No. 129562

IN THE SUPREME COURT OF ILLINOIS

MARATHON PETROLEUM COMPANY, LP f/k/a
MARATHON PETROLEUM COMPANY, LLC,

Plaintiff-Appellant,

v.

COUNTY OF COOK, COOK COUNTY DEPARTMENT
OF REVENUE, et al.,

Defendants-Appellees

Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-21-0635
There heard on Appeal from the Circuit Court of Cook County, Illinois,
County Department, Tax & Miscellaneous Remedies Section, No. 2019 L 050614
The Honorable John J. Curry, Judge Presiding

BRIEF OF THE ILLINOIS CHAMBER OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

Stanley R. Kaminski (ARDC #03126601)
Dakota S. Newton (ARDC #6331461)
DUANE MORRIS LLP
190 South LaSalle Street
Suite 3700
Chicago, Illinois 60603
(312) 499-6768
SRKaminski@duanemorris.com
dnewton@duanemorris.com

Counsel for Amicus Curiae
Illinois Chamber of Commerce

E-FILED
11/7/2023 1:16 PM
CYNTHIA A. GRANT
SUPREME COURT CLERK

SUBMITTED - 24981985 - Duane Morris LLP - 11/7/2023 1:16 PM

TABLE OF CONTENTS AND STATEMENT OF POINTS AND AUTHORITIES

Page

INTEREST OF AMICUS CURIAE 1

Carney v. Union Pacific R.R. Co., 412 Ill. Dec. 833 (2016) 1

Hertz Corp. v. City of Chicago, 413 Ill. Dec. 1 (2017) 1

Illinois Road & Transportation Builders Ass'n v. County of Cook, 461 Ill. Dec. 431 (2022) 1

Rosenbach v. Six Flags Entertainment Corp., 432 Ill. Dec. 654 (2019) 1

SUMMARY OF ARGUMENT 3

Commercial National Bank v. City of Chicago, 89 Ill. 2d 45 (1982) 4

Hertz Corp. v. City of Chicago, 413 Ill. Dec. 1 (2017) 4

Ill. Const. 1970, Art. VII, § 6(e) 3

Illinois Constitution of 1970 ....3, 5

Marathon Petroleum Co., LP v. Cook County Department of Revenue, 2022 IL App (1st) 210635 3

Paper Supply Co. v. City of Chicago, 75 Ill. 2d 553 (1974) 4

Waukegan Community Unit School District No. 60 v. City of Waukegan, 95 Ill. 2d 244 (1983) 4, 5

ARGUMENT 6

I. COOK COUNTY'S EXPANSION OF ITS FUEL TAX TO SALES OF INTANGIBLE CONTRACT RIGHTS RENDERS THE TAX AN ILLEGAL OCCUPATION TAX IN VIOLATION OF THE ILLINOIS CONSTITUTION. 6

55 ILCS 5/5-1009 ....11, 12

SUBMITTED - 24981985 - Duane Morris LLP - 11/7/2023 1:16 PM

CCO § 74-471 6

CCO §§ 74-472 ....6, 10

CCO § 74-472(a)...6, 7

CCO § 74-472(b) 7

CCO § 74-473 6

CCO § 74-473(2) 6

CCO § 74-478 10

Chicago Health Clubs, Inc. v. Picur,
124 Ill. 2d 1 (1988) 10

Commercial National Bank v. City of Chicago,
89 Ill. 2d 45 (1982) 9, 10

Cook County Code Ch. 74, Art. XII 6

Fidelity Federal Savings & Loan Assn. v. Grieme,
112 Ill. App. 3d 1014 (3d Dist. 1983)..7

Fuel Tax Ordinance...6, 7, 8, 10

Ill. Const. 1970, Art. VII, § 6(e) 9, 12

Ill. Const. 1970, Art. VII, § 6(g) 12

Illinois Constitution of 1970 ....6, 9, 11

Marathon Petroleum Co., LP v. Cook County Department of Revenue,
2022 IL App (1st) 210635 ....8, 11, 12

Mulligan v. Dunne,
61 Ill. 2d 544 (1975) 7, 8

Waukegan Community Unit School District No. 60 v. City of Waukegan,
95 Ill. 2d 244 (1983) 9, 10, 11

SUBMITTED - 24981985 - Duane Morris LLP - 11/7/2023 1:16 PM

II. COOK COUNTY'S EXPANSION OF ITS FUEL TAX ON INTANGIBLE TRANSACTIONS THAT OCCUR SOLELY OUTSIDE OF THE COUNTY IS AN UNCONSTITUTIONAL EXTRATERRITORIAL APPLICATION OF THE TAX....................................12

