rules." (*IDOR Resp. p. 7*). Yet, the Department undermines its own challenge by pointing out that MPC could not file for a refund of tax paid in to the Department by MPC's dealers, because the right to file for a refund lies with the person making the payment directly to the Department.

The Department cites a General Information Letter ("GIL"), ST 98-0304-GIL, which it notes is "available on the Department's website" and it faults MPC because "despite this ruling having been publicly available, Marathon apparently chose to recoup the overpayment of tax by the Marathon dealers tax exempt customers" (*IDOR Resp. p. 3*); there is great irony in that statement. According to the Department's own regulations, GILs "do not constitute statements of agency policy that apply, interpret or prescribe the tax laws administered by the Department." 2 Ill. Admin. Code § 1200.120. Indeed, GILs "are **not binding on the Department, may not be relied upon by taxpayers** in taking positions with reference to tax issues and create no rights for taxpayers under the Taxpayers' Bill of Rights Act." *Id.* Yet, according to the Department MPC was to have relied on that GIL to change its methods. The Department proposes to assess MPC for "not following . . . the Department's rules" while citing GILs which "are not binding" and faulting MPC for not consulting and heeding GILs which "may not be relied upon by taxpayers."

The Department abides by its rules as much as it abides by the State policy against unjust enrichment, hence its insistence that this Tribunal allow MPC to *twice* overpay the Department, and hence MPC's insistence on obtaining information about what information was available to the Department before making the assessment and about what directives and practices it has in place to offset overpayments against liabilities.

ST-98-0304-GIL, cited by the IDOR, and ST-01-0094-GIL (referenced in MPC' s Petition) confirm the Department's year-to-year continuing awareness of and indifference to the difficulties of giving effect to exemptions at the pump, through government credits cards tendered by employees of exempt units of government who did not have the unit of government's exempt E-number issued by the IDOR. The IDOR consistently offered no options except that dealers file claims for refund for every month in which sales were made to such local governments. Of course, the IDOR letters don't disclose that such claims would have been denied because the dealers still would not have the exempt E-numbers, or that any such claims might not have been filed for fear of generating an audit with liability exceeding available overpayments to offset, or that if MPC were to file directly with the IDOR for a refund it too would have been denied because MPC, although it bore the burden of the tax, did not directly pay it into Revenue. Each potential alternative perpetuates unjust enrichment without bother to the Department. ²

The Department also tries to impose a procedural restriction on Section 2505-275 by limiting the offset to one against a "final tax liability," arguing that MPC's tax liability is not final due to the 3 to 3 ½ year statute of limitations (tolled

² The Department also argues that MPC needed to follow some obsessive compulsive parity, not supported by any citation to statute or regulation, between sales tax overpaid to dealers on their retail sales which MPC then credited to its sales tax due on sales by MPC to end users. IDOR Resp. p. 3-4. That suggests that somehow, despite all the other arguments the Department makes against MPC avoiding unjust enrichment, the Department might have allowed the offsetting credit if it was against a tax due on other sales to dealers. That is an illusory suggestion, as sales to dealers would always be for resale, and be exempt for that reason, generating no liability against which the overpayment by MPC on dealers' exempt sales could be credited. The parity the Department suggests is lacking might satisfy an arbitrary and obsessive compulsion of a tax administrator, but it does not satisfy any statutory or regulatory requirement that should concern this Tax Tribunal.

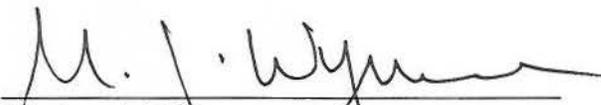
by the pending protest). *IDOR Resp.* p. 6. But for the Department's audit and assessment, MPC's tax liability bearing the burden of the overpayment to its dealers but allowing it to offset that payment against its own liability, would have been a final tax liability once the statute of limitations closed. The Department chose to not allow MPC the finality it now says is a barrier to using Section 2505-275. The Department had choices to make. The Department could have chosen to respect the State policy against unjust enrichment and not issued the assessment. The Department could have issued the assessment with a liability and an equal offsetting credit that would both be "final" at the expiration of 60 days without a protest, again respecting the State policy against unjust enrichment. Even now, the Department could stipulate that if MPC stipulates to the assessed liability it will apply an equal offsetting credit, and thus cure its initial violation of the State policy against unjust enrichment. Yet, even now, the Department chooses instead to make arguments that justify keeping an acknowledged overpayment, and that justify imposing yet again a burden the Department's auditor determined MPC already bore. By its choices the Department makes clear it is fully committed to violate the State policy against unjust enrichment with impunity and without consequence; that in itself highlights the relevance of the discovery sought.

At this stage in the proceedings MPC wants relevant discovery to determine whether the IDOR had access to information to confirm that making the assessment against MPC would result in the unjust enrichment by making

MPC twice bear a burden the Department's own auditor acknowledged it had already borne, and chose instead to violate a State policy against unjust enrichment thus vitiating the presumption of administrative regularity and correctness the NTL would usually earn under the ROTA. MPC also wants relevant discovery to confirm that, if the IDOR will not withdraw the assessment, the Department has the capability to offset credits against liability to cure the unjust enrichment, which may involve information about how the IDOR has applied Section 2505-275 with customs or policies more liberal than those it argues here, and about whether it has erected any internal barriers to its application not supported by the statute.

Respectfully submitted,

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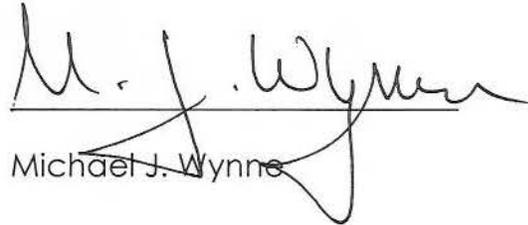
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CERTIFICATE OF SERVICE

I, Michael J. Wynne, an attorney of record for Petitioner Marathon Petroleum Corporation, state that I served a copy of the attached Reply to Department's Response to Motion to Compel upon:

Michael Coveny
Special Assistant Illinois Attorney General
Illinois Department of Revenue
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By email attachment to Michael.coveny@Illinois.gov, on April 22, 2015.



Michael J. Wynne