

**IN THE ILLINOIS INDEPENDENT TAX TRIBUNAL
COOK COUNTY, ILLINOIS**

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

**MARATHON PETROLEUM CORPORATION’S RESPONSE TO THE ILLINOIS DEPARTMENT
OF REVENUE’S MOTION TO QUASH TAKING OF DEPOSITION**

Petitioner, Marathon Petroleum Company LP (“Marathon”), pursuant to Illinois Supreme Court Rules 202 and 204, asks this honorable Tribunal to deny Respondent’s Motion to Quash the Notice of Deposition, and to compel the Respondent, the Illinois Department of Revenue (the “Department”) to (i) provide the identity or identities of the Department’s representative or representatives that is/are responsible for executing actions of the Department pursuant to 20 ILCS 2505/2505-275 and who has/have information regarding the ability of the Department to credit overpayments; and (ii) produce such representative or representatives for deposition. In support thereof, Marathon states as follows:

I. BACKGROUND

On May 23, 2014, Marathon filed its Petition in the present matter with this Tribunal. In the Petition, Marathon outlined its Counts against the Department which included that: (i) the Department’s assessment against Marathon, which is at issue in the present matter, was an impermissible contravention of the State’s policy against unjust enrichment and (ii) Marathon had a claim for recoupment of the tax paid to the

Department for exempt purchases because, as the Department determined, Marathon “bore the burden” of the tax and incurred the tax overpayment.

On September 2, 2014, Marathon served upon the Department its First Set of Written Interrogatories and on February 4, 2015, the Department served its response to Marathon’s First Set of Written Interrogatories. Attached as **Exhibit 1**.

The Department objected to several of Marathon’s Written Interrogatories, and Marathon filed its Motion to Compel the Department’s responses on April 2, 2015. On June 24, 2015, by Order, this Tribunal denied Marathon’s Motion to Compel and required the parties to schedule and take depositions within the next 90 days.

In furtherance of this Tribunal’s June 24, 2015 Order and pursuant to Supreme Court Rule 202, Marathon served upon the Department, on December 7, 2015, its Notice of Deposition requesting the Department identify and produce “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.” In response to Marathon’s Notice of Deposition, the Department filed its Motion to Quash Taking of Deposition on January 15, 2016, which is the issue of the present filing.

II. SCOPE OF DISCOVERY

Illinois Supreme Court 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 any other party,” and that applies to discovery of information that may lead to relevant evidence.

If evidence has *any* tendency to make a consequential fact more or less probable than it would be without the evidence, it will be considered “relevant evidence.” Ill. R. Evid. 401. A “consequential fact” need not be dispositive; on the contrary, “[t]he fact to be proved may be ultimate, intermediate, or evidentiary; it matters not, so long as it is of consequence in the determination of the action.” *People v. Monroe*, 66 Ill. 2d 317, 322 (1977). Illinois law favors admissibility over disallowance. *See People ex rel. Noren v. Dempsey*, 10 Ill. 2d 288, 293 (1957) (“The basic principle that animates our law of evidence is that what is relevant is admissible. Exceptions to that principle must justify themselves.”). “Relevancy is ‘tested in the light of logic, experience and accepted assumption as to human behavior.’” *Voykin v. Estae of DeBoer*, 192 Ill. 2d 49, 57 (2000) (internal citation omitted).

III. ARGUMENT

A. Discovery is Needed to Test the Department’s Unsupported Statutory Interpretation

Marathon’s Notice of Deposition requests the Department identify and produce “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.”

The Department filed an Answer to Marathon’s Petition rather than moving to dismiss, hence the claims addressed above and stated by Marathon in its Petition are the

touchstone for any inquiry regarding the relevance of discovery. *See* Ill. Sup. Ct. R. 181(a); 735 ILCS 5/2-610; Ill. R. Evid. 401.

Marathon's requested deposition seeks information relevant to both stated counts in the Petition. Specifically, Section 2505/2505-275, in relevant part, reads as follows:

Tax overpayments. In the case of an 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 . . .

The Department argues in its Motion to Quash that Section 2505/2505-275 is not relevant in the present matter and that "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." Dept's Motion to Quash, p. 8. However, that argument is not supported by the plain language of Section 2505/2505-275. Rather, the Department's argument relies on inserting language or interpretations not suggested by the statutory terms.

