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.

On Appeal from the Appellate Court of Illinois,
First Judicial District, No. 1-21-0635.
There Heard 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 AND APPENDIX OF PLAINTIFF-APPELLANT

E-FILED
11/1/2023 11:04 AM
CYNTHIA A. GRANT
SUPREME COURT CLERK

CATHERINE A. BATTIN
MARY KAY MARTIRE
MCDERMOTT WILL & EMERY LLP
444 West Lake Street, Suite 4000
Chicago, Illinois 60606
(312) 984-3233
cbattin@mwe.com
mmartire@mwe.com

Counsel for Plaintiff-Appellant
Marathon Petroleum Company LP f/k/a Marathon Petroleum Company, LLC

ORAL ARGUMENT REQUESTED

COUNSEL PRESS · (866) 703-9373 PRINTED ON RECYCLED PAPER

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

TABLE OF CONTENTS
AND STATEMENT OF POINTS AND AUTHORITIES

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

NATURE OF THE CASE

This action involves the interpretation of the Cook County Retail Sale of Gasoline and Diesel Tax Ordinance ("Ordinance"). The Ordinance imposes a tax on the retail sale of gasoline and diesel in Cook County ("Motor Fuel Tax" or "Tax"). At issue in this dispute is whether Marathon Petroleum Company LP ("Marathon") is liable for Motor Fuel Tax on forward contracts for the future sale and delivery of gasoline and diesel ("Motor Fuel"), which were ultimately settled for cash, without any actual exchange of fuel. The Administrative Law Judge ("ALJ") sustained the Cook County Department of Revenue's ("County") assessment of Motor Fuel Tax on the financial transactions based on her finding that Marathon did not carry its burden of proving that all of the transactions were cash settlements of forward contracts with neither possession nor ownership transferring between the parties. The ALJ did not address the question whether the Ordinance imposes the Motor Fuel Tax on such financial transactions. Despite not reaching the question whether the Ordinance imposes the Motor Fuel Tax on the financial transactions, the ALJ held that the taxation of the financial transactions did not constitute an unconstitutional occupation tax, nor did it amount to an extraterritorial exercise of home rule powers.

On appeal, both the circuit court and appellate court agreed that the ALJ erred in finding that Marathon did not meet its burden of proof, and that the proper focus of this proceeding is the legal question whether the financial transactions at issue are subject to Motor Fuel Tax. For the most part, any agreement between the circuit court and the appellate court ends there as the courts issued drastically different opinions. The circuit court held that the Motor Fuel Tax does not apply to financial transactions because there was no transfer of ownership or possession of Motor Fuel. Having held that the financial

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

transactions were not subject to the Tax, the circuit court did not consider Marathon's constitutional arguments.

In contrast, the appellate court characterized the financial transactions as the sale of "an intangible interest in a commodity" that are subject to Motor Fuel Tax. The appellate court also affirmed the ALJ's conclusion that the imposition of the Tax on the financial transactions did not impose an occupation tax nor an extraterritorial tax in violation of the Illinois Constitution. This appeal followed.

The judgment below is not based on the verdict of a jury. No questions are raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

The following issues are presented for review:

1. Whether financial settlements of forward contracts for the sale of Motor Fuel are retail sales subject to the Motor Fuel Tax within the plain meaning of the Ordinance?

2. Whether the County's construction of the Ordinance renders the Tax an unconstitutional occupation tax or renders the Tax unconstitutionally extraterritorial?

3. Whether the County failed to establish a *prima facie* case for its imposition of Motor Fuel Tax on the financial settlements of forward contracts?

4. Whether Marathon sufficiently rebutted the County's *prima facie* case by the presentation of testimonial and documentary evidence establishing that the County imposed the Tax on financial settlements of forward contracts, not sales of Motor Fuel?

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

STATEMENT OF JURISDICTION

Illinois Supreme Court Rule 315 confers jurisdiction upon this Court. On December 30, 2022, the Illinois Appellate Court, First District issued its opinion reversing the judgment of the Circuit Court of Cook County, Tax & Miscellaneous Remedies Section. *Marathon Petroleum Co. LP v. Cook County Dep't of Revenue*, 2022 IL App (1st) 210635. Marathon timely filed a Petition for Rehearing pursuant to Illinois Supreme Court Rule 367. On March 6, 2023, the Illinois Appellate Court, First District issued an order denying Marathon's Petition for Rehearing. On April 7, 2023, Marathon filed a Petition for Leave to Appeal. On September 23, 2023, this Court allowed Marathon's Petition for Leave to Appeal. On October 10, 2023, Marathon timely filed a Notice of Election to File Additional Brief. The filing of this brief on November 1, 2023, is timely.

STATUTES INVOLVED

Cook County Retail Sale of Gasoline and Diesel Fuel Tax Ordinance (No. 11-O-19, 2-16-2011), § 74-470, *et seq*. (Included in the Appendix to this Brief at A-161-65).

STATEMENT OF FACTS

A. Marathon's operations

Marathon is a leading, integrated, downstream energy company operating the nation's largest refining system with approximately 2.9 million barrels per day of crude oil refining capacity with its principal place of business in Findlay, Ohio. *See* C 12904. Marathon is a large wholesale supplier of Motor Fuel to resellers in the United States and these operations are conducted through Marathon entering into contracts with third parties to purchase and sell Motor Fuel. Under the terms of its contracts, the delivery of the Motor Fuel is to occur on a future date. C 12908. When Marathon sells Motor Fuel to third parties, the transfer of the product to the purchaser is made via various means including by a

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

pipeline transfer, or by a third-party, or its carrier, taking possession of the Motor Fuel at a fuel terminal. C 12462-64. Sale transactions require documentation to show a change in ownership and possession of the Motor Fuel. If a sale takes place by a pipeline transaction, a pipeline meter ticket is issued to reflect the change in ownership. C 12462-64. If a sale takes place at a fuel terminal, a transfer order is issued to direct the terminal operator to shift the inventory positions. C 12463, 12690.

At times, prior to the future delivery date, Marathon or its counterparty recognizes that one or both parties are unable to fulfill the delivery obligation or has no need for the Motor Fuel. C 12421, 12465. This happens for a variety of reasons, including an inventory shortage (or inventory surplus by the receiving party), offsetting purchase and sale obligations, or because of the receiving party's inability to hold or store the contracted-for product. C 12417, 12482-12483, 12558-59. In such instances, the parties agree to fulfill the contract by financially settling the contractual obligation in lieu of delivery of the product (hereinafter referred to as a "Book Out" transaction).[1] C 12438, 12464-66, 12551-52. When the parties execute a Book Out, there is no transfer of title or change of possession of Motor Fuel, nor are either party's inventory positions affected. C 12551-52**.** Similarly, there is no change in ownership and consequently, there is no pipeline meter ticket issued or transfer order generated for the Book Out transaction. C 12466, 12478, 12551, 12690. The Book Out transactions are purely financial, and the parties resolve the contractual obligation by settling the obligation with cash and forego the delivery (no change of possession nor title transfer) of the Motor Fuel.

[1] The terms "Book Out" and "Book Transfer" are used by the petroleum industry (and other industries) to describe a financially settled contractual obligations. Marathon used the terms interchangeably.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

When delivery of Motor Fuel is impractical, impossible, or unnecessary because the parties have offsetting obligations, Marathon initiates the paperwork to financially settle the forward contracts and document the parties' decision to accept financial settlement instead of physical delivery or receipt of product. *Id.* Marathon documents its Book Out transactions with a contract (a matching buy/sell agreement), a physical deal sheet, a book out or book transfer letter and corresponding invoices issued by Marathon and its counterparty which record the payment obligation to financially settle the contract. C 12908-12, 12915-17, 12919, 12921. The same documents are used to record all Book Out transactions. C 10485.

B. The County's Audit of Marathon

On May 19, 2014, the Department initiated a tax audit of Marathon (the "Audit") for the period January 2006 through July 2014. C 12904. At the conclusion of its audit, the Department issued an assessment for Motor Fuel Tax (the "Original Assessment"). C 5380, 5383. The Department subsequently revised the Original Assessment to reduce the amount of Motor Fuel Tax assessed (hereinafter referred to as the "Revised Assessment"). C 5404. The County's audit papers reflect that the Revised Assessment only assessed Motor Fuel Tax on the Book Outs: "[w]orking paper purpose: To Compute Tax…for Book Transfer Made to Unregistered Distributors." C 12899, 12901. The Revised Assessment includes $4,398,180.76 in taxes, interest, and penalties attributable to purported gasoline sales and $10,537,077.16 in taxes, interest, and penalties attributable to purported diesel sales. *Id.*

The Department's audit file also contains Gasoline and Diesel Book Transfer Audit Workpapers which assess an identical number of "gallons" of gasoline and diesel as the

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

Revised Assessments (31,201,380 and 92,059,380, respectively). C 12127-29, 12123-25.[2] Accordingly, the Book Outs, or as referred to on the Department's audit workpapers, "book transfers," represent 100% of the assessed liability. C 13519-20, 13589-90.

The County assessed Tax on the Book Out transactions based on its mistaken conclusion that ownership of Motor Fuel was transferred from Marathon to its counterparty. The County's auditor Jose Vega ("Vega") testified that he did not know what a Book Out transaction was. C 2769. In addition, Vega admitted that the County did not confirm whether fuel was transferred in a Book Out transaction. C 12197, 12199-200. The County's conclusion that the Book Outs involved the taxable sale of fuel was predicated on the fact that money changed hands: "[t]here was money involved…. [I]f you tell me that you sold me something for a price, that's a sale." C 12220.

The County's decision to assess was also predicated on a misreading of the term "Generic Chicago Pipeline. F.O.B. Chicago, IL" used by Marathon in its forward contracts. C 12908-12, 12172. The County incorrectly assumed this phrase meant that Marathon was physically transferring fuel in Chicago. *Id*. In fact, Marathon had no terminals or ability to transfer fuel in Chicago. C 12452, 12513-14, 12905. Marathon explained to the County during the Audit, and again at the administrative hearing, that the phrase "Generic Chicago Pipeline. F.O.B. Chicago, IL" has a distinct meaning in the oil and gas industry (and internally at Marathon). C 12515-25. This term does not reflect where fuel is delivered or transferred. C 12515-21. Rather, the term "Chicago" refers to one of five pricing regions

[2] The County's workpapers identify only ten counterparties that Marathon entered into Book Out transactions. The County assessed Tax on all of them. C 12127-29, 12123-25.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

for Motor Fuel used by the petroleum industry that is unrelated to a delivery point and definitively is "not the physical delivery location." C 12518.

C. Pre-hearing proceedings

On October 9, 2014, Marathon timely challenged the County's Original Assessment by filing a protest and request for administrative hearing. C 5417-25. After the County issued its Revised Assessment, Marathon filed a Supplemental Protest, contesting the County's imposition of tax and interest on the Book Out transactions, and all associated penalties. C 4002-4065.

In pre-hearing proceedings, Marathon sought leave to issue discovery regarding the County's audit methodologies, findings, and basis for conclusions. The County opposed Marathon's request and the ALJ denied Marathon's request. C 1255. At the parties' final pre-hearing status, the ALJ confirmed the court's understanding that there was no Motor Fuel transferred in the Book Out transactions:

> [T]he issue in dispute, sometimes referred to as book-outs…which *I've said a number* of times is the – *instead* of proceeding with actual buying and selling of a commodity, in this case oil and gas…the parties decide they don't want to go through with the *actual buy and sells* [*sic*]*;* they want to settle the contracts for a cash payment.

C 5766 (emphasis added).

D. The administrative hearing

At the Cook County administrative hearing (the "Hearing"), Marathon presented evidence that the Book Outs did not involve the transfer or exchange of Motor Fuel, but rather, were purely financial transactions. Matthew Freeman ("Freeman"), a Marathon commercial analysis manager, testified that the underlying concept in Book Outs is always the same – it is a financial transaction where parties resolve their contractual obligations

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

by settling with cash and forgoing the physical transfer of fuel. C 12475-76, 12551-52. Freeman also testified that neither title to, nor possession of, Motor Fuel changes from one party to another in a Book Out transaction, and that as a result, the parties' inventory positions do not change. *Id.* Joesph Steiner ("Steiner"), a Marathon Motor Fuel tax specialist and employee of 36 years, testified regarding Marathon's tax compliance and reporting of the Book Out transactions. C 12678-79. Steiner corroborated Freeman's testimony and confirmed that Motor Fuel and inventory levels never change in the Book Out transactions. C 12681-84, 12690-91.

Freeman also testified about a representative Book Out transaction with Sunoco. He identified all of the documents Marathon uses to record the Book Out transactions, including: (i) a forward contract (matching buy/sell agreement), which identified reciprocal obligations to buy and sell Motor Fuel (C 12908-12); (ii) a physical deal sheet, which recorded the quantities of Motor Fuel that were to be financially settled (C 12914-15); (iii) a book transfer letter used by Marathon to document the parties' intent to financially settle the contract (C 12917); and (iv) book transfer invoices issued by both Marathon and its counterparty confirming that the parties' respective obligations to receive and/or deliver fuel under the forward contract had been financially settled (C 12919, 12921). Freeman testified that the Sunoco transaction and associated documentation were representative of all the Marathon Book Out transactions in the Revised Assessment. C 10485. In addition, he testified that Marathon's documentation for every Book Out transaction consisted of the same documents introduced and admitted at the Hearing (with variation only as to the counterparty, date, volume and price reported). C 12550-12551.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

All of the documents described by Freeman during the Hearing, including the County's Audit file, Marathon's Documents Intended to Be Relied on at Trial, Marathon's Supplemental Disclosure of Documents to Be Relied Upon (stipulated to by the County), and Marathon's Statement of Facts and Associated Documents, were presented or served on the County during Audit and/or admitted into the Record by the parties' pre-Hearing stipulation. *See* C 10042-68, C10897-11243, C 11256-353, C11635-12026, C 12029-118, C 12131-157, C12998-13160, C 13163-564, C13567-711.

Marathon's expert witness professor Dr. Gregory Arburn ("Arburn") confirmed that no Motor Fuel is transferred, exchanged, or disposed of in a Book Out transaction. Arburn testified that: (i) Book Outs are forward contracts where two parties agree to financially settle the contract; (ii) there is no change in possession of a commodity; and (iii) parties elect to financially settle contracts "for risk management and cost control." C 12412-12417. The County's audit supervisor, Gary Michaels ("Michals"), and its rebuttal expert witness, Dr. Andria van der Merwe ("van der Merwe"), agreed that no Motor Fuel is exchanged in a Book Out transaction. Dr. van der Merwe testified:

> [W] hat happens under a cash settlement is that there is no fuel delivered. What is exchanged between the two counter parties is the economic equivalent value of the forward contract…[a]nd that's exchanged in cash.

C 12974-75. *Id.*, C 12362 (Michals).

At the Hearing, the County did not offer any rebuttal evidence and did not contest Marathon's testimony or documentary evidence that established the Book Outs were financial transactions that involved no transfer or exchange of Motor Fuel. Prior to closing arguments, the ALJ confirmed that the Book Out transactions were purely financial transactions and asked the County to address the following legal issue:

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

> Is the Department of Revenue's position *that the kinds of cash settlements that this case is about,* standing alone, are taxable under the gas tax ordinance, or, is it the Department of Revenue's position that somehow *in these cash settlements* there is nonetheless something that counts as a sale as defined by the ordinance and generally that would be the transfer or possession of the transfer of ownership?

C 12977-78 (emphasis added).

Throughout the Hearing, the County identified the issue to be decided by the ALJ as a legal issue — whether the Motor Fuel Tax applied to financial transactions when there is no change in possession or ownership. *See, e.g.,* C 11549-50 (Department's Counsel: "…this entire case is dealing with the issue of a book out…. the sole issue…is book outs."). Prior to issuing her Decision, the ALJ agreed the same to be true. ("[T]he issue…was whether or not the Cook County gas and diesel tax ordinance applies to the settling of futures contracts involving taxable product...") C 5574.

E. The administrative law decision

On September 9, 2019, nearly two years after the conclusion of the administrative hearing, the ALJ issued an Opinion and Judgment Order of Administrative Law Judge (the "Decision") affirming the County's Revised Assessment, including the imposition of penalties, on the basis that Marathon presented insufficient documentary evidence to disprove the assessment. A-21. The ALJ found that Marathon failed to present documentary evidence that the Book Outs involved "nothing more than making a cash payment in lieu of transferring either possession or ownership of the product identified in the forward contract." A-30. The ALJ also ruled that Marathon failed to show that the Revised Assessment consisted entirely of Book Out transactions. A-38. The ALJ did not address the underlying legal question regarding whether Book Out transactions were subject to the Motor Fuel Tax. A-37. The ALJ also rejected Marathon's alternative

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

arguments that the County's application of the Motor Fuel Tax to Book Out transactions was an impermissible occupation tax in violation of the Illinois Constitution and an extraterritorial tax in violation of the due process clauses of the Illinois and United States Constitutions. A-41-43.

F. The circuit court decision

On administrative review, the Circuit Court of Cook County overturned and reversed the ALJ's Decision, including the penalty award. A-45. The circuit court held that the County had failed to meet the standard of reasonableness necessary to produce a *prima facie* correct assessment. A-61. In addition, the circuit court held that even if the County had met its *prima facie* burden, thus shifting the burden of proof to Marathon, that Marathon "met its burden of proof to support its protest and proved that the transactions in question were mere cash settlements of forward contracts and not sales of motor fuel." A-117. Lastly, the court held that the financial transactions were not subject to Motor Fuel Tax because "[o]nly sales of motor fuel to unregistered distributors subject the seller to the Gas Tax…and a predicate to such a tax is the fact that the transaction must be a sale of motor fuel." A-116. Because it held that the Book Out transactions were not subject to Motor Fuel Tax, the circuit court did not reach the parties' constitutional arguments. A-117.

G. The appellate court decision

By an Opinion issued on December 30, 2022, the appellate court reversed the circuit court's decision and upheld the Revised Assessment, except for the award of penalties. A-1. Unlike the ALJ and the circuit court, the appellate court held that the Book Out transactions were taxable sales under the Ordinance. A-13, ¶ 37. The appellate court found

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

that the ALJ's analysis was misplaced. A-11, ¶ 35. Instead, the appellate court found that "[t]he question here is not whether book-out transactions occurred, but how forward contracts with corresponding book-out transactions should be treated for tax purposes." *Id.* The appellate court held that the Book Out transactions involved transfers of an intangible ownership interest, and that such transfers were subject to the Motor Fuel Tax. ("We find that under section 74-471 of the Fuel Tax Ordinance–which broadly defines the sale of fuel as "any transfer of ownership or possession or both *** by any means whatsoever" . . . – the transfer of that intangible ownership interest is enough to make these transactions taxable.") A-13, ¶ 37 (citation omitted). The appellate court also addressed the constitutional arguments, holding that the County's imposition of Motor Fuel Tax on the Book Out transactions did not constitute an unconstitutional occupation tax or extraterritorial tax. A-14, 16, ¶¶ 43, 47. The appellate court also held that the ALJ's decision to affirm the imposition of penalties was contrary to the manifest weight of the evidence and remanded the case for recalculation of the amount due without penalties. A-16-18, ¶¶ 48-50.

On April 7, 2023, Marathon timely filed a Petition for Leave to Appeal with this Court. The County did not file a cross petition.

STANDARD OF REVIEW

The applicable standard of review depends on whether the question presented is one of fact, law, or mixed fact and law. *AFM Messenger Serv., Inc. v. Dep't of Employment Sec.*, 198 Ill. 2d 380, 390 (2002). An administrative agency's findings on questions of fact are considered "prima facie true and correct." 735 ILCS 5/3-110; *Cinkus v Stickney Mun. Officers Electoral Bd.*, 228 Ill. 2d 200, 210 (2008). When a court is reviewing an agency's

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

factual findings, "the court will ascertain only if the findings of fact are against the manifest weight of the evidence." *AFSCME v. Ill. State Lab. Relations Bd.*, 216 Ill. 2d 569, 577 (2005) (citing *City of Belvidere v. Ill. State Lab. Relations Bd.*, 181 Ill. 2d 191, 204 (1998)). An agency decision on the legal effect of a given set of facts is reviewed under the clearly erroneous standard. *AFSCME*, 216 Ill. 2d at 577. In contrast, questions of law are reviewed *de novo* and are not binding on a reviewing court. *Cinkus*, 228 Ill. 2d at 210-11.

The issue of whether the Motor Fuel Tax can legally be imposed on Book Outs is purely a legal determination, which is subject to *de novo* review. The remaining questions relating to the potential conflict between the County's statutory interpretation and the Illinois and U.S. Constitutions, whether the County failed to establish a *prima facie* case and whether Marathon sufficiently rebutted any such *prima facie* case are mixed questions of law and fact that must be reviewed under the clearly erroneous standard.

ARGUMENT

I. The Book Out Transactions are not Subject to the Motor Fuel Tax Under the Plain Language of the Ordinance.

A. The Motor Fuel Tax is imposed on the physical transfer of possession or ownership of Fuel for retail sale

The Book Out transactions are not subject to the Motor Fuel Tax under the plain and unambiguous text of the Ordinance because there is no transfer of Motor Fuel for retail sale. In interpreting a statute, a court should "ascertain and give effect to the true intent" of the enacting body. *In re Marriage of Kates*, 198 Ill. 2d 156, 163 (2001). "The best evidence of legislative intent is the language used in the statute itself, which must be given its plain and ordinary meaning." *Id.* "There is no rule of construction which authorizes a court to declare that the legislature did not mean what the plain language of the statute

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

imports, and a court is not at liberty to depart from the plain language of a statute by reading into it exceptions, limitations or conditions that the legislature did not express." *Kunkel v. Walton,* 179 Ill. 2d 519, 534 (1997).

The Ordinance imposes a tax "on the retail sale in Cook County of gasoline, diesel fuel, biodiesel fuel, and gdiesal (sic) fuel at the rate of $0.06 per gallon or fraction thereof." Sec. 74-472(a). The Ordinance does not define the terms "retail sale" or "retail." § Sec. 74-471. The Ordinance does define "sale, resale and selling" as "any transfer of ownership or possession or both, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever." *Id*. The definition goes on to provide that "[i]n every case where gasoline, diesel fuel, biodiesel, or gdiesal (sic) fuel are exchanged, given or otherwise disposed of, it shall be deemed to have been sold." *Id.*

As an undefined term in the Ordinance, the term "retail" must be given its ordinary meaning. *Horsehead Corp. v. Dep't of Rev.,* 2019 IL 124155, ¶ 37 (2019). The term "retail" is defined in the Black's Law dictionary as "[t]he sale of goods or commodities to ultimate consumers, as opposed to the sale for further distribution or processing." Black's Law Dictionary (11th ed. 2019). Thus, a "retail" sale necessarily involves the transfer of tangible personal property. This is consistent with the way "retail sale" is defined in other Cook County ordinances and by the Illinois legislature. Other Cook County ordinance taxing articles define a "retail sale" as "any transfer for valuable consideration of the ownership of or title to tangible personal property to a consumer or end user." Ord. Sec. 74-231 (Cook County New Motor Vehicle and Trailer Excise Tax); Sec. 74-271 (Cook County Home Rule County Use Tax). Similarly, the Illinois legislature defines "sale at retail" to mean "any transfer of the ownership of or title to tangible personal property to a

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

purchaser, for the purpose of use, and not for the purpose of resale in any form … for a valuable consideration." 35 ILCS 105/2.[3]

Further, the Tax is imposed on various types of fuel. The definitions of the various types of fuel do not include a financial or intangible transaction. *See, e.g.*, the Ordinance's definition of "Diesel Fuel" ("any petroleum *product* intended for use or offered for sale as fuel for engines in which fuel is injected into the combustion chamber and ignited by pressure without an electric spark"); and "Gasoline" ("all *products* sold as gasoline which includes aviation gasoline and gasohol, or any product which consists of gasoline blended with alcohol.") Sec. 74-471 (emphasis added). These definitions confirm that the Tax is imposed on the transfer of ownership, possession, or sale of physical product.

By its plain language, the Motor Fuel Tax is imposed on the transfer of possession or ownership of Motor Fuel in Cook County for retail sale. The Book Out transactions are not subject to the Motor Fuel Tax because they do not involve a physical transfer or change in ownership of fuel. Neither gasoline nor diesel fuel were exchanged in any of the transactions.

As discussed in section IV, the appellate court concluded that the Book Outs resulted in the transfer of an intangible ownership interest in Motor Fuel. *See* A-13, ¶ 37. Even if that conclusion is correct, which Marathon maintains it is not, the Book Out transactions are still not subject to Motor Fuel Tax because they do not involve a transfer of Motor Fuel for retail sale to consumers. Imposition of the Tax on financial or intangible transactions would lead to double taxation when a distributor ultimately sells the product

[3] *See also* Pomp, Richard, *State and Local Taxation*, 9th ed., 7-1 (2019) (Most jurisdictions "define a retail sale as a sale of tangible personal property for any purpose other than resale.")

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

that was earmarked in the buy/sell agreements, but financially settled prior to delivery. This result is contrary to the plain language of the Ordinance and legislative intent.

B. The broader context confirms the Motor Fuel Tax is only imposed on the transfer of Motor Fuel

Not only is the County's position contrary to the plain language in the imposition clause, but it is also inconsistent with the Ordinance as a whole. A statute must be evaluated as a whole; each provision should be construed in connection with every other. *Miller v. Dep't of Registration & Educ.*, 75 Ill. 2d 76, 81 (1979). The County's interpretation of the Ordinance would deviate in material respects from the Ordinance's carefully calibrated framework.

To start with, the Ordinance provides that the "incidence and liability for payment" of the Tax "is to be borne by the consumer of the gasoline, diesel fuel, biodiesel fuel and gdiesal (sic) fuel." Sec. 74-472(b). A "consumer" is defined, in turn, as an "end user." Sec. 74-471. More, the Ordinance forbids sellers to absorb the Tax themselves — that is, to fail to pass it on to the consumer. The Ordinance provides that "it shall be deemed a violation of this Article for any distributor or retail dealer to fail to include the tax in the retail sale price of gasoline, diesel fuel, biodiesel fuel, gdiesal (sic) fuel or to otherwise absorb the tax." Sec. 74-472(b). This anti-absorption clause evidences the intent of the County Commissioners to impose the tax on consumers.

Given that the proper ambit of Cook County's home rule authority is limited to consumers *in Cook County* — Cook County has no valid authority to regulate the conduct of consumers outside its boundaries (*see* Section V.B., *infra*) — the purpose of the Motor Fuel Tax is necessarily limited to reaching retail sales to end consumers *in Cook County*. It would contradict the goals of the Ordinance to apply it in a manner that results in taxes

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

being paid by distributors who settle forward contracts or transfer intangible ownership interests, absent any connection to a retail sale in the County.

Moreover, the Ordinance requires collection of the Motor Fuel Tax from the purchaser of "fuel in the *possession* of distributors or retail dealers." Sec. 74-472(c) (emphasis added). The Ordinance further provides that "[i]f the retail dealer shall *receive*…fuel upon which no tax has been collected by the distributor or supplier…then the retail dealer shall collect such tax and remit it directly to the Department within 30 days of the *receipt* of" such … fuel. Sec. 74-472(f) (emphasis added). These provisions illustrate that the Cook County legislators intended to Tax an actual transfer of Motor Fuel.

Finally, Marathon's interpretation is also compelled by the chain of collection obligations, which are established in Section 74-472(c) of the Ordinance. The Ordinance imposes the primary Tax collection and remission responsibility on "Gas Distributors," defined as "any person who either produces, refines, blends, compounds, or manufactures gasoline or diesel fuel in this County or transports or has transported gasoline or diesel fuel into this County or receives gasoline, diesel fuel or biodiesel fuel in Cook County on which this tax has not been paid." Sec. 74-471.[4] Gas Distributors are required to collect and remit the Tax on their sales of Motor Fuel to (1) retail dealers doing business in the County, (2) consumers who purchase Motor Fuel directly from a Gas Distributor for delivery in the County; or (3) other Gas Distributors doing business in the County that do not hold valid County registration certificates. Sec. 74-472(c).[5] Absent a transfer of Motor Fuel between

[4] Retail dealers who "receive gasoline, diesel fuel, biodiesel fuel or gdiesal (sic) fuel upon which not tax has been collected" have a corresponding duty to collect and remit the Tax directly to the County. Sec. 74-472(f).

[5] The Ordinance provides three exceptions to this requirement. Gas Distributors are not required to collect and remit Tax on sales of Motor Fuel to (1) other Gas Distributors

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

distributors, or from distributor to retailer, there is no gas to be passed on to a retail consumer, and the stated purpose of the Ordinance – to tax retail transactions – cannot be achieved. Imposing the Motor Fuel Tax on intangible transactions effectively reads the "retail sale" requirement out of the Ordinance, improperly rendering the phrase superfluous (*see People v. Balark*, 2019 IL App (1st) 171626 ¶ 59), and raising constitutional issues discussed in more detail in Section V, *infra*. Importantly, the Book Out transactions do not fall within the scope of the Ordinance because they do not involve (as the County incorrectly assumed) a transfer from a Gas Distributor to another unregistered Gas Distributor doing business in the County. A "Gas Distributor" is engaged in the physical production of Motor Fuel. Sec. 74-471. Gas Distributors who engage in these activities in the County are required to register as distributors with the County, and those who fail to register must pay the Tax when purchasing Motor Fuel in the County from another registered Gas Distributor. Sec. 74-472(c)(3); Sec. 74-474(a).

At trial, County auditor Vega conceded that parties who do not transport Motor Fuel into or out of the County and who do not blend, produce, or refine, or otherwise manufacture Motor Fuel in the County are not doing business in the County. C 2772. As such, distributors engaging in Book Out transactions – financial settlements of forward contracts for the future sale of Motor Fuel – are not "Gas Distributors" required to register with the County. Correspondingly, under the plain meaning of the Ordinance, Marathon had no duty to collect Motor Fuel Tax in the Book Out transactions because the distributors with whom they dealt were not doing business in the County with respect to the transactions

---

holding valid County gas tax registration certificates; (2) other Gas Distributors or retail dealers when the Motor Fuel is delivered to a location outside of the County; or (3) the United States, the State of Illinois or their instrumentalities. Sec. 74-473.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

at issue, and thus not legally obligated to register as "Gas Distributors" within the meaning of the Ordinance. The County treats the transaction as one involving an unregistered Gas Distributor doing business in the County for tax purposes, but not engaged in activities that require it to register as a Gas Distributor with the County. This interpretation renders the Ordinance's registration clause meaningless, contrary to statutory construction principles. *People v. Lloyd*, 2013 IL 113510 ¶ 25.

The unambiguous plain language of the Ordinance imposes a tax on the retail sale of Motor Fuel. The "tax imposed" clause, when read together with the applicable definitions, other provisions in the Ordinance and the registration requirements, leaves no doubt that that Motor Fuel Tax is not imposed on the settlement of forward contracts nor the sale of intangible rights.

II. Any Ambiguity Regarding the Imposition of the Tax Must be Resolved in Favor of the Taxpayer (Marathon).

Even if the Ordinance could be subject to varying interpretations, any ambiguity must be resolved in favor of Marathon. The Illinois Supreme Court has long held that "[t]axing statutes are to be strictly construed. Their language is not to be extended or enlarged by implication, beyond its clear import. In cases of doubt they are construed most strongly *against the government* and *in favor of the taxpayer*." *Van's Material Co. v. Dep't of Rev.*, 131 Ill. 2d 196, 202 (1989) (emphasis added) (citing *Mahon v. Nudelman*, 377 Ill. 331, 335 (1941)); *Canteen Corp. v. Dep't of Rev.*, 123 Ill. 2d 95, 105 (1988); *Chet's Vending Serv., Inc. v. Dep't of Rev.*, 71 Ill. 2d 38, 42 (1978).

This presumption of strict construction in favor of the taxpayer is well established in Illinois Supreme decisions stretching over many decades. *Id.*; *see also People's Gas Light & Coke Co. v. Ames*, 359 Ill. 152, 154-55 (1934). As the Court explained in *Van's,*

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

when strictly construing a statutory provision, a court must "give effect to the intention of the legislature, and that inquiry must begin with the language of the statute." *Van's Material Co.,* 131 Ill.2d at 202 (citing *Canteen Corp.,* 123 Ill.2d at 104; *Metro. Life Ins. Co. v. Washburn*, 112 Ill. 2d 486, 492 (1986)). As discussed above, the plain language of the Ordinance supports Marathon's interpretation. To the extent that the Ordinance could be found to have any ambiguity – and, to be clear, Marathon submits that the plain language resolves this dispute in its favor – the canon requiring narrow reading of tax statutes would resolve this matter in the taxpayer's favor.

This rule of statutory construction also ensures a necessary certainty for taxpayers, who rely on the rule to ensure that taxing statutes are not construed in unfavorable, unanticipated ways. The need for the rule is particularly apparent here, where the County did not comply with the Ordinance's directive to "prescribe reasonable rules, definitions, and regulations necessary to carry out the duties imposed upon it." Sec. 74-482. The County has issued no administrative regulations or rulings related to the Motor Fuel Tax.

III. The ALJ and Circuit Court of Cook County Have Each Concluded that the Motor Fuel Tax Does Not Apply to Book Out Transactions.

Consistent with the plain meaning of the Ordinance, both the ALJ and circuit court assigned to this proceeding have held that the Motor Fuel Tax does not apply to Book Out transactions. In a recent opinion issue in a similar case involving another taxpayer,[6] the ALJ held:

> In sum, viewing the Ordinance's definition of "sale" as a whole, giving all of its undefined terms their plain and popularly understood meaning, but

[6] In this proceeding, the ALJ did not reach the underlying legal question because it found that Marathon had not met its burden of proving that the transactions in question were financial transactions. A-37. As demonstrated below (and as the Circuit Court held), the ALJ's conclusion that Marathon did not meet its burden of proof was clear error.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

> being mindful that the definition of "sale" must be construed strictly in favor of [the taxpayer,] the Ordinance does not extend to the monetary settlement of contracts to sell or buy gasoline or diesel fuel.

Opinion and Order in *County of Cook (Department of Revenue) v. BP Products North America, Inc.*, No. RD-16011 & RG-16010 (Jan. 31, 2022), at 39 ("BP Order"). A-157.[7]

Similarly, in its opinion overturning the ALJ's Opinion and Judgment Order in this case, the circuit court held that the Motor Fuel Tax did not apply to financial transactions at issue in this proceeding:

> [T]here is no evidence in the record that when the book transfer transactions occurred, either a transfer of ownership or possession occurred or fuel was exchanged, given, or disposed of. Accordingly, the book transfer transactions were not sales of fuel as defined in § 74-471 of the Gas Tax Ordinance. Because they were not sales of motor fuel, as so defined, the transactions were not taxable under the Ordinance. The ALJ's decision to the contrary was patently unreasonable due to the evidence in the record, clearly erroneous, and an incorrect application of the law.

A-114.

IV. The Appellate Court's Decision is Clearly Erroneous and Must be Reversed.

The appellate court's conclusion that the Motor Fuel Tax applies to Book Out transactions does not withstand scrutiny and must be overturned. As discussed in Section I, the court ignored fundamental rules of statutory construction when it failed to consider the plain language of the Ordinance, which does not subject the transfer of intangible rights to the Motor Fuel Tax. Even if the Ordinance was ambiguous, which Marathon maintains it is not, the appellate court failed to construe the Ordinance – a tax imposition statute – in favor of the taxpayer. *See Van's Material Co.,* 131 Ill.2d at 202. Moreover, even if the Ordinance did impose a tax on the transfer of intangible, which it does not, there was no

[7] The County has appealed the BP Order. The case is currently pending before the Circuit Court of Cook County as *County of Cook v. BP Products North America, Inc.,* No. 2022 L 50113.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

such transfer here. The appellate court erroneously ignored Marathon's evidence and instead improperly took judicial notice of an unsubstantiated factual source to define the transactions at issue. In addition, the appellate court misconstrued two state-issued private letter rulings, which are not supportive of its interpretation of the statute.

A. There was no legal transfer of ownership under Illinois law

The appellate court misapprehended Illinois law by concluding that the Book Out transactions involved a taxable transfer of "ownership" of an intangible interest.[8] *See* A-13, ¶ 37. As the circuit court correctly concluded, Illinois case authority establishes that the minimum elements of "ownership" are control and possession, including the right to control, use, and enjoy the property. *People v. Chicago Title & Trust Co.,* 75 Ill.2d 479, 489 (1979); *Chicago Patrolman's Ass'n v. Department of Revenue,* 171 Ill. 2d 263, 273 (1996); *Dep't of Transp. v. Anderson,* 384 Ill. App. 3d 309, 312 (3d Dist. 2008)*; Lombard Pub. Facilities Corp. v. DOR,* 378 Ill. App. 3d 921, 932 (2d Dist. 2008). Possession of title alone is insufficient to establish ownership; evidence of control is also required. *Chicago Title*, 75 Ill.2d at 489; *Chicago Patrolmans' Ass'n*, 171 Ill. 2d at 273. Where, as here, performance of a contract is established by financial settlement, rather than physical transfer of Motor Fuel, the fulfillment of the contract does not equate to the transfer of ownership.

As discussed in more detail below, the record contains no evidence that Marathon's counterparties who engaged in the Book Out transactions obtained either control or possession of Motor Fuel from Marathon, either at the time of entry into the matching

[8] As discussed below, in reaching this conclusion, the appellate court overlooked testimonial and documentary evidence that there was no change in possession, title or ownership in the transactions that were before the court. C 12551-2, 12490.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

buy/sell agreement or at the time of the Book Out. The contracting counterparties never obtained control or possession of Marathon's Motor Fuel, nor did they acquire a right to control, use, or enjoy the Motor Fuel. Further evidencing that the counterparties never obtained control or possession of the Motor Fuel is the undisputed fact that neither Marathon's nor its counterparties' inventories of Motor Fuel were impacted from the Book Out transactions. C 2985-87. Because there was no product transfer, Marathon's counterparties never obtained any control over the Motor Fuel within the meaning of Illinois law. Even if the initial matching agreement is viewed as establishing a future right to possession in the event Motor Fuel is ultimately delivered, this is insufficient to establish ownership. *See Fid. Fed. Sav. & Loan Ass'n v. Grieme*, 112 Ill. App. 3d 1014, 1018-19 (1983) (as a matter of law, an agreement for deed in and of itself is insufficient to establish a change in ownership.")

B. The appellate court improperly took judicial notice of the PwC glossary to conclude ownership transferred in the Book Out transactions

The appellate court also improperly took "judicial notice" of online definitions of "forward buying" and "futures contract" appearing on a glossary of terms published by PricewaterhouseCoopers ("PwC"). A-12, ¶ 36. According to the appellate court, the glossary defines a "book out" as a transaction in which ownership transfers but possession does not, thus supporting the conclusion that a taxable "sale of intangible" takes place in a book out transaction. *Id.*

In Illinois, a court may only take judicial notice of facts not subject to reasonable dispute, either because they are generally known or because they are capable of accurate, ready determination by reference to sources whose accuracy is beyond reasonable question. Ill. Rule Evid. 201(b); *Muller v. Zollar*, 267 Ill. App. 3d 339, 341 (3d Dist. 1994). Facts

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

must be "capable of instant and unquestionable demonstration" for this Court to take judicial notice of them. *Aurora Loan Serv., LLC v. Kmiecik*, 2013 IL App (1st) 121700, ¶ 37; *May Dep't Stores Co. v. Teamsters Union Local No. 743*, 64 Ill. 2d 153, 159 (1978).

The PwC glossary does not meet this standard. The County did not introduce the glossary into evidence at the Hearing, nor did it question any of the expert witnesses about it, including its own expert. The glossary lacks supporting authority for its definitions and the URL used to view the glossary does not link to the PwC website or any other website that might otherwise support or verify the information contained in the glossary. It appears from the URL and context that it was prepared for a European audience and was compiled by the Energy utilities and mining practice, not the PwC tax department. The URL suggests it is a "EU Commodities Trading" document, as evidenced by the fact that the work "organization is spelled "organisation" throughout. There is no apparent connection between the defined terms and the taxation of Motor Fuel, much less the Ordinance.

In addition, the terms in question ("forward buying" and "futures contracts") are not generally known. Illinois courts may only take judicial notice of common word's accepted meanings, (*see e.g., Home Indem. Co. v. Hunter*, 7 Ill. App. 3d 786, 790 (1st Dist. 1972) ("automobile" means something different than "motorcycle")), or of widely understood business facts ordinary people might know from their day-to-day life experiences (*see., e.g, People v. Toliver*, 60 Ill. App. 3d 650, 652 (1st Dist. 1978) (taking judicial notice that Jewel-Osco is a retail store that offers good for sale)). The terms the appellate court took notice of are not well known, even to well-informed people. *Cf. Ashland Sav. and Loan Ass'n v. Aetna Ins. Co.*, 18 Ill. App. 3d 70, 77-78 (1st Dist. 1974) (judicial notice relates to "matters of public concern which are well known by all well-

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

informed persons.") In contrast here, because the concepts of Book Out transaction and forward/futures contracts are not well known (as noted above, Vega admitted that he did not know what a Book Out transaction was), the meaning of the terms was a subject of considerable testimony at the Hearing, including by Marathon's fact witnesses and both party's expert witnesses. C12418-21, 3057-59. This evidence, not definitions from an unrelated, unsubstantiated online glossary, should control the meaning of the terms for this proceeding.

The appellate court's reliance on the PwC glossary was also improper because the glossary was not introduced at the Hearing. *See Ashland Sav. & Loan Ass'n v. Aetna Ins. Co*., 18 Ill. App. 3d 70, 78 (1st Dist. 1974) ("Judicial notice cannot be extended to permit the introduction of new factual evidence not presented to the trial court.").

C. The private letter rulings cited by the appellate court do not support the appellate court's ruling

The appellate court also misconstrued two Illinois Department of Revenue ("IDOR") private letter rulings it claimed are supportive of its interpretation of the Ordinance. Department IDOR private letter rulings ("PLRs") are issued in response to specific taxpayer inquiries concerning the application of a tax statute or rule to a particular fact situation. A PLR is binding on the IDOR, but only as to the taxpayer issued the ruling, and only as to the specific tax and facts presented. 2 Ill. Admin. Code 1200.110. Assuming the underlying facts do not change, the taxpayer to whom the letter ruling has been issued may rely on the guidance for ten years. *Id.* Once the ten-year period has expired, the guidance is revoked and has no application, even to the taxpayer to whom it was issued. *Id.*

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

In its Opinion, the appellate court referenced two private letter rulings issued by IDOR in support of its conclusion that the County Motor Fuel Tax applies to the sale of an intangible interest. A-13, ¶ 38. Neither ruling involves the County or the Motor Fuel Tax, much less Marathon. Moreover, both PLRs are more than ten years old and thus have been revoked.

Even if still authoritative or involving the same parties, taxing authority or tax, neither ruling supports the appellate court's conclusion because the underlying facts in the PLRs are materially different than those at issue here. In ST 87-0396-PLR (issued 6/1/1987), the taxpayer asked for guidance concerning whether the Illinois prepaid sales tax applied to book transfers of Motor Fuel with a non-licensed distributor or supplier. Unlike the Book Out transactions at issue here, where neither ownership nor possession has transferred, the taxpayer seeking the PLR advised the Department that the transfers in question involved "the passing of title to product among several parties without physically moving the product." In response, the Department advised that the prepaid sales tax requirement applied.

In IT-003-PLR (issued 11/18/2011), the taxpayer was a securities dealer in uranium pursuant to Internal Revenue Code Sec. 475. The PLR addressed the question whether the taxpayer's qualification as a securities dealer for federal tax purposes would be respected for Illinois corporate net income tax purposes. Unlike the parties to the Book Out transactions in this case, the uranium dealer in the PLR held title to the uranium, and the ownership of the uranium was reflected in its inventory. However, due to the nature of the commodity, the trading company could not take possession of the uranium (it was stored in a third-party facility). When trades were made, "book transfer" account entries were

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

entered to restate the inventory positions and the transfer of title. Based on these facts, the Department advised that the taxpayer qualified as a securities dealer. For these reasons, neither PLR supports the appellate court's reading of the Ordinance.