City of Carbondale v. Van Natta,
61 Ill. 2d 483 (1975) 12

Commercial National Bank v. City of Chicago,
89 Ill. 2d 45 (1982) 13, 14

Dean Milk Co. v. City of Elgin,
405 Ill. 204 (1950) 13

Harris Bank of Roselle v. Village of Mettawa,
243 Ill. App. 3d 103 (2d Dist. 1993)....................................12

Hertz Corp. v. City of Chicago,
413 Ill. Dec. 1 (2017)....................................14, 15

Ill. Const. 1970, Art. VII, § 6(a) 12

Illinois Constitution of 1970 12

Schanerberger and Kaminski, *A Presumption of Taxability Cannot Save an Extraterritorial Tax*, State Tax Notes (June 5, 2017)....................................13

Seigles, Inc. v. City of St. Charles,
365 Ill. App. 3d 431 (2d Dist. 2006)....................................13

Strauss v. Town of Pontiac,
40 Ill. 301 (1866) 13

CONCLUSION....................................16

Rule 341(c) Certificate of Compliance 17

SUBMITTED - 24981985 - Duane Morris LLP - 11/7/2023 1:16 PM

INTEREST OF AMICUS CURIAE

The Illinois Chamber of Commerce (the "Chamber") is an association that focuses on improving Illinois' business climate. Since 1919, the Chamber has been the unifying voice for Illinois industry, advocating for an environment that allows Illinois businesses to thrive and its citizens to have abundant job opportunities to provide for their families. The Chamber's membership is diverse and broad, with over 1,800 members. It includes pharmaceutical and medical device companies, manufacturers, wholesalers, retailers, healthcare providers, insurers, and construction companies.

The Chamber's members, the Illinois business community as a whole, and the millions of citizens they employ, rely on this Court to bring clarity, certainty and reason to the constellation of regulations and laws they must navigate daily with precision—and almost *zero* margin for error—in order to avoid costly lawsuits and onerous legal liability.

Given the Chamber's long history of business advocacy and its status as a unifying voice for the Illinois business community, it can assist the Court in exploring and appreciating the impact of the Court's rulings on Illinois businesses. This unique perspective has been recognized multiple times by the Court in other cases, when the Court has permitted the Chamber to serve as *amicus curiae* in matters that will affect Illinois businesses. See*, e.g., Illinois Road & Transportation Builders Ass'n v. County of Cook*, 461 Ill. Dec. 431 (2022); *Rosenbach v. Six Flags Entertainment Corp.*, 432 Ill. Dec. 654 (2019); *Hertz Corp. v. City of Chicago*, 413 Ill. Dec. 1 (2017); and *Carney v. Union Pacific R.R. Co.*, 412 Ill. Dec. 833 (2016).

Although this appeal involves a rather discrete issue concerning the application of the Cook County Retail Sale of Gasoline and Diesel Fuel Tax, the appellate court's decision will have troubling consequences for Illinois tax law if it is not reversed. Specifically, the

SUBMITTED - 24981985 - Duane Morris LLP - 11/7/2023 1:16 PM

appellate court's decision approves an illegal occupation tax and then authorizes the extraterritorial application of that tax to transactions occurring solely outside of the taxing jurisdiction.

In addition, from a tax policy viewpoint, if the appellate court decision is affirmed by this Court this will result in a historic reversal of tax policy in Illinois that will be devastating to Illinois businesses. Allowing the appellate court decision to stand would allow home rule municipalities and counties to impose occupation taxes on businesses on a potential cornucopia of sales of intangibles, such as sales of option contracts, music or video copyrights, patents, bonds, mortgages, certificates of deposit, custom software, future services rights, sourcing contracts, commodity futures contracts, franchises, marketing rights, exploratory rights, licenses, trade secrets—to name just a few. This was surely not contemplated by the delegates to the Illinois constitutional convention that approved home rule taxing power, and would be a dramatic about-face in how this Court has interpreted the limitations on the power of home rule units to impose taxes on the sale of intangibles.

Thus, the Chamber and its members have a substantial and direct interest in this case because the appellate court's decision which authorizes the County of Cook ("Cook County" or "County") to impose an unconstitutional occupation tax with an extraterritorial application that can be easily adopted by other home rule units on a plethora of intangible transactions, even when those transactions have no, or merely a tenuous connection to the home rule units, thereby creating a potential avalanche of new municipal tax obligations on businesses in Illinois.