Further the Department argues that "the provision does not allow or permit, much less require, the Department to credit one taxpayer's overpayment to another taxpayer . . ." Dept's Motion to Quash, p. 5. First, it is the language of the statute that determines whether the provision allows the adjustments. There is no language limiting credits of overpayments to a single taxpayer. Second, factually relevant to that determination might be whether the Department has done so before, despite its current protestations, and whether it is indeed possible for the Department to make such an adjustment.¹

¹ For instance, without limiting the potential scenarios, whether and how the Department has dealt with instances where one taxpayer's payment was applied to a different taxpayer, either by error of the taxpayer or of the Department, or, where payment for one tax-type was applied to a different tax, or even a different tax-type of another taxpayer, would be relevant to factually prove or disprove the Department's claim here.

The Department mischaracterizes the factual situation. Specifically, the Department's own auditor stated in his audit notes that Marathon "bore the burden" of the tax on exempt sales made by its dealers to exempt purchasers, because Marathon paid the tax on such sales to the dealers to be remitted to the Department. See Exhibit 2. Further, the Department, in its Response to Petitioner's Motion to Compel (attached as Exhibit 3), conceded that the overpayment was Marathon's. Dept's. Response to Motion to Compel pg. 4 ("Rather, Marathon over paid its dealer's tax liability."). Additionally, paragraph 32 of the Petition and the Department's Answer state as follows:

32. The Courts agree that "a tax is overpaid when a taxpayer pays more than [sic] 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 [Marathon] 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 [Marathon] 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 that such case law speaks for itself.

Dept's Answer attached as Exhibit 4. While admitting to the existence of the case law, the Department did not deny that Marathon was overpaid as to the amounts received by the Department on the exempt sales at issue in the present matter. A statement of fact, if not denied, is admitted. 735 ILCS 5/2-610(b). Thus, it is admitted in the Answer and in the Response to the Motion to Compel, that there was an overpayment of the dealers' tax, and that Marathon bore the burden of an overpayment arising from an act administered by the Department. So the relevant inquiry is whether it may, both legally and factually, be credited to

Marathon, or, if it cannot be, whether finalizing the assessment would result in an irreparable unjust enrichment contrary to State policy.

B. Unjust Enrichment

The assessment against Marathon is for the same amount paid by Marathon on exempt sales by its dealers. Thus, the Department seeks a double payment of the same tax amount by the same taxpayer: Marathon. The claims in the Petition are that the Department, armed with the knowledge that Marathon bore the burden of the tax and made the overpayment, cannot ignore the State policy against unjust enrichment and simply refuse to (a) avoid unjust enrichment by cancelling its assessment, or (b) correct the unjust enrichment after assessment through recoupment and Section 2505/2505-275 of the Civil Administrative Code.

Unjust enrichment occurs when one unjustly retains a benefit to another's detriment, and that retention of the benefit violates the fundamental principles of justice, equity, and good conscience. *HPI Health Care Services, Inc. v. Mt. Vernon Hosp., Inc.*, 131 Ill. 2d 145, 160 (1989). Unjust enrichment “underlies a number of legal and equitable actions and remedies, including the equitable remedy of constructive trust and the legal actions of *assumpsit* and restitution or quasi-contract.” *Id.* The Illinois sales tax system is designed to prevent unjust enrichment. *John Nottoli, Inc. v. Dept. of Rev.*, 272 Ill. App. 3d 822, 824 (4th Dist. 1995) (“There is no question but that section 2-40 of the Retailers' Tax Act is designed to prevent unjust enrichment on the part of retailers by the collection of a retailer occupation tax in excess of that allowed on the property subject to tax.”); *see also Acme Brick & Supply Co. v. Dep't of Rev.*, 133 Ill. App. 3d 757, 760 (2d

Dist. 1985) (“The trial court determined that the purpose of section 2 was to prevent the unjust enrichment . . .”).

In a situation where the plaintiff is seeking recovery of a benefit that was transferred to the defendant by a third party the courts have found that retention of the benefit would be unjust where “(1) the benefit should have been given to the plaintiff, but the third party mistakenly gave it to the defendant, (2) the defendant procured the benefit from the third party through some type of wrongful conduct, or (3) the plaintiff for some other reason had a better claim to the benefit than the defendant. *HPI Health*, 131 Ill. 2d at 161–62 (internal citations omitted). Courts have found that money held unlawfully by the government must be returned on equitable grounds. *Alvarez v. Pappas*, 229 Ill. 2d 217, 222–23 (2008) (citing *Gannaway v. Barricklow*, 203 Ill. 410 (1903)). As noted by Justice Goldenhersh of the Illinois Supreme Court, the “vague principle of fireside equity that, since only the State will be enriched unjustly, no harm is done” is not supported by authority “for the obvious reason . . . that there is none.” *Adams v. Jewel Co., Inc.* 63 Ill. 2d 336, 353 (1976) (dissenting, Goldenhersh, J.).

