IN THE ILLINOIS INDEPENDENT TAX TRIBUNAL
COOK COUNTY, ILLINOIS

Marathon Petroleum Company LP	)	
Petitioner,	)	
	)	**Case No. 14-TT-88**
v.	)	
	)	
Illinois Department of Revenue,	)	**Chief Judge Conway**
Respondent.	)	

NOTICE OF FILING

TO: See Attached Certificate of Service

PLEASE TAKE NOTICE that October 12, 2016, Petitioner, Marathon Petroleum Company LP, through its counsel Reed Smith LLP, filed by electronic mail with the Illinois Independent Tax Tribunal **(i) Petitioner's Motion for Summary Judgment; (ii) Memorandum in Support of Motion for Summary Judgment; and (iii) Stipulation of Facts and Other Matters**, in the above-captioned matter, true copies of which are attached hereto and herewith served upon you.

Dated: October 12, 2016

MARATHON PETROLEUM COMPANY LP

By: ______________________
Michael J. Wynne, Counsel for the Petitioner

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CERTIFICATE OF SERVICE

I, Michael J. Wynne, an attorney, hereby certify that on October 12, 2016, I caused a copy of **(i) Petitioner's Motion for Summary Judgment; (ii) Memorandum in Support of Motion for Summary Judgment; and (iii) Stipulation of Facts and Other Matters**, in the above-captioned matter, to be served on all parties of record in this cause by electronic mail and by enclosing the same in an envelope addressed to such attorneys at their business address below and by depositing said envelope in the U.S. Postal Service mail chute at 10 S. Wacker Drive, Chicago, Illinois 60606, with postage fully prepaid, before the hour of 5:00 pm on October 12, 2016:

Michael Coveny
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By: ______________________
Michael J. Wynne

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IN THE ILLINOIS INDEPENDENT TAX TRIBUNAL
COOK COUNTY, ILLINOIS

Marathon Petroleum Company LP **Petitioner,**	)	
	)	**Case No. 14-TT-88**
v.	)	
Illinois Department of Revenue, **Respondent.**	)	**Chief Judge Conway**

PETITIONER'S MOTION FOR SUMMARY JUDGMENT

Petitioner, Marathon Petroleum Company LP, by and through its attorneys, Reed Smith LLP, files this motion for summary judgment in its favor and against the Respondent, the Illinois Department of Revenue (the "Department"), pursuant to 735 ILCS 5/2-1005. In support of its Motion, Petitioner submits the attached Memorandum of Law and Stipulation of Facts and Other Matters.

Respectfully submitted,

MARATHON PETROLEUM COMPANY LP

Date: October 12, 2016

M. J. Wynne

Michael J. Wynne, Counsel for the Petitioner

IN THE ILLINOIS
INDEPENDENT TAX TRIBUNAL

MARATHON PETROLEUM COMPANY LP Petitioner, v. ILLINOIS DEPARTMENT OF REVENUE, Respondent.	))))))))	Nos. 14 TT 88 & 16 TT 76 Chief Judge James Conway

STIPULATION OF FACTS AND OTHER MATTERS

The Petitioner in this matter is Marathon Petroleum Company LP ("MPC"). The Respondent is the Illinois Department of Revenue (the "Department" or "IDOR"). The parties stipulate that the following facts were true during the tax periods January 1, 2009 through July 31, 2010 of the audited periods, from January 1, 2011 through June 30, 2011, and from July 1, 2011 through December 31, 2013 (the "Tax Period at Issue") and that these facts are admitted into evidence in this proceeding, upon being offered into evidence by the parties. The parties also stipulate that any document attached as an exhibit hereto is authentic and is admitted into evidence in this proceeding, upon admission into evidence of this Stipulation.

1. During the Tax Periods at Issue, MPC processed exempt (commercial) sales made with WEX, Voyage, Marathon fleet,

Marathon or Superfleet payment products through its credit card center.