SUBMITTED - 24981985 - Duane Morris LLP - 11/7/2023 1:16 PM

SUMMARY OF ARGUMENT

The appellate court's decision in this case approving Cook County's expansion of its home rule taxing power to sales of intangibles not only opens a Pandora's box of possible new municipal occupation taxes that can be imposed on businesses, but is also in direct violation of Illinois' constitutional prohibition on home rule occupation taxes. The appellate decision also authorizes Cook County to expand its taxing jurisdiction on intangible businesses transactions occurring solely outside the borders of the County, which is likewise in direct violation of the Illinois constitution's prohibition on extraterritorial taxes.

Put succinctly, by sanctioning the extension of the Cook County Retail Sale of Gasoline and Diesel Fuel Tax (the "Fuel Tax" or "Tax") to Plaintiff's sales of intangible contract rights to buy fuel in the future, when no actual sale or delivery of tangible fuel ever takes place in the County, the appellate court has authorized a broad expansion of Cook County's home rule taxing power beyond what is constitutionally allowed. *Marathon Petroleum Co., LP v. Cook County Department of Revenue*, 2022 IL App (1st) 210635 ¶¶ 33-39 (hereafter the "Appellate Decision). Additionally, by permitting the Defendants to impose this Fuel Tax on Plaintiff's contracts entered into solely outside Cook County, when no tangible fuel is delivered, nor physical possession or ownership of fuel (constructive or otherwise) is transferred in Cook County, the appellate court has improperly extended Defendants' taxing power to purely extraterritorial transactions. Appellate Decision at ¶¶ 41-47. *Amicus* asserts this far-reaching expansion of home rule municipal taxing power is expressly banned by the Illinois Constitution.

The Illinois Constitution of 1970 expressly prohibits home rule units such as Cook County from imposing "occupation taxes" under their home rule taxing powers. Ill. Const.

SUBMITTED - 24981985 - Duane Morris LLP - 11/7/2023 1:16 PM

Art. VII, § 6(e). Hence, this Court has routinely held that home rule municipalities and counties simply do not have the right to impose home rule occupation taxes. *Commercial National Bank v. City of Chicago,* 89 Ill. 2d 45 (1982) (hereafter "*Commercial National Bank*"). Prohibited occupation taxes include not only taxes on a given occupation (*Paper Supply Co. v. City of Chicago*, 75 Ill. 2d 553 (1974)), but also more broadly include any taxes on services, which is specifically defined by this Court to include sales of intangibles. *Waukegan Community Unit School District No. 60 v. City of Waukegan*, 95 Ill. 2d 244, 254 (1983) (hereafter "*Waukegan*") ("The term 'service,' in the context of Illinois tax law, has generally been held to include all 'sales' transactions other than sales of tangible property.").[1]

Moreover, as to the reach of home rule municipal taxing power, this Court has emphasized that such taxing power does not extend beyond the municipality's borders. *Hertz Corp v. City of Chicago*, 413 Ill. Dec. 1 (2017) (hereafter "*Hertz*"). Therefore, transactions entered into outside the municipality cannot be taxed by the municipality unless the tangible item being sold has been shown to be actually delivered, used or physical possession is transfers within the municipality's borders. See *Hertz*, supra; *Commercial National Bank*, supra.

Notwithstanding these constitutional requirements, the appellate court's decision in this case simply side-stepped these fundamental constitutional principles and upheld the Defendants' imposition of the Fuel Tax to the sale and ultimate settlement of intangible

[1] *Waukegan* involved a consumer utility tax which included a tax on message or telecommunication transactions sold by telecommunication providers. As discussed by this Court, this sale of messages is a sale of an intangible and thus a sale of a service under Illinois law. 95 Ill. 2d at 253.

SUBMITTED - 24981985 - Duane Morris LLP - 11/7/2023 1:16 PM

contract rights—and then ignored the fact that these contracts occurred exclusively outside Cook County and that no fuel was ever delivered, used or possession transferred in Cook County. The appellate court therefore improperly authorized not only the application of an unconstitutional occupation tax but also the extraterritorial application of the Tax to transactions that do not occur in Cook County.