Marathon is raising this issue to prevent the second unjust enrichment that will occur if the Department finalizes its assessment in the current matter. To reiterate, the Department admits that Marathon bore the burden of the tax even though no tax was due on such sales to exempt purchasers—this is the initial unjust enrichment by the State that Marathon is willing to let go. But if the Department’s assessment is allowed to stand, the State will be unjustly enriched for a *second* time, except that this second overpayment will be on Marathon’s own taxpayer account. The Department can stop this second unjust enrichment by not assessing Marathon in the current matter, as is prayed for in

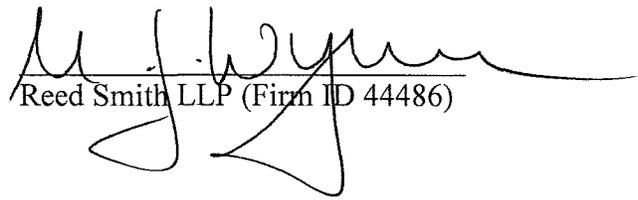
Marathon's petition. Marathon needs to depose a person or persons at the Department who can testify whether there is another way for Marathon to offset its payments already made or the payment it will make if the Department is allowed to assess a tax amount it already determined was paid to the State.

A denial by this Tribunal of the ability to take the requested deposition is in all relevant contexts a determination of Summary Judgment by this Tribunal against Marathon on its entire Petition. With unanswered Interrogatories and an inability to depose anyone, by granting the Department's motion to quash the Tribunal would effectively shut down discovery, implying that no material facts are disputed and that the issue is teed up as a purely legal one. But this case is largely factual, there being an admitted overpayment of an amount which is to be twice collected if the assessment is finalized and there being disputed facts about the Department's ability to avoid or cure the unjust enrichment which will, contrary to State policy, result. Further discovery is needed to sort out fact from fiction.

WHEREFORE, Defendant requests that this Honorable Tribunal deny the Department's Motion to Quash Petitioner's Deposition and Order the Department to produce a suitable deponent within 30 days.

February 15, 2016

Respectfully submitted,



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EXHIBIT 1

**ILLINOIS INDEPENDENT TAX TRIBUNAL
CHICAGO, ILLINOIS**

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

**ILLINOIS DEPARTMENT OF REVENUE’S RESPONSE TO
PETITIONER’S FIRST SET OF INTERROGATORIES TO RESPONDENT**

Now comes the State of Illinois, Department of Revenue (“Department”), by and through its attorney, LISA MADIGAN, Illinois Attorney General, and responds to Petitioner’s First Set of Interrogatories to Respondent as follows:

GENERAL OBJECTIONS

These General Objections are made in addition to the Specific Objections and no full or partial answer of a Request is intended to waive either these General Objections or any Specific Objection to Request. The Department incorporates the following General Objections into their Responses and Specific Objections below:

- (a) The Department objects to the extent Petitioner’s First Set of Interrogatories seeks disclosure of information protected by the attorney-client privilege, the attorney work product doctrine, or any other applicable privilege or doctrine.
- (b) The Department objects to the extent Petitioner’s First Set of Interrogatories purport to impose obligations beyond those imposed by the Illinois Supreme Court Rules, Rules of the Illinois Independent Tax Tribunal, 86 Ill.Adm.Code § 5000.10, *et. seq.*, or any rules or orders of this Court.

(c) The Department objects to the extent Petitioner's First Set of Interrogatories seek or call for a legal conclusion rather than the admission of a fact.

ANSWERS TO INTERROGATORIES

INTERROGATORY 1: State with specificity the facts that you believe support the denial set forth in the Answer to allegation number 21 of the Petition.

RESPONSE: The allegations in paragraph 21 were denied because they contained a legal conclusion.