2. During the Tax Periods at Issue, the specific tax-exempt transactions at issue in the present matter were conducted as follows:

a. Tax-exempt customer uses a credit card to complete a transaction at a Marathon dealer's pump, which includes the full price of the sale and the applicable sales tax charged to the tax-exempt customer's credit card;

b. The Marathon dealer transmits its daily sales activities and credit card receipts to the credit card companies;

c. The credit card companies take the sales detail information received from the Marathon dealer and check that information against their tax-exempt customer list and calculate the sales tax that was charged on tax-exempt sales and pay the Marathon dealer for the sales transaction, excluding the sales tax and a processing fee. For example, if a Marathon dealer made sales of $100 at the pump, in fuel, inclusive of tax, to a tax exempt entity for the day, and assuming that the fuel cost $90 and the sales tax was $10, the credit card company would pay or remit to that dealer only $90, less any processing fee on those tax exempt sales. In other words, the credit company would only pay or remit the price of the fuel, excluding any Illinois sales tax collected at the pump.

d. The Marathon dealer receives the additional sales tax on the tax-exempt sales that was not given to them by the credit card companies from MPC. So following the example above, MPC would pay that dealer the $10 for the sales tax that it did not receive from the credit card company.

3. During the Tax Periods at Issue, MPC, in its role as a Marathon brand licensor and intermediary with credit card issuers, reimbursed Marathon dealers for the total amount of sales tax paid at the pump by tax-exempt entities using fleet cards.

4. For each Tax Period at issue, Marathon-branded dealers remitted and paid over to the Department the amount of the reimbursements received from MPC, which amounts included the amounts of sales tax on sales to ***tax***-exempt purchasers.

5. In addition to its role as a fuel distributor for its Marathon branded dealers, MPC also sold fuel at retail to bulk users. Those bulk users were generally unrelated to or unaffiliated with MPC or its dealers. Consequently, MPC's retail

sales of bulk fuel were not related to the aforementioned credit card reimbursements to its dealers. For each Tax Period at Issue, MPC, in an attempt to recover the sales tax reimbursed or paid to its dealers on the dealers' exempt fuel sales, took a credit against its own sales taxes in the amount of its payment to MPC dealers as tax on their exempt sales.

6. There is no dispute that while the Marathon dealers overpaid their sales tax to the Department by paying over to the Department the reimbursement received from MPC, MPC was the source of and actually bore the burden of the overpayment.

7. The Department's assessment against MPC is in the same amount as taxes overpaid by MPC dealers to the Department when the MPC dealers remitted to the Department the amount MPC paid to its dealers in respect of their sales to exempt purchasers.

8. For purposes of this matter, MPC is a separate taxpayer with separate filing obligations from its dealers. The dealers are separate and independent taxpayers responsible for filing their own returns as retailers of fuel.

Respectfully submitted,

Illinois Department of Revenue

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Marathon Petroleum Company LP

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IN THE ILLINOIS INDEPENDENT TAX TRIBUNAL
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Petitioner,	)	Nos. 14-TT-88
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v.	)	
	)	
ILLINOIS DEPARTMENT OF REVENUE,	)	Chief Judge James Conway
	)	
Respondent.	)	
	)	

MARATHON PETROLEUM CORPORATION'S MEMORANDUM OF LAW IN SUPPORT OF PETITIONER'S MOTION FOR SUMMARY JUDGMENT

Petitioner, Marathon Petroleum Company LP ("Marathon"), by and through its attorneys, Reed Smith LLP, files this memorandum of law in support of its motion for summary judgment in its favor and against the Respondent, the Illinois Department of Revenue ("the Department"), pursuant to 735 ILCS 5/2-1005.

I. BACKGROUND

Marathon Petroleum Company LP ("Marathon") is based in Findlay, Ohio and is a distributor of motor fuel to other wholesalers and retailers. Answer, ¶ 3. In July 2011, the Department began a sales tax audit of Marathon covering the periods January 1, 2009 through June 30, 2011.[1] During the audit period, Marathon made wholesale sales of motor fuels to Marathon-branded gas station dealers ("Dealers") for resale. Answer, ¶ 4. The Dealers were not owned or operated by Marathon. Answer, ¶ 19. Dealers were independent resellers who

[1] Marathon has two parallel cases before the Tribunal with identical issues, covering different audit periods: 14-TT-88 and 16-TT-76. Because these two cases have not been consolidated, Marathon will file two separate motions for summary judgment. The amount at issue in 14-TT-88 is $942,358.29, for the period January 2009 through June 2011. The amount at issue in 16-TT-76 is $108,493.88, for the period July 2011 through December 2013. On the Notices of Tax Liability issued in both cases, prior payments and credits were used to partially offset the assessed liability, penalty, and interest. Since Petitioner contests the validity of these assessments, the application of prior payments or credits to these amounts is improper and has deprived Petitioner of such funds. Accordingly, Petitioner protests the gross amounts assessed.

purchased motor fuel, either directly or indirectly, from Marathon in accordance with their respective brand license agreements. Stip., ¶ 8.