Because the appellate court has improperly expanded the taxing power of the Cook County—and potentially all home rule municipalities in Illinois—well beyond what the Illinois Constitution allows, *Amicus* agrees with the Plaintiff in this case that the appellate court's decision must be reversed by this Court. There is simply no constitutional authority to apply the Fuel Tax to businesses on merely their sales of intangible rights, as this is directly contrary to the prohibition on home rule occupation taxes. *Waukegan*, 95 Ill. 2d at 254. Moreover, while Plaintiff's sales contracts are entered into with the goal that they ultimately result in a sale and delivery of a product, this is irrelevant until such sale and delivery occurs, since only then is there an actual "sale" of fuel for Defendants to tax. And, even when an actual "sale" of fuel occurs, the transaction must still occur within Cook County before the Fuel Tax applies. *Amicus* therefore urges this Court to reverse the appellate court's decision and hold that the imposition of the Fuel Tax on Plaintiff's sales contracts for the future sale of fuel is contrary to the explicit wording of the County's own ordinance, violates the occupation tax prohibition in the Illinois Constitution, and illegally applies the Fuel Tax to extraterritorial transactions.

SUBMITTED - 24981985 - Duane Morris LLP - 11/7/2023 1:16 PM

ARGUMENT

I. COOK COUNTY'S EXPANSION OF ITS FUEL TAX TO SALES OF INTANGIBLE CONTRACT RIGHTS RENDERS THE TAX AN ILLEGAL OCCUPATION TAX IN VIOLATION OF THE ILLINOIS CONSTITUTION.

The Fuel Tax, as contained at Cook County Code Ch. 74, Art. XII (the "Fuel Tax Ordinance"), is exclusively imposed on the retail "sale" in Cook County of motor fuel. Cook County Code ("CCO") § 74-472(a). A "sale" is defined as a "*transfer of ownership or possession* or both, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever." CCO § 74-471 (emphasis added). This retail sale and physical transfer of ownership, or possession by delivery or otherwise of the physical fuel in Cook County, is the *sole* taxable event under the Fuel Tax Ordinance. Nowhere in the Fuel Tax Ordinance is the Tax imposed on merely intangible contracts rights or intangible financial transactions for the future sales of fuel. This is consistent within the broader context of the Fuel Tax Ordinance which expressly states that no tax is due when the delivery or transfer of possession of the fuel is "to a location outside of the County." CCO § 74-473(2).

While the sole taxable event under the Fuel Tax Ordinance is the retail "sale" in the County, the Ordinance does have a special early collection provision for the collection of the Tax at the wholesale level by a gas distributor, but this provision is only operational if an actual wholesale sale occurs and there is a physical transfer of possession, ownership or both (in other words, delivery) of the fuel within Cook County. See CCO § 74-473. Therefore, unless there is an actual wholesale sale and transfer of ownership or delivery of the fuel occurs within Cook County by the gas distributor, and not simply some creation of an intangible contract right for the future sale of fuel that may never take place, no early collection of tax is required. See CCO §§ 74-472 (requiring that tax required be collected

SUBMITTED - 24981985 - Duane Morris LLP - 11/7/2023 1:16 PM

on the "sale" of fuel, which occurs by definition upon the transfer of possession or ownership of the physical fuel), 74-473(2) (stating no tax is due on delivery of fuel "outside the County"), and 74-474(a) (stating that a gas distributor is only required to register to collect the Fuel Tax if it produces the "fuel … in this County" or "transports or has transported … fuel into this County" or "receives … fuel in Cook County"). Notably, the circuit court similarly held that the actual transfer of the ownership of the tangible fuel is needed, and that "a contractual right to future possessory right is insufficient to establish the existence of ownership" of property. Circuit Court Decision at 67 (citing *Fidelity Federal Savings & Loan Assn. v. Grieme*, 112 Ill. App. 3d 1014, 1018-19 (3d Dist. 1983)).

Equally important, is that this early collection provision is only legally permitted when coupled with the rebuttable presumption that the retail "sale "of the fuel —the taxable event—will also occur in Cook County. This is because the only taxable event in the Fuel Tax Ordinance is a retail sale in Cook County and the ultimate incidence of the Fuel Tax is on the retail purchaser of the fuel. CCO § 74-472(a) and (b); see similarly *Mulligan v. Dunne*, 61 Ill. 2d 544 (1975) (hereafter "*Mulligan*"). For example, in *Mulligan,* this Court reviewed an occupation tax challenge to a virtually identical early collection provision imposed under the Cook County alcoholic beverage tax. 61 Ill. 2d at 551. In that case, this Court upheld this early collection procedure after explicitly finding that the "tax is clearly levied *only on retail sales*, and forms already issued by the Bureau of Administration [now Cook County Department of Revenue] pursuant to its authority to enact rules and regulations provide a *means of claiming a refund of tax* paid on liquor which is never sold at retail." *Id.* at 552. (emphasis added). This Court went on to emphasize that the "forms issued by the Bureau of Administration allow refunds and apparently *will*