INTERROGATORY 2: From the date of the commencement of the audit which concluded in the issuance of the notices of tax liability that are the subject of the Petition to the date of the Department's response to these Interrogatories state whether the Department had access to each of the following, with respect to a retailer in Illinois registered under the Illinois Retailers' Occupation Tax Act to whom Marathon made sales for resale of gasoline during any or all of the audit period covered by said notices:

- a. The retailer's registration number;
- b. The tax returns filed by the retailer;
- c. The tax return information provided by the retailer;
- d. The records of a Department audit of the retailer;
- e. The retailer's tax payment and collection history; and
- f. Record of any claim for credit or refund filed by the retailer for said period, and its status and disposition.

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.

INTERROGATORY 3: State with specificity the facts that you believe support the denial set forth in the Answer to allegation number 30 of the Petition.

RESPONSE: Allegation number 30 of the Petition was denied because in order to admit the statement, every Illinois Marathon Branded dealer would have to be audited. In addition, documentation would have to be provided on every Marathon Branded dealer that was audited to prove that all the tax was remitted.

INTERROGATORY 4: With regard to 20 ILCS 2505/2505-275, identify with specificity each record or document, including, without limitation, a regulation, informational bulletin, technical advice memorandum, intra-departmental memorandum, instruction, procedure, letter, electronic mail, or other record, whether maintained or accessed in physical format or electronically, concerning Department action pursuant to 20 ILCS 2505/2505-275.

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.

INTERROGATORY 5: Unless the full legal citation for such authority is included in the materials identified in response to Interrogatory No. 4, identify with specificity any statute, regulation, judicial precedent, or other legal authority that regards action by the Department pursuant to 20 ILCS 2505/2505-275.

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.

INTERROGATORY 6: Identify with specificity each program area, bureau, division, office of other organizational unit within the Department responsible for executing actions of the Department pursuant to ILCS 2505/2505-275 with respect to sales (occupation), use and excise taxes administered by the Department.

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.

INTERROGATORY 7: For any unit of the Department identified in response to Interrogatory No. 6, identify, by name, title, and the location where they are primarily employed by the Department, each person within such unit that is responsible for implementation of Department action pursuant to 20 ILCS 2505/2505-275.

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.

INTERROGATORY 8: Identify, by name, title and the location where they are primarily employed by the Department, any person, or persons if there is more than one, with authority to order Department action pursuant to 20 ILCS 2505/2505-275.

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.

INTERROGATORY 9: Disclose the name and title of any person, or persons employed by the Department, who, prior to the date of the response to these Interrogatories, requested of any person identified in Interrogatory No. 8 that the Department take action pursuant to 20 ILCS 2505/2505-275 with respect to the amount which Allan Schell, Revenue Auditor III, concluded the Taxpayer "bore the burden of the tax" in page 2 of the Auditor's Narrative dated March 12, 2014, and the amount of liability which the same narrative describes as "disallowed use of franchise exempt sales of \$572,392.00."

RESPONSE: The answer to this interrogatory is contained in the Department's audit file, specifically the document titled "Auditor's Narrative," page, 2, a copy of which was previously provided to counsel for the Petitioner.

INTERROGATORY 10: Disclose the name and title of each person, or persons, employed by the Department, who, prior to the date of the response to these Interrogatories, with respect to the amount which Allan Schell, Revenue Auditor III, concluded that the Taxpayer "bore the burden of the tax" in page 2 of the Auditor's Narrative dated March 12, 2014, and the amount of liability which the same narrative describes as "disallowed use of franchise exempt sales of \$572,392.00", requested authorization to offset the two amounts.

RESPONSE: The answer to this interrogatory is contained in the Department's audit file, specifically the document titled "Auditor's Narrative," page, 2, a copy of which was previously provided to counsel for the Petitioner.

INTERROGATORY 11: With respect to each request made by a person disclosed in response to Interrogatories No. 9 and No. 10, disclose the name and title of each person, or persons, to whom the request was made.

OBJECTION: The Defendants object to this interrogatory as ambiguous and unclear. It is not clear what "request" the interrogatory is referring to. The persons disclosed on page 2 of the Auditor's Narrative" did not make any request. They were supervisors of the Department's auditor.

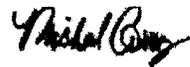
RESPONSE: For the reasons stated in the objection above, the Department cannot answer.

INTERROGATORY 12: Identify by name, title, employer and business address any and all individuals that assisted or were consulted in the preparation of any response to these Interrogatories.

RESPONSE: (a) Allan Schell, Revenue Auditor III; (b) Roger Koss, Sales and Miscellaneous Taxes Division Manager; and (c) Angela Freitag, Revenue Audit Supervisor; (d) Michael Coveny, Special Assistant Attorney General.