In addition to selling Marathon branded-fuel, the Dealers were obligated to accept Marathon-branded "fleet cards" as payment for motor fuel purchased by the retail cardholders. Fleet cards are similar to credit cards in that they are issued by a bank and enable the cardholder to make retail purchases without cash. Unlike a traditional credit card, however, fleet cards can typically be used only for fuel- and vehicle-related purchases. As a result, fleet cards are commonly used by commercial and governmental vehicle fleet operators to make tax-free purchases of fuel and related items.

The transactions at issue in this appeal involve motor fuel that was purchased by exempt organizations (such as local governments for police vehicles) using Marathon-branded fleet cards. Stip., ¶ 4. Marathon is not the issuer of the fleet cards; they are issued by a third-party bank. When an exempt organization's employee purchases gas at the pump, he or she swipes the fleet card as payment. Stip., ¶ 2.

Illinois exempts entities such as governmental bodies from sales tax.[2] 35 ILCS 120/2-5(11). The exemption is conditioned on the entity having a valid tax exempt identification number with the Department. *Id.* Normally, if an exempt governmental body makes a retail purchase, it will not be charged tax by the retailer because the customer can provide a valid exemption certificate at the point of sale. *Id.*; 86 Ill. Admin. Code § 130.2007; 86 Ill. Admin. Code § 130.2005(d)(l) & (d)(2). However, this process does not apply to purchases of motor fuels from retail gas stations by exempt entities.

[2] For simplicity we will use the term "sales tax" to encompass both the Illinois Retailers' Occupation Tax, 35 ILCS 120/1 *et seq.*, and the Illinois Use Tax, 35 ILCS 105/1 *et seq.*

The scenario referenced above stems from Illinois laws requiring motor fuel retailers to post the price per gallon of fuel as tax-inclusive. As a result, it is not feasible for a dealer to back out sales tax from the purchase price of motor fuel sales to tax-exempt entities. Therefore, if the tax-exempt entity pays with cash, it is required to pay sales tax on the motor fuel—even though the transaction is non-taxable. If the exempt entity uses a fleet card as payment, the situation is more complicated because of the number of entities involved with the sale transaction.

In Marathon's case, the Dealers transmit their daily fleet card activity (which includes sales to exempt entities) to Heartland Payment Systems ("Heartland"), a third-party technology company that provides payment-processing services. Heartland in turn transmits daily sales reports to the banks that issue the fleet cards. The issuing banks compare those reports against their tax-exempt customer lists. For each fleet purchase made by an exempt entity from a Dealer, the issuing bank makes a payment to Marathon equal to the amount of the fuel sale as shown at the pump less sales tax and processing fees. The issuing bank bills the exempt cardholder for the price of the fuel without sales tax. In this way, the exempt entity does not pay sales tax on its fuel purchases. *See* Stip., ¶ 2.

Marathon then pays to the Dealer the amount it receives from the issuing bank, plus the amount of the sales tax charged at the pump. Stip., ¶¶ 2 & 3. The amount paid to Marathon by the banks does not include sales tax on the exempt customer using the card as payment because that exempt customer is known to the card issuer to be exempt, and the sales tax is removed from the total sales amounts, which include sales tax, incurred at the pump by the exempt customer. Stip., ¶ 2. Because an exempt purchaser does not ultimately pay the sales tax that was included in the price at the pump, Marathon makes up the difference between the amount actually charged to and paid by the cardholders (which does not include sales tax) and pays the amount of that sales tax to the Dealers. Stip., ¶¶ 2 & 3. In other words, Marathon pays the sales tax to the Dealer that was not included in the tax-exempt customer's credit card remittance when that transaction at the pump is credited to the Dealer's account. Stip., ¶ 6. The Dealers remit the sales tax to the Department when they file their monthly ST-1 tax returns. Stip., ¶ 4.