SUBMITTED - 24981985 - Duane Morris LLP - 11/7/2023 1:16 PM

insure that tax is paid only as to those wholesale transactions which actually result in retail sales." *Id.* at 553. (emphasis added). Therefore, in order for the early collection provision in the Fuel Tax to be constitutional, no tax can be due and any tax collected must be refunded to the gas distributor, when there is *no* ultimate retail sale of the fuel occurring in Cook County. See *Mulligan*, supra.

In this case, the Defendants opted not to follow the explicit wording of the Fuel Tax Ordinance and instead applied the Fuel Tax to the Plaintiff's mere sale and settlement of intangible contract rights for future wholesale sales of motor fuel, even though no ultimate wholesale sale or even retail sale of the fuel ever occurred in Cook County. These transactions were referred to in Plaintiff's books and records and the expert testimony as either "Book Transfers" or "Book Out" transactions, since no actual sale and delivery/transfer of possession or ownership of the physical fuel occurred on these contracts, rather they were terminated and settled for financial reasons. Appellate Decision at ¶¶ 11-12, 15-17. The terms "Book Out" and "Book Transfers" mean the same thing and were used interchangeably by the experts and in the lower court decisions. As to these Book Out transactions, Plaintiff's witnesses offered uncontroverted testimony explaining that these Book Out transactions resulted in a non-sale where no transfer of ownership or possession of fuel occurs, but rather a financial settlement of the contract was entered into by the parties. Appellate Decision at ¶¶ 15-17. Notably, the Defendants offered no evidence that any sale of fuel ever happened or that a delivery of fuel actually occurred in Cook County. In fact, the circuit court expressly noted that even the "ALJ did not find that any physical transfer, delivery or exchange occurred." Circuit Court Decision at 57. Consequently, by imposing the Fuel Tax on these intangible transactions, and requiring

SUBMITTED - 24981985 - Duane Morris LLP - 11/7/2023 1:16 PM

Plaintiff to pay the Fuel Tax notwithstanding that no sale, delivery, or transfer of fuel took place in Cook County, Defendants have converted the Fuel Tax into a tax on Plaintiff's sales of intangible rights—*i.e.*, an occupation tax on Plaintiff's business—in direct violation of the Illinois Constitution.

Article VII, § 6(e) of the Illinois Constitution of 1970 prohibits home rule municipalities, including Cook County, from imposing taxes on "occupations." This Court has interpreted this prohibition to include taxes on given occupations, as well as taxes on services. *Commercial National,* 89 Ill. 2d at 77-80. This Court has also clarified that an impermissible tax on services is broadly defined in Illinois law to includes taxes on all "sales transactions other than sales of tangible property." *Waukegan*, 95 Ill. 2d at 254. For instance, in *Waukegan* this Court concluded that the City of Waukegan's "consumer utility tax" on various utility sales including sales of messages by telecommunication providers—a sale of an intangible—was a "service tax".

Once it is determined that a tax could be an occupation tax, this Court has then applied a second test. *Commercial National*, 89 Ill. 2d at 62-66. When the tax is on sales of tangible personal property, the "legal incidence" test is simply applied, since this was viewed as a permissible type of tax by the delegates to the Illinois constitutional convention. *Id.* at 62-64. However, when the tax is imposed on sales of services, including sales of intangibles, or is imposed on other types of taxes not specifically deemed permissible in the constitution convention, then a "practical operations" test is used. *Commercial National*, 89 Ill. 2d at 65-66; *Waukegan* 95 Ill. 2d at 255. Under the practical operations test, a tax is deemed an unconstitutional occupation tax if it imposes tax collection obligations on seller, makes the seller liable for taxes not paid, and imposes

SUBMITTED - 24981985 - Duane Morris LLP - 11/7/2023 1:16 PM

penalties, record keeping and other obligations on seller to enforce collection of the tax. *Waukegan* 95 Ill. 2d at 255.