V. Principles of Constitutional Avoidance Prohibit the County's Construction of the Ordinance.

The County's interpretation of the Ordinance as applied to Marathon renders it unconstitutional. Courts have a duty to avoid constitutional questions whenever possible and to construe the challenged statute in a manner that preserves its constitutionality. *See Innovative Modular Solutions v. Hazel Crest Sch. Dist. 152.5*, 2012 IL 112052, ¶ 38, ("It is settled that courts should avoid constitutional questions when a case can be decided on other grounds"); *see also People v. Melongo*, 2014 IL 114852, ¶ 20, (holding that a reviewing court has a duty to construe a challenged statute in a manner that preserves its constitutionality whenever it is reasonably possible to do so). If an ordinance is subject to two constructions, one of which may render it unconstitutional, courts are "bound to adopt the construction which avoids the constitutional problem." *Bd. of Comm'rs v. County of DuPage*, 119 Ill. App. 3d 1085, 1093 (1983). For multiple reasons, the construction advanced by Marathon avoids the constitutional infirmities inherent in the County's contrary position.

A. Adoption of the County's interpretation would render the Motor Fuel Tax an "occupation tax" in violation of the Illinois Constitution

Marathon challenges the County's application of the Motor Fuel Tax *as applied* to the Book Out transactions as an impermissible occupation tax. The ALJ ignored Marathon's argument and instead found that *facially*, the Motor Fuel Tax was constitutional. *See* C 66. The ALJ applied the incorrect constitutional analysis and never considered the County's application of the Motor Fuel Tax to the transactions at issue.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

Home rule units of government in Illinois, such as Cook County, are prohibited under the Illinois Constitution from imposing "occupation" taxes absent specific authorization by the Illinois General Assembly. Ill. Const. Art. VII, § 6(a); *S. Bloom, Inc. v. Korshak*, 52 Ill. 2d 56, 59-63 (1972). Thus, Cook County only has the power that the General Assembly provides by law "to license for revenue or impose taxes upon or measured by income or earning upon occupations." Ill. Const. Art. VII § 6(e). The General Assembly has enumerated limited instances where a home rule authority is not preempted from imposing an occupation tax and a tax on Motor Fuel distributors is not one of those exceptions. 55 ILCS 5/5-1009.

An occupation tax is one "designed to impose, and [that], in fact, imposes a tax upon given occupations." *Estate of Carey v. Vill. of Stickney*, 81 Ill. 2d 406, 411 (1980). An occupation tax in this context would occur if the Motor Fuel Tax was in effect imposed on the distributor, instead of on the consumer. *See* Sec. 74-472(a) (noting that "nothing in this Article shall be construed to impose a tax upon the occupation of distributors, supplies or retail dealers.") The County's interpretation of the Ordinance changes the Motor Fuel Tax from a "sales" tax (borne ultimately by consumers) into a tax on the "occupation" of being a distributor in Cook County. This is because practically speaking, the Tax cannot be passed on to the consumer since the transactions at issue are merely financial transactions and there has been no transfer of Motor Fuel that could ultimately be sold to a consumer since there is no transfer of title or possession of Motor Fuel.

The ALJ improperly concluded that the Motor Fuel Tax is not an impermissible occupation tax "because the plain language of the Gas Tax Ordinance makes it clear that the gas tax is not an occupation tax." A-42. Illinois Supreme Court precedent clearly

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

establishes that the Illinois Constitution's mandate against taxation of occupations cannot be "nullified by simply inserting" the language that "nothing in this [Ordinance] shall be construed to impose a tax upon the occupation of distributors." *Commercial Nat'l Bank v. City of Chicago*, 89 Ill. 2d 45, 68 (1982). Doing so would "effectively repeal[], or delete[] from our constitution, the requirement that authorization by the General Assembly must first be given before a home rule unit may impose taxes upon occupations." *Id*. at 69.

The ALJ further erroneously relied on *Illinois Gasoline Dealers Ass'n., v. City of Chicago,* 119 Ill. 2d 391, 401 (1988), for her conclusion that there was no constitutional violation. *See* C 66. There the Court found Chicago's vehicle fuel tax to be constitutional because it was imposed on tangible property authorized by home rule authority and distinguishable from other ordinances that were found to be unconstitutional occupation taxes where tax was imposed on a service. 119 Ill. 2d at 400-01. This is why the Motor Fuel Tax is *facially* constitutional – because it imposes tax on the sale of actual fuel. However, *as applied*, the County's imposition of the Motor Fuel Tax on Book Out transactions is a tax on a sale of an intangible which results in an unconstitutional occupation tax on the distributor. By affirming the Revised Assessment, the ALJ transformed the application of the Ordinance in this case from a Tax intended to be imposed on consumers into an impermissible occupation tax on distributors.

B. Adoption of the County's construction would render the Motor Fuel Tax unconstitutionally extraterritorial

The County's construction of the Ordinance also extends the Motor Fuel Tax to reach conduct outside the boundaries of Cook County, violating clear constitutional limitations on home rule authority. Under the Illinois Constitution, a home rule unit may not impose a tax outside of its borders unless expressly authorized by the Illinois General

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

Assembly. Ill. Const. 1970, art. VII, § 6(a). As one court explained, "[i]t is now axiomatic that home rule units like defendant 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 (2006); *see also Harris Bank of Roselle v. Vill. of Mettawa*, 243 Ill. App. 3d 103, 114 (1993) ("Absent an express grant of statutory authority, a municipality may not exercise extraterritorial governmental power."). A tax operates extraterritorially when "it attempts to tax behavior outside the boundaries of the [home rule unit]." *Midwest Gaming & Entertainment, LLC v. Cnty. Of Cook*, 2015 IL App (1st) 142786, ¶ 62.

This Court recently addressed the issue of extraterritorial taxation in *Hertz Corp v. City of Chicago*, 2017 IL 119945 (2017). In *Hertz*, the City of Chicago sought to require car rental companies located within 3 miles of Chicago's borders to collect tax on transactions involving customers with a Chicago billing address. The tax was imposed based on the presumption that the vehicle would be used within Chicago. This Court held that such an imposition of tax was unconstitutional because the City was attempting to tax "transactions that take place wholly outside Chicago's borders." *Id*. at ¶ 30.

The County's imposition of the Motor Fuel Tax on the Book Out transactions is similarly unconstitutional because it has an extraterritorial effect and is therefore an improper exercise of the County's home rule powers. The record unequivocally demonstrates that no transfer of possession, ownership or title occurred in Cook County. C 12412-12414, 12466, 12690. The County's imposition of Motor Fuel Tax was predicated on its misinterpretation of the term "Generic Chicago Pipeline. F.O.B. Chicago, IL" used by Marathon in its forward contracts. C 12908-12912, 12172. The County assumed this phrase meant that Marathon was physically transferring fuel in Chicago. *Id*.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

Yet Marathon had no terminals or ability to transfer fuel in Chicago, and thus could not be transferring fuel from a Chicago location. C 12452, 12513-14, 12905. The Chicago designation was a placeholder that identified the pricing of the product. C 12515-21, 12524. The mere possibility that a potential sale or delivery could have occurred in Cook County if there was no Book Out does not create the requisite connection with the County for it to exercise its municipal power to tax.

The Court should adopt the plain meaning of the Ordinance advanced by Marathon, which avoids this constitutional problem. Alternatively, if the Court concludes the Tax applies to Book Out transactions, the Court should declare the Motor Fuel Tax unconstitutional as applied to the facts in this case.

VI. The Department Failed to Establish a *Prima Facie* Case of Taxability.

The appellate court mistakenly reported that the circuit court found the County's auditing method met minimum standards of reasonableness. A-7, ¶ 21. In fact, the circuit court found that "[t]he DOR's assumptions are not reasonable assumptions, and the Revised Assessments cannot meet a minimum standard of reasonableness." A-60. Thus, the circuit court found that the County failed to establish a *prima facie* case of taxability and the ALJ's failure to rule in favor of Marathon on that basis alone was clearly erroneous. A-117. The record shows that the County's refusal to accept the evidence presented by Marathon was egregious. Thus, this Court should follow the circuit court's sound reasoning and rule in Marathon's favor on the grounds that the County did not establish a *prima facie* case of taxability of the Book Out transactions.

Illinois case authority confirms that a department of revenue may establish a *prima facie* case by submitting its corrected return into evidence. *Young v. Hulman,* 39 Ill. 2d 219, 222 (1968), explaining 35 ILCS 105/20 and stating "[the Department's] determination

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

shall be prima facie correct"). However, when (as here) a taxpayer challenges a department of revenue's methodology, the department must demonstrate that it met a minimum standard of reasonableness before its *prima facie* case can be accepted. *Masini v. Department of Revenue,* 60 Ill. App. 3d 11, 14 (1st Dist. 1978) citing *Fillichio v. Department of Revenue,* 15 Ill. 2d 327 (1958). The reasonableness standard is based on 35 ILCS 120/4, which dictates that "as soon as practicable after any return is filed, the Department shall examine such return and shall, if necessary, correct such returns *according to its best judgment and information.*" (emphasis added). As this Court has observed, "[i]t was not the intent of the legislature to allow any document styled by the Department as 'corrected assessment' to be 'prima facie' evidence against the taxpayer, …" *Grand Liquor Co. v. Department of Revenue*, 67 Ill. 2d 195, 202-03 (1977) (rejecting assessment based on the department's failure to demonstrate proper foundation for computer program on which assessment was based).

As the circuit court correctly concluded, in this instance the County failed to meet a minimum standard of reasonableness in issuing the Revised Assessment because it ignored Marathon's records and substituted its own faulty judgment based on conclusions that were directly contrary to the evidence of record. *See* A-117. The County's conclusion that the Book Out transactions were taxable sales was grounded in a complete refusal to acknowledge the evidence provided by Marathon that the transactions were cash settlements, mere financial transactions. *See* A-116. Where, as here, the County ignores taxpayer records when issuing an assessment, it fails to meet a minimum standard of reasonableness and its assessment must be overturned. *See Mel-Park Drugs, Inc. v. Department of Revenue*, 218 Ill. App. 3d 203, 216-17 (1st Dist. 1991) (stating "the

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

Department may not ignore the taxpayer's records when they are complete and accurate, and substitute its judgment based upon general estimates"); *Goldfarb v. Department of Revenue*, 411 Ill. 573, 581 (Ill. 1952) (stating "the Department did not question the sufficiency of the taxpayer's records; it ignored them").

The County issued the Revised Assessment based on its erroneous conclusion that that Marathon sold Motor Fuel during the years at issue for which the Tax was not paid. C 12899, 12901. In support of its conclusion, the County relied on Marathon's Internal Summary Report ("ISR"), claiming that it disclosed each of these "sales." C 2727. County auditor Vega testified that he concluded that taxable Motor Fuel sales had occurred because the ISR entries listed a seller, a buyer, an invoice number, a fuel amount, and a price. *Id*. The County's conclusion was fatally flawed because it ignored Marathon's evidence that pointed out the distinctions between ISR entries for actual sales of gas, on which Tax was collected, and ISR entries for financial settlements of futures contracts, on which Tax was not collected and the Revised Assessments were based.

First, rather than listing a "Carrier Name," each of the transactions covered by the Revised Assessments were identified as a "Book Transfer." C 2763-80. Witnesses testified that when "Book Transfer" was entered under the Carrier column on the ISR, the entry indicated that the transaction was a cash settlement of a forward contract, not a sale of Motor Fuel. C 2986. Witnesses also testified that in all book transfers, no fuel was transferred, delivered, or moved, and that there was no change in ownership or possession of any fuel. C 12974-75.

Second, rather than listing an "Origin Name" and a "Destination Name," such as listing one of the three oil and gas terminals Marathon uses in Cook County (Mount

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

Prospect, Des Plaines, and Argo), each of the transactions covered by the Revised Assessments listed "Chicago IL" as the "Origin" and the "Destination." C 12712, 12767-68. Marathon witnesses testified that Marathon did not have a Chicago terminal or facility for the storage and sale of fuel, and that it entered the term "Chicago" on the ISR not as a geographic term, but to indicate that the pricing for the financial settlement was from the Chicago pricing region. C 12515-25.

Third, Marathon witnesses explained that Marathon recorded book transfers in this fashion because its computerized accounting system had no specific format for recording Book Outs. C 2982, 2994-95. Thus, Marathon used the same system for recording Book Outs as it did for recording actual product sales, modifying it as described above to distinguish between actual transfers and financial settlements.

Notably, the County introduced no evidence to contradict Marathon's testimony. It did not impeach Marathon's witnesses or demonstrate that their testimony was inherently improbable. Similarly, the ALJ did not conclude there was any basis to reject the evidence or testimony offered by the Marathon witnesses – rather, the Court asked for more evidence (which as demonstrated below, was unwarranted).[9] A finder of fact may not reject unrebutted testimony or discount witness testimony unless it has been impeached, contradicted by positive testimony or circumstances, or found to be inherently improbable. *Sweilem v. Department of Revenue*, 372 Ill. App. 3d 475, 485 (1st Dist. 2007); *Goldfarb v.*

[9] Although in its brief for the administrative hearing the County claimed that with each of these transactions, "the fuel is already in the pipeline and the Buyer ... must obtain the fuel at the pipeline…", there is no evidence in the record to support this assertion. The record below establishes that the Book Out transactions are not subject to the Motor Fuel Tax because they are financial transactions that did not involve the transfer of ownership, possession, or title to any Motor Fuel.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

Department of Revenue, 411 Ill. 573, 581 (1952). Marathon's witnesses had none of these defects.

A review of the Hearing transcript reveals that in their testimony, the County's witnesses admitted they ignored Marathon's explanation of Book Out transactions, misinterpreted the term "Generic Chicago Pipeline. F.O.B. Chicago, IL" to refer to actual transfers of gas, failed to check changes in inventory levels and concluded Tax was due simply because there had been an exchange of money. C12172, 12197, 12199, 12908-12, 12172, 12199-1220. The County also made faulty assumptions about the ISR, and it failed to consider industry standards. As Marathon explained to the County during the Audit, if the Book Outs involved the transfer of product, meter tickets or transfer orders – commonly used in the transfer of possession and title of Motor Fuel – would have been issued. C 2855, 2989. None were issued for the Book Out transactions that are the subject of the Revised Assessment.

For all of these reasons, the County failed to meet a minimum standard of reasonableness in issuing the Revised Assessment and has failed to establish a *prima facie* case against Marathon. The ALJ's failure to recognize the lack of a *prima facie* case and rule in Marathon's favor on this basis was clearly erroneous and must be reversed.

VII. To the Extent the County Did Establish a *Prima Facie* Case, Marathon Presented Documentary Evidence and Testimony that Rebutted the County's Case.

Even if the Revised Assessment is *prima facie* correct, which Marathon disputes, Marathon met its burden of proving the Revised Assessment was incorrect at the Hearing, which took place over five days and included the testimony of three Marathon witnesses and the admission of numerous exhibits. *Fillichio,* 15 Ill. 2d at 333 (In order to rebut the

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

government's *prima facie* case, "the taxpayer . . . has the burden of proving by competent evidence that the proposed assessment is not correct"). Contrary to the ALJ's conclusions, the evidence presented at the Hearing established that the Book Outs were cash payments made in lieu of transferring either possession or ownership of the Motor Fuel identified in the forward contracts. C 12908-12, 12914-15, 12917, 12919, 12921. In addition, Marathon established that the Revised Assessment was entirely imposed on Book Out transactions. C 12899, 12901. The record also contains documentary evidence of representative contractual documents that Marathon used for all of its Book Out transactions, regardless of particular type. C 12908-12, 12914-15, 12917, 12919, 12921. In light of this evidence, the ALJ clearly erred by concluding that Marathon failed to meet its burden of proof.

A. Substantial evidence supports Marathon's assertion that the Book Outs were cash payments made in lieu of transferring possession or ownership of Motor Fuel

Marathon fact witnesses Freeman and Steiner, and its expert witness Arburn, all testified that the Book Outs were financial transactions without transfer of title or possession of Motor Fuel. C 12476-80, 12551, 12681, 12690-91, 12412-17. The witness testimony included the following:

- Steiner testified "the book out transaction is simply a financial transaction, just a settling of the contract and nothing more. A physical transaction, on the other hand, would actually mean that product either transferred or moved and there's some kind of documentation to that effect, a meter ticket, a bill of lading, a transfer order … something to evidence the fact there's been a change in ownership or movement." C. 12690.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

- Freeman testified that, in a book out transaction, "you don't change title. You don't transfer possession because, again, the two keys that we talked about are meter ticket, which show physical movement, or a transfer order has to go to a terminal … in a book out, neither are there. C 12466.
- Freeman also testified that "[i]n a book-out transaction … I haven't given a transfer order to the terminal to move it possession-wise from A to B or B to A … there is no physical movement … you're not physically transferring any product across any network and I'm not giving title to it. I'm not giving you possession of it. This is all an accounting exercise." C 12476.
- Steiner testified that there was no product originating or being delivered to Chicago (or anywhere) because no gasoline or diesel is moved. C 12684.
- Arburn testified that "all the book out is one or both parties have decided to financially settle the transaction" for risk management or cost control. C 12414, 12417.

As discussed above, Marathon's witnesses also refuted the County's conclusions regarding the ISR, the principal document on which the County relied in support of its characterization of taxability. *See, e.g.,* C 12687. The witnesses explained that ISR entries for Book Out transactions were distinct from physical sales of fuel, on which Motor Fuel Tax was collected. *See, e.g.,* C 12687.

Both the ALJ and the County have improperly criticized Marathon for failing to prove a negative – that the Book Out transactions did not involve a transfer of possession or ownership. *See e.g.,* A-74 (circuit court stating that "in explaining the ISR entries for book transfers and explaining the substance of book transfer transactions as mere cash

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

settlements and not sales of product, *Marathon was placed in the position of proving a negative*: that no motor fuel sales occurred and that no "title" to fuel changed.") (emphasis added). Where a legal presumption requires proof of a negative, conclusive proof is not required, "and even vague proof, or such as renders the existence of the negative probable" will satisfy the burden. *Prentice v. Crane*, 234 Ill. 302, 311 (1908). *See also Baer v. DeBerry*, 31 Ill. App. 2d 86, 90 (1st Dist. 1961); *Conxall Corp. v. ICONN Systems, LLC*, 2016 IL App (1st) 140158, ¶ 44 (a party is not required to prove a negative by "conclusively disproving" the adverse party's claim). As the circuit court properly concluded, Marathon satisfied its burden of proof by providing documentary and testimonial evidence that the Book Outs were financial settlements and not sales of Motor Fuel. A-75. Marathon presented two unrebutted fact witnesses and one expert witness, each of whom confirmed the financial nature of the Book Out transactions. C2856, 2986-87, 2843. Marathon also introduced contracts, correspondence, data files, and invoices which established the nature of these transactions. C 12908-12, 12914-15, 12917, 12919, 12921. Despite the testimony of its auditor (Vega) that each book transfer was a taxable sale, the County has since conceded that the transactions involved no delivery, movement, or "physical transfer" of Motor Fuel. C 1726-28, 13996.

B. Additional testimony and evidence demonstrate that the Revised Assessment consisted solely of Book Out transactions

The documentary and testimonial evidence of record also refutes the ALJ's conclusion that Marathon failed to prove that the Revised Assessment was based solely on Book Out transactions. County witnesses testified that all the transactions included as taxable in its Revised Assessment were listed in Marathon's ISR. C 2725, 2728, 10225, 10242-43. Marathon's witness Steiner also testified that each of the disputed transactions

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

identified in the revised Assessment and set forth on the ISR were book transfers. C 12687-91. Steiner's testimony is consistent with the County's workpapers for the Revised Assessment (*see, e.g.*, Revised Gasoline Assessment Exhibit 5, stating "Working paper purpose: To Compute Tax … for Book Transfer Made to Unregistered Distributors.") C12899, 12901. In addition, the County's audit file includes "Gasoline and Diesel *Book Transfer* Audit Workpapers" (emphasis added). C 12127-12129, 12123-12125. The Workpapers assess Motor Fuel Tax on an identical number of gallons of Motor Fuel as the gallons listed in the Revised Assessment (31,201,380 gallons of gasoline and 92,059,380 gallons of diesel). *Id*. This evidence conclusively demonstrates that 100% of the assessed liability in the Revised Assessments related to Book Transfers.

C. The representative exhibits of Book Out transactions satisfied Marathon's burden of proof

Marathon also introduced substantial testimonial and documentary evidence to explain how it documented the book transfers identified on the ISR. Commercial analysis manager Freeman testified that book transfers begin when one party to a forward contract for Motor Fuel decides to financially settle the contract. C 12475. The parties then negotiate a financial settlement of the forward contract through the execution of a Book Out letter. C 12917. Once the Book Out is agreed to, the original forward contract is settled for cash. C 12919, 12921.

Using a representative transaction with Sunoco, Freeman identified a series of exhibits (Respondent's Exs. 4, 9, 10, 11 and 12) to demonstrate how Book Outs are documented (the "Sunoco book transfer documents"). C 2864, 73-74, 77. The documents included a buy/sell agreement, invoices, physical deal sheets, and book transfer letters related to the transaction. *Id.* The Sunoco book transfer documents were not summaries of

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

evidence; they were documents used in the Book Out transactions at issue. Marathon witness Steiner identified the ISR Book Transfer entry to which the documents relate. C 12687-91.

The Sunoco book transfer documents were all admitted into evidence. A-26. Importantly, Freeman testified that the Sunoco book transfer documents were representative of all documents used in all Marathon book transfer transactions, regardless of the type of Book Out transaction. C12550-51. Freeman testified at length about each document used by Marathon in a Book Out transaction. C 12444-582, 12908-12912, 12914-21. His testimony, unrebutted by the County, established that identical documents were used to memorialize all the Book Out transactions at issue (except for the quantities, prices and parties). C 10485. The ALJ ignored this undisputed point and held that Marathon failed to introduce sufficient books and records of all Book Out transactions. C 3460.

Contrary to the ALJ's conclusion, Marathon met its burden of proof by the introduction of the Sunoco book transfer documents. Requiring Marathon to introduce evidence with respect to each Book Out transaction or each type of Book Out transaction is unreasonable in this circumstance, where the testimony of record is that there is no material difference between the Sunoco book transfer documents and the documents used to memorialize other Book Out transactions. Parties to disputes routinely satisfy their burden of proof by introducing representative documents, accompanied by testimony (like that presented by Marathon here) that the documents are reflective of all similar transactions. *See, e.g., Lehnbueter v. Holthaus,* 105 U.S. 94, 96 (1881) (patent case in which the Court based its finding of patent infringement based on its review of July 1877

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

circulars and other documents found to be representative of publications used for all relevant time periods); *Koefoot v. American College of Surgeons*, 652 F.Supp. 882, 897-98 (N.D. Ill. 1986) (trial court reviewed representative samples of medical charts to determine admissibility). Moreover, requiring proof of every transaction would violate the Administrative Procedure Act provision that "unduly repetitious evidence" should be excluded from hearings. 5 ILCS 100/10-40(a). Similarly, trial courts have discretion to preclude repetitive testimony or evidence. *See, e.g., People v. Pacheco,* 2023 IL 127535 ¶ 54.

Requiring Marathon to present documents related to each Book Out transaction or each type of Book Out transaction would be particularly inappropriate here, where they are listed on the ISR, the very document on which the County based its assessment. In *Miller v. Department of Revenue*, this Court rejected a similar argument made by the IDOR. IDOR issued a corrected return reporting higher taxable receipts based on the taxpayer's records, then criticized the records and testimony offered by the taxpayer in response to the IDOR assessment:

> The only evidence of the Department was its auditor's describing the method by which the markup formula was computed. Since that procedure was based solely on the taxpayers' records, which concededly were correct so far as used by the Department, the taxpayers' records as to sales, together with the evidence offered by them explaining the difference between the projected sale and the sales as recorded, was sufficient to justify the lower court in quashing the assessments.

408 Ill. 574, 581-2. *See also Goldfarb*, 411 Ill. at 577 (taxpayer overcame the *prima facie* presumption of the correctness of the department's corrected return by presenting testimony "not so inconsistent or improbable" which corroborated its books and records, and the Department made no attempt to substantiate its conclusion). Similarly here, the

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

ALJ erred by accepting the County's presentment of Marathon's books and records in the ISR, while refusing to accept Marathon's evidence based on the ISR and representative Sunoco Book Transfer documents.

The ALJ's ruling also fails because the evidence of record establishes that the ISR and supporting documents were made available to the County during the Audit, and in pre-hearing proceedings. *See, e.g.*, the County's Brief in which the County admitted to relying on Marathon's "*substantial and reliable books and records [which] are its contracts and invoices* supporting the information contained in the Internal Summary Report" to determine there was a cash settlement [and] a change of ownership." C 13738. The ALJ's acceptance of the County's presentment of the Marathon books and records as reliable, while denying Marathon the same treatment, is clear error, and in violation of *Miller*.

Finally, the case authority cited by the ALJ in support of its conclusion that Marathon failed to prove its case is easily distinguished because it involved taxpayers who presented little or no evidence to supplement its oral testimony. *See* A-37. In *Chak-Fai v. Dep't of Revenue*, for example, the taxpayer failed to keep any books and records and instead offered income tax returns as an attempt to prove its sales volumes. 2019 Ill App (1st) 17258, ¶40. The other case authority cited by the ALJ contained similar facts. *See, e.g., PPG Industries, Inc. v. Dep't of Revenue*, 328 Ill. App. 3d 16 (1st Dist. 2002) (taxpayer failed to produce any sales records); *Mel-Park Drugs, Inc. v. Dep't of Revenue*, 218 Ill. App. 3d 203, 220 (1st Dist. 1991) (taxpayer lacked original source documents): and *Elkay Mfg. Co. v. Sweet*, 202 Ill. App. 3d 466, 471 (2d Dist. 1990) (taxpayer failed to produce a proper resale certificate). Accordingly, the ALJ erred by ignoring the voluminous books

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

and records available for her review, Freeman's testimony that established the documentation presented at the Hearing was representative of all Book Out transactions, and improperly holding Marathon to an insurmountable burden of proving a negative.

VIII. The County Failed to Rebut Marathon's Evidence.

When a taxpayer meets its burden of proving its case by offering competent evidence, the burden then shifts back to the government, which is required to prove its case by competent evidence. *Young v. Hulman,* 39 Ill. 2d 219, 223 (1968); *Mel-Park Drugs,* 218 Ill. App. 3d at 217 (citing *Young).* The County plainly failed to meet this burden. It made no attempt to rebut the testimony of Marathon's witnesses. It did not offer any rebuttal evidence and did not contest Marathon's testimony or documentary evidence that established the Book Out transactions were financial transactions that involve no transfer or exchange of Motor Fuel. This was recognized by the ALJ who, after the parties had concluded presenting their evidentiary cases, stated "the Department could have asked for an opportunity to present other witnesses on their side that would rebut Mr. Freeman's and Mr. Steiner's testimony. And that did not occur." C 5769.

At the Hearing, the County's auditor (Vega) admitted that he ignored Marathon's explanation of Book Out Transactions in the ISR and "didn't pay too much attention to what a book transfer was or wasn't." C 12172. 12197, 12199. The County misinterpreted the term "Generic Chicago Pipeline. F.O.B. Chicago, IL" found in Marathon's forward contracts, assuming incorrectly that Marathon was physically transferring fuel in Chicago. C 12908-12, 12172. In addition, Vega admitted that he failed to confirm whether inventory levels, a central component of the transfer of ownership of Motor Fuel, changed in a Book Out transactions (they did not). C 12199-12200. Instead of assessing tax on the sale of

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

transfer of Motor Fuel, Vega testified that he assessed tax on the Book Out transactions simply because "[t]here was money involved ... that's a sale." C 12220.

Perhaps most egregious was the ALJ's disregard of the testimony of Marathon's expert witness, Dr. Arburn, and the County's rebuttal expert witness, Dr. van der Merwe, each of whom testified that no Motor Fuel is exchanged in a Book Out transaction. Dr. Arburn testified that (1) Book Outs are forward contracts in which two parties agree to financially settle the contract, (2) there is no change in possession of a commodity; and (3) parties elect to financially settle contracts "for risk management and cost control." C 12412-17. Similarly, Dr. van der Merwe admitted that "what happens under a cash settlement is that there is no fuel delivered. What is exchanged between the two counter parties is the economic equivalent value of the forward contract … [a]nd that is exchanged in cash." C12974-5.

Given that plain language of the Ordinance confirms that the Motor Fuel Tax applies only to actual physical exchanges of Motor Fuel, the County's expert admissions are fatal to its case. Because the Motor Fuel Tax does not apply to intangible transfers, it cannot apply to the Book Out transactions at issue here.

CONCLUSION

For all the foregoing reasons, this Court should void the Revised Assessment in its entirety and find that:

(1) the Book Out transactions are not retail sales subject to the Motor Fuel Tax within the plain meaning of the Ordinance;

(2) the County's construction of the Ordinance renders the Motor Fuel Tax an unconstitutional occupation tax and renders the Tax unconstitutionally extraterritorial;

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

(3) the County failed to establish a *prima facie* case for its imposition of Motor Fuel Tax on the Book Out transactions; and

(4) Alternatively, Marathon sufficiently rebutted the County's *prima facie* case, by demonstrating that the County erroneously imposed the Tax on Book Out transactions, not sales of Motor Fuel, and the County failed to rebut Marathon's evidence.

Dated: November 1, 2023

Respectfully submitted,

/s/ Catherine A. Battin
Catherine A. Battin
Mary Kay M. Martire
McDermott Will & Emery, LLP
444 West Lake Street
Suite 4000
Chicago, IL 60606
(312) 984-3233
cbattin@mwe.com
mmartire@mwe.com

Counsel for Plaintiff-Appellant
Marathon Petroleum Company LP f/k/a
Marathon Petroleum Company, LLC

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

CERTIFICATE OF COMPLIANCE

Catherine A. Battin hereby certifies 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 45 pages.

/s/ Catherine A. Battin
Catherine A. Battin

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

APPENDIX

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

TABLE OF CONTENTS TO APPENDIX

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

2022 IL App (1st) 210635

No. 1-21-0635

Opinion filed: December 30, 2022

Sixth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

MARATHON PETROLEUM COMPANY LP, f/k/a Marathon Petroleum Company LLP,	)	Appeal from the Circuit Court of Cook County, Illinois.
Plaintiff-Appellee,	)	
v.	)	No. 2019 L 050614
THE COOK COUNTY DEPARTMENT OF REVENUE; ZAHRA ALI, as Director of the Cook County Department of Revenue; and THE COOK COUNTY DEPARTMENT OF ADMINISTRATIVE HEARINGS,	)	The Honorable John J. Curry Jr., Judge Presiding.
Defendants-Appellants.	)	

JUSTICE C.A. WALKER delivered the judgment of the court, with opinion.
Presiding Justice Mikva and Justice Tailor[1] concurred in the judgment and opinion.

OPINION

[1] Oral argument was held in this case before a panel that included Justice Pierce. Justice Pierce has retired, and Justice Tailor has been assigned in his place. Justice Tailor has read the briefs and record, and he has listened to the oral argument.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

No. 1-21-0635

¶ 1 The instant appeal arises from the circuit court's reversal of an administrative law judge's decision that upheld taxes and penalties imposed by the Cook County Department of Revenue (Department) pursuant to the Cook County Retail Sale of Gasoline and Diesel Tax Ordinance (Fuel Tax Ordinance) (Cook County Code of Ordinances § 74-470 *et seq*. (approved Feb. 6, 2011)). The Department imposed fuel taxes and penalties on Marathon Petroleum Company LP (Marathon) for book-out transactions, in which no fuel changes location and the parties' fuel inventories do not change. Marathon filed a petition seeking administrative review of the Department's tax assessments, and the administrative law judge found that Marathon's book-out transactions were taxable under the Fuel Tax Ordinance. Hence, Marathon sought administrative review, the circuit court reversed, and this appeal followed. On appeal, the Department contends the record supports the administrative law judge's finding that the book-out transactions, though they do not involve the physical delivery of fuel, still involve the transfer of an ownership interest as to that fuel and are thus taxable sales under the Fuel Tax Ordinance. For the following reasons, we reverse the circuit court's decision, affirm in part and reverse in part the administrative law judge's decision, and remand for recalculation of the amount due without penalties.

¶ 2 I. BACKGROUND

¶ 3 A. Cook County Fuel Tax Ordinance

¶ 4 Fuel is a widely traded commodity, and the County of Cook taxes the sale of gasoline, diesel fuel, biodiesel fuel, and GDiesel at a retail level pursuant to the Fuel Tax Ordinance. The Department is responsible for administering and enforcing the Ordinance. The Fuel Tax Ordinance provides a unique tax collection plan. When a distributor sells fuel to a retailer located in Cook County, the distributor collects the fuel tax from the retailer and remits the tax payment to the Department. The retailer recovers the fuel tax by adding the tax price to the consumer's fuel

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

purchase. Similarly, when a distributor sells fuel directly to a consumer, the distributor adds the tax price to the consumer's fuel purchase.

¶ 5 The fuel tax collection plan also occurs in distributor-to-distributor transactions. If a buying distributor holds a registration certificate issued by the Department, the selling distributor does not collect the fuel tax from the buying distributor. The tax is only collected when the last distributor in the distribution chain sells the fuel to a retailer doing business in Cook County or to a consumer who purchases fuel directly from a fuel distributor for delivery in Cook County. In contrast, if a buying distributor does not hold a registration certificate, the selling distributor must collect the fuel tax from the unregistered buying distributor and remit the tax payment to the Department. If the selling distributor fails to collect the fuel tax from the unregistered buying distributor, the Department may seek the uncollected fuel tax from the selling distributor.

¶ 6 B. Marathon's Tax Fuel Assessments

¶ 7 Marathon is a refiner of crude oil and distributes petroleum products from facilities in Mount Prospect, Argo, and Des Plaines, Illinois, all of which are municipalities located in Cook County. Marathon also holds a registration certificate issued by the Department.

¶ 8 In May 2014, the Department started an audit of Marathon's gasoline and diesel transactions occurring between January 2006 and July 2014. At the end of the audit, the Department issued two "Notices of Tax Determination and Assessment." The first notice involved Marathon's gasoline transactions and assessed $16,450,932.78 in tax, interest, and penalties. The second notice involved Marathon's diesel transactions and assessed $13,149,477.88 in tax, interest, and penalties.

¶ 9 Marathon filed a "Protest and Petition for Hearing" for each assessment and subsequently gave the Department additional documents for review. Based on the Department's review, it

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

amended Marathon's assessments, reducing the gasoline assessment to $4,398,180.76 and the diesel assessment to $10,537,077.16. Marathon filed a supplemental "Protest and Petition for Hearing," arguing that the assessments contained "book transfers" or "book out"[2] transactions that were not taxable sales of fuel as set forth in the Fuel Tax Ordinance.

¶ 10 C. Administrative Proceeding

¶ 11 The case proceeded to an administrative hearing on Marathon's protest and petition for hearing. At the hearing, Dr. Gregory Arburn, Marathon's expert witness, testified that a forward contract is an agreement to deliver a product on a specific date and that a book-out transaction is one way to financially settle a forward contract "instead of delivery or making delivery" of the product. In a book-out transaction, "the parties may sell and acquire an intangible interest in a commodity." The purpose of a book-out transaction is for risk management and cost control.

¶ 12 Dr. Andria van der Merwe, the Department's expert witness, testified that a forward contract is a privately negotiated agreement between two parties that "creates an economic obligation to buy or sell a commodity" at a specific date. Specifically, on the contracting date, but before the delivery date, the parties will negotiate the terms of the contract, including the quantity of the commodity, delivery location, delivery date, and the commodity price. The parties must fulfill their obligations under the contract by either "physically delivering the commodity or by doing a cash settlement." Dr. van der Merwe stated that, based on Dr. Arburn's testimony, she understood that a book-out transaction is "the cash settlement of the forward contract" and that there is no "physical transfer of commodity, but there is a transfer of cash that is the economic equivalent of the value of the forward contract." When asked whether title of ownership transfers

[2]The terms "book transfer" and "book out" are used interchangeably throughout the record. Hereinafter, we refer to these transactions as book-out transactions for consistency purposes.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

in a book-out transaction, Dr. van der Merwe responded, "From an economic perspective, I don't want to opine on transfer of title."

¶ 13 Mr. Jose Vega, the Department's audit supervisor, testified that he was assigned to review Marathon's revised assessments. During the audit, the Department requested Marathon's internal summary report. The report included invoices that listed the name of a seller, the name of a purchaser, the net gallons of fuel sold, and the origin and destination of the fuel. Based on these invoices, the Department determined that there were additional sales to unregistered gas distributors not listed in Marathon's tax return. According to Vega, the invoices showing that Marathon sold fuel to a buyer exemplified a transfer of ownership in the fuel.

¶ 14 Gary Michals, the Department's deputy director of compliance, testified that he oversaw the audit on the initial and revised assessments. Michals reviewed Marathon's internal summary report and found that Marathon was involved in multiple transactions with nonregistered purchasers and that these transactions occurred in Cook County. Michals testified that a transfer in ownership occurs "on a given delivery date determined by the FOB where a destination is. Then at the—at that point money is transferred into Marathon's account to conclude the sales transaction usually within a 48-hour period." He elaborated that a "[t]ransfer of ownership means a right to that given product. Doesn't necessarily have to be a physical possession."

¶ 15 Joseph Steiner, Marathon's motor fuel tax specialist, defined a book-out transaction as "a mechanism which is used to settle contracts and to remove associated obligations without physically moving or transferring any product." The difference between a book-out transaction and a transaction where fuel is sold and transferred is "the book-out transaction is simply a financial transaction" whereas a "physical transaction *** would actually mean that the product either transferred or moved and there's some kind of documentation to that effect, a meter ticket,

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

a bill of lading, a transfer order with a facility operator, something to evidence the fact that there's been a change in ownership or movement somewhere."

¶ 16 Matthew Freeman, Marathon's commercial analysis manager, testified to the different types of book-out transactions that Marathon employs when settling forward contracts. Freeman stated that Marathon generally uses three types of book-out transactions: direct, indirect, and distress. In a direct book-out transaction, two companies contract to sell some quantity of fuel to one another. The companies merge their contractual agreements together, financially settle the contract, and retain their own inventory rather than physically move barrels of fuel. In an indirect transaction, three or more companies enter a chain of forward contracts. There is a separate contract for each company in the chain. Ultimately, the chain of contracts come full circle and the initial company in the chain becomes the buyer and seller. Instead of fulfilling each contractual agreement between the various companies, they agree to financially settle the contracts and the initial company retains its fuel inventory.

¶ 17 In a distress book-out transaction, the selling company cannot fulfill its contractual agreement to sell a certain quantity of fuel to the buying company. The buying company agrees to enter into a subsequent contractual agreement wherein the buying company will "contract back to [the selling company] the same quantity of barrels, just a final obligation saying you're going to sell from [the buying company] back to [the selling company]." The selling company "use[s] that paperwork to say [the buying company gave] back the barrels on the original transaction. In this there's no inventory moving, no meter tickets are cut, no transfer orders are sent to the terminal." Freeman explained that the transaction is "just a financial settling." The companies do not change title and do not physically move the fuel. The buying company is not obligated to enter a book-out transaction and, instead, may seek enforcement of the contract.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

¶ 18 Freeman testified to respondent's exhibit 4, a buy-sell contract between Marathon and Sunoco, and exhibit 11, an invoice for the sale of fuel that Marathon sent to Sunoco. Freeman explained that, under the buy-sell contract, Marathon agreed to sell 20,000 gallons of fuel to Sunoco. Marathon sent the payment invoice to Sunoco for payment to "settle" or "book out" the transaction. No physical transfer of the fuel occurred during the transaction.

¶ 19 The administrative law judge determined that Marathon provided insufficient evidence that its book-out transactions were not subject to the Fuel Tax Ordinance during the audit period. Specifically, Marathon failed to corroborate Freeman's testimony concerning the different types of book-out transactions with any documentary evidence of the cash settlement contracts associated with the revised tax assessment or with a representative sample of the different types of cash settlement contracts and their corresponding forward contracts. While the administrative law judge acknowledged Marathon's buy-sell contract with Sunoco, she found that Marathon failed to provide any documentary evidence "memorializing the parties' agreement to settle two forward contracts for cash and setting the terms of the settlements, particularly the price terms." Because Marathon failed to provide sufficient evidence to support its claim, the judge rejected Marathon's argument that the book-out transactions are not taxable sales of fuel subject to the Fuel Tax Ordinance.

¶ 20 D. Circuit Court Proceeding

¶ 21 Marathon filed a complaint for review of the administrative decision in the circuit court. In his written decision, the circuit court judge found that the Department's auditing method met minimum standards of reasonableness. He also found that, even assuming the assessment was reasonable, Marathon met its burden of showing that its book-out transactions were "mere cash settlements" and not taxable sales of fuel. The circuit court judge held that the administrative law

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

judge's decision constituted reversible error and entered judgment in Marathon's favor. The Department appeals.

¶ 22 II. ANALYSIS

¶ 23 A. Administrative Decision

¶ 24 The Department challenges the circuit court's reversal of the administrative law judge's decision. We review the administrative agency's decision, not the judgment of the circuit court. *Exelon Corp. v. Department of Revenue*, 234 Ill. 2d 266, 272 (2009). On administrative review of an agency decision, a court may encounter three types of questions, each with different degrees of deference. *Cinkus v. Village of Stickney Municipal Officers Electoral Board*, 228 Ill. 2d 200, 210 (2008).

¶ 25 An agency's findings and conclusions on questions of fact are deemed *prima facie* true and correct, and a reviewing court will not overturn those findings unless they are against the manifest weight of the evidence. *Id.* An agency's findings on questions of law, in contrast, are not binding, and a court's review is *de novo*. *Id.* "Mixed questions of fact and law are questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated." (Internal quotation marks omitted.) *Id.* at 211. For mixed questions, the reviewing court reviews whether the agency's decision is clearly erroneous. *Id.* An agency's decision is clearly erroneous when the reviewing court is left with the definite and firm conviction that a mistake has been made. *Id.*

¶ 26 1. The Department's *Prima Facie* Case

¶ 27 Marathon argues that the Department failed to establish a *prima facie* case that its auditing method met a minimum standard of reasonableness because (1) the Department failed to

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

distinguish between buy-sell transactions and book-out transactions when it audited Marathon's internal summary report and (2) the Department failed to understand the nature of book-out transactions by ignoring Marathon's documents during the audit and adopting its own interpretation of the transactional record. The Department argues that it did not fail to make a distinction between the two types of transactions but that forward contracts, even if they are later "booked out," still constitute taxable sales of fuel under the Fuel Tax Ordinance.

¶ 28 Section 34-64 of the Cook County Code of Ordinances states that "[a]ny tax determination and assessment, or amended tax determination and assessment, shall be deemed *prima facie* correct and the burden shall be on the person assessed to prove the contrary." Cook County Code of Ordinances § 34-64(b)(2) (approved Feb. 16, 2011). If the taxpayer challenges the method employed by the Department to calculate the amount of tax due, then the record must show that the techniques and assumptions that the Department used met some minimum standard of reasonableness. *Chak Fai Hau v. Department of Revenue*, 2019 IL App (1st) 172588, ¶ 46.

¶ 29 We begin our review of the Department's method by first examining the relevant provisions of the Fuel Tax Ordinance. Section 74-472 of the Fuel Tax Ordinance imposes a tax on the retail sale of gasoline, diesel fuel, biodiesel fuel, and GDiesel fuel on a distributor or supplier. Cook County Code of Ordinances § 74-472(a) (approved Feb. 16, 2011). Section 74-472(c)(3) provides that the tax levied "shall be collected by each distributor or supplier who sells gasoline, diesel fuel, biodiesel fuel, or gdiesal [*sic*] fuel to *** [a]nother Gas Distributor doing business in the County that is not holding a valid registration certificate." *Id.* § 74-472(c)(3). Section 74-471 of the Fuel Tax Ordinance defines "Sale, resale, and selling" as "any transfer of ownership or possession or both, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever." *Id*. § 74-471.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

¶ 30 Considering these provisions, the record shows that the Department's auditing method met a minimum standard of reasonableness. Vega audited Marathon's books and records pertaining to the revised assessment. During the audit, Vega reviewed the internal summary report, along with additional contracts, invoices, and documents provided by Marathon. Based on this information, Vega identified multiple sales transactions between Marathon and distributors unregistered with the Department. Vega determined that the transactions constituted sales because the report listed Marathon as the seller, a purchaser company that was not listed as a registered Cook County distributor, the gallons of fuel sold, and the origin and destination of that fuel was in Cook County.