Dated: February 4, 2015

Respectfully submitted,



Illinois Department of Revenue
100 West Randolph Street, 7-900
Chicago, IL. 60601
(312) 814-6697; FAX (312) 814-4344

Michael Coveny
Special 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 Response to Petitioner's First Set of Written Interrogatories upon:

Michael J. Wynne
Reed Smith LLP
10 South Wacker Drive
Chicago, IL 60606
mwynne@reedsmith.com

Adam Beckerink
Reed Smith LLP
10 South Wacker Drive
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By email to the email addresses listed above on February 9, 2015.

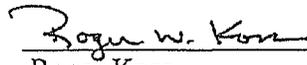


Michael Coveny

STATE OF ILLINOIS)
)
COUNTY OF SANGAMON) SS

VERIFICATION

I, Roger Koss, being first duly sworn upon his oath, deposes and says that I am an employee of the Illinois Department of Revenue and as such I am the duly authorized agent for the Illinois Department of Revenue, that I have read the foregoing Department of Revenue's Response to Petitioner's First Set of Written Interrogatories, 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 the matters and things contained in it are true to the best of my knowledge, information and belief.



Roger Koss
Sales and Miscellaneous Taxes Division Manager
ILLINOIS DEPARTMENT OF REVENUE

Dated: February _____, 2015

EXHIBIT 2

AUDITOR'S NARRATIVE
MARATHON PETROLEUM COMPANY LP
AUDIT PERIOD: 01/01/2009 TO 06/30/2011
REGISTRATION NUMBER: 2877-6585
TRACK NUMBER: A362241024

BACKGROUND AND HISTORY OF TAXPAYER

Marathon Ashland Petroleum LLC (taxpayer) is one of the largest oil companies in the U.S., operating primarily in the Midwest. Though based in Houston Texas, corporate headquarters is located in Findlay Ohio. Illinois operations include both a refinery and fueling terminals. The terminals are basically tank farms storing various grades and types of refined fuels from which trucks are loaded in making deliveries to area customers.

AUDIT PERIOD

The audit period is from January 1, 2009 through June 30, 2011. The Statute of Limitations runs through June 30, 2012. Statute of Limitations waivers were obtained extending the statute to June 30, 2014.

MULTIPLE LOCATIONS

Taxpayer does maintain several locations within the state of Illinois. They operate a refinery, eight terminal (tank farms or marketing division) and five asphalt plants.

PAYMENT VERIFICATION

ACCELERATED PAYMENTS

Taxpayer is required to make accelerated payments.

SALES TAX RETURNS

The transcript of returns included with the audit package, were compared with the taxpayer copies of the ST-1's and checked for errors. No differences were found. Verification of payments and timeliness of filing was performed via department records.

ST-16 and ST-17

The taxpayer takes advantage of the Manufacturer Purchase Credits. The taxpayer presented me with copies of the returns for 2009, 2010 and 2011. Verification that the returns were received from the department was requested through Jason Dasher. The copies of the departments returns were received and they were received prior to the due date.

PREPAID SALES TAX ON MOTOR FUEL

A tax paid by retailers to distributors at an amount of three cents per gallon. The taxpayer being a distributor is required to collect and remit the five or six cents per gallon that it sells to retailers. Verification of payments and timeliness of filing was performed via department

records. Copies of the returns were provided by the taxpayer and are being submitted with the audit.

BUSINESS INCOME TAX RETURNS

The taxpayer is also registered for BIT. The taxpayer has a calendar year end of December 31 and files form 1065 (Federal) and IL-1065 (Illinois). Compliance was verified via Gentax for the periods ending December 31, 2009 and 2010. Hardcopies were provided by the taxpayer and are included in the audit folder.

Personal Income Tax for Individuals and Trusts

There were two partners in 2009 and three partners in 2010. The 2009 return shows a loss and the one shareholder does not maintain a BIT account. Since the 2009 shows a loss a referral was submitted. The 2010 return has two minor partners who file as part of the major partners unitary return.

WITHHOLDING INCOME TAX

The taxpayer is also registered for WIT. All records and payments have been filed and paid to the department in a timely manner. Verification of payments and timeliness of filing was performed via department records; information was printed for hard copies.

SALES RECONCILIATION

SCHEDULE 3

A sales reconciliation was prepared by using the summary of transactions by state and recording those totals under B&R's.