In *Waukegan*, this Court held that the "practical operation" of the municipal tax was on the utility companies selling services or intangibles because they were required to collect the tax, were liable for taxes uncollected, were liable for penalties, and had record-keeping obligations under the tax ordinance. *Id.* This rendered the tax an unconstitutional occupation tax. *Id.* In other words, if a home rule municipal tax is applied to the sale of intangibles and the "practical operation" of the tax is on the seller (*i.e.*, the collection obligation for the tax and penalties for failure to comply can be imposed on the seller), the tax is an unconstitutional occupation tax under Illinois law.

Significant to the case at hand, this Court has held that a tax can be deemed an unconstitutional occupation tax either on its face or *as applied* to a specific business or group of transactions. *Commercial National Bank,* 89 Ill. 2d 45 and *Chicago Health Clubs, Inc. v. Picur*, 124 Ill. 2d 1 (1988) (holding that Chicago's Amusement Tax was an occupation tax as applied to activities at health clubs). Accordingly, a tax that is applied to a business's intangible transactions, such as a sales contract to sell fuel in the future where no fuel is ultimately sold, would therefore be deemed a prohibited occupation tax under Illinois law when the practical operation of the tax is on the business/seller.

Here, the practical operation of the Fuel Tax is plainly on the Plaintiff because the Fuel Tax Ordinance requires Plaintiff to pay the Tax, makes Plaintiff liable for any Tax not collected from or paid by a retail buyer, imposes record-keeping obligations on Plaintiff, and imposes penalties on the Plaintiff for non-collection or non-payment of the Tax. CCO

SUBMITTED - 24981985 - Duane Morris LLP - 11/7/2023 1:16 PM

§§ 74-472 and 74-478. Consequently, the Fuel Tax as applied to the Plaintiff's sales and settlement of intangible contract rights is an illegal occupation tax under Illinois law.

Remarkably, the appellate court's reasoning that the Fuel Tax as applied to Plaintiff does not violate the Illinois Constitution ignores both the facts and established law. The appellate court's analysis completely dismisses the critical fact that no actual sale of tangible fuel occurs but that only a financial settlement of an intangible contract took place. Instead, the appellate court erroneously believes that the sale of this intangible right outside of the County is somehow sufficient to legally impose the Tax. Appellate Decision at ¶ 37. The appellate court confuses the sale of an intangible right to potentially own fuel in the future, which it refers to as the sale of the "intangible ownership interest" in the future sale of fuel, with the actual transfer of legal ownership (*i.e.,* title and control over) of the tangible fuel. Appellate Decision at ¶ 37. The fact that the appellate court uses the term intangible ownership interest to refer to the sale of this intangible right is simply semantics. A sale of an intangible right to potentially own fuel is not the transfer of possession or actual ownership of that fuel, but is merely the purchase of an intangible right for a future purchase of that fuel. Thus, the appellate court's analysis is not only faulty, but its conclusion that the Fuel Tax is valid as applied to Plaintiff's sales of intangible rights is directly contrary to settled Illinois law as articulated in *Waukegan*, since a tax on the sale of intangibles is a service tax and therefore an improper occupation tax under Illinois law.

The appellate court also cites Section 5-1009 of the State County Code (55 ILCS 5/5-1009) as allowing a municipal tax on the sale of tangible fuel. Appellate Decision at ¶ 41. Again, the appellate court misses the point since no actual sale of tangible fuel ever occurred. Rather, as the appellate court acknowledged, the Defendants imposed the Fuel

SUBMITTED - 24981985 - Duane Morris LLP - 11/7/2023 1:16 PM

Tax on the intangible rights conveyed in the contract to sell which was financially settled out based on financial reasons, so no actual sale or delivery of fuel occurred. Appellate Decision at ¶ 37. More importantly, Section 5-1009 is an additional limitation on home rule taxation under § 6(g) of Article VII of the Illinois Constitution, and has nothing to do with the prohibition on occupation taxes under Article VII, § 6(e). Similarly, the exclusions in Section 5-1009 from this new limitation that listed the sale of fuel or other tangible property as not being prohibited by this additional limitation under Section 6(g), does not nor would it logically override the separate prohibition on occupation taxes under Article VII, § 6(e). Rather Article VII, § 6(e) prohibition stands on its own to prohibit improper occupation taxes. The appellate court's reasoning is inherently flawed and should therefore be corrected by this Court.