Marathon bears the burden of the tax because it is the one that pays it to the Dealers. Stip., ¶ 6. The underlying transactions however, are non-taxable because they involve an exempt entity. Stip., ¶4 . The amount of tax remitted to the Department with respect to these non-taxable fuel sales was $703,599.00 during the audit period. Stip., ¶ 7. To recover that tax on non-taxable transactions, Marathon took credits of $703,599.00 against the sales tax that would have otherwise been due on its monthly ST-1 returns. Stip., ¶ 5.

After completing its audit, the Department disallowed Marathon's credit for taxes paid even though the Department concedes that the tax at issue was paid to the Department on exempt transactions. Stip., ¶ 4. The Department does not contest these facts as evidenced by the Joint Stipulation:

- Sales tax was overpaid to the Department on the transactions at issue.
- Marathon was the source of and actually bore the burden of that overpayment.
- The amount of the tax overpayment was $703,599.00, which is also the amount of the credit that was disallowed by the Department.

Stip., ¶¶ 6 & 7.

II. STANDARD FOR SUMMARY JUDGMENT

Summary judgment should be granted "if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." 735 ILCS 5/2-1005(c). "Summary judgment is proper where the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Cain v. Hamer*, 2012 IL App (1st) 112833, ¶ 11 (internal quotations omitted).

Here, the parties do not dispute the material facts in this case, as evidenced by the Joint Stipulation of Facts.[3] Furthermore, the Tribunal has provided that if Marathon prevails in this case, "the Tribunal will direct the Department to honor Marathon's claim" regardless of how Marathon's payments to Dealers are designated. *Order on Motion to Quash Taking of Deposition*, p. 4 (Mar. 2, 2016). Accordingly, there is no issue as to the form of remedy or the Department's ability to apply a remedy.

The only issue to be decided by the Tribunal is a legal one, namely, whether the Department's Notice of Tax Liability will result in unjust enrichment, and if so, how to remedy this problem. This is a solely legal issue subject to summary judgment by the Tribunal.

III. THE DEPARTMENT'S TAX ASSESSMENT WILL RESULT IN UNJUST ENRICHMENT

A. Marathon had no realistic remedy to recover its overpayments

1. *Motor fuel distributors and retailers face a unique factual situation due to the requirements to both prepay sales tax on motor fuel and also charge tax-inclusive prices at the pump.*

The Department assessed Marathon because it determined that, since the Dealers are the ones formally remitting the tax they are the ones that need to claim the credits. In the typical case, where there is no statutorily-required prepayment of sales tax by a retailer to its wholesale supplier, the Department's reasoning under the current case is correct: under Illinois law, it is the retailer (not the purchaser) that must file a claim for refund to recover sales tax improperly paid to the Department under a mistake of fact or an error of law. Marathon's case is not typical,

[3] Note also the Tribunal's remark that "the core transactions appear to be incontrovertible." *Order on Motion to Quash Taking of Deposition*, p. 1 (Mar. 2, 2016).

however; the retail sale of motor fuel to a tax-exempt entity is a special situation for which there is no clearly specified procedure in the law.

First, it is not clear under the statute that the Dealers were even permitted to file refund claims with respect to the transactions at issue. As explained in the statute and the Department's regulations, the Department cannot approve any sales tax refund claim unless the claimant can clearly establish either that: the claimant bore the burden of the tax erroneously paid, or the claimant unconditionally repaid the amount of the tax to the vendee.[4] In Marathon's case, the Dealers cannot establish either one of these alternative requirements. The Department concedes that Marathon (not the Dealers) bore the burden of the tax at issue. *See* Stip., ¶ 6. Further, the vendees in this case are the exempt entities that purchased fuel from the Dealers. Stip., ¶ 4. Because the exempt entities did not pay any sales tax on their fuel purchases, there is nothing for the Dealers to reimburse to these "vendees." Accordingly, the Dealers fail to satisfy either of the statutory requirements for obtaining a refund of the tax at issue.

Second, sales of motor fuels are different than other sales of tangible personal property because the statute requires the prepayment of sales tax on motor fuel. Specifically, a licensed distributor such as Marathon is required to collect and remit sales tax on its wholesale sales of motor fuel to retail dealers.[5] The statute clearly makes the distributor liable for any tax due.[6] During its audit, the Department reviewed Marathon's prepaid sales tax returns and found no discrepancies.