¶ 31 Michals reviewed audits on the initial and revised assessments. He reviewed Marathon's internal summary report and entered the names of all the companies involved in transactions with Marathon into the Department's fuel registration database to determine whether the company was a registered distributor. Michals found that there were multiple sales transactions that occurred between Marathon and a company that was not listed in the registration database. He calculated the amount of fuel sold to the unregistered companies and generated the revised tax assessments. In light of Vega's and Michals's testimonies, we find that the Department's method was reasonable despite Marathon's assertion that the Department failed to adopt its interpretation of a book-out transaction. Accordingly, we hold that the Department established a *prima facie* case.

¶ 32 2. Marathon's Rebuttal to the Department's *Prima Facie* Case

¶ 33 Next, we consider Marathon's alternative argument that it overcame the Department's *prima facie* case by presenting rebuttal evidence that its book-out transactions were not subject to the Fuel Tax Ordinance. The Department contends that Marathon did not meet its burden because it failed to present evidence "consistent, probable, and identified with" its books and records showing that the Department's revised assessment was incorrect.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

¶ 34 The burden is on Marathon to present "competent evidence to show that the Department's assessment of additional tax liability was incorrect." *Chak Fai Hau*, 2019 IL App (1st) 172588, ¶ 54. "[A taxpayer] may not prevail by merely saying [his] own return was correct,***. Simply questioning the Department of Revenue's return does not shift the burden to the Department of Revenue." (Internal quotation marks omitted.) *Id.* The taxpayer must present " 'competent evidence, identified with *** books and records showing that the Department's returns are incorrect.' " *Id.* (quoting *Masini v. Department of Revenue*, 60 Ill. App. 3d 11, 15 (1978)); see also *PPG Industries, Inc. v. Department of Revenue*, 328 Ill. App. 3d 16, 34 (2002) ("a taxpayer *** must present sufficient documentary support for its assertions" (internal quotation marks omitted)). " 'The law is well-settled that a taxpayer cannot overcome the Department's *prima facie* case merely by denying the accuracy of the Department's assessments or by suggesting hypothetical weaknesses.' " *Chak Fai Hau*, 2019 IL App (1st) 172588, ¶ 54 (quoting *Smith v. Department of Revenue*, 143 Ill App. 3d 607, 613 (1986)).

¶ 35 Here, the administrative law judge acknowledged that Marathon presented testimony on the nature and types of book-out transactions Marathon used to settle its forward contracts. The administrative law judge, however, found that Marathon failed to corroborate that testimony with documents demonstrating that book-out transactions actually occurred. We find this focus to be somewhat misplaced. The question here is not whether book-out transactions occurred, but how forward contracts with corresponding book-out transactions should be treated for tax purposes. Marathon's position is that no taxable event occurs because the act of "booking out" forward contracts before delivery is a purely financial transaction involving no actual transfer of an ownership interest in fuel. This understanding is contradicted not only by how the relevant terms

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

are used in the field of commodities trading but also by the testimony of Marathon's own witnesses.

¶ 36 The Department invites us to take judicial notice of the definitions used in the PriceWaterhouseCoopers "Glossary of terms used in the trading of oil and gas, utilities and mining commodities." See PriceWaterhouseCoopers, Energy, Utilities & Mining Glossary, https://www.pwc.com/gx/en/energy-utilities-mining/pdf/eumcommoditiestradingriskmanagementglossary.pdf (last visited Dec. 16, 2022) [https://perma.cc/A7AS-ZK5T]. There, "[f]orward buying" is defined as "[t]he acquisition of energy or related services in advance of need." *Id*. at 52. Unlike a "[f]utures contract," in which "the seller doesn't sell the commodity until the date on the contract" (*id*. at 55), a "[f]orward'' contract is the present sale of a commodity "that will be delivered to the buyer at a specified time in the future." *Id*. at 52. A "[b]ook" is "[t]he total of all forward positions held by a trader or company," and a "[b]ook transfer" or "book out" is "[t]he transfer of title of a cash commodity to the buyer without a corresponding physical movement." *Id*. at 13. As both the glossary and Marathon's expert, Dr. Arburn, note, futures contracts are regulated by the Commodity Futures Trading Commission (CFTC); forward contracts, like the ones at issue here, are not.

¶ 37 These definitions align with Marathon's own internal documentation and the testimony of its witnesses in these proceedings. Exhibit 4, referenced above, implicitly recognizes that delivery on a forward contract may take place "by book transfer." Dr. Arbun agreed that a book-out transaction can involve the acquisition of "an intangible interest in a commodity." Mr. Freeman likewise explained that in a book-out "I have the barrels, you gave them to me essentially," and "I'm going to give them back to you," although "[w]e're not going to move them anywhere." We find that under section 74-471 of the Fuel Tax Ordinance—which broadly defines the sale of fuel

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

as "any transfer of ownership or possession or both *** by any means whatsoever" (Cook County Code of Ordinances § 74-471 (approved Feb. 6, 2011))—the transfer of that intangible ownership interest is enough to make these transactions taxable.

¶ 38 Although not commented on by the parties, we note, as further persuasive support for this understanding, the apparently longstanding treatment of book transfers as taxable sales by the Illinois Department of Revenue (IDOR). When asked, for example, whether the Illinois prepaid sales tax would be owed "on book transfers of motor fuel with a non-licensed distributor or supplier," which involved "the passing of title to product among several parties without moving the product," the IDOR responded in a June 1, 1987, opinion letter that, based on this limited information, the tax would indeed be owed. Ill. Dep't of Revenue Letter Ruling No. 87-0396 (June 1, 1987), 1987 WL 53530. When asked more recently about book transfers in the uranium market, the IDOR noted in a 2011 private letter ruling that a company purchasing uranium in book entry form for eventual resale could sell, swap, or trade the uranium during that time (though the uranium itself remained in the possession of a second company at that company's secure facility) and thus qualified as a "dealer" under the Illinois Income Tax Act. Ill. Dep't of Revenue Private Letter Ruling No. IT 11-0003-PLR (Nov. 18, 2011), https://tax.illinois.gov/content/dam/soi/en/web/tax/research/legalinformation/letterrulings/it/documents/2011/it-11-0003-p.pdf [https://perma.cc/8H23-4BVP].

¶ 39 Based on the foregoing, we agree with the administrative law judge's determination that Marathon failed to rebut the Department's *prima facie* case that the transactions at issue here were taxable sales under the Fuel Tax Ordinance.

¶ 40 B. Marathon's Alternative Arguments

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

¶ 41 Marathon additionally argues that the Fuel Tax Ordinance, as applied to book-out transactions, impermissibly imposes an occupation tax on fuel distributors in violation of the Illinois Constitution. The Illinois Constitution authorizes a home rule unit, such as Cook County, to exercise any power and perform any function pertaining to its government and affairs. Ill. Const. 1970, art. VII, § 6(e). A home rule unit only has "the power that the General Assembly may provide by law *** to license for revenue or impose taxes upon or measured by income or earnings or upon occupations." *Id.* The General Assembly has enumerated certain instances where a home rule unit is permitted to impose an occupation tax; however, a tax on fuel distributors is not one of these exceptions. See 55 ILCS 5/5-1009 (West 2020). Thus, as Marathon argues, it generally would be impermissible for the Department to impose an occupation tax under the circumstances in this case.

¶ 42 Here, however, the fuel tax ordinance does not impose an impermissible occupation tax on fuel distributors that engage in book-out transactions. In her decision, the administrative law judge rejected Marathon's argument that no retail sale, *e.g.*, the taxable sale of fuel to consumers or end users, occurred in book-out transactions. The administrative law judge found that Marathon failed to establish that the fuel associated with its book-out transactions could never be sold at retail and that the tax will never be imposed on the consumer or end user.

¶ 43 Moreover, to the extent that Marathon challenges the Fuel Tax Ordinance's collect-and-remit plan between two distributors, our supreme court held that similar collect-and-remit plans do not impose an occupation tax. See *Mulligan v. Dunne*, 61 Ill. 2d 544, 551-52 (1975); *S. Bloom, Inc. v. Korshak*, 52 Ill. 2d 56 (1972). Thus, we hold that the administrative law judge did not err in finding that the Fuel Tax Ordinance did not impose an occupation tax in violation of the Illinois Constitution.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

¶ 44 Next, Marathon contends that the Department erroneously held that the Fuel Tax Ordinance applied to book-out transactions that did not occur within Cook County. Marathon asserts that this application constitutes an extraterritorial tax in violation of the Illinois Constitution. Marathon also argues that its book-out transactions have no nexus with Cook County and, therefore, violate the due process clauses of the United States and Illinois Constitutions (U.S. Const. amend. V; Ill. Const. 1970, art. I, §2). Marathon specifically refers to the Department taxing its transactions labeled "F.O.B. Chicago, IL" despite Marathon having no fuel storage facilities in Chicago and the fact that no sale, as defined by the Fuel Tax ordinance, occurred in Cook County. To support its argument, Marathon relies on *Hertz Corp. v. City of Chicago*, 2017 IL 119945.

¶ 45 In *Hertz*, the City of Chicago sought to enforce a tax ordinance that required suburban vehicle rental companies within three miles of the City's borders to collect taxes on Chicago residents who rented vehicles. *Hertz Corp.*, 2017 IL 119945, ¶ 5. Our supreme court found that the tax was based on the mere presumption that residents will drive the vehicle in Chicago when, in fact, there was no evidence of such occurrence. *Id.* ¶ 30. Consequently, the court held that the tax had an extraterritorial effect and, therefore, was beyond the City's home rule powers. *Id.* ¶ 31.

¶ 46 We find *Hertz* inapplicable here given the procedural posture of this case. The Fuel Tax Ordinance requires a selling distributor to collect taxes from "[a]nother Gas Distributor *doing business in the County* that is not holding a valid registration certificate." (Emphasis added.) Cook County Code of Ordinances § 74-472(a)(3) (approved Feb. 16, 2011). The administrative law judge held that Marathon failed to produce evidence that the companies it contracted with did not do business as distributors of fuel in Cook County. In fact, as the administrative law judge found, one of the companies that was a party to Marathon's book-out transactions, Phillips 66, registered

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

with the Department as a Cook County distributor within the audit period indicating that, at some point, Marathon sold fuel to an unregistered distributor doing business in Cook County.

> "In examining an administrative agency's factual findings, a reviewing court does not weigh the evidence or substitute its judgment for that of the agency. Instead, a reviewing court is limited to ascertaining whether such findings of fact are against the manifest weight of the evidence. An administrative agency's factual determinations are against the manifest weight of the evidence if the opposite conclusion is clearly evident." *Cinkus*, 228 Ill. 2d at 210.

¶ 47 Here, we find the agency's factual determinations are not against the manifest weight of the evidence, and we find the facts satisfy the statutory standard such that the rule of law as applied to the established facts has not been violated. We are not left with the definite and firm conviction that a mistake has been made. Thus, we decline to extend *Hertz* to this case because Marathon failed to show that it did not conduct book-out transactions with unregistered distributors that were doing business in Cook County and thereby demonstrate that its book-out transactions had no connection to Cook County. Accordingly, we do not find the decision of the agency to be clearly erroneous. *Id.*

¶ 48 Finally, Marathon argues the Department should not have imposed penalties in addition to the taxes and interest imposed in the revised tax assessment. Cook County's Uniform Penalties, Interest, and Procedures Ordinance provides:

> "If the Director determines that the taxpayer or tax collector had reasonable cause for any of the following:
>
> (1) Paying late;
>
> (2) Remitting late;

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

> (3) Underpaying the applicable tax;
>
> (4) Filing a late or incomplete tax return; or
>
> (5) Filing a late or incomplete remittance return, the applicable penalty shall be waived." Cook County Code of Ordinances § 34-68(c) (amended Dec. 17, 2014).

The ordinance echoes section 3-8 of the Uniform Penalty and Interest Act, which similarly permits abatement of penalties when the taxpayer shows reasonable cause for failing to pay the taxes. 35 ILCS 735/3-8 (West 2020). Additionally, the Administrative Code provides:

> "The determination of whether a taxpayer acted with reasonable cause shall be made on a case by case basis taking into account all pertinent facts and circumstances. The most important factor to be considered in making a determination to abate a penalty will be the extent to which the taxpayer made a good faith effort to determine his proper tax liability and to file and pay his proper liability in a timely fashion." 86 Ill. Adm. Code 700.400(b) (2019).

See *Horsehead Corp. v. Department of Revenue*, 2019 IL 124155, ¶ 46.

¶ 49 Our supreme court's decision in *Horsehead Corp.* provides guidance on this issue. There, the Illinois Department of Revenue imposed late payment and late filing penalties against Horsehead Corporation (Horsehead) for failing to pay a use tax. *Horsehead Corp.*, 2019 IL 124155, ¶¶ 4, 45. The court found that Horsehead had reasonable cause for failing to pay the use tax because, *inter alia*, the use tax exemption, which Horsehead argued was applicable to its case, had no statutory definition and no caselaw that Horsehead could rely on for guidance as to how the exemption is interpreted and applied. *Id.* ¶ 51. The court held that, therefore, the imposition of penalties was against the manifest weight of the evidence. *Id.* ¶ 52.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

¶ 50 Here, as in *Horsehead*, the taxpayer's decision not to pay the taxes resulted from a reasonable interpretation of the law. No prior Illinois case established the taxability of book-out transactions as sales. Because no product changes hands and no inventories change, the transaction in some respects appears not to include any sale. We find that under the circumstances of this case, the decision to affirm the imposition of penalties is contrary to the manifest weight of the evidence. See *Horsehead*, 2019 IL 124155, ¶ 46. We remand the case to the Cook County Department of Administrative Hearings for redetermination of the debt without the imposition of penalties. In all other respects, we affirm the administrative law judge's decision.

¶ 51 III. CONCLUSION

¶ 52 The administrative law judge did not err in upholding the revised tax assessment on the imposition of taxes and interest. However, Marathon showed reasonable cause for its failure to pay the taxes at the time of the sales, so the Department improperly imposed penalties on Marathon. We affirm the administrative law judge's decision insofar as the decision requires the payment of taxes, but we reverse the decision to impose penalties, and we remand for recalculation of the amount due.

¶ 53 Circuit court judgment reversed; Department decision affirmed in part and reversed in part; cause remanded.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

No. 1-21-0635

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

Decision Under Review:	Appeal from the Circuit Court of Cook County, No. 19-L-050614; the Hon. John J. Curry Jr., Judge, presiding.
Attorneys for Appellant:	Kimberly M. Foxx, State's Attorney, of Chicago (Cathy McNeil Stein, Marie D. Spicuzza, Paul L. Fangman, and Jonathon D. Byrer, Assistant State's Attorneys, of counsel), for appellants.
Attorneys for Appellee:	David W. Machemer and Marilyn A. Wethekam, of Horwood Marcus & Berk Chtrd., of Chicago, for appellee.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

No. 1-21-0635

IN THE APPELLATE COURT, STATE OF ILLINOIS
FIRST DISTRICT

MARATHON PETROLEUM, COMPANY LP) f/k/a MARATHON PETROLEUM COMPANY,) LLC,	)	On appeal from the Circuit Court of Cook County, IL
Plaintiff- Appellee,	)	
v.	)	Case No. 2019 L 050614
COUNTY OF COOK, COOK COUNTY) DEPARTMENT OF REVENUE, et al.,	)	
Defendant-Appellant	)	Hon. Judge John J. Curry Jr., Judge Presiding

ORDER

This cause coming to be heard on the Appellee's petition for rehearing, all parties having been duly notified, and the court being advised in the premises.

IT IS HEREBY ORDERED:

The petition for rehearing is denied.

ORDER ENTERED
MAR 06 2023
APPELLATE COURT FIRST DISTRICT

Enter:

/s/ Mary L. Mikva
Justice

/s/ Carl A. Walker
Justice

/s/ Sanjay T. Tailor
Justice

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

IN THE COOK COUNTY
DEPARTMENT OF ADMINISTRATIVE HEARINGS
COOK COUNTY, ILLINOIS

County of Cook, Illinois (Department of Revenue)	)	
v.	)	RD-160013 and RG-160012
Marathon Petroleum Company LP f/k/a Marathon Petroleum Company LLC	)	

Opinion and Judgment Order of
Administrative Law Judge

THE TAX AT ISSUE

Cook County taxes at the retail level the sale of gasoline, diesel fuel, biodiesel fuel, and gdiesal[1] fuel (collectively, "taxable fuel"). Cook County Code of Ordinances, Cook County Retail Sale of Gasoline and Diesel Fuel Tax Ordinance ("Gas Tax Ordinance" or "Ordinance") §§ 74-471, 74-472(a) and (b) (2019).

The tax – referred to herein as the "gas tax" – is imposed on the consumer, i.e., end user, of taxable fuel. Gas Tax Ordinance §§ 74-471, 74-472(a) and (b). While the gas tax is imposed on consumers and is paid by consumers at the point of sale, it is collected and remitted to the

[1]The correct spelling of this type of fuel is "gdiesel," not "gdiesal," though both spellings appear throughout the tax ordinance at issue.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

Cook County Department of Revenue[2] ("DoR") often prior to taxable fuel being purchased by consumers.

The Gas Tax Ordinance's collect-and-remit architecture operates as follows. When a distributor[3] of taxable fuel sells taxable fuel to a retailer located in Cook County, the distributor collects the gas tax from the retailer and remits the tax collected to DoR. Gas Tax Ordinance § 74-472(c)(1). The retailer recoups the gas tax paid to the distributor by adding it to the base price of taxable fuel so that the total price paid by a consumer is the fuel price plus the gas tax. Gas Tax Ordinance § 74-472(b) ("The incidence of and liability for payment of the tax levied in this Article [the Gas Tax Ordinance] is to be borne by the consumer . . . . [I]t shall be deemed a violation of this Article for any . . . retail dealer to fail to include the tax in the retail sale price of gasoline, diesel fuel, biodiesel fuel, gdiesal [sic] fuel or to otherwise absorb the tax."). Likewise, when a distributor sells taxable fuel directly to a Cook County consumer, the distributor adds the gas tax to the fuel price and remits the tax amount to DoR so that, once again, the total price paid by the consumer is the fuel price plus the gas tax. Gas Tax Ordinance § 74-472(c)(2).

The Gas Tax Ordinance's collect-and-remit architecture is more involved when distributor-to-distributor sales occur, a not infrequent occurrence. If a buying distributor holds a

---

[2]The Department of Revenue is responsible for administering and enforcing Cook County's tax ordinances, including the Gas Tax Ordinance. Gas Tax Ordinance §§ 74-472 (e) and (f), 74-474, 74-475, 74-482. *See also* Cook County Code of Ordinances, Chapter 2 Administration (Article V Departments and Similar Agencies, Division 3 Bureau of Finance, Subdivision III Department of Revenue) §§ 2-434 (2019).

[3]"Distributor" is defined as "any person who either produces, refines, blends, compounds, or manufactures gasoline or diesel fuel in this County or transports or has transported gasoline or diesel fuel into this County or receives gasoline, diesel fuel or biodiesel fuel in Cook County on which this tax has not been paid." Gas Tax Ordinance § 74-471.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

DoR-issued registration certificate, the selling distributor does not collect the gas tax from the buying distributor. Gas Tax Ordinance § 74-473(1). Thus, in transactions involving multiple DoR-registered distributors, the gas tax is collected and remitted only when the last distributor in the distribution chain sells taxable fuel to a Cook County retailer or consumer. Gas Tax Ordinance §§ 74-472(c) (1) and (2), 74-473(1). If, however, a distributor sells taxable fuel to a distributor that does not hold a DoR-issued registration certificate, the selling distributor is required collect the gas tax from the unregistered buying distributor and remit the tax collected to DoR. Gas Tax Ordinance § 74-472(c)(3).

The requirement that selling distributors collect the gas tax from unregistered buying distributors is intended to ensure that unregistered buying distributors will recoup the gas tax paid to selling distributors by passing it down the distribution chain until it reaches retailers and, ultimately, consumers[4] when retailers add the gas tax to the fuel price. Whenever distributors sell taxable fuel to unregistered distributors and fail to collect the amount of gas tax called for by the transactions, DoR may seek the uncollected gas tax from the selling distributors.

THE BUSINESS OF MARATHON PETROLEUM COMPANY LP f/k/a MARATHON PETROLEUM COMPANY LLC ("MARATHON")

Marathon, at all relevant times, was a refiner of crude oil. (Tr. Oct. 17, 2017, at 111). At all relevant times, Marathon was also in the business of "moving physical barrels" of petroleum products (Tr. Oct. 17, 2017, at 142) which meant that Marathon traded with other entities to buy

[4]The Gas Tax Ordinance is constructed on the rebuttable presumption that distributor-to-distributor transactions involving taxable fuel that take place in Cook County will lead ultimately to the retail sale of the taxable fuel in Cook County. Regarding rebuttable presumptions under Illinois law, *see, e.g., Franciscan Sisters Health Care Corp. v. Dean*, 95 Ill. 2d 452, 462-63 (1983); *McElroy v. Force*, 38 Ill. 2d 528, 533 (1967); *Greenpoint Mortgage Funding Inc. v. Hirt*, 2018 Il App (1st) 170921 ¶ 21.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

and sell petroleum products (Tr. Oct. 17, 2017, at 119-21). In addition, at all relevant times, Marathon shipped, i.e., distributed, petroleum products from locations in Cook County. (Tr. Oct. 17, 2017, at 171, 190.) Specifically, Marathon operated a terminal in Mount Prospect, Illinois, a municipality located in Cook County, and also had petroleum products at terminals located in Argo and Des Plaines, Illinois, municipalities located in Cook County. (Tr. Oct. 17, 2017, at 189.) From the terminals in Mount Prospect, Argo, and Des Plaines, Marathon distributed taxable fuel. Accordingly and as required by the Gas Tax Ordinance, Marathon registered with DoR as a distributor, and at all relevant times, held a DoR-issued registration certificate. (Tr. Oct. 16, 2017, a.m. session, at 48.)

Marathon also operated retail outlets for a time under the brand names Marathon and Speedway, though Marathon "got out of the retail business" sometime between 2006 and 2014. (Tr. Oct. 17, 2017, at 158; Tr. Oct. 18, 2017, at 28.) It appears that Marathon's remittances of gas tax to DoR were reduced after it exited the retail business as it no longer collected and remitted gas tax on retail sales of taxable fuel. (Tr. Oct. 18, 2017, at 28.) It further appears that the reduced remittances from Marathon might have been one of the reasons DoR decided to audit Marathon, an audit that led to the instant litigation.

THE TAX ASSESSMENTS AT ISSUE

DoR commenced an audit of Marathon on May 19, 2014. (Marathon Trial Exh. 2 at 2, admitted without objection at Tr. Oct. 16, 2017, p.m. session, at 69-70, 71.) The audit examined transactions occurring between January 2006 through and including July 2014. (Marathon Trial Exh. 2 at 2.) The audit resulted in two Notices of Tax Determination and Assessment, one for transactions involving gasoline and one for transactions involving diesel fuel.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

Both the gasoline assessment and the diesel fuel assessment (collectively, the "assessments" or "assessments at issue") were issued on September 26, 2014. The gasoline assessment totaled $16,450,932.78 in tax, interest, and penalties. (DoR Trial Exh. 2, admitted without objection at Tr. Oct. 16, 2017, a.m. session, at 111-12.) The diesel fuel assessment totaled $13,149,477.88 in tax, interest, and penalties. (DoR Trial Exh. 4, admitted without objection at Tr. Oct. 16, 2017, a.m. session, at 111-12.)

The assessments were sent to Marathon via Federal Express on September 25, 2014.[5] Marathon responded by filing a Protest and Petition for Hearing challenging the gasoline assessment and a separate Protest and Petition for Hearing challenging the diesel fuel assessment (collectively, "Protests"). The Protests were sent to DoR via United States certified mail on October 9, 2014, which was within 20 days of the date DoR sent the assessments to Marathon.[6] As Marathon's Protests were filed timely, the Cook County Department of Administrative Hearings has jurisdiction to hear and decide the merits of the Protests. Uniform Procedures Ordinance § 34-81. After filing its Protests, Marathon tendered additional documents to DoR for its review and "some of those documents were enough to amend the original liability. So we, we excluded some of those transactions from the original liability." (Tr. Oct. 16, 2017, a.m. session, at 60-61.) Accordingly, the original gasoline assessment was reduced to $4,398,180.76 in tax,

---

[5]No explanation appears in the record as to the reason the assessments were sent to Marathon the day before the issue date appearing on the assessments.

[6]Under the Uniform Penalties, Interest and Procedures Ordinance ("Uniform Procedures Ordinance"), the recipient of a DoR-issued tax assessment who wishes to contest the assessment must file a Protest and Petition for Hearing within 20 days of the date of personal service or date of mailing. Cook County Code of Ordinances, Uniform Penalties, Interest and Procedures Ordinance § 34-80(a) (2019).

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

interest, and penalties. (DoR Trial Exh. 3, admitted without objection at Tr. Oct. 16, 2017, a.m. session, at 111-12.) The original diesel fuel assessment was reduced to $10,537,077.16 in tax, interest, and penalties. (DoR Trial Exh. 5, admitted without objection at Tr. Oct. 16, 2017, a.m. session, at 111-12.) Both of the new assessments involved a number – not quantified – of so-called book transfers or book outs between Marathon, a DoR-registered distributor of taxable fuel, and distributors of taxable fuel that were not registered with DoR.

Marathon, through counsel, responded to the new assessments by supplementing its Protests. In the supplemental filing, Marathon reiterated the position stated in its Protests that "book transfers" or "book outs" are not sales of taxable fuel and, thus, are not subject to the gas tax. Because Marathon was unable to persuade DoR that "book transfers" or "book outs" are not subject to the gas tax, the Protests proceeded to an evidentiary hearing on whether or not such transactions are taxable transactions under the Gas Tax Ordinance.

"BOOK TRANSFERS," "BOOK OUTS," AND CASH SETTLEMENTS OF FORWARD CONTRACTS

"Book transfer" and "book out" are synonymous terms for Marathon[7] (Tr. Oct. 17, 2017, at 26-27; Tr. Oct. 18, 2017, at 11, 35) but they are not synonymous for others. For example, your dictionary.com defines "book transfer" as the "act of transferring ownership of a product or asset

[7]However, "book transfer" appears throughout Marathon's books and records but not "book out." For example, "book transfer" appears in Marathon's internal summary report of transactions. (DoR Trial Exh. 1, admitted without objection at Tr. Oct. 16, 2017, a.m. session, at 111-12.) Similarly, "book transfer" appears in Marathon's sample contract admitted into evidence to explain the transactions at issue. (Marathon Trial Exh. 4 at 2 ["If delivery takes place by *book transfer*, payment is due on the effective date of the book."] [emphasis added], admitted without objection at Tr. Oct. 18, 2017, at 68.) Finally, "book transfer" appears in other internal Marathon documents related to the transactions at issue. (Marathon Trial Exhs. 10 and 11, admitted without objection at Tr. Oct. 18, 2017, at 68-69.)

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

without actually delivering the physical goods." yourdictionary.com/book-transfer, last accessed July 15, 2019. Similarly, accountingtools.com defines "book transfer" as the "transfer of the legal right of ownership of an asset, without physically shifting the asset to the new owner." accountingtools.com/articles/2017/5/11/book-transfer, last accessed July 15, 2019. Ditto for the financial-dictionary which defines "book transfer" as a "change in ownership, especially of a security, that does not result in a change of location." financial-dictionary.the freedictionary.com/book+transfer, last accessed July 15, 2019. As is clear, the foregoing definitions of "book transfer" undercut Marathon's consistent assertion that no transfer of ownership occurs in its "book transfers." (Tr. Oct. 17, 2017, at 128-29, 158-59; Tr. Oct. 18, 2017, at 20.)

At least one definition of the term "book out" is similarly unhelpful to Marathon. To illustrate, risk.net defines a "book out" as "an agreement between two physical gas shippers to exchange legal title to a physical commodity gas at a specific location, without an explicit nomination to move the gas to the pipeline operator." risk.net/definition/book-out, last accessed June 24, 2019.

Other definitions of "book out" appear to be more in line with what Marathon contends occurs in the transactions it variously calls "book transfers" and "book outs." For example, investopedia.com notes that the term "may also be interpreted as the agreements to cancel outstanding contracts by the parties involved through a cash settlement of the difference between the price specified in the contract and an acceptable reference price."[8]

---

[8]On the other hand, investopedia.com goes on to note that "[i]n the oil and gas industry, two different companies that ship gas may agree to transfer title to the physical commodity at one location without moving the gas through the operator of a pipeline."

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

investopedia.com/terms/b/bookout.asp, last accessed Aug. 19, 2019. *See also* financial-dictionary.thefreedictionary.com/Book-Out, last accessed July 15, 2019 ("To close a position on [a] . . . derivative . . . by selling a long position, buying a short position *or simply paying the market value of the derivative to the other party of the transaction.*" [Emphasis added.]). Because a range of sources do not share Marathon's treatment of "book transfer" and "book out" as synonymous and because the meaning of the terms indicates that ownership or title to the item referenced in a "book transfer" or "book out" often transfers, it falls to Marathon to establish the exact nature of the transactions that it calls at times "book transfers" and at other times "book outs." Marathon attempted to do so by calling Dr. Gregory W. Arburn as an expert witness over DoR objection. (Tr. Oct. 16, 2017, a.m. session, at 12-16, 22-23; Tr. Oct. 17, 2017, at 71-72.)

Dr. Arburn testified about the concept of "book out" and used that term throughout his testimony rather than alternating between "book out" and "book transfer." Dr. Arburn's testimony placed "book out" in the context of a forward contract in a commodity such as a petroleum product. Dr. Arburn testified that a commodity forward contract is a contract to deliver a commodity or accept delivery of a commodity at a future time. (Tr. Oct. 17, 2017, at 75, 93.) Dr. Arburn explained in his testimony that a commodity forward contract, unlike a commodity futures contract, is a private agreement and is not regulated by the Commodities Futures Trading Commission. (Tr. Oct. 17, 2017, at 75-76.) Dr. Arburn testified variously that a "book out" is: 1) "just a financial way to settle the contract"; 2) "to financially settle instead of taking delivery or making delivery"); and 3) "one of the solutions to a forward contract. A forward contract can result in delivery. A forward – a forward contract can result in a book-out." (Tr. Oct. 17, 2017, at 78, 98.)

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

Dr. Arburn's testimony was corroborated in substantial part by the testimony of DoR's expert witness, Dr. Andria Van Der Merwe. Dr. Van Der Merwe testified that "a commodity forward contract is privately negotiated. It's bilateral. So that means it's between two counter parties, and the forward contract creates an economic obligation to buy or sell a commodity at a future date." (Tr. Dec. 18, 2017, at 21.) Like Dr. Arburn, Dr. Van Der Merwe testified that a commodity forward contract could result in a cash settlement in lieu of "physical transfer of [the] commodity." (Tr. Dec. 18, 2017, at 45.) Dr. Van Der Merwe explained that "[f]rom an economic perspective, what happens under a cash settlement is that there is no fuel delivered. What is exchanged between the two counter parties is the economic equivalent value of the forward contract . . . [a]nd that's exchanged in cash." (Tr. Dec. 18, 2017, at 51-52.) Thus like Dr. Arburn, Dr. Van Der Merwe testified that there is no physical movement or transfer of possession of the commodity in a cash settlement of a commodity forward contract. (Compare Tr. Dec. 18, 2017, at 51 to Tr. Oct. 17, 2017, at 78-79, 98-99.) Dr. Van Der Merwe declined to opine on whether or not a transfer of ownership occurred when a commodity forward contract is settled for cash (Tr. Dec. 18, 2017, at 51), while Dr. Arburn did not address the issue in his testimony. Finally, it appears that neither Dr. Arburn nor Dr. Van Der Merwe examined any documents related to Marathon's cash settlements of commodity forward contracts, i.e., "book transfers" or "book outs." Dr. Arburn specifically testified that he had not looked at any Marathon documents (Tr. Oct. 17, 2017, at 94, 95), while Dr. Van Der Merwe was not asked if she had reviewed any Marathon documents but, rather, confined her testimony to the concept of settling commodity forward contracts for cash.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

The testimony of Drs. Arburn and Van Der Merwe supports Marathon's position that a forward contract in gasoline or diesel fuel can be settled for cash in lieu of making and accepting delivery, but their testimony leaves open the issue of whether or not ownership might transfer between the parties when a commodity forward contract is settled for cash. Moreover, as shown above, various definitions of the terms suggest that ownership may well transfer when a commodity forward contract is settled for cash. Nonetheless, the testimony of other Marathon witnesses is emphatic that no gasoline or diesel fuel moves in any way, shape, or form between the parties to a cash settlement of a petroleum-product forward contract and that a cash settlement does not involve a transfer of ownership. Therein lies Marathon's problem: It failed to introduce sufficient documentary evidence to corroborate its claim that the cash settlement of a petroleum-product forward contract, whether called "book transfer" or "book out," involves nothing more than making a cash payment in lieu of transferring either possession or ownership of the product identified in the forward contract. That evidentiary failure is established by the testimony of Marathon's principal witness, Matthew Freeman.

TESTIMONY OF MATTHEW FREEMAN

Matthew Freeman, an employee of a wholly-owned subsidiary of Marathon, testified extensively about Marathon's practice of settling forward contracts in petroleum products for cash. Mr. Freeman gave testimony in the following areas: 1) cash settlement of "distressed" forward contracts: 2) cash settlement of "indirect" forward contracts; 3) cash settlement of straight buy-sell forward contracts; and 4) cash settlement of matching buy/sell forward contracts."

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

Cash Settlement of "Distresssed" Forward Contracts

Mr. Freeman testified that settling a "distressed" forward contract for cash is common and that two contracts are involved in such a transaction. (Tr. Oct. 17, 2017, at 129-30, 133-34, 136-37, 154-56.) According to Mr. Freeman, there is the original or underlying forward contract under which Party A is to sell a specified quantity of specified petroleum product to Party B at a future date. (Tr. Oct. 17, 2017, at 129). If, however, the seller is unable or unwilling to deliver the product to the buyer as called for in the original forward contract, the parties may enter into a second contract – a contract settling for a cash payment the original forward contract which is "distressed," i.e., not to be performed via delivery. (Tr. Oct. 17, 2017, at 127, 130-31, 133-34, 154-56.) Mr. Freeman further testified that in a cash settlement of a "distressed" forward contract, Party A is paid by Party B on the original sell-buy contract, and Party B is paid by Party A on the "distressed" cash-settlement contract. (Tr. Oct. 17, 2017, at 130-31.) In essence, according to Mr. Freeman, the cash settlement of a "distressed" forward contract is a device under which both parties maintain their inventory positions of the petroleum products involved (Tr. Oct. 17, 2017, at 134, 138) while honoring the terms of the original contract (Tr. Oct. 17, 2017, at 133, 136), which is done by generating a cash-settlement contract that corresponds to the original sell-buy contract.

Mr. Freeman's testimony was unequivocal that two contracts are involved in the cash settlement of a "distressed" forward contract, that the price term typically is not the same between the two contracts, and that settling a "distressed" forward contract for cash is routine in the petroleum industry. (Tr. Oct. 17, 2017, at 129-30, 131-32, 134, 135, 137, 154-56.)

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

The unarticulated implication of Mr. Freeman's testimony is that cash settlements of "distressed" forward contracts are included in the assessments at issue. However, Marathon did not attempt to quantify the number of "distressed" cash-settlement transactions included in the assessments.[9] Further, despite Mr. Freeman's unequivocal testimony that there are two contracts involved in every cash settlement of a "distressed" forward contract, Marathon did not introduce a representative sample of such contracts. In fact, Marathon did not introduce even one example of a "distressed" forward contract and its corresponding cash-settlement contract. The absence of documentary evidence corroborating Mr. Freeman's testimony is critical because it means that Mr. Freeman's testimony is, at most, educational only. In sum, Mr. Freeman's testimony, uncorroborated by the documentary evidence he repeatedly referenced, is insufficient to establish as fact that Marathon settled "distressed" forward contracts for cash during the audit period and how often Marathon did so.

Cash Settlement of "Indirect," i.e. Multi-Party, Forward Contracts

Mr. Freeman also gave testimony on the cash settlement of an "indirect" forward contract which is a forward contract involving three or more parties with Party A at both the beginning and the end of a multi-party chain of sell-buy contracts. (Tr. Oct. 17, 2017, at 141, 150.) Mr. Freeman testified that there is a separate sell-buy contract for each party in the multi-party chain.

---

[9]Marathon maintains that all of the transactions included in the assessments at issue – one hundred percent – are cash-settlement transactions. (Marathon's Statement of Facts and Issues ¶ 20; Respondent's [Marathon's] Requests for Admission of Facts to Petitioner [County of Cook] Request to Admit No. 11.) DoR denies that claim. (County of Cook's Response to Respondent's [Marathon's] Request for Admission of Facts to Petitioner [County of Cook] Answer to Request to Admit No. 11.) DoR's denial means that Marathon has the burden of producing documentary evidence to support its claim that every transaction DoR seeks to tax in the assessments is a cash-settlement of a forward contract.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

(Tr. Oct. 17, 2017, at 148-49), and presumably there is a separate cash-settlement contract or similar document corresponding to each original sell-buy contract because, at the least, the price in each original forward contract typically is not the same as the cash-settlement price (Tr. Oct. 17, 2017, at 131-32, 142). Once again, Mr. Freeman indicated that the inventory positions of the parties to the cash settlement of an "indirect" forward contract do not change (Tr. Oct. 17, 2017, at 151) even though the parties honored the terms of each of the original contracts by entering into a cash-settlement contract or similar document signaling a meeting of the minds, each of the latter corresponding to one of the former.

The unarticulated implication of Mr. Freeman's testimony regarding cash settlements of "indirect" forward contracts is that such cash settlements are included in the assessments at issue, just as DoR included cash settlements of "distressed" forward contracts in the assessments. Yet, once again, Marathon did not attempt to quantify the number of "indirect" cash settlements included in the assessments. Likewise, Marathon did not seek to introduce a representative sample of "indirect" forward contracts and the corresponding cash-settlement contracts or other type of cash-settlement documentation corresponding to the original sell-buy forward contracts. Indeed, Marathon did not offer even one example of a cash settlement of an "indirect" forward contract which would have involved offering the complete chain of original contracts and corresponding cash-settlement contracts or other cash-settlement documentation. Without some corroborating documentary evidence, Mr. Freeman's testimony cannot establish as fact that the cash settlement of "indirect" forward contracts actually occurred during the audit period and, if so, their frequency.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

Cash Settlement of "Direct" Forward Contracts

Mr. Freeman testified that traders in petroleum products often enter into transactions that essentially involve offsetting obligations but are costly in terms of the logistical expense of moving petroleum products. For example, Mr. Freeman testified that one trader for Party A might enter into a forward contract to sell a specified quantity of a specified petroleum product to a buyer, Party B, while, unbeknownst to that trader, another trader for Party A entered into a forward contract with Party B under which Party A is buying from Party B a petroleum product of the same quantity and quality that Party A is selling to Party B in the first forward contract. (Tr. Oct. 17, 20176, at 142-43.) In other words, two different traders not in communication with each other have entered into two separate forward contracts whereby Party A is selling a specified quantity of a specified product to Party B and buying the same quantity and quality of product from Party B. (Tr. Oct. 17, 2017, at 142-43, 145-46.) According to Mr. Freeman, performing on both forward contracts is often both meaningless and expensive which prompts the parties to settle their respective obligations with cash payments rather than performance. (Tr. Oct. 17, 2017, at 147.) Once again, Mr. Freeman testified that the inventory positions of the parties do not change (Tr. Oct. 17, 2017, at 144), but the contracts are honored via cash settlements even though, as is the case with "distressed" and "indirect" cash-settlement transactions, the product price in the original contract and the cash-settlement price likely are different (Tr. Oct. 17, 2017, at 131-32, 142.)

Mr. Freeman, in describing the decision to substitute cash settlement for performance in a "direct" cash settlement of forward contract, testified that the parties just "mash" the two forward contracts together and "settle [them] financially" (Tr. Oct. 17, 2017, at 144) so it is unclear

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

whether or not there are corresponding cash-settlement contracts or other documentation, though presumably there would be because, as has been noted, typically the price in the original forward contract is not the price when the original forward contract is settled for cash (Tr. Oct. 17, 2017, at 131-32, 142.) Nonetheless, as with the other examples of settling forward contracts for cash, the unarticulated implication of Mr. Freeman's testimony is that DoR included cash settlements of "direct" forward contracts in the assessments. Once again, however, Marathon did not seek to quantify the number of "direct" cash-settlement transactions included in the assessments. In addition, despite there being at least two forward contracts involved in a "direct" cash-settlement transaction and quite likely two corresponding cash-settlement contracts or corresponding cash-settlement documentation, none were introduced at trial. In other words, as with the other types of cash settlement of forward contracts, Marathon did not introduce any documentary evidence to establish as fact that it settled "direct" forward contracts for cash during the audit period and exactly how frequently it did so.

Cash Settlement of Matching Buy/Sell Forward Contracts

Mr. Freeman testified at length about Marathon's matching buy/sell forward contracts and the cash settlement of such contracts. In the sole example presented at trial and admitted as Marathon's Trial Exhibit 4 (Tr. Oct. 18, 2017, at 68), Marathon is the buyer of a specified type and amount of petroleum product – 20,000 barrels of 87 regular conventional – and expects to take delivery from the seller – Sunoco – in the first cycle of February, and Sunoco is the buyer of the same type and amount product and expects to take delivery from Marathon in the second cycle of February. In other words, in the matching buy/sell forward contract admitted into evidence, Marathon is both a buyer and a seller as is Sunoco.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

Mr. Freeman further testified that separate and apart from the Marathon-Sunoco matching buy/sell forward contract, Marathon and Sunoco entered into a separate forward contract whereby Marathon was buying from Sunoco the same quantity and quality of product that Marathon was supposed to be selling to Sunoco under the Marathon-Sunoco matching buy/sell forward contract. (Tr. Oct. 27, 2017, at 197-99.) Mr. Freeman explained that the parties – Marathon and Sunoco – wanted to avoid the cost entailed in moving the same quantity and quality of product back and forth between them by settling for cash the forward contract under which Marathon was buying from Sunoco and also settling for cash the second part of the Marathon-Sunoco matching buy/sell forward contract under which Marathon was selling to Sunoco. (Tr. Oct. 17, 2017, at 198-99.) Significantly, while the Marathon-Sunoco matching buy/sell forward contract was in evidence, Marathon did not present the separate forward contract under which Sunoco was to sell to Marathon even though Mr. Freeman testified that it was that forward contract that prompted the parties to settle for cash both the Sunoco-to-Marathon forward contract and the Marathon-to-Sunoco portion of the matching buy/sell forward contract. (Tr. Oct. 17, 2017, at 206.) Moreover, given Mr. Freeman's consistent testimony that the price in a forward contract typically varies from the price in a cash settlement of the forward contract, Marathon nonetheless did not introduce any document showing the parties' agreement as to the price term in the two cash settlements about which Mr. Freeman testified.[10]

---

[10]Marathon did present an internal Marathon document (Marathon Trial Exh. 10) related to these cash settlements, but Marathon did not produce any documentary evidence memorializing the parties' agreement to settle two forward contracts for cash and setting the terms of the settlements, particularly the price terms. In essence, Marathon offered an internal document as a proxy for the parties' agreements to settle two forward contracts for cash in lieu of performance. But an internal document cannot substitute for documents establishing the parties' meeting of the minds that the two forward contracts would be settled for cash.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

There is a common thread to Mr. Freeman's testimony and that thread is that there is a contract to buy or sell and a corresponding cash-settlement agreement, which may itself be a contract or at least a document that functions as a contract. However, with the exception of the Marathon-Sunoco matching buy/sell forward contract, Marathon did not produce any other examples reflecting the many separate forward contracts Mr. Freeman referred to throughout his testimony. Further, Marathon did not produce documentary evidence memorializing agreements to settle forward contracts for cash. That evidentiary failure makes it impossible to address the central claim Marathon advances in this litigation which is that settling forward contracts involving gasoline and diesel fuel for cash is not subject to the Gas Tax Ordinance because cash settlements, by their terms, never result in a sale between the settling parties, let alone the retail sale of taxable fuel in Cook County.[11] (Marathon's Response Post-Hearing Brief in Opposition to the County of Cook's Assessment of Gasoline and Diesel Fuel Tax Assessments ["Post-Hearing Brief] at 16-19, 23, 24, 25.) Simply put, sufficient documentary evidence was not produced in support of the central claim advanced by Marathon, and it is well settled that a taxpayer or tax collector contesting a tax assessment cannot defeat the assessment by testimony alone but must corroborate its testimony by producing documentary evidence drawn from its books and records. *See, e.g., Chak Fai Hau v. Dept. of Rev.*, 2019 Il App (1st) 172588 ¶¶ 54, 56; *PPG Industries, Inc. v. Dept. of Rev.*, 328 Ill. App. 3d 16, 34 (1st Dist. 2002); *Mel-Park Drugs, Inc. v. Dept. of Rev.*, 218 Ill. App. 3d 203, 217 (1st Dist. 1991); *Elkay Mfg. Co. v. Sweet*, 202 Ill. App. 3d 466, 472 (1st Dist. 1990); *Central Furniture Mart, Inc. v. Johnson*, 157 Ill. App. 3d 907,

[11]The paucity of evidence is all the more striking in light of Marathon's claim – disputed by DoR – that the assessments at issue reach only cash settlements of forward contracts. *See supra* n. 9.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

911 (1st Dist. 1987). Thus, while Marathon's principal witness, Matthew Freeman, gave lengthy testimony, Marathon did not corroborate his testimony by producing documentary evidence of the other contracts associated with the cash settlement of forward contracts which Mr. Freeman expressly and repeatedly testified prompted use of the cash-settlement device. Also missing is documentary evidence memorializing the cash settlements themselves. As the party seeking relief, it is Marthon's burden to produce sufficient evidence to support its claim for relief and it did not do so. *See Berron v. Ill. Concealed Carry Licensing Review Bd.*, 825 F.3d 843, 847-48 (7th Cir. 2016) ("As a matter of administrative law, the proponent of a position bears the burden of showing entitlement by a preponderance of the evidence."); *Perez v. Ill. Concealed Carry Licensing Review Bd.*, 2016 Il App (1st) 152087 ¶ 25 quoting and following *Berron v. Ill. Concealed Carry Licensing Review Bd.* Accordingly, Marathon's principal contention that the cash settlement of petroleum-product forward contracts is not subject to the Gas Tax Ordinance is rejected.