II. COOK COUNTY'S EXPANSION OF ITS FUEL TAX ON INTANGIBLE TRANSACTIONS THAT OCCUR SOLELY OUTSIDE OF THE COUNTY IS AN UNCONSTITUTIONAL EXTRATERRITORIAL APPLICATION OF THE TAX

The Illinois Constitution broadly authorizes home rule units to exercise "any power and perform any function pertaining to its government affairs including […] the power to […] tax." Ill. Const. 1970, Art. VII, § 6(a). Although this confers extensive taxing powers to home rule units, Illinois courts have, for more than a century and a half, opined that not only are these powers restricted solely to matters within the home rule unit's corporate boundaries but that Art. VII, § 6(a) does not bestow extraterritorial jurisdiction. For example, in *City of Carbondale v. Van Natta,* this Court stated that Article VII, § 6(a) does not "confer extraterritorial sovereign or governmental powers" on home rule units. 61 Ill. 2d 483, 485 (1975). The appellate court has similarly stated "if a municipality wishes to enact and enforce extraterritorial regulations, it must act under the color of a specific,

SUBMITTED - 24981985 - Duane Morris LLP - 11/7/2023 1:16 PM

express grant of statutory authority." *Harris Bank of Roselle v. Village of Mettawa*, 243 Ill. App. 3d 103, 117 (2d Dist. 1993). Thus, "[i]t is now axiomatic that home rule units […] have no jurisdiction beyond their corporate limits except what is expressly granted by the legislature." *Seigles, Inc. v. City of St. Charles*, 365 Ill. App. 3d 431, 434 (2d Dist. 2006).[2]

By way of background, in the early case of *Strauss v. Town of Pontiac,* the Town of Pontiac attempted to prohibit the "sale of spirits and beer" within a three-mile extension of the town's borders. 40 Ill. 301 (1866). The *Strauss* Court bluntly invalidated this attempt to regulate extraterritorial activities, holding "[w]e are not able to find in [the State charter] any authority to pass that portion of the ordinance which forbids the sale of spirits or beer outside the corporate limits and within three miles thereof." This Court further explained "[i]t cannot be contended that a town can give its ordinances an extraterritorial effect except so far as it may be clearly authorized to do so by the legislature." *Id.* at 302. Almost a century later, this Court again applied the prohibition on extraterritorial municipal power in *Dean Milk Co. v. City of Elgin* by holding that the City of Elgin's attempted regulation of a milk plant located outside of the City because the plant sold to persons within the City, was an improper extraterritorial exercise of municipal power. 405 Ill. 204, 207-08 (1950).

This Court held its course three decades later when it struck down the extraterritorial imposition of a tax by a home rule municipality in the 1982 case of *Commercial National Bank*. In that case, this Court considered the constitutionality of the City of Chicago's home rule service tax ordinance that imposed a tax on a purchaser who purchased services performed outside of the City but used in the City, at a rate of 1% of

[2] For a more in-depth review of Illinois case law on prohibited extraterritorial taxes, see Schanerberger and Kaminski, *A Presumption of Taxability Cannot Save an Extraterritorial Tax*, State Tax Notes (June 5, 2017).

SUBMITTED - 24981985 - Duane Morris LLP - 11/7/2023 1:16 PM

the purchase price of the service. 89 Ill. 2d at 51. Chicago's service tax ordinance required the collection of the tax by the non-Chicago seller on the sale of a service outside of the City if the use of the service (as defined in the ordinance) occurred in the City. *Id.* at 78. This raised the critical question of whether a non-Chicago seller who engaged in business in the City on other, unrelated, transactions could be forced to collect this service tax on these non-City sales of services when no part of the service or transaction occurred in the City. This Court *unanimously* held that the City did not have the extraterritorial taxing power to impose these tax collection responsibilities on the non-City seller: a "home rule municipality is prohibited from forcing sellers to collect taxes that are not rendered and nor performed within that municipality's borders" because "home rule units [like Chicago] do not possess extraterritorial governmental powers." *Id.* at 78 and 77. In reaching this conclusion, this Court found that the tax was "a clear attempt by the city of Chicago to give extraterritorial effect to its ordinance and to tax services that have no connection with the taxing city." *Id.* at 77. This Court explained further: "[i]n our judgment, Chicago's imposition of tax liability or tax-collection duties upon nonresident purchasers and sellers of services performed outside the city is incompatible with the intent of the drafters of our constitution as determined in *Van Natta*." *Id.* at 78.