Because of this prepayment requirement, motor fuels retailers remit only a portion of the tax ultimately received by the Department on motor fuel sales. Accordingly, with respect to claims for credit of prepaid sales tax, the distributor (not the retailer) must file any refund claim

[4] *See* 35 ILCS 120/6; 86 Ill. Admin. Code § 130.1501.
[5] 35 ILCS 120/2d; 86 Ill. Admin. Code § 130.551.
[6] 35 ILCS 120/2d(g).

with the Department. Like a claimant seeking a refund related to a non-fuel transaction, the distributor is required to show that it refunded the prepaid tax to the retailer before filing a claim for credit. 35 ILCS 120/6. However, statutorily requiring that the wholesale fuel distributor act as a retailer under the prepaid tax creates a disconnect between the taxable sale of fuel from the distributor to the dealer on the one hand, and the sale from the retailer to the tax-exempt purchaser on the other hand. The delay in time between the prepayment of tax by the dealer to its distributor and the sale by the dealer to the end-user results in a large portion of sales tax being prepaid to the State on motor fuel that is later sold to tax-exempt entities. Accordingly, in the motor fuels context, where sales tax is prepaid and remitted by the distributor, it is appropriate for distributors such as Marathon to be credited for tax paid on motor fuels ultimately sold to exempt entities.

2. *Marathon's offset method fits with the overall scheme contemplated by the* Retailers' *Occupation Tax Act*

Under the Retailers' Occupation Tax Act ("ROTA"), "[n]et revenue realized for a month shall be the revenue collected by the State pursuant to this Act, less the amount paid out during that month as refunds to taxpayers for overpayment of liability." 35 ILCS 120/3; *see also* 35 ILCS 120/6 ("[n]o credit may be allowed or refund made for any amount paid by or collected from any claimant unless it appears that the claimant has unconditionally repaid, to the purchaser, any amount collected from the purchaser and retained by the claimant with respect to the same transaction under the Use Tax Act."). The same is indicated by Section 3-45 of the Illinois Use Tax Act, which provides that "[i]f a seller collects use tax measured by receipts that are not subject to use tax, or if a seller, in collecting use tax measured by receipts that are subject to tax under this Act collects more from the purchaser than the required amount of the use tax on the transaction, the purchaser shall have the legal right to claim a refund of that amount from the seller," with the proviso that "[i]f, however, that amount is not refunded to the purchaser for any reason, the seller is liable to pay that amount to the Department." 35 ILCS 105/3-45. These provisions evidence a clearly stated legislative preference that overpayments of sales tax be returned to the person who paid the tax. Having the State keep the money is evidently the non-preferred choice. An overpaid tax was by definition not owed to the State, and therefore ought to be returned to the person who paid the tax.

Here, there were two possible outcomes once a sale of fuel was made to a tax-exempt entity and this transaction was processed by the fleet card company—either Marathon, the person who paid the tax could keep the money, or the State could keep the money. Because sales tax was not owed on the sale, the legislative preference is for the tax remitted to the State to be returned to the person who paid the tax: Marathon. This is precisely what Marathon's fleet card payment and credit arrangement agreement did, thus carrying out the legislative prerogative expressed by the ROTA.

The legislative history of the prepaid sales tax rule for motor fuel supports this interpretation. The General Assembly expressed a deep suspicion of Dealers, and sought to have tax prepaid by the Dealers to the distributors to avoid tax evasion. *See* 83RD GENERAL ASSEMBLY, REGULAR SESSION pp. 55–67 (June 24, 1983). For example, Sen. DeAngelis supported the prepayment legislation because "people with strange sounding foreign names who stand there and sell gasoline, they get nabbed, they sell the place to their cousin, the cousin operates for a while, he gets nabbed, then another cousin comes in and does that." *Id.* at 65. If the distributor was perceived by the legislature to be the more trustworthy party, then it could be better trusted to validly account for sales to tax-exempt entities relative to the Dealers, in accordance with the intent of the General Assembly.

3. Marathon had no remedy and its facts are distinguishable from other cases

There are no Illinois cases addressing the unique factual posture of this case. The Department may attempt to analogize the present case to various precedents, but none of these are sufficiently analogous to control the outcome of this case. We will address two lines of reasoning below and show why they do not control the outcome of this case: (1) that equitable tolling is not allowed for tax refund statutes of limitations, and (2) that making a formal refund claim for self-remitted use tax, as opposed to offsetting it on the taxpayer's return against other taxes owed, is required.