SCHEDULE 5

Schedule 5 was prepared to verify sales tax collections. This was accomplished by reconciling the tax collected per the books and records to that reported on the ST-1 returns. The sales tax collected and the sales tax remitted shows a balance due of \$571,392.00.

Exempt Credit Card Sales

All Marathon Gas Stations are independently owned (there are no corporate owned stations) and the taxpayer has various types of credit cards issued through the corporation. When an exempt organization purchases gas at the pump sales tax is paid since the tax is built into the price at the pump. The dealers transmit their daily credit card activity to Heartland Payment Systems. The credit card companies then run the sales reports against their tax exempt customer list. They then pay the taxpayer for the sales transaction minus the sales tax and processing fees. The taxpayer, for some reason, pays the dealers the full amount of the sales transactions plus sales tax but minus a processing fee. The exempt agencies are billed by the banks for the sales minus the sales tax. So the exempt agencies are bill correctly and the dealers have reported the sales as taxable and paid the tax on the exempt sales. So at this point the taxpayer has bore the burden of the tax when they sent it to the dealers to remit on their sales tax returns. So to recover the sales tax they are offsetting the sales tax from their bulk sales against the exempt credit card sales. The process has been disallowed since the dealers are the one remitting the tax they are the ones that need to claim the credits. This was discussed with Charles Frederick and James Irwin who

were in agreement with the decision after their review. The other issue is that the exempt sales take place throughout the state yet they are offset the tax paid to only the terminal locations, eight of them, where the bulk transactions take place. So an exempt Chicago sale is being used to offset a bulk sale in Rockford.

INTERNAL CONTROL

The internal controls of the taxpayer were reviewed and found to be adequate.

SALES EXAMINATION

The taxpayer provided me with a detailed list of its customers. The customers were alphabetically sorted and every fourth customer's certificate was pulled for review. The taxpayer had all of the certificate on file and all were in proper order. There is no tax liability established in this portion of the audit.

PURCHASES EXAMINATION

CONSUMABLE GOODS AND FIXED ASSETS

The consumable supplies and fixed assets were examined using CAA. The taxpayer is a Direct pay participant with the State of Illinois. The purchases are divided into two divisions, Marketing and Refinery. The Refinery Division consists of the refinery and the tank farm located at the refinery and the Marketing Division consists of the remaining tank farms and the asphalt plants. Each division's examination is set up into 5 strata's with each strata having their own taxable percentage. Listed below are the new percentage for the taxable, MPC earned and MPC allowed to be used.

Marketing:

<u>Strata</u>	<u>Taxable %</u>	<u>MPC Earned %</u>	<u>MPC Use %</u>
Strata 1	63.68%	0.00%	0.00%
Strata 2	55.42%	0.00%	0.00%
Strata 3	60.02%	0.00%	0.00%
Strata 4	23.70%	0.00%	0.00%
Strata 5	Detailed	Detailed	Detailed

Refinery:

<u>Strata</u>	<u>Taxable %</u>	<u>MPC Earned %</u>	<u>MPC Use %</u>
Strata 1	30.02%	39.76%	20.80%
Strata 2	24.70%	43.06%	14.59%
Strata 3	19.96%	41.58%	7.75%
Strata 4	15.86%	46.73%	8.94%
Strata 5	Detailed	Detailed	Detailed

The MPC Use Percentage for the refinery is the percentage based on the total sample size. Converted the percentage to a percentage of taxable purchases for audit calculations. So for

example Stata 1 was $(20.80\% \times 100)/30.02\%$ or 69.29%. This was done for all four strata's and worked into the workpapers.

The liability established for the marketing division totaled \$36,587.00. The liability established for the refinery division totaled \$59,175.00. There was one item in the refinery division detailed exam that was assessed in the audit in the amount of \$1,750.00. The total liability established for both divisions is \$97,512.00.

MPC:

Of the liability established for the Refinery and Marketing divisions \$63,680.00 is being paid by MPC. The taxpayer also can exchange MPC for cash in the amount of \$87,930.00. See attachment 1 for the calculations. As the attachment shows, any month where the taxpayer over paid the month the additional MPC allowed to be used is converted to cash and if a liability still exists then it is being used to cover a portion of the liability. Per technical even though the 2009 MPC is out of statute excess from 2010 and 2011 can be used to cover 2009. So the amount allowed for 2009 minus what was used, the difference is being converted to cash.

