

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-Respondents.

On Petition for Leave to 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 OF *AMICI CURIAE* AMERICAN FUEL & PETROCHEMICAL
MANUFACTURERS AND AMERICAN PETROLEUM INSTITUTE IN
SUPPORT OF PLAINTIFF-APPELLANT**

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INTEREST OF AMICI CURIAE

The American Fuel & Petrochemical Manufacturers (“AFPM”) and the American Petroleum Institute (“API”) submit this brief as *amici curiae* in support of Marathon Petroleum.

AFPM is a national trade association representing most of the U.S. refining and petrochemical manufacturing capacity. These companies provide jobs, directly and indirectly, to more than three million Americans, contribute to our economic and national security, and enable the production of thousands of vital products used by families and businesses throughout the United States. AFPM members manufacture gasoline and diesel fuel and are directly affected by government regulations that distort the free market and impact consumer choices for vehicles and fuel.

API is a national trade association that represents nearly 600 members in the oil and natural gas industry. API’s members include corporations that produce, process, store, transport, and market oil and natural gas products, as well as companies that support the oil and natural gas sector. With over 30 active chapters in 12 states, API harnesses its members’ expertise to research and advocate for economically-efficient and environmentally-sound approaches to the production and supply of energy resources.

Amici’s members have a deep interest in the outcome of this case. *Amici’s* members are subject to state and local fuel taxes nationwide, including the Cook County Retail Sale of Gasoline and Diesel Tax Ordinance (“Motor Fuel Tax Ordinance”) at issue in this case and will be impacted by the outcome of this case. *Amici’s* members are intimately familiar with the regulatory and legal issues at the heart of this case. *Amici* write to offer their insight regarding the proper scope of the Motor Fuel Tax Ordinance and the real-world impacts of the same.

INTRODUCTION

This matter involves the interpretation of the Motor Fuel Tax Ordinance (Cook County Code of Ordinances § 74-470 *et seq.* (approved Feb. 6, 2011)).

Cook County imposes a tax (“Motor Fuel Tax”) on the retail sale of gasoline and diesel fuel with the tax to be paid by the purchaser or consumer in Cook County. To qualify as a “retail sale” under the Motor Fuel Tax Ordinance, the following elements must be met: (i) there must be a transfer of possession, ownership, or title of tangible personal property for consideration, and (ii) the transferee of the personal property must be the intended user or ultimate consumer of the personal property, rather than someone who intends to resell the personal property to the ultimate consumer.

In this case, the Cook County Department of Revenue improperly imposed the Motor Fuel Tax on book-out transactions, which are transactions where parties agree to settle their delivery obligations financially rather than making physical delivery of fuel. In the book-out transactions at issue in this case, no fuel was transferred, there was no change in ownership, and the parties’ fuel inventories did not change.

The Illinois Appellate Court, First District affirmed in part the Cook County Office of Administrative Hearing’s decision to impose the Motor Fuel Tax on book-out transactions. If this Court does not correct the appellate court’s unprecedented holding there will be a profound impact on motor fuel distributors and the citizens of Illinois.

ARGUMENT**I. IF ALLOWED TO STAND, THE APPELLATE COURT'S DECISION WILL HAVE WIDESPREAD IMPLICATIONS FOR THE MOTOR FUEL INDUSTRY.**

In the motor fuel industry, forward contracts between a supplier and buyer are commonly used to lock in a set price, amount, and expiration date for the exchange of refined petroleum products. The buyer determines the average amount of fuel needed and enters into a contract to purchase a certain amount of fuel at a price pegged to a financial exchange, with performance occurring by delivery on a future date. Fuel suppliers benefit from these contracts by ensuring a predictable level of demand, enabling them to plan for adequate deliveries into a particular region. Buyers benefit by locking in fuel prices, which acts as a hedge to protect them against fluctuating fuel market prices. Buyers also benefit because fuel contracts ensure that a buyer will be able to obtain fuel as future market conditions and available supply fluctuate. Without long term fuel contracts, market scarcity can cause disruption in fuel supply, the potential for price spikes, and ultimate harm to consumers.