In *Dow*, a corporation was under an income tax audit and was issued a Notice of Deficiency in December 1979. *See Dow Chem. Co. v. Dep't of Rev.*, 224 Ill. App. 3d 263 (1st Dist. 1991). The taxpayer protested the Notice of Deficiency in early 1980. The Department determined errors were made during the audit, and sent the case back for a re-audit in March 1982. In December 1982, while the re-audit was still ongoing, Illinois changed from a separate return policy to a unitary combined return policy. A year later in December 1983, the Department concluded its re-audit, and found that the taxpayer had actually overpaid its tax under the new (but retroactive) filing methodology. The Department accordingly voided the originally-issued Notice of Deficiency but refused to entertain the taxpayer's claim for a refund of the overpayment, arguing that their claim was time-barred by the statute of limitations.

The taxpayer in *Dow* argued for equitable relief, namely an equitable tolling of the statute of limitations. The taxpayer argued that uncertainty in the law concerning whether the separate return or combined return method was required, and the delays caused by the Department's re-audit relating to that issue, prevented it from acting in a timely manner. The Court held that it could not equitably toll the statute of limitations because "taxpayers ha[ve] an affirmative duty to file for a refund within a prescribed period of time" and Illinois case law interprets statutes of limitation strictly. *Id.* at 267.

Dow has no application to the case at bar. First, the remedy for the taxpayer in *Dow* was clear—file for a refund—the only question was whether the income tax refund statute was subject to equitable tolling. Here, as we have shown, there was no clear remedy for Marathon. Second, *Dow* was an income tax case where a taxpayer was reporting and paying its own liability, not a sales tax case where a company is statutorily compelled to collect taxes on behalf of the State and devise ways to give effect to the General Assembly's and the Department's exemption decisions; indeed, this is a prepaid sales tax scenario where a wholesaler is made to collect and remit tax of a retailer before it is known whether and in what amount exempt sale will be made. Third, contrary to the taxpayer in *Dow*, Marathon is not requesting an equitable tolling of the statute of limitations—Marathon acted affirmatively unlike Dow. Marathon is requesting that the Tribunal prevent action by the Department (finalizing the assessment) that will result in the unjust enrichment of the Department, or that the Tribunal remedy such unjust enrichment once assessed via statutorily-allowed offsets. Therefore, *Dow* is inapposite.

Another case which appears on the surface to be more analogous to ours, *American Airlines*, is also distinguishable. *See Am. Air., Inc. v. Dep't of Rev.*, 402 Ill. App. 3d 579 (1st Dist. 2009). In that case, the taxpayer self-remitted use tax on jet fuel purchased in Illinois. After a new I.R.S. ruling that classified more of its flights as being international or in foreign trade and therefore not subject to Illinois use tax, the taxpayer timely filed for refunds of tax associated with fuel used in such flights. During the audit, the taxpayer was asked to re-submit its refund claim forms because they were purportedly not filled in correctly. Upon doing so, the taxpayer increased the amount of tax it was claiming for refund, because in the time since the original filing and the second filing, it realized more of its flights were international exempt flights than it originally believed. The Department denied the second refund claim, saying that the first claim did not toll the statute of limitations, and that the second claim did not relate back to the first claim, and was therefore time-barred.

For reasons that are not germane to this discussion, the Court agreed with the Department that the second claim did not relate back to the first, and was therefore time-barred. It also rejected the taxpayer's equitable tolling argument by citing to *Dow*. *American Airlines* is distinguishable from the present case because there the taxpayer had a clear remedy—file a refund claim for the use tax it remitted directly to the Department within the statutory time period. Moreover, self-remitted use tax is, like the income tax, different from collecting prepaid sales taxes on wholesale sales to retailers on the State's behalf or from collecting taxes on retail sales upon the State's behalf as a retailer, like Marathon and its Dealers respectively did. Again, forcing a company to collect tax on the State's behalf and also comply with a variety of conflicting rules (e.g., prepay tax, charge tax at the pump, but do not tax certain purchasers) places Marathon in a different position entirely than the taxpayer in *American Airlines*. And, Marathon is not requesting an equitable tolling of the statute of limitations, but rather for the Tribunal to prevent the unjust enrichment of the Department, or remedy such unjust enrichment via offsets.