SCHEDULES AND ATTACHMENTS

There were two schedules or attachments generated in this audit.

Attachment 1: this attachment was generated to calculate the amount of MPC for Cash exchange and the amount of MPC to be used in the audit.

Attachment 2: this attachment was generated to show how the prepayment was distributed during the audit period. There were two types of prepayment, cash and MPC. The cash was used to cover liability that could not be paid for with MPC. The MPC was more of a headache.

MPC prepayment could only be used to cover the liability eligible to be covered by MPC. Since only the Refinery side of the audit generates and uses MPC these are the areas MPC was applied. One issue was that the taxpayer is a direct pay participant and the tax is allocated to various municipalities which may have local tax implications. Based on a discussion with Mansoor Qureshi the amount of MPC used to cover the local portion of the tax is immaterial and to try and calculate the state portion of the tax due for each for each month too time consuming. So the MPC used were applied to only the Refinery liability established each month till it was used up. Attachment 2 show the amount of MPC used each month.

MISCELLANEOUS

CAA was contacted for this audit and the CAA audit was Vince Russell. This is a mandatory CAA audit and a direct pay audit.

MPC was an issue in this audit.

Great Lakes Questionnaire was not completed by the auditor, based on the information provided during the audit.

ASSESSMENTS/CREDITS or STATEMENT OF ACCOUNT

There is an open assessments on the taxpayer's account but was not created till October 2013 and on RUT-25, not part of the statement issued. The taxpayer does have a useable credit on the account. The Statement of Account was generated and presented to the taxpayer.

MAINTENANCE

The taxpayer was registered with the state, NUC-1 was not completed. There were several locations that either needed added or reactivated for the direct pay allocation. These locations were added or activated via the NUC-010.

OPEN WORK ITEM

No open work items existed on the account at the time of this write up.

AUDIT REFERRALS

There was no audit referral submitted with this audit.

CAF

There was a prior audit conducted on this taxpayer for the period 4/1/2006 to 12/31/2008. The CAF was provided via email. The CAF was reviewed prior to the audit appointment.

SC-137

This audit is not the result of a SC-137 (audit referral).

CONFLICT OF INTEREST

Your audit was conducted without a conflict of interest with the taxpayer or their representative.

AUDIT INTEREST

The interest was calculated to the date that the audit was presented to audit supervisor. Since the audit is un-agreed daily interest was not an issue.

STANDALONE RETURNS

Due to rounding issues and the MPC for Cash exchange stand-a-lone returns had to be generated, both EDA-105's and EDA-104's. Was instructed that the EDA-104's could not have negative penalty so it had to be removed from several returns.

LETTERS

EDA-70 – not utilized in this audit.

EDA-11-A – not utilized in this audit.

EDA-11-B – not utilized in this audit.

RR-83 – was not utilized in this audit.

The taxpayer was easy to work with and provided all requested documentation upon verbal requests.

RESULTS OF AUDIT

This audit resulted in a liability of \$881,170.00. The liability consists of disallowed use of franchise exempt sales of \$571,392.00, credit of ROT in the amount of \$1,399.00, direct pay tax due Marketing Division of \$13,928.00, direct pay tax due Refinery Division of \$80,911.00, detailed exam of \$1,750.00, Marketing and Refinery projected use tax of \$1,159.00, penalty of \$149,862.00 and interest of \$63,567.00. The taxpayer was in agreement with the tax due for the two divisions (Marketing and Refinery) but were not in agreement with the disallowed use of the franchise exempt sales. They petitioned to ICB, which ruled against them and the audit was delayed future when the taxpayer and the state tried to work out a settlement. Notified that the offer was not accepted and the taxpayer informed of such was instructed to submit the audit as un-agreed. Prepared the audit paperwork and remitted for review to Charles Frederick RAS at his residence in Cleveland Ohio.

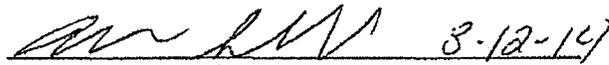

Allan Schell Revenue Auditor III Date 3-12-14

EXHIBIT 3

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, and ultimately improper 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 the 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 as 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.

Overpayment Provision Does Not Apply

Marathon in its Motion to Compel invoked Section 2505-275 from the Civil Administrative Code of Illinois. The provision, titled "Tax Overpayments" 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. *Id.* The second provision is not at issue here.

Marathon's first problem is that it does not have an overpayment of its own tax liability. Rather, Marathon over paid its dealers' tax liability. 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.