These contracts are fulfilled in two different ways: (1) by performance, whereby the gasoline or diesel fuel actually moves between the parties, or (2) by monetary payment between the parties without movement of the gasoline or diesel fuel. Often, the monetary payment is made because a supplier under one contract is simultaneously a buyer under a separate contract with the same counterparty, meaning that the parties' contractual commitments for a particular period fully or partially offset against each other, such that it would be economically inefficient to physically transfer fungible product back and forth. When a contract to sell or buy gasoline or diesel fuel is fulfilled

by monetary payment, the motor fuel industry refers to the transaction as a “book-out” or “book transfer.”

The monetary settlement should not be treated as taxable under the Motor Fuel Tax Ordinance as there is no transfer of title or ownership; no transfer of possession; no exchange; no barter; no giving; and no disposal of gasoline or diesel fuel, as required by the Motor Fuel Tax Ordinance to impose tax. Cook County is made no worse off because the subsequent final sale to a consumer remains taxable.

It is a common practice across the entire country for participants in the motor fuel industry to financially settle forward contracts. In this circumstance, there is no transfer of possession or change in ownership of motor fuel. The industry estimates that about 30 percent of motor fuel exchanges/ buy-sells are booked out. As evidenced by the Chicago Board of Trade data, hundreds of thousands of fuel futures and options contracts are financially settled each week without physical delivery. *See* CME Group, Crude Oil Futures and Options, <https://www.cmegroup.com/markets/energy/crude-oil/light-sweet-crude.volume.html> (last visited Oct. 21, 2023) (showing thousands of contracts and zero deliveries). Standard form templates commonly used by industry members, such as the LEAP Master Agreement for Purchasing and Selling Refined Petroleum Products and Crude Oil, contain terms allowing for monetary settlement without physical delivery of a commodity. *See, e.g.*, LEAP Master Agreement for Purchasing and Selling Refined Petroleum Products and Crude Oil, version 2.1 (Apr. 2009), https://naesb.org/pdf4/wgq_contracts120511a2.pdf (last visited Oct. 25, 2023) (providing a standard book-out provision whereby either party may elect to make a payment in lieu of physical delivery). These transactions have never been taxed. The book-out provisions

compensate the counterparty in a transaction, akin to a damages clause in other types of contracts, which should not be taxable under the Motor Fuel Tax Ordinance.

The Appellate Court's acceptance of a PricewaterhouseCoopers' ("PwC") glossary of definitions is problematic for several reasons. *See Op.* at 14, PricewaterhouseCoopers, Energy, Utilities & Mining Glossary, <https://www.pwc.com/gx/en/energy-utilities-mining/pdf/eumcommoditiestradingriskmanagementglossary.pdf>. The glossary states that it was compiled by PwC's Energy Utilities and Mining practice, not its tax department, and the glossary gives no insight regarding how book-out transactions should be analyzed for motor fuel tax purposes. Nothing in the glossary indicates that the energy industry treats monetary settlement or book transfers as implied physical movement of the underlying commodity. While different tax regimes may exist to tax cash commodities, it makes no sense that a cash commodity would be treated as taxable under a motor fuel ordinance, such as the Motor Fuel Tax Ordinance at issue in this case, when tangible motor fuel was never exchanged, given, or otherwise disposed of as required under the Motor Fuel Tax Ordinance.

Parties engage in these transactions and settle contracts monetarily for a variety of commercial reasons, including (1) the pipeline does not have capacity to move product through the pipeline, (2) the buyer did not have the capacity necessary to receive the gasoline or diesel fuel it had contracted to purchase, (3) the seller did not have access to the gasoline or diesel fuel it had contracted to deliver, (4) the buyer no longer needed the gasoline or diesel fuel it had contracted to purchase, or (5) the parties have offsetting obligations for a particular period. When contracts are settled monetarily, the parties'

inventories of gasoline or diesel remain the same, as no movement of gasoline or diesel fuel took place, while avoiding the inefficiencies of forcing a party to deliver in disadvantageous circumstances solely to avoid tax consequences. Further, book-out transactions are evidenced with documents such as an invoice and book transfer letter.

Each of these scenarios commonly occurs across the motor fuel industry. In upholding the appellate court's decision, each time one of these reoccurring events happens, consumers once again would be subject to double, triple, or more taxation both on the corresponding book-out transaction and then again with the ultimate sale (with transfer of ownership and title) of the fuel. The IRS and state rules on motor fuel/excise taxes are intended to be incurred by the ultimate purchaser, the consumer who puts the fuel into the gas tank (car/vehicle/truck/train/plane/vessel). Having an excise tax on book-outs where there is no delivery, sale, or title transfer, will result in additional taxes. This would raise several significant concerns regarding how those transactions would be tracked against certain volumes later sold, and how they could be recouped by the oil and gas supplier. Suppliers are not able to track petroleum products by the molecule, because they are fungible, so suppliers cannot know that a certain volume of motor fuel was part of a book-out that was already taxed by one jurisdiction and is now being sold for physical delivery and taxed for a second time. Suppliers would have no way to recoup tax on the specific volume of motor fuel that was already taxed as a book-out.