Dow and *American Airlines* bear a surface resemblance to the instant case because the taxpayers were denied repayment of funds that equity would demand be repaid (in the absence of other considerations). However as explained, the similarities end there, because neither case is concerned with unjust enrichment and related equitable doctrines, and neither case focuses on the taxpayer collecting and remitting tax on behalf of the state in wholesale/retail motor fuel settings.

Another case with a different line of reasoning that the Department may attempt to rely on is *Armour*, where a pharmaceutical company disputed the Department's Notice of Tax Liability in connection with its claim of the manufacturing exemption for Use Tax. *Armour Pharma. Co. v. Dep't of Rev.*, 312 Ill. App. 3d 662 (1st Dist. 2001). Any property "resold as an ingredient of an intentionally produced product or by-product of manufacturing" is exempt from use tax. 35 ILCS 105/2. Armour purchased alcohol for use in the manufacturing of its pharmaceutical products—after it was used, the alcohol was contaminated, and needed to be cleaned before it could be used again. The Department held the taxpayer should pay Use Tax on the alcohol. However, because the alcohol was contaminated and unusable after the manufacturing process, the Court ruled that it was a by-product eligible for the manufacturing exemption.

While the Court ruled for the taxpayer and voided the Department's Notice, it also ruled that Armour's method of recovering overpaid tax—by offsetting other sales tax on its return by the overpaid amount—was incorrect and that it should have filed a formal refund claim with the Department. The Court ruled that the taxpayer's overpayment of use tax resulted from "error of law," which put it squarely within the refund statute, which is open to taxpayers that have overpaid through a "mistake of fact or an error of law." 35 ILCS 120/6.

Armour does not apply to the case at bar. *Armour* dealt with self-assessed use tax, and therefore, there was no question as to who could claim a refund (Armour) or how it would be filed (through the normal process). Here, the issue is how to process an overpayment of sales tax collected on sales which the Department agrees were tax-exempt owing to conflicting laws requiring such collection, and remitted to the State by two different taxpayers (Marathon directly remitted the prepaid portion; the Dealers directly remitted the non-prepaid portion, though were reimbursed by Marathon for tax on exempt sales). There are serious doubts as to whether a refund of the overpaid tax in this case was obtainable by either the Dealers or by Marathon through the statutory procedures, unlike *Armour* where the controversy was over whether the sale was exempt in the first place. Furthermore, the taxpayer in *Armour* had apparently remitted the tax, and then at a later date determined that use tax associated with the alcohol was not owed, allowing the Court to say that the taxpayer made an error of law. Here, there was no error of law—all relevant parties, including the Department, have always agreed that the sales at issue were tax-exempt pursuant to 35 ILCS 120/2-5. *See* Stip., ¶ 4. Moreover, there was no mistake of fact on Marathon or the Dealers' part because the fleet card system ensured that all the exempt sales at issue were properly categorized. *See* Stip., ¶ 2. The remittance of the overpaid sales tax in this case is, unlike *Armour*, not due to a mistake of fact or an error of law, and therefore *Armour* cannot serve as a basis for ruling against Marathon.

B. The Department will be unjustly enriched if its assessment is allowed to stand

Unjust enrichment occurs when one person unjustly retains a benefit to another's detriment in violation of fundamental principles of justice, equity, and good conscience. *HPI Health Care Services, Inc. v. Mt. Vernon Hosp., Inc.*, 131 Ill. 2d 145, 160 (1989); *see also Smithberg v. Ill. Mun. Retirement Fund*, 192 Ill. 2d 291 (2000) ("When a person has obtained money to which he is not entitled, under such circumstances that in equity and good conscience he ought not retain it, a constructive trust can be imposed to avoid unjust enrichment."). An action to prevent unjust enrichment is maintainable in all cases where one person has received money that in equity and good conscience he ought not be allowed to keep it. *A.T. Kearney v. INCA Int'l, Inc.*, 132 Ill. App. 3d 655, 660 (1st Dist. 1985).