MARATHON'S ALTERNATIVE ARGUMENTS

Marathon asserts five alternative arguments as grounds for invaliding the assessments at issue. None of the alternative arguments is backed by evidence, and, thus, all are rejected.

Marathon argues that none of the counter parties to the forward contracts settled for cash were distributors of taxable fuel in Cook County during the audit period, and, thus, none were required to register with DoR as distributors. (Marathon Post-Hearing Brief at 24-26.) In essence, Marathon maintains that it had no collect-and-remit obligation with respect to those distributors even if the Gas Tax Ordinance otherwise applies to the cash settlement of forward contracts.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

Marathon contends that the unregistered parties did none of the things in Cook County that would qualify them as distributors of taxable fuel. Gas Tax Ordinance § 74-471 (defining "distributor"). According to Marathon, the unregistered parties did "not produce, refine or manufacture gasoline or diesel fuel in Cook County, nor transport[ed] gasoline or diesel fuel to or from Cook County" and did not receive fuel in Cook County. (Marathon Post-Hearing Brief at 24, 25.) Significantly and with the exception of Marathon Trial Exhibit 4, Marathon did not identify the unregistered parties at trial.[12] Of equal significance, Phillips 66, a party to some of Marathon's cash settlements of forward contracts, registered with DoR as a distributor of taxable fuel effective July 1, 2012, which was within the audit period and which indicates that Phillips 66 had a presence as a distributor of taxable fuel in Cook County during approximately four years of the audit period. (*See* Marthon's Disclosure of Documents Intended to be Relied on at Trial [relevant pages not Bates stamped].) Finally, it is telling and not in a positive way that Marathon did not produce evidence that the other unregistered parties were not present in Cook County, i.e., were not doing business as distributors of taxable fuel in Cook County, during the audit period. Given the absence of evidence to support Marathon's claim that the unregistered parties were not distributors of taxable fuel in Cook County during the audit period, Marathon has not carried its burden of proof and the argument is rejected.

Marathon also argues that the Gas Tax Ordinance taxes only the retail sale of taxable fuel, i.e., the sale of taxable fuel to consumers or end users, and no retail sale occurred in the cash

---

[12]The unregistered party in Marathon's Trial Exhibit 4 is Sunoco. Other unregistered parties not identified at trial are CHS, Inc., Glencore Ltd., Noble Americas, PBF Holdings, Phillips 66, Quick Trip Corp., and Sun Refining and Marketing. (*See* Marathon's Disclosure of Documents Intended to be Relied on at Trial at 284-86, 293-95.)

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

settlements of forward contracts at issue in this litigation. (Marathon's Post-Hearing Brief at 16-18, 23.)

The argument was made at trial as well with Marathon pointing to language in the Marathon-Sunoco matching buy/sell forward contract that the gasoline referenced in the contract was "not for sale to the ultimate consumer." (Tr. Oct. 17, 2017, at 170-73; Marathon Trial Exh. 4.) Significantly, only one forward contract involving gasoline settled for a cash payment was introduced at trial – the aforementioned Trial Exhibit 4 – and no such forward contract involving diesel fuel was introduced. Moreover, Marathon's witness, Matthew Freeman, undercut its reliance on the language of Trial Exhibit 4 when he testified that at the time Trial Exhibit 4 was entered into, the gasoline could not be sold at retail which left open the obvious possibility that the gasoline referenced in Trial Exhibit 4 might be sold at retail at a later time.

Mr. Freeman testified with respect to Trial Exhibit 4 as follows:

> "So these aren't ready to be sold to retail yet. . . . These aren't ready for retail yet." (Tr. 17, 2017, at 164.)
>
> "This is not ready for retail." (Tr. 17, 2017, at 167.)

Mr. Freeman went on to explain that the gasoline specified in Trial Exhibit 4 had to be processed further to be suitable for retail sale. (Tr. Oct. 17, 2017, at 171-73.) At no time, however, did Mr. Freeman testify that the gasoline referenced in Trial Exhibit 4 could never or would never be sold at retail and Marathon did not produce any documentary evidence on the point. The inference to be drawn from Mr. Freeman's testimony is simply that the gasoline referenced in Trial Exhibit 4 was not ready for retail sale at the time the forward contract was entered into, not that the gasoline could never or would never be sold at retail.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

It is Marathon's burden to show, based on at least a representative sample of both gasoline and diesel fuel forward contracts and supporting testimony, that the petroleum product identified in the contracts could never or would never be sold at retail. Marathon made no such showing and, indeed, did not attempt to make such a showing. Accordingly, the argument is rejected for want of evidence.

Marathon next argues that the assessments at issue amount to taxing transactions that occur outside of Cook County in violation of the Illinois constitution and the due process guarantees of the Illinois and United States constitutions. (Marathon Post-Hearing Brief at 31-34.) Marathon offered no evidence at trial to support the argument and offers no evidence in its Post-Hearing Brief.

It is undisputed that Marathon does business in Cook County as a distributor of taxable fuel. However, as noted above (*supra* at 18-19), Marathon did not offer any evidence at trial to the effect that the unregistered distributors that were parties to the forward contracts at issue were not present in and did not do business in Cook County during the audit period. In fact, one such party – Phillips 66 – was present in and did business in Cook County as a distributor of taxable fuel because it registered with DoR as a distributor effective July 1, 2012. Only if the other parties had no presence in and did not do business as distributors of taxable fuel in Cook County during the audit period would an issue be raised that DoR was attempting to reach gasoline and diesel fuel transactions taking place outside Cook County. Because Marathon did not present any evidence in support of this argument at any point in the instant litigation, the argument fails and is rejected for that reason.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

Marathon's final argument is that applying the gas tax to the cash settlement of forward contracts converts the tax, at least as to Marathon, into an occupation tax which is prohibited by Illinois law. (Marathon Post-Hearing Brief at 27-30.)

Marathon's argument fails because the plain language of the Gas Tax Ordinance makes it clear that the gas tax is not an occupation tax. For example, Subsection 74-472(a) provides that the gas tax is "imposed on the retail sale" of taxable fuel and "is to be paid by the purchaser." Subsection 74-472(a) further provides that nothing in the language of the Ordinance "shall be construed to impose a tax upon the occupation of distributors, suppliers or retail dealers." Finally, Subsection 74-472(b) provides that the "incidence of and liability for payment of the tax levied in this Article [the Gas Tax Ordinance] is to be borne by the consumer" of taxable fuel and distributors and retail dealers are prohibited from "absorbing" the tax.

Numerous Illinois cases have held that tax ordinances that impose collect-and-remit obligations on distributors of tangible goods, as does the Gas Tax Ordinance, do not impose occupation taxes. *See, e.g., Ill. Gasoline Dealers Assn v. City of Chicago*, 119 Ill. 2d 391, 401 (1988) (In upholding the City of Chicago's vehicle-fuel tax ordinance, the Illinois Supreme Court approved a collect-and-remit scheme similar to the Gas Tax Ordinance, and in doing so, found "no merit in plaintiff's contention that the vehicle fuel tax is an occupation tax because the ordinance imposes certain obligations and burdens upon the seller."); *Mulligan v. Dunne*, 61 Ill. 2d 544, 551-52 (1975) (In upholding Cook County's liquor tax ordinance against the claim that the ordinance's the collect-and-remit scheme amounted to an occupation tax, the Illinois Supreme Court explained that a tax is not an occupation tax where the "legal incidence of the tax [is] on the consumer" and distributors "merely serve[ ] as collection agents.").

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

Of particular relevance is *Illinois Wine & Spirits Company v. County of Cook*. There, a distributor of alcoholic beverages located in Will County failed to collect Cook County's liquor tax on sales the distributor made to retailers located in Cook County, and Cook County sought the uncollected tax from the distributor. The Illinois Appellate Court for the First District concluded that the liquor tax ordinance did not tax the occupation of distributing alcoholic beverages despite imposing a collect-and-remit obligation on distributors. 191 Ill. App. 3d 924, 926-28 (1st Dist. 1989.) In so holding, the appellate court affirmed a judgment of $154,729.12 against the distributor representing uncollected liquor tax plus interest on the distributor's sales to Cook County retailers. In other words, imposing a tax liability on a distributor for the amount of tax the distributor should have collected and remitted, but did not, does not convert the tax into an occupation tax. *Illinois Wine & Spirits* controls. That DoR has turned to Marathon for uncollected gas tax does not make the gas tax an occupation tax as to Marathon. Marathon's argument to the contrary is rejected.

Marathon closes by asking to be relieved of the negligence and late penalties DoR included in the assessments. Two reasons are offered for its penalty-relief request: 1) no taxable fuel is "involved" and none is "moved or transferred in Cook County" when petroleum-product forward contracts are settled for cash, and 2) no other taxing body has sought fuel or petroleum taxes from Marathon on its cash settlement of forward contracts. (Marathon's Post-Hearing Brief at 34-36.)

Marathon's first reason is rejected because Marathon did not carry its burden of establishing that all of the transactions assessed by DoR were in fact cash settlements of forward contracts with neither possession nor ownership transferring between the parties

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

to the settlements. Marathon's second reason is rejected because Marathon cites no authority that precludes DoR from seeking uncollected gas tax from Marathon simply and only because DoR may be the first to do so.

CONCLUSION

The assessments are upheld in their entirety.

L. Anita Richardson
Administrative Law Judge

Entered: September 9, 2019

THIS OPINION AND JUDGMENT ORDER IS FINAL AND APPEALABLE AS PROVIDED BY THE ADMINISTRATIVE REVIEW LAW.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

MARATHON PETROLEUM COMPANY LP,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 19 L 050614
	)	
THE COUNTY OF COOK, COOK COUNTY DEPARTMENT OF REVENUE, et al.,	)	Cal. 3
	)	
Defendants.	)	

OPINION AND ORDER

This matter is before the Court pursuant to a Complaint for Review of an Administrative Decision ("Dec.") of the Cook County Department of Revenue. This is an appeal of a tax assessment under the Cook County Retail Sale of Gasoline and Diesel Fuel Tax Ordinance ("County Gas Tax Ordinance"), Ch. 74, Art. XII, Sec. 74-470 et seq. The Plaintiff in this matter is Marathon Petroleum Company LP, f/k/a Marathon Petroleum Company LLC ("Marathon"), an oil company that sells gasoline and diesel fuel (or, in short, "motor fuel") and against which the tax assessments were issued. Joined in this matter as Defendants are The County of Cook ("Cook County"), Cook County Department of Revenue ("DOR"), Zahra Ali, Director of the Cook County Department of Revenue, ("Director") and the Cook County Department of Administrative Hearings ("CCDOAH") (all of the foregoing hereafter referred to collectively as "the County"). This Court having considered all the pleadings, briefs, oral arguments, and the record below, issues the its decision and order as follows:

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

I. OPINION

A. THE FACTS AND THE RECORD BELOW

1. Background and Brief Description of the Dispute

After an audit of Marathon's records, DOR issued to Marathon two Notices of Tax Determination and Assessment on September 26, 2014, one for gasoline and the other for diesel fuel, both under the County Gas Tax. Marathon protested the Notices. After further communications between the parties, the DOR gave partial relief and revised its claimed amount of tax, including interest and penalties, to the its final assessment amounts of $4,398,180.76 for gasoline and $10,537,077.16 for diesel fuel. This revised determination was set forth in DOR's "Revised Fuel Tax Assessments" ("Revised Assessments"). Marathon continued to protest the Revised Assessments, asserting that none of the transactions identified in the Revised Assessments were taxable transactions under the County Gas Tax. Marathon alleged that the transactions identified in the Revised Assessments were financial settlements of forward contracts, that is, contracts for future delivery of gas and diesel fuel. Marathon alleged that by these financial settlements, also referred to as cash settlements, the parties would give up contracts for the purchase of motor fuel, and no fuel was delivered. Marathon claimed that these cash settlements, identified in its records as "book transfers", were not taxable under the Gas Tax Ordinance. Due to Marathon's petition and protest, the CCDOAH held an evidentiary hearing on the dispute in 2017. On September 9, 2019, the Administrative Law Judge ("ALJ") who presided at the hearing entered a decision upholding the Revised Assessments and rejecting Marathon's claim that the transactions identified in the final Notices were non-taxable, even if they constituted "book transfers." Marathon appeals the ALJ's decision.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

2. County Gas Tax

The County Gas Tax constitutes a tax at the retail level on the sale of gasoline, diesel fuel, and other fuels as delineated in the Ordinance. Order of the Department of Administrative Hearings ("ALJ Dec."), Cook County Department of Administrative Hearings Record ("CCDOAH") 04071. The tax is imposed on the consumer, i.e., end user, of the taxable fuel. Id.; Gas Tax Ordinance, §§ 74-471, 74-472 (a)-(b). While the gas tax is imposed on consumers and paid at the point of sale, it is often collected and remitted to the DOR prior to the consumer's purchase, in accordance with a "collect-and-remit architecture" set up under the Ordinance. ALJ Dec., pp. 1-2. Under collect-and-remit, when a gas distributor sells fuel to a retailer in the County, the distributor collects the Gas Tax from the retailer and remits the tax collected to the DOR. Id., p. 2. The retailer recoups the tax paid by adding the amount to the base price of the fuel sold to the consumer. Id.; Gas Tax Ordinance, §§ 74-472(b) ("…liability for payment of the tax levied…is to be borne by the consumer…).

The Tax's collect-and-remit architecture "is more involved when distributor-to-distributor sales occur…" ALJ Dec., p. 2. If a buying distributor holds a DOR registration certificate, the selling distributor does not collect the Gas Tax from the buyer. Gas Tax Ordinance, § 74-473(1). Accordingly, when fuel is sold through a chain of registered distributers, only the last distributor in the chain which sells directly to a retailer or a consumer collects and remits the tax. §§ 74-472(c)(1)-(2); 74-473(1). If on the other hand a distributor sells fuel to an unregistered distributor, the selling distributor is required to collect the tax from the unregistered distributor and remit it to the DOR. § 74-472(c)(3). The latter is required in order to "ensure that unregistered buying distributors will recoup the gas tax paid to selling distributors by passing it down the distribution chain until it reaches retailers and, ultimately,

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

consumers…" ALJ Dec., p. 3. The DOR monitors distributor transactions to recover unremitted Gas Tax from those that sell to unregistered distributors. Id.

3. Marathon and Its Business Pertinent to the Case

Marathon, which sells motor fuel, has sold it in the County, has paid the Gas Tax, and is a distributor registered in the County. Marathon's principal place of business is in Findley, Ohio. CCDOAH 8862. When Marathon sells motor fuel, the physical transfer of the fuel is made through either a pipeline transfer or a third party carrier [1] which takes possession of the fuel at a terminal. Id. at 8501-8502. Marathon has three pipelines in the United States that price at Chicago region prices. Id. at 8553-59. Marathon can maintain inventory at three gas terminals in Cook County: Argo terminal, DesPlaines terminal, and Mount Prospect terminal. Id. at 8565, 8863; ALJ Dec., p. 4.. Anytime fuel is sold at those terminals or through a pipeline, a meter ticket or transfer order is generated. CCDOAH 8501, 8504, 8728. For all such fuel sold, reflected in a meter ticket or transfer order, Marathon collected and remitted the Gas Tax. Pltf. Opening Br., pp. 2-3.

Marathon has argued, both here and before the ALJ, that the transactions subject to the Revised Assessments were not subject to the Gas Tax. Marathon states that all of the subject transactions consisted of the ultimate "financial settlement" of "forward contracts" for the sale of motor fuel, which settlements were entered on Marathon's records as "book transfers". Pltf. Opening Br., pp. 1-2; ALJ Dec., pp. 6, 10-11. A commodity forward contract is a contract to deliver a commodity, like motor fuel, or accept delivery of a commodity at a future time. ALJ Dec., p. 8. Since delivery of the commodity is anticipated in the future, sometimes the parties to

[1] Such as a trucking company. CCDOAH 8725-26, 8798.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

a forward contract agree upon a cash settlement of the contract instead of physical delivery of the commodity. Id., pp. 8-10. When such a cash settlement occurs, there is no physical movement or transfer of possession of the commodity identified in the contract. Id. These cash settlements have been referred to, in short, as "book outs". Id., p. 8. Marathon has also referred to these settlements as "book outs", but has also alternated between the use of the terms "book outs" and "book transfers" for descriptions of the settlements. CCDOAH 0219, ¶ 7, n.2; ALJ Dec., p. 6, n.7. Testimony discloses that Marathon uses the terms "book out" and "book transfer" interchangeably when referring to these financial settlements of forward contracts. CCDOAH 8719-20, 8728, 8743. Because the primary Marathon records, which were the substantial focus of the ALJ's and DOR's consideration of the issue, labeled the transactions as "book transfers", the Court will use the term "book transfer" throughout this decision to refer to the disputed transactions to avoid confusion.[2] (Where a witness uses the term "book out", the Court will employ the listed term "book transfer".) Marathon has stated that all of the "book transfers" sought to be taxed under the County's assessments were the cash settlement of forward contracts, thus mere financial transactions and not sales. Marathon has argued that in a book transfer, no fuel is sold or moved and no change of title or ownership of the fuel occurs. Marathon has argued that such transactions do not constitute the sale of motor fuel under the Gas Tax and are therefore not subject to the tax. The County, to the contrary, asserts that these cash settlements are sales under the Gas Tax.

[2] Where a witness uses the term "book out", the Court will employ the listed term "book transfer".

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

4. Hearing in the Department of Administrative Hearings

At the evidentiary hearing, the County placed into evidence its Revised Assessments. DOR witnesses who explained the audit, the creation of the Revised Assessments, and the basis for the conclusion of amount of tax due and owing under the Revised Assessments were DOR Audit Supervisor Jose Vega ("Vega") and DOR Deputy Director of Compliance Gary Michals ("Michals"). CCDOAH 3345, 3409. The DOR witnesses testified that the Revised Assessments, which identified alleged taxable sales under the Gas Tax, were supported by Marathon's own record which it provided to DOR. Defendant's Response, pp. 8-9. The Marathon record that the DOR relied upon for the propriety of its Revised Assessments was a document the parties identified as Marathon's "Internal Summary Report" ("ISR"). CCDOAH 3345, 3348, 8328, 8345-46, 8722-23, 8792-8851. The ISR consisted of spreadsheets listing consecutive transactions vertically by individual lines. Id. at 8792-8851. Each transaction entry on the ISR listed motor fuel buyers, invoice dates and numbers for the purchases, and quantities purchased (net gallons of fuel), the foregoing categories being set forth horizontally in separate headed columns. Id. at 3345, 8792-8851. Given that the ISR identified specific fuel purchasers from Marathon, DOR was able to identify most of them as purchasers that are unregistered distributors in Cook County. Id. at 8328. A sale of motor fuel to an unregistered distributor will require remittance of the Gas Tax. Gas Tax Ordinance, §§ 74-741, 74-742. The Revised Assessments and the ISR were introduced into evidence by the DOR and admitted into evidence at the hearing. CCDOAH 3345, 3358, 3710-59, 3820-21; ALJ Dec., p. 6, n.7. Based on the information derived from the ISR, as stated here, DOR concluded that taxable sales occurred and that the Revised Assessments were enforceable. CCDOAH 1642-53.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

Marathon contested the County's submissions by offering evidence that the transactions at issue were not sales of fuel but rather cash settlements of forward contracts. ALJ Dec., pp. 10-16; CCDOAH 8719, 8728. The Marathon record it used to establish the occurrence of the cash settlements was primarily the ISR, the same record DOR relied upon in generating the Revised Assessments. CCDOAH 8719-22. Marathon described these "cash settlements" on the ISR as "Book Transfers". Id. As stated, personnel at Marathon interchangeably used the terms "book transfers" and "book outs" to refer to these cash settlements. Id. at 8719-20, 8743.

Joseph Steiner, a Marathon tax specialist, testified that all "Book Transfers" listed on the ISR were all cash settlements of forward contracts. Id. at 8719-20, 8743. He testified that "a book out transaction is a mechanism which is used to settle contracts and to remove associated obligations without physically moving or transferring any product." Id. at 8719. Each book transfer was a "financial transaction". Id. at 8728.

In testimony intended to be explanatory, Marathon witnesses stated that because all forward contracts contemplate the future delivery of motor fuel, occasionally either the need for the fuel will disappear before that date or a decision is made (or forced) to abandon the delivery before that date. Id. at 8450-53, 8455, 8469, 8476, 8505-06, 8517-23, 8535-45, 8597; ALJ Dec., pp. 10-12.

Matthew Freeman, a Marathon commercial analysis manager with significant knowledge of Marathon's cash settlements, testified that when Marathon settles a forward contract with a buyer through a cash settlement (a book out) no motor fuel is physically transferred, moved, or delivered. Id. at 8502-05, 8510, 8514. He further testified that no possessory rights or title changes on any motor fuel pursuant to a cash settlement or book out. Id. at 8502-05, 8514, 8590. He testified that the cash settlement or book out is merely "an accounting exercise." Id. 8514.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

As Freeman testified, the need for a financial settlement of motor fuel purchase contracts, as opposed to a simple contract cancellation, is due to the fact that in the oil and gas industry, such contracts cannot be cancelled. CCDOAH 8509. The ability to arrange such cash settlements derives from the fact that the contracting parties tend to have other cross or counter obligations to buy or sell fuel which allows for settlement. Id. at 8505-06. The simplest example of the ability to achieve such a cash settlement in the oil and gas industry is when "Party A" enters a forward contract with "Party B" to purchase gasoline at a certain quantity, while simultaneously entering into another forward contract to sell "Party B" gasoline. ALJ Dec., p. 14. The counter obligations can cancel each other out and be reconciled through a "book transfer". CCDOAH 8502-07. Freeman testified that the resulting cash settlements saves Marathon "logistics costs" (sic). Id. at 8585-86.

Freeman testified in detail as to how a book transfer transaction occurs and is documented. To aid in his explanation, he used as an example a book transfer concluded with Sunoco Oil Company, which appeared on the ISR.[3] Id. at 8518-46. First, the parties agree to a book transfer in order to settle an outstanding forward contract. The agreement is memorialized in a written agreement, an example of which is entitled "Light Products Matching Buy/Sell" agreement, concluded with Sunoco. Respondent Exhibit ("Resp. Ex.") 4; CCDOAH 8535, 8866-70. Second, Marathon creates a "Physical Deal Sheet", an internal document which reflects the fact of the agreement to settle for cash, allows for the creation of an identification number for the book transfer, and documents the book transfer internally, referencing the forward contracts to be

[3] The ALJ made much of the fact that Freeman did not specifically affirm the authenticity of the Sunoco book transfer documents. However, Freeman understood their content and testified to them in detail. CCDOAH 8518-46, 8567-89. Steiner laid the foundation for the documents' admission. CCDOAH 8739-43.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

settled for cash. Resp. Ex. 9; CCDOAH 8567-71, 8895-96. Third, a "Book Transfer Letter" is created for internal accounting purposes which documents the book transfer agreement and designates the forward contract involved as settled for cash. Resp. Ex. 10; CCDOAH 8575-77, 8897. The Book Transfer Letter also creates a book transfer number for the transaction and creates new invoice numbers for the cash settlement invoices. Id. Finally, a Book Transfer Invoice is created bearing the invoice number established in the Book Transfer Letter. Resp. Ex. 11; CCDOAH 8577-79, 8586, 8898. In addition, a Corresponding Invoice may be generated, as was done in this example, which further reflects the payment demand for the cash settlement. Resp. Ex. 12; CCDOAH 8586, 8588, 8899. All of the foregoing Respondent's Exhibits (Nos. 4, 9 – 12) were taken from a single book transfer transaction between Marathon and Sunoco, designated as BT 912 (BT presumably meaning book transfer) and Invoice Number 356519. See CCDOAH 8866, 8895, 8897-99 (Resp. Exs. 4, 9, 10, 11, 12). Book transfer transaction BT 912/Invoice No. 356519 plainly appears in the ISR for February 19, 2009. CCDOAH 8816. Freeman testified that the Sunoco book transfer documents, Exhibits 4 and 9 through 12, were representative of all documents used in all Marathon book transfer transactions. CCDOAH 8588-89. All of the aforementioned Respondent's Exhibits were admitted into evidence at the hearing. ALJ Dec., pp. 6 n.7, 15; CCDOAH 8739-43; Pltf. Opening Br., p. 7.

In its case, Marathon also provided more information regarding additional data that appeared on each individual entry on the ISR, much of which was not attested to by the DOR's witnesses on direct examination. This data appears under columns titled as "Origin Name", "Destination Name", and "Carrier". Steiner testified that if a transaction was a book transfer cash settlement, the transaction would be identified as "Book Transfer" in the "Carrier" column of the ISR. Id. at 8720-22. He also testified that in a "Book Transfer" entry on the ISR,

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

"Chicago" would be inserted in the columns for both Origin Name and Destination Name. Id. at 8721-22. Steiner testified that the entries of "Chicago" in the Origin and Destination Name columns was short for "generic Chicago region", indicating that the transaction was a book transfer and not a sale of product. Id. He testified that the entry "Chicago" referred to a region within the United States for pricing the transaction, and neither an origin nor destination for any product. Id. Steiner explained that the limitations of Marathon's computerized accounting system required that in listing book transfer cash settlements, the system's format for product sales was required to be used on the ISR, therefore resulting in the company placing "Book Transfer" as an entry under "Carrier", and "Chicago", for the pricing region, in both the origin and destination columns. Id. at 8721, 8734-35. Steiner testified that if a transaction constituted an actual sale of fuel at Marathon, a meter ticket, a bill of lading, a transfer order, or some other "evidence [of] change of ownership or movement" would have to exist. CCDOAH 8728-29.

Marathon's expert witness, Dr. Gregory Auburn, an economics professor, testified that book out transactions are contracts where the parties have "agreed to financially settle." Id. at 8450-51. He testified that a forward contract is an agreement "to deliver or accept delivery of a product at a future point in time". Id. at 8451. He stated that a book out financially settles agreements because a forward contract requires delivery of the subject product and settlement releases the obligation of delivery. Id. at 8454. It is a cost-cutting measure. Id. at 8456. He testified that no product is received when a book out transaction occurs. Id. at 8455 ("…they'll book it out. Financially settle the transaction so that they don't have the expense of receiving product that they can't use, can't take, don't want." Id.) He testified that the book out transactions were common in businesses involved in the sale of commodities and are mere financial transactions. Id. at 8450-56.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

The DOR called its own expert witness, Dr. Andria van der Merwe, an economist, as a rebuttal witness to counter Marathon's case. Dr. van der Merwe testified that a forward contract creates an economic obligation to buy or sell a commodity at a future date. ALJ Dec., p. 9. She further testified that such contracts could wind up as cash settlements in lieu of physical transfer of the subject commodity. Id. Neither Dr. Auburn nor Dr. van der Merwe testified as to the content of the Revised Assessments, the ISR, or any of Marathon's records.

On September 9, 2019, the ALJ upheld the Revised Assessments "in their entirety", which included the imposition of statutory penalties.

B. ANALYSIS

1. Standard of Review

An administrative agency's findings and conclusions on questions of fact are deemed prima facie true and correct. Cinkus v Stickney Mun. Officers Electoral Board, 228 Ill.2d 200, 210 (2008). The reviewing court is limited to ascertaining whether the findings of fact are against the manifest weight of the evidence. Id. A decision is against the manifest weight of the evidence only where it is clearly erroneous and an opposite conclusion is clearly evident. Id. Where the agency's decision presents a mixed question of law and fact, it is reviewable under a "clearly erroneous" standard, which requires significant deference to the decision below, but is less stringent than the manifest weight standard. Board of Educ. of Springfield Sch. Dist. No. 186 v. Attorney General, 2017 IL 120343, ¶ 68; Ji Aviation v Dept. of Rev., 335 Ill.App.3d 905, 911-14 (2002). However, an agency's decision "must rest upon competent evidence and be supported by substantial proof." Walker v. Dart, 2015 ILApp (1st) 140087, ¶ 37. An agency decision on the legal effect of a given set of facts is reviewed under the clearly erroneous

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

standard. Danigeles v. Ill. Dept. of Fin. & Prof'l Regulation, 2015 IL App (1st) 142622, ¶ 73. Under the clearly erroneous standard, the agency decision is reversed only when the court, on the entire record, is left with the definite and firm conviction that a mistake has been committed." Springfield Sch. Dist. No. 186, supra, at ¶ 68 Finally, when an agency's decision involves a question of law, it is reviewed de novo by the court and is not binding. Cinkus, supra, 288 Ill.2d at 210.

In the instant case, the parties both assert that the clearly erroneous standard applies to this review of the ALJ's decision.

2. Establishing a Prima Facie Case and the Standard of Reasonableness

Once a taxpayer's challenge is brought before an administrative law judge for an evidentiary hearing, the administrative law judge considers the agency's tax assessment. A tax assessment is deemed prima facie correct and prima facie evidence of the correctness of the amount of tax due. Fillichio v. Dept. of Rev., 15 Ill.2d 327, 333 (1958). However, before the presumption of the tax assessment's correctness attaches, the agency must properly make its prima facie showing. Mitchell v. DOR, 230 Ill.App.3d 795, 801 (1st Dist. 1992). The method of preparing or producing the tax assessment must meet some minimum standard of reasonableness. Mel-Park Drugs, Inc. v. Dept. of Rev., 218 Ill.App.3d 203, 207-08 (1st Dist. 1991); Elkay Mfg. Co. v. Sweet, 202 Ill.App.3d 466, 470 (1st Dist. 1990); Central Furniture Mart, Inc. v. Johnson, 157 Ill.App.3d 907, 910 (1st Dist. 1987); Smith v. DOR, 143 Ill.App.3d 607, 611 (1986); Puleo v. DOR, 117 Ill.App.3d 260, 266 (1983). In addition, the record must show that the techniques and assumptions which the agency used met some minimum standard of reasonableness. Smith, supra, 143 Ill.App.3d at 611. The Supreme Court observed that "[i]t was not the intent of the legislature to allow any document styled by the Department [of Revenue] as 'corrected

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

assessment' to be 'prima facie' evidence against the taxpayer, especially … [where the] sole evidence lacked any background information on … accuracy … ." Grand Liquor Co. v. DOR, 67 Ill.2d 195, 202-03 (1977). On an appeal from an administrative agency, the court may consider whether the record contains evidentiary support for the asserted prima facie case and whether the "evidence provides just and reasonable support for the agency's conclusion" that a prima facie case was made. Mitchell, supra, 230 Ill.App.3d at 801.

Marathon argued that the Revised Assessments were unreasonable and did not support a conclusion that the DOR had established a prima facie case. The Revised Assessment indicated that Marathon had sold gas and diesel fuel during the audit period for which the Gas Tax was not paid. The DOR presented a case before the ALJ which relied on the assertion that the ISR disclosed each of those sales. Marathon presented evidence showing that each of the transactions covered by the Revised Assessment and listed on the ISR bore the designation, in its ISR listing, of "Book Transfer". As indicated above, the evidence showed that the ISR listed each transaction with identifying information under the following columns:[4]

Purchaser/PurchaserNo/InvoiceDate/InvoiceNo/TicketDate/TicketNo/NetGallons/Tax/Product/

OriginName/Dest[ination]Name/Carrier

See, e.g. CCDOAH 8792-93.

[4] An additional column identified the seller, which was always Marathon. For that reason, it is unnecessary for the following illustration and is left off. For each entry, Marathon was in fact listed as the seller.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

Taxable transactions were set forth in a fashion reflected in the following example:

Purchaser/ PurchaserNo/InvoiceDate/InvoiceNo/TicketDate/TicketNo/NetGallons/Product/
JacobusEnergy/1072030/ 1-2-07 / 977824 / 1-2-07 / 162014 / 1,503 / GAS /
OriginName/ Dest[ination]Name/ Carrier Name
MountProspect IL MountProspect IL Smith Cartage

See CCDOAH 8798.

The "Book Transfer" transactions were set forth, by contrast, as follows:

Purchaser/PurchaserNo/InvoiceDate/InvoiceNo/TicketDate/TicketNo/NetGallons/Product/
Sunoco Inc/1066840/ 2-19-09 / 356519 / 2-19-09 / 912 / 840,000 / GAS /
OriginName/Dest[ination]Name/Carrier
Chicago IL Chicago IL Book Transfer

See CCDOAH 8816.

The County presented a case in which it stated that each book transfer transaction was a sale because the ISR showed a seller (Marathon), a purchaser, an invoice date, an invoice number, net gallons sold, a product (gas or diesel fuel), origin and destination names. Def. Br., pp. 2, 4, 9; CCDOAH 3345-49, 3354-57. Based solely on this reading of the ISR, the County argued that these transactions were taxable sales of motor fuel. Id. Marathon presented testimony, however, that showed that Marathon had only three oil and gas terminals it used in Cook County, those being located at Mount Prospect, DesPlaines, and Argo. CCDOAH 8565, 8863; ALJ Dec., p. 4. In addition, Freeman testified that Marathon had no Chicago terminal or facility for the storage and sale of fuel. CCDOAH 8490, 8551-52. Furthermore, Steiner testified that the term "Chicago" entered on the ISR for origin and destination was not a geographic term for the delivery or transfer of fuel, but was an indicator for the pricing of the product, because "Chicago IL" referred to the Chicago pricing region, one of several in the United States. Id. at

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

8721, 8734-35. Steiner testified that when "Book Transfer" was entered under the Carrier column on the ISR, it was an entry that indicated that the transaction was a book transfer, and not a sale of fuel, which meant a cash settlement of the forward contract. Id. at 8721, 8734-35. Marathon's witnesses testified that in all book transfers, no fuel was transferred, delivered, or moved and that there was no change in ownership or possession of any fuel. ALJ Dec., p. 10. Steiner explained that the limitations of Marathon's computerized accounting system required that in listing book transfer cash settlements, the system's format for product sales was required to be used on the ISR, therefore resulting in the company placing "book transfer" as an entry under "Carrier", and "Chicago", for the pricing region, in both the origin and destination columns. CCDOAH 8721, 8734-35. The County introduced no evidence to contradict Marathon's testimony and therefore had no evidence that the transactions listed as "Book Transfers" in the Carrier column were actual deliveries or transfers of fuel. The County argues that with each of these transactions, "the fuel is already in the pipeline and the Buyer…must obtain the fuel at the pipeline…" Def. Br., p. 16. But there is absolutely no evidence in the record to support that assertion.[5]

The County's conclusion that the book transfer transactions were sales was grounded in a complete refusal to acknowledge the evidence provided by Marathon that the transactions were cash settlements, mere financial transactions. The complete and utter rejection of the testimony as to the meaning of the "Chicago" and "Book Transfer" entries was not based on the existence of any contrary evidence, but on a conscious decision to simply ignore it. The DOR's conclusion

[5] The County cites only eight pages of Gary Michals's testimony to support this assertion (CCDOAH 3416-17, also appearing at CCDOAH 8343-8350), however, the lack of substance in his testimony will be discussed below.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

and the County's argument that "Chicago" could mean some unspecified Cook County delivery point or that ownership changed is pure speculation. If the County puts forth any argument that the DOR's assumptions regarding those entries are reasonable, which the Court does not discern, it is contrary to reality, because the assumptions are wholly dependent on ignoring clear evidence in the record and requires acceptance of groundless speculation as to what the listed terms on the ISR mean. See Berke v. Manilow, 2016 IL App (1st) 150397, ¶ 53; Illinois Bell Tel. Co. v. Purex Corp., 90 Ill.App.3d 690, 697 (1st Dist. 1980). A finder of fact may not simply reject unrebutted testimony. Sweilem v. Illinois Dep't of Revenue, 372 Ill.App.3d 475, 485 (1st Dist. 2007), see also Goldfarb v. Dept. of Rev., 411 Ill. 573, 581 (1952). Moreover, it cannot discount witness testimony unless it was impeached, contradicted by positive testimony or circumstances, or found to be inherently improbable. Id. The record reveals none of these defects in the testimony of Marathon's witnesses. Accordingly the DOR's assumptions are not reasonable assumptions, and the Revised Assessments cannot meet a minimum standard of reasonableness. See Smith, supra, 143 Ill.App.3d at 611.

In the Grand Liquor case, the state's DOR witness could not testify to the data that comprised a computer printout upon which the DOR's case relied. 67 Ill.2d at 199-202. The Supreme Court concluded that because the DOR could not attest to the accuracy or the background data comprising the printout, it did not establish a prima facie case of the amount of tax due. Id. at 202-203. In Mitchell, the court found that the DOR had failed to have minimal evidence to establish its contentions, thereby failing to establish a prima facie case against the taxpayer. 230 Ill.App.3d at 801. It held that a court may not hesitate to grant relief where the record does not disclose evidentiary support for the agency's determination. Id. The Court faces the same circumstance in the instant case. Because the Revised Assessments cannot meet a

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

minimum standard of reasonableness, the County failed to establish a prima facie case against the taxpayer. The ALJ's failure to recognize the lack of a prima facie case and rule in favor of Marathon, based on a review of the entire record, was clearly erroneous. Moreover, the ALJ's implicit decision that the DOR sustained its case and met a minimum standard of reasonableness was also against the manifest weight of the evidence.

3. Marathon's Evidence in Rebuttal of the County's Case

Despite the clear deficiencies in the DOR's case, it seems apparent that the ALJ deemed the Revised Assessments as sufficient to satisfy the County's burden in establishing its entitlement to collect the tax, even though the ALJ never made a direct finding that the DOR established a prima facie case. ALJ Dec., pp. 5-6, 10. It is possible to read the ALJ's decision as implicitly finding that the Revised Assessment and the DOR witness testimony that the disputed transactions were taxable sales created a prima facie case. It is also important to note that despite the rule on assessment reasonableness enunciated by the Supreme Court in Grand Liquor and followed by many appellate courts as cited above, there is a strong trend in the Illinois courts toward a more rare use of the reasonableness standard and reliance on the government's assessment or return as ipso facto establishing a prima facie case. See Grand Liquor, supra, 67 Ill.2d at 205-06 (Underwood, J., dissenting); Mitchell, supra, 230 Ill.App.3d at 801 ("We acknowledge…the agency's determination is generally sustained."); A.R. Barnes & Co. v. DOR, 173 Ill.App.3d 826, 832 (1st Dist. 1988); see also Fillichio, supra, 15 Ill.2d at 333; Goldfarb, supra, 411 Ill. at 575 (1952); Mel-Park Drugs, supra, 218 Ill.App.3d at 217. The ALJ, who cited Mel-Park Drugs, appears persuaded by this line of authority and held that the burden of proof fell upon Marathon to establish the grounds of its protest. Id. at 10, 18. Accordingly, this Court feels compelled to analyze the decision from the perspective of whether Marathon itself provided

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

sufficient evidence to set aside the Revised Assessment in a fashion that presumes that the County established a prima facie case, even though this decision holds that it did not.

Marathon was placed in the position of rebutting the County's case with evidence in order avoid the tax liability. As stated above, the DOR witnesses testified that all of the transactions included as taxable in the Revised Assessments were set forth on Marathon's ISR. CCDOAH 3345, 3348, 8328, 8345-46. Marathon's witness Steiner testified that each of the disputed transactions identified in the Revised Assessments and set forth on the ISR were book transfers. Id. at 8719-20, 8743. He testified that "a book out transaction is a mechanism which is used to settle contracts and to remove associated obligations without physically moving or transferring any product." Id. at 8719. Each book transfer was a "financial transaction". Id. at 8728.

Marathon's expert witness, Dr. Auburn, testified that book out or book transfer transactions financially settle forward contracts because those contracts require future delivery of the subject product and settlement releases the obligation of delivery. Id. at 8454. As a cost-cutting measure common in the commodities business, he testified that no product is received when a book out transaction occurs. Id. at 8451, 8455-56.

Commercial analysis manager Freeman testified on how the book transfers listed on the ISR worked at Marathon. ALJ Dec., pp. 10-16. In essence, he gave a practical and itemized explanation of the book transfer transactions at Marathon, for which Dr. Auburn's testimony served as a conceptual or theoretical explanation. The genesis of a book transfer occurs at Marathon, Freeman testified, when one party to a forward contract for gas or diesel decides to avoid performance of the contract, which contracts cannot be cancelled in the oil and gas industry. CCDOAH 8505-06, 8509. The parties then negotiate a settlement of the forward

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

contract through an agreement to a new transaction. Id. at 8503-07. Once the new transaction is agreed to, the original forward contract is settled for cash. Id. at 8503-07, 8510. Thus, the parties engage in the matching of other deals resulting in a book out, which is a cash settlement of a single forward contract. Id. at 8505-46. Freeman testified that no motor fuel is transferred to any party in a book transfer and that "title" to any motor fuel does not change. Id. at 8510, 8590. Steiner reiterated that in a book transfer no product is delivered anywhere. Id. at 8722. The ALJ found that Steiner and Freeman's testimony was "emphatic that no gasoline or diesel fuel moves in any way, shape, or form between the parties to a cash settlement of a petroleum-product forward contract and that a cash settlement does not involve a transfer of ownership." ALJ Dec., p. 10.

As stated, Freeman testified that documents from the Sunoco book transfer represented an example of how the book transfer transaction works and is documented. CCDOAH 8535, 8567-79, 8586, 8895-99. He explained that an agreement to settle a forward contract can occur, and as a consequence, a deal sheet and a book transfer letter are generated, resulting in a contract and invoice numbers for the book transfer transaction. Id. Steiner specifically identified the Sunoco book transfer documents as back up for the entry of that book transfer transaction on the ISR. Id. at 8725-28, 8739-47. The Sunoco book transfer documents, Respondent's Exs. 4, 9, 10, 11, and 12, were all admitted into evidence. ALJ Dec., pp. 6 n.7, 15. Freeman testified that the Sunoco book transfer documents admitted were representative of all documents used in all Marathon book transfer transactions. CCDOAH 8588-89.