First, Marathon overpaid a third party's liability, not its own. It was the dealer's who actually remitted the taxes on exempt sales, even if the funds actually came from Marathon.

Nothing in the language in the provision itself suggests that the legislature intended to give the Department authority to apply an overpayment from one taxpayer to another. Under the confidentiality provision of the Retailers' Occupation Tax Act ("ROTA") the Department would be precluded from sharing any of the dealers' tax information with Marathon, yet under Marathon's interpretation, the Department is required to apply the Dealer's overpayment to Marathon's liability. 35 ILCS 120/11 (all tax information received from returns or Department investigations is confidential). This would represent an extreme if not bizarre interpretation. In construing ambiguous statutes, courts are to avoid any interpretation that results in an absurd result. *Town of Naples v. County of Scott*, Ill.App.3d 186, 190-91, 443 N.E.2d 799 (4th Dist. 1982)(Appellate Court held that Scott County Board of Commissioner's interpretation of Election Code was absurd). It is difficult to believe the legislature intended to require the Department to apply, at taxpayer's request, overpayments made by a third party to the taxpayer's own unrelated liability, especially since the Department would be precluded from sharing tax information with any third party.

Another independent obstacle to Marathon's interpretation is the language of Section 2505-275 itself. Specifically, the Department can only credit or apply the overpayment against a "final tax liability." 20 ILCS 2505/2505-275. While "final tax liability" is not defined in this section, or for that matter anywhere in the Department of Revenue Section of the Civil Administrative Code, the ROTA provides when a Notice of Tax Liability becomes a "final assessment." See 35 ILCS 120/4 and 120/5("If a protest to the notice of tax liability and request for a hearing thereon is not filed within 60 days after such notice, such notice of tax liability shall become final without the necessity of a final assessment being issued and shall be deemed to be a final assessment.")

It is clear therefore that Marathon's sales tax liability is not a "final tax liability" within the meaning of the Section 2505-275. The liability reported by Marathon on its sales tax returns is not final because it is subject to adjustment by the Department and/or amendment by Marathon for 3 to 3½ years. 35 ILCS 120/4 (statute of limitations for Department to issue Notice of Tax Liability); 35 ILCS 120/6 (statute of limitations for taxpayers to file refund claim). Consequently, even if the other obstacles to application of Section 2505-275 did not exist, it would not apply here in any event.

The final obstacle to application of this provision here is that Marathon essentially created or devised its own method of recouping an overpayment of sales tax. Even if Marathon were trying to recover its own taxes, as opposed to a third party's taxes, its method of offsetting unrelated sales tax liability against its the overpaid taxes on sales made by Marathon dealers, would not work. Taxpayers must follow the Department's procedure and use its designated forms in seeking a refund. 35 ILCS 120/6a; *Armour Pharmaceutical Company v. Illinois Department of Revenue*, 321 Ill.App.3d 662, 668, 748 N.E.2d 265 (1st Dist. 2001)(Even though taxpayer overpaid use tax on its purchases of exempt alcohol, it could not get a refund of its overpaid tax because it did not file a proper refund claim. "Accordingly, we affirm the Department's finding that Armour's proper remedy is to file a refund claim in accordance with section 6 of the Retailer's Occupation Tax Act.").

Under the voluntary payment doctrine, taxpayers can only recover taxes voluntarily paid or remitted to the Department when authorized by statute. *Geary v. Dominick's Finer Foods, Inc.*, 129 Ill.2d 389, 393 (1989). So even if Marathon were the taxpayer who made the overpayment, it was required to follow the statute and Department rules on refund claims. The only statute authorizing a refund of the taxes Marathon voluntarily paid is the refund claim provisions of the

ROTA. See 35 ILCS 120/6a, 6b, 6c. By creating its own methodology recoup the overpaid tax, Marathon was not following the refund provisions of the ROTA or the Department's rules.

The statute Marathon attempts to rely on, Section 2505-275, of the Department of Revenue Law does not, and will not ever apply to a situation like this. 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 taxing act to another. And even then, only when the liability being offset is final. Marathon's interpretation, while perhaps 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 requested will never be relevant, nor will it ever lead to relevant evidence. Consequently, Marathon's Motion to Compel should be denied.

LISA MADIGAN
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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 Response to Petitioner's Motion to Compel 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 April 20, 2015.



Michael Coveny,
Assistant Attorney General

EXHIBIT 4

**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.

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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