Here, the elements of unjust enrichment are satisfied. First, the Department would retain a benefit, namely the $703,599.00 of tax remitted to it that was associated with sales to tax-exempt purchasers. This retention of the taxes paid would be unjust for two reasons. First, the sales at issue were tax-exempt and therefore the tax was not owed to the Department. Stip., ¶ 4. Second, because, as explained *supra*, there is no procedure by which Marathon can get a refund for the taxes that the Department agrees it paid and bore the burden of, and now agrees were not due. The Department's unjust retention of the $703,599.00 of tax remitted on sales to tax-exempt entities would be detrimental to Marathon in particular, because Marathon paid and bore the burden of these taxes. Stip., ¶ 6.

Finally, this unjust and detrimental retention of the taxes paid by Marathon would violate fundamental principles of justice, equity, and good conscience because the combination of: (1) requiring prepayment of sales tax, (2) requiring that tax be included in the price at the pump, and (3) exempting certain customers from sales tax makes simultaneous compliance with all three State policies impossible for taxpayers. Though we contest *supra* whether a refund to the retailer is viable, it is beside the point for unjust enrichment purposes. No policy should force taxpayers to knowingly break the rules and then file false refund claims[7] in perpetuity to fix the problem caused solely by State policies, and not taxpayer actions. Yet this is precisely what the Department's "model approach" to this problem mandates. Such a mandate is fundamentally unfair and cannot be recommended in good conscience. Therefore, because the Department's unjust retention of $703,599.00 of taxes to the detriment of Marathon in violation of fundamental fairness would occur if the Notice of Tax Liability were allowed to stand, the Department would be unjustly enriched. In order to prevent the Department from being unjustly enriched the Tribunal should void the Department's Notice of Tax Liability, which would leave all parties whole.

[7] A refund claim must be "the result of a mistake of fact or an error of law." 35 ILCS 120/6. There is no mistake of fact or error of law in our situation, and this in itself could serve as a basis for rejecting the refund claim, rendering that remedy illusory. *See supra* Section III.A.3.

This result conforms to the long-standing policy, inherent in the Illinois sales tax structure, of avoiding unjust enrichment. For example, in *John Nottoli, Inc. v. Dep't of Rev.*, 272 Ill. App. 3d 822, 824 (4th Dist. 1995), the court explained that the refund and credit provisions of section 2 of the Retailers' Tax Act were "designed to prevent unjust enrichment on the part of retailers" who might otherwise collect tax in excess of that allowed. *See also Acme Brick & Supply Co. v. Dep't of Rev.*, 133 Ill. App. 3d 757, 760 (2d Dist. 1985). The same principle ought to apply when it is the State that is unjustly enriched. *See, e.g.*, *Adams v. Jewel Co., Inc.*, 63 Ill. 2d 336, 353 (1976) (dissenting, Goldenhersh, J.).

Importantly, ruling in Marathon's favor in this case would not create any widely-applicable precedent for taxpayers to circumvent the prohibition against them filing a sales tax refund claim directly with the Department. Marathon's situation is unique to the motor fuel industry that is subject to prepayment of sales taxes by retailers to suppliers, that engages in fleet card agreements, and that reimburses tax on exempt sales to the retailers. Any ruling here, therefore, would have little application beyond the facts of this case.

The Department would be unjustly enriched if it was to retain the tax at issue and therefore the Department's assessment against Marathon should be voided. Given that Marathon directly remitted prepaid sales tax to the Department during the audit period, offsetting this amount with a credit to avoid unjust enrichment of the Department should be straightforwardly allowed under Illinois law. The issue is less clear as to the remainder of the tax liability, the burden of which was undeniably borne and paid by Marathon, but which was technically remitted by the Dealers. For the reasons previously stated, to uphold the Department's Notice of Tax Liability would cause unjust enrichment at the expense of Marathon. The cumulative effect of conflicting policies foisted upon Marathon and the Dealers created a unique factual milieu and left Marathon without an adequate remedy. Marathon requests that the Tribunal prevent unjust enrichment under these unique facts.

WHEREFORE, Petitioner prays that this Honorable Tribunal:

1. Rule that unjust enrichment will occur if the Department's Notice of Tax Liabilities are finalized and either:
    a. Cancel the Notice of Tax Liability to prevent unjust enrichment; *or*
    b. Direct the Department to use its power under 20 ILCS 2505/2505-275 to offset the taxes assessed in the Notice of Tax Liability against Marathon with the taxes already paid by the Dealers.

Respectfully submitted,

MARATHON PETROLEUM COMPANY LP

By: ______________________

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