Upon review of Marathon's case, the ALJ made the following determination:

> "[Marathon] failed to introduce sufficient documentary evidence to corroborate its claim that the cash settlement of a petroleum-product forward contract, whether called "book transfer" or "book out", involves nothing more than making a cash payment in lieu of

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

> transferring either possession or ownership of the product identified in the forward contract."
>
> ALJ Dec., p. 10.
>
> "…Marathon did not produce documentary evidence memorializing agreements to settle forward contracts for cash. That evidentiary failure makes it impossible to address the central claim Marathon advances…which is that settling forward contracts involving gasoline and diesel fuel for cash is not subject to the Gas Tax Ordinance because cash settlements, by their terms, never result in a sale between the settling parties, let alone the retail sale of taxable fuel in Cook County."
>
> Id. at p. 17.
>
> "…Marathon did not corroborate [Freeman's] testimony by producing documentary evidence of the other contracts associated with the cash settlement of forward contracts… Also missing is documentary evidence memorializing the cash settlements themselves. As the party seeking relief, it is Marathon's burden to produce sufficient evidence to support its claim for relief and it did not do so. … Accordingly, Marathon's principal contention that the cash settlement of petroleum-product forward contracts is not subject to the Gas Tax Ordinance is rejected."
>
> Id. at p. 18.
>
> The ALJ's decision is clearly erroneous on several grounds.

The ALJ held that Marathon bore the burden of proving its book transfer/cash settlement contention by a preponderance of the evidence. Id. at p. 18, citing Perez v. Ill. Concealed Carry Licensing Rev. Bd., 2016 IL App (1st) 152087 ¶ 25. A preponderance of the evidence is proof that the fact at issue is more likely true than not. Wells Fargo Bank, N.A. v. Hansen, 2016 IL App (1st) 143720 ¶ 17. However, the ALJ failed to recognize that Marathon had satisfied its burden, as the record plainly reflects. Marathon had submitted sufficient evidence to shift the burden of proof back to the County to prove that the transactions were of such a nature that they were subject to the tax. The ALJ's ruling on this matter, in view of the entire record in this case, was clearly erroneous and constituted reversible error.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

4. The Sufficiency of Marathon's Evidence

The ALJ was in error on two issues; the first in regard to her conclusion that Marathon failed to provide sufficient documentary evidence in support of its claim, and the second in regard to her conclusion that Marathon failed to prove that the book transfer transactions did not consist of either a transfer of possession or title. Because in many respects both of these matters are related to one another, the Court will address them together.

"In contesting the assessment of a tax, the taxpayer has the burden of proving by competent evidence that a proposed assessment is not correct, and when such evidence is not so inconsistent or improbable in itself as to be unworthy of belief, the burden then shifts to the [government], which is required to prove its case by competent evidence." Young v. Hulman, 39 Ill.2d 219, 223 (1968); Mel-Park Drugs, supra, 218 Ill.App.3d at 217 (citing Young, supra). The taxpayer usually cannot carry its burden by submitting the mere testimony of the taxpayer unsupported by sufficient documentary evidence, and the documentary evidence should be "identified with [the taxpayer's] books and records". City of Chicago v. Sommerfeld, 2020 IL App (1st) 180855 ¶¶ 64-70; Mel-Park Drugs, supra, 218 Ill.App.3d at 217. It is also set forth in the County Ordinances that taxes set forth in an assessment are "presumed" to be due and owing, and that the taxpayer has "the burden of proving with documentary evidence, books and records" a claim that no tax is due. Cook County Ordinance, Ch. 34, Art. III, § 34-63(d). Marathon argues that the ALJ erred in holding that Marathon had not presented sufficient documentation "identified" with its "books and records" to support its claim of non-taxability. This Court agrees.

Where the ALJ went astray was in her assessment of Marathon's documentary evidence and her perplexing conclusion that a greater quantum of documentary evidence was necessary

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

for Marathon to sustain its burden of proof. Although there appears to be no direct precedent on the level of proof imposed upon an oil company to establish that a cash settlement of a forward contract implicated neither a transfer of product nor ownership (and the ALJ and the parties did not cite any), Illinois courts have provided ample law on how a taxpayer's presentation of evidence, including supporting documents, in support of its tax protest is to be examined and evaluated. The ALJ's decision and Marathon's case must be considered in light of those decisions.

The earliest significant case to address the issue of the quantum of proof necessary to overcome the government's prima facie case is Novicki v. Dep't of Finance, 373 Ill. 342 (1940). In that case, the taxpayer was a tavern owner. Id. at 343. The state assessed a deficiency against the taxpayer on the Retailer's Occupation Tax, the retail sales tax due. Id. In auditing the taxpayer for the assessment, the state looked only at the taxpayer's purchases of beer and applied a markup factor to calculate the total amount of retail sales of beer. Id. at 343-44. The taxpayer challenged the assessment by introducing all of his daily receipts, which reflected lower total sales receipts. Id. The Supreme Court accepted that the assessment was prima facie correct. Id. at 345. Yet it observed that "[i]t is undisputed that if the entries contained in the [taxpayer's] books are correct, the proposed assessment is wrong." Id. The taxpayer testified that the sales receipts reflected lower receipts than anticipated given the volume of beer he purchased and the depletion of those stocks because a portion of the beer was depleted for a variety of reasons, including loss of beer through cleaning the coils for the beer taps and other spillage and complimentary beers given to purchasers of liquor drinks. Id. at 346. The taxpayer estimated that he lost about four to six gallons for each barrel of beer purchased. Id. The Court found that the taxpayer provided "positive testimony that his books were true and correct." Id. The Court

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

held that "with the [taxpayer's] evidence uncontradicted, the prima facie case made by the proposed assessment was overcome, and the burden shifted to the [state] to prove its case by competent evidence. This it failed to do." Id.

In the case of Miller v. Dep't of Revenue, 408 Ill. 574 (1951), the Supreme Court heard another case challenging the state's deficiency assessment for unpaid retail sales tax. The taxpayer was the operator of a chain of liquor stores. Id. at 576. Again, the state only looked at the taxpayer's inventories and its purchases of liquor for resale. Id. With these figures, the state again calculated a markup and identified a deficiency based on the taxpayer's returns. Id. The taxpayer challenged the assessment by introducing daily sales records, its sales journals, and other records. Id. The taxpayer testified that the discrepancy between its sales records and the markup calculations performed by the state was due to product waste, theft losses, reduced price sales, and "consumption other than sale". Id. at 577. The Court stated that the "sole question on appeal" was "whether the evidence of the taxpayer was sufficient to overcome [the state's] prima facie case." Id. at 578. The state argued that the taxpayer's evidence was insufficient on various grounds, including lack of product specificity in reported sales, lack of documents supporting the claim of embezzlement losses, and failure to segregated reduced price sales from full price sales. Id. at 579-80. The state also argued that many records were not generated or kept in accordance with statutory and regulatory form requirements, and hence should not have been relied upon. Id. In reviewing these arguments, the Court stated:

> In view of the voluminous and extensive records kept by the taxpayers…, it cannot be said that their books and records failed to meet the requirements of the [statute] as to form. The evidence produced to support the correctness of their records [which included taxpayer testimony explaining sales and losses] was fully as worthy of belief as the admitted artificial result reached by the [state] by application of its formula of markup. … the [state] prepared its audit upon the taxpayer's records alone, and while accepting those records as correct so far as

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

> purchases were concerned, rejected them as sales receipts. … It would seem that the taxpayer's evidence in the instant case is sufficient to overcome the prima facie case made by the deficiency assessment here. That being so, the burden shifts to the Department to prove its case by competent evidence. The only evidence of the Department was its auditor's describing the method by which the markup formula was computed. Since that procedure was based solely on the taxpayers' records, which concededly were correct so far as used by the Department, the taxpayers' records as to sales, together with the evidence offered by them explaining the difference between the projected sales and the sales as recorded, was sufficient to justify the lower court in quashing the assessment.
>
> Id. at 581-82. (emphasis added)

The Supreme Court reviewed yet another sales tax deficiency dispute which considered the sufficiency of the taxpayer's evidence in Goldfarb v. Dep't of Revenue, 411 Ill. 573 (1952). In this case, the taxpayer was a department store operator. Using the taxpayer's opening and closing inventories reported on the tax returns, the state applied product purchase prices and its markup formula to generate a deficiency assessment. Id. at 576. In protesting the assessment, the taxpayer submitted his daily sales receipts, monthly reports, and other detailed records. Id. at 577. The taxpayer then testified that the lower recorded receipts were a function of numerous charitable gifts of inventory, theft losses, and reduced price sales. Id. The Court noted that the state "contends that the deficiency assessment should not be disturbed…unless it is palpably erroneous or contrary to the manifest weight of the evidence." Id. at 580. The Court continued:

> That is not the rule in this type of case. The rule here [as cited in cases including Novicki and Miller, supra] is that the …return is prima facie correct but when the prima facie presumption is overcome, the [state] has the burden of proving its case by a preponderance of competent evidence. Here, the hearing officer rejected the competent testimony of the taxpayer, that testimony and his records overcame the prima facie case…, and the [state] failed to prove the corrected return by a preponderance of the evidence.
>
> …
>
> The [state] did not question the the sufficiency of the taxpayer's records; it ignored them. The taxpayer testified positively that his records were true and correct and this testimony was not refuted. His testimony [regarding gifts, prices,

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

> and losses] cannot be said to be so inconsistent or improbable, in itself, as to be unworthy of belief, in view of [general knowledge of the retail industry]. The positive testimony of the taxpayer has not been refuted or impeached, in spite of the fact that the auditors had possession of all his books and records and ample opportunity to determine and show if they were incorrect or false in any respect. Under these circumstances, the court will not assume the taxpayer testified falsely. … the trial court erred in affirming the final assessment …
>
> Id. at 580-81. (emphasis added)

The foregoing authorities remain good law on the matter. "As a general matter, …all sales…are taxable unless the taxpayer produces evidence identified with its books and records to establish its claim of non-liability." Mel-Park Drugs, supra, 218 Ill.App.3d at 217. The taxing body "may not ignore the taxpayer's records…." Id. at 216. Moreover, as stated above, "a finder of fact may not simply reject unrebutted testimony… and may not discount witness testimony unless it was impeached, contradicted by positive testimony or by circumstances, or found to be inherently improbable." Sweilem, supra, 372 Ill.App.3d at 485 (case of a taxpayer protest of tax liability).

In the instant case, the most significant exhibit contained in its books and records that Marathon relied upon was the ISR, which the DOR introduced and was admitted into evidence. The County concedes that the ISR was a Marathon record; the ALJ did not decide differently. Indeed, the County itself relied upon the ISR as its most significant basis, drawn from Marathon's books and records, for the Revised Assessments. CCDOAH 3345, 3348-49, 3351-54, 8328. Steiner of Marathon identified the ISR as a Marathon record and testified that its entries identified transactions which amounted to book transfers. Id. at 8720-22. The book transfers are clearly identified on the ISR as they are labeled "Book Transfer" in the "Carrier" column of the spreadsheets that make up the ISR. Id. at 03710-59. All of the contested transactions are identified in that manner on the ISR, and Steiner so testified. Id. at 3710-59,

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

8720-22. Each individual transaction, whether a book transfer or not, is separately listed on the ISR with an invoice number. Id. at 8726-28, 8739-43. In addition, book transfers on the ISR also have a book transfer number listed. Id.

As stated, Freeman testified that a book transfer transaction would include a book transfer agreement, a physical deal sheet, a book transfer letter, and a book transfer invoice. Id. at 8535, 8567-79, 8586-88. Steiner identified an exemplar book transfer agreement and deal sheet, the Sunoco transaction described hereinbefore. Id. at 8739-43. Steiner tied this example to a specific invoice listed on the ISR as a book transfer. Id. at 8726-28, 8739-43, 8746-47. That invoice number, reflected on both the ISR (see id. at 8727-28, 8816) and the invoice for Sunoco, admitted as Respondent's Exhibit No. 12 (see id. at 8727-28, 8899) was invoice number 35619. Exhibit No. 12 also bore the transaction's book transfer number of BT 912. Id. Likewise, the book transfer number was listed for the same transaction on the ISR under the column for "ticket number". Id. The invoice admitted as Exhibit No. 12 was related to the Book Transfer Invoice, admitted as Respondent's Exhibit No. 11 (see id. at 8898), which set forth the BT number 912. [6] Id. at 8575, 8898. Both invoices, Exhibit Nos. 11 and 12, correspond to the Book Transfer Letter for that transaction, which was admitted as Respondent's Exhibit No. 10. Id. at 8575-76, 8897. The Book Transfer Letter identifies the book transfer number of the transaction as BT 912. Id. It also contains the original transaction sales order number 29282. Id. The sales order number 29282 is set forth on the Physical Deal Sheet, admitted as Respondent Exhibit No. 9, which constituted Marathon's record of Sunoco and Marathon's agreement to reduce the original

[6] It appears that Exhibit No. 11, by its format, was the invoice actually given to Sunoco, while Exhibit No. 12 was a Marathon internal company invoice record for the same invoice. Whether this is correct or not is beside the point.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

forward contract to a cash settlement/book transfer. Id. at 8739-43, 8895-96. All of the foregoing exhibits relate to the same book transfer transaction identified as invoice number 356519 on the ISR. Id. at 8816. Exhibits Nos. 10 and 11, the letter and the invoice, bear the label "Book Transfer". Steiner and Freeman both testified that in a book transfer transaction, such as the one described, no motor fuel is moved, transferred, or delivered and none is subject to any change of ownership or title. ALJ Dec'n, p. 10.

The foregoing evidence produced by Marathon sufficiently rebutted the DOR's prima facie case based on the Revised Assessments, since it established that the identified book transfers were cash settlements and not sales of motor fuel. It was based on Marathon's books and records, namely its ISR, and its representatives testified that the transactions listed on the ISR as book transfers were cash settlements made in the fashion described above and that no motor fuel was sold in those transactions.

In deciding that Marathon failed to sustain its burden of proof, the ALJ ignored all of the foregoing evidence. As stated, the hearing officer cannot ignore the taxpayer's testimony and the documentary evidence consisting of its books and records. Goldfarb, supra, 411 Ill. at 581; Mel-Park Drugs, supra, 218 Ill.App.3d at 216; see also Veco Corp. v. Babcock, 243 Ill.App.3d 153, 163-64 (1st Dist. 1993). The ISR was the record of the taxpayer. Despite this, the ALJ allowed the absurdity of finding the assessments valid because the DOR relied almost exclusively upon the ISR, a record from Marathon's books, while finding that Marathon's reliance on the same document insufficient to sustain its burden of proof. See Miller, supra, 408 Ill. at 581 ("…the Department prepared its audit upon the taxpayer's records alone, and while accepting those records as correct as far as purchases were concerned, rejected them as to sales receipts.") The ISR entries marked "book transfers", which the DOR acknowledged, were fully explained by

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

Marathon's witnesses as cash settlement transactions only, wherein no motor fuel was sold. Such explanatory testimony from the books and records of the taxpayer is fully competent to sustain the taxpayer's burden of proof in overcoming the government's case. Id. at 581-82; Novicki, supra, 373 Ill. at 345-46. By contrast, DOR witness Vega plainly admitted that he ignored the designation of book transfers and what it meant. He testified, "[t]o me, [the book transfers on the ISR,] it's sales. I didn't pay too much attention to what a book transfer was or wasn't." CCDOAH 8238. The ALJ's clear error in ignoring this evidence is perhaps best captured in her following statement: "The unarticulated implication of Freeman's testimony regarding the cash settlement of 'indirect' forward contracts is that such cash settlements are included in the assessments at issue…" ALJ Dec., pp. 13. Freeman's testimony was not the evidence used to establish that cash settlements were included in the assessments; Steiner's testimony was. Steiner testified that each transaction subject to the assessments appeared in the ISR as book transfers. CCDOAH 8720-22, 8726-28, 8739-43. The County repeats the ALJ's error in arguing that the decision be affirmed. It its brief, the County argues "…the ALJ's Decision should be affirmed because Marathon failed to provide any documentary evidence - beyond Mr. Freeman's testimony and contracts regarding only the Marathon-Sunoco matching buy/sell forward contract…" Def. Br., p. 7. Again, the documentary evidence was Marathon's ISR, and the supporting testimony was Steiner's.

The conclusion that Marathon's ISR and its witness testimony were sufficient to sustain its burden of proof turns on applying the correct burden of proof, which in this case was preponderance of the evidence. ALJ Dec., p. 18. Under that standard, a proposition proved by a preponderance of the evidence is one that has been found to be more probably true than not true. Bazydlo v. Volant, 164 Ill.2d 207, 213 (1995). As held in Goldfarb, Miller, and Novicki, if the

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

evidence is not so inconsistent and improbable, in itself, as to render it unworthy of belief, then the taxpayer has met his burden of proof. Goldfarb, supra, 411 Ill. at 581; Miller, supra, 408 Ill. at 581-82; Novicki, supra, 373 Ill. at 346. Moreover, a trier of fact may not discount witness testimony unless it is impeached, contradicted by positive testimony or by circumstances, or found to be inherently improbable. Sweilem, supra, 372 Ill.App.3d at 485.

In testifying in support of the Revised Assessments, Vega testified that DOR concluded that taxable motor fuel sales had occurred because the ISR entries listed a seller (Marathon), a buyer, an invoice number, a fuel amount, and a price. CCDOAH 3345. In providing this testimony, however, Vega ignored the existence and meaning of additional information on the ISR entries, which were "Origin Name", "Destination Name", and "Carrier". Id. at 8211, 8271. Steiner testified that if the transaction was a book transfer cash settlement, the transaction would be identified as "Book Transfer" in the "Carrier" column of the ISR. Id. at 8720-22. He also testified that the entries of "Chicago" in the Origin and Destination Name columns was short for "generic Chicago region", indicating that the transaction was a book transfer and not a sale of product and that it referred to a region for pricing the transaction, and neither an origin nor destination for any product. Id. at 8721-22. Steiner explained that the limitations of Marathon's computerized accounting system required that in listing book transfer cash settlements, the system's format for product sales was required to be used on the ISR, therefore resulting in the company placing "book transfer" as a entry under "Carrier", and "Chicago", for the pricing region, in both the origin and destination columns. Id. at 8721, 8734-35. Indeed, the use of "Chicago" as an indicator of how the contract was priced as opposed to an actual delivery destination was buttressed by Marathon's evidence that there was no fuel facility in existence by the name of "Chicago" and that Marathon had no fuel terminal in Chicago. Id. at 8490, 8551-52.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

As shown in the testimony, if the transaction was a motor fuel sale, either a transportation company or a pipeline would be indicated in the "Carrier" column, instead of "Book Transfer". Id. at 8720-29, 8798. Likewise, if it was an actual sale, the actual origin and destination locations would be inserted into the "Origin" and "Destination" columns, such as Argo or Mount Prospect, the abbreviated designations of actual terminals. Id. at 8720-22, 8798. Accordingly, the ISR made it easy to distinguish transactions which were actual motor fuel sales from transactions which were only book transfer cash settlements. Moreover, Steiner testified that if a transaction constituted an actual sale of product at Marathon, a meter ticket, a bill of lading, a transfer order, or some other "evidence [of] change of ownership or movement" would have to exist. Id. at 8728-29. Thus, the absence of any indication on an ISR transaction entry of an actual carrier, an actual place of origin of fuel, an actual place of its destination, an actual meter ticket, an actual bill of lading, or an actual transfer order supports Marathon's testimony that the book transfers are mere cash settlements of forward contracts and not an actual sale of motor fuel. In relation to this point, it is notable that the DOR and the ALJ accepted as fact the following propositions: there was not a "Chicago" fuel facility of any kind and no motor fuel was delivered, transferred, or moved in any of the book transfer transactions on the ISR. ALJ Dec., pp. 10, 17, 19; CCDOAH 1650-52, 8208, 8272; Def. Br., pp. 8-9, 10, 13-14.

The foregoing evidence introduced by Marathon is not so inconsistent or improbable as to be unworthy of belief. And it cannot be simply ignored. Goldfarb, supra, 411 Ill. at 581; Mel-Park Drugs, supra, 218 Ill.App.3d at 216. In addition, in explaining the ISR entries for book transfers and explaining the substance of book transfer transactions as mere cash settlements and not sales of product, Marathon was placed in the position of proving a negative: that no motor fuel sales occurred and that no "title" to fuel changed. If a presumption of law requires proof of

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

a negative, the difficulty of doing so requires that slight proof ought to be sufficient to shift the burden. Prentice v. Crane, 234 Ill. 302, 311 (1908). Where a party has the burden of proving a negative, conclusive proof is not required, and even vague proof, or such as renders the existence of the negative probable, is in some cases sufficient to shift the burden to the other party. Id. Evidence the renders the existence of the negative probable is sufficient in the absence of proof to the contrary. Baer v. DeBerry, 31 Ill.App.2d 86, 90 (1st Dist. 1961). Moreover, a party is not required to prove a negative by "conclusively disproving" the adverse party's claim. Conxall Corp. v. ICONN Sys., LLC, 2016 IL App (1st) 140158, ¶ 44. So it is with the instant case; for the book transfer transactions listed on the ISR, Marathon provided evidence that they were cash settlements of forward contracts and not motor fuel sales. To show that they were not motor fuel sales or title transfers, Marathon witnesses testified that the generic designations on the entries as "book transfers" and "Chicago", and the commensurate absence on the entries of actual carriers, origins, and destinations, showed no movement of fuel. Moreover, Marathon's witnesses testified that no title to fuel changed. CCDOAH 8502-05, 8514, 8590. As the aforesaid authorities held, the evidence here was sufficient to "prove the negative" that no motor fuel was sold or ownership transferred in the book transfer transactions. Marathon met its burden of proof on these points. And even though Vega testified to his suspicion that each book transfer listed on the ISR was an actual "sale", the County has since conceded that the book transfer transactions implicated no delivery, movement or "physical transfer" of motor fuel. CCDOAH 1650-52.

As stated, the ALJ erroneously refused to recognized Marathon's evidence as satisfying its burden of proof. At this juncture, it is important to note the nature of some of Marathon's documentary evidence that the ALJ chose to ignore. To explain how book transfer entries are created on the ISR, Marathon introduced Respondent's Exhibits Nos. 9 through 12, the Sunoco

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

documents under invoice 356519. These were an example of how a book transfer was further documented in the company's accounting and how they provided the information for entry on the ISR. Even though the ALJ erroneously concluded that even these documents were insufficient to prove that a cash settlement only had occurred in the Sunoco book transfer, she further noted that Marathon failed to even begin to sustain its burden by failing to provide the same documents for each listed book transfer transaction ("…Marathon has the burden of producing documentary evidence…that every transaction [at issue] is a cash-settlement…"). ALJ Dec., pp. 12 n.9, 17. This conclusion disregards an important aspect of Marathon's evidence. Where a fact may be ascertained only by the inspection of a large number of documents comprised of detailed statements, a summary of those documents may be received into evidence. In Re Marriage of Delarco, 313 Ill.App.3d 107, 115-16 (2nd Dist. 2000); see also F.L. Walz, Inc. v. Hobart Corp., 224 Ill.App.3d 727, 731 (1992). Compilation documents, which aggregate and assimilate information from numerous other documents, are admissible. See id. In disregarding both the ISR, a compilation document, and the Sunoco documents supporting invoice 356519, the ALJ ignored competent evidence which supported Marathon's protest and constituted part of the evidence which showed Marathon had sustained its burden of proof. Contrary to the ALJ's conclusion that Marathon did not show with documentary evidence that "every transaction" at issue (ALJ Dec., p. 12 n. 9) was a cash settlement, Marathon provided direct documentary proof with the ISR which showed that the book transfers were payments in which no fuel was transferred. Marathon was not required to produce every single deal sheet, book transfer letter, and invoice to support its clear testimony that the book transfer entries on the ISR were indeed book transfers and cash settlements; it satisfied its burden by relying on the ISR, which identified all cash settlements, which in turn were listed as book transfers under the "Carrier" column.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

Indeed, the Administrative Procedure Act provides that "unduly repetitious evidence" should be excluded at hearings. 5 ILCS 100/10-40(a). The compilation record, the ISR, was sufficient evidence in this case for Marathon to satisfy its burden of proof, as it showed that it was more likely than not that the transactions were cash settlements and not taxable sales.

Neither the ALJ nor the County relied on any case on point to take the position that Marathon's documentary evidence was insufficient. The ALJ cited the following cases to support its determination that the documentary evidence was insufficient: Chak Fai Hau v. DOR, 2019 IL App (1st) 172588; PPG Industries, Inc. v. DOR, 328 Ill.App.3d 16 (1st Dist. 2002); Elkay Mfg. Co. v. Sweet, 202 Ill.App.3d 466 (1st Dist. 1990); Central Furniture Mart, Inc. v. Johnson, 157 Ill.App.3d 907 (1st Dist. 1987); and Mel-Park Drugs, supra, 218 Ill.App.3d at 217. The County cited the following cases for the same proposition as well: Ford Motor Co. v. DOR, 2019 IL App (1st) 172663 and Soho Club, Inc. v. DOR, 269 Ill.App.3d 220 (1st Dist. 1995). All of these cases either cite or rely on the basic proposition that a taxpayer must present evidence which is consistent, probable, and identified with its books and records.

However, all of the foregoing cases cited by either the ALJ or the County involved a taxpayer which was challenging the government's case as overstating the taxpayer's income and some of those also alleged that they were allowed insufficient tax allowances to reduce the net income or tax. In one of those cases, Chak Fai Hau, the taxpayer had absolutely no business record of any sort to support its witness testimony that it did not underreport income. Chak Fai Hau, supra, at ¶¶ 55-56. In three other cases, Soho Club, Ford Motor, and Central Furniture, the taxpayers had no basic records showing the actual amount of income to support the claim of less taxable income. Soho Club, supra, 269 Ill.App.3d at 223-24, 231; Ford Motor, supra, at ¶¶ 21-34, 47-49, 51; Central Furniture,157 Ill.App.3d at 908-09, 911-12. In each of the remaining three

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

cases, the taxpayer was required to keep statutory records of receipts and/or certificates and failed to either do so or produce them at the hearing, relying on its witness's conclusionary testimony alone. PPG Industries,Inc., supra, 328 Ill.App.3d at 34-35; Elkay Mfg. supra, 202 Ill.App.3d at 468-69,472-73; Mel-Park Drugs, supra, 218 Ill.App.3d at 211, 214, 217. They were denied relief accordingly. Therefore, these cases are clearly distinguishable from the instant case. Marathon is not contesting an alleged overstated calculation or summation of receipts; it is challenging the very notion that the identified transactions are taxable at all. And not only did Marathon submit its books and records in support of its contention, the ISR, its main record, was used by the DOR as its primary evidence and the basis for its Revised Assessments. The County cannot on one hand accept Marathon's business record as supporting the Revised Assessment, but on the other hand condemn it as inadequate proof of the substance of the transactions listed. See Miller, supra, 408 Ill. at 581-82. The cases the ALJ and the County cite are clearly inapposite. As such, they express no specific holdings which support the ALJ's decision.

The record plainly discloses that Marathon relied upon a comprehensive business record that recorded the book transfer transactions with specifity, the ISR. Marathon's witnesses showed how these transactions involved no change in possession or ownership of fuel, but merely reflected a cash settlement of forward contracts, which render the transactions merely financial. The County accepted the ISR as an accurate record of Marathon's transactions. Marathon introduced documents, admitted into evidence, from the Sunoco book transfer transaction to show how the book transfer process occurs and how it is documented in a fashion picked up on the ISR. The ALJ's decision rejecting this proof was clearly erroneous, as was her finding that Marathon's documentary evidence was insufficient. As shown, the ALJ's conclusion that the ISR and the Marathon witness testimony was insufficient to rebut the

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

County's case was contrary to law. The ALJ's decision that Marathon failed to sustain its burden of proof and show that the transactions were mere cash settlements and not taxable sales was clearly erroneous in view of the entire record. Moreover, given the evidence entered into the record, the ALJ's decision on these points was also against the manifest weight of the evidence. The decision must be reversed on these alternative grounds accordingly.

5. Book Transfer Transactions as Cash Settlements

It is very possible that the County's and the ALJ's disregard of all of Marathon's evidence boils down to a conceptual problem - the County and the ALJ appear to disbelieve that a cash settlement of a forward contract can even exist ("…Marathon did not [establish] that all of the transactions…were in fact cash settlements of forward contracts with neither possession nor ownership transferring between the parties… ALJ Dec., p. 23 (emphasis added)). On the County's end, the conceptual problem was absolute; its primary witness Vega admitted that he did not understand what a book transfer was. CCDOAH 8236, 8288. Michals admitted that he looked at Illinois Department of Revenue literature to see what a book transfer was. Id. at 8342. Although the evidence in the record is clear that a cash settlement of forward contracts replaces the obligation to deliver fuel created by the very same forward contracts, the County and the ALJ appear incapable of accepting this concept. Instead, they enunciate a suspicion that book transfers actually result in some margin of exchange of actual fuel or change in ownership. Based on this suspicion, the ALJ has in effect imposed a burden of proof of clear and convincing evidence on Marathon, requiring it to disprove that "neither possession nor ownership transferr[ed]". The suspicion arises early in the record in Vega's testimony that "[t]here was money involved [in the book transfer transactions]… [I]f you tell me that you sold me something for a price, that's a sale." CCDOAH 8259. It culminates in the ALJ's decision that Marathon

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

was required to prove, apparently with clear and convincing evidence or beyond doubt, that the book transfer transactions were "in fact cash settlements of forward contracts with neither possession nor ownership transferring between the parties." ALJ Dec., p. 23. As shown above, a "cash settlement of forward contracts" would by definition not involve any transfer of possession or ownership. But this was a concept the ALJ could not accept.

The ALJ's apparent disbelief in the notion of a cash settlement devoid of the exchange of possession or ownership flies in the face of all the evidence in the record. Drs. Auburn and Van Der Merwe, the expert economists who testified for each party, testified that a cash settlement or "book out" of forward contracts can result in no transfer of possession or ownership. CCDOAH 8450-55, 8951-52; ALJ Dec., p. 9. As noted above, such cash settlements reflect the changed circumstances of the parties to the forward contract before the contract is due to be performed and save logistical costs. In this Court's opinion, based on the testimony of the economists and Freeman, it is also clear that the cash settlements bear another component of value; they are a cost paid to maintain a business relationship. The parties enter into cash settlements from time to time in order to preserve their standing with one another in anticipation of future profitable dealings, particularly in an industry, as Freeman testified, where contracts are never cancelled. These circumstances appear beyond the comprehension of the ALJ and the County; they cannot conceive of the notion of any value exchanged when such cash settlements occur. Their lack of conception cannot control the outcome of this case, which must turn instead on the evidence introduced.

The ALJ ignored all the value components of the cash settlement of forward contracts established by the evidence. Instead, the ALJ implicitly adopted the County's argument that the ISR book transfer entries could be read as "sales" merely because each entry included the name

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

of a buyer, an invoice number, a date, a price, quantities of fuel. CCDOAH 3345. In accord with the discussion above, this interpretation erroneously ignored the evidence pertaining to the other information in those entries, that being their designation as book transfers, the place-holder designation of "Chicago" region for pricing, and the absence of the designation of actual fuel origin, destination, and carrier (transportation or pipeline). The County's argument amounts to only a partial reading of the transaction entries and a disregard of that information that shows the non-existence of the sale of any fuel. It also amounts to an argument, not supported by any evidence, that the stated additional data contained in each entry does not mean that a cash settlement with no transfer of fuel took place. This too is clearly erroneous. As shown above, Marathon submitted positive evidence that the book transfer entries, which contained no data for delivery or transfer of fuel, were not sales of fuel. Vega testified that he did not consider those data entries at all, but ignored them and concluded the transactions were sales. CCDOAH 3345, 8208, 8236, 8238, 8271-73, 8288, 8300. Where the evidence allows for the inference of the nonexistence of a fact to be just as probable as its existence, the conclusion that the fact exists (the sale of fuel) is a matter of speculation, surmise, and conjecture, and the inference cannot be reasonably drawn. Berke, supra, at ¶ 53; First Cash Fin. Services v. Industrial Comm'n, 367 Ill.App.3d 102, 106 (1st Dist. 2006); see also People v. Lind, 307 Ill.App.3d 727, 741 (1999); People v. Rhoades, 74 Ill.App.3d 247, 253 (1979). Because Marathon's witnesses, who had first hand knowledge of the business and its accounting, testified that the book transfer transactions listed on the ISR were not sales of fuel, the DOR's testimony that ignored that evidence and simply asserted, without other proof, that they were sales was speculative and cannot support a finding that such sales occurred. Speculation is not a proper substitute for proof. Illinois Bell, supra, 90 Ill.App.3d at 697.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

In holding that Marathon did not produce sufficient documentary evidence to sustain its burden of proof, the ALJ essentially held that Marathon was required to produce more evidence to disprove the notion that a change in "ownership" of the amount of motor fuel occurred in a booked out forward contract settled for cash. ALJ Dec., p. 17. ("…Marathon did not produce documentary evidence memorializing agreements to settle forward contracts for cash. That evidentiary failure makes it impossible to address the central claim [of] Marathon…that settling forward contracts…is not subject to the Gas Tax Ordinance because cash settlements…never result in a sale between the settling parties, let alone the retail sale of taxable fuel in Cook County." Id. (emphasis added)) Again, this conclusion ignores the nature of the evidence submitted by Marathon, discussed above, that established that each book transfer subject to the Revised Assessments was listed on the ISR, that each book transfer transaction was a cash settlement, and that as a consequence, no motor fuel was sold, transferred, or moved and no title to the same changed. That, as stated, was sufficient to sustain Marathon's burden of proof, because the quantum of proof required to prove a negative (no transfer of fuel or ownership and no "Chicago" facilities) is low (Conxall Corp., supra, at ¶ 44; Baer, supra, 31 Ill.App.2d at 90) and Marathon otherwise provided evidence sufficient to show that it was more likely than not that the transactions were cash settlements only. Hansen, supra, at ¶ 17. Significantly, the ALJ never specified what other documentation was necessary to support Marathon's claim. ALJ Dec. pp. 10-17. But the ALJ's finding that more documentation was needed to disprove "ownership" changes derived from a misguided analysis of the evidence and a confused perception of the book transfer process otherwise made clear in the evidence.

The ALJ, in recounting Freeman's testimony in her decision, stated that "a common thread" to his description of the book transfer/cash settlement process at Marathon was "that

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

there is a contract to buy or sell and a corresponding cash-settlement agreement, which may itself be a contract or at least a document that functions as a contract." ALJ Dec., p. 17. The ALJ further stated that, "[h]owever, [except for the Sunoco transaction, No. 356519], Marathon did not produce any other examples reflecting the many separate forward contracts Mr. Freeman referred to throughout his testimony." Id. Accordingly, the ALJ decided that Marathon did not provide enough documents to prove its claim. Id. As stated above, this ruling ignored Marathon's evidence which included the ISR, a compilation record, and Freeman and Steiner's direct testimony that the transactions were book transfers void of any transfer of possession or ownership. The ALJ's conclusion here is also essentially argumentative. Her conclusion refuses to accept the direct testimony of no transfer of possession or ownership and implicitly speculates that some contract in Marathon's files might belie the testimony and disclose an actual transfer of possession or ownership. The ALJ's ruling was unsupported by any case authority holding that a compilation record like the ISR and explained through the testimony of knowledgeable witnesses fails to meet the taxpayer's burden of proof as established in Goldfarb, Miller, and Novicki. Likewise, the County fails to cite any in defense of the ALJ's ruling. (The cases the ALJ and the County relied upon holding that a taxpayer providing no or few books and records supporting its protest does not meet its burden of proof, discussed above, are inapposite because Marathon, as noted, did indeed rely on its books and records admitted into evidence.)

The ALJ's concern that only one "agreement to settle" was provided, motivating her statement that they all should have been submitted, at least, arises from her suspicion that in one or more or all of the book transfer transactions, "ownership" was transferred. This springs perhaps from her observation of Freeman's testimony that "the product price in the original [forward] contract and the cash-settlement price likely are different". ALJ Dec., pp. 13, 14. It is

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

clear to the Court that the ALJ was concerned about this margin between the forward contract and the cash settlement. It is equally clear to the Court that to the ALJ, this marginal value represented a possible sale. In her own questions to Freeman during his testimony, she inquired about the possibility that other later "contracts", after the original forward contract, the agreement to settle it, and the drafting of the Book Transfer Letter have occurred. CCDOAH 8520-22, 8537-46, 8555, 8564-65, 8578-79, 8581-82, 8584-85. The ALJ perhaps perceived this as generating a cascading series of supplemental contracts, particularly where there are numerous matching deals between multiple parties seeking to have a cash settlement. ALJ Dec., p. 13. The County picked up on this concern, arguing, in a confusing manner, "[s]imply put, the ALJ's Decision should be affirmed because Marathon failed to provide any documentary evidence … as to how the book out transactions after the taxable transactions at issue…impact those taxable transactions when Marathon sells to an unregistered distributor." [7] Def. Br., p. 7. Accordingly, the ALJ was really concerned with a subsequent stream of transactions occurring after any particular the book transfer transaction occurs, which results, at the end of the stream, a transaction which amounts to a sale wherein change in possession or ownership really occurs. See ALJ Dec., pp. 11-18. The ALJ suspected this could happen because of the marginal difference between the forward contract price and the book transfer price, as acknowledged by Freeman. Hence, her finding that "the complete chain of original contracts and corresponding cash-settlement contracts" should have been produced at the hearing. Id. at p. 13 (emphasis added)

[7] It should be apparent that the County clearly does not understand (or ignores) the ALJ's concern given its articulation of it in the preceding statement. The "book out transactions" were the taxable transactions at issue, and the County must be referring to what the ALJ referred to as subsequent contracts. This will be discussed at length below.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

It should be clear by this point that the ALJ's criticism that the "corresponding cash settlement contracts" should have been produced constitutes an elevation of Marathon's burden of proof to that of clear and convincing evidence to prove conclusively that no sale or transfer of possession or ownership occurred. This, of course, is clearly erroneous, and an incorrect application of the law. But more fundamentally, the possible existence of subsequent "corresponding contracts" is completely beside the point. Sales only are taxable, not contracts. And all of the transactions in which a payment was received are reduced to individual line items on Marathon's ISR. The DOR used these line items to arrive at its Revised Assessment, which identified the book transfer transactions set forth on the ISR, again, each on its own line, as taxable sales. Again, each such transaction is identified by invoice number, BT number, customer name, and date. As stated, Freeman testified that all book transfer agreements (cash settlement agreements) result in the generation of an invoice with an invoice number. CCDOAH 8508, 8586, 8588-89, 8895, 8897-99. The existence of any "corresponding contract" which results in any change of possession or sale would necessarily result in the creation of yet another invoice and invoice number. And an exchange of money or fuel reflected in an invoice and an invoice number would necessarily be reported on the ISR. As shown, all sales of fuel listed on the ISR were subject to tax, and this is undisputed between the parties. Id. at 8798. The only disputed transactions were the book transfer transactions, the cash settlements. In short, a "corresponding contract" implicating an actual sale of fuel would show up on the ISR separately because there would be an invoice – and the listing of the fuel's carrier and actual destination. Put another way, Marathon was paid on invoices, not contracts, and each transaction listed on the ISR is listed by invoice, not contract. Thus, the inquiry into "corresponding contracts", "second transactions", and other articulations of the same concept is essentially a red herring. The only

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

proper focus in this case is on each book transfer transaction identified in the Revised Assessment as taxable. Each such transaction stands on its own. And neither the ALJ nor the County articulated in any reasonable fashion how a later transaction, if any, has any effect on the transactions at issue.

There is another reason why this matter of so-called "corresponding contracts" cannot support the ALJ's decision – it is entirely speculative. The ALJ never articulated how the possible existence of later "corresponding" contracts would affect the taxability of the listed book transfer transactions. Implicit is the suggestion that such later contracts could result in a tangible sale. But to opine this is to engage in rank speculation. Entering a finding based on speculation is clear error. See See Berke, supra, at ¶ 53; First Cash Fin. Services, supra, 367 Ill.App.3d at 106; Illinois Bell, supra, 90 Ill.App.3d at 697; see also Lind, supra, 307 Ill.App.3d at 741; Rhoades, supra, 74 Ill.App.3d at 253. Indeed, Freeman testified that at times the corresponding book transfer transactions would even out and that there would be no difference between the forward contract price and the cash settlement amount. CCDOAH 8507-08. Hence, any surmise as to what the other costs would be is mere speculation. And as stated, requiring Marathon to produce all related documents, including copies of "corresponding contracts" improperly elevates the burden of proof to one of clear and convincing evidence. That is also clearly erroneous. The entire concern over subsequent transactions after a cash settlement agreement is reached, a book transfer letter is generated, and the book transfer is reduced to a cash settlement amount and an invoice is completely speculative. Furthermore, the ALJ's concern over subsequent "corresponding agreements" constituted the central articulated basis for the ALJ's finding that Marathon provided insufficient documentation for its claim that the disputed transactions constituted non-sale cash settlements. ALJ Dec., pp. 11-18. The foregoing

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

discussion plainly shows how the ALJ's conclusion that because of Marathon's "failure" to produce all records including "corresponding agreements", the County's prima facie presumption was not overcome was both clearly erroneous and against the manifest weight of the evidence.

At this juncture, it is perhaps illuminating to point out how the County completely misunderstands the transactions in question.[8] In its brief, the County stated, "…Mr. Freeman described, at length, various types of irrelevant book out transactions used by Marathon. Importantly, these transactions happen after Marathon sells to an unregistered distributor, or, in other words, the transactions after the taxable transactions at issue in this proceeding." Def. Br., p. 10. This is plainly incorrect. Freeman testified to the nature of Marathon's book transfer transactions. These included the book transfer transactions identified by Steiner in the ISR. It is these transactions that are at issue in this case; and Freeman was referring to them. The "taxable transactions at issue" are not some prior transactions; they are the book transfer transactions themselves. The evidence does not provide any basis for the fractured description of the transactions made by the County in its briefs. The County's understanding of the transactions involved is a complete muddle, and its arguments inform no one as to what Marathon's books and records reflect.

In veering away from a confrontation with the plain, direct evidence of cash settlements having occurred (again, as shown by the ISR entries and the testimony of Marathon's witnesses), the ALJ delved into a strange, irrelevant dissection of Freeman's description of various scenarios which would result in a book transfer transaction. ALJ Dec., pp. 10-16. Based on his testimony,

[8] Or, perhaps, the County is intentionally misrepresenting the nature of the transactions.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

the ALJ discussed what she divined as four categories under which forward contracts are settled, namely (1) the cash settlement of "distressed" forward contracts, (2) the cash settlement of "indirect" forward contracts, (3) the cash settlement of "straight buy-sell forward contracts" (or "direct" forward contracts), and (4) the cash settlement of "matching buy/sell forward contracts". Id. The ALJ identified the Sunoco book transfer no. 356519, regarding which Freeman testified at length as an example, as the settlement of a matching buy-sell forward contract. Id., p. 15.

The ALJ criticized Marathon (and Freeman specifically) for failing to identify which book transfers on the ISR fell into any of the four categories.[9] Id., p. 12. For each category the ALJ identified (other than the Sunoco matching buy/sell settlement), she held that Marathon failed to introduce any records reflecting the type of cash settlement, including the "cash-settlement contracts" themselves. Id. at pp. 12, 13, 15, 16. Because of the absence of these records in Marathon's case, the ALJ held that Marathon failed to satisfy its burden of proof on its claim that the transactions were cash settlements. Id. at p. 17. In coming to this conclusion, the ALJ missed the forest for the trees. As Steiner testified, each of the book transfer transactions on the ISR was in fact a cash settlement. CCDOAH 8719-29. The specific type of cash settlement, or the category into which each cash settlement would fall, is beside the point. All that matters is whether the transactions identified in the assessment were cash settlements or not. Steiner's testimony, Marathon's ISR entries. and Marathon's other evidence plainly demonstrated that they were. With that, Marathon presented all the evidence it needed to satisfy its burden of proof. Whether or not a particular book transfer transaction, a cash settlement, was a "direct" settlement, an "indirect" settlement, or any other category of settlement is irrelevant. The point

[9] E.g., "…Marathon did not attempt to quantify the number of 'distressed' cash-settlement transactions included in the assessments." ALJ Dec., p. 12.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

was, they were all cash settlements. The ALJ did not explain why it would make any difference whether any particular transaction was of one type or another. Indeed, there would be no difference.