This would result in a never-ending cycle of taxation, thereby creating a chilling effect on the industry as a whole, impacting the entire motor fuel supply chain and its consumers.

II. THE APPELLATE COURT’S MISAPPLICATION OF THE MOTOR FUEL TAX ORDINANCE TO BOOK-OUT TRANSACTIONS WOULD INCREASE THE MOTOR FUEL INDUSTRY’S COMPLIANCE BURDEN AND REPORTING REQUIREMENTS.

Another repercussion for the motor fuel industry is increased compliance burdens and reporting requirements. Under the Motor Fuel Tax Ordinance, distributors who transport or receive motor fuel in Cook County must register with the Cook County Department of Revenue. *See* Cook County Code of Ordinances § 74-474 (approved Feb. 6, 2011). The Motor Fuel Tax Ordinance states that it is “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.” *Id.* If cash settlement is deemed an implied physical delivery of gasoline, any party to a fuel contract which allows for financial settlement would then potentially in the future be subject to these registration requirements, even if they are not in the business of transporting or receiving the actual motor fuel in Cook County. *Amici*’s members have accounting systems, built to accommodate federal and tax requirements, which companies use to track the physical inventory of petroleum products by location. If companies now are required to report book-outs, new systems would need to be developed for reporting. Further, the IRS and states are not set-up to receive data for book-outs where no title transfer/physical inventory moves. If reporting on book-out transactions becomes required, new reports and tax forms would be needed to report booked-out inventory. *Amici*’s members would face a significant, increased compliance burden if the Appellate Court’s decision in this case is upheld.

An influx of large volumes of financial contracts where no physical delivery (no change in ownership or possession) is made will flood the registration and tracking

systems, make it more difficult to identify contracts where physical delivery actually takes place, and frustrate government agencies' abilities to track the movement of motor fuel. This is clearly not the intended effect of the Motor Fuel Tax Ordinance. The intent of the motor fuel tax regime is to tax only transactions involving the physical 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.

The Cook County motor fuel tax return, and most motor fuel tax returns, require motor fuel distributors to report starting inventory, inventory changes (from purchases and sales of motor fuel), and ending inventory. Requiring motor fuel distributors to also report financial transactions onto a return intended to only capture inventory movement is not feasible, because the returns are not intended to capture the trading of contracts, exchange of cash, or acquisition of intangible interests.

A cursory review of the Cook County and State of Illinois motor fuel tax returns both clearly require the taxpayer to identify its beginning "stick" (or actual) gasoline or diesel inventory. A major problem with Cook County's imposition of motor fuel tax on financial transactions is that these transactions cannot be reported on the County and Illinois motor fuel tax returns, and presumably all other motor fuel returns, without altering the actual inventory held by motor fuel distributors such as our members. The beginning "stick" inventory would never reconcile with the "gallons" reported on Cook County returns which, under the Appellate Court's holding, requires the reporting of financial transactions. Similarly, under the lower court's conclusions, a taxpayer's ending "inventory" would never align with the following month's beginning inventory.

Reporting book-out transactions would create irreconcilable differences between reported and actual inventory gallons, increase the burden associated with motor fuel tax compliance by our members, and complicate the review and auditing by the jurisdictions of these returns for transactions never intended to be subject to motor fuel tax.

III. THE ILLINOIS APPELLATE COURT’S IMPOSITION OF THE MOTOR FUEL TAX TO BOOK-OUT TRANSACTIONS IS UNPRECEDENTED.

The Illinois Appellate Court upheld the imposition of the Motor Fuel Tax on Marathon even though no motor fuel was transferred, sold, or otherwise used. No prior Illinois case has interpreted the Motor Fuel Tax Ordinance, the City of Chicago Vehicle Fuel Tax, or the State of Illinois’ motor fuel tax this way. In fact, Cook County recently held in favor of a different taxpayer, finding that transactions with similar facts to Marathon’s transactions were not subject to tax under the Motor Fuel Tax Ordinance. See the *Opinions and Order in County of Cook (Department of Revenue) v. BP Products North America, Inc.*, No. RD-16011 & RG-16010 (Jan. 31, 2022) (Copy attached as Exhibit A):

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 [the taxpayer,] the Ordinance does not extend to the monetary settlement of contracts to sell or buy gasoline or diesel fuel.