More recently, this Court struck down the City of Chicago's extraterritorial imposition of its Personal Property Lease Transaction Tax (the "Lease Transaction Tax") to short term motor vehicle rentals that occurred outside of Chicago. *Hertz*, 413 Ill. Dec. 1 (2017). In that case, Chicago promulgated an administrative ruling ("Ruling 11") that expanded the Lease Transaction Tax to certain suburban short-term vehicle rental locations within three miles of the City's borders. This expansion was predicated on the City's

SUBMITTED - 24981985 - Duane Morris LLP - 11/7/2023 1:16 PM

assumption that vehicles rented near Chicago by certain drivers would necessarily be used primarily within the city and thereby trigger the Lease Transaction Tax. In its analysis, this Court found that Ruling 11 imposed collection of the tax not on the actual use of rental vehicles in Chicago, "but in fact, the tax is imposed on stated intent as to future use or on a conclusive presumption of use." 413 Ill. Dec. at 9. The City's effort to require early collection of its tax on possible future use rather than actual use led this Court to find that "[a]bsent an actual connection to Chicago, the City's tax under Ruling 11 amounts to a tax on transaction that take place wholly outside Chicago's borders." and "at most, there is only a tenuous connection between the City and the taxed transaction". *Id.* The Court consequently concluded that Ruling 11 was an improper extraterritorial exercise of municipal power.

There is no material difference between the application of the extraterritorial taxes that this Court and the appellate court have struck down over the last 150 years and the Defendants' application of the Fuel Tax to Plaintiff's Book Out transactions. The underlying contracts for the future sale of motor fuel that are being subjected to Tax were negotiated and agreed to outside of Cook County. The parties entering into the contracts were located outside of Cook County. No transfer of ownership or possession of fuel occurred within Cook County via delivery or any other means. And, the mere possibility that a potential sale or delivery in Cook County could have occurred if there was no Book Out is simply meaningless, since at best it creates a tenuous connection to the County. See *Hertz,* 413 Ill. Dec. at 9. In fact, no transfer of ownership or possession occurred at all in these Book Out transactions. Rather, Plaintiff held title to motor fuel that would have been sold in the future under the forward contract, and when that contract was booked out,

SUBMITTED - 24981985 - Duane Morris LLP - 11/7/2023 1:16 PM

Plaintiff continued to hold title to the motor fuel. No other party had actual or constructive ownership or possession of the motor fuel at any time. Only intangible contractual rights entitling the holder to future performance of the forward contract were exchanged and that exchange did not occur in Cook County. The Defendants' application of the Fuel Tax to Plaintiff's Book Out transactions occurring solely outside Cook County must therefore be struck down as an unconstitutional extraterritorial application of its Fuel Tax.

CONCLUSION

For the foregoing reasons, and those presented by the Plaintiff, *Amicus* urges this Court to reverse the decision of the appellate court.

Dated: October 27, 2023

Respectfully submitted,

THE ILLINOIS CHAMBER OF COMMERCE

By: /s/ Stanley R. Kaminski________

Stanley R. Kaminski (ARDC #03126601)
Dakota S. Newton (ARDC #6331461)
DUANE MORRIS LLP
190 South LaSalle Street
Suite 3700
Chicago, Illinois 60603
(312) 499-6768
SRKaminski@duanemorris.com
dnewton@duanemorris.com

Counsel for Amicus Curiae
Illinois Chamber of Commerce

SUBMITTED - 24981985 - Duane Morris LLP - 11/7/2023 1:16 PM

Rule 341(c) Certificate of Compliance

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 4,840 words.

Dated: October 27, 2023 /s/ Dakota Newton__________

Dakota S. Newton

SUBMITTED - 24981985 - Duane Morris LLP - 11/7/2023 1:16 PM

CERTIFICATE OF FILING AND SERVICE

The undersigned certifies under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, that on October 27, 2023, the foregoing *Brief of the Illinois Chamber of Commerce as Amicus Curiae in Support of Plaintiff-Appellant* were filed with the Clerk of the Supreme Court of Illinois using the Court's electronic filing system and served on all parties to this appeal that are listed with that system.

Persons Served:

Catherine A. Battin (cbattin@mwe.com)
Mary Kay McCalla Martire (mmartire@mwe.com)
MCDERMOTT WILL & EMERY LLP
444 West Lake Street, Suite 4000
Chicago, IL 60606
Attorneys for Appellant Marathon Petroleum Company, LP

Kimberly M. Foxx
State's Attorney of Cook County
Marie D. Spicuzza (marie.spicuzza@cookcountyil.gov)
Assistant State's Attorney
500 Richard J. Daley Center
Chicago, IL 60602
Attorneys for Defendants County of Cook

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

/s/ Dakota Newton______________________

SUBMITTED - 24981985 - Duane Morris LLP - 11/7/2023 1:16 PM