All that is at issue is whether the transaction was a taxable one, a sale, or, as argued by Marathon, a non-taxable one, a cash settlement. Nowhere in the evidence was it established that any one type of cash settlement was definitely taxable as opposed to another. Perhaps the ALJ was alluding to the marginal difference between the value of off-setting forward contracts and cash settlements discussed above (which, the ALJ infers, might be more prevalent in one category of settlement as opposed to another), but, as shown, any such marginal value is meaningless and uninformative with regard to the issue of whether one designated and identified book transfer transaction was a cash settlement or not, or taxable or not. Accordingly, the ALJ's granular inquiry into the different categories of motor fuel cash settlements, which comprised about three quarters of the ALJ's discussion of the book transfer transaction issue, provides no support for any argument that the decision must be affirmed and merely compounds the clear error below. Furthermore, the discussion above relating to the ALJ's mistaken focus on the specific content of book transfer transactions and her conclusion that Marathon was required to produce every cash settlement contract applies to her discussion and conclusions regarding each individual category of cash settlement as well. See pp. 38-43, supra. Her requirement that each category of settlement had to be specifically identified and supported by separate contracts was clear error for the same reasons.

For all the foregoing reasons, the ALJ's decision that Marathon was required to produce every (or a substantial number of) forward contracts, cash settlement contracts, and other supporting records in order to satisfy its burden of proof on the fact issue of whether the book

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

transfer transactions were cash settlements only and not transfers of possession or ownership was clearly erroneous and an incorrect application of the law. Marathon met its burden of proof through testimony and its records that each book transfer transaction was a cash settlement only and not a transfer of possession or ownership, a showing that proved it was more likely than not that such was the case, and the burden therefore shifted to the County to prove that the transactions were taxable sales. The ALJ's decision to the contrary was clearly erroneous and an incorrect application of the law.

Both the ALJ and the County found fault with Marathon's case on the ground that four published "definitions" of book transfers and book outs available to the financial industry (e.g., financial-dictionary.thefreedictionary.com/book+transfer, ALJ Dec., p. 7) include statements that a transfer of asset or title occurs in such transactions. Accordingly, the ALJ stated that due to these definitions, "it falls to Marathon to establish the exact nature of the [book transfer] transactions…". ALJ Dec., p. 8. This is despite the fact that the ALJ identified two published definitions of "book out" that "appear to be more in line with what Marathon contends". Id. at p. 7. Again, this foray into the variety of definitions for book transfers and book outs in the financial and accounting industries seems to have been another step in the ALJ's decision to impose a higher burden of proof on Marathon. Regardless, this survey of dictionary definitions of the terms is a poor, if not improper, evidentiary tool where direct testimony of sworn witnesses appeared to define what the term meant for Marathon. Dr. Auburn, the economist, clearly testified that a book transfer or a book out could amount to a cash settlement payment only, without any transfer of ownership or title. CCDOAH 8450-56. Dr. Auburn's testimony was not rebutted. Indeed, Dr. van der Merwe, the DOR's expert, testified that where a forward contract is reduced to a cash settlement, no fuel is delivered. Id. at 8945, 8951-52. Freeman and

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

Steiner clearly testified that a book transfer transaction at Marathon meant that a cash settlement of a forward contract had been concluded and that no possession or ownership of fuel changed. This was all Marathon had to do to sustain its burden of proof on the matter of what the term "book transfer" in the ISR entries subject to the assessments meant. The minimum threshold for the sufficiency of such proof is that it not be so inconsistent nor so improbable as to be unworthy of belief. Goldfarb, supra, 411 Ill. at 581; Miller, supra, 408 Ill. at 581-82; Novicki, supra, 373 Ill. at 346. Marathon's three witnesses were completely consistent on these points. Whether it was "consistent" with a handful of dictionary definitions is not probative and does not show a level of inconsistency questionable under the standards for this burden of proof. See id. Moreover, the consistency of the three witnesses, the concessions by Dr. Van Der Merwe on the concept of cash settlements of forward contracts, and the existence of dictionary definitions which "appear" to support Marathon demonstrate that it was definitely not improbable that Marathon settled contracts for cash without transferring possession or ownership.

6. Other Matters Discussed in the ALJ's Decision

The structure of the ALJ's decision reflects its erroneous substance. Instead of directly analyzing all of the evidence, the decision meandered from a survey of the dictionary definitions of "book transfer", to a review of the expert economists' testimony, to a discussion of Freeman's testimony regarding the four categories of book transfer agreements, with a conclusion focusing on the finding that Marathon's documentary submissions were insufficient. ALJ Dec., pp. 6-18. The ALJ's analysis almost completely ignored Steiner's testimony identifying and describing the book transfer transactions and tying in the Sunoco transaction exhibits. See pp. 14-19, supra. The foregoing analysis of this Court shows what the ALJ ignored and how its decision was clearly erroneous. The manner in which the ALJ knit together various points of discussion,

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

summarized above, does not save it from the fatal errors identified above. The simple issues posed to the ALJ were what were the transactions at issue and were they taxable. By ignoring Marathon's evidence, as discussed above, the resulting decision was clearly erroneous.

It should also be noted that the ALJ never made a finding that the Marathon witnesses lacked credibility. Having failed to determine that the Marathon witnesses were not credible, the ALJ was bound to accept the natural and reasonable inferences of that testimony. See Goldfarb, supra, 411 Ill. at 579; Novicki, supra, 373 Ill. at 346; Sweilem, supra, 372 Ill.App.3d at 485. Indeed, where the finder of fact fails to make an adverse credibility determination, and the record discloses no basis for concluding that the witness is incredible, the case must proceed on the assumption that the witness was credible. See generally, People v. Geier, 407 Ill.App.3d 553, 556 (2d Dist. 2011); In Re Marriage of Rushing, 2018 ILApp (5th) 170146, ¶ 81 (dissenting op.). The County does not present any argument that Marathon's witnesses were incredible. A review of the record does not disclose any basis for finding that they were incredible. The absence of inconsistency or improbability in their testimony was discussed above. Accordingly, the testimony of the Marathon witnesses must be taken at face value, and this Court proceeds on that basis.

Perhaps some of the fault for the error in the ALJ's decision rested with the confused and meritless case presented by the County, which urged many of the points emphasized by the ALJ in her decision. In addition to contesting the sufficiency of Marathon's evidence, the County relied exclusively on the contention that the transactions listed on the ISR were ipso facto taxable without any other showing. The County's case relied on the ALJ ignoring Marathon's evidence, which the foregoing discussion demonstrates was achieved. The County plainly insisted that with regard to all the book transfer transactions listed in the ISR, the designation "book transfer"

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

be completely ignored. CCDOAH 8208-11, 8237-38, 8259, 8271-73, 8288, 8300-05. Accordingly, the County insisted that for every contested transaction, the book transfer designation, the lack of a designated carrier, and the "Chicago region" designation that signaled no sale of fuel but rather a cash settlement be disregarded. Id. Under cross-examination, Vega bluntly testified that he did not care what the meaning of "book transfer" was and that he actually did not know what it meant. Id. at 8238, 8288. All that mattered to Vega was that there was a payment ("There was money involved."). Id. at 8237-38, 8259. It is clear that Vega's conclusion was that if there was a payment of money, and it was any way related to a quantity of motor fuel, it was a taxable sale. Id. at 8259, 8305. Apparently, the ALJ adopted this assumption, leading to the erroneous decision.[10]

As noted, Marathon's evidence included testimony that the designation "book transfer", the absence of an identified carrier for motor fuel, and the insertion of "Chicago" as the indicator of the price region applicable, clearly identified a listing as a book transfer, meaning a cash settlement transaction. The DOR's witnesses essentially quibbled with this testimony. Vega testified that "Chicago" was a place in Cook County, rendering the transaction taxable. Id. at 8272-73. Even though he acknowledged that Marathon had only two fuel terminals in Cook County, that being Argo and Mount Prospect (although not mentioning the third in DesPlaines), with none in Chicago, and that the taxable fuel sales transactions listed on the ISR clearly identified them as either origin or destination locations (see, e.g., id. at 8792-96), he took the position that using "Chicago" in those entries meant that Marathon would be using "any one" of

[10] These conclusions noticeably connect to the conceptual problem discussed above wherein the ALJ and the County cannot accept the notion of cost savings and other values exchanged, as opposed to motor fuel, in a cash settlement transaction.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

their actual terminals, or any location in Cook County. Id. at 8272-73. Incredibly, Vega made this assertion even though he acknowledged that Marathon had explained to him that the term meant pricing in the Chicago region, and not either an origin or a destination for motor fuel. Id. at 8208-11, 8272. Vegas's conclusions were plainly adopted by Michals as well. Id. at 8318-46.

Similarly, Michals testified that because the term "Chicago" was entered into the origin and destination columns for the book transfer entries, one could conclude that a taxable sale had occurred. Id. at 8343-50, 8391. He testified that the term "Chicago" meant either "generic Chicago pipeline" or "generic Chicago pipeline FOB Chicago". Id. at 8409-10. Under cross examination, Michals clearly showed that he completely ignored information provided by Marathon that indicated that the term "Chicago" on the ISR meant a pricing region, and not an actual destination for fuel. Id. at 8404-11. He acknowledged that the term "generic Chicago pipeline FOB Chicago" appeared in the Sunoco matching buy-sell agreement. Id. at 8406-07. Michals testified that he drew the conclusion that there was a taxable sale because the Sunoco matching buy-sell agreement showed fuel "going into a generic Chicago pipeline with an origin – or a destination of Chicago, Illinois. So we went by the Chicago pipeline, generic Chicago pipeline, FOB, Chicago, Illinois, on the contract." [11] Id. at 8407. However, when asked what "generic Chicago pipeline" actually meant, Michals answered that "[a]ll I see [on the agreement] is that it's delivery into the Chicago pipeline…that's my understanding…I can only go by what I see on the documentation that's provided by Marathon." Id. at 8409. Given the ambiguity in his testimony, the ALJ followed up with the following inquiry: "The question is, do you know what

[11] Michals's reliance on the Sunoco matching agreement, provided to the DOR by Marathon, is somewhat audacious as he earlier testified that the DOR did not "accept" those same documents offered by Marathon in support of its protest. CCDOAH 8347-48.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

that term means? Not what you think it means." Id. Michals answered, "I'm telling you my understanding of the meaning. … so from my viewpoint, I'm assuming, my understanding, my meaning, is that delivery took place in Chicago per the contract." Id. at 8409-10. (emphasis added)

What Vega and Michals did was ignore Marathon's explanation of what terms in the transaction entries on the ISR meant and merely speculated on an alternative meaning for the terms. Vega and Michals had no evidence to show, other than their own speculation, that the use of the term "Chicago" for both origin and destination meant any Marathon facility in Cook County. See id. at 8272-73 8407-10. Worse, Vega essentially deliberately misinterpreted the meaning of the terms set forth on the transaction entries. Id. at 8208-11, 8272-73. A misinterpretation of the evidence cannot form a basis for a finding of fact. See e.g. Vickers v. Abbot Labs., 308 Ill.App.3d 393, 405 (1st Dist. 1999). And as stated above, mere speculation on the meaning of the entries cannot support a finding of fact either. See Berke, supra, at ¶ 53; First Cash Fin. Services, supra, 367 Ill.App.3d at 106; Illinois Bell, supra, 90 Ill.App.3d at 697; see also Lind, supra, 307 Ill.App.3d at 741; Rhoades, supra, 74 Ill.App.3d at 253. Michals's testimony that he was "assuming" a meaning, that being a specific delivery of fuel due to the matching agreement's industry-specific language, was likewise baseless speculation. What renders Michal's testimony even more fallacious is that he ignores the fact that the matching agreement was not the basis of the payment at issue; the basis of the payment was the succeeding book transfer letter agreement which in turn generated the invoice which was paid. In other words, the payment was for the book transfer letter agreement, and not the preceding matching agreement. See pp. 41-43, supra. Marathon's testimony on the meaning of the terms contained in the book transfer entries was neither improbable nor inconsistent. Indeed, Steiner testified that

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

Marathon was bound to enter the book transfer transactions this way due to the limitations of its computer format. Id. at 8721, 8734-35. The trier of fact is bound to accept uncontroverted, plausible testimony. Goldfarb, supra, 411 Ill. at 581. The ALJ's concession to the DOR's mistaken or speculative testimony here, implicit in her decision, was unreasonable and clear error.

In a similar fashion, Vega also testified, based on nothing more than the mere ISR transaction entries, which are silent on the matter, that title or ownership of fuel changed when the transaction occurred. As noted, Vega made the statement that if "money" was [paid], then a "sale" occurred, which statement was an unsupported conclusion of fact. Id. at 8259. The ALJ allowed Vega to testify to this conclusion of fact that title or ownership changed based on nothing more than the existence of the transaction on the ISR. Likewise, Michals testified that "rights" to "ownership" were exchanged based on nothing more than his speculative interpretation of "generic Chicago pipeline FOB Chicago" in the matching agreement.[12] Again, because there was no inherent evidence in the transaction listings that ownership changed, and because Marathon explained that the transactions were cash settlements where no ownership or title to fuel changed, the DOR's conclusion that it had indeed changed was mere speculation. It must be rejected for the same reasons stated above. The ALJ's concession to the DOR's

[12] It is telling that the ALJ's and the County's acceptance of Michal's speculative interpretation of the book transfer entries is also an acceptance of Michal's pure extrapolation from the Sunoco matching agreement containing the "generic Chicago pipeline FOB Chicago" entry that the term applies to all of the ISR book transfer entries, while at the same time the ALJ and the County contend that Marathon's use of the same document to explain the nature of the book transfer transactions is insufficient and without merit. One can carry this further and deem this as a DOR admission that the Sunoco book transfer documents, which DOR did not "accept", were representative of all book transfer transactions reflected in the ISR.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

speculation here, implicit in her decision, was also unreasonable, clear error, and against the manifest weight of the evidence.

It should be clearly noted at this point that because Marathon satisfied its burden of proof, the County had other recourse to prove its case, if it indeed there was such a case to prove. The DOR began with what it deemed to be a prima facie case, made by its Revised Assessments, which in turn were based on its audit. Once Marathon satisfied its burden of proof overcoming the DOR's prima facie case, the presumption upon which the DOR was entitled to rely was overcome, or as stated elsewhere, the "bubble" of the presumption, was "burst". Franciscan Sisters Health Care Corp. v. Dean, 95 Ill.2d 452, 462 (1983). As a result, the burden was shifted back to the DOR to present competent contradicting evidence to support its claim that the transactions were taxable motor fuel sales. Goldfarb, supra, 411 Ill. at 580; Miller, supra, 408 Ill. at 582; Novicki, supra, 373 Ill. at 346. The most obvious approach to contesting Marathon's claims would be to introduce those transaction invoices which would have shown that actual sales occurred.[13] But the DOR elected not to do so. Instead, in its rebuttal case, it relied solely on the expert testimony of the economist Dr. Van Der Merwe, who never looked at Marathon's evidence, but simply opined that a generic book transfer settling a commodities sales agreement might possibly result in an actual transfer of possession. Clearly, DOR wished to use Dr. Van Der Merwe's testimony to buttress its speculation that the transactions resulted in such transfers. But the DOR never introduced any direct evidence contradicting Marathon's evidence that the

[13] For instance, the introduction of invoices might have demonstrated the transfer of fuel that the ALJ suspected with respect to an ultimate book transfer agreement to be found at the end of a cascade of agreements. Of course, this is not likely to have occurred, because, as discussed above, the ALJ's concern regarding "later contracts" was mistaken. See pp. 38-43, supra.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

book transfer transactions were mere cash settlements in which neither possession nor ownership changed.

These circumstances must be viewed in light of the fact asserted by the DOR that they had access to all of Marathon's documents which supported the ISR list of transactions. Def.Br., p. 4; CCDOAH 3349, 3351, 8268, 8347-48. Indeed, the County affirmed before this court that Marathon had "provided the DoR with contracts and invoices supporting the information contained in the Internal Summary Report." Def. Br., p. 4. Significantly, the DOR deemed the ISR so accurate that it admitted that it used the ISR to support the Revised Assessments issued to Marathon and introduced the ISR into evidence as its own exhibit. Id. The ALJ's suspicion that the supporting contract documents and invoices related to each book transfer transaction listed on the ISR might reveal a taxable transaction could have been easily allayed by the DOR's reference to them in its rebuttal case against Marathon. This it failed to do. The DOR never claimed that it did not have access to the documents; rather, it claimed to have it all. Id. This state of affairs renders this case the complete opposite of PPG Industries, a case that the ALJ relied on, in which not only did the taxpayer not introduce key business records to support its protest, it had even refused to turn them over to the DOR on request. PPG Industries, supra, 328 Ill.App.3d at 34-35. Moreover, even if there was any question regarding the lack of relevant documents (which, as stated, there was not (Def.Br., p. 4)), the DOR opposed pre-hearing discovery which would have resulted in production of any additional documents to make them available at the hearing. Def.Br., p. 20. Furthermore, Vega freely admitted that Marathon's invoices in the Sunoco book transfer transaction described above were the same type or equivalent to all other invoices referenced in the ISR. CCDOAH 8268. Simply put, if one accepts the County's theory of the case, the DOR could have easily eviscerated Marathon's case

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

by pointing to specific transaction evidence showing that particular book transfer transactions on the ISR did indeed relate to actual sales of motor fuel. But it did not do so. This abdication of the most sensible strategy strongly suggests that the DOR understood that it would discover nothing more than even more cash settlement evidence equal to the Sunoco book transfer documentation and no evidence of any real sale. Faced with these circumstances, the DOR appears to have elected to take an alternative course and bamboozle the ALJ by urging the blatant misinterpretation or obfuscation of the meaning of the entries on the ISR as a basis for rejecting Marathon's evidence. Indeed, the County takes the same position before this Court. This Court sees the County's case of misinterpretation, obfuscation and speculation for what it is. Its success before the ALJ is therefore short lived for all the reasons previously discussed.

7. Whether Book Transfers Constituted Sales under the Gas Tax Ordinance

In presenting a case dependent on ignoring Marathon's evidence on the meaning of the book transfer transaction data on the ISR, the County has urged a decision which leaves a critical ambiguity: were the cash settlements actually sales? The County frames the issue as whether the transactions came under the definition of sales in the Gas Tax Ordinance. ("While Marathon argues that the DoR did not understand that Marathon's 'book-out' transactions did not transfer product, the relevant issue is whether the ALJ's Decision finding [the] transactions taxable sales under the Ordinance should be affirmed … The record is clear that … there was no 'Department misunderstanding of the financial transactions.'" Def. Br., pp. 7-8.) Its argument that they are taxable under the Ordinance leaves implicit in the County's case that a determination of what the transactions actually are is unimportant. It would appear that this upends normal logic in these cases: one should proceed to identify the nature of the transaction and then make a determination

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

as to whether the tax applies. As the ALJ discussed at length at the outset of her decision, the Gas Tax is a tax on the retail sale of motor fuel. ALJ Dec., pp. 1-3. The County does not even attempt to describe what the disputed transactions are; all that matters, per its argument, is that the DOR concluded that they were taxable sales. Def. Br., pp. 8-9. This argument, of course, is completely contingent on an adjudicator finding that the DOR established its prima facie case and that Marathon failed to establish its defense by a preponderance of the evidence. If the presumption bubble is not burst, what matter is the identification of the transaction? As discussed above, Marathon did indeed meet its burden of proof and the presumption bubble was burst. Moreover, in its argument before this Court, the County appears to accept the notion that the transactions were "cash settlements", citing Vega's testimony admitting the same. Id. at 8; CCDOAH 3354-55. But the County appears confident that this fact is beside the point; it argues that the cash settlements clearly come within the ordinance definition of taxable sales. Thus, the fundamental issue in this case is whether the cash settlement transactions come within the definition of motor fuel sales under the Gas Tax Ordinance.

The Gas Tax Ordinance contains provisions which define motor fuel sales subject to the tax. The County considers that the crucial provision which relates to this case is § 74-471 of the Ordinance. Def. Br., pp. 3, 12; ALJ Dec., p. 10. (Oddly, the ALJ never cited this provision of the Ordinance to support the conclusion that the transactions were taxable sales. However, the ALJ's statement that a transfer of ownership is taxable indicates reliance on the aforesaid provision. Id.) Section 74-472(a) states that "[a] tax is hereby imposed on the retail sale in Cook County of gasoline, diesel fuel, biodiesel fuel, and gdiesel fuel… ." (emphasis added) Section 74-471 states:

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

> Sale, resale, and selling means any transfer of ownership or possession or both, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever. In every case where gasoline, diesel fuel, biodiesel, or gdiesel fuel are exchanged, given or otherwise disposed of, it shall be deemed to be sold.

A critical point in this case is that the County concedes that there was no physical transfer or delivery of motor fuel in any of the contested book transfer transactions. Def. Br., p. 12, 13. ("…no physical transfer of fuel occurred…" id. at 13.) The ALJ did not find that any physical transfer, delivery, or exchange occurred. ALJ Dec., p. 10. This should not be disputed, because the only evidence in the record on this matter is that provided by Marathon (characterized by the ALJ as "emphatic" (id.)) that showed that no fuel was ever moved or left Marathon's possession. Therefore, the County concedes, and it is indisputable based on this record, that no "transfer of …possession", as required under the Ordinance occurred.

This leaves the issue of whether a "transfer of ownership" occurred in these transactions. The County places great emphasis on this question. As stated, Marathon's witnesses were equally "emphatic" that no transfer of ownership occurred. The ALJ merely decided, in an erroneous fashion as discussed above, that Marathon failed to disprove that ownership did not transfer, ignoring the law on the level of proof required to "prove a negative". ALJ Dec., pp. 10, 17-18; Conxall Corp., supra, at ¶ 44; Baer, supra, 31 Ill.App.2d at 90. The County firmly disputes Marathon's position and claims that the record supports the notion that ownership was transferred. In essence, the County's case comes down to the bare argument that a cash payment connected to a forward contract by definition includes a change in ownership, and is therefore a taxable sale. The search for evidentiary support in the record for this proposition is frustrating, even for the County. In attempting to establish change of ownership in the transactions at issue, the County's first reference to the purported supporting evidence is its reference to the DOR's "reli[ance] on Marathon's invoices to determine there was a change in ownership". Def. Br., p.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

8. The County's citation in support of this statement is to Vega's testimony appearing at CCDOAH 3355 to 3357. Id. At this point in his testimony, Vega stated that he had reviewed the invoices that comprised the Sunoco transaction discussed above. CCDOAH 3355. He stated that one document from the Sunoco transaction he looked at was a document later admitted as Respondent's Exhibit No. 4, CCDOAH 8866. Vega testified that said document "says matching to buy and sell". Indeed, the document is entitled "Light Products Matching Buy/Sell". Vega then stated, "If you look at the definition of buy and sell, that's a change of ownership." CCDOAH 3355. Vega then observed that what was admitted as Respondent Exhibit No. 4, the matching buy/sell agreement, was related to invoice number 356519 (which was discussed above). Id. He stated that invoice 356519 was also connected to ticket number BT 0912. CCDOAH 3356.[14] Indeed, Vega admitted that the Sunoco invoice matched the invoice number for it on the ISR. CCDOAH 3349. Vega's statement that the "definition" of "buy and sell" was "a change of ownership" was the sole testimony given by him on this point. No foundation was laid for this conclusionary testimony. The record does not reveal this testimony to be anything more than speculative opinion with no basis in fact or evidence. Indeed, the source of the "definition" he referred to was never identified.

Under cross-examination, Vega was pressed on these points and acknowledged that the Sonoco transaction documents regarding which he had testified were identified by Marathon as book transfers. CCDOAH 8237. Vega testified that "[m]ore than once [Marathon] explained to us what a book transfer was." Id. When asked what his understanding of a book transfer was, Vega testified:

[14] Invoice 35619, part of BT 912 and one of the Sunoco transaction documents, was discussed above and was set forth in Respondent's Exhibit No. 12, CCDOAH 8899.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

> For what I understand (sic), it happened between two or more companies in which they settled for a price. That price, it could go higher or lower, depending on the market, how the market reacts. So you could make some money, and you could lose some money. I think that's what I got from this, from what a book transfer was; because for me, I mean, I'm looking at sales. To me, it's sales. I didn't pay too much attention to what a book transfer was or wasn't… If I look at the invoice, I said, yes, that's a transfer of ownership.
>
> CCDOAH 8237-38.

Upon further cross-examination, Vega was asked whether he understood that during book transfer transactions, Marathon does not transfer any inventory, he testified that he did not know. Id. at 8238-39. When specifically asked if in a transaction where there is no transfer of inventory, no change in possession, and no change in ownership, there could be a retail sale, Vega evaded the question by stating, "The ordinance specifically said what is sales (sic)." Id. at 8241. When pressed again on the same question, Vega testified that it is "[n]ot a retail sale but a sale." Id. at 8242. Notably, counsel followed up with a question to him as to whether "under the [Ordinance], a transaction that is purely financial would not be subject to the tax", an objection to that question was sustained, with the ALJ stating, "that does call for a conclusion of law … that question is for me to decide, not Mr. Vega." Id. at 8242, 8243-44.

As can be plainly seen, contrary to the County's bald assertion, Vega provided no concrete evidence that the book transfer transactions involved a change in ownership. Essentially, it was merely his opinion that there was a change in ownership and his opinion lacked any substantive basis. Worse, no foundation was laid to enable him to venture this opinion. His conclusion that change of ownership occurred, upon careful review of all his testimony, springs from his related conclusion that because there was "money involved", a "sale" occurred, and therefore the "sale" was taxable. CCDOAH 8259. This logic, incredibly, is one embraced by the County, which argues "the reality is that the exchange of money is

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

consideration for the exchange of ownership in the fuel." Def. Br., p. 15. Again, there is no evidence in the record that payment on the transactions at issue resulted in exchange of ownership in the fuel, or indeed that any change in ownership occurred at any time. So, in the end, Vega's testimony is no evidence that a change in ownership occurred, and Vega's conclusions, lacking any foundation, amount to a circular argument that exchange of cash alone is a sale, and a sale is a taxable sale. See Goldfarb, supra, 411 Ill. at 578. In addition, because the ALJ made no findings regarding change in ownership, the County could not cite any.

Another contention by the County merely implies that a change of ownership occurred. That argument is simply that the ISR listed transactions are self-evident of taxable sales. This also was discussed above. This argument completely depends on a selective reading of each transaction listing on the ISR, ignoring that information entered that denoted a book transfer/ cash settlement. As noted above, Vega's testimony that the book transfer transaction listings were evidence of a "sale" depended completely on a selective reading of the ISR entries, focusing on the existence of a price, an invoice number, a date and a product amount, and completely ignoring the entries for the same transactions on the same lines that showed the book transfers were cash settlements. CCDOAH 3345, 8305. The ignored entries, as stated above, were the "Chicago" entries, designating a pricing region and the lack of a delivery arrangement for any fuel, and the entry of "book transfer" in the Carrier column, indicating a book transfer and not a delivery. Again, the County cannot rely on a selective reading of competent evidence. It cannot ignore the evidence. See pp. 27-35, supra. A fractured reading of the ISR proves nothing other than the lack of substance in the County's case.

In a further reach to support its argument that ownership changed, the County claims that Freeman acknowledged that in the Sunoco matching buy/sell agreement (Respondent Ex. No. 4,

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

CCDOAH 8866), wherein the parties agreed to match up separate forward contracts for purchase of fuel as a predicate to a final book transfer agreement, the term "FOB Chicago" is set forth. Def. Br., p. 10. The County acknowledges that Freeman testified that "FOB Chicago" contained in that agreement is merely a pricing indicator, referring to the Chicago pricing region in the fuel industry. Id.; CCDOAH 8559, 8562-63. But the County argues that Freeman's testimony cannot be accepted because the dictionary definition of FOB is "free on board", which "means without charge for delivery to and placing on board a carrier at a specific point." Def.Br., p. 10. The County continues, stating that the "specified point of exchange was Chicago" and "[t]hus, ownership transferred in Cook County." Id. This approach was taken by Michals, who testified that "FOB Chicago" (as well as the reference to "generic Chicago pipeline") meant that Marathon was committed to delivering fuel into a "Chicago pipeline", and therefore, the transaction was a taxable sale. This argument is fallacious on many levels. First, as Freeman testified, the Sunoco matching buy/sell agreement, Ex. 4, was not a definite delivery contract, but a predicate to the cash settlement, which was the book transfer eventually entered into the books. CCDOAH 8535-70. The matching agreement's term referenced a future date for delivery of the fuel, and the succeeding book transfer letter, the agreement which settled for cash the delivery commitment, was entered before the delivery due date, thus cancelling the delivery commitment. Id. at 8590-99, 8866-70, 8895-99. And as previously shown, the ISR book transfer transaction was a payment on the invoice generated by the book transfer letter, not the matching agreement. See pp. 41-43, supra. Freeman was very clear that the FOB Chicago reference was only a pricing reference, tying the ultimate price to the Chicago region price, and was not a delivery instruction. CCDOAH 8559-63. The County has pointed to no evidence in the record to contradict this testimony.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

Second, the contract itself supports Freeman's testimony and not the County's imaginative reading. The February 4, 2009 contract contains FOB Chicago reference at a section entitled "Delivery Date" and reads, in the first part, "1st Cycle February into Generic Chicago Pipeline. FOB Chicago, IL." Resp. Ex. No. 4, CCDOAH 8866. Freeman testified that "Generic Chicago Pipeline" is also a pricing reference, because there is no such pipeline with that designation, which really means three possible Midwest pipelines, none of which is actually in Cook County. CCDOAH 8853-59. In order to ship the fuel, an actual pipeline must be selected. Id. In phrasing the contract in such generalities, it lays the ground work for the book transfer agreement, the book transfer letter, which immediately follows and which terminates the delivery obligation. See id. at 8835-86.

Third, the County provides no foundation for lifting a term ("FOB Chicago") from a specialized industry contract, grafting a general dictionary definition onto it, and concluding that the contract means a product was actually delivered. Freeman's testimony is buttressed by the connection of the contract, through its contract number, 96460, to the resulting book transfer transaction, number BT 912 and invoice number 356519, as reflected in the admitted exhibits, Resp. Ex. Nos. 9 – 12. The County appears foolish in cherry picking one term from a specialized contract and pronouncing that it controls the ultimate description of the transaction. And it should be noted that the transaction at issue was tied to the book transfer invoice and the book transfer letter, and not the preceding matching buy/sell agreement. CCDOAH 8816. It was on the invoice that Sunoco paid, as stated, not the matching agreement. Put another way, if the Sunoco matching buy/sell agreement, which bore the number 96460, was the transaction which constituted the "sale" of motor fuel, it should have been identified on the ISR by its number, which the County fails to do. Instead, it was the payment on Invoice No. 356519/BT 912, both

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

numbers referencing the book transfer letter agreement, that was identified by the Revised Assessment. CCDOAH 8816, 8898-99.

Fourth, because there is no evidence that the "delivery", as the County argues is meant by FOB, actually occurred (the contract, by its terms, is prospective), there is no proof that ownership of any product changed. This suggests yet another ambiguity the County seems to wish the Court to embrace, and that is that a contractual commitment to deliver fuel in the future triggers the obligation to pay the Gas Tax. Nothing in the Ordinance creates that obligation. Fifth, the County appears to contradict itself in presenting this argument, because an FOB delivery necessarily means transfer or movement of the fuel. At all other times, as stated, the County does not dispute Marathon's contention that fuel was never transferred or moved in these transactions. Since this confuses the issue, the argument is even less persuasive that there was a change of ownership. In all, there is no evidence in the record that ownership changed.

As stated, the Ordinance defines that a sale will have occurred if there was a transfer of ownership. In order to prevail on this issue, the County must have established in the hearing below that there was a transfer of ownership when the book transfer transactions occurred. That is because, as this Court has concluded, Marathon sustained its burden of proof on this matter (through proof of the "negative" that no ownership transferred), and the burden of proof shifted back to the County to prove otherwise. Neither the County nor the ALJ considered the law related to ownership, which is determinative on this issue.

To determine whether a party has ownership, the ownership clause in the Ordinance itself must be examined. In doing so, the Court must give effect to the intent of the legislature. Michigan Ave. Nat'l Bank v. County of Cook, 191 Ill.2d 493, 503-04 (2000); Salier v. Delta Real Estate Invs., LLC, 2020 IL App (1st) 181512, ¶ 33. The best indicator of intent is the

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

statutory language, which must be accorded its plain and ordinary meaning. Davis v. Toshiba Mach. Co., 186 Ill.2d 181, 184-85 (1999); see id. The dictionary can be used to ascertain the ordinary and popular meaning of words. Detrana v. Such, 368 Ill.App.3d 861, 867 (1st Dist. 2006). In addition, courts should be mindful of case precedent interpreting the same statutory terms. See Exelon v. DOR, 234 Ill.2d 266, 306, 314 (2009).

To begin with, it is notable that one court has observed that "ownership" is "an amorphous concept." Fidelity Fed. Sav. & L. Ass'n v. Grieme, 112 Ill.App.3d 1014, 1018 (3rd Dist. 1983). Indeed, the Supreme Court has noted that the term "owner" has no fixed meaning applicable to all circumstances. People v. Chicago Title & Trust Co., 75 Ill.2d 479, 489 (1979). Nonetheless, many precedents provide useful definitions of ownership and analytical tools for making an ownership determination. Our courts apply "a realistic approach to ownership." Chicago Patrolman's Ass'n v. DOR, 171 Ill.2d 263, 273 (1996). Several courts have taken as a starting point the Black's Law Dictionary definition: ownership is "the collection of rights allowing one to use and enjoy property, including the right to convey it to others. Ownership implies the right to possess a thing, regardless of any actual control." Detrana, supra, 368 Ill.App.3d at 868 (citing Black's Law Dictionary 1130 (7th ed. 1999); see also Dep't of Transp. v. Anderson, 384 Ill.App.3d 309, 312 (3rd Dist. 2008); People v. Kelley, 2017 IL App (1st) 150340-U, ¶ 24 (unpublished opinion). That definition has led our courts to hold that there are "certain minimum elements that must be present for a person to be considered an owner of property." Anderson, supra, 384 Ill.App.3d at 312.

The minimum elements of ownership are control or occupation (possession in terms of personal property) of the property, and/or possession of the right to control, use, and enjoy the property. See Chicago Title, supra, 75 Ill.2d at 489; Chicago Patrolman's Ass'n, supra, 171

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

Ill.2d at 273 (1996); Anderson, supra, 384 Ill.App.3d at 312; Lombard Pub. Facilities Corp. v. DOR, 378 Ill.App.3d 921, 932 (2nd Dist. 2008). Possession of title alone is insufficient to establish ownership; the aforesaid minimum elements of ownership must be established. Chicago Title, supra, 75 Ill.2d at 489; Chicago Patrolman's Ass'n, supra, 171 Ill.2d at 273 (1996); Anderson, supra, 384 Ill.App.3d at 312. Could the statutory language at issue here be more expansive than that accorded in these precedents? The law clearly suggests not. Tax laws are to be construed strictly against the government and in favor of the taxpayer, and in the case of doubt, construed most strongly against the government and in favor of the taxpayer. Revzan v. Nudelman, 370 Ill. 180, 184 (1938); Chicago Bears Football Club v. Cook County DOR, 2014 IL App (1st) 122892, ¶ 26. Thus, we can conclude that aforesaid elements comprising ownership are applicable in this case.

As shown, there was no evidence indicated by the County that the other fuel companies in Marathon's book transfer transactions obtained either control or possession of fuel from Marathon. Vega's testimony that "ownership" changed and Michals's testimony that the existence of "generic Chicago pipeline FOB Chicago" in the matching agreement showed the creation of a "right" of ownership were mere conclusions of fact opined without foundation.[15] The County's misrepresentation of the cash settlements as taxable sales is a fruitless attempt to force a square peg into a round hole. The argument that the transactions were really "sales", which is dependent upon ignoring or misconstruing the data listed on the ISR and the testimony showing cash settlements, is without merit and lacks any evidentiary support.

[15] Indeed, it is telling that Vega and Michals were not on the same page in drawing their starkly differing conclusions on how the documents evidenced an alleged change in ownership.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

The sole remaining suggestion that there was evidence of a change in ownership is the effect of the contract which predicates the book transfer transaction, such as the Sunoco matching buy/sell agreement (Respondent's Ex. No. 4) discussed above. Both the ALJ and the County believe that the matching agreement creates rights in fuel already in Marathon's inventory. ALJ Dec., p. 20; Def.Br., pp. 16, 18-19. As discussed, the County argues that the FOB Chicago clause shows that the agreement created rights to the fuel for Sunoco. And as shown, there is no basis for this conclusion based either in the terms of the agreement itself or in any other evidence at the hearing. Also as discussed, the terms of the matching agreement make reference to a future delivery of fuel, and the agreement is then superseded by a book transfer letter, the agreement confirming the cash settlement between the parties, entered before the anticipated delivery date. See pp. 26-27, 51, supra. Also as stated above, there is no evidence that any actual "delivery" occurred by the delivery due date, and, to the contrary, a book transfer agreement was reached before the delivery due date, and payment was made under the book transfer letter agreement (per the invoice number) and not the matching agreement. See pp. 26-27, 41-43, 51, supra. The Sunoco matching agreement cannot be viewed apart from the succeeding book transfer letter and related documentation, the latter of which show that no "rights" to any fuel were ever acquired by Sunoco. Moreover, one cannot consider the matching agreement and the succeeding contractual documentation apart from the testimony of Marathon's witnesses, who testified that when a forward contract is settled in a book transfer transaction, logistical costs are saved, no rights in any of Marathon's inventory is created, and no fuel is transferred, moved, or delivered. See pp. 8-10, 26-31, supra. Thus, under these circumstances, at the time of the transaction, i.e., the issuance of and payment on the invoice to Sunoco set forth

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

on the ISR, Sunoco had no control or possession of any of Marathon's fuel and had no right to control, use, or enjoy the fuel, and no evidence to the contrary appears in the record.

Even if arguendo one were to view Sunoco's position in light of the matching buy/sell agreement alone, any rights to fuel Sunoco would obtain would be prospective only, ascertainable only at the time of future delivery. CCDOAH 8866-67. The right to property rights in the future is insufficient to establish ownership. Grieme, supra, 112 Ill.App.3d at 1018-19 (as a matter of law, an agreement for deed in and of itself is insufficient to establish a "change in ownership").

The ALJ suggested that parties to a Marathon book transfer, due to the existence of contracts in the process like the Sunoco matching agreement, would have rights to fuel in the future. ALJ Dec., p. 20 ("[Because the Sunoco matching agreement included gasoline not saleable to consumers, it] left open the obvious possibility that the gasoline referenced in [Respondent's] Exhibit 4 might be sold at retail at a later time.") This wisp of a possibility clearly falls into the category, at best, of a future right to some fuel. Again, a contractual right to future possessory right is insufficient to establish the existence of "ownership". Grieme, supra, 112 Ill.App.3d at 1018-19. More fundamentally, the ALJ's observations are completely unsupported by the record. It ignores the real relationship of the matching agreement to the book transfer transaction explained above.[16] Thus, the ALJ's description of the meaning of the contracts is erroneous. Accordingly, the ALJ's decision cannot support the proposition that the matching agreement created rights which satisfy the minimum elements necessary to establish

[16] As Freeman testified, and as the Sunoco documents reveal, the matching buy/sell agreement is a predicate, or a first step, to the book transfer settlement. See pp. 8-10, 26-27, 51, supra. Immediately after the matching agreement, the book transfer letter is created, which results in the settlement, the book transfer transaction. Id.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

ownership of fuel on the part of Sunoco. In short, the record shows that nothing contained in any contractual arrangement between Marathon and its purchasers, such as Sunoco, occurring in a book out transaction, created any rights in the purchasers. Therefore, nothing in the record supports a finding that the purchasers had present ownership rights in fuel at the time of the transactions assessed.

Marathon sustained its burden of proof in establishing that in its book transfer transactions, no ownership rights transferred to or were obtained by any other party. The County did not present or identify any evidence to the contrary. The record does not contain any evidence to the contrary. Indeed, the argument that ownership transferred is based on faulty premises, as shown, and amounts to mere speculation. Because the record does not support the legal conclusion that there was any transfer of ownership in the transactions at issue, the transactions do not fall within that clause of § 74-471. Any decision to the contrary would be clearly erroneous. Accordingly, the "transfer of ownership" prong of the County's argument is without merit.

The County's sole remaining argument that the transactions were taxable as sales as defined under § 74-471 is that in collecting money from buyers under invoices issued in the book transfer transactions, Marathon "disposed of" fuel.[17] Def. Br., p. 11. As stated, § 74-471 also provides that "[i]n every case where [fuels] are exchanged, given or otherwise disposed of, it shall be deemed to be sold." The County argues that when Marathon was paid on its book transfer invoices, "it is clear that the fuel was sold or 'otherwise disposed of' under the plain meaning of Section 74-741… ." Def. Br., p. 11. The County does not bother to explain how fuel

[17] The ALJ does not appear to have made any finding whatsoever on this point, sticking instead to the transfer of ownership theory. See ALJ Dec., p. 10.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

was "disposed of" in these transactions. It appears to rest on the assumption, much like Vega's and Michals's assumptions, that if there was a payment on an invoice, then fuel was disposed of. See id. This would constitute the same fallacy as the conclusion, based on no evidence, that a payment of money alone constitutes a change in ownership, a premise necessarily based on complete disregard of the evidence of cash settlement. Accordingly, the same discussion above will apply to the "disposed of" argument. See pp. 35-41, 45-52, 55-68, supra. Even though the argument is devoid of any explanation, a dictionary reference should be considered. The Merriam Webster on line dictionary provides the following definition for "dispose of": "1(a)(1): to get rid of, (a)(2): to deal with conclusively, 1(b): to transfer to the control of another, 2: to place, distribute, or arrange especially in an orderly manner." https://www.merriam-webster.com/dictionary/dispose. The dictionary definition plainly suggests movement of the object of the verb, so the same determination and discussion regarding whether transfer of possession or ownership is evident in the record applies with equal force here. There is no evidence in the record that fuel was disposed of.

But even more to point, in a book transfer transaction, something was disposed of, and that was not fuel but the original forward contract. The book transfer transactions, as cash settlements, ended the parties' obligations under a designated forward contract to purchase fuel. Once the book transfer agreement was reached, no fuel was sold. So clearly, what was "disposed of" was the forward contract or the obligation to purchase under the forward contract. This settling of the obligation to purchase in the future, as discussed, was the "value" obtained when the payment was made, a concept that the ALJ and the County cannot either comprehend or accept. Fuel was not disposed of, and therefore the book transfer transaction does not come

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

under the "disposed of" clause of the Ordinance, which, by its plain language, covers disposal of fuel only.

Thus, there is no evidence in the record that when the book transfer transactions occurred, either a transfer of ownership or possession occurred or fuel was exchanged, given, or disposed of. Accordingly, the book transfer transactions were not sales of fuel as defined in § 74-471 of the Gas Tax Ordinance. Because they were not sales of motor fuel, as so defined, the transactions were not taxable under the Ordinance. The ALJ's decision to the contrary was patently unreasonable due to the evidence in the record, clearly erroneous, and an incorrect application of the law.

Before the Court lays to rest an analysis of whether the transactions, based on the record, were taxable, the County's convoluted assertions as to how the book transfer transactions were allegedly structured should be addressed. On more than one occasion, the County has asserted that the book transfer transactions involved two separate transactions. Def. Br., pp. 1, 7, 10. Specifically, the County has stated that "the book out transactions [occur] after the taxable transactions at issue." Id. at 1, 7. The County argued that Marathon rightly lost its case before the ALJ because it never produced documentary evidence to show "how the book out transactions after the taxable transactions at issue in this proceeding impact those taxable transactions when Marathon sells… ." Id. at 7. Referring specifically to Freeman's testimony about the various circumstances under which a book transfer would arise, including the Sunoco matching buy-sell agreement resulting in a book transfer, the County argued that "these transactions happen after Marathon sells to an unregistered distributor [such as Sunoco], or, in other words, the transactions after the taxable transactions at issue in this proceeding." Id. at 10. In advancing this argument, the County completely misconstrues the evidence. What the County

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

called the "book out transaction" was the alleged "taxable" transaction. That is, the transactions identified in the Revised Assessment as subject to the fuel tax were the very same book transfer transactions described by Freeman. Each book transfer transaction was identified by an invoice number. As Freeman testified, that invoice number is generated once an agreement to reduce the deal to a book transfer is reached, and not before. See pp. 8-10, 26-27, 51, supra.