The case is currently pending on appeal before the Circuit Court of Cook County as *County of Cook v. BP Products North America, Inc.*, No. 2022 L 50113.

No prior case from *any* state across the entire country has established the taxability of these book-out transactions in the motor fuel industry. Generally speaking, every state and many local taxing jurisdictions, like Cook County here, has a comparable

framework of motor fuel taxes being applicable to the physical sale of gasoline or diesel fuel. *See e.g.*, Ohio Rev. Code Ann. § 5735.01, *et seq.* (West 2013); Tex. Tax Code Ann. § 162.101, *et seq.* (West 2023); Cal. Rev. & Tax. Code Ann. § 7362-7364 (West 2002); La. Stat. Ann. § 47:818.13 (West 2007). This means that each state declined to enact legislation taxing transactions where no physical transfer of fuel occurs, despite opportunities to do so. It is abundantly clear that no such law exists in any state, because the clear intent of motor fuel tax laws across the country is to tax the physical transfer of fuel and nothing else.

Upholding the appellate court's decision would have a widespread and deleterious effect not only in Illinois and not only against Marathon, but in all states across the country and across the motor fuel industry in its entirety.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Appellate Court.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 2718 words.

Respectfully Submitted,

/s/ Jason P. Stiehl

Jason P. Steihl

Exhibit A

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

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 ordinance¹, BP North America was registered with the Cook County Department of Revenue (“DoR”) as a distributor. DoR Exh. 1 at 64² (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 fuel³, the Ordinance places a collection obligation on Cook County distributors of such fuel whenever a distributor sells⁴ gasoline or diesel fuel directly to a Cook County consumer, a Cook County

¹Code of Ordinances, Cook County, Illinois, Cook County Retail Sale of Gasoline and Diesel Fuel Tax Ordinance (“Gas Tax Ordinance” or “Ordinance”), § 74-474 (2021).

²DoR’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.

³Gas 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. . . .”).

⁴The 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

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.

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 Dispute⁶

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.

⁵A 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.

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

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.

⁷At 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.

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;

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.

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.

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.

⁸A barrel contains 42 gallons.

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.

⁹Three 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.

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.

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.

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,

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.

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.

¹⁰The auditor assigned to this case agreed, testifying that "disposed of" means to "get rid of something." Tr. April 22, 2021, at 817.

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

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.

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

“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

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.

Other Disputed TransactionsLemont 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.

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.

¹¹DoR’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.

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.

¹²The audit file was admitted by stipulation. Joint Pre-Trial Stipulation of Exhibits ¶ 3.

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

¹³Testimony 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).

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 –

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*

¹⁴Code 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 in 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., Pooch-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.”).

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,

¹⁶Contrary 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.

¹⁷DoR 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

¹⁸Similarly, 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

¹⁹DoR 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

²⁰The 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 be 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

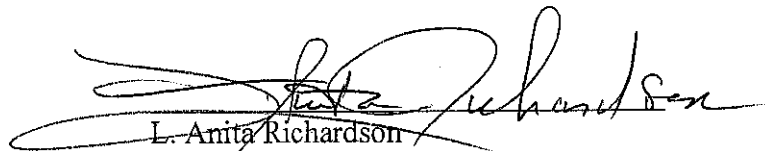
February 2010 and totaled exactly 2,100,000 gallons. BP North America Exh. 82 at 2190.²¹
(Exhibit 82 was admitted by ¶ 5 of Joint Pre-Trial Stipulation of Exhibits.)

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

²¹Page 2190 of exhibit 82 is a copy of page 101 of DoR's audit file but is more legible than page 101.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on November 1, 2023 I electronically filed the foregoing Brief Of Amici Curiae American Fuel & Petrochemical Manufacturers and American Petroleum Institute In Support of Plaintiff-Appellant and Exhibit A with the Clerk of the Illinois Supreme Court by using the electronic filing system.

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.

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/s/ Jason P. Stiehl

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