If one could characterize the process as two separate transactions, which itself is inaccurate, then the "book out transaction" is actually the last of the two transactions. The evidence revealed absolutely no prior sales to unregistered distributors which were taxable and identified in the Revised Assessments. In stating that such sales did occur, the County makes a false and unsupported statement. As shown above, the only agreement preceding a book transfer transaction was the initial forward agreement to purchase fuel, which agreement is settled by the book transfer transaction itself. In the Sunoco book transfer example, there was an additional agreement after the initial forward contract, that being the matching buy/sell agreement, which was later reduced to the book transfer agreement (shown by the book transfer letter), which in turn was then documented as the book transfer transaction cited in the Revised Assessment. The payment that was made was made on the book transfer invoice, not on any other agreement (or at least none ever identified by the County). Again, no transfer of ownership or possession of fuel occurred upon that payment, and fuel was not disposed of by that payment. The County's fallacious assertions serve only to confuse the matter. Worse, they throw into high relief the lack of substance in the County's argument that the transactions were taxable sales. In the end, having no evidence to show sales occurred, the County has attempted to embroil the ALJ and the Court in a puzzle over semantics. Such a strategy is not persuasive here.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

Having determined that the book transfer transactions, being mere cash settlements of unfilled forward contract obligations, do not constitute sales of motor fuel under the Gas Tax Ordinance, the issue of whether the payment of cash settlements by unregistered distributors provides an additional basis, or an alternative basis, to impose the Gas Tax can be easily disposed of. Only sales of motor fuel to unregistered distributors subject the seller to the Gas Tax, under the provisions cited by the County. § 74-472(c)(3). A predicate to such a tax is the fact that the transaction must be a sale of motor fuel. Id. Because the book transfer transactions at issue did not constitute sales of motor fuel, the fact that the payors of the cash settlements were not registered distributors in Cook County is irrelevant. Moreover, their status as unregistered distributors did not convert these non-taxable transactions into taxable transactions. Even Vega admitted that if nothing occurred within Cook County related to the transaction, the unregistered distributors would not be subject to the Gas Tax. CCDOAH 8248. Because the transactions at issue did not constitute sales under § 74-471, the involvement of payors who were unregistered distributors did not render them taxable, and § 74-472(c)(3), in and of itself, does not render them taxable. For these reasons, the ALJ's finding that the parties paying Marathon for the book transfers were unregistered distributors, and the ALJ's commensurate decision that such transactions were taxable because they were unregistered distributors, are clearly erroneous and a misapplication of the law.[18]

Circling back to the ALJ's excellent description of the County's Gas Tax regime, it should be clear that Marathon's book transfer transactions were not the sale of motor fuel as

[18] Indeed, the ALJ based her conclusions regarding the payments by unregistered distributors on the premise that the transactions were sales because a transfer of ownership had occurred. As discussed, these conclusions regarding sale and ownership were clearly erroneous. See pp. 45-47, 48-52, 55-70, supra.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

defined by the Gas Tax Ordinance because they did not involve the sale or transfer of motor fuel destined for ultimate retail sale in Cook County. The language of the Gas Tax Ordinance does not cover cash settlements of forward contracts to purchase fuel; it cannot be stretched to embrace these transactions. There was no evidence in the record to the contrary. The ALJ's decision that they were taxable sales was clearly erroneous and must be reversed.

Because the Court has concluded that the decision below was clearly erroneous and that the record shows that the transactions identified in the Revised Assessments, the book transfer transactions, were not subject to the Gas Tax, the Court need not address the various other arguments presented by Marathon as a basis for reversing the decision below.

II. CONCLUSION

Under either the clearly erroneous or the manifest weight of the evidence standards, the ALJ's decision requires reversal. The County's Revised Assessments failed to meet minimum standards of reasonableness. In the alternative, Marathon met its burden of proof to support its protest and proved that the transactions in questions were mere cash settlements of forward contracts and not sales of motor fuel. The decision otherwise was both against the manifest weight of the evidence and clearly erroneous. Based on the evidence, the transactions in question did not come under the category and definition of sales as set forth in the Gas Tax Ordinance, and as assessment of them as taxable under the Ordinance is not authorized by law. For these reasons, the ALJ's decision constituted reversible error and must be reversed, and judgment will be entered in favor of Marathon. Goldfarb, supra, 411 Ill. at 579. Due to this decision, there is no cause to address the other objections made by Marathon to the ALJ's decision.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

ORDER

IT IS HEREBY ORDERED THAT:

The findings, decisions, and order of the Administrative Law Judge of the Cook County Department of Administrative Hearings finding liability in favor of Defendants the County of Cook and the Cook County Department of Revenue and against Plaintiff Marathon Petroleum Company, LP is REVERSED and VACATED, and

This matter is remanded to the Cook County Department of Administrative Hearing to enter such orders as necessary to VACATE the September 9, 2019 finding of liability of unpaid and overdue gasoline and diesel fuel tax and the September 30, 2019 findings, decisions, and order imposing fines, costs, and penalites, to AFFIRM and FIND IN FAVOR of Plaintiff Marathon Petroleum Company's request for relief under its petition and protest, and to enter any such other orders not inconsistent with this Opinion and Order as necessary or required under law.

The hearing date of May 20, 2021 is stricken.

Date: May 14, 2021

ENTER:

_____
Hon. John J. Curry, Jr.
Judge Presiding

Order of Court

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

In the Department of Administrative Hearings
Cook County, Illinois

County of Cook (Department of Revenue), Petitioner	)	
v.	)	RD-16011 and RG-16010
BP Products North America, Inc., Respondent	)	

Opinion and Order

The Business of BP Products North America, Inc. ("BP North America")

BP North America, at all relevant times, was part of a larger entity known as British Petroleum, an international energy business. At all relevant times, the energy at the core of British Petroleum's business was hydrocarbons, the raw material from which gasoline and diesel fuel are produced. Tr. April 20, 2021, at 498-99.

British Petroleum, at all relevant times, extracted crude hydrocarbons from beneath the earth's surface; refined the extracted hydrocarbons into finished products (e.g., gasoline, diesel fuel, jet fuel, asphalt, wax, etc.); and sold the finished products on the open market. Tr. April 20, 2021, at 498-99.

BP North America, at all relevant times, marketed gasoline and diesel fuel in the continental United States, including the mid-west, east coast, and west coast. Tr. April 21, 2021, at 694. At all relevant times, BP North America provided gasoline and diesel fuel to British Petroleum-branded retail outlets, i.e. service stations. Tr. April 21, 2021, at 694. In addition, at

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

all relevant times, BP North America sold gasoline and diesel fuel to "unbranded" service stations. Tr. April 21, 2021, at 694.

BP North America, at all relevant times, did business in Cook County as a distributor of gasoline and diesel fuel. As required by local ordinance[1], BP North America was registered with the Cook County Department of Revenue ("DoR") as a distributor. DoR Exh. 1 at 64[2] (listing BP North America's DoR-issued tax registration number as 793076). Also at all relevant times, BP North America filed tax returns with and remitted tax to DoR. DoR Exhs. 12 and 13; Tr. April 19, 2021, at 55.

The Tax at Issue

Cook County imposes a tax on the retail sale of gasoline and diesel fuel (hereinafter, "gas tax"). Gas Tax Ordinance § 74-472. The gas tax is imposed on the consumer of gasoline or diesel fuel – variously referred to in the Ordinance as the consumer, purchaser, and end-user. Gas Tax Ordinance §§ 74-471, 74-472(a), (b), and (c). By explicit language, the tax is not imposed on distributors of gasoline and diesel fuel. Gas Tax Ordinance § 74-472(a) ("The tax is to be paid by the purchaser, and nothing in this [Ordinance] shall be construed to impose a tax upon the occupation of distributors . . . ."). Despite being a tax on the consumer of gasoline or diesel fuel[3], the Ordinance places a collection obligation on Cook County distributors of such fuel whenever a distributor sells[4] gasoline or diesel fuel directly to a Cook County consumer, a Cook County

[1]Code of Ordinances, Cook County, Illinois, Cook County Retail Sale of Gasoline and Diesel Fuel Tax Ordinance ("Gas Tax Ordinance" or "Ordinance"), § 74-474 (2021).
[2]DoR's exhibit 1, along with 13 other exhibits and a separate exhibit 15, was admitted by stipulation. Joint Pre-Trial Stipulation of Exhibits ¶¶ 4, 6; Tr. April 19, 2021, at 165-66.
[3]Gas Tax Ordinance § 74-472(b) ("The incidence of and liability for payment of the tax levied in this [Ordinance] is to be borne by the consumer of [ ] gasoline [or] diesel fuel. . . .").
[4]The Ordinance defines "sale" of gasoline or diesel fuel as "any transfer of ownership or possession or both, exchange or barter, conditional or otherwise, in any manner or by any means

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

retailer, or, for purposes of the instant case, another Cook County distributor that is not registered with DoR. Gas Tax Ordinance § 74-472(c).

The Audit

DoR, from time to time, audits individuals and entities doing business in Cook County to ensure compliance with all applicable Cook County taxes. Discharging its tax-compliance responsibilities, DoR audited BP North America. The audit was completed in December 2014. DoR Exh. 3 at 59 and Exh. 5 at 372.

The audit period was January 2006 through and including August 2014. DoR Exh. 8 at 27; DoR Corrected Exh. 10 admitted without objection at Tr. April 20, 2021, at 265. At the conclusion of the audit, DoR issued two assessments – one for gasoline sales in Cook County and one for diesel fuel sales in the County.

The gasoline assessment sought $5,858,237.57 which included tax, interest, and penalties. DoR Exh. 8 at 27. The diesel fuel assessment sought $14,390,445.34 which included tax, interest, and penalties. DoR Corrected Exh. 10.

DoR sent both assessments to BP North America at its corporate office in Houston, Texas, by Federal Express. Joint Stipulation of Facts Regarding Statement of Jurisdiction ("Statement of Jurisdiction") Exhs. A and B. The assessments were placed with Federal Express in a single package with a single tracking number on December 19, 2014. Statement of Jurisdiction Exhs. A and B.

BP North America had 20 days from the date the assessments were placed with Federal Express to contest them. Code of Ordinances, Cook County, Illinois, Uniform Penalties, Interest

---

whatsoever. In every case where gasoline [or] diesel fuel . . . are exchanged, given or otherwise disposed of, it shall be deemed to have been sold." Gas Tax Ordinance § 74-471.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

and Procedures Ordinance ("Uniform Procedures Ordinance"), § 34-80(a) (2021). On January 7, 2015, within the 20-day period, BP North America filed a Protest and Petition for Hearing ("Protest") in which it challenged both assessments.[5]

The parties communicated frequently after BP filed its Protest, and after two years, DoR reduced the amounts it was seeking for under-collected, under-remitted gas tax. DoR Exhs. 4, 6. Specifically, DoR reduced the amount of tax it was seeking on gasoline transactions in Cook County to $4,000,111.41, inclusive of tax, interest, and penalties (DoR Exh. 9), and reduced the amount of tax it was seeking on diesel fuel transactions in the County to $6,195,400.86, inclusive of tax, interest, and penalties (DoR Exh. 11).

The parties made additional refinements to the particulars of their dispute by way of stipulating both to the gallons of gasoline and diesel fuel at issue and the tax amount associated with those gallons. Specifically, 74,020,008 gallons of gasoline and diesel fuel are at issue accounting for $4,441,200.48 in tax to which interest and penalties would be added if DoR prevails. Exh. 1 to Supplemental Joint Stipulation Identifying Assessed Quantities by Issue ("Stipulation of Quantities by Issue").

The Principal Issue in Dispute[6]

DoR's Position

DoR maintains that during the audit period BP North America sold gasoline and diesel fuel to various Cook County distributors that were not registered with DoR as distributors.

[5]A timely filed protest vests the Cook County Department of Administrative Hearings with jurisdiction to resolve the issues raised except for two: i) the tax ordinance underlying the assessment is unconstitutional on its face and ii) the Cook County Board of Commissioners lacked authority to enact the ordinance. Uniform Procedures Ordinance § 34-81(a). Neither jurisdictional restriction is present in the instant case.

[6]There are three ancillary issues addressed *infra* at 21-24, 39-42.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

Pointing first to the Gas Tax Ordinance, DoR contends that the Ordinance required BP to collect and remit gas tax on all such sales. Gas Tax Ordinance § 74-472(c) ("[T]he tax levied by this [Ordinance] shall be collected by each distributor or supplier who sells gasoline [or] diesel fuel . . . to: [a]nother [g]as [d]istributor doing business in the County that is not holding a valid registration certificate."). Next, DoR points to BP North America's own records related to the audit period that: i) identified BP North America as a seller of gasoline and diesel fuel; ii) identified buyers of gasoline and diesel fuel; iii) labelled the transactions as sales; and iv) indicated that the sales originated in Cook County.

BP North America's Position

BP North America maintains that the overwhelming majority of the transactions in dispute – 64 in total – were not sales. According to BP North America, in lieu of actually selling and buying gasoline or diesel fuel, the parties to the transactions (often referred to as counterparties) elected to settle the transactions with monetary payments.[7] In other words, BP North America contends that contracts for the sale or purchase of gasoline or diesel fuel can be honored by performance – actually transferring gasoline or diesel fuel between counterparties – or by monetary payments between counterparties. According to BP North America, only the former are subject to the gas tax because only the former are sales within the meaning of the Gas Tax Ordinance.

[7]At all relevant times, BP North America referred to such settlements as "book outs" or "book transfers," synonymous and interchangeable terms for BP North America. Tr. April 20, 2021, at 400-01; Tr. April 21, 2021, at 728; Tr. April 22, 2021, a 765.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

FINDINGS OF FACT

SAP Reports

1. At the time of the audit, BP North America used financial accounting software called "SAP" – System Analysis Program. Tr. April 20, 2021, at 360, 385.

2. BP North America's general ledger was contained within SAP. Tr. April 21, 2021, at 613, 641, 646.

3. BP North America's general ledger contained information regarding assets and liabilities and was used to generate financial statements, balance sheets, income statements, and similar financial documents. Tr. April 21, 2021, at 646.

4. Information in the SAP enabled BP North America to maintain accurate records for "audit purposes, regulatory purposes, shareholder purposes." Tr. April 20, 2021, at 433.

5. One component of SAP generated invoices. Tr. April 21, 2021, at 641-42, 647.

6. During the audit, BP North America provided DoR's auditor with SAP reports for gasoline and diesel fuel transactions occurring in Cook County for each year of the audit period. Tr. April 19, 2021, at 41, 56.

7. All of BP North America's Cook County gasoline and diesel fuel transactions were included in the SAP reports reviewed by the auditor. Tr. April 19, 2021, at 57.

8. DoR's initial gasoline and diesel fuel assessments issued in December 2014 were based solely on the auditor's review of the SAP reports. Tr. April 19, 2021, at 95, 97; Tr. April 22, 2021, at 835.

9. The SAP reports contained the following information: i) transaction type, either a sale or a sale return (Tr. April 19, 2021, at 83); ii) seller name (BP North America); iii) buyer name; iv) transaction origin; v) destination of the gasoline or diesel fuel involved in each transaction;

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

and vi) quantity of gasoline or diesel fuel involved in each transaction. DoR's Exh. 2; BP North America's Exhs. 83 and 84, admitted by ¶ 5 of Joint Pre-Trial Stipulation of Exhibits.

10. Because of the size of the SAP reports, the auditor created a spread sheet using information contained in the reports. Tr. April 19, 2021, at 58, 63; *see also* DoR Exh. 2.

11. The actual SAP reports tendered to the auditor by BP North America were not introduced into evidence at the contested evidentiary hearing. Tr. April 19, 2021, at 59, 170-71, 172; Tr. April 22, 2021, at 803-04.

12. Based on information taken from the SAP reports, the auditor determined that BP North America sold gasoline and diesel fuel in Cook County to Cook County distributors that were not registered with DoR. Tr. April 19, 2021, at 77-78, 80.

13. Sixty four transactions listed in the SAP reports for the audit period were included in the initial assessments DoR issued to BP North America in December 2014.

14. The same sixty four transactions were included in DoR's revised assertions of tax liability. Exh. 1 to Stipulation of Quantities by Issue.

Characteristics of a Sale or Purchase of Gasoline or Diesel Fuel

1. Typically, in a transaction for the sale or purchase of gasoline or diesel fuel, title and possession transfer at the time fuel moves from an origination point to a transporter, i.e., a pipeline, barge, rail car, or truck. In other words, transfer of title and possession occur simultaneously. Tr. April 21, 2021, at 657, 695-96; *see also* Tr. April 21, 2021, at 736.

2. Upon occasion, title and possession transfer at the destination point when gasoline or diesel fuel moves from the transporter to the buyer. Tr. April 21, 2021, at 657-58.

3. Whether at the point of origination or the point of destination, both title and possession hinge on movement.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

4. Movement can be: i) from a refinery to a pipeline (Tr. April 21, 2021, at 685, 695, 701); ii) from a refinery to a vessel such as a barge (Tr. April 21, 2021, at 695); iii) from a bulk-storage location to a pipeline (Tr. April 21, 2021, at 702); iv) from a pipeline to a terminal (Tr. April 21, 2021, at 689, 698-99); and v) from a terminal to a rail car or truck (Tr. April 21, 2021, at 685-86, 688-89).

5. Movement of gasoline and diesel fuel always impacts inventory levels. Tr. April 21, 2021, at 734-35; Tr. April 23, 2021, 913-18, 922-23, 930.

6. In the case of a sale, the seller's inventory decreases by the quantity of product sold in the transaction. Tr. April 23, 2021, at 922-23, 930.

7. In the case of a purchase, the buyer's inventory increases by the quantity of product purchased in the transaction. Tr. April 23, 2021, at 923, 930.

8. Whenever, wherever, and by whatever means gasoline and diesel fuel move, the movement is documented by issuance of a custody-transfer document. Tr. April 20, 2021, at 357-58; Tr. April 22, 2021, at 782-83; Tr. April 23, 2021, at 917, 923-25, 1001-01.

9. A custody-transfer document reflects the means by which gasoline and diesel fuel move, also known as mode of transportation. Tr. April 22, 2021, at 857-58.

10. Modes of transportation are pipeline, barge or other vessel, rail car, and truck. Tr. April 22, 2021, at 858.

11. When gasoline and diesel fuel move via pipeline, the custody-transfer document is called a meter ticket. Tr. April 20, 2021, at 357; Tr. April 21, 2021, at 734; Tr. April 22, 2021, at 858; Tr. April 23, 2021, at 924.

12. When gasoline and diesel fuel move by vessel, the custody-transfer document is called a gauger report. Tr. April 20, 2021, at 357; Tr. April 22, 2021, at 751, 857-58.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

13. When gasoline and diesel fuel move at a terminal, the custody-transfer document is called a bill of lading. Tr. April 20, 2021, at 357; Tr. April 22, 2021, at 751, 857.

14. When there is no movement of gasoline or diesel fuel, there is never a custody-transfer document. Tr. April 23, 2021, at 922; *see also* April 20, 2021, at 357.

Cook County Pipeline Operation

1. During the audit period, several pipelines ran through Cook County, with West Shore Pipe Line being a major one. BP North America Exh. 69, admitted over objection at Tr. April 28, 2021, at 1142; Tr. April 21, 2021, at 697, 700.

2. Typically and during the audit period, pipelines transported bulk quantities of gasoline and diesel fuel. Tr. April 21, 2021, at 683-84.

3. During the audit period, a bulk transaction on the West Shore Pipe Line ranged from 5,000 to 75,000 barrels.[8] BP North America Exhs. 1 through 64, inclusive, admitted by ¶ 2 of Amended Joint Stipulation.

4. During the audit period, BP North America could not inject from a location in Cook County gasoline or diesel fuel into a pipeline running through Cook County such as the West Shore Pipe Line. Tr. April 21, 2021, at 702-03.

5. "Injecting" means placing petroleum products into a pipeline and is sometimes referred to as "originat[ing] product into the pipeline." Tr. April 21, 2021, at 702; *see also* Tr. April 21, 2021, at 698-99.

6. During the audit period, BP North America owned two terminals in Cook County -- the Harlem Avenue Terminal in Forest View and the O'Hare Terminal in Des Plaines. Tr. April 21, 2021, at 687-88.

[8]A barrel contains 42 gallons.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

7. During the audit period, neither the Harlem Avenue Terminal nor the O'Hare Terminal could inject bulk quantities of gasoline or diesel fuel into a pipeline running through Cook County. Tr. April 21, 2021, at 688, 702-03.

8. During the audit period, the Harlem Avenue Terminal and the O'Hare Terminal received gasoline and diesel fuel but neither could receive such fuel in bulk quantities. Tr. April 21, 2021, at 688-89.

9. During the audit period, there were through stations in Cook County, also known as pipeline stations, that facilitated the movement of gasoline and diesel fuel through a pipeline to a destination point where the gasoline or diesel fuel exits the pipeline. BP North America Exh. 69; Tr. April 21, 2021, at 702.

10. During the audit period, gasoline and diesel fuel could not be injected, i.e., originated, into a Cook County pipeline at a pipeline station, and gasoline and diesel fuel could not be taken off, i.e., received from, a pipeline at a Cook County pipeline station. Tr. April 21, 2021, at 702-03.

11. During the audit period, the pipeline stations in Cook County did not originate or receive gasoline and diesel fuel because there were no tanks or other storage facilities at pipeline stations. Tr. April 21, 2021, at 702.

12. Sixty one of the transactions referenced in BP North America's exhibits 1 through 64, inclusive, involved bulk transactions of gasoline or diesel fuel of between 10,000 and 75,000 gallons to be moved by pipeline, most often by the West Shore Pipe Line.[9] BP North America Exhs. 1 through 64, inclusive.

[9]Three of the sixty four transactions involved 5,000 gallons of gasoline or diesel fuel. BP North America Exh. 9 at 139, Exh. 10 at 155, and Exh. 25 at 428.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

Other Terminal Locations

1. During the audit period, BP North America did not own the Valero Blue Island Terminal or own gasoline or diesel fuel at the Valero Blue Island Terminal. Tr. April 21, 2021, at 689-91.

2. During the audit period, BP North America did not own gasoline or diesel fuel at the NuStar Blue Island Terminal. Tr. April 21, 2021, at 692-93.

3. During the audit period, the Apex Forest View Terminal, located next to the Harlem Avenue Terminal, held only asphalt and diesel fuel. Tr. April 21, 2021, at 693.

4. During the audit period, BP North America did not own diesel fuel at the Apex Forest View Terminal. Tr. April 21, 2021, at 693.

Exchange Transactions

1. In an exchange transaction, two parties agree to allow their respective customers to secure gasoline or diesel fuel from each others' supply. Tr. April 21, 2021, at 526-27; Tr. April 23, 2021, at 926-27.

2. As an example, party A needs gasoline or diesel fuel for a customer in a particular location, but party A does not have fuel at the location that would meet the customer's requirements.

Party A finds another party – party B, a counterparty – that has fuel the customer requires at the location specified by the customer. Party B agrees to allow party A's customer to pick up the fuel at Party B's facility.

Party B, however, requires gasoline or diesel for a customer at a different location, and party A has fuel at that location. Party A, therefore, agrees to allow party B's customer to pick up the fuel at party A's facility. Tr. April 21, 2021, at 526-27.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

The result: Party A and party B have exchanged gasoline or diesel fuel, not directly but through their customers.

3. In an exchange transaction, transfer of title and possession of gasoline or diesel fuel take place. Tr. April 23, 2021, at 999.

4. In an exchange transaction, both parties' inventory levels change because there is movement of gasoline or diesel fuel. Tr. April 21, 2021, at 532, 542; Tr. April 22, 2021, at 784-85; Tr. April 23, 2021, at 927-29.

5. In an exchange transaction, custody-transfer documents are created and invoices generated. Tr. April 21, 2021, at 529, 540-41.

6. In an exchange transaction, the charge to each party is minimal, reflecting differences in the quality of gasoline or diesel fuel exchanged, mode of transportation used in each side of the exchange, and where each side of the exchange occurred. Tr. April 21, 2021, at 541-42, 544; Tr. April 22, 2021, at 780.

7. In an exchange transaction, there is no charge for the actual gasoline or diesel fuel involved. Tr. April 21, 2021, at 541-42; Tr. April 22, 2021, at 780-81; *see also* Tr. April 23, 2021, at 929-30.

8. While the Gas Tax Ordinance treats an exchange transaction as a sale, neither the Ordinance nor DoR has defined such a transaction. Gas Tax Ordinance § 74-471; Tr. April 23, 2031, at 947.

9. Because an exchange transaction involves some charges to each party, however minimal, and because the Gas Tax Ordinance deems an exchange transaction a sale subject to the gas tax, exchange charges are taxable.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

10. None of the sixty four transactions contained in BP North America's exhibits 1 through 64, inclusive, involved an exchange. Tr. April 21, 2021, at 545.

"Barter," Given," and "Disposed Of"

1. The Gas Tax Ordinance includes "barter" in its definition of "sale," but the Ordinance does not define the term. Gas Tax Ordinance § 74-471.

2. DoR's witnesses did not define the term.

3. One of BP North America's witnesses attempted a definition but to little effect. Tr. April 28, 2021, at 1056-58.

4. In the absence of a definition, the term will be given its plain and popularly understood meaning. *See, e.g., Metropolitan Life Ins. Co. v. Hamer*, 2013 Il 114234 ¶ 20 ("Where a term is undefined, we presume that the legislature intended the term to have its popularly understood meaning. It is appropriate to employ a dictionary to ascertain the meaning of an otherwise undefined word or phrase."); *Exelon Corp. v. Il. Dept. of Rev.*, 234 Ill. 2d 266, 274-75 (2009) ("Absent statutory definitions indicating a different legislative intent, words in a statute are to be given their ordinary and popularly understood meaning. To ascertain the ordinary and popular meaning of words, this court sometimes uses the dictionary as a resource."). *See also Gem Electronics of Monmouth, Inc. v. Dept. of Rev.*, 183 Ill. 2d 470, 477-78 (1998).

5. "Barter" is defined as the "exchange of one commodity or service for another without the use of money" (Black's Law Dictionary, 11th ed. at 184); "trading goods or commodities for other goods or commodities" (West's Encyclopedia of American Law, 2nd ed. 2008) and at www.thefreedictionary.com, last accessed November 29, 2021); "to trade goods or services in exchange for other goods or services" (www.merriam-webster.com, last accessed November 29,

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

2021); "to give (goods or services) in return for other goods or services" without using money (Webster's New World College Dictionary, 4th ed. 2002, at 118); "to exchange in trade, as one commodity for another" (Webster's New Universal Unabridged Dictionary, 1996, at 171).

6. Under the ordinary and popularly understood meaning of barter, no bartering occurred in this case, particularly in the sixty four transactions contained in BP North America's exhibits 1 through 64, inclusive (Tr. April 20, 2021, at 313), and DoR has not contended otherwise.

7. The Gas Tax Ordinance deems the giving of gasoline or diesel fuel a taxable transaction. Gas Tax Ordinance § 74-471.

8. There is no evidence that any of the sixty four transactions contained in BP North America's exhibits 1 through 64, inclusive, involved BP North America giving gasoline or diesel fuel to a counterparty or receiving a gift of gasoline or diesel fuel from a counterparty.

9. At no time has DoR contended that BP North America either gave gasoline or diesel fuel to a counterparty or was the recipient of a gift of gasoline or diesel fuel from a counterparty.

10. The Gas Tax Ordinance deems the disposition of gasoline or diesel fuel a taxable transaction. Gas Tax Ordinance § 74-471 ("In every case where gasoline [or] diesel fuel [is] . . . otherwise disposed of, it shall be deemed to have been sold.").

11. "Disposed of" is not defined in the Gas Tax Ordinance. § 74-471.

12. The supervisor of the BP North America audit, called as an adverse witness, testified that "disposed of" requires physical, tangible property, but beyond that, the witness did not define "disposed of." Tr. April 23, 2021, at 980.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

13. One witness for BP North America agreed with DoR's witness that "disposed of" requires tangible property. Tr. April 28, 2021, at 1056 ("It's hard to dispose of anything unless you have it.").

14. The plain and ordinary meaning of "dispose of" is to destroy, discard, throw away, waste, or otherwise get rid of something.[10] *See, e.g.,* American Heritage Dictionary of the English Language, 5th ed. (2016) and at www.thefreedictionary.com, last accessed November 29, 2021; Webster's New World College Dictionary, 4th ed. (2002), at 415 ("to get rid of; throw away").

15. There is no evidence of record that BP North America destroyed, discarded, threw away, wasted, or otherwise got rid of gasoline or diesel fuel during the audit period.

16. While no BP North America witness defined "disposed of," one witness testified that no gasoline or diesel fuel was "disposed of" in any of the sixty four transactions contained in exhibits 1 through 64, inclusive. Tr. April 20, 2021, at 313-14.

"Book Out" Transactions

1. A contract to sell or buy gasoline or diesel fuel must be fulfilled. Tr. April 21, 2021, at 721.

2. At least during the audit period, there were two routes to fulfilling a contract to sell or buy gasoline or diesel fuel: i) by performance, i.e., gasoline or diesel fuel actually moved between the parties or ii) by monetary payment between the parties without movement. Tr. April 21, 2021, at 721, 723.

[10]The auditor assigned to this case agreed, testifying that "disposed of" means to "get rid of something." Tr. April 22, 2021, at 817.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

3. When a contract to sell or buy gasoline or diesel fuel is fulfilled by monetary payment, BP North America called the transaction a "book out" or "book transfer," synonymous terms that BP North America used interchangeably during the audit period. Tr. April 20, 2021, at 400-01; Tr. April 21, 2021, at 728; Tr. April 22, 2021, at 765.

4. In BP North America's exhibits 1 through 64, inclusive, two contracts were involved. In one contract, party A contracted to sell gasoline or diesel fuel to party B. In the other contract, party A contracted to buy gasoline or diesel fuel from party B. Tr. April 20, 2021, at 349.

5. Using the term "book transfer," the contracts underlying the sixty four transactions set out in BP North America's exhibits 1 through 64, inclusive, expressly provided that the contracts could be fulfilled by monetary payment. BP North America Exhs. 1 through 64, inclusive; Tr. April 20, 2021, at 400-01; Tr. April 21, 2021, at 723.

6. During the audit period, a "book out" transaction might take place for a variety of reasons such as: i) pipeline capacity (A "pipeline does not have infinite capacity to move product so it is – it requires that the industry work together to narrow down all of the transactions and only ship the product on the pipeline that physically needs to move from the origin points to the destination points." [Tr. April 21, 2021, at 729]); ii) the buyer did not have the capacity necessary to receive the gasoline or diesel fuel it had contracted to purchase (Tr. April 22, 2021, at 861); iii) the seller did not have access to the gasoline or diesel fuel it had contracted to deliver (Tr. April 22, 2021, at 861); and iv) the buyer no longer needed the gasoline or diesel fuel it had contracted to purchase (Tr. April 23, 2021, at 921).

7. During the audit period, a "book out" transaction generally involved bulk quantities of gasoline or diesel fuel, which in the event of actual performance, would move by pipeline

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

because only a pipeline had the capacity to transport gasoline or diesel fuel in such large quantities. Tr. April 20, 2021, at 342.

8. All of the transactions contained in BP North America's exhibits 1 through 64, inclusive, would have moved by pipeline if the parties had elected to fulfill the underlying contracts by actual performance rather than by monetary payment. BP North America Exhs. 1 through 64, inclusive.

9. In the sixty four transactions contained in BP North America's exhibits 1 through 64, inclusive, no gasoline or diesel fuel moved. Tr. April 21, 2021, at 734; Tr. April 22, 2021, at 779, 858, 863; Tr. April 23, 2021, at 921-22, 1000.

10. Because in the sixty four transactions contained in BP North America's exhibits 1 through 64, inclusive, no gasoline or diesel fuel moved, there was no custody-transfer document for any of the transactions. Tr. April 22, 2021, at 863.

11. A custody-transfer document is issued every time gasoline or diesel fuel moves from a seller to a buyer. Tr. April 20, 2021, at 356-57, 358 ("Q Is a custody document required every time gasoline or diesel moves from BP to a counterparty? A Yes. Q. And would a custody statement be required every time gasoline or diesel moves from a counterparty to BP? A Yes."); Tr. April 21, 2021, at 734; Tr. April 22, 2021, at 750-51, 857-58; Tr. April 23, 2021, at 919-20, 921 ("The custody statement reflects actual physical either [sic] custody transfer or movement of physical molecules of product," e.g., gasoline and diesel fuel.); Tr. April 23, 2021, at 1000-01.

12. In the sixty four transactions contained in BP North America's exhibits 1 through 64, inclusive, the parties' inventories of gasoline or diesel fuel did not change because no movement of gasoline or diesel fuel took place. Tr. April 20, 2021, at 314; Tr. April 21, 2021, at 734-35; Tr. April 22, 2021 at 779; Tr. April 23, 2021, at 922-23.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

13. Because there was no movement of gasoline or diesel fuel in the transactions set out in BP North America's exhibits 1 through 64, inclusive, there was no transfer of title or ownership; no transfer of possession; no exchange; no barter; no giving; and no disposal of gasoline or diesel fuel. Tr. April 20, 2021, at 313-14; Tr. April 22, 2021, at 779; Tr. April 23, 2021, at 922-23.

14. During the audit period, whether a contract to sell gasoline or diesel fuel was fulfilled by actual performance or monetary payment, BP North America, as seller, would issue an invoice to the buyer. BP North America Exhs. 1 through 64, inclusive; Tr. April 20, 2021, at 352; Tr. April 21, 2021, at 646-47; Tr. April 22, 2021, at 778, 857-58.

15. During the audit period, whether a contract was fulfilled by actual performance or monetary payment, if BP North America was the buyer, the seller would issue an invoice to BP North America. BP North America Exhs. 1 through 64, inclusive; Tr. April 20, 2021, at 314-15, 352; Tr. April 22, 2021, at 778, 857-58.

16. In the case of contract fulfillment by actual performance, if BP North America was the seller, the invoice issued to the buyer recorded a mode of transportation – pipeline, vessel, rail car, or truck. Tr. April 20, 2021, at 401-02; Tr. April 22, 2021, at 858-59.

17. In the case of contract fulfillment by monetary payment, if BP North America was listed as seller, no mode of transportation appeared on the invoice generated by BP North America because no movement by any means of transport occurs in a contract fulfilled via monetary payment. BP North America's Exhs. 1 through 64, inclusive; Tr. April 22, 2021, at 858-59.

18. In the case of contract fulfillment by monetary payment if BP North America was listed as buyer, the invoices issued to BP North America often noted that the transaction was a

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

"book transfer," "book," "book out," or other similar term. BP North America Exh. 1 at 16 ("book transfer"), Exh. 3 at 49 ("book"), Exh. 4 at 62 ("book trans"), Exh. 5 at 78 ("book transfer"), Exh. 6 at 93 ("book transfer"), Exh. 7 at 107 ("book transfer"), Exh. 8 at 122 ("book transfer"), Exh. 9 at 140 ("book transfer"), Exh. 11 at 183 ("book transfer"), Exh. 12 at 204 ("book transfer"), Exh. 14 at 242 ("book"), Exh. 15 at 256 ("book"), Exh. 16 at 275 ("book transfer"), Exh. 18 at 305 ("book trans"), Exh. 19 at 323 ("book transfer"), Exh. 21 at 358 ("book transfer"), Exh. 22 at 377 ("book transfer"), Exh. 24 at 411 (book TRSF"), Exh. 25 at 429 ("book"), Exh. 28 at 473 ("book"), Exh. 34 at 567 ("book transfer"), Exh. 35 at 580 ("book transfer"), Exh. 36 at 593 ("book transfer"), Exh. 44 at 701 ("book transfer"), Exh. 46 at 737 ("book transfer"), Exh. 49 at 786 ("book transfer"), Exh. 50 at 803 ("book transfer"), Exh. 52 at 832 ("book transfer"), Exh. 53 at 852 ("book transfer"), Exh. 54 at 868 ("book"), Exh. 58 at 921 ("book transfer"), Exh. 59 at 936 ("book out"), Exh. 60 at 953 ("book out"), and Exh. 63 at 1042 ("book transfer").

19. In the case of contract fulfillment by monetary payment if BP North America was listed as buyer, the invoices issued to BP North America sometimes placed the words "book transfer," "book," or "book out" in the "mode-of-transportation" field or "transport" field. BP North America Exh. 3 at 49, Exh.14 at 242, Exh. 15 at 256; Exh. 24 at 411, Exh. 25 at 429, Exh. 28 at 473, and Exh. 54 at 868.

20. In his testimony, the auditor did not provide a definition of a "book out" transaction but thought it might be a "ledger transaction." Tr. April 22, 2021, at 805.

21. The auditor also testified that he did not consider the definition and explanation of a "book out" transaction offered by BP North America because the SAP reports identified the sixty

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

four transactions contained in BP North America's exhibits 1 through 64, inclusive, as sales, not "book outs." Tr. April 22, 2021, at 808, 809-10, 828.

22. In later testimony, the auditor reaffirmed his reliance on the SAP reports in determining that the sixty four transactions were subject to the gas tax. Tr. April 22, 2021, at 829-30, 832.

23. The supervisor assigned to the BP North America audit did not define a "book out" transaction in his testimony but testified about information he received from the State of Illinois regarding both a "book out" and a "book transfer," which the supervisor appeared to regard as synonymous terms. Tr. April 23, 2021, at 946 ("I look as [sic] book transfer are [sic] book-out similar, in my mind.").

24. The information the supervisor received from the State of Illinois did not match BP North America's explanation of a "book out" transaction. *Compare* DoR Exh. 4 at 8 and Exh. 6 at 303 *with* the testimony of BP North America's witnesses. Tr. April 20, 2021, at 312-14; Tr. April 21, 2021, at 734-35; Tr. April 22, 2021, at 779; Tr. April 23, 2021, at 921, 1000-01.

25. The supervisor also testified about his understanding of the term "book out" from the fuel industry's point of view, but that understanding did not reflect BP North America's explanation of the term since sellers and buyers in its "book out" transactions did not "cancel[ ] out each other's payables and receivables." Tr. April 23, 2021, at 946. All of BP North America's evidence was to the effect that in "book out" transactions, sellers invoice buyers and buyers are expected to pay the invoices they receive. Tr. April 21, 2021, at 735-36.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

Other Disputed Transactions

Lemont Transactions

1. The parties stipulated that DoR assessed gas tax on certain transactions occurring in Lemont, Illinois. Exh. 1 to Stipulation of Quantities Assessed by Issue.

2. The number of gallons assessed was 7,785,703, and the tax amount assessed was $467,142.18. Exh. 1 to Stipulation of Quantities Assessed by Issue.

3. The Lemont transactions took place at a CITGO refinery. Tr. April 21, 2021, at 595; Tr. April 22, 2021, at 785-86.

4. While Lemont is located in three Illinois counties (Cook, DuPage, and Will), the CITGO refinery was located in Will County at the time of the audit and likely still is. Tr. April 21, 2021, at 595-96, 601-02; Tr. April 22, 2021, at 785-86.

5. A witness for BP North America testified that while it is possible that BP North America's records might have listed the Lemont transactions as occurring in Cook County, such a listing would have been incorrect because the address of the CITGO refinery was at all relevant times a Will County address according to Will County property tax records. Tr. April 21, 2021, at 595-96, 602; *see also* Exh. M to Respondent's Post-Hearing Brief in Opposition to the County of Cook's Assessment of Gasoline and Diesel Fuel ("BP North America's Post-Hearing Brief").

6. A witness for DoR, the supervisor of the BP North America audit, was unable to place the CITGO refinery in Cook County. Tr. April 28, 2021, at 1121-22 (By DoR's counsel, "are you aware of facilities related to gasoline or diesel in Cook County in Lemont? A Yes. Q And what are those or what is it? A I'm aware of two facilities in Lemont. Q And could you state what those are for the record, please? A CITGO Refinery and also the IMTT Refinery. Q Okay.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

Do you know which – Is CITGO located in Cook County; do you know? A. IMTT Refinery is in the County of Cook.").

Blue Island Transactions

1. The parties stipulated that DoR assessed gas tax on certain transactions occurring in Blue Island, Illinois, a municipality located in Cook County. Exh. 1 to Stipulation of Quantities Assessed by Issue.

2. The number of gallons assessed was 3,570,305, and the tax amount assessed was $214,218.30. Exh. 1 to Stipulation of Quantities Assessed by Issue.

3. A witness for BP North America testified that there were two terminals in Blue Island during the audit period, the Valero Blue Island Terminal and the NuStar Blue Island Terminal. Tr. April 21, 2021, at 689-93.[11]

4. The same witness testified that BP North America did not own gasoline or diesel fuel at the Valero Blue Island Terminal or the NuStar Blue Island Terminal during the audit period. Tr. April 21, 2021, at 690-92 ("BP was not holding title to any products in the Valero Blue Island facility."); ("did not own any inventory at [the Blue Island] facility during the time period in question."); (did not own any inventory at the NuStar Blue Island Terminal.).

5. The same witness also testified about a terminal in Forest View, Illinois, a municipality located in Cook County. Tr. April 21, 2021, at 693.

6. Aside from BP North America having no inventory at the Forest View terminal during the audit period (Tr. April 21, 2021, at 693), the terminal had nothing to do with the Blue Island transactions since the terminal was in Forest View, not Blue Island.

[11]DoR's witness on this issue, the audit supervisor, did not identify the Blue Island transactions as occurring at either the Valero Blue Island Terminal or the NuStar Blue Island Terminal, only that they occurred in Blue Island. Tr. April 28, 2021, at 1116-19.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

The Louis Dreyfus Energy Services Transactions

1. The parties stipulated that DoR assessed gas tax on transactions involving 2,100,000 gallons of gasoline between BP North America as seller and Louis Dreyfus Energy Services ("Dreyfus") as buyer. Exh. 1 to Stipulation of Quantities Assessed by Issue.

2. The tax amount assessed was $126,000. Exh. 1 to Stipulation of Quantities Assessed by Issue.

3. BP North America issued an invoice for the sale on February 16, 2010, billing Dreyfus a total of $1,879,500 for 1,050,000 gallons of gasoline. BP North America Exh. 79 at 1593. (Exhibit 79 was admitted over objection. Tr. April 28, 2021, at 1144.)

4. On February 17, 2010, BP North America reversed the Dreyfus sale invoice by issuing Dreyfus a credit memorandum in the amount of $1,879,500 for 1,050,000 gallons of gasoline. BP North America Exh. 79 at 1594; Tr. April 21, 2021, at 588-90.

5. A witness for BP North America testified that by assessing gas tax on 2,100,000 gallons of gasoline, DoR actually assessed both the February 16, 2010, sale and the February 17, 2010, credit memorandum that reversed the sale. Tr. April 21, 2021, at 590-91.

6. The audit supervisor on the BP North America file testified that the Dreyfus credit memorandum was not taxed, referring to pages 101 and 124 of DoR's audit file.[12] Tr. April 28, 2021, at 1093-95, 1114-15, 1115-16.

7. There is a discrepancy between page 101 of the audit file and page 124 of the file.

8. Page 101 of the audit file lists the total gallons (2,100,000) involved in an unspecified number of BP North America-Dreyfus transactions, shows that the transactions occurred in February 2010, and treats the transactions as sales.

[12]The audit file was admitted by stipulation. Joint Pre-Trial Stipulation of Exhibits ¶ 3.

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

9. According to page 101 of the audit file, there were no other transactions between BP North America and Dreyfus for the entirety of 2010.

10. Page 124 of the audit file shows an unspecified number of BP North America-Dreyfus transaction totaling 3,150,000 gallons and also shows what appears to be an offsetting transaction of 1,050,000 gallons.

11. The audit supervisor did not explain the discrepancy between page 101 of the audit file and page 124 of the file, but page 101 does not support the supervisor's testimony that the refund was not assessed while page 124 appears to support that testimony.

12. The audit supervisor did not offer any testimony that called into question the competent, credible, and knowledgeable testimony of BP North America's witness Anthony Caputo, whose testimony was based on BP North America's records, to the effect that DoR assessed both the Dreyfus sale and the Dreyfus refund. (Tr. April 21, 2021, at 590-91.)

APPLICABLE LAW

Contested Tax Assessments

An assessment of tax liability is deemed correct, and the party assessed has the burden of rebutting the assessment with documentation and explanatory testimony.[13] *See, e.g., Il. Cereal Mills, Inc. v. Dept. of Rev.*, 99 Ill. 2d 9, 15-16 (1983) (Once a tax authority presents a determination of tax liability, "the burden shift[s] to the plaintiff taxpayer to overcome the *prima facie* evidence by showing the transaction[s] to be nontaxable."); *Elkay Mfg. Co*, 202 Ill. App. 3d

[13]Testimony denying liability or merely asserting that a tax assessment is wrong is insufficient to rebut the assessment. *Chak Fai Hau v. Dept. of Rev.*, 2019 Il App (1st) 172588 ¶ 54 (A taxpayer or tax collector's testimony denying the accuracy of a tax assessment or raising hypothetical weaknesses in the assessment cannot rebut the assessment as a matter of law.); *Elkay Mfg. Co. v. Sweet*, 202 Ill. App. 3d 466, 472 (1st Dist. 1990) ("[A] taxpayer must present more than its testimony denying the accuracy of the assessments. . . ."); *Central Furniture Mart, Inc. v. Johnson*, 157 Ill. App. 3d 907, 911 (1st Dist. 1987) (same).

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

at 470 ("Once a *prima facie* case has been established, the taxpayer thereupon bears the burden of overcoming this evidence by showing the transaction[s] to be nontaxable.").

A taxpayer or, as in this case, a tax collector has two avenues to challenge an assertion of tax liability. The taxpayer or tax collector can seek to establish that the method utilized to calculate the tax assessed failed to meet the required standard of minimum reasonableness. *See, e.g., Chak Fai Hau*, 2019 Il App (1st) 172588 ¶ 46 ("If the taxpayer calls into question the method employed . . . to calculate the amount of tax due, then the record must show that the techniques and assumptions . . . used met some minimum standard of reasonableness."); *Brandenburg Indus. Serv. Co., v. Hamer*, 2015 Il App (2nd) 140741 ¶ 26 ("In a tax protest case, the [Illinois] Department [of Revenue] has the initial burden and is required to issue an assessment that meets the reasonableness requirement to establish its *prima facie* case."); *Saco Indus. v. Dept. of Rev.*, 301 Ill. App. 3d 191, 196 (3rd Dist. 1998) (same); *Mel-Park Drugs, Inc. v. Dept. of Rev.*, 218 Ill. App. 3d 203, 207 (1st Dist. 1991) (same). If the tax assessment at issue meets the required minimum standard of reasonableness, the taxpayer or tax collector remains entitled to rebut the assessment by producing documentary evidence along with explanatory testimony establishing that the assessment is incorrect. *See, e.g., Fillichio v. Dept. of Rev.*, 15 Ill. 2d 327, 333 (1958) (When a tax assessment meets the required minimum standard of reasonableness, the taxpayer or tax collector "has the burden of proving by competent evidence that the proposed assessment is not correct."); *Mel-Park Drugs*, 218 Ill. App. 3d at 216-17 (same); *Masini v. Dept. of Rev.*, 60 Ill. App. 3d 11, 14-16 (1st Dist. 1978) (same). If a taxpayer or tax collector presents competent evidence that "is not so inconsistent or improbable in itself as to be unworthy of belief," the burden shifts back to the party asserting a tax liability – here, DoR –

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

to establish liability by a preponderance of the evidence.[14] *Fillichio*, 15 Ill. 2d at 333; *see also Mel-Park Drugs*, 218 Ill. App. 3d at 217 (same).

Construing a Tax Ordinance

The rules for construing and applying a tax law, whether a statute or an ordinance,[15] are well settled. Thus, a tax law is to be applied as written, and an adjudicatory body, whether a court or an administrative tribunal, is precluded from "depart[ing] from its terms by reading into it exceptions, limitations, or conditions that conflict with the express legislative intent, nor may we add provisions that are not found in a statute." *Acme Markets, Inc. v. Callanan*, 236 Ill. 2d 29, 38 (2009). *See also Metropolitan Life*, 2013 Il 114234 ¶ 18 ("It is improper for a court to depart from the plain language of the statute by reading into it exceptions, limitations, or conditions that conflict with the clearly expressed legislative intent.") *Canteen Corp. v. Dept. of Rev.*, 123 Ill. 2d 95, 105 (1988) (The language of a tax law "is not to be extended or enlarged by implication beyond its clear import."). In addition, a tax law is to be construed strictly against the governmental body that enacted the law – here, the County of Cook – and in favor of the tax payer or tax collector. *See, e.g., Kankakee Cty. Bd. of Rev. v. Prop. Tax Appeal Bd.*, 226 Ill. 2d 36, 52 (2007) ("A tax statute must be strictly construed against the government and in favor of the taxpayer."); *People Who Care v. Tax Objectors*, 193 Ill. 2d 490, 496 (2000) (same); *Gem*

[14]Code of Ordinances, Cook County, Illinois, Art. IX – Administrative Hearings, § 2-911(i) (2021) ("No violation may be established except upon proof by a preponderance of the evidence; . . . ."); Uniform Procedures Ordinance § 34-81(h) ("Nothing is this Ordinance shall limit the powers and duties of the hearing officers, as authorized by Chapter 2, Article IX of the Cook County Code.").

[15]*See, e.g., Pooh-Bah Enterprises v. County of Cook*, 232 Ill. 2d 463, 492 (2009) ("The rules of construction apply to municipal ordinances."); *Ford Motor Co. v. Chicago Dept. of Rev.*, 2014 Il App (1st) 130597 ¶ 5 ("When construing an ordinance, we follow the same rules that govern the construction of a statute.").

SUBMITTED - 25029489 - Catherine Battin - 11/1/2023 11:04 AM

Electronics, 183 Ill. 2d at 475 (same); *Van's Material Co. v. Dept. of Rev.*, 131 Ill. 2d 196, 202 (1989) (same); *Canteen Corp.*, 123 Ill. 2d at 105 (same).

The Question Presented

The central question for decision requires construing the Gas Tax Ordinance to determine if it taxes monetary settlements of contracts for the sale and purchase of gasoline and diesel fuel. Specifically, do such monetary settlements fall within the definition of "sale" set forth in the Ordinance or are they untethered from the term as so defined? The short answer is that monetary settlements of contractual obligations are not subject to the gas tax. The plain language and clear intent of the Ordinance is to tax only transactions involving the sale of gasoline and diesel fuel specifically at the retail level, not to tax monetary payments that settle contracts to sell or purchase gasoline or diesel fuel because no gasoline or diesel fuel can ever be sold at the retail level when contracts are settled monetarily.

ANALYSIS

DoR Established a *Prima Facie* Case

DoR's *prima facie* case of tax liability against BP North America rested almost exclusively on the SAP reports BP North America provided to DoR during the audit. DoR's auditor testified at the contested evidentiary hearing that he used only the SAP reports in arriving at the initial tax assessments issued in 2014. When the auditor revised the assessments in 2016, he testified that he again relied primarily on the SAP reports.

The SAP reports themselves were not introduced into evidence at hearing. However, the SAP reports reviewed by the auditor identified the transactions contained in the reports as predominantly sales. The reports also: i) identified BP North America as the seller; ii) identified

buyers by name; iii) listed the origination and destination points of the transactions; and iv) specified the quantity of gasoline or diesel fuel involved in each transaction.

The auditor then turned to DoR records to ascertain whether or not the buyers identified in the SAP reports were registered with DoR as distributors. In doing so, the auditor identified sixty four transactions – the sixty four transactions that are at the core of this litigation – in which BP North America was identified as the seller of gasoline or diesel fuel to distributors that were not registered with DoR as distributors.[16] Following the language of the Gas Tax Ordinance, the auditor concluded that the transactions were subject to the gas tax. Gas Tax Ordinance § 74-472(c)(3) (providing that the gas tax is to be collected by any Cook County distributor selling gasoline or diesel fuel to an unregistered distributor doing business in Cook County).

The SAP reports, the auditor's substantial but reasonable reliance on the reports, and the auditor's testimony established DoR's *prima facie* case of tax liability against BP North America because an assessment of tax liability calculated primarily on the basis of a taxpayer or tax collector's own records is sufficient to satisfy the standard of minimum reasonableness required by Illinois law. *See, e.g., Chak Fai Hau*, 2019 Il App (1st) 172588 ¶ 46; *Brandenburg Indus. Serv.*, 2015 Il App (2nd) 140741 ¶ 26; *Saco Indus.*, 301 Ill. App. 3d at 196; *Mel-Park Drugs*, 218 Ill. App. at 207. Accordingly, the evidentiary burden shifted to BP North America to establish that the sixty four transactions were not subject to the gas tax. Based on the Findings of Fact,

[16]Contrary to County of Cook's Post Hearing Response Brief in Support of the Revised Fuel Tax Assessments ("County of Cook's Response Brief" at 2, 7), neither the auditor nor the audit supervisor testified that the sixty four transactions were taxable because the buyers in the transactions were retail dealers rather than unregistered distributors, and neither testified that the transactions were taxable because BP North America sold gasoline and diesel fuel directly to Cook County consumers.

supra at 6-24, and the text of the Gas Tax Ordinance, BP North America rebutted DoR's *prima facie* case.

BP North America's Rebuttal Case-in-Chief

BP North America presented documentary evidence – books and records – and explanatory testimony supporting its contention that the sixty four transactions, called "book outs" or "book transfers," were transactions settled via monetary payments rather than actual performance. In particular, BP North America called five witnesses who were knowledgeable and credible and who gave competent testimony explaining the differences between settling contracts to sell or buy gasoline or diesel fuel via actual performance and settling contracts via monetary payment.

BP North America's evidence was substantial and established the factual differences between actual performance and monetary settlement. Further, BP North America's evidence hewed closely to the plain language of the Gas Tax Ordinance's definition of "sale." As distilled, BP North America's evidence established that during the audit period:

1. When a contract to sell or buy gasoline or diesel fuel was fulfilled by actual performance, the fuel physically moved and title, i.e., ownership, and possession transferred from seller to buyer simultaneously. When such a contract was fulfilled by monetary payment, no fuel physically moved and there was no transfer of title and possession between the parties.

2. When contract fulfillment was by actual performance, the parties' inventory of gasoline or diesel fuel changed, decreasing for the seller and increasing for the buyer. When contract fulfillment was by monetary payment, neither parties' inventories changed because no fuel moved between the parties.

3. In contract fulfillment by actual performance, the physical movement of gasoline or diesel fuel was recorded by a custody-transfer document in all cases. In contract fulfillment by monetary payment, there was no custody-transfer document because there was no physical movement of fuel.[17]

4. In contract fulfillment by actual performance, the invoice BP North America as seller sent to the buyer indicated the specific means by which the gasoline or diesel fuel would move from seller to buyer in a field on the invoice designated as MOT, shorthand for mode of transportation. When contract fulfillment was by monetary payment, the entry in the MOT field did not list a mode of transportation but, instead, read "book out."

5. The terms "book out" and "book transfer" were synonymous, interchangeable terms for BP North America, and the contracts underlying the sixty four transactions settled by monetary payment had specific language providing for contract performance by monetary payment.

6. A number of the counterparties in the sixty four transactions settled by monetary payment referred to the settlements as "book transfers," "books," "book outs," or similar terms when preparing invoices sent to BP North America.

7. None of the sixty four transactions that were settled by monetary payment were exchanges.

8. None of the sixty four transactions that were settled by monetary payment involved bartering gasoline or diesel fuel for some other commodity or service.

[17]DoR did not present any evidence contradicting the testimony of BP North America's witnesses on this point. In particular, DoR's counsel did not impeach the testimony of BP North America's witnesses and did not elicit contradictory testimony from the witnesses.

9. None of the sixty four transactions that were settled by monetary payment involved BP North America giving gasoline or diesel fuel to a counterparty or BP North America receiving a gift of gasoline or diesel fuel from a counterparty.

10. None of the sixty four transactions that were settled by monetary payment involved a counterparty that was a Cook County retailer of gasoline or diesel fuel or a Cook County consumer of such fuel.

BP North America also established that the quantities of gasoline and diesel fuel involved in the sixty four monetarily settled transactions were bulk quantities that if actually moved, would move by pipeline. In addition, the contracts underlying the transactions provided that movement would be by pipeline.

BP North America further established that during the audit period, it did not have the capacity to place, i.e., inject or originate, bulk quantities of gasoline or diesel fuel into a pipeline located in Cook County. Likewise, during the audit period, BP North America established that it did not have the capacity to receive from, i.e., off-load from, a pipeline in Cook County bulk quantities of gasoline and diesel fuel. Thus, during the audit period, BP North America established that it could not import into or deliver in Cook County the bulk quantities of gasoline or diesel fuel specified in the contracts underlying the sixty four monetarily settled transactions. Because BP North America established that ownership and possession of gasoline or diesel fuel go hand in hand, BP North America established that it was impossible to fulfill by actual performance within Cook Count any of the sixty four transactions at issue.[18]

[18]Similarly, because bulk quantities of gasoline and diesel fuel could not be moved within Cook County from BP North America to a distributor, bulk quantities of gasoline or diesel fuel could not be exchanged, bartered, given, or disposed of in Cook County.

BP North America's evidence presented at the contested evidentiary hearing was more than enough to shift the burden of proof and persuasion back to DoR. *See, e.g., Fillichio*, 15 Ill. 2d at 333; *Mel-Park Drugs*, 218 Ill. App. 3d at 217.

DoR Did Not Carry Its Burden of Proof

DoR, as it has throughout this litigation, argued at hearing and in its post-hearing briefs that the SAP reports overcome BP North America's rebuttal case-in-chief. County of Cook's Post Hearing Brief in Support of the Revised Fuel Tax Assessments ("County of Cook's Post Hearing Brief") at 4, 7-9, 17 and County of Cook's Response Brief at 5-6.

The SAP argument certainly established DoR's *prima facie* case. However, in light of the entire record which is as exhaustive as it is voluminous, the argument cannot overcome the credibility and weight of BP North America's rebuttal case-in-chief.

The business records comprising the sixty four monetarily settled transactions along with the competent testimony of five knowledgeable, credible witnesses called by BP North America (Caputo, Stanphill, Falk, Preze, and Kirby) established that the SAP reports reviewed by DoR's auditor did not reflect the true nature of the transactions. The SAP reports do not defeat BP North America's rebuttal case-in-chief and are not sufficient to sustain the tax assessments insofar as the assessments assert that BP North America is liable for the gas tax on those transactions.

DoR also contends that ownership transferred in the monetarily settled transactions because "an exchange of money" transfers title, i.e., ownership, to the gasoline or diesel fuel referenced in the underlying contracts (County of Cook's Post Hearing Brief at 17),[19] but there is

[19]DoR contradicts this argument by maintaining that the transactions were conditional sales that are taxable under the definition of "sale" in the Gas Tax Ordinance. County of Cook's Post Hearing Brief at 12; County of Cook's Response Brief at 3. Contradiction aside, the argument is without merit because there is no evidence that any of the transactions qualified as a conditional sale which occurs when a seller transfers possession to a buyer but retains ownership until the

no evidence in the record to support that position. DoR did not cross-examine any of BP North America's witnesses on the point, and DoR did not impeach or otherwise call into question the consistent, credible testimony of BP North America's witnesses to the effect that ownership and possession of gasoline and diesel fuel go together, i.e., occur simultaneously, and that neither transferred in the sixty four monetarily settled transactions.

DoR, nonetheless, insists that ownership transferred in the sixty four monetarily settled transactions and asks this tribunal to take judicial notice of a PriceWaterhouseCoopers ("PWC") document that purports to separate ownership and possession. According to DoR, the document defines "book out" as a transaction in which ownership transfers but possession does not. County of Cook's Post Hearing Brief at 13; County of Cook's Response Brief at 4.

It is significant that DoR does not cite any authority for its request that this tribunal take judicial notice of the PWC document. In Illinois, however, judicial notice may be taken only when the document a party seeks to place before an adjudicatory body contains "readily verifiable facts from sources of indisputable accuracy." *See, e.g., People v. Davis*, 65 Ill. 2d 157, 166 (1976) ("[T]he extension of the doctrine of judicial notice to include facts which, while not generally known, are *readily verifiable from sources of indisputable accuracy* is an important aid in the efficient disposition of litigation, and its use, *where appropriate*, is to be commended.") (Emphasis added.); *Metzger v. Brotman*, 2021 Il App (1st) 201218 ¶ 27 (same).

The PWC document that DoR urges upon this tribunal is a compilation of a host of definitions but the document does not provide any sources from which the definitions were

---

buyer makes full payment. *Dargis v. Paradise Park, Inc.*, 354 Ill. App. 3d 171, 178 (2nd Dist. 2004) ("Under conditional sales contracts, vendors retain title in personal property until full payment is made by the vendee."); *see also* Black's Law Dictionary, 11th ed. at 1604. Certainly, DoR produced no evidence at hearing on the claim.

derived. Moreover, the document does not purport to be an authoritative source of the definitions contained therein. Thus, it cannot be said that the document contains "readily verifiable facts from sources of indisputable accuracy." Finally, even if judicial notice were taken of the PWC document in contravention of applicable law, the document is insufficient to overcome the competent, credible, knowledgeable testimony of BP North America's witnesses that ownership and possession go together or at least did so during the audit period. Accordingly, judicial notice of the PWC document will not be taken.

DoR, again citing the PWC document, proceeds to argue that a "book out" and a "book transfer" are not synonymous terms and, thus, are not interchangeable as BP North America's witnesses testified. While judicial notice will not be taken of the PWC document, DoR's reading of the definition set forth in the document is incorrect. In actuality, the very definition that DoR is seeking to advance by the device of judicial notice undercuts its argument that "book out" and "book transfer" are not synonymous, interchangeable terms. To the contrary, the PWC document defines the terms as synonymous, just as BP North America's witnesses did in their testimony, as the following entry from the document illustrates: "[b]ook out, "book transfer" is "[t]he transfer of title of a cash commodity to the buyer without corresponding physical movement." In other words, while the substance of the definition supports DoR's attempt to separate ownership from possession in order to argue that the monetarily settled transactions were taxable sales because at least ownership transferred, the definition nonetheless treats the terms as synonymous and interchangeable just as did BP North America during the audit period. Moreover, DoR ignores the evidence of record, particularly the competent testimony of knowledgeable and credible witnesses on behalf of BP North America to the effect that the terms meant the same thing and were used interchangeably during the audit period to refer to monetarily settled transactions.

DoR also ignores the fact that many of BP North America's counterparties in the sixty four monetarily settled transactions used "book transfer," "book," "book out," and other similar terms when invoicing BP North America for monetarily settled transactions in which BP North America was listed as buyer, indicating not only that "book out" and "book transfer" were synonymous and interchangeable terms during the audit period, but that other similar terms were treated as synonymous and interchangeable with "book out" and "book transfer." Finally, the supervisor overseeing the audit of BP North America testified that "book out" and "book transfer" were the same thing in his mind. Tr. April 23, 2021, at 946. Accordingly, DoR's attempt to sustain its assessment of the monetarily settled transactions by bifurcating ownership and possession is rejected.

DoR, on a more granular level, contends that BP North America's inventory changed with respect to the sixty four monetarily settled transactions which, DoR says, is evidence that the contracts underlying the transactions were fulfilled by actual performance, not by monetary payment. There is no evidence of record to support that argument. For example, during the audit period, there was no line item on DoR's gas-tax return form that remotely referenced monetarily settled transactions. Thus, there was nothing on the audit-period tax-return form to support the audit supervisor's testimony that he could tell from BP North America's tax returns that monetarily settled transactions resulted in inventory changes. Tr. April 23, 2021, at 954. Indeed, when asked specifically by counsel for BP North America whether or not such transactions changed inventory, the supervisor gave the following equivocal testimony: "I *would* say – yes, I *would* say there is inventory changing because of the tax returns." Tr. April 23, 2021, at 954-55 (emphasis added).

It is true, of course, that BP North America's Cook County gas-tax returns for the audit period showed inventory changes because BP North America did make taxable sales during the period and never has claimed otherwise. But it is impossible to draw any inference from the tax returns to the effect that the change in inventory reported on the returns in any way encompassed the transactions that were settled monetarily. Finally, DoR's position flies in the face of the competent testimony of BP North America's witnesses, who were knowledgeable and credible, to the effect that BP North America's inventory did not change – either up or down – in the sixty four monetarily settled transactions. And it is notable that counsel for DoR did not cross-examine BP North America's witnesses on the point. In sum, the argument fails and, thus, cannot defeat BP North America's rebuttal case-in-chief.

DoR advances two other arguments, neither of which has any basis in the record. First, DoR maintains that the sixty four monetarily settled transactions were taxable because they were retail sales. County of Cook's Response Brief at 2, 7.

DoR's retail-sale argument is rejected for several reasons. To start with, the Gas Tax Ordinance clearly differentiates between a retail sale and a sale between distributors. Gas Tax Ordinance § 74-472(c). The former requires a distributor to collect the gas tax on every sale to a Cook County retail dealer or directly to a Cook County consumer, while the latter requires a distributor to collect the tax only when selling to an unregistered distributor doing business in Cook County. Further, the plain language of the Ordinance provides that a retail sale is a sale to the consumer, i.e., the end user, "for use or consumption and not for resale in any form." Gas Tax Ordinance § 74-471 (defining consumer); § 74-471 (defining retail dealer); § 74-472(b)

(imposing the gas tax on the consumer).[20] At no point in this litigation, at least prior to the filing of post-hearing briefs, has DoR contended that the sixty four monetarily settled transactions were retail sales. To the contrary, it has been DoR's position from the beginning that the sixty four transactions were sales between BP North America and unregistered distributors, not sales between BP North America and retail dealers or between BP North America and consumers. At this late date, DoR cannot disavow its seven-year theory of the case and assert a new one that has no support in the extensive record in this case.

Another DoR argument is even stranger. For the first time, DoR suggests that BP North America has the burden of proof because it sought an exemption. County of Cook's Post Hearing Brief at 2; County of Cook's Response Brief at 10.

Never until post-hearing briefing has DoR hinted that its assessments were based on BP North America asserting an exemption that DoR rejected. To the contrary, the overwhelming evidence presented by DoR was to the effect that the assessments were based on DoR's determination that the sixty four monetarily settled transactions were taxable sales because they occurred between BP North America and unregistered distributors doing business in Cook County. County of Cook's Post Hearing Brief at 3-6, 7-8, 17; County of Cook's Response Brief at 7-8. DoR's exemption argument is rejected as without foundation in the record.

It is noted as well that DoR did not address evidence to the effect that it was impossible for BP North America to fulfill any of the sixty four transactions at issued by actual performance because it could not inject bulk quantities of gasoline or diesel fuel into a Cook County pipeline or off-load bulk quantities from a Cook County pipeline. In sum, DoR has not come forward

[20]The plain language of the Ordinance does not support the audit supervisor's testimony that a sale from a distributor to distributor not registered with DoR is a "retail sale" or a "retail sale wholesale." Tr. April 19, 2021, at 252.

with evidence or argument to defeat BP North America's rebuttal case-in-chief. Accordingly, the issue that remains is whether or not monetary settlements of contracts to sell or buy gasoline or diesel fuel are sales within the meaning of the Gas Tax Ordinance.

The term "sale" must be given the meaning ascribed to it by the Gas Tax Ordinance, but the undefined terms within the definition are to be given their plain and popularly understood meaning. *Metropolitan Life*, 2013 Il 114234 ¶ 20; *Exelon*, 234 Ill. 2d at 274-75; *Gem Electronics*, 183 Ill. 2d at 477-78. In addition, the term is to be construed strictly in favor of BP North America and against Cook County and DoR and may not enlarged to include verbiage not found in the Ordinance's definition of "sale." *Kankakee Cty. Bd. of Review*, 226 Ill. 2d at 52 (strict construction); *People Who Care*, 193 Ill. 2d at 496 (strict construction); *Gem Electronics*, 183 Ill. 2d at 475 (strict construction); *Metropolitan Life*, 2013 Il. 114234 ¶ 18 (terms not found in a tax law cannot be added judicially); *Canteen Corp.*, 123 Ill. 2d at 105 (the language of a tax law cannot be "extended or enlarged by implication beyond its clear import"); *Acme Markets*, 236 Ill. 2d at 38 (provisions not found in a tax law may not be added judicially). *Accord Western Nat'l Bank v. Kildeer*, 19 Ill 2d 342 at 349-50 (1960) ("Courts will not inject provisions not found in the statute however desirable they may appear to be."). Applying applicable law, the Ordinance's definition of "sale," and the evidence of record as reflected in the Findings of Fact, *supra* at 6-24, the sixty four monetarily settled transactions at issue were not sales under the Ordinance and, thus, were not taxable transactions.

The sixty four transactions at issue involved only monetary payments between counterparties and nothing else. On this record, which is extensive, there was no transfer of ownership or transfer of possession of gasoline or diesel fuel in the transactions. There was no transfer of ownership without transfer of possession in any of the transactions; there was no

transfer of possession with transfer of ownership to follow in any of the transactions. Neither gasoline nor diesel fuel was exchanged in any of the transactions. No bartering was involved in the transactions. No gasoline or diesel fuel was given in the transactions. And while the contracts underlying the transactions were disposed of in the sense of contractual obligations being met, no gasoline or diesel fuel was disposed of which is the focus of the Gas Tax Ordinance's definition of "sale." Put otherwise, the Ordinance's inclusion of the phrase "disposed of" relates to the "disposal" of actual, physical product – here, gasoline and diesel fuel. To conclude otherwise would be to enlarge the Ordinance's definition of "sale" beyond the intent of the Ordinance which is to tax the retail sale of gasoline and diesel fuel in Cook County. Gas Tax Ordinance § 74-472(a) ("A tax is hereby imposed on the retail sale in Cook County of gasoline [and] diesel fuel. . . .). In sum, viewing the Ordinance's definition of "sale" as a whole, giving all of its undefined terms their plain and popularly understood meaning, but being mindful that the definition of "sale" must be construed strictly in favor of BP North America, the Ordinance does not extend to the monetary settlement of contracts to sell or buy gasoline or diesel fuel. Because substantial evidence established that the sixty four transactions at issue were nothing more than mutual payments to settle contractual obligations, which payments were authorized by the language of the contracts being settled, the transactions were not sales and were not taxable.

Miscellaneous Issues

Lemont Transactions

DoR assessed gas tax on several transactions that took place at a CITGO refinery. According to DoR, the transactions were taxable because the CITGO refinery was located in Cook County during the audit period and the SAP reports listed the transactions as sales.

BP North America countered with credible evidence that the transactions, even if they were sales, were not taxable because the CITGO refinery was and remains located in Will County. As to the location of the CITGO refinery, a BP North America witness testified that he accessed the website of the Will County tax assessor and the information on the website indicated that the refinery was located in Will County, not Cook County. Tr. April 21, 2021, at 595-96. A hard copy of the Will County assessor's tax information for 2019 and 2020 was submitted as exhibit M to BP North America's Post-Hearing Brief. That documentation listed the property identification number for the CITGO refinery; placed the refinery in Will County; and set out the amount of real property tax due Will County in 2020.

DoR's rebuttal witness on the Lemont transactions offered only equivocal testimony as to the location of the CITGO refinery. Specifically, the witness was able to place a refinery in Cook County which he identified as the IMTT refinery, but he was unable to place the CITGO refinery in Cook County. Tr. April 28, 2021, at 1121-22. Further, DoR's post-hearing briefs did not address the tax records of the Will County assessor showing that the CITGO refinery was situated on real property within Will County in 2019 and 2020. Given that a hydrocarbon refinery is a substantial physical presence, it is likely that the refinery was situated at the same Will County site during the audit period as it was in 2019 and 2020. By a preponderance of the evidence, the CITGO refinery where the Lemont transactions occurred was not in Cook County. Accordingly, the Lemont transactions were not subject to the Cook County gas tax.

Blue Island Transactions

DoR assessed gas tax on several transactions that occurred in Blue Island, Illinois, a municipality located in Cook County. As it has throughout, DoR relied on the SAP reports to

conclude that the transactions were taxable sales because the reports placed the transactions in Cook County and listed the transactions as sales. Tr. April 28, 2021, at 1116-19.

BP North America countered with credible testimony that it did not hold any gasoline or diesel fuel at either of the terminals located in Blue Island – the Blue Island Terminal or the NuStar Blue Island Terminal – during the audit period. Tr. April 21, 2021, at 689-92. At the contested evidentiary hearing, DoR did not cross-examine BP North America's witness on the Blue Island transactions. Tr. April 22, 2021, at 787-795. In addition, DoR's own witness on the Blue Island transactions was not asked questions that might have elicited testimony to contradict or otherwise undermine the testimony of BP North America's witness who testified knowledgeably and credibly that no sales could have occurred in Blue Island during the audit period because BP North America did not hold gasoline or diesel fuel at either of the Blue Island terminals during that time. Tr. April 28, 2021, at 1116-20. By a preponderance of the evidence, the Blue Island transactions were not subject to the Cook County gas tax.

The Dreyfus Transactions

BP North America contends that DoR assessed gas tax on a February 2010 transaction in which it was to sell 1,050,000 gallons of gasoline to Dreyfus but also assessed tax on a February 2010 credit memorandum that reversed the anticipated sale. According to BP North America, DoR added the gallons in the anticipated sale to the gallons listed in the credit memorandum and assessed tax on the total of 2,100,000 gallons when, in actuality, no gallons ever transferred from BP North America to Dreyfus. Tr. April 21, 2021, at 590-91. In support, BP North America points to the audit file which shows that the transactions between it and Dreyfus occurred only in

February 2010 and totaled exactly 2,100,000 gallons. BP North America Exh. 82 at 2190.[21] (Exhibit 82 was admitted by ¶ 5 of Joint Pre-Trial Stipulation of Exhibits.)

DoR counters by pointing to page 124 of the audit file which, according to DoR, shows 2010 sales from BP North America to Dreyfus totaling 3,150,000 gallons and an entry of 1,050,000 gallons placed in parentheses – presumably, indicating a reduction of some sort. According to DoR, the entries mean that it took account of the Dreyfus refund which covered 1,050,000 gallons but that BP North America actually made taxable sales to Dreyfus totaling 2,100,000 gallons in February 2010. Tr. April 28, 2021, at 1115-16.

The preponderance-of-the-evidence standard cannot be satisfied by the conflicting evidence offered by DoR, particularly when balanced against the competent testimony of BP North America's witness, Anthony Caputo. Tr. April 21, 2021, at 590-91. Accordingly, the Dreyfus transactions totaling 2,100,000 gallons were not subject to the gas tax.

CONCLUSION

For the reasons stated, the assessments are not upheld.

L. Anita Richardson
Administrative Law Judge

Entered: January 31, 2022

[21]Page 2190 of exhibit 82 is a copy of page 101 of DoR's audit file but is more legible than page 101.

ARTICLE XII. - GASOLINE AND DIESEL FUEL TAX

Footnotes:
*--- (**6**) ---*
***Editor's note—** Ord. No. 11-O-19, adopted Feb. 16, 2011, amended Art. XII in its entirety to read as herein set out. Former Art. XII pertained to similar subject matter and was comprised of §§ 74-470—74-478. See the Code Comparative Table for the amendatory history to those former sections.*

Sec. 74-470. - Short title.

This Article shall be known and may be cited as the Cook County Retail Sale of Gasoline and Diesel Fuel Tax Ordinance.

(Ord. No. 11-O-19, 2-16-2011.)

Sec. 74-471. - Definitions.

The following words, terms and phrases, when used in this Article, shall have the meanings ascribed to them in this Section, except where the context clearly indicates a different meaning:

Biodiesel Fuel means a fuel made wholly or partly from vegetable oils, animal fats or any other renewable resource or naturally occurring material, for use in a diesel engine. This definition does not include home heating oil or railroad locomotive fuel.

Consumer means end user.

Department means the Department of Revenue.

Diesel fuel means any petroleum product intended for use or offered for sale as a fuel for engines in which the fuel is injected into the combustion chamber and ignited by pressure without electric spark. This definition does not include home heating oil or railroad locomotive fuel.

Gasoline means all products sold as gasoline, which also includes aviation gasoline and gasohol, or any product which consists of gasoline blended with alcohol. This definitions does not include propane, kerosene or jet fuel.

Gas distributor means any person who either produces, refines, blends, compounds, or manufactures gasoline or diesel fuel in this County or transports or has transported gasoline or diesel fuel into this County or receives gasoline, diesel fuel or biodiesel fuel in Cook County on which this tax has not been paid.

GDiesel Fuel means fuel made wholly or partly from Ultralow Sulfur Diesel and Natural Gas intended for use or offered for sale as a fuel for a diesel engine. This definition does not include home heating oil or rail locomotive fuel.

Person means any individual, corporation, Limited Liability Corporation, organization, government, governmental subdivision or agency, business trust, estate, trust, partnership, association and any other legal entity.

Retail dealer means any person who engages in the business of selling gasoline, diesel fuel, biodiesel fuel or gdiesel fuel in the County to a purchaser for use or consumption and not for resale in any form.

Sale, resale and *selling* means any transfer of ownership or possession or both, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever. In every case where gasoline, diesel fuel, biodiesel, or gdiesal fuel are exchanged, given or otherwise disposed of, it shall be deemed to have been sold.

(Ord. No. 11-O-19, 2-16-2011.)

Sec. 74-472. - Tax imposed.

(a) *Tax rate*. A tax is hereby imposed on the retail sale in Cook County of gasoline, diesel fuel, biodiesel fuel, and gdiesal fuel at the rate of $0.06 per gallon or fraction thereof. The tax is to be paid by the purchaser, and nothing in this Article shall be construed to impose a tax upon the occupation of distributors, suppliers or retail dealers.

(b) The incidence of and liability for payment of the tax levied in this Article is to be borne by the consumer of the gasoline, diesel fuel, biodiesel fuel and gdiesal fuel. Therefore, it shall be deemed a violation of this Article for any distributor or retail dealer to fail to include the tax in the retail sale price of gasoline, diesel fuel, biodiesel fuel, gdiesal fuel or to otherwise absorb the tax.

(c) *Taxable transactions*. Except as provisions are made in this Article for the collection of the tax levied in this Article upon the sale of gasoline, diesel fuel, biodiesel fuel and gdiesal fuel in the possession of distributors or retail dealers on the effective date of the ordinance from which this Article is derived, the tax levied in this Article shall be collected by each distributor or supplier who sells gasoline, diesel fuel, biodiesel fuel, or gdiesal fuel to:

(1) A retail dealer doing business in the County;

(2) A consumer who purchases gasoline, diesel fuel, biodiesel fuel or gdiesal fuel directly from a Gas Distributor for delivery in the County; or

(3) Another Gas Distributor doing business in the County that is not holding a valid registration certificate.

[(d) *Reserved.*]

(e) Any Gas Distributor or supplier of gasoline, diesel fuel, biodiesel fuel or gdiesal fuel shall pay the tax levied by this Article to the Department. Any person receiving payment of this tax shall be a trustee for the County.

(f)

If the retail dealer shall receive gasoline, diesel fuel, biodiesel fuel or gdiesal fuel upon which no tax has been collected by the distributor or supplier, and then the retail dealer shall collect such tax and remit it directly to the Department within 30 days of the receipt of such gasoline or diesel fuel.

(g) *Tax in addition to other taxes.* The tax imposed by this Article is in addition to all other taxes imposed by the Government of the United States, the State, or by any unit of local government.

(Ord. No. 11-O-19, 2-16-2011.)

Sec. 74-473. - Tax-free sales.

Gas Distributors doing business in the County shall make tax-free sales of gasoline, diesel fuel, biodiesel fuel or gdiesal fuel with respect to which they are otherwise required to collect the tax to the following:

(1) Another Gas Distributor holding a valid Cook County Department of Revenue gas tax certificate of registration;

(2) Another Gas Distributor, or a retail dealer where the selling distributor, or its agent, delivers the gasoline, diesel fuel, biodiesel fuel or gdiesel fuel to a location outside of the County;

(3) The United States of America, the State, or their instrumentalities.

(Ord. No. 11-O-19, 2-16-2011.)

Sec. 74-474. - Gas distributor; retail dealer registration.

(a) Gas Distributors who produce, refine, blend, compound, or manufacture gasoline, diesel fuel, biodiesel fuel or gdiesel fuel in this County or transports or has transported gasoline, diesel fuel, biodiesel fuel or gdiesel fuel into this County or receives gasoline, diesel fuel, biodiesel fuel or gdiesel fuel in Cook County on which this tax has not been paid shall register with the Department within 30 days after the effective date of this ordinance.

(b) Retail dealers shall register and provide information as provided by rules and regulations promulgated by the Department of Revenue.

(c) It shall be unlawful to engage in the business of a Gas Distributor, as defined in this Article, prior to obtaining a certificate of Gas Tax registration issued by the Department.

(Ord. No. 11-O-19, 2-16-2011.)

Sec. 74-475. - Returns and remittances.

(a) Gas Distributors shall file each month with the Department a report of sales of gasoline, diesel fuel, biodiesel fuel or gdiesel fuel in such form as prescribed and furnished by the Department on or before the 20th day from the last day of the month for which the return is due. Each report of

sales of gasoline or diesel fuel shall be accompanied by a remittance of the appropriate amount of tax applicable to the sales reported. The remittance shall be made payable to the County Collector.

(Ord. No. 11-O-19, 2-16-2011.)

Sec. 74-476. - Tax in addition to other taxes.

The tax imposed by this Article is in addition to all other taxes imposed by the Government of the United States, the State, or by any unit of local government.

(Ord. No. 11-O-19, 2-16-2011.)

Sec. 74-477. - Books and records.

Every gas distributor and retailer dealer as defined in this Article, shall keep accurate books and records of its beginning inventory, purchases, sales and ending inventory including original source documents and books of entry denoting the transactions that gave rise, or may have given rise, to any tax liability, exemption or deduction or defense to liability. Books and records and other papers relating to transactions which occurred during any period with respect to which the Department is authorized to issue notices of tax liability as provided in Chapter 34, Article III, Uniform Penalties, Interest and Procedures Ordinance shall be preserved until the expiration of such period unless the Department, in writing, authorizes their destruction or disposal prior to such expiration. All those books and records shall be kept in the English language and, at all times during business hours, shall be subject to and available for inspection or copying by the Department.

(Ord. No. 11-O-19, 2-16-2011; Ord. No. 16-1372, 5-11-2016.)

Sec. 74-478. - Violation; penalties.

Any person determined to have violated this Article, as amended, shall be subject to a fine of $1,000.00 for the first offense, and a fine of $2,000.00 for the second and each subsequent offense. Separate and distinct offense shall be regarded as committed each day upon which said person shall continue any such violation, or permit any such violation to exist after notification thereof. It shall be deemed a violation of this Article for any person to knowingly furnish false or inaccurate information to the Department. Criminal prosecution pursuant to this Article shall in no way bar the right of the County to institute civil proceedings to recover delinquent taxes, interest and penalty due and owing as well as costs incurred for such proceeding.

(Ord. No. 11-O-19, 2-16-2011.)

Sec. 74-479. - Municipality and township tax rebate.

Any municipality or township with its primary administrative office located in the County shall be entitled to a tax rebate. Such rebate shall be paid on an annual basis. Claims for such reimbursement must be made within six months from the end of each calendar year, upon forms prescribed by the Department, and shall only address purchases made in the previous calendar year. The Department shall determine the proof required to substantiate the rebate by rule.

(Ord. No. 11-O-19, 2-16-2011; Ord. No. 16-1372, 5-11-2016.)

Sec. 74-480. - Tax rebate late filing penalty.

Any request for gas tax rebate received by the Department, postmarked or physically received after the due date, June 30 of the year following the calendar year for which the tax rebate is being requested, but before December 31 of the year following the calendar year for which the tax rebate is being requested, shall be assessed a penalty equal to ten percent of the total amount of the tax rebate due or owed by the Department to the municipality or township. The Department will deny as untimely any request for gas tax rebate received by the Department after December 31 of the year immediately following the calendar year for which the tax rebate is being requested.

(Ord. No. 11-O-19, 2-16-2011; Ord. No. 16-1372, 5-11-2016.)

Sec. 74-481. - Application of uniform penalties, interest and procedures ordinance.

Whenever not inconsistent with the provisions of this Article or whenever this Article is silent, the provisions of the Uniform Penalties, Interest and Procedures Ordinance shall apply and supplement this Article.

(Ord. No. 11-O-19, 2-16-2011.)

Sec. 74-482. - Rulemaking.

The Department shall prescribe reasonable rules, definitions, and regulations necessary to carry out the duties imposed upon it by this Article. Such rules, definitions, and regulations shall include, but not be limited to, reasonable procedures consistent with existing practices of distributors, suppliers and retail dealers for collection and remittance of the tax herein levied upon the purchaser of gasoline or diesel fuel.

(Ord. No. 11-O-19, 2-16-2011; Ord. No. 16-1372, 5-11-2016.)

Secs. 74-483—74-509. - Reserved.

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE COOK JUDICIAL CIRCUIT
COOK COUNTY, ILLINOIS

MARATHON PETROLEUM COMPANY, LP
Plaintiff/Petitioner

v.

COUNTY OF COOK, ET AL.
Defendant/Respondent

Reviewing Court No: 1-21-0635
Circuit Court/Agency No: 2019L050614
Trial Judge/Hearing Officer: JOHN J. CURRY, JR.

COMMON LAW RECORD - TABLE OF CONTENTS

Page 1 of 6

This document is generated by eappeal.net
IRIS MARTINEZ, CLERK OF THE COOK JUDICIAL CIRCUIT COURT ©
CHICAGO, ILLINOIS 60602
Purchased from re:SearchIL

COMMON LAW RECORD - TABLE OF CONTENTS

Purchased from re:SearchIL

COMMON LAW RECORD - TABLE OF CONTENTS

Purchased from re:SearchIL

COMMON LAW RECORD - TABLE OF CONTENTS

Purchased from re:SearchIL

COMMON LAW RECORD - TABLE OF CONTENTS

Purchased from re:SearchIL

COMMON LAW RECORD - TABLE OF CONTENTS

Purchased from re:SearchIL

Report of Proceedings

Cook County Department of Revenue ("CCDOR") Witnesses

Jose Vega, CCDOR Audit Supervisor

Mr. Gary Michals, CCDOR Deputy Director of Compliance

Mr. Kenneth Harris, CCDOR Deputy Director

Dr. Andria van der Merwe, CCDOR Expert Witness

Marathon Witnesses

Mr. Matthew Freeman, Marathon's Commercial Analysis Manager

Mr. Joel Steiner, Marathon's Motor Fuel Tax Specialist

Dr. Gregory Arburn, Marathon's Expert Witness

NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

MARATHON PETROLEUM, COMPANY LP f/k/a MARATHON PETROLEUM COMPANY, LLC,	)	
Plaintiff-Appellant,	)	
v.	)	No. 129562
COUNTY OF COOK, COOK COUNTY DEPARTMENT OF REVENUE, et al.,	)	
Defendants-Appellees.	)	

The undersigned, being first duly sworn, deposes and states that on November 1, 2023, there was electronically filed and served upon the Clerk of the above court the Brief and Appendix of Plaintiff-Appellant. On November 1, 2023, service of the Brief will be accomplished through the filing manager, Odyssey EfileIL, to the following counsel of record:

Marie D. Spicuzza
STATE'S ATTORNEY OF COOK COUNTY
marie.spicuzza@cookcountyil.gov

Michael J. Wynne
JONES DAY
Mwynne@jonesday.com

Jason P. Stiehl (6276001)
CROWELL & MORING LLP
JStiehl@crowell.com

Christopher Gurley
CROWELL & MORING LLP
CGurley@crowell.com

Stanley R. Kaminski,
Dakota S. Newton
DUANE MORRIS LLP
SRKaminski@duanemorris.com
dnewton@duanemorris.com

Carina C. Federico
CROWELL & MORING LLP
CFederico@crowell.com

Robert E. Elworth
Alec Messina
HEPLERBROOM LLC
relworth@heplerbroom.com
amessina@heplerbroom.com

Within five days of acceptance by the Court, the undersigned states that 13 paper copies of the Brief bearing the court's file-stamp will be sent to the above court.

/s/ Catherine A. Battin
Catherine A. Battin

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.

/s/ Catherine A. Battin
Catherine A. Battin